



relevant, namely (i) NCP Chlorchem (Pty) Ltd (“NCP”), a South African registered company; and (ii) Walvis Bay Salt Holdings (Pty) Ltd (“WBSH”), a Namibian registered company.

[4] Botash, a limited liability company incorporated in Botswana, is the primary target firm. The Government of the Republic of Botswana holds 50% of the shares in Botash; the remaining 50% of the shares is held by the following companies - collectively referred to hereinafter as the “selling shareholders”:

- Anglo American South Africa Capital (Pty) Ltd 14%
- De Beers Botswana (Pty) Ltd 14%
- AECI Ltd 14%
- FirstRand Bank Ltd 3.96%
- Standard Bank Group Ltd 2.47%
- Nedbank Ltd 1.57%

## THE TRANSACTION

[5] In terms of the proposed transaction CAH will acquire 50% of the issued share capital of Botash from the selling shareholders. Post-merger Botash will be jointly controlled by CAH and the Botswana Government with each party holding 50% of the shares in Botash. The proposed transaction thus constitutes a merger in terms of section 12(1) of the Act.

## BACKGROUND TO THE HEARING

### *Competition Commission’s recommendation*

[6] The Competition Commission (“Commission”) upon referral of this merger to the Tribunal in November 2009 recommended that the proposed transaction should be prohibited. However post the Commission’s referral of this matter to the Tribunal, Botash and Sasol Polymers<sup>1</sup> (“Sasol”) in December 2009 concluded a long-term supply agreement for chemical grade salt. Sasol currently is the only inland customer of the merging parties of chemical grade salt (see paragraphs [14] to [20] below for the delineation of the relevant product market and paragraphs [28] to [37] for the delineation of the relevant geographic market). This said commercial agreement for chemical grade salt supply makes provision *inter alia* for a fixed volume-based price with a yearly escalation factor.

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<sup>1</sup> A division of Sasol Chemical Industries Limited.

Furthermore following this supply agreement with Botash, Botrail<sup>2</sup> committed to making adequate rail infrastructure capacity available to Sasol to service this salt supply on the basis of certain tonnage commitments by Sasol. Sasol informed the Commission that these developments alleviated its commercial concerns by insulating Sasol from the (horizontal and vertical) effects of the proposed deal for the duration of the said commercial contract period with Botash. The Commission consequently changed its recommendation from a prohibition of the proposed deal to a conditional approval since it was of the view that certain behavioural conditions addressed the competition concerns in relation to Sasol as the only shared customer between the merging parties as well as in relation to potential new inland chemical grade salt customers. The Commission's proposed behavioural conditions relate to issues such as the obligation to supply and the price and logistics of supply.

*Sasol*

- [7] Sasol pre the conclusion of the said commercial supply agreement with Botash submitted that the proposed acquisition may compromise the long-term sustainability of its chlor-vinyls business. According to Sasol, WBSH is its only viable chemical grade salt supplier other than Botash and post-merger chemical grade salt price increases by the merged entity would make its chlor-vinyls business commercially unsustainable. This would allegedly have an adverse impact on the downstream companies that utilise Sasol's products as inputs in their respective production processes. For example, any negative impact in respect of Sasol's polyvinyl chloride ("PVC") resins business will also adversely affect the following industries: water and sewage pipes, conduit, cable, packaging materials, footwear and film. Sasol further submitted that these anti-competitive effects would be most harmful in the caustic soda market (see paragraphs [60] to [63] and paragraphs [67] to [75] below) given that this product is a primary input in industries such as mining, pulp and paper, soaps and detergents and textiles. Sasol also submitted that this might result in job losses in the affected downstream industries.

**RATIONALE FOR THE TRANSACTION**

- [8] The acquiring parties submit that the primary objective of CAH in the proposed deal is to expand its product range with the addition of soda ash - an important

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<sup>2</sup> Botrail is owned by the Government of Botswana which, as stated above, is also a shareholder in Botash (see paragraph [4] above).

and profitable additional product to NCP's current chemicals product line (also see paragraph [13] below). The sellers' rationale for the proposed deal is that the business of Botash does not fit with their core businesses.

## **THE RELEVANT MARKET(S)**

### *Horizontal overlap of activities*

- [9] WBSH<sup>3</sup> manufactures mainly chemical grade salt, as well as limited amounts of food grade salt and fine food salt<sup>4</sup>. On the target side, Botash's primary business is the manufacturing of soda ash<sup>5</sup> (sodium carbonate) and as a by-product of this process it manufactures (mainly) chemical grade salt, sold in bulk, as well as a limited amount of food grade salt.<sup>6</sup>
- [10] Therefore, there is a horizontal overlap between the activities of the merging parties in respect of the manufacturing and sale of salt, in particular chemical grade salt. This will be referred to in these reasons as the upstream activities or upstream market(s).

### *Vertical dimension*

- [11] Chemical grade salt is used as an input in the production of certain chlor-alkali products and derivatives, for example in the production of chlorine and caustic soda. The proposed deal also has a vertical dimension since NCP<sup>7</sup> is active in the manufacture and distribution of these products. Botash however is not active in the latter areas. The activities relating to the production and sale of various chlor-alkali products will be referred to in these reasons as the downstream activities or downstream markets.

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<sup>3</sup> A CAH subsidiary, see paragraph [3] above.

<sup>4</sup> Fine food salt is produced by further processing of coarse salt of a food grade quality.

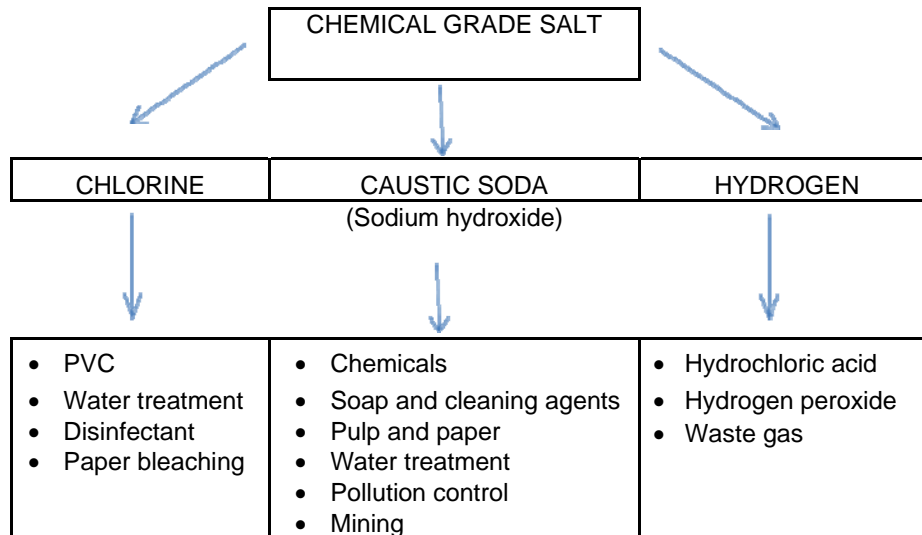
<sup>5</sup> Soda ash is mainly used in glass manufacture, metallurgical applications, the detergent industry and chemical manufacture. The product is extracted from alkali-rich brine. First soda ash is converted to sodium bicarbonate, which is relatively insoluble. The sodium bicarbonate crystals are then separated from the brine and purified by washing. This purified sodium bicarbonate is converted back to sodium carbonate by heating and the ash is finally compacted into dense granules so that it is easy to transport and handle. The soda ash is exported by rail and road to customers in South Africa, Zimbabwe, Zambia and Central Africa.

