



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM061Jun20

In the matter between:

DH BROTHERS INDUSTRIES (PTY) LTD

Acquiring Firms

SEABOARD CORPORATION

and

RUSSELLSTONE PROTEIN (PTY) LTD

Target Firm

Panel:	Y Carrim (Presiding Member) A Wessels (Tribunal Member) H Cheadle (Tribunal Member)
Heard on:	26 – 29 July 2021, 2- 3 August 2021, 6 August 2021
Last submission received on:	26 August 2021
Order issued on:	31 August 2021
Reasons issued on:	29 October 2021

REASONS FOR DECISION

CONDITIONAL APPROVAL

- [1] On 31 August 2021, the Competition Tribunal conditionally approved the proposed acquisition of joint control of RussellStone Protein (Pty) Ltd (“RSP”), by DH Brothers Industries (Pty) Ltd (“DH Brothers”) and Seaboard Corporation (“Seaboard”).

BACKGROUND

- [2] On 29 June 2020, the Competition Commission (“Commission”) received a notice of a large merger between DH Brothers, Seaboard and RSP.
- [3] The Commission filed a recommendation of prohibition on 22 April 2021. The Commission had concluded that the proposed transaction was likely to result in a substantial prevention and/or lessening of competition and that the merger ought to be prohibited. The merging parties, on the other hand, disputed that the transaction led to a substantial lessening of competition but were willing to tender conditions to address the Commission's concerns.
- [4] The matter was set down for hearing and the Commission persisted with its recommendation for prohibition on the basis that the conditions tendered by the merging parties did not adequately address its concerns.
- [5] We heard evidence on 26 – 29 July 2021 and 2 – 3 August 2021, with closing argument on 6 August 2021.
- [6] The Commission called the following witnesses to give evidence at the Tribunal hearing:

Factual

6.1. Mr Morne Botha from Wilmar SA (Pty) Ltd.¹

Expert

6.2. Ms Khalirendwe Ranenyeni from the Commission’s Economic Research Bureau.

- [7] The merging parties called the following witnesses to give evidence at the Tribunal hearing:

¹ Wilmar SA is an edible oil and fats company which is involved in, among others, oilseed (soybean/sunflower seed) crushing, refining, and bottling. Wilmar SA is part of Wilmar International Ltd, an agricultural commodity business headquartered in Singapore.

Factual

- 7.1. Mr Johannes De Wet Boshoff from the Animal Feed Manufacturers Association of South Africa (“AFMA”);
- 7.2. Mr Heiko Koster from Kaonne Investments (Pty) Ltd;²
- 7.3. Ms Lesley Heads from Seaboard; and
- 7.4. Mr Mohamed Zubeir Moosa from Willowton.

Expert

- 7.5. Professor Liberty Mncube from FTI Consulting.

[8] We note that the merging parties’ factual witnesses included customers such as Mr Heiko Koster from Kaonne Investments (Pty) Ltd. The Commission's only witness from Wilmar, which had a toll crushing agreement with RSP for a short period of time when its plant had burnt down, was essentially a competitor of the merging parties. No other factual witnesses were called by the Commission either in support of its theory of harm or in rebuttal.

[9] At the end of the hearing, we invited the merging parties to submit their proposed remedies, which they did on 10 August 2021. On 23 August 2021, we circulated proposed conditions for comment by the merging parties and the Commission.

[10] Following our request for comments on the proposed conditions, the Commission made submissions indicating its discontent with the proposed conditions. However, the merging parties noted that the Commission had had ample opportunity to engage on the remedies but failed to do so, as its stance has consistently been that no remedies could cure the likely substantial prevention or lessening of competition that would be caused by the proposed transaction.

² Kaonne Investments (Pty) Ltd is the holding company of a number of companies involved in feed mills; animal nutrition; specialty products for the animal feeds market; consulting with major feed companies on feed milling; formulations; on-farm production of poultry, dairy, swine, feedlot and sheep production in most sub-Saharan and North African countries; and supplying most feed companies in the ruminant market.

Mr Koster was previously the Vice Chairman of the Board of AFMA and Vice Chairman of the Technical Committee of AFMA. At the time of the hearing, Mr Koster was the Chairman of the Trade Committee of AFMA.

[11] After consideration of the submissions by the merging parties and the Commission, we decided on a set of conditions, which we are of the view adequately address the competition concerns in the identified market and approved the transaction conditionally.

[12] These are the reasons for our approval. The conditions are attached hereto as Annexure A.

Procedural Issues

[13] We pause to mention here that the timetable for the further conduct of proceedings was outlined in the Tribunal direction of 6 May 2021, which included a process of discovery, as contemplated in section 55 of the Competition Act No 89 of 1998, as amended (“the Act”). On 2 June 2021 the merging parties filed an application to compel the discovery of certain internal documents of the Commission (the “merging parties’ discovery application”). On 7 June 2021, the Commission also filed an application to compel various documents from the merging parties (the “Commission’s discovery application”). Both applications were heard on 23 June 2021. On 2 July 2021, we dismissed the merging parties’ discovery application. We granted the Commission’s discovery application on 8 July 2021, most of which the merging parties had agreed to discover. The reasons for our decision to dismiss the merging parties’ discovery application are provided here after the merits of our decision have been dealt with.

PARTIES TO THE TRANSACTION

Primary acquiring firms

[14] DH Brothers is a wholly owned subsidiary of Willowton Group (Pty) Ltd (“Willowton Group”), which is indirectly controlled by several family trusts.³

[REDACTED]

³ [REDACTED]

[15] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁵ In these reasons we refer to DH Brothers, its subsidiaries, and its controllers as “Willowton”.

[16] Willowton is active in sunflower seed and soya bean crushing and oil refinery operations and has interests in the manufacturing and sale of edible oils, cleaning and packaging of rice, maize milling and in the fast-moving consumer goods (FMCG) market. Willowton sells its products under, amongst others, the following brands: Sunfoil, Sunshine D, D’Lite, Crown, Nuvolite and Allsome Rice.

[17] Willowton has manufacturing facilities in Pietermaritzburg, Kempton Park and Cape Town, and owns four silos located at its oil seed crushing facility in Pietermaritzburg and a further 12 silos at its facility in Isando, Kempton Park.
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[18] Seaboard is a company listed on the New York Stock Exchange. Seaboard’s two largest shareholders⁶ are SPC Preferred, LLC (as to 36.7%) and Seaboard Flour, LLC (as to 39.9%). Seaboard has shareholding interests in multiple firms in South Africa:

- 18.1. As to 100%: Seaboard Overseas Trading and Shipping (Pty) Ltd (South Africa); InterAfrica Grains (Pty) Ltd (South Africa); Paramount Mills (Pty) Ltd (South Africa); Prize Milling (Pty) Ltd; and Showlands Investments (Pty) Ltd.

⁴ Willowton SA holds over 50%, Noko Milling (Pty) Ltd, which in turn wholly controls Viva Milling (Pty) Ltd and Noordfed (Pty) Ltd.

⁵ [REDACTED]

⁶ As of 8 March 2020.

18.2. As to 50%: Eurogerm South Africa (Pty) Ltd (South Africa) and Gloridge Bakery (Pty) Ltd.

18.3. As to 30%: the target firm, RSP.

[19] Seaboard is active in South Africa in the trading of agricultural commodities such as soya beans, soya meal, soya hulls, crude soya oil, sunflower seeds, sunflower meal, sorghum, wheat, and maize. Seaboard mainly imports the products but also sources these products locally. Seaboard currently has a toll crushing agreement with RSP, in terms of which RSP crushes soya beans and supplies soya meal, soya hulls, and crude soya oil to Seaboard, in exchange for a toll fee. Seaboard has no crushing facilities of its own.

Primary target firm

[20] The primary target firm, RSP is controlled by African Afgri Opportunities Limited (“African Agri”) as to 70% and the remaining 30% is held by Seaboard. African Agri also controlled Elangeni Oil (Pty) Ltd (“Elangeni Oil”),⁷ which closed in March 2019 and no longer has any business operations. RSP controls two non-operational companies.⁸

[21] RSP owns a soya bean crushing plant situated in Bronkhorstspuit. The plant only crushes soya beans. The soya meal produced by RSP’s plant is used in the animal feed industry, mainly for poultry and pigs.

Activities of the parties in the soya bean industry

[22] The soya bean value chain comprises of the following market participants:⁹

22.1. Producers of soya beans are commercial and smallholder farmers mostly in the inland region who grow the soya bean crop. Soya beans

⁷ Elangeni Oil is a subsidiary of African Afgri Opportunities (Pty) Ltd and ceased operating in March 2021.

⁸ [REDACTED]

⁹ Merging Parties’ Heads of Argument (5 August 2021), page 6.

are also imported into South Africa from countries such as Argentina, Brazil and the United States of America.

22.2. Traders are commodity traders who source soya beans or derivatives of soya bean (soya meal, soya hulls, or crude soya oil) locally or from imports in order to meet the needs of processors. Traders ensure that producers have a ready market for their soya beans and derivatives, and processors have a reliable supply for their inputs. The JSE platform, SAFEX,¹⁰ is used by traders to achieve the best price for the produce and to supply or negotiate with processors. Examples of traders include, among others, Seaboard, COFCO International (“COFCO”), Bunge Limited, and Cargill Inc.

22.3. Crushers or processors crush the raw soya bean to produce soya meal, soya hulls and crude soya oil. Crushing refers to the process of dehulling and extraction. The soya meal (and in certain instances, soya hulls) is then sold to animal feed manufacturers who use it as an input for animal feed, primarily for the poultry industry. Examples of crushers include, among others, Willowton, RSP, Nedan, Wilmar and COFCO.

22.4. Refineries, which process crude soya oil further to yield refined soya oil. The refined soya oil is sold to consumers as an edible oil to be used for cooking.

[23] Willowton crushes both soya beans and sunflower seeds at its plant in Isando. Willowton's plant can switch between soya and sunflower seeds. While Willowton is regarded primarily as an oil manufacturer in refined sunflower and soya oil, it also supplies soya meal to the animal feed market.

[24] Seaboard is a trader in soya meal but does not own a crushing facility. Prior to its toll crushing agreement with RSP, Seaboard was primarily an importer of soya meal.

¹⁰ South African Futures Exchange.

