COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case Nos: 33/LM/May02 – 38/LM/May02

In the large mergers between:

Sandown Motors Holdings (Pty) Limited and McCarthy Limited

and

Sandown Motors Holdings (Pty) Limited and Barloworld Motor (Pty) Limited

and

Barloworld Motor (Pty) Limited and Durban South Motors (Pty) Ltd

and

Newco, (being a joint venture company between Barloworld Motor (Pty) Limited and Durban South Motors (Pty) Ltd) and McCarthy Limited

and

Sandown Motors Holdings (Pty) Limited and Imperial Holdings (Pty) Limited

and

Imperial Holdings (Pty) Limited and Sirius Motor Corporation (Pty) Limited

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Reasons for Tribunal's Decision

Introduction

1. We have been asked to approve six transactions[1] involving the sale of firms who are authorised dealers for the products of Daimler Chrysler South Africa ('DCSA').

2. Ordinarily, each of these mergers would be considered separately since legally, at least, they constitute discrete transactions. However, with good reason, the merging parties and the Competition Commission have treated them as one for the purposes of their evaluation. We have been commended to follow that approach which we have done.

3. The reason for this approach is that the six transactions all involve the same four firms, variously cloaked in the garb of buyer and seller, and are driven by the same rationale; the desire by DCSA to implement its ambitious dealer network strategy ('the DNS').

4. In a nutshell, what is happening is that DCSA has re-organised its sales network in certain urban areas, into five geographical territories, which it refers to as "metro centres". Only one firm will be awarded a franchise for a particular metro centre. Each of the four firms of dealers will be allocated at least one territory, whilst one firm will be located two. Since presently some of the firms are located in more than one territory it was necessary to engage in the several transactions before us to effect the re-organisation.

5. Post the series of mergers, the DCSA dealer network in the five metro areas will in the words of the DNS be characterised by *"bigger territories with less owners"*[2]We have to decide whether the transactions in question will substantially lessen or prevent intra-brand competition, and if they do, then the question is whether there remains sufficient inter-brand competition to ameliorate any concern about the possible loss of intra-brand competition.

6. Although the mergers in question are horizontal in nature, they form part of the manufacturer's strategy to re-align its own distribution network - this means that the competition concerns, if any, should be examined from a vertical rather than horizontal perspective.

History of the Matter

7. The mergers were notified to the Commission in May 2002. On the 31 July 2002 the Commission recommended in terms of section 14 A of the Act

1 Five horizontal mergers and a joint venture agreement.
2 Page 24 of the DNS document.

that they be approved without conditions. The Retail Motor Industry Organisation (RMI)[3], an industry body that represents dealers, applied to intervene in the proceedings. There was no objection from the merging firms and we allowed them to do so on the basis of their interest in the matter. The RMI argued that the merger should be approved, but subject to conditions relating to the franchise agreement between DCSA and its dealers.

8. On the 14 August 2002 we held a pre-hearing conference and requested further documentation from the parties.

9. The matter was heard on the 11 September 2002. Apart from hearing submissions from the parities, the Commission and the RMI, the parties also led oral testimony from two employees of DCSA South Africa, Mr Christoph Kopke, the Chief Executive Officer, Fritz van Olst, the Sales and Marketing Director, as well as Mr. Phillip Michaux, the Managing Director of Cargo Motors, who also serves as the chairman of the Mercedes Benz Dealer Council[4].

10. On the 12 September 2002 we ordered that the merger be approved without conditions.

Background to the DNS

11. Daimler Benz recently merged with the Chrysler Corporation in one of the largest corporate mergers ever, to form Daimler Chrysler the parent of DCSA. The merger greatly increased the portfolio of products to be distributed by the merged firm, but also meant that the company was now distributing very different product offerings.[5] This issue has vexed DCSA considerably as it meant that in the same outlet a number of unconnected or competing brands appeared under the same roof. In the minds of their marketing people, this was detracting from the brand equity of their premium marque, Mercedes Benz. Put in the words of their CEO one would find a Colt bakkie next to a Mercedes SLK on the same showroom floor. The proximity of the plebeian cart to the patrician coach would serve to diminish the latter's value in the eye of the beholder. Thus an important component of the DNS is to end multi-brand DCSA show rooms and

3The RMI comprises 6,500 members with branches in six cities. It represents 95% of all franchised motor dealers within South Africa.

4 The Dealer Council is elected from the dealer network of 100 DCSA dealers and it meets with DCSA management board on a quarterly basis.

5 Previously, as Mercedes Benz South Africa Limited, the firm had also been responsible for the distribution of Honda products but claims that these products were complimentary to, and not competitive with its other offerings. (see Competitiveness report page 1)

replace them with those dedicated to their specific brands, namely Mercedes Benz, Chrysler, Colt and Mitsubishi.

12. But the re-design in strategy that is sought in the DNS does not end there. Another major aspect is to change the focus of its dealers. It is this aspect of the strategy which is perhaps the most contentious and for this reason we need to examine the status quo first before we deal with the new proposals.

