**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA**
**HELD AT PRETORIA**

**CASE NO: 55/LM/Sep01**

**In the matter between:**

**Unilever Plc**

**Unifoods, a division of Unilever South Africa (Pty) Ltd**

**Hudson & Knight, a division of Unilever South Africa (Pty) Ltd**

**Robertsons Foods (Pty) Ltd**

**Robertsons Food Service (Pty) Ltd** **The merging parties**

**and**

**The Competition Commission of South Africa** **The Commission**

**and**

**CEPPWAWU**

**FAWU**

**NUFBWSAW** **The Unions**

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**REASONS FOR DECISION**

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**Approval**

1. We approved with conditions the merger between Unilever Plc; Unifoods, a division of Unilever South Africa (Pty) Ltd; Hudson & Knight, a division of Unilever South Africa (Pty) Ltd; Robertsons Foods (Pty) Ltd; and Robertsons Food Service (Pty) Limited. Certain of the conditions for the approval have been kept confidential to the merging parties and the Commission in order to preserve the value of the assets to be divested. The non-confidential conditions of approval are annexed hereto marked "A". Below we give the reasons for our decision.

**The Transaction**

2. This merger came about as a result of an acquisition by Unilever PLC and Unilever N.V. of the entire business of Bestfoods worldwide. The acquisition necessitated a worldwide restructuring of the businesses of Bestfoods and Unilever.

3. The transaction was relevant to South Africa in so far as a South African company, Robertsons Holdings (Pty) Limited (Robertsons), which is part of the Remgro group of companies, is, together with a Bestfoods' subsidiary, Bestfoods Europe Group Limited (Bestfoods Europe), involved in a joint venture company called Bestfoods Robertsons Holdings Limited LLC. The United States registered joint venture company has two subsidiaries in South Africa, namely Robertsons Foods (Pty) limited and Robertsons Food Service (Pty) Limited. In terms of the joint venture agreement, Bestfoods licenses its products to Robertsons Foods to manufacture, distribute, market and sell in South Africa. Bestfoods licenses know-how and technology to Robertsons Foods and does not import products into South Africa.

4. The parties to this transaction have agreed to form a new joint venture company in South Africa combining the food business of Unilever SA and those of the Bestfoods and Robertsons joint venture company. The new joint venture company, to be called Unilever Bestfoods Robertsons, will include Unifoods and Hudson & Knight from Unilever SA, and Robertsons Foods (Pty) Ltd and Robertsons Food Service (Pty) Limited from Robertsons' Holdings. Unilever plc will have management control of Unilever Bestfoods Robertsons.

**The Relevant Market**

A. THE PARTIES' MARKET DEFINITION

5. The merging parties' core business is the production and sale of processed food to the retail food sector and the professional food sector. According to the merging parties, even though they trade in the same markets, they target different classes of consumers. Robertsons' position is strong among the lower income consumers whilst Unifoods' strength lies in the middle to higher income consumers.

6. The merging parties, relying on a number of reports and studies that they commissioned, recognize four broad relevant markets for purposes of this transaction. These are the markets for the production and sale of cooking ingredients, sauces, ready meals and flavoured spreads.

Cooking ingredients

7. These are products used by consumers to enhance the taste of the food by adding flavour, aroma, colour and texture to food. Cooking ingredients may be divided into flavour enhancers and meal makers. Examples of flavour enhancers are products like salt and pepper, herbs and spices, curry, meat and vegetable stock etc. The meal makers are products such as tomato and onion mixes, soya mince, whole peeled potatoes, tomato based pastes and purees and coatings.

Sauces

8. Sauces are thickened flavoured liquids used in the preparation or serving of a meal in order to enhance its taste, for example, tomato sauce, chutney, mayonnaise pasta and cream-based sauces, gravy and salad dressing.

Ready Meals

9. This refers to convenience food products that the consumer can prepare in a very short time. Generally, preparation consists of warming up, mixing or simply serving as is. No recipe skills are required to prepare the meals, all the ingredients are already included in the meal or there will be precise instructions on what to add and how to prepare the meal. Ready meals may be divided into family meals and personal meals/snacks. Family meals are those meals packaged in larger sizes for 3-4 servings and aimed at formal meal occasions such as lunch or dinner. Personal meals are packaged for one person, are not designed for formal meals and may be consumed at anytime, for example, ready to eat snacks. According to the merging parties instant soup, as opposed to powdered soup mixes also falls into this market.