<sup>6</sup> Salt is a by-product from the production of trona brine which is the feedstock to the soda ash production plant; salt deposits out in the solar pond crystallisers as the brine concentrates with evaporation. Then, a salt washing plant upgrades the quality of the harvested salt and separates the salt into fine and coarse products. The stages in the production of salt are harvesting, washing and screening, and fine salt drying and milling.

<sup>7</sup> Also a CAH subsidiary, see paragraph [3] above.

[12] **Figure 1** below depicts the chemical grade salt value chain and provides a broad overview of the (downstream) uses thereof – the main products being chlorine and caustic soda.

**Figure 1: Chemical grade salt value chain**



[13] A limited number of South African firms use chemical grade salt in downstream production processes, namely:

In Gauteng:

(i) NCP

As stated in paragraph [11] above, NCP uses salt in the manufacturing of certain chlor-alkali products and derivatives, i.e. chlorine and caustic soda products. NCP’s chlorine products are used in the treatment of our national water supply to keep it clean of diseases such as cholera; NCP has thus been declared a national “key point” installation under the National Key Points Act 102 of 1980.

(ii) Sasol

Sasol also uses salt in the production of chlor-alkali products<sup>8</sup>: it produces caustic soda both for internal use<sup>9</sup> and for sale to third parties and produces chlorine exclusively for internal use in the production of *inter alia* PVC resin.

<sup>8</sup> First the salt is dissolved in water to produce brine and then treated to remove impurities. The brine solution is then introduced to an electrolytic cell where, by passing an electric current through the salt solution, caustic soda, chlorine and hydrogen are produced.

<sup>9</sup> Sasol Polymers supplies caustic soda to its mining reagents business where it is used as an input in the production of sodium cyanide solution.

Commercial supply relationships exist between Sasol and NCP for certain products. Sasol is for example the sole producer in South Africa of specialised paraffin which it supplies to NCP for the production of chlorinated paraffin. Sasol in turn purchases certain volumes of caustic soda and hydrochloric acid from NCP during certain periods, and vice versa.

In KwaZulu-Natal:

(iii) Mondi

Mondi uses salt in its chlor-alkali plant for the production of caustic soda, which is used as an input into its wood chip cooking liquor circuit and bleaching circuits.<sup>10</sup>

(iv) Zetachem<sup>11</sup>

Zetachem uses (relatively small quantities of) salt as input into its sodium hypochlorite production processes.

(v) Sappi Manufacturing<sup>12</sup>

Sappi Manufacturing uses (relatively small quantities of) salt for brine solution which is used for water softening as part of its chemical cellulose production line.

## Relevant product markets

### Upstream: manufacturing and supply of salt

[14] Of relevance in the instant case to market delineation from a demand- and supply-side perspective are the various produced grades of salt, i.e. various salt purity levels. The main grades of salt produced are: (i) pharmaceutical grade salt; (ii) chemical grade salt; and (iii) food grade salt.

[15] **Table 1** below states the purity levels of these main salt grades. The factors that determine the level of purity in the salt include (i) the source of the raw material; (ii) the crystallization process; and (iii) the salt washing process. The level of purity refers to the percentage of sodium chloride (NaCl) in the salt product:

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<sup>10</sup> It also uses soda ash for the addition of sodium to its cooking liquor circuit.

<sup>11</sup> Part of the Omnia Group.

<sup>12</sup> A subsidiary of Sappi Limited.

**Table 1 Purity levels of various salt grades**

Salt grade	Purity level (%)
Pharmaceutical grade	99.9+
Chemical grade	98.75+
Food grade	97+

[16] Each of these salt grades is described in more detail below:

(i) Pharmaceutical grade salt

As the name suggests this high quality salt is mainly used as an input into the production of pharmaceutical products. However, neither of the merging parties produces pharmaceutical grade salt. The only current South African producer of this salt is Cerebos (at Coega) by means of a vacuum crystallisation process, i.e. vacuum evaporation of brine in specialist machinery, followed by chemical treatment of the salt to remove impurities. Water desalination techniques are an alternative production method – a technique that Straits Chemicals, a hopeful entrant into the South African salt market, intends to use. If this comes to fruition, the production of salt from desalination and crystallization will be a first in South Africa (also see paragraph [46] below).

(ii) Chemical grade salt

As shown in **Figure 1** above, this salt is used as an input into chemical products such as chlorine and caustic soda. As stated in paragraphs [9] and [10] above, both WBSH and Botash are active in the production and sale of chemical grade salt: Botash produces this by the solar evaporation of underground brine; WBSH produces its salt by way of the solar evaporation of sea water<sup>13</sup>.

(iii) Food grade salt

This salt is used in food products<sup>14</sup> and industries such as agriculture. Food grade salt, which itself has a number of grades, is produced in South Africa using both the above-mentioned production methods. As stated in paragraph [9] above, Botash and WBSH produce relatively small quantities of food grade salt. Local South African producers dominate this market and

<sup>13</sup> There are two main parts to this production process: being salt fields and washing plants to remove impurities such as sand and magnesium.

<sup>14</sup> Fine food salt is used for direct human consumption. This requires further processing of food grade salt at a fine salt plant.

Botash has an estimated market share in South Africa of less than 0.1%. Since the merging parties, specifically Botash, export limited amounts of food grade salt into South Africa, we will not consider this possible relevant market any further in these reasons.

[17] The Commission through its market investigation identified certain pertinent salt demand and supply dynamics. Its investigation indicates that the larger salt consumers, i.e. the downstream chlor-alkali product manufacturers, require a constant supply of high quality salt - at least of chemical grade – as the main input into their production processes. From a demand-side perspective customers consider the following salient factors when choosing between alternative salt suppliers:

(i) price

Sasol (as the merging parties' said only current shared salt customer) indicated that the above-mentioned various salt grades are not interchangeable owing to significant price differences between these grades, as well as the quantity and quality of salt required for downstream chlor-alkali manufacturing processes. Sasol estimates the cost of switching from chemical grade salt to higher quality pharmaceutical grade salt at 7.5 times the price of chemical grade salt. This large price differential is due primarily to the costs associated with the energy required during the treatment processes of pharmaceutical grade salt.

Furthermore, the cost of salt is significantly influenced by packaging and transportation (transport costs will be discussed in more detail below, see paragraphs [30] to [37] below). Food grade salt is demanded in much smaller quantities than chemical grade salt and requires an additional washing process, heating and further milling and packaging. In addition there are other safety and health standards which increase the production cost of food grade salt. According to the merging parties, bagging processes can increase the production costs of food grade salt by more than three times. The price of food grade salt is therefore significantly higher than the price of chemical grade salt.