13. Various models for motor vehicle distribution exist and our market has examples of all of them. In the first place we have dealerships that are owned by the manufacturers. This apparently is the norm for the sale of commercial vehicles and has been known, although is not the norm, in the distribution of passenger vehicles.[6]

14. This is because the distribution of passenger vehicles requires a ubiquitous network, to make a manufacturer attractive to consumers, and hence a high level of investment downstream, which is not something manufacturers would readily assume.

15. This has led to dealerships being undertaken by firms owned independently of the manufacturer who are either dedicated dealers of that manufacturers' products, or distribute the products of several manufacturers, the so–called "multi– brand" franchises.

16. Nevertheless even multi–brand franchisees have not distributed more than one manufacturer's products in any one outlet. Thus, by way of example, although the McCarthy Group holds franchises from most of the major manufacturers, it has dedicated outlets for each manufacturer.

17. In the second hand market things are different and it is not unusual to see the products of rival manufacturers side by side on the same show room floor. Why has this distinction come about? It is because one cannot become a retailer of new cars without a supply agreement with a manufacturer, which will invariably, as one of its conditions of supply, require the dealer to provide a dedicated show room for its products. [7]

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6 This was the approach formally adopted, although since abandoned, by BMW. It is also a centrepiece of DCSA's strategy through their acquisition of a 75% stake in Sandown Motors, as appears more fully below.

7 In response to a question posed at the hearing by the panel with regard to whether dealers could have a giant showroom from where they would market a number of competing

18. In the second hand market a dealer does not need any contract with a supplier and hence the condition is not practically enforceable.

19. The final species of dealer is the exclusive dealer who retails only the products of a specific manufacturer but is owned by a firm independent of the manufacturer but as with the multi-brand dealers, has a franchise agreement with the manufacturer.

20. In 1999 DCSA, as part of the evolution of the dealer network strategy, took a strategic decision to enter the dealer network directly and hence took up a share in one of its exclusive dealers, by acquiring a 75 % stake in Sandown Motors.

21. The merger was notified to us as a large merger and we approved it without conditions.[8] Already at that stage there were murmurings of unhappiness amongst the dealers and the RMI initially indicated that it wanted to intervene in our proceedings to oppose the merger, but later did not do so, formally withdrawing their objection to the merger at the hearing, after a memorandum of understanding was reached in terms of which DCSA undertook to maintain transparency and to consult with the RMI with regard to all aspects of its new strategy in an appropriate forum. The RMI were nevertheless invited to make submissions with regard to various aspects of the transaction, as well as to the nature of the industry in general.

22. DCSA as it was entitled to, has proceeded to implement the merger with Sandown Motors. The present six transactions represent the next phase of the implementation strategy.

The Transactions

23. Sandown Motors Holdings (Pty) Limited and McCarthy Limited
SMH will acquire from McCarthy its retail motor outlets in Randburg, Milnerton, Claremont and Culemborg. McCarthy will acquire from SMH its Pretoria outlets, being Ellenby Motors and its Mitsubishi dealership.

24. Sandown Motors Holdings (Pty) Limited and Barloworld Motor (Pty) Limited SMH will acquire from Barloworld its passenger car and

brands, Mr Van Olst replied:"*The current franchise agreements, I think, from all the manufacturers would prevent that. That is not, they can't choose to do that.*"

8 Our decision in this matter is reported as DaimlerChrysler SA (Pty) Ltd and Sandown Motor Holdings (Pty) Ltd under 44/LM/Jul01.

commercial vehicle outlets in Roodepoort, being Garden City Roodepoort PC and Garden City Roodepoort CV.

25. *Barloworld Motor (Pty) Limited and Durban South Motors (Pty) Ltd* (the joint venture)
The parties are to enter into an agreement in terms of which they will set up a joint venture with the view of combining their motor retail outlets for DCSA products in the Durban area. Barloworld Motor (Pty) Ltd is to contribute its dealerships in the area to the joint venture, whilst Durban South Motors (Pty) Ltd will contribute its dealership in the area to the joint venture.

26. *Newco, (being a joint venture company between Barloworld Motor (Pty) Limited and Durban South Motors (Pty) Ltd) and McCarthy Limited*
All parties to this transaction are retailers of motor vehicles. The parties are to enter into an agreement in terms of which the joint venture between Durban South Motors and Barloworld Ltd is to acquire from McCarthy its passenger cars and commercial vehicle outlets in Pinetown

27. *Sandown Motors Holdings (Pty) Limited and Imperial Holdings (Pty) Limited* An agreement is to be entered into between the parties in terms of which SMH will acquire from Imperial Holdings Ltd certain retail motor outlets, being Mitsubishi Motors Cape Town, Cargo Northcliff and Cargo Rosebank.

28. *Imperial Holdings (Pty) Limited and Sirius Motor Corporation (Pty) Limited*
The parties are to enter into an agreement in terms of which Sirius is selling the Mercedes Benz franchise rights for Springs to Imperial, as well as selling the Mitsubishi franchise rights for Gauteng East to Imperial. In addition it is selling to Imperial the freehold property in Springs from where the Union Motors dealership operates.