Flavoured Spreads

10. Flavoured spreads include all those products used by consumers principally to enhance taste of bread and biscuits, for example jam, peanut butter, dairy, honey and syrup, fish and meat spreads.

## B. THE COMMISSION'S MARKET DEFINTION

11. The Commission disagrees with the parties' market definition. In the Commission's opinion, the merging parties have defined the market too widely. In its report the Commission criticizes the various reports and studies relied upon by the merging parties for their market definition. The Commission seeks to demonstrate that the said reports and studies do not support the market definitions proposed by the parties. It points out perceived inconsistencies and omissions amongst the documents filed by the parties in support of their market definition. The efficiencies that the merging parties claim will result from the merger are also disputed by the Commission. In addition, the Commission casts doubts upon the objectivity of the studies and the reports.

12. According to the Commission, the appropriate method of defining the market for purposes of this transaction is to use the product classifications adopted by AC Nielsen, a firm that collects product data in the food sector. The Commission adopted the food classifications used by AC Nielsen in collecting data for its clients as the correct market definition. The Commission points out that this is the market definition adopted by the parties' international counterparts in their notification of the worldwide merger to the European Commission.

13. Through its Retail Measurement Services, ACNielsen captures information on product movement, market share, distribution, price and other market sensitive data using in-store scanning of product codes in the retail sector and store visits by auditors. These data are compiled by classifying products into very basic Product Definitions e.g. jams, fresh milk, yoghurt etc., and market shares are calculated by the amount each brand sells through the retail sector.

14. AC Nielsen identifies over 27 food product classifications. The Commission found overlaps between the merging parties' products in 10 (ten) markets. Below is a table reflecting the parties products and market shares in the various markets identified by the Commission:

| **RELEVANT MARKET** | **UNIFOODS** | | **ROBERTSONS** | | |
|---|---|---|---|---|---|
| | **Products** | **Market share** | **Products** | **Market share** | **Post Merger** |
| Packet soup | Royco Soup | 29,4% | Knorr Soup | 48,1% | 77,5% |
| Soya mince | Royco vitamince | 1,7% | Knorr soya mince and Knorr nyamanyama | 31,3% | 33,0% |
| Sishebo mixes | Royco Shebo-o-mix | 11,6% | Robertsons Jikelele stew mix | 83,8 % | 95,4% |
| Salad Dressing | Royco Salad Dressing | 14,4% | Knorr Salad Dressing | 55,4% | 69,8% |
| Recipe mixes | Royco Royco potato bake and Royco potato wedges | 48,2% | Knorr | 18,0% | 66,2% |
| Dry marinades | Royco Instant Marinade | 35,3% | Knorr Marinades and Meat Mate Marinade | 64,5% | 99,8% |

| | | | | | |
|---|---|---|---|---|---|
| Pour-over-sauces | Royco<br>Royco sauce sensations | 47,8% | Knorr stir & Serve<br>Knorr sauce combinations | 34,4% | 82,2% |
| Dry pasta sauces | Royco instant pasta sauce | 49,3% | Knorr instant sauce and<br>Knorr pastamia | 32,7% | 82,0% |
| Instant soups | Royco cup-a-soup and<br>Royco cup-a-snack | 67,4% | Knorr quick soup and<br>Knorr Oodles of Noodles | 21,4% | 88,8% |
| Black Spreads | Oxo spread | 10,0% | Marmite and Bovril | 89,5% | 99,5% |

15. With the exception of the market for the production and sale of soya mince, the combined market shares of the parties in the other 9 markets identified by the Commission are extremely high, ranging from 69,8% to 99,5%. Using the HHI index, the Commission found that there is a very high level of concentration within the markets identified in its report. The Commission argued the high market shares and concentration levels resulting from the merger are likely to lead to a lessening of competition in the identified markets.

16. In addition, the Commission found that:

    a. there were significant barriers to entry in the identified markets;
    b. the transaction would result in the removal of an effective competitor; and
    c. it is not clear that the parties' customers would possess sufficient countervailing power to prevent the exercise of market power on the part of the merged entity;
    d. claimed efficiencies are not convincingly substantiated, and in any event would not outweigh the anti-competitive effects of the merger.