(ii) volume

Sasol and other chlor-alkali product producers consume vast quantities of salt in their downstream production processes and require dependable supply sources – volumes that Cerebos as the only current South African producer of pharmaceutical grade salt (see paragraph [16] above) cannot sufficiently supply. Participants in the downstream industries, including Straits Chemicals as a hopeful entrant, supported Sasol's view that a high grade salt producer such as Cerebos (although it produces the best quality salt) would not be able to supply a chlor-alkali plant given Cerebos' limited production capacity. Saltcor<sup>15</sup> and Sasol were of the same mind that security of supply is a major concern for these salt customers.<sup>16</sup> In practice chemical grade salt sales normally take place in terms of long-term contracts and the producers usually are required by customers to commit to supplying specified volumes (as well as a committed salt quality, see (iii) below).

(iii) purity level

The Commission's market investigation confirms that, from a requisite purity level perspective, there is no substitute for chemical grade salt in customers' downstream production processes. The concentration of impurities in salt is dependent upon the method of production (also see paragraph [18] below) and in general the less pure the salt the more costly it is for a downstream chlor-alkali producer to utilise it. Chlor-alkali producers confirmed that they face significant cost implications when salt purity levels are even slightly compromised. Sasol and Zetachem for example confirmed that switching between different salt grades are associated with a high risk of damage to plant membranes owing to the different impurities contained in the various salt grades. Straits Chemicals also supported the notion that salt impurities could damage plant membranes. Therefore, given the considerable variation in the concentration and distribution of impurities in the various salt grades and the cost implications thereof for downstream users, we conclude that the different salt grades are not interchangeable from a commercial and market delineation perspective.

[18] From a supply-side perspective, the Commission's market enquiries reveal that salt producers' manufacturing processes constrain the grade of salt that they

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<sup>15</sup> Saltcor is part of the Donald Brown Group which is involved in the production and refining of salt.

<sup>16</sup> Letter from Saltcor to the Commission dated 21 May 2009.

can produce. This investigation indicates that although switching to the production of a lower salt grade may be a possibility, different salt grade manufacturing processes require different capital outlays and as such salt manufacturers cannot switch to producing a higher grade of salt without incurring significant additional capital costs. The production process for pharmaceutical grade salt is much more expensive than other methods since it requires specialist vacuum machinery and fuel for the evaporation (also see paragraph [16] above). The latter production process is too expensive to justify selling salt of a pharmaceutical grade as chemical grade.

- [19] In summary: (i) from a purity point of view chemical and food grade salt are not substitutable in downstream chlor-alkali manufacturing processes owing to the aforementioned damage that higher levels of impurities can cause to plant membranes; and (ii) chemical grade salt cannot be substituted with pharmaceutical grade salt owing to the latter salt's relatively high costs and relatively low production volumes which would be unable to sustain chlor-alkali customers.
- [20] Based on the above we define the production and sale of chemical grade salt as a separate relevant product market.

### **Downstream: markets for various chlor-alkali products**

- [21] As stated in paragraph [12] above, the relevant downstream chlor-alkali manufacturing processes that use chemical grade salt as input are (i) chlorine, (ii) caustic soda and (iii) hydrogen production, as discussed in more detail below:

#### *Chlorine*

- [22] Although Sasol and Mondi produce chlorine as a "co-product" of caustic soda production, NCP is the only commercial producer of chlorine in its bulk or packed form in South Africa.<sup>17</sup> Furthermore, due to the unstable and highly toxic nature of this chemical, import competition is not relevant. NCP's chlorine customers include municipalities, Sasol and other chemical manufacturers. The main use of chlorine in South Africa is water purification – no substitutes exist for chlorine in this application. Sasol also confirmed that chlorine cannot be substituted for any other product in its PVC production processes.

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<sup>17</sup> Sasol and Mondi do so mainly for in-house use and do not supply third parties.

- [23] We concur with the Commission's finding that the production and sale of chlorine constitutes a separate relevant product market.

*Caustic soda*

- [24] According to the Commission's investigation, caustic soda can be sold in two forms, namely either as lye or flakes, and these forms are largely interchangeable from a demand- and supply-side perspective.

- [25] The Commission furthermore investigated the potential substitutability between caustic soda and soda ash<sup>18</sup> and concluded that these products are not interchangeable in most applications. Caustic soda is predominately supplied as a solution and soda ash as a solid which means that they cannot be readily substituted without the necessary investment in storage and handling systems. As stated in footnote 5 above, the primary use of soda ash is glass manufacturing where caustic soda is not at all a substitute for soda ash. Zetachem and Mondi Manufacturing<sup>19</sup> also confirmed that these products are not substitutable in their production processes. The Commission's market investigation shows that in a select number of processes<sup>20</sup> soda ash could be substituted with caustic soda, for example in Mondi's cooking liquor circuit. However, Mondi has not quantified the cost implications, if any, of switching between these two products. We therefore concur with the Commission's finding that the production and sale of caustic soda and soda ash respectively constitute separate relevant product markets.

- [26] We shall examine the potential vertical effects of the proposed acquisition in the market for the production and sale of caustic soda.

*Hydrogen*

- [27] Hydrogen, a by-product of the production of caustic soda, chlorine and oil refining, is mainly used in the production of hydrochloric acid. However, owing to the difficulties associated with handling this gas, hydrogen is often vented by

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<sup>18</sup> Produced by Botash, see paragraph [9] above.

<sup>19</sup> The soda ash would have to be converted in a kiln to sodium oxide and dissolved in water to make caustic soda before being used in the bleach process.

<sup>20</sup> A Chemical Market Association Inc ("CMAI") report states that "*there are certain markets where customers have the flexibility of switching between soda ash and caustic soda. This is mostly within the soaps and detergent applications*". See "*An Overview of Soda Ash*"; CMAI, June 2008.

companies in the chlor-alkali industry. For example, Sasol uses its hydrogen internally as alternative fuel for heating and in the production of hydrochloric acid and does not supply it to the market. Furthermore, according to the Commission's market investigation there are other alternatives to hydrogen as a fuel in heating processes and certain other applications.<sup>21</sup> Since the Commission's market investigation shows that the proposed deal was not likely to substantially affect the South African supply of hydrogen, we shall focus our assessment of the vertical aspects of the proposed deal on the above-mentioned chlorine and caustic soda markets.

### **Relevant geographic markets**

#### **Upstream: manufacturing and supply of chemical grade salt**

- [28] WBSH's salt production facility is located at Walvis Bay in Namibia and that of Botash at Sau Pan<sup>22</sup> in Botswana. WBSH utilises shipping to transport its salt from Walvis Bay to the KwaZulu-Natal coast and from there by road transport to Sasol in the inland region: the relevant delivered costs therefore include the ex works salt price, the sea freight rate from Walvis Bay to Richards Bay and port charges (offloading, handling and temporary storage). Botash's salt is transported via rail to Sasol: by Botrail from Sua Pan to Ramatlabama and by Transnet from Ramatlabama to Sasolburg.<sup>23</sup>
- [29] From a customer perspective the users of chemical grade salt are located in two distinct geographical locations in South Africa, i.e. either in:
- (i) the inland region, namely Sasol located at Sasolburg in the Free State and NCP located at Chloorkop in Gauteng; or
  - (ii) the coastal areas, namely Mondi, Sappi and Zetachem, all located on the KwaZulu-Natal coast respectively at Richards Bay, Durban and Umkomaas.
- [30] However, regardless of these customers' geographic location, all market participants highlighted transport costs, whether sea or land transportation or both, as a critical factor in the selection of a chemical grade salt supplier. Given

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<sup>21</sup> Teleconference between the Commission and Mr Worthington and Ms Pillay of Sasol held on 01 July 2009.