<u>Extent of the mergers effect on the DCSA distibution network</u>

29. The mergers affect only the five so-called metro centres and DCSA's distribution network outside of this remains unchanged. The reason for this is that dealers outside these areas have a much lower turnover in DCSA vehicles and it would not make sense for them to establish separate brand show rooms for each of the DCSA's brands. Their distribution network is thus considered an exception to the DNS strategy.

30. The tables below reflect the outlets which distribute DCSA's products in the five metro centres and how the ownership of each will change post-

merger. A distinction is made between commercial vehicles and passenger vehicles.[9]

COMMERCIAL VEHICLES

31. Commercial vehicles are typically classified according to light commercial vehicles ("LCVs"), medium commercial vehicles ("MCVs"), heavy commercial vehicles ("HCVs") and buses & coaches.

Table 1: Gauteng North [10]

Dealership	Owner –Pre Merger	Owner-Post Merger
McCarthy Freightliner, Pretoria	McCarthy	SMH
McCarthy Truck Centre, Centurion[11]	McCarthy	SMH

Table 2: Gauteng East

Dealership	Owner Pre-merger	Owner Post-merger
Sandown Truck Centre, Kelvin	SMH	To be relocated to another brand centre
Cargo Wadeville, Wadeville	Imperial	Imperial

Table 3: Gauteng West

Dealership	Owner –Pre merger	Owner –Post merger
Garden City Roodepoort (CV)	Barloworld	SMH

9 Note that this delineation between the two is not meant to constitute them as relevant markets for the purpose of the competition assessment. The relevant markets are more likely to be sub-groups of both these two broad categories. It is however convenient to organise the analysis in this way as there are different considerations that arise in the respective commercial and passenger sectors.

10 These outlets were taken from maps submitted by parties in their latest submission, under tab A1-6. Ref:page 689-90, 790 [Competitivness Report] –all outlets selling anything other than commercial vehicles alone are grouped under PC's. LCV's occupy a category between CV's and PC's. Therefore in analysing the passenger vehicle market, we have included cars that would theoretically be classified as LCV's. Italics denote change in ownership.

11 Denoted as separate outlet to McCarthy Freightliner on map under tab A6

Table 4: Durban

Dealership	Owner –Pre merger	Owner –Post merger
McCarthy Truck Centre Pinetown (CV)	McCarthy	BML & Durban South J.V
NMI Prospection	Barloworld	

Table 5: Cape Town

Dealership	Owner	Owner –Post merger
McCarthy Truck Centre, Montague Gardens	McCarthy	SMH
Sandown CV Bellville	SMH	SMH

32. What we observe from the above is that in at least two metro centres the number of different dealer outlets goes from two to one. In at least two centres the number of dealers remains the same, although the identity of the dealer may have changed. The parties argue that in respect of commercial vehicles, the market is national and the alteration of ownership in the metro centres, even if it leads to fewer players in certain centres, is irrelevant, as the number of players nationally remains unaltered. The reason they argue that the market is national, is because the customer profile is different from that in the passenger vehicle market. The typical commercial vehicles customer would be a firm buying several vehicles for its fleet and which is not inconvenienced by sourcing from anywhere in the country. Given that most commercial vehicles are considerably more expensive on average than passenger vehicles, customers are not reluctant to spend the extra time in travelling to source the best deal.

33. We accept this argument and we have no reason to believe that the restructuring insofar it affects commercial vehicle outlets of DCSA will lead to any meaningful diminution of competition.

34. There remains as well significant inter-brand competition in the markets for MCV's and coaches and busses. We set these tables out below.

Table 6: Market Shares of MCV's[12] 2001-2002

12 Commercial vehicles with a weight of between 7.5 and 16 tons.

Firm	*Market Share*
Mercedes Benz	**24.6%**
Nissan	25.2%
Toyota	22.2%
Isuzu	15.6%
M.A.N	8.8%
Iveco	2.3%
Freightliner	0.9%
Volvo	0.45
ERF	0.1%

Source: MB Commercial Vehicles Business Plan 2001/2

Table 7: Market Shares of HCV's[13]– 2001-2002

Firm	*Market Share HCV's*
Mercedes Benz	**21.6%**
M.A.N	18.6%
Navistar	14.1%
Scania	9.8%
Freightliner	9.1%
Volvo	6.3%
Nissan	5.6%
Peterbilt	4.8%
Toyota	3.3%
Iveco	2.4%
Isuzu	1.7%
ERF	1.5%
Mack	1%

Source: MB Commercial Vehicles Business Plan 2001/2

Table 8: Market Shares of Buses– 2001-2002

Firm	*Market Share HCV's*
Mercedes Benz	**35.5%**
M.A.N	28.4%
Iveco	15.8%
Volvo	9.4%
ERF	6.3%
Scania	4.6%

Source: MB Commercial Vehicles Business Plan 2001/2

13 Commercial vehicles with a weight over 16 tons.

35. The possible exception may be the category of light commercial vehicles[14]. This category is an amalgam of light delivery vehicles and passenger utility vehicles or four-wheel drives. Again, it is not necessary for us to delineate as the relevant product market, if it be one, any further, as there is sufficient inter-brand competition for both LCV's and four-wheel drives to alleviate any concerns. Below for the sake of completeness we set out market shares in respect of the sale of light delivery vehicles.