[25] RSP's crushing plant in Bronkhorstspuit is dedicated only to the crushing of soya beans. [REDACTED]

[26] RSP has been toll crushing for Seaboard since [REDACTED]. In terms of the toll crushing agreement, all the soya meal, soya hulls and crude soya oil produced by RSP are supplied exclusively to Seaboard.¹¹

[27] Willowton procures all of the crude soya oil produced by RSP from Seaboard.¹²

[28] Thus, the pre-merger arrangement between the three parties is that Seaboard off-takes all the soya meal and hulls produced by RSP (the target firm) and on-sells all the crude soya oil produced by RSP to Willowton. Hence Seaboard and Willowton are currently in a customer-supplier relationship for crude soya oil.¹³

TRANSACTION AND RATIONALE

[29] The proposed transaction involves two indivisible parts. The first part being the acquisition of 50% of the shares and loan claims in RSP by Willowton; and the acquisition of a further 20% of the shares and loan claims in RSP by Seaboard, (thereby increasing Seaboard's current shareholding in RSP from 30% to 50%) creating a joint venture ("JV"). The second part being the sale of certain of the assets of Elangeni Oil, which include land, buildings, refinery and tanks, and plant and equipment, to RSP.

[30] Willowton submitted, among others, that the proposed transaction presents an opportunity for it to expand its business activities in the soya bean market and to allow it to invest in a facility dedicated to soya bean crushing in order to guarantee a consistent supply of good quality soya meal.¹⁴ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]¹⁵

¹¹ Bundle B, Record, page 81, para 14.1.4.

¹² Transcript (29 July 2021), page 515 lines 3-4; and page 517 lines 9 – 14.

¹³ Transcript (29 July 2021), page 515 lines 3-4.

¹⁴ Bundle B, Record, page 108, para 3.1.1 and 3.1.5.

¹⁵ Bundle B, Record, page 108, para 3.1.5.

[31] [REDACTED]

RELEVANT PRODUCT MARKET

[32] In determining the relevant product market, the Commission identified horizontal overlaps in the markets for soya meal; soya hulls; crude soya oil; and refined soya oil.

Soya meal

[33] Soya meal is a significant source of protein in the animal feed market, in particular in the poultry industry. Based on international case law¹⁹ and the views of market participants,²⁰ the Commission found that soya meal cannot be adequately substituted for other oilseed products such as sunflower meal and therefore constitutes a separate and distinct relevant product market. This was consistent with the merging parties' views.

Soya hulls

[34] In relation to soya hulls, the Commission did not define the market conclusively as there was mixed evidence showing that (i) there are other products such as wheat and bran that could potentially compete with soya hulls,²¹ and (ii) supply-

¹⁶ Bundle B, Record, page 109, para 3.2.1.

¹⁷ Bundle B, Record, page 109, para 3.2.2.

¹⁸ Bundle B, Record, page 109, para 3.2.3.

¹⁹ *Bunge and European Oilseed Processing Facilities* Case No. M.8199.

²⁰ A feed manufacturer submitted that it cannot use sunflower meal, sunflower pellets or any other oilseed product in place of soya bean meal in the event of a 5-10% increase in the price of soya bean meal because soya bean meal has superior nutritional characteristics compared to the other products. Another feed manufacturer noted that while soya bean meal and sunflower meal can be substituted, this can only be done partially because the higher protein level of soya bean meal cannot be replaced by sunflower meal due to sunflower meal having a lower protein level. A similar sentiment was echoed by a competitor of the merging parties (Bundle A, Commission's Recommendation, para 64).

²¹ Competitors of the merging parties submitted that all products with a high fibre content, such as wheat and bran, do provide a competitive constraint on soya hulls. Further, soya hulls are priced to compete

side substitution is limited. However, the Commission assessed the effects of the proposed transaction in a distinct soya hulls market, similarly defined by the merging parties.

Crude soya oil

[35] The Commission found that the market for crude vegetable seed oils is wide and includes, among others, various seed crude oils such as soya bean, sunflower, and canola crude oil.²² Seeing that the merging parties are only involved in crude soya oil and crude sunflower oil, the Commission limited its assessment to the market for crude soya oil, as the only area of overlap in the activities of the merging parties. The Commission's and merging parties' definition of this market are aligned.

Refined soya oil

[36] The Commission did not conclude on the precise market delineation as it found that there will be no overlap in the activities of the merging parties in relation to refined soya oil.

Conclusion on the relevant product markets

[37] The economic experts of the merging parties and Commission agreed that the proposed transaction raises no competition concerns in relation to the markets for soya hulls, crude soya oil and refined soya oil.²³

[38] As we discuss in detail below, it was accepted by both the merging parties and the Commission that the relevant market of concern in this transaction is the market for the sale of soya meal.

RELEVANT GEOGRAPHIC MARKET

[39] In defining the relevant geographic market, the Commission considered the market to be national with imports. The Commission based this on submissions

with other "filler" products such as wheat, bran and maize chop (Bundle A, Commission's Recommendation, para 78).

²² *Bunge and European Oilseed Processing Facilities* Case No. M.8199.

²³ Exhibit M.

by third parties that soya bean products are supplied nationally and in certain instances, to neighbouring countries.²⁴

[40] The merging parties submitted that the relevant geographic market can be segmented into a coastal market comprising of the Eastern Cape and Western Cape provinces, and an inland market comprising the provinces of Free State, Gauteng, Northern Province, Mpumalanga, North-West, and Kwa-Zulu Natal. According to the merging parties, the supply for soya meal in the inland region is sufficient to meet the demand inland, and where there is any surplus in the inland region, this is used to supply the coastal region. However, the demand in the coastal region is met primarily by imports due to the high costs of transporting soya meal from inland to the coast. In certain instances, a small supply of imported soya meal may be sold in the inland region. Thus, the geographic market could be considered to be inland with imports and coastal with imports.²⁵

[41] Ms Ranenyeni submitted in her expert report that the relevant geographic market is national with imports. She found that imports are not limited to the coastal region as approximately half of the imported soya meal is transported to the inland region.²⁶ She did not believe that transport costs were prohibitive in this regard.

[42] Mr Botha, on the other hand, testified that inland suppliers do not usually compete in the coastal regions because transporting soya meal to the coast from inland is a high cost. Therefore, this would not be viable. It would be more economical to rather import in the coastal region than transport from inland.²⁷ Thus, lending credence to the merging parties' submission that the market can be divided into two – inland and coastal.

[43] In determining whether the geographic market is inland or coastal, Prof Mncube assessed the impact that transport costs have on pricing and based his

²⁴ Bundle A, Commission's Recommendation, paras 101 – 105.

²⁵ Bundle A, Commission's Recommendation, para 98.

²⁶ Bundle E, Ms Ranenyeni's Expert Report, para 7.

²⁷ Transcript (26 July 2021), page 22 lines 6 – 10, page 113 lines 6 – 10.

assessment on submissions by various competitors indicating that due to high transport costs a supplier of locally produced soya meal will provide soya meal in the inland areas, while imports will supply the coastal region. He found that prices for locally-produced soya meal transported and supplied in the coastal region tend to be high due to transport costs and that prices of imported and locally-produced soya meal in the inland region tend to follow import parity pricing (“IPP”) closely, factoring either a discount or slight premium.²⁸ From this, Prof Mncube concluded that there is evidence of different competitive dynamics in the inland and coastal regions and that while locally-produced soya meal does not constrain prices of imported soya meal sold in the coastal region effectively, IPP (in the coastal regions) may constrain prices in the inland regions.²⁹ Therefore, despite the debate about transport costs in the hearing, what was not disputed and is apparent to us is that the market is 'divided' into the coastal and inland regions due to transport costs. The coastal region is mainly supplied by imports and the inland region largely by local crushers and by imports (whether from the coast or overland from countries such as Zambia).³⁰

[44] We note that following the expert meeting, the Commission and the merging parties' experts agreed that the relevant geographic market is national, including imports.³¹

RELEVANT MARKET SHARES

Commission and merging parties' submissions

[45] In its recommendation, the Commission noted that the size of the market must be based on the products which are physically available. Hence, the Commission based its market share calculations on products which are (i) locally produced, (ii) procured through toll manufacturing agreements, and (iii) directly imported from abroad. The Commission excluded the products that are sourced

²⁸ Bundle E, Expert Report of Prof. Mncube, paras 111 – 117.

²⁹ Bundle E, Expert Report of Prof. Mncube, paras 128.

³⁰ Bundle D, Witness Statement of Mr Botha para 9, Witness Statement of Mr Moosa para 54; and Witness of Statement of Ms Heads para 40-41 and 85; Witness statement of Mr Boshoff paras 23-25; Witness Statement of Mr Koster, para 28.,

³¹ Exhibit M.

locally for resale (i.e., those that are traded) since including the traded volumes would lead to double counting.

[46] The merging parties asked the Commission to consider the multiplier effect of soya beans being traded multiple times, and the principle of double counting, meaning that because a product could be traded multiple times it could lead to double counting. The Commission noted that if this was taken into account it could deflate market shares and thereby, reduce the true proportion of the market shares.

[47] Based on the relevant market definition of soya meal (being the relevant market of concern in this transaction), we consider below the market shares submitted by the Commission, merging parties and the economic experts in respect of the sale of soya meal.

[48] The Commission estimated market shares in the national market and inland market for the sale of soya meal including imports, based on the merging parties' revenue and volumes from 2017 to 2019. The Commission's market share calculations are depicted in Table 1 and 2 below:

Table 1: Market share estimates in the national market for the sale of soya meal, including imports – ³²

Company name	Revenue share estimates			Volume share estimates		
	2017	2018	2019	2017	2018	2019
Willowton	█	█	█	█	█	█
Seaboard	█	█	█	█	█	█
RSP	█	█	█	█	█	█
Combined	█	█	█	█	█	█
Free State Oil	█	█	█	█	█	█
Nedan	█	█	█	█	█	█
Majesty	█	█	█	█	█	█
COFCO	█	█	█	█	█	█
CEOCO	█	█	█	█	█	█

³² Bundle A, Commission's Recommendation, Table 16 (pages 62 – 63).

Bester						
Wilmar						
Total	100%	100%	100%	100%	100%	100%

Table 2: Market share estimates in the inland market for the sale of soya meal, including imports – ³³

Company name	Revenue Share Estimates			Volume Share Estimates		
	2017	2018	2019	2017	2018	2019
Willowton						
Seaboard						
RSP						
Combined						
Free State Oil						
Nedan						
Majesty						
COFCO						
CEOCO						
Bester						
Wilmar						
Total	100%	100%	100%	100%	100%	100%

[49] In the Commission's view, the merging parties would be the largest competitors in the market for the sale of soya meal and would be dominant in both the national and inland markets. The Commission considered the merging parties' market shares as being relevant to determining potential coordination by the JV partners given that collectively the post-merger market shares would result in the merging parties being presumptively dominant in terms of market shares. The Commission concluded that the high post-merger market shares may limit competition and cause the merging parties to align their incentives to increase inland soya meal prices to import parity levels.³⁴

³³ Bundle A, Commission's Recommendation, Table 17 (pages 63 – 64). The Commission noted that the market shares in this regard may be overstated because it did not have the estimated total size of the inland market.

³⁴ Bundle A, Commission's Recommendation, para 152.