<sup>22</sup> Part of the Makgadigadi pan, North-West of Francistown, Botswana.

<sup>23</sup> No import duties apply given that both Botswana and Namibia are part of SACU.

the low value of salt relative to the cost of transportation, the determining factors in the economics of salt supply is typically the proximity of the source of supply to the point of use and the mode and availability of transport. The major impact of transport costs on the delivered costs implies that the competitive effects on each customer grouping in a specific geographic area must be analysed separately.

[31] Furthermore, in a geographic market delineation context the relevant price indicator is not the ex-factory salt price, but the delivered price to the customer inclusive of all relevant transport and related supply chain costs. We shall therefore assess relative price differences between (actual and potential) chemical grade salt suppliers on the latter basis.

[32] Given these significant transportation costs and their effect on the competitive landscape for chemical grade salt supply, the Tribunal concurs with the Commission's finding that chemical grade salt supply to (i) the coastal areas of South Africa and (ii) the inland areas of South Africa respectively constitute separate relevant geographic markets. We shall first consider the effect of the proposed transaction on customers located in the coastal areas and thereafter turn our attention to the inland customers.

#### *Coastal regions*

[33] The evidence from coastal customers is unequivocal regarding the fact that Botash does not provide any competitive constraint to WBSH in the coastal regions. Zetachem, Mondi and Sappi all confirmed that they do not regard Botash and WBSH as competitors since the transport costs of importing chemical grade salt from Botash to their coastal locations are commercially prohibitive. Botash for its part confirmed that it has never supplied salt to any of the South African coastal customers. These coastal customers have indicated that Dampier (located in Western Australia) would be a more feasible alternative supplier than Botash. Straits Chemicals (with its planned location in Port Elizabeth) also indicated that from its perspective Botash cannot be considered an alternative salt supplier (also see paragraph [46] below).

- [34] Furthermore, a comparison by Genesis<sup>24</sup> of delivered price estimates<sup>25</sup> for 2006 to 2009 at which Botash and Dampier respectively could supply the coastal customers indicate that Botash, despite an import duty advantage over Dampier<sup>26</sup>, is not the next best alternative to WBSH. This quantitative information suggests that Dampier is a far superior rival in the coastal regions given that it enjoys approximately a [0-30]% delivered salt price advantage over Botash throughout the period considered<sup>27</sup>. The proposed deal therefore does not relax a notional potential entrant constraint.
- [35] Given the above quantitative and customer evidence, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in the market for chemical grade salt supply to the coastal areas of South Africa. The same conclusion applies to the vertical aspects of the proposed deal as far as they relate to the coastal customers. In the remaining part of these reasons we shall therefore focus on the potential effects of the proposed deal on the only existing customer (i.e. Sasol) and potential future customers in the inland regions of South Africa.

*Inland regions*

- [36] Premerger both Botash and WBSH supply chemical grade salt to Sasol in inland South Africa, whilst NCP (also located inland) imports chemical grade salt from WBSH. These two firms are currently the only inland users of chemical grade salt.
- [37] As indicated in paragraph [30] above, the delivered price of chemical grade salt inevitably will be influenced by *inter alia* the mode of transport, more specifically the terms and conditions negotiated with a particular transport service provider. These terms and conditions will in turn *inter alia* depend on the salt volumes to be transported and a customer's willingness to commit to these volumes over the contract period (also see paragraph [6] above). The available quantitative data in the instant case clearly indicate that the (freight and other) costs of transporting large quantities of chemical grade salt over long distances, for example from Australia to South Africa, and over land from the relevant port to inland destinations, are significant. The submitted data furthermore show that

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<sup>24</sup> The merging parties engaged Genesis Analytics to produce a competitiveness report.

<sup>25</sup> The pricing analysis takes into account both ex-works prices and transport costs to Richards Bay.

<sup>26</sup> Since Botswana is part of SACU no import tariff is applicable.

<sup>27</sup> Other than when the 2008 spike in shipping rates occurred, see footnote 38 below.

Botash is the most favourable supplier in terms of delivered costs which is largely attributable to more advantageous rail transport costs from Botswana to inland South Africa compared to imports from countries such as Namibia and Australia. We shall elaborate on these transport dynamics below in our assessment of the competitive effects of the proposed transaction on the market for the supply of chemical grade salt to the inland areas of South Africa.

### **Downstream: markets for chlor-alkali products**

#### *Chlorine*

- [38] Given that NCP is currently the only supplier of chlorine in South Africa, as well as the logistical difficulties associated with transporting a hazardous chemical such as chlorine, we shall assess the vertical aspects of this transaction relating to the chlorine market on a national basis.

#### *Caustic soda*

- [39] The Commission concluded that the relevant geographic market for the production and supply of caustic soda is national in scope with limited import competition. The Commission found that South African caustic soda suppliers are more effective than their international counterparts owing largely to their value offering and ability to service the domestic market in a timely fashion. This view is supported by Sasol who indicated that although some caustic soda is imported, this is largely done when domestic supply is insufficient to cover domestic demand and that customers tend to prefer a domestic supplier who can offer more immediate supply, post-sale services and the likes.
- [40] For the purposes of assessing the vertical aspects of the proposed deal we shall consider a national caustic soda market taking imports into South Africa into account.

## COMPETITION ANALYSIS

### Upstream: manufacturing and supply of chemical grade salt to inland South Africa

#### *Botash's production volumes*

- [41] An important issue in the context of the competitive assessment and the imposed behavioural remedies (also see paragraph [79] below) is the fact that Botash's salt production volumes are dependent on its soda ash production, i.e. it cannot reduce its salt output without concurrently reducing its soda ash production. The volume of salt that is produced and not sold is stockpiled and these volumes are very significant - Botash submits that it currently has a stockpile approaching [0-10] million tonnes of unsold coarse salt.

#### *Market shares and levels of concentration*

- [42] Notwithstanding the delivered chemical grade salt price differences between Botash and WBSH, Sasol has sourced significant quantities of salt from WBSH in the past three years. According to Sasol it entered into a supply agreement with WBSH as recently as March 2009; Sasol also submitted figures confirming the supply of chemical grade salt by WBSH to it as recently as October 2009<sup>28</sup>, and submitted a letter and email from WBSH requesting Sasol's chemical grade salt requirements for October 2009 and January/February 2010 respectively.<sup>29</sup>
- [43] Botash has in recent years increased its market share year-on-year in the supply of chemical grade salt to inland South Africa (i.e. to Sasol): its market share in this relevant market increased from approximately [60-70]% in the financial year ending August 2008 to approximately [80-90]% in the year ending August 2009<sup>30</sup> - WBSH makes up the balance of supply.
- [44] From the above it is evident that premerger WBSH and Botash are the only chemical grade salt manufacturers who actually supply into inland South Africa. Premerger concentration levels in the relevant market are thus already extremely high and since this is a merger to pure monopoly the proposed deal

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<sup>28</sup> Sasol letters to the Commission dated 29 May 2009 and 22 October 2009 respectively.

<sup>29</sup> Letter from WBSH to Sasol dated 13 October 2009 and email sent from WBSH to Sasol on 21 October 2009.