Table 9: Market shares Light Commercial Vehicles, July 2002

Firm	Market Share
Daimler Chrysler	9.07%
Delta	18.56%
Fiat	.59%
FMCSA	20.79%
Nissan	18.75%
Renault	.51%
Toyota	28.26%
Volkswagen	3.47%

Source: MB Commercial Vehicles Business Plan 2001/2

36. Although the market is moderately concentrated and DCSA has a share of 9.07%, there are a number of players in this market who have significant shares.

37. We conclude that in the commercial vehicle market viewed as a whole, or by segment, there will be no loss of either intra-brand or inter-brand competition as a result of the transactions. As far as intra-brand competition is concerned the reconfiguration of the metro areas has made little difference and to the extent that it may in certain categories which may be more local than national, inter-brand competition remains sufficiently vibrant across all categories.

38. We will therefore focus the remaining part of our analysis on the categories within the passenger vehicle market.

PASSENGER VEHICLES

39. We set out in the tables below the change in the number of players in each of the sector by comparing the pre-merger and post–merger

14 Described as a vehicle with a weight of 3.5 to 7.5 tons.

positions.

Table 10: Gauteng North

Dealership	Owner Pre Merger	Owner Post Merger
McCarthy Fountains, Pretoria	McCarthy	*SMH*
Ellenby Motors, Hatfield	SMH	*McCarthy*
McCarthy Menlyn	McCarthy	McCarthy
McCarthy Centurion Park, Centurion	McCarthy	McCarthy
Mitsubishi Centurion	SMH	*McCarthy*
Grand Central Motors, Midrand	Independent	Independent

Table 11: Gauteng East

Dealership	Owner	Owner Post Merger
Mercurius Motors, Kempton Park[15]	Imperial	Imperial
Cargo Edenvale	Imperial	Imperial
Cargo M2 City, Johannesburg	Imperial	Imperial
Mitsubishi East Rand, Boksburg	*Sirius Motors*	*Imperial*
Mercurius East Rand, Boksburg	Imperial	Imperial
Cargo Germiston, Germiston	Imperial	Imperial
Mercurius Alberton, Alberton	Imperial	Imperial
Union Motors Springs[16]	*Sirius Motors*	*Imperial*

Table 12: Gauteng West

Dealership	Owner	Owner Post Merger
Garden City Krugersdorp[17]	*Barloworld*	*SMH*
Mitsubishi Sandton	SMH	SMH
McCarthy Randburg	*McCarthy*	*SMH*
Garden City, Roodepoort	*Barloworld*	*SMH*
SMH Sandton	SMH	SMH
Cargo Northcliff	*Imperial*	*SMH*
Cargo Rosebank	*Imperial*	*SMH*
Cargo Auckland Park	Imperial	Imperial
Shiraz Auto Lenasia	Independent	Independent
Century Motors Carltonville	Independent	Independent

15 Sell new CV's and PC's
16 Sell new CV's and PC's
17 Service and Parts outlet only

Table 13: Durban

Dealership	Owner Pre Merger	Owner Post Merger
McCarthy Pinetown (PC)	*McCarthy*	*BML & Durban South J.V.*
Durban South Motors, Winklespruit	Independent	*BML & Durban South J.V.*
Mitsubishi Umhlanga Rocks	Independent	*BML & Durban South J.V.*
NMI Umhlanga	Barloworld	*BML & Durban South J.V.*
NMI Durban	Barloworld	*BML & Durban South J.V.*

Table 14: Cape Town

Dealership	Owner Pre Merger	Owner Post Merger
Malmesbury Motors, Malmesbury	Independent	Independent
McCarthy Milnerton	*McCarthy*	*SMH*
Orbit N1 City	SMH	SMH
Paarl Motors, Paarl	Independent	Independent
Eikestad Motors, Stellenbosh	SMH	SMH
Mitsubishi Motors, Paarden Eiland	*IHL*	*SMH*
McCarthy Culemborg	*McCarthy*	*SMH*
McCarthy Claremont	*McCarthy*	*SMH*
Rola Motors, Strand	Independent	Independent

40. A comparison of the pre and post merger situations reveals exactly what the parties say it does – there will be fewer owners in the metro areas. What is not apparent from this comparison, but the parties concede this, is that these fewer owners will enjoy their franchise over a larger area than they enjoyed previously. This may be slightly misleading. All that this means is that DCSA will not grant another franchise within that metro centre to another dealer. It does not preclude a franchisee from dealing with customers who are situated in another metro.[18] We are thus not dealing with a situation where there are de jure exclusive territory allocations but they may nevertheless, and this we discuss further below,

18 At the hearing, the parties pointed out that the territorial demarcations will be maintained but the dealers will be entitled to advertise nationally. (See Transcript pg 68)

operate post merger as a de facto exclusive allocation of territories.