[50] The merging parties, on the other hand, took into account the effect of the market size being inflated as a result of soya meal being traded multiple times over and considered the volumes sold for end consumption versus volumes sold for onward trading in calculating market shares and submitted the following estimates:³⁵

Table 3: Market shares for the sale of soya meal in South Africa including imports – ³⁶

Producer / Trader	Estimated market share of total sales
Seaboard	██████████
Willowton	██████████
RSP	██████████
Merged Entity	██████████
COFCO	██████████
Majesty / Olam	██████████
Free State Oil	██████████
Wilmar	██████████
Nedan	██████████
Various Traders & Others	██████████
Total	100%

Table 4: Market shares for the sale of soya meal in the inland region including imports – ³⁷

Producer / Trader	Estimated market share of total sales
Seaboard	██████████
Willowton	██████████

³⁵ Bundle B, Record, pages 124 – 125.

³⁶ Bundle A, Commission's Recommendation, Table 9 (page 53).

³⁷ Bundle A, Commission's Recommendation, Table 10 (page 54).

RSP	██████████
Merged Entity	██████████
COFCO	██████████
Majesty / Olam	██████████
Free State Oil	██████████
Wilmar	██████████
Nedan	██████████
Various Traders & Others	██████████
Total	100%

[51] At that point in time, both the Commission and merging parties expressed the market shares as if the proposed transaction was a full merger between Willowton, Seaboard and RSP, while noting that it in fact would result in a JV between Willowton and Seaboard by virtue of their 50% acquisitions of RSP.

[52] The merging parties submitted that they had expressed the market shares assuming that this was a full merger, merely to demonstrate that the transaction will not substantially lessen or prevent competition given any construction of the market share estimates.³⁸

[53] The Commission suggested two approaches to how the market share of the JV should be dealt with post-merger. The first approach involves considering the JV as a separate entity independent of its shareholders and as such, its market shares should be considered in isolation. The Commission submitted that this approach is implausible as both Willowton and Seaboard will be actively involved in all strategic decisions affecting the JV. The second approach involves increasing the market shares of each of the acquiring firms slightly by the proportion of their acquired stake in RSP.

³⁸ Bundle A, Commission's Recommendation, paras 18 -21.

[54] However, the Commission did not believe that there would be a material change in the outcome reached regardless of the approach elected.

Market shares after experts meeting

[55] Prof Mncube and Ms Ranenyeni, in a pre-hearing meeting of experts, agreed to measure market shares using volumes as a proxy with reference to SAGIS³⁹ data on the total market size. The market shares calculated by the expert witnesses in the national market for soya meal including imports did not differ materially. The expert witnesses did not consider market shares in the inland market for soya meal.

[56] Ms Ranenyeni found that in 2019 Willowton's market share was approximately █%; Seaboard's market share was approximately █% and RSP's market share was approximately █%, with the combined market share post-merger estimated at █%.⁴⁰ Hence, Ms Ranenyeni submitted that the merging parties are significant players in the market, with high market shares that result in the merging parties being presumptively dominant.

[57] Prof Mncube found that in 2019 Willowton's market share was approximately █%; Seaboard's market share was approximately █% and RSP's market share was approximately █%.⁴¹ Prof Mncube did not combine the market shares to arrive at post-merger market shares as in his view the proposed transaction does not entail a full merger and the number of market players will remain the same post-merger. Prof Mncube also considered market shares for 2020 and found that Willowton's market share was approximately █%, Seaboard's market share was █%, and RSP's market share was 0%. RSP's market share was 0% as it has been exclusively toll crushing for Seaboard and its volumes were thus allocated to Seaboard's market shares.⁴²

³⁹ South African Grain Information Service.

⁴⁰ Exhibit J.

⁴¹ Exhibit R.

⁴² Bundle E, Expert Report of Prof. Mncube, para 166.

[58] Prof Mncube disagreed with the Commission's contention that the market shares are high and therefore, firms have the ability to coordinate. Prof Mncube's findings was that the market shares are asymmetric and such asymmetry does not favour the Commission's conclusion that the market is conducive to coordination.⁴³ .

Conclusion on market shares

[59] In our view there was alignment between Ms Ranenyeni and Prof Ncube's computation on the market shares of the individual firms, the only essential difference between them was that Ms Ranenyeni combined the three figures as if the transaction was a full merger of the three entities, arriving at a figure of █%. However even if the RSP market share was computed as 0% by Prof Ncube in 2020, this share should accrue to Seaboard as it had exclusive access to the RSP soya meal. This is reflected in Prof Ncube's higher market share for Seaboard in 2020.

[60] A more helpful way to express the post-merger market shares would be to utilise the 2019 figures and allocate the RSP market share in 2019 as to 50% each to Willowton and Seaboard. On the Commission's calculations the post-merger market shares for Willowton would be █%⁴⁴ and for Seaboard █%.⁴⁵ On Prof Mncube's calculations, the post-merger market shares for Willowton would be approximately █% and for Seaboard would be approximately █%.

[61] In essence the only significant dispute between Ms Ranenyeni and Prof Mncube was the size of the RSP market share accretion – for Ms Ranenyeni this was █% and for Prof Mncube this was approximately █%. The accretion however in either case is relatively small.

[62] We now turn to consider the Commission's theories of harm.

⁴³ Bundle E, Expert Report of Prof. Mncube, para 183.

⁴⁴ $9\% + 8/2 = 13\%$.

⁴⁵ $25\% + 8/2 = 29\%$.

THEORIES OF HARM

[63] In its recommendation the Commission concluded that the transaction between the two largest players in the soya meal market would result in a substantial lessening of competition in the market for soya meal and based this on the following theories of harm:

63.1. The merging parties will likely have the ability to increase the inland prices of soya meal through information sharing and coordination as a result of the JV in RSP.

63.2. The proposed transaction is likely to raise foreclosure concerns in the soya meal market, as Seaboard would have the ability and incentive to foreclose the downstream rivals of RSP and Willowton from accessing imported meal post-merger.

Coordinated effects

[64] The Commission's concern regarding coordination stems from the fact that two competitors, Willowton and Seaboard, would be joint partners in the production of soya meal, the same product that they would continue to compete in post-merger.

[65] The merging parties submitted that post-merger Willowton and Seaboard will continue to operate their respective businesses independently of each other outside of the JV and will remain competitors in the market for the supply of soya meal.⁴⁶ It is anticipated that both parties will however be jointly responsible for the decision making at RSP, with each having the ability to appoint a director to the board of RSP. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]⁴⁷ In the course of the proceedings the merging parties clarified that [REDACTED]

⁴⁶ Bundle B, Record, page 1040.

⁴⁷ Bundle B, Record, pages 787 – 788.

████████████████████████████████████████████████████████████████████████████████ In other words, Willowton and Seaboard considered the acquisition, from their perspective, as a vertical merger where the output of RSP would be for their own use, and not for any other third party. Considering this, the Commission formed the view that the proposed transaction is likely to result in the following – ⁴⁸

- 65.1. Create a structural link between Willowton and Seaboard as both parties will be jointly involved in decision making at RSP.
- 65.2. The joint decision making is likely to focus on key parameters of competition including sales and production, which both Willowton and Seaboard will have access to through RSP. This potential exchange of competitively sensitive information will result in Willowton and Seaboard aligning their respective interests, and thereby have the effect of lessening competition between Willowton and Seaboard.
- 65.3. The decisions taken at RSP and access to information through RSP are likely to result in (tacit) coordination of the business decisions and competitive behaviour of Willowton and Seaboard respectively.

[66] Thus, at the heart of the Commission’s argument is that the control structure in RSP and the acquiring firms’ financial interest in RSP will require the decisions of Willowton and Seaboard to be aligned. This will have the effect of lessening competition between the firms post-merger by reducing the independent pricing and sales of Willowton and Seaboard. In other words, the merging parties would be more likely to coordinate their pricing in their competing businesses which would remain outside the JV than compete independently. This means that they would be disincentivized from pricing independently because their incentives would be 'aligned' in RSP.

[67] In closing argument, the Commission posited that while its focus was on pricing, it was never its contention that the likely coordination arising through the platform created by the JV is limited to pricing issues. According to the Commission, it

⁴⁸ Commission’s Heads of Argument (5 August 2021), paras 17.1 – 17.5.

has always been its case that other forms of collusive conduct or coordination such as market or customer allocation could occur.⁴⁹

[68] The merging parties contested this finding, pointing to the characteristics of the market and that the Commission was biased in its assessment of the merger as it relied on the minority views that the merger should be prohibited and failed to have any regard to evidence in support of the approval of the merger.

Foreclosure

[69] The Commission did not pursue its concern about vertical effects. Further, the expert witnesses also agreed that there were no concerns relating to vertical effects.⁵⁰ Therefore, we do not deal with this any further.

EVALUATION

Legal principles

[70] In determining whether a merger would result in coordination in the market, we are required to consider the effects of the merger after taking into account all the evidence before us.⁵¹

[71] The Tribunal in *Main Street* held that there are two instances in which a merger may give rise to concerns of coordinated effects. Firstly, the merger can strengthen an existing coordination and secondly, the merger can increase the likelihood that firms will coordinate.⁵² While there is no set or precise test for determining whether co-ordination is likely, there are at least some prerequisites to be present for the likelihood of co-ordination. In *Main Street*, the Tribunal held that to sustain an argument of coordinated effects, the Commission is required to show, as a starting point and at the very least, that the participants to a coordinated strategy are able to –

⁴⁹ Transcript (6 August 2021), page 972 lines 1 -10; Commission's Heads of Argument, para 72.

⁵⁰ Commission's Heads of Argument (5 August 2021), para 44.91; Exhibit M.

⁵¹ *Main Street 333 (Pty) Ltd and Kumba Resources Ltd* Case No.: 14/LM/Feb06 ("*Main Street*"), para 39.

⁵² *Main Street*, para 37.

- (i) reach an agreement;
- (ii) monitor whether the agreement is being adhered to;
- (iii) punish deviation so as to make it costly; and
- (iv) believe that coordination is feasible (i.e., coordination will not be feasible if there are enough firms in the market who are not part of the coordination, or if enough firms can enter the market to make it unprofitable for the firms contemplating coordination.)⁵³

[72] In *Primedia*,⁵⁴ the Tribunal recognized that even where coordination may be a theoretical possibility, there must be strong evidence to make out a case of coordination.

[73] We assess below whether the evidence supports the Commission's argument that the merger is likely to result in coordination.

Key market characteristics

[74] We turn first to highlighting some key characteristics of the industry to understand the market dynamics in which the merger is taking place.

