

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case no.: 56/LM/Oct03

In the large merger between:

Imperial Group (Pty) Ltd

and

Clover SA (Pty) Ltd

Reasons for Decision

Approval

1. On 17 December 2003 the Competition Tribunal issued a Merger Clearance Certificate approving the transaction between Imperial Group (Pty) Ltd and Clover SA (Pty) Ltd. The reasons for this decision follow.

The Parties

2. The primary acquiring firm is Imperial Group (Pty) Ltd ("Imperial"), which is controlled by Imperial Holdings Ltd, a company listed on the JSE.
3. The primary target firm is the "Transportation Business" of Clover SA (Pty) Ltd ("Clover"). Clover is controlled by Clover Holdings (Pty) Ltd, a wholly owned subsidiary of National Co-operatives Dairies Limited.

The Parties' Activities

4. Imperial conducts a diverse variety of activities within the transportation, fleet management and mobility sectors and its activities encompass a wide range of related products and services, which are constituted of the following broad categories of services:
 - Leasing and fleet management,
 - Logistics and transportation,
 - Aviation leasing,
 - Distribution, particularly in respect of motor vehicles,
 - Car rental and tourism, and
 - Insurance, focusing on motor and motor-related coverage.
5. The Clover Group is in the business of processing, marketing, selling and distributing dairy and dairy related products as well as beverage and branded products. To this end, Clover SA has five divisions namely, Milk Procurement, Production, Commercial, Distribution and Transport.
6. Clover's distribution or logistics business is an adjunct to the dairy and beverage and branded products business which Clover operates and enables the distribution of Clover

products throughout Southern Africa. As a service provider its services include primary and secondary distribution, sales and merchandising, management information systems and credit control.

7. In addition, Clover operates its own transport division, which is responsible for the supply, finance and maintenance of a fleet of temperature-regulated vehicles to Milk Procurement (mainly tankers) and Clover Logistics (primary and secondary distribution). The Transportation Business includes workshops and a tanker manufacturing plant, which provides tankers for sale in the open market.

The Merger Transaction

8. The transaction is effected by three agreements.
9. The first is the *Sale of Business* agreement in terms of which Imperial will be acquiring Clover's Transportation Business, consisting of its fleet of 440 general and temperature-regulated vehicles and tankers, as well as the related assets including 14 national workshops, 2 panel beating workshops and a stainless steel tanker-manufacturing plant.
10. Imperial and Clover will then conclude an Outsourcing Service Agreement ("OSA") in terms of which Imperial will re-lease to and maintain the acquired fleet for Clover, including the following services: provision of vehicles per service line, the optimization of fleet composition, ensuring the compliance of the fleet to Clover's standards management administration support but excluding driver management.
11. The parties will conclude a *Lease Agreement* in respect of the premises from which Clover conducts its Transportation Business.

Rationale for the Transaction

12. From Imperial's perspective, the transaction will allow it to develop its existing support services and maximize economies of scale within the Republic of South Africa. It will also allow for a significant amount of flexibility and variation in terms of fleet composition into the future.
13. From Clover's perspective, the decision to outsource its transportation function to Imperial is based on (1) Clover's need to create a long-term business solution to the company's varying fleet requirements, and (2) to focus on its core competencies. The transaction will bring about both time and cost-savings.

Evaluating the Merger

The relevant market

14. There are 3 relevant markets affected by the transaction viz.:
 - the market for Fleet management, entailing the acquired and fleet and the fleet management function;
 - the market for Maintenance; and
 - the market for Stainless steel tanker manufacturing.

15. Since Imperial is not involved in the market for Stainless steel tanker manufacturing, we find that there is no product overlap in this market. The impact on the other two markets will be dealt with shortly.
16. We find that the geographic market in respect of the relevant markets is national. The leasing and fleet management services provided by Imperial within the Republic are provided nationally and maintenance (workshop services) is also typically provided by national franchises. There are approximately 1200 national franchises in the maintenance market.