<sup>30</sup> Source: Genesis' competitiveness report on the proposed transaction; March 2009.



results in the ultimate level of concentration i.e. a Herfindahl-Hirschman Index (HHI) of 10,000 points.

*High entry barriers and lack of new entry*

- [45] We find that there are high barriers to entry in the market for the production and sale of chemical grade salt to inland South Africa. First, on the production side mining rights must be in place and market participants point to a lack of or dwindling economically viable salt reserves. Furthermore, environmental legislation represents an entry barrier as well as significant capital investment, for example a washing plant to separate the salt into fine and coarse products.
- [46] As stated in paragraph [16] above, Straits Chemicals has been identified as a hopeful entrant in the manufacturing of chlor-alkali products and salt. The available evidence however suggests that if it indeed enters the salt market, that in the early years of entry it will focus on supplying its in-house chlor-alkali business while building capacity to supply external customers. Furthermore Sasol alleges, based on a SRK Consulting report<sup>31</sup>, that Straits Chemicals has abandoned its former plans to in future produce salt.<sup>32</sup> Be that as it may, the available information also suggests that should it start producing chemical grade salt for internal use it would not do so before 2014. Any potential entry by Straits Chemicals is therefore unlikely to have a disciplining effect on the merged entity within a reasonable period of time.

*Closeness of competition*

- [47] One of the central economic questions in a unilateral effects context is the extent to which the merging firms can be regarded as close competitors. Sasol submits that WBSH is Botash's closest competitor premerger. Sasol further informs us that it assessed the viability of importing chemical grade salt from Dampier in Australia and from other countries such as India, but that the transportation costs in terms of the delivered salt price are prohibitive. Sasol further avers that logistical issues make sourcing from an overseas firm (like Dampier) more difficult than sourcing from suppliers in the SACU<sup>33</sup> region, given that its chemical grade salt demand can fluctuate significantly on a monthly basis. Sasol submits that it takes between three to four months from the date of order to land

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<sup>31</sup> Report prepared on behalf of Straits Chemicals, dated April 2008.

<sup>32</sup> Letter from Sasol to the Commission dated 12 June 2009.

<sup>33</sup> Namibia and Botswana are part of SACU.

the chemical grade salt supply from for example Australia, while it takes a maximum of one week to order the same from Botash. Furthermore, it avers that a cancellation in respect of a Botash order can be done in a couple of days while an overseas cancellation is not flexible and could result in unforeseen costs and penalties.

[48] As part of its market investigation the Commission contacted Dampier to establish whether or not it is a potential chemical grade salt supplier to inland South Africa. Dampier confirmed that it has not supplied chemical grade salt into South Africa for approximately eight years and that it has ceased supply to Sasol because of the lower delivered prices of Botash and WBSH. More specifically, high sea freight levels from 2003 have made it difficult for Dampier to be competitive. Moreover, Dampier indicated that from its more global perspective Sasol is a relatively small chemical grade salt customer<sup>34</sup>; Sasol is therefore unlikely to have any form of negotiating or countervailing power in regard to imports from Dampier.

[49] Notwithstanding Sasol's logistical concerns, chemical grade salt appears to be a product that can be easily stored and Sasol submitted no evidence of a lack of or high storage costs. While we accept that salt supply from different geographically located sources may vary significantly in respect of flexibility<sup>35</sup>, the extent to which Sasol's averred additional risks, logistical costs and inconvenience associated with an overseas supplier such as Dampier could be mitigated through proper planning is not addressed in its submissions. Sasol submits that a proper risk assessment was unwarranted since based solely on price considerations overseas suppliers such as Dampier and BS International were not commercially viable supply sources.<sup>36</sup> We will therefore focus our analysis below on the quantitative evidence in relation to relative differences in delivered costs between the potential alternative suppliers.

[50] From a delivered cost of salt perspective, Genesis on behalf of the merging parties submitted comparative pricing information on the delivered chemical grade salt price to an inland customer such as Sasol from (i) Botash in

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<sup>34</sup> According to the merging parties, Dampier claims to be the world's largest salt exporter and supplies the majority of its salt into Asian countries.

<sup>35</sup> The customer advises when shipments are required and usually is required to give 40-days notice for each shipment during the contract term.

<sup>36</sup> Sasol letter to the Commission dated 02 July 2009.

Botswana, (ii) WBSH in Walvis Bay and (iii) Dampier in Australia.<sup>37</sup> According to the quantitative evidence submitted by the merging parties the delivered cost of chemical grade salt would significantly increase should an inland customer source its requirements from suppliers other than WBSH or Botash, for example from Dampier in Australia. Firstly, the submitted data for the period 2006 to 2009<sup>38</sup> consistently show Botash as the lowest cost supplier to Sasol on a delivered cost basis<sup>39</sup> and secondly show WBSH as the next best alternative. This shows that Botash's delivered prices to Sasol have consistently been significantly lower than that of WBSH, i.e. at minimum [0-20]% lower in the period 2006 to 2009<sup>40</sup>, and further suggests that much of Botash's advantage in pricing is derived from its favourable location and the associated lower logistical costs of transporting salt via rail to Sasolburg. According to the merging parties, the transport costs from WBSH to Sasol constitute over [50-100]% of the final delivered price to Sasol; from Botash to Sasol the comparable statistic is [50-100]% to [50-100]%.<sup>41</sup>

- [51] Genesis further quantifies the cost differences in the delivered price of WBSH (as the second lowest cost supplier) and Dampier (as the most expensive supplier of the three firms) over this period as ranging from [0-20]% to [0-20]%. By comparison: the corresponding figure provided by Sasol for 2009 is [0-20]%.<sup>42</sup>
- [52] In conclusion: the quantitative price data submitted by the merging parties and Sasol clearly indicate that WBSH is Botash's closest competitor from a pricing perspective.

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<sup>37</sup> Importation from Botswana implies rail transportation and importation from Namibia and Australia implies both sea freight costs and transport over land.

<sup>38</sup> Historical data were used for 2006 and 2007. The year 2008 was divided into two distinct periods: a 'pre-spike' and 'spike' period given a spike in global shipping rates in July 2008. The recent global economic downturn had a significant effect on global shipping rates and brought them more into line with the longer term trend.

<sup>39</sup> For WBSH and Dampier this involves the ex works salt price, sea freight to Richards Bay and rail transport to Sasolburg. Imports from Dampier in Australia attract a 10% import duty (as opposed to 0% from SACU countries, also see footnotes 23, 26 and 33 above). For Botash it involves the ex works salt price and rail the entire route; transport by Botrail for the Botswana leg and by Transnet for the South African leg from Ramatlabama to Sasolburg.

<sup>40</sup> See page 34 of Genesis report.

<sup>41</sup> Page 17 of Genesis report.

<sup>42</sup> Sasol letter to the Commission dated 12 June 2009.