17. Based on the above analysis, the Commission concluded that the merger would lead to a substantial lessening or prevention of competition. It recommended that we approve the merger subject to the following conditions:

    - "Unifoods divests of the whole product portfolio currently marketed under the Royco and Oxo brands, including the sub-brands
    - The divestiture to be to a viable third party, approved by the Commission
    - The divestiture to take place within [confidential] months and prior to implementation."

18. Provision was also made for the monitoring by the Commission of the compliance with the proposed divestiture conditions.

19. Without conceding that the Commission's market definition and analysis is appropriate, the merging parties made several offers to the Commission to divest and out-license some of their sub-brands in the markets identified by the Commission as problematic. These proposals were not acceptable to the Commission. The Commission wanted the parties to divest the whole of the Royco and Oxo brands, together with any sub-brands. An agreement could not be reached. The Commission did not feel that the parties' proposed remedies sufficiently addressed all its concerns. On the other hand, the parties viewed the Commission's market definition as too narrow. They also argue that the Commission's proposed remedies go beyond addressing the concerns raised by it.

20. Subsequent to the referral, the Commission and the merging parties reached agreement on the appropriate remedy for the concerns raised by the Commission. On our request, this agreement was filed as a draft order.

21. In terms of the draft order submitted the merging parties would dispose of all products sold and marketed under the Royco and Oxo brands, including any sub-brands. With regard to the sale of the Royco brand, and subject to certain confidential provisions, the following products would be excluded from the divestiture:

    - the sub brand Cup-a-Soup including :"Lite" and "Thick and Creamy",
    - the sub-brand Cup-a-Snack;
    - the sub-brand Mates including "Chicken Mate", "Mince Mate" and "Tuna Mate", and
    - the sub-brand Pasta and Sauce including "Macaroni and Cheese".

22. At the hearing, the merging parties reiterated their belief that the Commission's market definition is too narrow and its proposed remedies excessively broad. The parties did not, in other words, concede the Commission's market definition. They argued that the AC Nielsen product classification was not an appropriate classification for purposes of identifying a market for competition purposes. In the parties' opinion, the Nielsen classification is the narrowest possible classification of products and does not take into account the substitutability of use by consumers that occurs across the product classifications. The parties argued that since the remedies agreed to with the Commission were enough to satisfy the very narrow market definitions based on the Nielsen's product classifications, the merger is unlikely to raise competition concerns under any other market definition.

23. The Commission stood by its market definition. It sought to convince us that the divestiture proposals contained in the draft order address the competition concerns identified in its report.

THE UNIONS' SUBMISSIONS

24. The Unions filed papers arguing for an outright prohibition of the merger. Claiming lack of sufficient information, they did not provide their own market definition but went along with the Commission's market definition. The unions argued that the merger should be prohibited because of the high levels of concentration in the market and the dominance of the merging parties.

25. The Unions were skeptical about the accuracy of the market share figures based on ACNielsens' reports relied upon by the Commission. They argued that these figure do not show the complete extent of the merging parties dominance because, first, AC Nielsen only reads data from the retail sector and does not cover the wholesaling sector. The market shares therefore only reflected sales through the retail sector and not other channels. Secondly, the Unions claimed that the AC Nielsen figures did not take into consideration the fact that so-called house brands sold in the market by retailers, are the merging parties' products packed differently or by a third party and marketed as products of the retailer. The Unions further argued that the relationship between the major retailers and manufacturers, including the merging parties, was not based on countervailing power in the market, but rather profitable mutual dependence.

26. The Unions also raised a number of public interest grounds in support of prohibition of the merger. Firstly, they pointed to the large number of job losses resulting from the merger-induced redundancies.[1] They stressed the effects these retrenchments will have on the retrenched workers, their dependents and society in general in a situation where the unemployment rate is already very high. In summary the view of the Unions is that this merger was not in the interest of broader society, but rather of the merging parties alone.