Competitive Analysis of the passenger vehicle market

41. We have previously stated that a reduction in intra-brand competition is only of concern if there is weak inter-brand competition.[19] For this reason we will approach our decision in two stages. First, we will examine whether there has been a reduction in intra-brand competition. Only if we find that there has do we need to consider the state of inter-brand competition in order to determine if the merger raises competition concerns.

Intra-brand competition in the passenger vehicle markets

42. The RMI raised various concerns with regard to the Dealer Network Strategy. In relation to inter-brand competition, in their written submission, they suggested that the merger be approved subject to two conditions to protect intra-brand competition. Firstly, that DCSA may not prevent dealers from conducting sales via there own websites and secondly that there be no prohibition on franchised dealers carrying out sales to independent resellers. It is not clear whether the new DCSA franchise agreement, which we are advised is still in the process of being negotiated, will contain these restrictions. We will not consider the merit of these proposals now. Later in this decision we set out the approach we have taken in relation to all the conditions that the RMI have suggested.

43. The extent of intra-brand competition in the metro centres pre-merger is difficult to determine. The Tribunal was given mixed messages by the parties throughout the documentation and during the hearing. The DNS documentation reveals a great pre-occupation with preventing the dealers from competing with themselves as did evidence at the hearing:

44. According to the testimony of DCSA's Mr van Olst dealers at present were too focussed on intra rather than inter-brand competition.

> " Certainly, it is our contention that dealers focus on the intra-brand competition rather than on the inter-brand. And that is the reality on what is happening. It is to get the deal to come through my door, rather than some other dealer of the same brand's door, rather than try and compete with the BMW's and the like" [20]

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19 DaimlerChrysler SA (Pty) Ltd/Sandown Motor Holdings (Pty) Ltd and Nkosinauth Ronald Msomi & Others v British American Tobacco 49/IR/Jul02, at para 49.

20 See Transcript page 26.

45. Similar sentiments were echoed by Mr.Kopke the chief executive officer. The documentation submitted by the parties detailing the DNS strategy also shows DCSA's pre-occupation with the perceived competition amongst its dealer network. A sample of the cryptic sound bites of their presentation package illustrates this:

> "DCSA franchise is overrepresented ," or *"profiteering at whatever cost",* or *"inter-dealer rivalry rather than the competition",* or *"Dealerships need to avoid intra-network competition,* or *"Minimise and hopefully eliminate the negative effects of current discount practice.."* [21]

46. In another document one of the weaknesses identified is *" inter –dealer competition"*

47. On the other hand, the dealer perception of this level of competition was more muted. Mr Michaux from Cargo Motors stated in his testimony that competition is based on customer retention:

> "Sure there is intra-brand competition that takes place, but it really is not I think of the magnitude that the discussion talked earlier on… *our closeness to our customer and the opportunity to sell a customer and have a customer for life, for us, now I am talking as Cargo Motors as a dealer versus the other dealers. It is a big issue for us. We pride ourselves in customer retention."*[22]

48. One of the difficulties in assessing the level of intra-brand competition is that pricing is not transparent. As one witness put it, price competition takes many forms and includes the provision of extras and trading allowances.[23]

49. The stated intention of the new strategy is to have fewer sales points and more service points to conveniently serve customer's servicing requirements. There is little doubt that it is DCSA's stated intention to reduce whatever level of intra-brand competition already exists in the five metro areas. The new structure is likely to inhibit intra-brand competition as dealers are situated further apart, physically leaving only certain customers, located on the peripheries of two overlapping metro areas, with the ability to shop around without having to travel too far.

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21 DCSA Strategy Workshop Document July 2000
22 Transcript page 56.
23 Transcript page 47.

50. Two other factors will further inhibit dealers. First, dealers are required to make substantial investments in the new showrooms envisaged in terms of the DNS, estimated by the parties to be in the order of some forty million Rand. They are therefore unlikely to want to risk that investment by angering DCSA, particularly if the franchise can be cancelled at short notice. Second, as DCSA increasingly integrates further into the downstream market, through its investment in Sandown Motors, its ability to monitor the behaviour of other dealers is increased, whilst at the same time its incentives to reduce intra-brand rivalry also increase, as it now competes with its own customers in distribution.

51. We have come to the conclusion that the combined effect of a physical network, in which there will be fewer dealers selling in the relevant geographical areas, and the increased disincentives faced by dealers to compete inter se, will lead to a reduction in intra-brand competition. Whether the reduction is sufficient to meet the test of 'substantiality' required under section 12 A, is more difficult to answer, as we do not know to what extent there was intra-brand competition in these areas before the merger. However, we do not need to be more precise about this aspect on account of our conclusions about the level of inter-brand competition.

<u>Inter-brand competition in the passenger vehicle market</u>

52. Having concluded that there is, in all likelihood, going to be a reduction in intra-brand competition, we need to examine whether inter-brand competition will be substantially lessened.