*Information asymmetry and likely price effects*

- [53] One of the key aspects of the evaluation of the competitive effects of this merger is a comparison of the situation in which the current single buyer (and potential future salt customers) can negotiate with two suppliers vs. only one supplier, i.e. the implications of the proposed deal for customers' ability to negotiate lower prices or, put differently, the effect on customers' countervailing power. According to Genesis, Botash is not able to price closer to WBSH in the premerger context because of information asymmetries between these two suppliers. Genesis furthermore contends that historically the price point of chemical grade salt agreed between Botash and Sasol was a function of each party's negotiating power. Premerger the prices that Sasol receives from WBSH are unknown to Botash during price negotiations and as such Botash prices independently from its rival - it is stressed that the negotiated price is not dependent on the precise price offered by WBSH as the next best alternative since this is unknown to Botash.
- [54] Premerger WBSH provides effective competitive discipline to Botash - it provides Sasol with a credible and effective threat of switching sources of supply and as such bolsters Sasol's countervailing power. This is a bona fide threat: Sasol has not just threatened to source salt from WBSH but has in fact done so over a considerable period of time (see paragraphs [42] and [43] above). The effectiveness of this threat is further evident from the available historic pricing data since Botash would likely be charging Sasol a higher price if it were indifferent to its rival WBSH.
- [55] The above findings are consistent with economic theory that robustly predicts that efficiency is more likely if a buyer can negotiate with more than just one supplier. A merger to monopoly unquestionably weakens the bargaining power of the buyer – to the advantage of the merged entity – since it eliminates the customer's primary negotiating tactic: playing one supplier off against another.
- [56] In summary: the proposed merger will remove the significant competitive discipline of WBSH as a potential alternative supplier of chemical grade salt to Sasol, albeit an imperfect alternative, and hence would likely lead to higher post-merger prices or other poorer supply conditions. Put differently, the proposed deal alters the balance of bargaining power (between the power of Botash and

any countervailing power of Sasol) which is likely to adversely affect post-merger prices. Customers' countervailing power will decrease substantially owing to the removal of the only effective competitor to Botash and the only credible threat in terms of switching suppliers. This clearly would negate inland customers' opportunities for price and volume negotiations.

*Removal of an effective competitor*

[57] The merging parties' claim that Botash and WBSH are not effective competitors because of qualitative differences in the salt supplied<sup>43</sup> is totally unsubstantiated and has in fact been discredited by Sasol. Based on the actual supply evidence there is no reason to doubt Sasol's contention that the salt supply of Botash and WBSH to its chlor-alkali plant is interchangeable: Sasol in fact combines the salt from the two supply sources and uses it simultaneously in its plant.

[58] Based on the above we conclude that WBSH is an effective competitor to Botash in the South Africa inland market for chemical grade salt. From a customer perspective, whether existing or potential, the proposed deal will not only remove an effective competitor but in fact will remove the only existing competitor to Botash in the relevant market.

Conclusion

[59] The proposed transaction results in a merger to monopoly<sup>44</sup> in the market for chemical grade salt supply to inland South Africa; it removes WBSH as the only effective competitor to Botash. Sasol and any potential future inland salt customer would therefore not be able to use the threat of switching to an alternative supplier in order to negotiate more competitive prices or other advantageous supply conditions. This merger therefore removes the very element that underpins customer bargaining power since no amount of bargaining power is as valuable to a buyer as adding one extra bona fide supplier to which it can turn. Furthermore and importantly, the quantitative pricing evidence clearly shows that WBSH is Botash's closest competitor in the relevant market. Any alternative supply source available to Sasol or a potential

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<sup>43</sup> Botash's salt is relatively high in carbonates; while WBSH's salt is relatively high in magnesium and calcium.

<sup>44</sup> There is no need for us to elaborate on the anti-competitive effects of mergers to monopoly. It is well established that monopolies are associated with many disadvantages for society and consumers, which disadvantages may include: (i) higher prices than in competitive markets; (ii) a decline in consumer surplus; (iii) less incentives to be efficient; and (iv) possible diseconomies of scale.

future inland customer, for example salt supply by Dampier in Australia, would not bolster the customers' negotiation power in the manner that WBSH does. In addition, Botash would post-merger gain an alternative and vertically integrated chemical grade salt customer in NCP which is likely to further adversely impact the relative balance of power and post-merger pricing outcomes.

**Downstream: markets for chlorine and caustic soda**

[60] As stated in paragraph [13] above, Sasol uses salt to produce (i) chlorine which in turn is used in-house to produce PVC and (ii) commercially traded caustic soda. Thus, if the merged entity increases its salt price post-merger Sasol may be incentivised to procure its chlorine requirements from NCP rather than producing same in-house. Potential future inland entrants in the markets for the production and sale of chlorine and caustic soda could hypothetically also be vertically affected should Botash institute post-merger salt price increases.

[61] As stated in paragraph [22] above NCP is currently the only supplier of chlorine in South Africa and thus has a 100% market share in a national chlorine production and supply market.<sup>45</sup> In the caustic soda market NCP and Sasol are the only suppliers to third parties in South Africa apart from imports.<sup>46</sup> **Table 2** below depicts the national market shares of NCP and Sasol, based on production capacities, for caustic soda supply and imports of caustic soda into South Africa:

**Table 2 Commission's estimated national market shares for the supply of caustic soda**

Player/Imports	Market share (%)
NCP	[40-50]
Sasol	[40-50]
Imports	13

Source: Production capacities of NCP and Sasol as sourced by the Commission.

[62] As is evident from the above, NCP is a monopolist in the supply of chlorine in South Africa and has a significant market share of more than 40% in a highly concentrated national market for the supply of caustic soda.

<sup>45</sup> Sasol and Mondi produce chlorine for internal use only, see paragraph [22] above.

<sup>46</sup> Mondi confirmed that it does not sell caustic soda into the market. See letter to the Commission dated 09 June 2009.

- [63] NCP claims that there is an oversupply of chlorine in South Africa, low local prices and a lack of viable export options. This is suggestive of high entry barriers and unlikely potential future entry. In regard to caustic soda, the Commission's market investigation suggests that caustic soda is in excess demand in South Africa.

*Barriers to entry and potential new entry*

- [64] As stated in paragraph [16] above the Commission's market investigation has identified Straits Chemicals as a hopeful new entrant in the manufacturing of chlor-alkali products. Straits Chemicals intends to produce chlorine for the international market and caustic soda for the South African market.
- [65] Straits Chemicals submissions point to high barriers to entry into the markets for the production and sale of chlorine and caustic soda. It submits that there are prohibitive government regulatory requirements that a new entrant in the chlor-alkali markets must adhere to, which processes include application with the Department of Environmental Affairs and Tourism ("DEAT"), the (former) Department of Minerals and Energy ("DME") and the National Ports Authority ("NPA"). Straits Chemicals furthermore states that it would take approximately three years to finalise the regulatory obligations. Straits Chemicals estimates these latter costs at approximately R[20-30] million and the total cost of establishing a salt plant together with a chlor-alkali plant at approximately R[1-5] billion. Straits Chemicals also added that a chlor-alkali business requires specialised labour skills. The Commission furthermore informs us that Straits Chemicals has been trying to enter the chlor-alkali markets for the past five to seven years and anticipates that its chlor-alkali business will become operational only by 2012. The merging parties are sceptical of Straits Chemicals' potential entry and highlighted potential electricity shortages and the general global economic downturn as threats to the viability of Straits Chemicals' intended salt and chlor-alkali plants.
- [66] In conclusion: at present there is too much uncertainty<sup>47</sup> in regard to Straits Chemicals to conclude that its entry is likely. However, even if it does occur, given the above-mentioned anticipated time horizons timely entry by Straits

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<sup>47</sup> The Tribunal invited Straits Chemicals to give factual evidence at the hearing of this matter. However its representative in South Africa could, unfortunately, not attend due to personal reasons.