27. With regard to the agreed divestiture, the view of the Unions was that it does not adequately address the competition concerns identified in their submission Even though they wanted the merger prohibited, the Unions urged that, if we decided to approve the merger, we should impose the following conditions on the parties:

[1] The merging parties estimated that on a 'worst case' scenario the gross number of job losses is likely to be around 769 positions, with unionized job losses standing at approximately 358. The merging parties sought to argue that the number of positions that will be rendered redundant by the merger is confidential information. We deal with this argument below under "Public Interest Issues".

- "No job losses
- No price increases above CPIX
- An annual compliance report verified by independent auditors submitted, at own cost, to the Tribunal"

**Finding**

28. We find that the implementation of this merger, subject to the conditions listed in the attached order, is not likely to result in the substantial lessening or prevention of competition. The conditions attached to the approval of the merger adequately address any competition problems that may have resulted from the merger based on the narrower market definition adopted by the Commission. Therefore, we do not consider it necessary to make a finding on the relevant product market for purposes of this transaction. It is common cause that the relevant geographic market is national.

29. As already stated above, the Commission adopted ACNielsen product classification as its product market definition for purposes of this transaction. Even though the parties relied mainly on the ACNielsen product classification in their submissions to the European Commission, they reject it for the purposes of this transaction. They argue that factors specific to South Africa justify a departure from the Nielsen categories. They also criticize the ACNielsen product classification as being of limited use in defining the relevant market for competition purposes. They argue that the priority in the ACNielsen Product Definitions is the practical collection of data on products and not the measurement of substitutability between different products and no consumer demand-led research is conducted in the compilation of data. As a result, the ACNielsen Product Definitions are too narrow for competition law purposes and products that compete with each other end up being classified under different classes.

30. However, an econometric analysis by Europe Economics commissioned by the parties to statistically prove this claim was, by their own admission, inconclusive. Data availability limited the use of sophisticated techniques to establish the degree of substitutability between products in the definition of the relevant market. The Tribunal could not fail to be impressed by the lack of variability in the prices of specific products and their likely substitutes. Any econometric estimation based on a theoretically specified model would struggle to find economically meaningful relationships with this data set.

31. The parties then sought to present an econometric analysis of the data to support their wider market definition by employing a panel data set that would address the

data availability problem. Composite price indices for the alternative market definitions were developed including the relative price of a product considered as the best substitute in switching studies, and two composite price indices to test the narrower and broader definitions of the market. We find this econometric analysis unconvincing for the following reasons:

- the inclusion of variables in an equation without a solid theoretical basis is not persuasive;
- econometric estimation problems of relationships between the explanatory price variables is not addressed; and
- consequently any interpretation of the results obtained has to be and should be qualified with sufficient caveats to render the subsequent analysis of doubtful value.

32. At the hearing the parties did agree that the econometric evidence did not conclusively support their market definition but felt that in the face of severe data problems they should be given some credit. Whereas the Commission had not produced any evidence in support of its position on market definition merely accepting the ACNielsen classification.

33. One of the merging parties main criticisms of the Commission's use of the ACNielsen product classification in defining the market is that these classifications do not take into account interchangeability of use by the consumer of products across different classifications and therefore reliance thereon leads to narrow markets. No one has suggested that the market may have narrower boundaries than those of the ACNielsen product classification[2].

34. It would appear therefore that if the Commission has erred in defining the market, its error would be in defining the market too narrowly. A wider market definition in this case would naturally have resulted in lower market shares and lower concentration levels for the parties in some of the markets where overlap occurs because of a larger pool of products and/or competitors[3]. Under those circumstances the conditions imposed on the transaction would obviously have been sufficient to remove any potential competition problems.

35. We are therefore satisfied that the divestiture of the Royco and Oxo brands on the conditions referred to in the attached order are sufficient to remove any competition concerns that may have resulted from the merger, regardless of

[2] As already noted, the parties found them a valid classification in their submission to the European Commission.

[3] Indeed, it is very hard to imagine that in any market, the parties' market shares could be higher than they are in some of markets identified by the Commission.

whether the market definition adopted by the Commission is correct or not. Generally, the conditions we have imposed have the effect of eliminating the overlaps between the parties' brands or sub-brands occurring on the market definition adopted by the Commission.

**Public Interest Issues**

36. The main public interest issue identified by the participants in these proceedings is the number of potential job losses. We have already referred to the Union's submission in this regard above. The Commission, though expressing concern about the number of potential job losses, did not think that this warranted a prohibition of the merger "as long as there are remedies for the anti-competitive implications of the proposed transaction".