[75] Soya beans are mainly produced in the inland provinces of Mpumalanga, Kwa-Zulu Natal, Gauteng, Free State and Limpopo, with the smaller producers of soya beans being in the Western, Eastern, and Northern Cape provinces.⁵⁵ South Africa currently relies on imports for the supply of soya meal to meet the demand, primarily in the coastal regions.

[76] Industry predictions however are that South Africa will move to become a net exporter of soya beans within the next five to ten years⁵⁶ and pricing in the industry could in the future move towards export parity. While the industry aims

⁵³ *Main Street*, para 39

⁵⁴ *Primedia Limited and Capricorn Capital Partners (Pty) Ltd And New Africa Investments Limited* Case number: IM013May06.

⁵⁵ Department of Agriculture, Forestry and Fisheries, "A profile on the South African Soybean Market Value Chain", 2019, pages 1 – 2.

⁵⁶ Trial Bundle D, Witness Statement of Mr Moosa page 15; Trial Bundle D, Witness Statement of Mr Boshoff, page 82.

to reach net export levels, it is anticipated that imports will remain a source of supply (in the coastal areas) going forward for the short to medium term.⁵⁷

[77] Due to South Africa currently being a net importer of soya beans and meal, local prices are influenced by global developments in those countries which are significant producers of soya beans, such as Argentina, Brazil and the United States, amongst others.⁵⁸ Recent trends however show a steady decline in imports, owing to an increase in the availability of locally produced soya meal as a result of increased soya bean crop production.

[78] At the moment the supply of locally grown soya beans in South Africa is insufficient to meet the demand of the crushing industry, and as a result, there is significant excess crushing capacity in the market.⁵⁹

[79] Pricing of soya meal is based on the pricing of soya beans which are traded on the commodities exchange, SAFEX. The price of soya meal is based on IPP. The formula for determining IPP is based on components which are transparent to market participants. These components are the soya meal futures quoted on the Chicago Board of Trade (“CBOT”), the Argentine premium (because most of the imported meal is sourced from Argentina), ocean freight, USD/ZAR exchange rate, import duty, landing costs and costs of transportation to the ultimate destination.⁶⁰

[80] All participants in the industry whether these are traders or crushers will work off IPP as a base price, adjusted for their particular business or customer. In most instances pricing would be IPP less a discount.

Evidence

[81] In advancing its theory of harm of coordination, the Commission considered and provided evidence in relation to the following factors:

⁵⁷ Bundle B, Record, page 1188 (BFAP Baseline Agricultural Outlook 2020 – 2029).

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Exhibit R, page 14.

- 81.1. local pricing and transparency of the market;
- 81.2. countervailing power;
- 81.3. excess capacity;
- 81.4. barriers to entry;
- 81.5. market shares and market concentration;
- 81.6. product homogeneity;
- 81.7. import competition as a constraint;
- 81.8. third party views; and
- 81.9. information exchange.

[82] We deal with each of these factors in turn, and also consider whether there is of existing coordination, and the post-merger operation of the JV and the transaction rationale.

Local pricing and transparency of the market

[83] It is common cause that soya meal is priced at IPP less discount, with IPP being calculated according to the components discussed above.

[84] During the Commission's investigation competitors and customers alike submitted that the elements of IPP are transparent.⁶¹ Prof Mncube provided a useful table, which we reproduce below, summarising the elements of IPP and noting the transparency of each of those elements.

⁶¹ Bundle A, Commission's Recommendation, para 184; Bundle B, Record, page 2226.

Table 5: IPP components, source, and transparency⁶²

Price Component	Source	Transparency
Soybean Meal Futures	CBOT (in short tons)	Transparent. Quoted on international commodity exchange.
Argentine Premium	Brokers/ Suppliers	Transparent. Quoted by brokers daily and by suppliers on request.
Ocean Freight	Brokers/ Vessel Owners	Transparent to those in Shipping & International Trading.
USD/ZAR Exchange Rate	Banks/ Reuters	Transparent.
Import Duty	SARS Import Tariff	Transparent (4.95% of FOB Value).
Landing Costs	Port Terminal/ Transnet	Transparent. Port charges available on request from the Terminal.
Transport to Destination	Road Transport Companies	Transparent. Available on request.
RSA Soybean Meal Basis	Crusher/ Trader	Subjective. Based on crush margin, quality, and location of crushing plant.

[85] The Commission's only contention was that freight costs, as one of the components of IPP, are not necessarily transparent⁶³ and that it is this element which Seaboard could manipulate post-merger. However, evidence to the contrary was presented by the various witnesses.

[86] Mr Koster testified that freight rates are publicised globally and that those in the industry have an indication of the freight rates at a particular time. He suggested that there have been fluctuations in freight cost as the market has changed and this is evident from the price lists that are circulated in the industry.⁶⁴ According to Mr Koster, this is a function of suppliers wanting to offer the best value for money and not so much from any interest of suppliers to manipulate freight costs.⁶⁵

[87] Ms Heads testimony supported Mr Koster's evidence that there are indicative freight rates that can be obtained from firms active in shipping and international trading, and that this component of IPP was sufficiently transparent.⁶⁶

⁶² Exhibit R, Page 14, Table 14.

⁶³ Transcript (26 July 2021), page 160 lines 8 – 14.

⁶⁴ Transcript (27 July 2021), page 260 lines 3 – 19.

⁶⁵ Transcript (27 July 2021), page 260 line 20 – page 261 line 6.

⁶⁶ Transcript (28 July 2021), page 329 lines 11 – 16.

- [88] The Commission's own witness, Mr Botha, conceded that freight costs are clearly comparable from the daily price lists sent out by traders.⁶⁷ Importantly, Mr Botha also noted that customers in this market are able to identify any costs that are overly excessive.⁶⁸
- [89] Similarly, Mr Koster also provided evidence that it would not be in the interest of any company to manipulate freight costs as this would be easily detected.⁶⁹
- [90] The merging parties have submitted that freight rates are dependent on various factors including the time for booking the freight, and whether it is a roundtrip or not. Thus, these are objective factors which would be hard for Seaboard to manipulate without risking being found out by customers.
- [91] In another argument, the Commission submitted that because Seaboard is the main importer of soya meal in South Africa, it is able to influence or even set prices in the market.
- [92] Seaboard frequently issues price lists with IPP pricing components to customers. The Commission's economic expert, Ms Ranenyeni relied on the statement "*Components in red not actively traded and as such cannot guarantee offer*" on Seaboard's price lists as being suggestive of Seaboard's ability to influence the price of soya meal in the country.⁷⁰ According to the Commission, an unintended consequence of this is that customers and competitors use the price lists to benchmark their prices and negotiate similar or better prices.⁷¹ An example of Seaboard's price list is depicted below:

⁶⁷ Transcript (26 July 2021), page 134 line 21 to page 135 line 5.

⁶⁸ Transcript (26 July 2021), page 116 line 20 to page 117 line 1.

⁶⁹ Transcript (27 July 2021), page 261, lines 4 to 6.

⁷⁰ Bundle E, Ms Ranenyeni's Expert Report, para 217.

⁷¹ Exhibit D, page 16.

Table 6: Seaboard's price list⁷²

 SEABOARD OVERSEAS TRADING & SHIPPING (PTY) LTD 14-May-20									
PRODUCT	SHIPMENT	FUTURES	FREIGHT	PREMIUMS	OTHER USD COSTS	ROE	ZAR COSTS	PRICE/MT CPT	PRICE / MT DBN
ARGENTINEAN SOYBEANMEAL									
46.50% PROTEIN Meal FCA in Bulk	Shipped Jun 2020	290.06	\$32	4	\$2.46	18.6890	R653	R7,409	R 7,347
46.50% PROTEIN Meal FCA in Bulk	Shipped Jul 2020	290.06	\$32	5	\$2.46	18.7457	R655	R7,452	R 7,390
46.50% PROTEIN Meal FCA in Bulk	Shipped Aug 2020	290.86	\$32	5	\$2.46	18.7890	R657	R7,486	R 7,424
46.50% PROTEIN Meal FCA in Bulk	Shipped Sep 2020	291.86	\$33	5	\$2.47	18.8430	R659	R7,548	R 7,486
46.50% PROTEIN Meal FCA in Bulk	Shipped Oct 2020	292.46	\$33	5	\$2.47	18.8897	R661	R7,579	R 7,517
46.50% PROTEIN Meal FCA in Bulk	Shipped Nov 2020	294.86	\$33	5	\$2.48	18.9428	R665	R7,652	R 7,590
46.50% PROTEIN Meal FCA in Bulk	Shipped Dec 2020	294.86	\$33	5	\$2.48	18.9959	R666	R7,673	R 7,611
46.50% PROTEIN Meal FCA in Bulk	Shipped Jan 2021	295.96	\$33	5	\$2.49	19.0294	R668	R7,710	R 7,648
46.50% PROTEIN Meal FCA in Bulk	Shipped Feb 2021	292.26	\$33	5	\$2.47	19.0809	R664	R7,648	R 7,585
46.50% PROTEIN Meal FCA in Bulk	Shipped Mar 2021	292.26	\$33	5	\$2.47	19.1308	R665	R7,667	R 7,605
Components in red not actively traded and as such cannot guarantee offer ZAR SPOT RATE: 18.5610 NOTES: 1. Except where stated otherwise, all price indications are CAD (Cash Against Documents), in BULK and excluding VAT. 2. All orders must be confirmed telephonically before the close of business i.e. 16h30 South African time 3. Due to the volatility of the RAND and CBOT, all prices are subject to telephonic confirmation. July 2020 Soybean Meal Option Settlement Date 2020-06-26 July 2020 Soybean Meal Futures First notice Day 2020-06-30 *** all July futures to be priced 3 days prior FND Please note that Premiums need to be fixed by no later than the 20th of the month preceeding shipment month Please note that all written pricing instructions need to be sent to ProteinTraders@seaboardship.co.za Thanking you in advance									

Source: DR49 of Item 28 of parties' response to discovery

[93] This was countered by the merging parties' economic expert who submitted that the only component in red (on the price list) is the Argentina premium, which is obviously transparent, and no one has claimed can be manipulated.⁷³ Therefore, any reliance on this is incorrect.

[94] The merging parties contend that Seaboard would not be able to set prices above what market rates are as this would allow other importers, such as COFCO, to import soya meal in South Africa and thereby, take Seaboard's market share.⁷⁴

⁷² See figure 14 in Bundle E, Ms Ranenyeni's Expert Report, page 63.

⁷³ Exhibit R, page 35.

⁷⁴ Merging Parties' Heads of Argument (5 August 2021) para 34.