Chemicals to offset any potential adverse competition effects arising from this merger is highly unlikely.

*Foreclosure concerns*

- [67] Post-merger Sasol and any potential future inland chemical grade salt customers entering the chlor-alkali markets will compete with NCP in these downstream markets. This theoretically gives the merged entity post-merger the incentive to increase salt prices to Sasol (and potential new inland entrants) to benefit NCP. The relevant theory of competitive harm in the context of the vertical assessment of this proposed transaction is therefore the likelihood of the merged entity foreclosing downstream rivals, more specifically input foreclosure or raising rivals' input costs.<sup>48</sup> We shall thus focus our analysis on this aspect, specifically the ability and incentive of the merged entity to post-merger increase salt prices.
- [68] Given that this is a merger from duopoly to monopoly in the upstream chemical grade salt market the merged entity clearly will have the ability to extract monopoly rents from its inland customers and such a strategy will raise downstream competitors' input costs. Quantitative evidence provided by the merging parties and Sasol confirms that the cost of salt is a significant element in the downstream production costs: Sasol indicated that chemical grade salt constitutes more than [20-30]% of the total cost of the production of both chlorine and caustic soda; the merging parties estimate same at above [20-30]%.
- [69] As concluded in paragraph [56] above, the instant merger removes the premerger competitive threat of WBSH as an alternative supplier to Botash in the inland chemical grade salt market which weakens customers' post-merger price negotiation ability. Furthermore, the merging parties' own evidence suggests significant price differences between the prices of WBSH and Dampier as the next best alternative supply source in the post-merger context.
- [70] Price however is not the only consideration in this vertical context. As concluded in paragraphs [30] and [37] above, logistics significantly affect the delivered cost

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<sup>48</sup> In the instant case **total** input foreclosure by the merged entity of downstream rivals is implausible since chemical grade salt is available from other international sources, for example Dampier in Australia – albeit at a significantly higher price.



of salt and ultimately the competitive landscape. In the instant case potential self-dealing, specifically in the context of supply chain constraints, i.e. limited Botrail rail transportation capacity,<sup>49</sup> raises concerns. Should Botash post-merger supply NCP with salt, the available Botrail rail capacity for salt transportation could be used to prioritise NCP's salt requirements at the expense of Sasol (or potential future inland salt customers). The available Botrail capacity would, even if averred levels of expansion are achieved, be insufficient to service the demand of both Sasol and NCP, especially also considering alleged NCP expansions.

[71] On the other hand, the merging parties submit that Botrail could be persuaded to acquire additional wagons and containers should a customer be willing to enter into a long-term rail transport contract (also see paragraph [6] above). They also aver that Botrail could significantly increase capacity if turnaround times were to improve. However, given that the imposed conditions also relate to the logistics of supply we shall not deal with these issues in any further detail.

[72] The most common incentive to raise downstream rivals' costs is the ultimate profitability for the merged entity of such a strategy. We accept that the merged entity must hold a degree of market power in the downstream markets to make such a strategy viable: in the instant case NCP as monopolist in a national chlorine market presumptively has such market power and likely has such power with a market share exceeding 40% in a national caustic soda market. By foreclosing Sasol and potential future inland salt customers, the merged entity would sacrifice relatively small margins in the upstream sale of chemical grade salt to ensure larger sales and profits of caustic soda downstream. The merged entity furthermore may also be able to increase prices in the downstream markets post-merger to recuperate any potential small losses in the sale of chemical grade salt.

[73] The market structures of the relevant upstream and downstream markets, the clear incentive of the merged entity to post-merger engage in a foreclosure strategy, as well as the complete lack of substantiation by the merging parties of any potential efficiency gains resulting from the proposed deal from a vertical perspective, persuade us to conclude that the proposed deal has significant

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<sup>49</sup> Transportation by Transnet from Ramatlabama to Sasolburg does not appear to be a concern from Sasol's perspective.

potential anti-competitive vertical effects since it could enable the vertically integrated merged entity to, by raising its downstream rivals' costs, constrain Sasol's and potential new inland salt customers' ability to compete in the downstream chlorine and caustic soda markets.

- [74] However, given the likely horizontal anti-competitive effects of this merger (as concluded in paragraph [59] above) and the imposed behavioural conditions which in our view address these horizontal concerns as well as any vertical competition concerns in this case, we shall not elaborate any further on these vertical issues in these reasons.

### Conclusion

- [75] There can be no doubt that this merger to monopoly in the supply of chemical grade salt to inland South Africa presents a very significant threat to competition from a horizontal perspective. The proposed merger will remove WBSH as the only effective alternative supplier to Botash in this relevant market. The threat to competition includes the institution by the merged entity of monopoly pricing, i.e. anti-competitive pricing, in the inland supply of chemical grade salt and potential foreclosure of rivals in the downstream markets for chlorine and caustic soda. The merged entity has the incentive to raise prices or manipulate the supply of chemical grade salt in order to profit in these downstream markets. This will directly impact downstream rivals', i.e. Sasol and potential future inland salt customers, ability to compete with NCP in the markets for chlor-alkali products.

### **PUBLIC INTEREST**

- [76] The merging parties confirmed that there will be no job losses in South Africa as a result of the proposed transaction.<sup>50</sup> No other public interest issues arise as a result of the proposed deal.

### **CONCLUSION**

- [77] The proposed transaction raises significant competition concerns horizontally since it is a merger to pure monopoly in the supply of chemical grade salt to the inland areas of South Africa. On this basis alone we therefore conclude that the

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<sup>50</sup> The primary target firm does not have employees in South Africa.

proposed deal is likely to substantially prevent or lessen competition. Furthermore, vertically the proposed merger raises significant potential foreclosure concerns.

[78] However, as stated in paragraph [6] above, the Commission changed its initial recommendation of a prohibition of the proposed deal to a conditional approval after the conclusion of a long-term commercial supply agreement between Botash and Sasol as the current only inland customer of chemical grade salt. The Tribunal considered the Commission's proposed behavioural conditions and, with some required changes thereto, concluded that the competition concerns in the instant matter can be adequately remedied by appropriate conditions.

[79] In reaching this conclusion the Tribunal considered a number of factors particular to this case that collectively mitigate<sup>51</sup> the said competition concerns, these factors include: (i) the fact that Botash's salt mine operations have a limited remaining life;<sup>52</sup> (ii) the existence at present of a single inland chemical grade salt customer namely Sasol,<sup>53</sup> who has secured a favourable long-term commercial supply agreement with Botash, as well as a transport agreement with Botrail; (iii) the fact that at present there is no indication of potential future inland customers who would require the supply of chemical grade salt, and furthermore to the extent that there are new entrants in future, the imposed conditions provide for non-discriminatory supply obligations; (iv) Botash has significant excess chemical grade salt volumes<sup>54</sup> which mitigate against concerns of either an outright refusal to supply or refusal to supply (potential) customers' required quantities; (v) innovation is not an important element of competition in the production of chemical grade salt;<sup>55</sup> and (vi) the said finite

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<sup>51</sup> Remedies are merger-specific and must be assessed on a case-by-case basis.