53. There have been profound changes to the motor vehicle industry since 1994, with the advent of our new constitutional dispensation. The political changes meant that the industry ended its years of isolation. Tariff barriers dropped, imports entered the market and a concerted industrial policy to streamline and revitalise the sector transformed the competitiveness of domestic manufacturing.

54. It is beyond the scope of this decision to analyse how and why these changes have come about. What is important is what they have brought about, a market in which we have a large number of manufacturers actively competing against one another, many with a large portfolio of brands across a wide segment of the market.

55. The presence of many brands of motor vehicle was confirmed at the hearing by Mr Michaux:

> "[In the] *South African market we have almost every single vehicle available for sale that is available internationally… I mean, if you look at vehicles like SAAB, Lexus, the new Peugeot that has come out, Bentley I believe is coming now. We really compete with everybody."*[24]

56. Mr Köpke remarked that in contrast to 1994, when there were approximately 6 manufacturers in the country, there are now a plethora of car brands on the market:

> "Certainly the exclusivity strategy that we are proposing has certainly not been a huge hindering factor for Peugeot, for Jaguar, for all those brands that have come in. They have come in very quickly. They have come in with very good dealers. They have had good backing and certainly they have all become competitors of ours, so the exclusivity strategy that we have is certainly not inhibiting new players in any way coming into this market place."[25]

57. The prevalence of many different brands in each market segment is testimony to the ease of entry of continually new manufacturers into the market.

58. The tables below reflect the proliferation of brands in all the relevant markets. Since the dealer network strategy affects DCSA franchises, the relevant segments in which DCSA is active are small cars, luxury cars, speciality cars, utility vehicles and minivans.[26]

59. The tables below reflect, where available, the regional and national market shares per segment and the significant DCSA competitors in all market segments in which it competes:

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24 Transcript pg 59.
25 Transcript pg 91.
26 In March 2002 the Mercedes Benz Smart car entered the SA market under the Mini Car segment. These market shares are insignificant, therefore not reflected. Although we reflect market shares in terms of these narrower categories, we accept, as we did in the last merger, the parties' arguments that there is much demand substitutability between upper and lower luxury cars, as well as between lower and upper speciality vehicles.

Table 15: Market Shares according to Segment– 2002

Segment	*Brand*	*Gauteng m/s*	*Western Province m/s*	*KwaZulu Natal m/s*	*Total National Market Share*[27]
Small Cars	Mercedes Benz	9	2	7	4.82
	Chrysler Neon				2.96
	VW	29	14	34	29.43
	Toyota	15	51	19	19.31
	Mazda	14	12	12	16.91
Other competitors	Nissan, Honda, Alfa, Audi, Daewoo, Ford, Opel, Peugeot, Renault, Subaru				
Lower Luxury	Mercedes Benz	30	37	44	37.05
	BMW	44	30	36	39.57
	VW	19	20	15	2.14
Other competitors	Alfa, Audi, Toyota Lexus, Opel, Saab, Volvo				
Upper Luxury	Mercedes Benz	21	55	34	27.87
	BMW	48	23	42	46.28
Other	Alfa, Audi, Cadillac, Jaguar, Toyota Lexus, Peugeot, SAAB, Volvo				
Lower Speciality	Mercedes Benz	34	6	47	36.79
	BMW	52	69	36	46.98
Other	Mazda, Opel, Peugeot, Renault,				
Upper Speciality	Mercedes Benz	29	37	38	31.03
	BMW	37	44	43	40.63
Other competitors	Alfa, Audi, Honda, Jaguar, Porsche, SAAB, Toyota, Volvo				

27 According to DCSA Market Analysis July 2002

Small Utility	Mitsubishi Pajero				1.42
	Chrysler Jeep Wrangler				3.16
	Landrover Freelander				21.18
	Toyota	48	62	54	58.49
Other	Opel, Renault, Suzuki,				
Lower Middle Utility	Jeep Cherokee	56	52	46	51.32
	Isuzu				32.76
	Landrover				8.84
	Nissan	21	27	28	24.79
Other	Honda, Isuzu, Subaru,				
Upper Middle Utility	Jeep Grand Cherokee				19.04
	Mercedes				15.58
	Mitsubishi Pajero				14.04
	BMW	38	38	35	20.39
	Landrover				16.26
	Toyota	5	21	5	6.54
Other	Audi, Chevrolet, Nissan, Volvo				
Small Minivans	Chrysler PT Cruiser				17.65
	Renault				78.22
	Daewoo				4.12
Minivans	Chrysler Grand Voyager				66.73
	VW				30.47
	Peugeot				1.4
Renault					1.4

Source: DCSA Market Analysis July 2002

60. As the parties pointed out at the hearing, in the high end of the market, that is, luxury vehicles, sports utility vehicles and specialised vehicles, there is now a large range of imported brands that are in direct competition with the Daimler Chrysler brands. Their convincing levels of market penetration suggests that they have had no difficulty whatsoever in finding distribution facilities within the country and are able to compete vigorously.