[95] The Commission's own witness, Mr Botha, conceded that Seaboard's price is based on IPP and that it is merely a reference point relied on by other players in the market, who then discount or charge premiums on that price.⁷⁵ Mr Botha further noted that the market does not blindly follow Seaboard's pricing.⁷⁶

[96] Another impact on pricing is hedging. Traders are able to hedge prices, which allows the prices of soya meal to be locked. Ms Heads testified that hedging is a risk borne by traders as it is possible to ultimately price lower than what the product is worth. Seaboard is active in hedging.⁷⁷

[97] Furthermore, Customers in the soya meal market are large, sophisticated players with experience in hedging. The merging parties would need to justify any increase on any component to these large customers. In addition, customers can fix or hedge components of the IPP-based price. It would thus be difficult to coordinate a price increase with Seaboard if the final price consisted of an element of hedging by customers. Hence, the ability of Willowton and Seaboard to set prices in an anticompetitive manner is limited.

[98] Notably, Mr Moosa's testimony showed great knowledge of the industry, and he was able to recall significant price indicators in the market with ease.⁷⁸ We were of the view that this further illustrated the transparency of pricing in the market.

[99] Under cross examination Ms Ranenyeni eventually conceded that Seaboard's influence on local pricing is minimal and that the IPP pricing mechanism is transparent.⁷⁹ In other words Seaboard is not a price setter.

[100] Thus, the evidence of all the witnesses, including that of the Commission, is that the pricing of soya meal is highly transparent, determined by market conditions,

⁷⁵ Transcript (26 July 2021) page 136 and 137, line 2, page s155, line 7 to 156, line 13.

⁷⁶ Transcript (26 July 2021) page 144, lines 15 to 17.

⁷⁷ Transcript (28 July 2021), page 327 line 21 – page 329 line 2. See also the evidence of Mr Koster – Transcript (27 July 2021), page 257 line 13.

⁷⁸ Transcript (29 July 2021), page 484 line 20 – page 491 line 12.

⁷⁹ Transcript (2 August 2021), page 622 lines 1-4.

and that it is unlikely that the merging parties could manipulate freight costs after the proposed transaction.

[101] Another important factor that would render price coordination difficult post-merger would be the different or asymmetric production costs of Willowton and Seaboard.

[102] Both Ms Heads and Mr Moosa testified that the business models of Willowton and Seaboard are different. Willowton focuses on crushing and Seaboard focuses on imports and trading. Therefore, Willowton and Seaboard face different costs structures.⁸⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[103] Ms Ranenyeni acknowledges that there is cost asymmetry, however, she is of the view that because Willowton and Seaboard will make joint decisions on prices and costs, the JV will remove the asymmetry between the parties.⁸² Relying on international jurisprudence,⁸³ Ms Ranenyeni maintained that the likelihood of coordinated effects still exists where, for example, one firm is a high-cost firm and the other is low-cost firm.⁸⁴ Prof Mncube, on the other hand, submitted that firms with production cost differences are unlikely to readily agree on price coordination. Prof Mncube's testimony was that asymmetry exists in relation to pricing [REDACTED]. Furthermore, there is also differences in the volumes sold by each and neither of them would know [REDACTED]. Prof Mncube does not agree with Ms Ranenyeni that the JV would remove the asymmetries by virtue of Seaboard and Willowton being on the same board, as post-merger

⁸⁰ Bundle D, Witness Statement of Mr Moosa para 51; and Witness Statement of Ms Heads, para 46.

⁸¹ Transcript (29 July 2021), page 465 line 11 – page 462 line 8.

⁸² Transcript (2 August 2021), page 649 lines 7 – page 650 line 2.

⁸³ *Gencor and Lawn Mower* 1996.

⁸⁴ Transcript (2 August 2021), page 660 lines 8 – 11.

Seaboard and Willowton will remain independent competitors and would not have access to each other's pricing information in their competing businesses.

[104] We are of the view that there was insufficient evidence provided by the Commission to support the theory that these two firms, with their different cost structures, but equally importantly, in light of their different pricing structures, were likely to coordinate their prices.

[105] With regards to the argument on predation, Ms Heads testified that it would not be economically viable for Seaboard to drop prices with the intention of driving competitors out of the market and then raising prices again because firstly, Seaboard will lose money from cutting prices and secondly, the crushing facilities of the party exiting the market will remain in the market which could be purchased by other competitors.⁸⁵ Prof Mncube submitted that this would not be rational and would further be self-defeating, considering the number of large firms in the market, some supported by multinational firms, that could and would move in, in the case of any increases in prices.⁸⁶ We find no reason to disagree, considering that the evidence has pointed to multiple players in the market and their ability to be able to also import soya meal into South Africa.

Countervailing power

[106] We turn next to the countervailing power of customers.

[107] In making its recommendation for prohibition the Commission relied extensively on the fact that customers, albeit large and sophisticated, will have their countervailing power weakened post-merger.

[108] Despite the evidence to the contrary, the Commission argues that although customers appear to have countervailing power pre-merger, the market conditions post-merger will reduce the countervailing power. According to the Commission's expert witness, customers' countervailing power is over local

⁸⁵ Transcript (28 July 2021), page 331 line 8 – page 332 line 3.

⁸⁶ Bundle E, Expert Report of Prof. Mncube, para 266.

producers of soya meal, and so when customers are unhappy with local suppliers, they tend to switch to imported soya meal. Therefore, countervailing power tends to push customers to Seaboard as the predominant importer of soya meal and because there are no credible alternatives to switch to.⁸⁷

[109] This is one of the areas the merging parties argue that the Commission suffered a biased selection of the evidence from customers,⁸⁸ as the evidence in the record and that of witnesses who testified before the Tribunal contradicts the Commission's proposition.

[110] The Commission had sent a number of queries to customers during its investigation. Most customers raised no concerns with the transaction, claiming that they were able to switch between suppliers of soya meal when the need arises; local soya meal could be substituted with imported soya meal on short notice; and the local crushing industry together with imports from Zambia and Argentina is adequate to supply competitively priced soya bean products in South Africa.⁸⁹

[111] Evidence from customers shows that switching can happen from a local supplier to another local supplier, from an importer to a local supplier; and from a local supplier to an importer. Several feed manufacturers submitted that they have switched between Seaboard and COFCO.⁹⁰ Another feed manufacturer submitted that it sourced soya meal from an importer and a local supplier due to cost competitiveness, and because having more than one supplier helps it to spread the risk.⁹¹

[112] Mr Botha also spoke to the ability of other firms to import soya meal into the country, which could possibly constrain Seaboard from charging higher prices above IPP.⁹² Ms Heads testified that COFCO, is one such firm that directly

⁸⁷ Bundle E, Ms Ranenyeni's Expert Report, para 267.

⁸⁸ Exhibit R, page 23.

⁸⁹ Bundle B, Record, pages 1476 – 1477.

⁹⁰ Bundle B, Record, page 1476-1477 and 1565.

⁹¹ Bundle B, Record, page 1565.

⁹² Transcript (26 July 2021), page 160 line 21 – page 161 line 12.

imports soya meal to South Africa and in other instances, imports indirectly through other players such as Seaboard.⁹³ There have also been imports coming from Zambia, from Wilmar SA and Bester.⁹⁴ Therefore, customers evidently have a choice between different suppliers of imported soya meal.

[113] Linked to the argument around the merging parties' ability to increase prices is the question of the reactivity of customers thereto. Mr Koster noted that customers rely on the reliability of the price of the soya meal supplied,⁹⁵ accordingly customers will negotiate the discount or local premium with the supplier to obtain a suitable price.⁹⁶ This is consistent with Mr Boshoff's testimony which suggested that customers have a keen eye on prices in the market.⁹⁷

[114] Moreover, the Commission's own findings in its record do not support this proposition. The Commission found that customers of the merging parties are well established feed manufacturers and that the market is characterised by short term contracts and the ability of customers to negotiate the terms of these contracts.⁹⁸ Furthermore, the Commission's own expert witness, referencing the submissions made by customers, notes that customers (i) have the ability to negotiate prices and discounts with suppliers, (ii) can play suppliers off against each other to get the best price possible, (iii) do switch between different suppliers from time to time with price and product quality being the main drivers for the switching, and (iv) contracts entered into between suppliers and customers act as a barrier to switching only for a limited period, 3-12 months, but they are generally not exclusive and can be terminated upon expiry.⁹⁹

[115] In other words, the Commission was unable support its own proposition that switching would be more difficult post-merger and that customers' countervailing power would accordingly be weakened.

⁹³ Transcript (28 July 2021), page 334.

⁹⁴ Bundle B, Record, page 2227.

⁹⁵ Transcript (27 July 2021), page 252 lines 14 – 16.

⁹⁶ Transcript (26 July 2021), page 32 lines 4 – 7; Transcript (27 July 2021), page 258 lines 17 – 20.

⁹⁷ Transcript (27 July 2021), page 210 line 16 – page 211 line 10.

⁹⁸ Bundle A, Commission's Recommendation, para 216 – 220.

⁹⁹ Bundle E, Ms Ranenyeni's Expert Report, para 268.

[116] However, Ms Ranenyeni persisted with the view that because the final price of soya meal to customers is uncertain, customers would not necessarily be able to interrogate it in the manner suggested by Mr Koster.¹⁰⁰ This was because, on her version, the JV in RSP will enable Willowton and Seaboard to agree on the discount to be given to customers.¹⁰¹ This argument fails to consider the evidence given that a price increase by Seaboard or Willowton post-merger would not be sustainable, mostly due to the ability of customers to react to any price changes.

[117] Mr Boshoff indicated that feed companies are knowledgeable about the trends in the market; they pay attention to where the “best product” can be purchased at the “best price”, and they make use of price modelling.¹⁰² Therefore, should a supplier of soya meal act in a manner not consistent with the analysis undertaken by the feed companies, this would raise a concern.

[118] The Commission’s own witness, Mr Botha, conceded that should the merging parties increase prices, customers would be able to switch to an alternative supplier and that this will remain the same post-merger.¹⁰³

[119] Another argument advanced by the Commission was that the proposed transaction reduced the number of local producers that customers can consider when making a decision to switch as RSP will no longer be in the market.¹⁰⁴ However, as pointed out by Prof Mncube,¹⁰⁵ this proposition is incorrect because pre-merger RSP is not in the market due to the toll crushing agreement and the merger therefore does not reduce the number of local competitors that customers can choose from.

¹⁰⁰ Exhibit D, page 16.

¹⁰¹ Commission’s Heads of Argument, para 66.2.

¹⁰² Transcript (27 July 2021), page 210 line 16 – page 211 line 10.

¹⁰³ Transcript (26 July 2021), page 105 lines 3 – 9.

¹⁰⁴ Bundle E, Ms Ranenyeni’s Expert Report, para 270.

¹⁰⁵ Exhibit R, page 42.

[120] Thus, the evidence of customers obtained during the Commission's investigation, the evidence of witnesses at the Tribunal, including the Commission's witness and the Commission's own description of customers in its expert report, considered together, does not aid the Commission's contention that the countervailing power of customers would be reduced or otherwise change post-merger.