37. There was a suggestion on the part of the merging parties that the number of employees who will be retrenched as a result of the merger is confidential to themselves, the Commission and the Unions and their members. They argue that this is sensitive business information since it had not been revealed to the non-unionised employees.

38. We do not accept this argument. Firstly, the Act defines 'confidential information' as information that is, inter alia, 'not generally available or known by others'. It was common cause that the unionized employees had been given this information by the Unions and were under no obligation not to reveal this information to their non-unionised colleagues, or to anybody else for that matter. Claiming that such information is confidential as contemplated in section 1 of the Act is clearly an untenable argument.

39. Secondly, it is doubtful that the information meets the other part of the definition, namely, that it is information of "economic value". Retrenchment figures may be viewed as sensitive information in the combustible world of labour relations, but that is no justification for attempting to dress them up as business secrets, which is the type of confidential information the Act seeks to protect.

40. In addition, section 13A(2) of the Act provides that merging parties must serve a copy of the merger notice on the registered trade union, employee representatives or, failing any of them the employees themselves. The merger notice that is referred to in the Act is contained in Form CC 4(1) in the Rules of the Competition Commission. Schedule 2 of CC 4(1) requires that a summary of the effect of the proposed merger on employment be attached to the notice. The purpose of these provisions is to ensure that employees' representatives are provided with the necessary information to enable them to make representations the competition authorities, if they so wish. The prime concern of employees would obviously be the effect of the merger on employment. The number of

people who might lose their jobs determines the effect on employment. Keeping this information confidential deprives labour not only of the right to access to information that the legislature clearly gives to them, but also their right to make meaningful representation to the Competition authorities on an issue that directly affects their interests. The legislature could never have contemplated that this information could be claimed as confidential information – all indications are to a contrary intention. We accordingly find that the number of employees which the merging parties contemplate retrenching does not constitute confidential information.

41. The parties were at pains to explain that the estimated number of job losses given by them, a gross figure of 769 positions, was the 'worst case' scenario. The job losses are the result of synergies and plant integrations arising from the merger. This will lead to redundancies across all levels of employment. The parties claim that they are yet to decide on the form that the restructuring of their companies will take to reap the benefits of the synergies and cannot therefore give a specific number of potential job losses. They have undertaken that once a decision has been made in this regard, they will consult the Unions to explore all possible alternatives to retrenchments.

42. When one considers all the information put before us on this subject, there is a strong indication that the 'worst case' scenario referred to by the merging parties is truly that - it is the most pessimistic view of the impact of the merger on employment. Be that as it may, we are still faced with the difficulty that while it is common cause that some negative impact on employment will result and the 'worst case' scenario has been given to us, the true extent thereof will for reasons referred to in 41 above, remain unknown until after the conclusion of the sale of the divested assets. This means that as things stand, we cannot make a valid assessment of the effect of the merger on employment. For this reason we have imposed as a condition for the approval of the merger, an obligation on the merging parties that once an agreement has been concluded with the proposed buyer of the divested assets, they consult with the Unions or their employees on this issue.

43. In our view the most significant right that the Competition Act extends to employees and their unions is the right to timeous information with respect to the potential employment impact of a merger. The news of a merger is, it appears, too often sprung upon unions and employees despite the powerful impact that these transactions often have on their interests. However, there is little doubt that, having received the information, the most powerful channel available to the unions to address employment related issues arising from the merger is the Labour Relations Act or private collective bargaining agreements where they exist. Although we welcome input by the unions and employees at Tribunal meetings clearly our decisions have to balance impacts on competition with

employment impacts whereas the concerns of the Labour Relations Act and other collective bargaining arrangements have no such balancing requirement. In this case it seems that there was only limited interaction between the unions and the merging parties following the filing on the unions required by the Competition Act. This is regrettable. We have not been able to ascertain who – the parties or the unions – bears responsibility for the failure to take advantage of this information and to negotiate a mutually satisfactory solution of the labour-related problems arising from the transaction. We have accordingly inserted a condition requiring the parties to enter into discussions with the unions.