Impact on competition

Increase in market share

17. With regard to the markets for fleet management and maintenance, Clover's Transportation Business conducts its activities **in-house**. Therefore, the assets and services are available for the sole utilisation of Clover and presently do not constitute part of the market for Fleet management and the market for Maintenance, in so far as the calculation of market shares is concerned. Therefore, there is no overlap in the activities of the parties.
18. This is in line with the Tribunal's previous decision in *Telkom SA / TPI Investments and Praysa Trade 1062*¹, where Telkom owned, managed and serviced the properties from which it conducted its telecommunications activities. Its properties and services were therefore fully integrated assets and activities of Telkom and were and only available for sole utilisation, and therefore not part of the property market or the facilities management services market.
19. In the *Telkom* case, the Tribunal held that:

"From a long term competition perspective the most significant upshot of this transaction is the increase in the size of the market – in no sense does it represent a shift in market from one controlling entity to another, but rather an expansion in the reach of the market. As such the transaction unequivocally promotes competition. However, in the short to medium term this pro-competition impact is modified somewhat by the form of this transaction because Telkom has simultaneously concluded a series of contracts in terms of which it leases back the property sold to TPI and it contracts all the services rendered by its erstwhile property management and maintenance divisions. In other words, although the acquiring companies have acquired businesses and assets previously part of Telkom, they will continue to be employed exclusively by Telkom. There is, accordingly, no immediate impact, on competition in either market."²
20. According to the South African Vehicle Renting and Leasing Association (SAVRALA), Imperial Fleet has a market share of between 15 and 20% of the market for the provision of Leasing and Fleet management Services. Since Clover conducts its Transport Business in-house, its vehicles are not included in the SAVRALA's figures. However, the vehicles, which Imperial will acquire, would, post merger, expand the market by about 0.65%, leaving Imperial with a minimal increase in market share.

¹ Case no: 81/LM/Aug00

² *ibid.* at paragraph 30

Exclusive Outsourcing Service Agreement

21. The Outsourcing Service Agreement provides Imperial with the exclusive right to provide commercial vehicles and fleet management services to Clover for an initial ten-year period, the intention of the parties being that the agreement will form the basis for an “evergreen” relationship. Imperial will essentially provide Clover with those services currently provided in-house to Clover by its Transportation Business. A ten-year period has been used as the basis for the recovery of capital depreciation, overhead costs and to ensure an adequate return on investment.³ The Commission’s enquiry into the incidence of exclusive agreements in the fleet management industry, found that apparently “all of the competitors” engage in exclusive arrangements with downstream players to discount for a return on investment and for vehicle life cycles.
22. In the past, Clover sourced additional vehicles through leasing agreements with Super Group Limited and Imperial. However post merger, the leasing agreements, which Clover has with Super Group, will be terminated and taken over by Imperial, with Super Group receiving a cancellation fee.
23. The Tribunal has in its previous decisions acknowledged exclusive arrangements with commercial rationales.⁴ In the *Telkom* case the Tribunal stated the following in respect of the exclusive outsourcing agreement between Telkom and TFMC:

“Although the implementation of Telkom's decision to outsource the management and maintenance of its property has assumed the form of a merger as defined in the Act, competition in the relevant markets implicated in the transaction is not affected - for at least the next 10 years the property is for the exclusive use of Telkom and the services provided by TFMC are dedicated to servicing this property. In form we have a merger, but in substantive content the property and its management and maintenance remain integrated within Telkom.”⁵
24. Imperial will continue to provide a diverse range of products and services to diverse customers. The Agreement is commercially validated and unlikely to lead to foreclosure. Competitors in the open market would be free to tender for Clover’s business should Clover disagree with the terms and conditions set out by Imperial by the renewal date. As a result, price competition would be preserved.