Excess capacity

[121] Another factor relied on by the merging parties as a competitive constraint is the significant excess crushing capacity in the market.

[122] During its investigation, the Commission found that crushers are currently not fully utilizing their installed capacity and as such have excess crushing capacity. The Commission calculated the following capacity utilization in the market for the crushing of soya beans:

Table 7: Capacity utilization in the crushing market -¹⁰⁶

	Installed Capacity	Share of Installed Capacity	Estimated Crush	Share of Crushed soybeans	Capacity Utilization
Willowton	██████	██	██████	██	██
RSP	██████	██	██████	██	██
Merged entity	██████	██	██████	██	
Free State Oils	██████	██	██████	██	██
Nedan	██████	██	██████	██	██
Cofco	██████	██	██████	██	██
Majesty Oils	██████	██	██████	██	██
Wilmar	██████	██	██████	██	██
GOCM ¹⁰⁷	██████	██	██████	██	██
Drak Oil	██████	██	██████	██	██
Ceoco	██████	██	██████	██	██
Other	██████	██	██████	██	██

¹⁰⁶ Bundle A, Commission's Recommendation, Table 24 (page 86).

¹⁰⁷ Gauteng Oil and Cake Mills.

Total	████████	████	████████	████	████████ ████
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[123] The table above shows that the average crush capacity utilization stands at approximately 63%. Therefore, the Commission concedes that there is excess crushing capacity in the market but contends it is neither a constraint nor a potential constraint, as its utility depends on the availability of soya beans.¹⁰⁸ The Commission found that there is a shortage of soya beans which is likely to prevail in the foreseeable future, and for this reason excess capacity is meaningless.

[124] While downplaying the role of excess capacity as a constraint on the merging parties, the Commission at the same time argues that the excess capacity in the merging parties' hands may be used to negate any of its competitors' actions.¹⁰⁹ The Commission does not however explain how such a strategy would be sustainable in the context of competitors' having excess capacity. The Commission's differing views on how the merging parties could utilise its excess capacity on the one hand and how competitors could utilise their excess capacity on the other hand is unexplained.

[125] The Commission's economic expert confirmed that the average capacity utilisation is approximately 62%. Ms Ranenyeni further considered the evidence of Ms Heads and Mr Moosa that crushers produce at optimal crush capacity which is approximately 80% of nameplate capacity, and calculated excess capacity as follows:

¹⁰⁸ Commission's Heads of Argument, paras 104 – 105.

¹⁰⁹ Bundle A, Commission's Recommendation, para 257.

Table 8: Excess capacity based on optimal crush capacity -¹¹⁰

	Installed Capacity (tons of beans to be crushed)	Optimal capacity (80% of installed capacity)	Potential Output (soymeal) at Optimal Capacity (=0,75*B)	Actual Output (soymeal) in 2019 (Wilmar in 2020) – submissions	Utilization of actual capacity (beans crushed in tons) (=D/0,75)	Utilization of Optimal Capacity (=E/B)	Excess Capacity (beans to crush in tons)	Excess Capacity (%)
	A	B	C	D	E	F	G	H
Willowton								
RussellStone								
Free State Oils (VKB)								
Nedan								
Cofco								
Majesty Oils								
Wilmar								
GOCM								
Drak Oil (Agri Oil Mills)								
Ceoco								
Total								

[126] According to Ms Ranenyeni, the biggest competitors of the merging parties, COFCO and Wilmar do not have excess capacity and most of the industry’s capacity is in the hands of small players. However, Ms Ranenyeni considers some of the small players – Majesty, GOCM and Drak Oil – as being too weak or small to have an impact on the merging parties, and that the only real competitor is Nedan, but it too would not be able to constrain the merging parties.¹¹¹

[127] The Commission and its expert’s conclusion on excess capacity are countered by Prof Mncube who found, based on his assessment, that even if RSP’s crush capacity was completely removed from the industry, there would still be 30% excess capacity remaining in the market.¹¹² We include below a table reflecting the excess capacity in the market as calculated by Prof Mncube.

¹¹⁰ Exhibit F.

¹¹¹ Exhibit F,

¹¹² Bundle E, Expert Report of Prof. Mncube, para 340.

Table 9: Excess capacity excluding RSP¹¹³

	Installed capacity	Share of capacity	Estimated Crush	Capacity utilisation	Excess Capacity
Willowton					
Free State Oils					
Nedan					
Cofco					
Majesty Oils					
Wilmar					
GOCM					
Drak Oil					
Ceoco					
Other					
Total (excl. RussellStone)					

Source: Adapted from Table 24 of the Commission's Confidential Report

Notes: The Commission's table seems to be based mostly on responses from crushers related to 2019 or 2020, except for Wilmar. We have replaced the Commission's numbers with the latest numbers reported by Wilmar for 2020.

[128] Based on the above, he concludes that it is evident that the impact of the removal of RSP's crushing capacity in the market is likely to be negligible.¹¹⁴

[129] Under cross examination, Mr Botha, the Commission's witness, conceded that there would be a substantial amount of crush capacity in the market, even if RSP's crush capacity was available only to the acquiring firms.¹¹⁵ Thus, confirming the views expressed by Prof Mncube above.

[130] Further, Mr Moosa testified that excess capacity in the market causes suppliers to price aggressively in attempts to maximise the utilisation of their capacity.¹¹⁶ Therefore, it is likely that excess capacity is a competitive constraint in this market.

[131] In interpreting the Commission's calculations depicted in Table 5 above, Prof Mncube notes that, if anything, the table highlights how large competitors are – for example, COFCO – significantly larger than any player in the market, including Willowton and RSP, separately and together.¹¹⁷ He also refutes the Commission's contention that competitors would not be able to timeously utilize

¹¹³ Bundle E, Expert Report of Prof. Mncube, Table 19 (page 218).

¹¹⁴ Bundle E, Expert Report of Prof. Mncube, para 340.

¹¹⁵ Transcript (26 July 2021), page 123 lines 9 – 13.

¹¹⁶ Transcript (29 July 2021), page 446 lines 12 – 16.

¹¹⁷ Bundle E, Expert Report of Prof. Mncube, para 255.

their excess capacity in response to a price increase because there is a shortage of soya beans in the country. In doing this, he refers to the BFAP¹¹⁸ report which states, in relation to soya beans, that South Africa for the outlook period (2020 - 2029) is expected to trade close to self-sufficiency, following a projected area expansion of over 150 000 hectares in 2021.¹¹⁹

[132] Furthermore, Prof Mncube submitted that economic theory acknowledges that excess capacity makes collusion difficult when there are many firms in the market.¹²⁰ We agree with this submission.

[133] In the instant case the Commission, while acknowledging that there was excess capacity in the market, was unable to demonstrate how post-merger collusion between the acquiring firms could be sustained notwithstanding significant excess capacity in the market.

Barriers to entry

[134] The Commission and its expert witness concluded that barriers to entry are high in the soya meal market and that entry into the market is not likely to occur in the near future. Further, even if entry was to occur, it would be unlikely to have a timely effect on competition in the industry nor is it likely to be sufficient to constrain any anticompetitive behaviour by the parties post-merger.¹²¹

[135] The Commission relied upon the evidence of the various competitors it contacted during its investigation that establishing a crushing plant or facility may range anywhere between R100 million to over R1 billion. It was submitted that a crushing plant with a crushing capacity of 600 metric tons per day may cost approximately R200 million to establish, while a crushing plant with capacity of between 250 000 to 500 000 metric tons may cost over R1 billion to establish.¹²²

¹¹⁸ Burea for Food and Agricultural Policy

¹¹⁹ Bundle B, Record, page 1188 (BFAP Baseline Agricultural Outlook 2020 – 2029)

¹²⁰ Exhibit R, page 25.

¹²¹ Bundle E, Ms Ranenyeni's Expert Report, para 266.

¹²² Bundle A, Commission's Recommendation, para 195.

[136] During evidence, Mr Botha submitted that constructing a new crushing plant, which would have a crushing capacity of 1 000 metric tons per day, would cost in the region of R525 million.¹²³ Mr Moosa disputed this amount and submitted that a new plant would not cost more than R300 million for a plant that crushes approximately 750 metric tons per day, and not more than R400 million for a plant that crushes approximately 1000 metric tons of soya beans per day.¹²⁴

[137] Mr Botha's estimates were based on the exact cost incurred by Wilmar when it reconstructed the crushing facility in Randfontein after the explosion in 2017. However, he noted Wilmar had some existing infrastructure from the previous crushing plant when they commenced reconstructions.¹²⁵

[138] From the above, we can accept that establishing a new plant could cost anything between R300 million and R500 million. The cost of the plant would certainly be affected by the size of its nameplate capacity.

[139] Evidence by Mr Moosa shows that an increase in soya bean harvests has resulted in the expansion of crushing facilities in South Africa in the last year and as discussed above, there is excess crush capacity.¹²⁶ This could also be taken to contradict the Commission's contention that the insufficient supply of soya beans in South Africa would be the main barrier to entry.

[140] In relation to entry into the market by new entrants, particularly crushers, Mr Botha submitted that it would take approximately two to five years to enter the market and become an effective competitor. This was consistent with the views of other competitors who submitted to the Commission that it would take anything between three to five years for a new crushing plant to operate optimally in the market.¹²⁷ A single competitor submitted to the Commission that

¹²³ Bundle D, Witness Statement of Mr Botha, para 17 (page 8).

¹²⁴ Transcript (29 July 2021), page 443 page 17 – page 444 line 1.

¹²⁵ Transcript (26 July 2021), page 32 line 19 – page 33 line 10.

¹²⁶ Bundle D, Witness statement of Mr Moosa, pages 21 – 23.

¹²⁷ Bundle B, Record, pages 1802, 1911, and 2228.

it would take 18 to 24 months for a new entrant to become an effective competitor in the market.¹²⁸

[141] Later in his evidence, Mr Botha conceded that while barriers to entry in crushing capacity are relatively high, they are not insurmountable. He acknowledged the recent entry of GOCM and the increase in crush capacity by existing players in the market; and also accepted that entry can occur through the purchase of an existing crush plant.¹²⁹ Similarly, Mr Moosa testified to the recent entry into the crushing market by GOCM (in the first half of 2020), and that of COFCO in the last three years.¹³⁰ The merging parties further noted the recent entries of Wilmar in late 2019 and CEOCO in the second half of 2020.¹³¹

[142] While competitors have intimated that greenfield entry may be on the high side, the merging parties and their expert witness have noted that it is possible for entry to occur quickly and inexpensively through the purchase of an existing crushing plant.¹³² When this proposition was put to Mr Botha, he submitted that while he does not know whether or not it would be cheap, it is indeed possible to enter the market through the purchase of an existing crushing plant.¹³³

[143] Even if we are to accept that barriers to entry in greenfield crushing plants are relatively high, the available evidence suggests that there are low barriers to entry as a trader in the soya meal market.