61. In addition, there have been major swings in market share within each segment in recent years. We have not wished to burden this decision with all the tables we have received evidencing this, but it will suffice to give a few examples. For instance;

- in the lower middle utility sector, Isuzu went from a market share of 32.22% in 1998 to 30% in 2001 to 4% in 2002. Land Rover went from 52% in 1997 to 20% in 2002 to 9% in 2002.
- In the lower luxury segment, Audi went from 20% market share in 1997 to 14.8% in 2002.
- In the upper luxury segment, Mercedes went from 48% in 1997 to 27.87% in 2002.

62. This erosion of market shares suggests that inter-brand competition is alive and robust within each market segment.

63. There is no doubt that BMW is a major competitor, dominating the luxury and speciality segments and, along with Toyota in the utilities segments, Chrysler is dominant in the minivan segment. However in this and all the other segments there are a significant number of other players in the market to constitute sufficient competition.

64. We have thus far approached the mergers by examining the likely negative effect on intra-brand competition. However as the literature on the subject reflects, a reduction in intra-brand competition is frequently accompanied by an increase in inter-brand competition. In the case of these mergers we have no reason to doubt that the same will occur. Balanced against the probable loss of intra-brand competition the mergers will make the re-aligned DCSA metro network a more formidable competitor to its rivals like BMW and Audi.

65. As the brand centre concept will entail dedicated marketing and resource focus on specific brands, the chances that such a strategy will enhance inter-brand competition between manufacturers of different brands is relatively high. This is reinforced by the fact that brand value in motor vehicles seems, more than in any other market, to command great power.[28] We therefore conclude that inter-brand competition is and is likely to remain vigorous and there will be no substantial lessening of competition in any of the relevant markets.

66. This does not conclude our analysis however as the dealer networks do not simply sell cars to retail buyers, they also offer service and sell spare parts. We consider these two issues below.

Servicing

67. The parties were questioned at the hearing as to what extent consumers would have a choice of dealer if they were unhappy with the service or price of one service dealer, particularly since there will be one dealer group per metro area. There was a concern that there would be a reduced choice in service outlets. Though there might well be a reduction in the choice of service outlets per area, this is mitigated by the fact that the price of such service is known upfront, since it is incorporated into the maintenance plan sold with the vehicle. Though there are slight differences between dealers in hourly labour rates, generally the maintenance plans mean that the service and repair cost is factored into the total purchase price. Therefore the consumer will tend to consider the pricing of the service as part of his or her overall purchase decision. The parties argued that as far as service quality is concerned, there is no obligation on consumers to go to an authorised dealer. Therefore if service levels deteriorate, he or she would be able to go elsewhere to service their vehicles. Some customers who are located conveniently in relation to more than one metro area will still have the choice of more than one outlet.

68. There of course is the risk that use of a non-authorised dealer may lead to service by people not competent in service of the vehicle or use of inferior parts and thus for many customers may not be an attractive alternative. On the other hand it is also true that specialist service outlets are now providing a growing number of services to the motorist, such as batteries, tyres and exhausts.

28 Mr Kopke confirmed that the South African market is unique in its degree of sophistication with respect to motor vehicle retailing.

69. Thus the class of consumer who may be faced with high service prices and who cannot substitute these services without great inconvenience may be relatively small , once we exclude those who have a maintenance contract, those who can get the service performed by another DCSA dealer or require a service that is not by its nature required to be performed by a DCSA service specialist .

Spare Parts

70. Like in the market for servicing, the market for spare parts is more local since customers typically do not wish to travel too far to obtain parts. Parts are bought for the maintenance and servicing of motor vehicles. Dealers generally source parts from the manufacturers of the brands they sell. Therefore they will stock only those parts of the particular DCSA brand they sell. According to the parties, 35% of DCSA parts are used in the dealers' own workshops. The other 65% are sold to retail customers, non-franchised dealers such as fleets, the repair industry and independent workshops.

71. In respect of pricing of spare parts, the parties in their papers do suggest that spare parts are invoiced to dealers at a premium margin for the manufacturer. Discounts are offered to customers, dependant on their size. Therefore individual consumers may actually receive very little discount on the cost of spare parts. However, the parties do maintain that there is presently nothing to prevent dealers from selling spare parts to independent repairers and the new DNS will not alter this, leaving the competitive nature of the spare parts market unchanged. Furthermore it is stated that independent companies compete vigorously with DCSA dealers in that they sell non-genuine, equivalent spare parts which account for about 40% of all spare parts demand for DCSA product. There is no evidence that the new strategy would diminish this alternate source of parts. In any event, the same considerations apply in respect of maintenance plans as do for servicing. The cost of spare parts will be factored into the customer's ultimate purchasing decision[29].

72. The brand-specific outlets will also offer servicing and parts sales in respect of that particular brand. The parties assert that not the number but merely the positioning of dealers selling the parts will change and there are likely to be more parts and servicing outlets. The DNS strategy will not change the marketing and sales of spare parts at all.