44. We therefore approved the merger subject to the attached conditions.

**D.H. Lewis** **04 April 2002**
**Date**

**Concurring: M. Holden; N.M. Manoim**

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**ORDER (Non confidential version)**

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Having heard the parties, the following order is made:

1. The merger is approved on the conditions that follow:

1.1 The merging parties shall dispose of the following assets ("the divested assets") to a buyer being an independent third party or parties approved by the Commission:
("The Divested Assets")

1.2 **Royco brand:**

This will include all Royco products, save for the sub-brands listed in clause 2 below.

1.3 **'Quick Soup' and 'Oodles of Noodles' sub-brands**:

This will include the sale of the sub-brands 'Quick Soup' and 'Oodles of Noodles', together with, at the option of the proposed buyer, a licence to use these sub-brand names together with the Knorr Brand for a maximum period of 2 years.

1.4 **Oxo Brand:**

This will include the sale of the Oxo brand in totality.

1.5 For each brand and/or sub-brand referred to above, the sale will include all the intellectual property associated with the brand, i.e. packaging design, formulations, intellectual rights to advertising and promotional material, finished goods and packaging material stock.

1.6 The divestiture could, at the option of the proposed buyer, include production facilities either to be used in a co-packing arrangement (by means of a service agreement) or as an outright sale of all the assets.

1.7 All the listed trademarks, attached hereto marked Schedule "A" will be transferred to the proposed purchaser on the effective date.

1.8 The costs of all trademark transfers will be for the merging parties.

2. The following assets ("the excluded assets") are excluded from the divested assets and will remain the property of the merging parties, subject to the provisions of 3, 4 and 5 below:

2.1.1 the sub-brand "Cup-a-Soup" including :"Lite" and "Thick and Creamy",
2.1.2 the sub-brand "Cup-a-Snack";
2.1.3 the sub-brand "Mates" including "Chicken Mate",, "Mince Mate" and "Tuna Mate", and
2.1.4 the sub-brand "Pasta and Sauce" including "Macaroni and Cheese".

2.2 The excluded assets, including any intellectual property associated with the sub-brands, ie packaging design, formulations, intellectual rights to advertising and promotional material, finished goods and packaging material stock will not form part of the divested assets.

3. [Confidential information]
4. [Confidential information]
5. [Confidential information]
6. [Confidential information]

7. [Confidential information]
7.1 [Confidential information]
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8. [Confidential information]

8.1 [Confidential information]
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8.3 [Confidential information]
8.4 [Confidential information]
8.5 [Confidential information]
8.6 [Confidential information]
8.7 [Confidential information]

9.

9.1 The merging parties shall submit the name of the proposed buyer to the Commission for its prior approval, together with the relevant documentation in respect of the proposed buyer in order that the Commission can assess whether the proposed buyer would be able to effectively utilise the divested assets so as to be a viable competitor to the merging parties.

9.2 The Commission will respond to the merging parties' proposal in relation to the proposed buyer within seven days from the date on which the name of the proposed buyer was submitted to the Commission.

9.3 Once the sale agreement with the proposed buyer has been concluded, the merging parties shall submit the sale agreement, together with the relevant documentation (including a preliminary competition analysis) to the Commission, in order to enable it to verify that the conditions laid down in this agreement are fulfilled and that there has been no material change in the status of the proposed buyer not reasonably foreseeable at the time the Commission assessed the proposed buyer's suitability, subject to the Commission agreeing to keep confidential all such information received.

10. [Confidential information]
11. [Confidential information]

12. The parties may apply to the Tribunal, on application, to vary the procedure set out in this order, and on notice to the Commission and the Unions.

13. Once the sale agreement with the proposed buyer has been concluded the merging parties must;

13.1.1 provide a summary of the effect of the proposed sale on employment on any party entitled to be given notice of the merger in terms of section 13 A (2) of the Act; and

13.1.2 consult, as soon as practicable, with the parties entitled to be given notice in terms of section 13 A (2), on the employment effects of the proposed transaction.

14. Paragraphs 3, 4, 5, 6, 7, 8, 10 and 11 above, shall remain confidential to the merging parties and the Competition Commission and the Trustee appointed, as set out above, and

may not be disclosed to any third party.

**N Manoim**
**Tribunal Member**

**DATED AT PRETORIA ON THE 6TH DAY OF MARCH 2002**