[144] Ms Heads testified that the market for the trading of locally produced or imported soya meal in South Africa is a free and open market, which allows any firm to trade soya meal at any point in time, and that it would take a new entrant less than a month to enter the market. Further, there are no significant investment requirements when entering the market.¹³⁴ Consequently, the barriers to entry in the trader market are relatively low.

¹²⁸ Bundle B, Record, page 1743.

¹²⁹ Transcript (26 July 2021), pages 132 – 134.

¹³⁰ Transcript (29 July 2021), page 580 line 17 – page 581 line 1.

¹³¹ Merging Parties' Heads of Argument, para 119.

¹³² Exhibit R, page 18.

¹³³ Transcript (27 July 2021), page 133 lines 15 – 20.

¹³⁴ Bundle D, Witness statement of Ms Heads, page 65.

[145] Taken together, the evidence above contradicts the Commission's conclusions that barriers to entry are so high in the soya meal market as to render post-merger collusion sustainable. In our view the evidence suggests that were the merging parties to embark on a post-merger collusive strategy, the ease of entry for traders together with the other market characteristics as explained, would render such strategy unsustainable.

Market shares and concentration

[146] The Commission reiterated its view that the combined market share of the merging parties is too high to be ignored in the context of the JV in RSP as this supports its argument regarding the impact of any coordination between the merging parties.¹³⁵

[147] Based on its market share calculations, the Commission concluded that the market is highly concentrated as in 2019 the largest four competitors made up 66% of the market, and the merging parties' collective share is a significant portion of that.¹³⁶ The Commission's expert witness, Ms Ranenyeni, calculated the following concentration ratios in the soya meal industry and found the following:

- 147.1. per the two-firm concentration ratio, the two largest firms in the industry controlled 51% of the market in terms of revenue and volume market shares and 36% of the market in terms of capacity market shares;
- 147.2. per the four-firm concentration ratio, the four largest firms in the industry controlled 70% of the market in terms of revenue market share, 71% of the market in terms of volume market shares and 59% of the market in terms of capacity market shares; and
- 147.3. per the eight-firm concentration ratio the eight largest firms in the industry controlled 97% of the market in terms of revenue and volume market shares and 94% of the market in terms of capacity market shares.

¹³⁵ Bundle A, Commission's recommendation, para 323.

¹³⁶ Bundle A, Commission's Recommendation, para 256.

[148] According to Ms Ranenyeni, international guidelines interpret the four-firm concentration ratio of over 70% as being highly concentrated.¹³⁷ Hence, she concluded that the high concentration levels combined with the collective revenue and volume market share of the merging parties of over 45% and the high post-merger capacity market shares, suggests that the proposed transaction may have a wide impact as a result of the likely anticompetitive effects stemming therefrom.¹³⁸

[149] Prof Mncube, on the other hand, found that given the number of players in the market and the asymmetric markets shares of these players, it can hardly be said that the market is highly concentrated. He found that there were at least 10 (ten) players active in the soya meal market, with asymmetric market shares as follows:

Table 10: market participants and market shares in the national soya meal market¹³⁹

	2017		2018		2019	
	Ton	Share	Ton	Share	Ton	Share
Willowton						
RussellStone						
Seaboard						
Free State Oil						
Nedan						
Majesty						
Cofco						
Ceoco						
Bester						
Wilmar						
Commission's total						
Other (difference)						
Total Market (SAGIS)						

Sources: Responses to Commission's information requests; Willowton; SAGIS; FTI calculations

[150] Based on the above, Prof Mncube calculated the HHI¹⁴⁰ in the soya meal market to be 1,565 based on the 2019 national market for soya meal. Relying on international horizontal merger guidelines, he concluded that the pre-merger, the market is close to 1, 500 which is indicative of a competitive marketplace. He

¹³⁷ Exhibit D, page 14.

¹³⁸ Bundle E, Ms Ranenyeni's Expert Report, para 348 – 351.

¹³⁹ Bundle E, Expert Report of Prof. Mncube, Table 7.

¹⁴⁰ HHI refers to the "Herfindahl-Hirschman Index", which is the accepted measure of concentration and is the sum of the squares of the market shares.

does not consider the market shares as a collective to determine the HHI post-merger as this is not a full merger.¹⁴¹ Prof Mncube cautioned that concentration indexes (for example, HHI) may be misleading as in some cases HHI increases as asymmetries of market share increases.¹⁴²

[151] We agree with the proposition put forward by Prof Mncube that firms with asymmetric market shares, read with the other market characteristics such as significant excess crushing capacity and potential imports in the case of a hypothetical small but significant post-merger price increase by the merging parties, are unlikely to have incentives to collude.

Product Homogeneity

[152] The Commission argued that the proposed transaction involves homogenous products, in respect of soya meal and hulls, which increases the likelihood of coordination.

[153] However, the merging parties and competitors of the merging parties have provided evidence that soya meal is a heterogenous product, as a result of the quality difference.¹⁴³

[154] To determine the quality of soya meal, there are minimum product specifications that must be met in terms of the urease levels. Three characteristics differentiate one product from another namely protein, fibre, and moisture levels.¹⁴⁴ The merging parties provided in the table below, the quality parameters that have to be met to produce quality soya meal:

¹⁴¹ Bundle E, Expert Report of Prof. Mncube, para 241.

¹⁴² Bundle E, Expert Report of Prof. Mncube, para 240 - 241.

¹⁴³ See Table 15 in Bundle E, Expert Report of Prof. Mncube, page 195.

¹⁴⁴ Bundle D, Witness Statement of Mr Moosa, 28 June 2021, para 43.

Table 11: soya meal quality parameters¹⁴⁵

Soybean Meal Quality Parameters -	
Protein %	46.5
Moisture %	11
Fibre %	3.5
Oil %	1.8
Urease %	0.1

[155] We understand that these characteristics also influence branding of the soya meal, which in turn influences a crusher's reputation for providing quality product.

[156] Mr Boshoff testified that local soya meal was now of similar quality to imported meal,¹⁴⁶ and that quality was important for feed manufacturers especially in the poultry industry.¹⁴⁷ Evidence by Mr Koster also showed that feed manufacturers in the poultry industry are sensitive to the quality and consistency of soya meal as it has a significant impact on the digestive system of the chicken and may affect its growth and mortality.¹⁴⁸ Mr Koster explained that urease levels have to be at an acceptable level from a nutritional point of view. Urease level of over 0.3% would be too high.¹⁴⁹ Hence, it would not be suitable for animal consumption.

[157] Furthermore, Mr Koster confirmed the merging parties' assertion that switching of production (for example, from soya meal to sunflower) would affect the quality of the product. He stated that a plant that runs on a short basis and has to start continuously and switch from one product to another, would make it difficult for stability of production to be established and therefore, impacts on the consistency of the quality.¹⁵⁰ Importantly, Mr Koster testified that customers are also willing to pay an extra premium for high quality soya meal.¹⁵¹

¹⁴⁵ Bundle B, Record, page 640.

¹⁴⁶ Transcript (27 July 2021), page 203 lines 7 – 10.

¹⁴⁷ Transcript (27 July 2021), page 204 lines 4 – 12.

¹⁴⁸ Transcript (27 July 2021), page 255 lines 8 – 16.

¹⁴⁹ Transcript (27 July 2021), page 253 lines 8 – 14.

¹⁵⁰ Transcript (27 July 2021), page 254 lines 4 – 13.

¹⁵¹ Bundle D, Witness statement of Mr Koster, 29 June 2021, para 19-25.

[158] What was clear from the evidence before us, was that the quality of soya meal is important. and it differentiates the soya meal supplied in the market by the various competitors. However, there was no factual evidence showing that any of the current players could not supply soya meal of the desired quality to its customers in South Africa.¹⁵²

Import competition as a constraint

[159] While the Commission's theory, based on the views of several competitors was that other players in the market could respond by importing soya meal (given that local supply did not meet the actual demand) if there were coordinated price increases post-merger, such import competition would serve to exercise a limited constraint on the merging parties' incentives.¹⁵³ This is due to the lack of economies of scale, which prevent other players from economically importing soya meal from Argentina.¹⁵⁴ According to the Commission's findings importing is not viable where a firm does not have enough volume to fill up a vessel – the minimum volume a firm can import is 30 000 tons. The decline in imported soya meal along with the increase in local capacity has ensured that Seaboard remains the incumbent, considering the critical mass it has through its existing business. Competitors submitted that firms like COFCO (which is the largest in the market) and Bester are not effective importers of soya meal.¹⁵⁵ It was the Commission's and its expert's contention throughout that Seaboard, unlike other firms, is uniquely positioned to import soya meal.¹⁵⁶

[160] Based on the evidence of Mr Botha when asked whether other market participants would import if Seaboard were to increase prices after the proposed transaction, the Commission concluded that once these competitors started importing as a response to a hypothetical post-merger price increase, Seaboard could then simply drop its prices, which would then deter any potential importer from bringing imports into the country. Thereafter, Seaboard would revert to its

¹⁵² Transcript (27 July 2021), page 203 line 7 – 10; page 207 lines 12 – 19.

¹⁵³ Bundle A, Commission's Recommendation, para 167.

¹⁵⁴ Bundle E, Ms Ranenyeni's Expert Report, para 242.

¹⁵⁵ Bundle A, Commission's Recommendation, para 171 – 172. Bundle E, Ms Ranenyeni's Expert Report, para 242.

¹⁵⁶ Bundle A, Commission's Recommendation, para 172 – 173.

high prices again, which would be to the detriment of competitors and in turn, customers.¹⁵⁷

[161] The evidence before us however seems to suggest the contrary.

[162] In the first instance, while import competition is still highly relevant and imports make up the shortfall for local demand, import volumes are on a decline due to the fact that the local supply of soya bean is on the increase.

[163] Furthermore, as mentioned above, Seaboard is not the only experienced importer of soya meal. COFCO, being a large multi-national, has a crushing plant in Argentina and is experienced in importing meal. Other players active in South Africa - Glencore, Bunge, and Louis Dreyfus Company – also own crushing plants in Argentina.¹⁵⁸ FR Waring is part of a large multi-national which has a crushing plant in Argentina and has the experience and financial muscle to retaliate timeously to any price increases. These large players could import soya meal very easily if such a need arose.

[164] Looking at Mr Botha's evidence that the Commission relied on above regarding competitors turning to imports, we find that while he noted that it is not so simple for competitors to do so because of factors such as storage and existing relationships, he effectively conceded that Seaboard would revert to normal competitive prices should other players import into South Africa. Hence, (potential) import competition would be a constraining factor on Seaboard.¹⁵⁹

[165] When the panel asked Ms Ranenyeni whether customers had been asked whether in the event of a small but significant price increase by the merging parties after the proposed transaction, increased imports of soya meal would take place, she could not recall if this was done.¹⁶⁰ We find that the Commission's evidence in this regard is lacking.