Collusion

25. Both Clover and Imperial are involved in the logistics market. Nevertheless, the Commission was of the view that collusion in the logistics market was highly unlikely since the logistics market is a fairly fragmented market. The Tribunal, however, was concerned that the transaction would give rise to information exchange between Imperial and Clover as a result of Imperial taking over the management function over the fleet. At the hearing, when questioned on this point, the parties stated that there was no correlation between the number of vehicles provided and the utilization of the capacity within those vehicles by Clover for its cold chain distribution activities. In so far as Imperial now has access to the number of vehicles, which are under Clover’s fleet management, they will not have

³ Correspondence from Moss Morris to Commission 16/11/2003 page 876-880 of file.

⁴ *Rustenburg Platinum Mines Ltd and The Royal Bafokeng Nation* Case no: 78/LM/Oct02 and in the Telkom merger when the parties were allowed to proceed with an exclusive arrangement, due to Reberse and Atkins still being willing and able to provide services to the rest of the market.

⁵ Supra. At paragraph 30

information regarding the manner in which those vehicles are used or the capacity to which they will be filled.⁶

26. The parties further stated that Clover out-sources its primary distribution to third parties, including to Unitrans, which is a direct competitor of Imperial. We therefore agree with the Commission that coordinated conduct as a result of the merger would be unlikely.

Vertical considerations

27. There are four vertical aspects to the transaction:

- Imperial's backward integration into the acquisition of Clover's stainless steel tanker manufacturing plant;
- the strengthening of Imperial's vertical structure due to the acquisition of Clover's workshops;
- the effect of the Sale of Business Agreement on vehicle suppliers (Imperial has a truck distributorship); and
- the effect of the Outsourcing Services Agreement on Clover's tanker suppliers.

28. We do not have any concerns in respect of any of the above aspects. Regarding the fourth aspect, Clover is currently engaged in two upstream relationships regarding the provision of tankers viz. with Fleet Africa and with Unitrans. The Outsourcing Services Agreement will terminate Clover's contract with Fleet Africa. However, in the past Fleet Africa has only provided Clover with 28 trucks (0,2% of its total business). The leasing agreement with Unitrans will continue post-merger.

Public interest

29. All employees of the Transportation Business will be transferred to Imperial Group. None of the unions notified about the transaction made submissions or expressed any reservations regarding the merger.

Confidentiality claims

30. The Tribunal was concerned at the fact that both parties made over-liberal use of claims to confidentiality. In the form CC7 (Claim that information is confidential) merging parties generally tend to make very broad claims in respect of documents, which may contain *some* confidential information. However, parties claim that the entire document is subject to confidentiality. This can pose obvious problems when that confidentiality is contested.

31. In terms of the section 1 of the Competition Act, "*confidential information*" means "*trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others*". The Act does not protect information merely because it is not generally known and would not normally be made public. The inclusion of the word "*and*" implies that this is an additional factor to the fact that the information has "*a particular economic value*". It is necessary for a party claiming confidentiality to provide precise and clear reasons why the information has the "*particular economic value*" required under the Act before it enjoys protection as being confidential. It is also not good practice for parties or their legal representatives to claim confidentiality in an

⁶ Transcript 17-21

entire document if only a part of it, or certain quantitatively small parts of it, such as a few statistics are considered to be confidential.

32. In the course of the hearing these claims were substantially reduced on being queried by the Tribunal. It would seem that a better practice would be for parties and their legal representatives to identify the actual items of information and to point out where in a particular document they occur. Further parties should state quite specifically the nature of the economic value of the information and refrain from using general descriptions.

Conclusion

33. We conclude that the merger will not lead to a substantial lessening of competition and there are no significant public interest concerns. Accordingly, we agree with the Commission's recommendation that the transaction be unconditionally approved.

N. Manoim

16 January 2004
Date

Concurring: T.Orleyn and L. Reyburn

For the merging parties:	Clover SA (Pty) Ltd: Nikki Bitter (Webber Wentzel Bowens) Imperial Group (Pty) Ltd: Paul Cleland (Moss Morris Attorneys)
For the Commission:	Odie Strydom Mergers and Acquisitions