73. Nevertheless our concerns about the ability of dealers to exercise market

29 Provided the customer utilises original spare parts.

power in relation to parts and service, post merger, were the ones least satisfactorily dealt with by the parties, but they are insufficient to change our conclusion reached earlier that the merger will not pose a competitive concern because of strong inter-brand competition.

74. The evidence suggests that consumers in this market are sophisticated. If the DCSA dealer network wishes to raise service prices beyond a competitive level the consumer is likely, at least in the medium term, to become aware of this and to favour the products of its rivals. This is likely to inhibit the exercise of market power by the dealers in the metro areas in relation to the cost of services.

Conditions

75. We referred above to the fact that the RMI had argued that the merger be approved subject to certain conditions. The two conditions that related to the loss of intra-brand competition were referred to earlier in our analysis.[30]

76. Two further conditions were suggested that relate to both intra-brand and inter-brand competition. Both conditions would require us to impose conditions on what DCSA's agreements with its franchisees may contain. We pointed out earlier that the new franchise agreements have not yet been concluded. We know what the present agreements contain, but the parties inform us there is an ongoing process of negotiation in respect of the new ones. We are certainly in no position to second-guess the respective hands of the negotiators at the bargaining table. The manufacturer's leverage is clear, but the dealers involved in this merger are all large concerns who DCSA can ill afford to alienate. Nevertheless the absence of an agreement is not in itself a bar to the imposition of conditions if they are appropriate. We will go on to consider their appropriateness.

77. The first condition was:

"that there shall be no direct or indirect non-compete obligation relating to the sale of motor vehicles and that multi-branding by any

30 See paragraph 42

dealer shall be possible as set out paragraph 4.2.1…"

78. It needs to be pointed out that presently there is no prohibition on a firm of dealers from selling the products of its rivals. Imperial, McCarthy and Barlows all retail the vehicles of a number of rival manufacturers. What most manufacturers prohibit their franchisees from doing is selling the rival product from the same showroom. Hence we have branches of the same firm of dealers with different product brandings, McCarthy Audi, McCarthy BMW etc.

79. The mergers do not alter the status quo in this regard. The RMI seem to be wanting to utilise the mergers as an opportunity for us to impose a structural change to the industry that we have never had before in this country. It is thus not a condition, which would restore the status quo, but one that seeks to restructure the industry into something it has never been. We do not seek to dismiss the RMI's major thesis, which is that consumers would be better served by having showroom floors which stock a range of rival manufacturers offerings. Retail outlets on this model would become giant supermarkets selling a range of brands. This, they inform us, is the direction that the European Union would like to see the market moving with its new block exemption. [31]

80. We must consider if a merger is likely to substantially lessen or prevent competition and only if the answer to that is, 'yes', after the public interest and efficiency balance have been taken into account, may we consider prohibition or impose conditions. Without that prior conclusion we have no jurisdiction to prohibit a merger or impose conditions.

81. It might well be, and we express no view on this, that another model of distribution of motor vehicles will increase rivalry and lead to lower prices.

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31 According to the new block exemption, July 2002, dealers can choose between selective or exclusive distribution. They will be allowed to sell competing motor vehicle models off the same showroom floor. If manufacturers allocate exclusive sales territories to dealers, they cannot stop them from selling to independent resellers. Furthermore, if dealers are not authorised to sell to independent resellers (selective distribution), that is supermarkets, internet resellers, then manufacturers will no longer be allowed to stop their dealers from setting up dealerships in other selective territories than the one in which they are authorised.

It is not our function, however, to use merger control to either re-regulate or regulate an industry's structure.

82. The same can be said for the remaining condition which states:

"That, to prevent a manufacturer from terminating a franchise agreement because a dealer engages in pro-competitive behaviour –

5.2.3.1 every notice of termination must clearly state the reasons for the termination;
5.2.3.2 one years notice of termination has to be given if a network is reorganised or if compensation is paid to the dealer, and two years' notice has to be given in all other cases; and
5.2.3.3 in the case of termination of a contract but also where disputes arise regarding contractual obligations, the parties shall refer such disputes to an independent expert third party or arbitrator."

83. It is certainly true a manufacturer could use a condition that allows it to terminate dealers at short duration, to discipline a maverick, but pro-competitive dealer. But it does not follow that by imposing a condition obliging DCSA to give longer notice periods to terminate their dealer contracts that this would inevitably have the effect of enhancing competition between the dealers. It is equally arguable that it could lead to the entrenchment of inefficient dealers.

84. The parties maintained that imposing either of these conditions would entail a selective intervention, in that it would affect only DCSA franchise contracts, and not those of other manufacturers. Though there might be some cases where such a selective intervention *is* justified, we do not find there is just cause in these merger proceedings. For all the above reasons, and in the absence of anti-competitive merger-specific effects, we do not deem it appropriate to impose any of the conditions on the back of a merger enquiry.

For all the above reasons we approved this series of mergers unconditionally. There are no public interest concerns, which would alter this conclusion.

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N. Manoim

19 November 2002

Date

Concurring: D. H. Lewis, F. Fourie

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For the Commission: Mr A. Coetzee and Ms. L. Blignaut