<sup>52</sup> The imposed conditions extend to the full (remaining) life of mine including expansions to the existing operations.

<sup>53</sup> As stated above, this is only one of a number of factors that were considered in justification of this conditional approval. We are by no means suggesting that a merger to monopoly of suppliers that serve a single buyer in general does not raise competition concerns and are *per se* justifiable. Neither modern economic theory nor empirical evidence suggests that bilateral monopolies are *per se* reliably efficient. Major impediments arise from the pervasive presence of private information and incomplete contracts. Each individual case must be assessed on its own merits.

<sup>54</sup> The market is a limiting factor: Botash sells far less chemical grade salt than its maximum production capacity; according to the parties' due diligence report Botash's salt washing plant is currently operating at only [0-100]% capacity.

<sup>55</sup> The harm to competition from mergers to monopoly is particularly prevalent in markets where innovation is an important element of competition.

duration of Botash's salt mining operations and thus of the imposed conditions, as well as the fact that there currently is only one affected customer, contribute to the administrability of (i.e. ability to both monitor and enforce) the requisite behavioural remedies.

[80] We cannot speculate on the (longer-term) competitive dynamics once these conditions have been imposed, but note that a number of factors in relation to Sasol would impact on the bargaining dynamics<sup>56</sup>, including (i) the fact that Sasol commercially is a very significant customer of Botash in terms of volumes, i.e. it accounts for approximately [0-50]% of Botash's total chemical grade salt sales<sup>57</sup>; (ii) Botash's significant excess salt volumes due to its production of soda ash; and (iii) the commercial relationships between Sasol and NCP, including the fact that Sasol is the sole supplier of specialist paraffin to NCP<sup>58</sup> (also see paragraph [13] above).

[81] We approve the proposed acquisition in term of section 16(2)(b) of the Act subject to the following conditions:

"Chlor-Alkali Holdings (Proprietary) Limited ("CAH") will commit to ensure that, for as long as CAH exercises control (for the purposes of the Competition Act, 1998, as amended) over the salt operations of both Botswana Ash (Proprietary) Limited ("Botash") and the operations at Walvis Bay Salt Holdings (Proprietary) Limited ("WBSH"), or for the life of the Botash mine (including any expansions to the existing mine), whichever is shorter:

- a) Botash will supply any inland South African-based purchaser of un-bagged and railed chemical grade salt for use in South Africa, salt of the same or similar quality as set out in Annexure A to this condition, at the following maximum price:

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<sup>56</sup> In the context of *inter alia* potential lower prices than the imposed maximum prices.

<sup>57</sup> Based on the year ending August 2008.

<sup>58</sup> Since NCP has no supply relationship with Botash premerger, this phenomenon was not relevant in the premerger scenario. According to NCP, Sasol is the sole supplier of its specialist paraffin requirements.

- i. The gross price for salt shall be based on the following pricing matrix:

<b>Volume p.a. (metric tonnes)</b>	<b>Gross Price</b>
181 000 +	\$20.00
161 000 – 180 000	\$23.00
141 000 – 160 000	\$25.00
121 000 – 140 000	\$30.00
101 000 – 120 000	\$35.00
Below 100 000	\$40.00

- ii. Botash shall be entitled to increase the gross price annually. The annual increase in respect of the gross price for salt will be calculated and implemented based on an escalation of not more than 50% of the Botswana Consumer Price Index (CPI) average for the 12 months from 01 July to 30 June for each preceding year. The price increases will come into effect on 01 July each year. However, should the gross price of salt for volumes of 181 000+ metric tonnes per annum be more than 10% higher than the West Europe published price upon commencement of the annual increase, Botash shall reduce the price increase applicable to volumes of 181 000+ metric tonnes per annum so that such price is within 10% of the West Europe published price; the resulting percentage price change in respect of this volume bracket will then be applied to each of the prices in each and every other volume bracket.
- iii. All taxes, levies and/or additional costs, levied in Botswana for the export of the salt, shall be for the cost of Botash.
- iv. The gross price shall include all of Botash's costs, expenses and liabilities to fully comply with the terms of the sale.
- v. The gross price shall include import duties, taxes and charges (including customs duties) to import the salt into South Africa, excluding VAT, which shall be paid by the customer.
- vi. The gross price excludes transportation fees.
- b) Botash's obligation to supply will be excused if any of the following circumstances are present or arise:
- i. CAH nor Botash shall not be deemed to be in breach of the conditions by reason of any delay in performing, or failure to perform, any of its

obligations under these conditions if the delay or failure was beyond Botash's reasonable control (including, without limitation, fire, flood, explosion, breakdown of equipment or machinery, epidemic, riot, civil commotion, any strike, lockout or other industrial action, act of God, war or warlike hostilities or threat of war, terrorist activities, accidental or malicious damage, or any prohibition by any governments or other legal authority which is not in force on the date of the drafting of these conditions); and

- ii. Botash's obligation to supply under the terms of these conditions will be subject to its existing supply commitments concluded in the ordinary course of business.
- c) Botash shall be responsible for the transportation of each consignment of salt using the rail infrastructure and rail trucks from Sua Pan to Ramatlabama, subject to all rail service providers' performance and having the necessary rolling stock and equipment, and subject to the necessary agreements being concluded between the customer and such service providers. Delivery of each consignment of salt will be taken by the customer at Ramatlabama. Botash shall only be responsible for the rail logistics in Botswana and the customer shall manage the rail logistics in South Africa.
- d) Botash will facilitate negotiations between new customers and Botswana Railways ("Botrail"). To the extent that Botash receives any logistical advantage that it gives to Sasol or that Sasol would be entitled to claim with Botrail, Botash will pass on that advantage to any new customers.
- e) WBSH will not discriminate in prices between its existing inland customers of chemical grade salt and any new inland South African-based purchaser of chemical grade salt.
- f) Botash will provide the Commission annually, within one month of the anniversary of the Tribunal order, with an affidavit setting out the calculation of the increase in the gross price of chemical grade salt for each volume category (in accordance with conditions a)i and a)ii) and provide for the previous year (i) a list of any requests for supply received from new inland South African-based purchasers of chemical grade salt;

(ii) the actual volume of chemical grade salt supplied to each customer; and (iii) the actual price charged to each customer for chemical grade salt.

g) The Tribunal may, on good cause shown, and on notice given to the Commission and to the merged entities' existing customers of chemical grade salt, lift, revise or amend these conditions upon being approached by the merging parties."

[82] In our view, transparency of these imposed conditions should provide potential entrants in the downstream chlor-alkali markets with certainty regarding the maximum prices that Botash may charge for various volumes of chemical grade salt as well as other relevant conditions of supply for the life of the Botash salt mine. This should in turn, if entry occurs, permit direct verification of the imposed conditions which should ease the Commission's monitoring function of the imposed behavioural conditions.

[83] No public interest issues arise from the proposed acquisition.

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**A Wessels**

**Y Carrim and M Holden concurring**

**14 May 2010**

Date

Tribunal Researcher: Romeo Kariga

For the merging parties: David Unterhalter (SC) and Jerome Wilson, instructed by White & Case LLP

For the Commission: Mark Wesley, instructed by the State Attorney in Pretoria