¹⁵⁷ Commission's Heads of Argument (5 August 2021), para 78.4.

¹⁵⁸ Bundle D, Witness Statement of Ms Heads, para 52

¹⁵⁹ Transcript (26 July 2021), page 145, lines 8 – 21.

¹⁶⁰ Transcript (2 August 2021), page 766 line 10 – page 767 line 7.

[166] The panel put to Ms Ranenyeni whether transport costs would be prohibitive for importers in the regional coast to transport soya meal inland if prices of soya meal in the inland region were increased after the proposed transaction. She agreed that the transport costs would not be prohibitive as evidence already indicates that half of the coastal imports are transported inland. Her earlier evidence had shown that transport costs are also not prohibitive from inland to the coast.¹⁶¹ This evidence of the Commission's expert supports the inference that the threat of imports would exert a constraint on any post-merger price increases, notwithstanding whether the price increase occurs inland or in the coast.

[167] In relation to the issue of scale, if a Tier One customer that requires a consistent supply of soya meal were to approach the likes of COFCO in the case of increased prices by the merging parties, this in our view could remove the impediment of scale (raised by the Commission) and allow others to import into South Africa. We do not find this to be an unlikely scenario considering the size of customers in the market and their requirement for quality and consistent soya meal. In fact, the Commission's own investigation revealed that at least two feed manufacturers have switched between importers.¹⁶² Ms Ranenyeni effectively conceded that an importer could have sufficient scale if in a hypothetical situation one large customer, which can switch as indicated above, requires supply for a whole year from that one importer.¹⁶³

[168] As to whether increased import competition itself was a competition concern, this was not fully explained by the Commission. The Commission's concern seemed to be that Seaboard is the incumbent in the import market and cannot be constrained by other players that may import into South Africa.

[169] However, the evidence suggests that although imports are on the decline they are still necessary to meet the demand for soya meal in the country, Seaboard

¹⁶¹ Transcript (2 August 2021), page 774 lines 2 – 14.

¹⁶² Bundle B, Record, pages 1476-1477, paragraph.28 (sub paragraph.28.1 & 28.1.1.); page 1565 item 25.

¹⁶³ Transcript (2 August 2021), page 775 lines 1 – 11.

is not the only importer, and there are currently a number of international players in the market who can import.¹⁶⁴ .

[170] One of the competitors that had submitted concerns withdrew its objection to the merger shortly before the hearings were set to commence. The reasons cited were, *among others*, that there has been a significant increase in the soya bean crop for the 2020/21 period which reduced the demand for imported soya meal. But as we indicated above, it is evident that notwithstanding, imports will remain relevant for the foreseeable future and may act a sufficient constraint on the conduct of the merging parties post-merger.

Other third-party views

[171] The submissions made by the National Agricultural Marketing Council (“NAMC”) and AFMA, which represents feed manufacturers who are also customers of the merging parties, were notable.

[172] NAMC submitted that mergers of this kind contribute to cost efficiency gains due to economies of scale and this is important for maintaining fair competition.¹⁶⁵

[173] AFMA submitted that the proposed transaction is unlikely to have a negative effect on the soya meal market as the merger could lead to optimization of capacity and increase efficiencies.¹⁶⁶ According to AFMA, there are sufficient players in the market and hence, the soya bean industry in its entirety is likely to remain competitive post-transaction. Further, the proposed transaction will give customers of soya meal assurance of supply.¹⁶⁷ Customers, through AFMA, anticipate that the merger will have a positive impact on the market.¹⁶⁸

¹⁶⁴ Bundle A, Commission’s Recommendation, pages 108 – 109.

¹⁶⁵ Bundle A, Commission’s Recommendation, para 257.

¹⁶⁶ Bundle A, Commission’s Recommendation, page 25.

¹⁶⁷ *Ibid.*

¹⁶⁸ Transcript (27 July 2021), page 211 line 14 – page 212 line 8.

[174] During the hearing, Mr Boshoff from AFMA confirmed that suppliers themselves are able to switch and obtain their supply from a competitor, which they then on-sell to their own customers.¹⁶⁹

[175] During its investigation the Commission had reached out to competitors of the merging parties and a few of them submitted concerns regarding the proposed transaction. We highlight here the concerns at the level of principle rather than attribute them to particular customers. One concern was that the proposed transaction would result in the merged entity having high market shares, approximately 45% - 50%, in the soya meal market and as a result would be able to heavily discount soya meal prices, which would in turn force smaller players out of the market.¹⁷⁰ Further, the merged entity may foreclose participants from accessing toll agreements, which are an important feature of the soya meal market.¹⁷¹ Another concern was that due to Seaboard being the largest importer of soya meal in South Africa, the proposed transaction would place the merged entity in a position to act anti-competitively, and this would be to the detriment of smaller players, who may be foreclosed post-merger.¹⁷²

[176] When these concerns were put to the merging parties, they asked us to take into account the fact that most of the competitors at that stage were under the impression that this was a full merger between Willowton and Seaboard, and these concerns should be assessed in that light. Furthermore, customers had indicated that they were able to switch to other suppliers. As indicated above, the Commission itself had conceded that the market was competitive, and that pricing was relatively transparent. In such market dynamics, it would be difficult for the merging parties to sustain coordination to any appreciable level of price increases or time.

[177] As to the possible anti-competitive actions that the merging parties were likely to engage in, this was posited as a significant price increase in the local market

¹⁶⁹ Transcript (27 July 2021), page 207 lines 10 – 19.

¹⁷⁰ Bundle A, Commission's Recommendation, pages 106 – 108.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

which was canvassed at some length during the hearing and for which no evidence was led.

[178] Finally, we note that most of the customers did not raise concerns with the transaction. Only one customer expressed a concern that the proposed transaction is likely to result in Willowton being the largest investor in the oilseed crushing market in South Africa and will use the soya oil produced by RSP internally, thereby reducing the availability of locally produced crude soya oil in the market.¹⁷³ However this concern was related to the soya oil market which is not relevant in the case before us.

Possibility of existing coordination

[179] As mentioned above, Seaboard has a 30% shareholding in RSP. In addition, RSP started toll crushing for Seaboard from [REDACTED] and does not provide any crushing services to third parties.

[180] The Commission's economic expert raised an interesting notion that coordination may have existed pre-merger as a result of Seaboard's current involvement in RSP and that this restrictive practice would now be extended to include Willowton.¹⁷⁴ Ms Ranenyeni based her assertion on the fact that Seaboard has access to the commercially sensitive information of RSP's sales and marketing information, and that it will continue to have access to this information post-merger.

[181] However, no evidence was adduced showing existing coordination.

[182] It was not clarified by the Commission what type of 'restrictive practice' the toll agreement constituted, nor could it point to any evidence that the toll agreement resulted in higher prices to customers after it was entered into. There was also no evidence from customers that the toll agreement had somehow resulted in higher prices or reduced quality or volumes of soya meal.

¹⁷³ Bundle B, Record, page 1534 – 1535.

¹⁷⁴ Bundle E, Ms Ranenyeni's Expert Report, para 333 – 334.

[183] We turn now to consider other factors to assess whether the merger will lead to some other form of co-ordination as suggested by the Commission.

The post-merger operation of the JV and the transaction rationale

[184] At the time the merger was filed with the Commission, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁷⁵

[185] When Ms Heads testified, she was of the view that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁷⁶ [REDACTED]
[REDACTED]
[REDACTED]¹⁷⁷ However, Ms Heads cautioned that this was still subject to further negotiations, as the merging parties were cautious about discussing such detail due to the legal advice that had been given to them at the time.¹⁷⁸

[186] Mr Moosa testified that when the transaction was first contemplated by the parties, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁷⁵ Bundle B, Record, pages 765 and 1004.

¹⁷⁶ Transcript (28 July 2021), page 301 line 9 - 19; page 374 lines 9 – 17.

¹⁷⁷ Transcript (28 July 2021), page 375 line 1.

¹⁷⁸ Transcript (28 July 2021), page 372 lines 13 - 15; page 374 lines 2 – 6.

¹⁷⁹ Transcript (29 July 2021), page 472 line 12 – page 473 line 1.

¹⁸⁰ Transcript (29 July 2021), page 473 lines 1 – 5.

[REDACTED]
[REDACTED] This was in fact
the pre-merger arrangement, albeit with some slight differences. [REDACTED]
[REDACTED]
[REDACTED]

[187] The Commission submitted that the evidence of the merging parties contradicted the rationale put up by each of the merging parties at the time the merger was filed. [REDACTED]
[REDACTED]
[REDACTED]¹⁸¹ Similarly, Seaboard's rationale was that [REDACTED]
[REDACTED]
[REDACTED]

[188] Noting the change in rationale for the proposed transaction, we called on the merging parties to provide us with certainty on how they saw the relationship unfolding post-merger as this has a material influence on the evaluation of the merger.¹⁸² Consequently, the merging parties submitted a draft Heads of Agreement which would regulate their post-merger relationship in *among others* the following terms—

188.1. RSP will only sell its products to Willowton and Seaboard, and will not sell or market soya meal to third parties in competition with Willowton and Seaboard;

188.2. [REDACTED]
[REDACTED]

188.3. [REDACTED]
[REDACTED]
[REDACTED]

¹⁸¹ Such as RCL Foods Limited, Country Bird Holdings (Pty) Ltd and Astral Foods Limited.

¹⁸² Transcript (29 July 2021), page 560 line 1 – page 561 line 9.

[REDACTED]

188.4. [REDACTED]

188.5. [REDACTED] and

188.6. [REDACTED].¹⁸³

[189] In the conditions tendered by the merging parties, the merging parties included a clause to regulate the abovementioned structural undertakings. However, we did not deem it necessary to impose these structural undertakings as conditions to the merger. We discuss this in detail under the Remedies section.

Information exchange

[190] The Commission advanced an argument that competition between Seaboard and Willowton would be restricted, and this could occur as a result of not only coordination, but also information sharing between the parties.¹⁸⁴

[191] The Commission considered the fact that [REDACTED]

[REDACTED]

[REDACTED] In addition, in terms of the shareholders agreement, [REDACTED]

[REDACTED] Furthermore, [REDACTED]

[REDACTED]

[REDACTED] It is on this basis that the Commission argues that the JV creates a platform for the sharing of commercially sensitive information between Seaboard and Willowton, and that through making decisions at RSP, Seaboard and Willowton will align their competitive behaviour such that

¹⁸³ Merging Parties' Heads of Argument, pages 12 – 15.
¹⁸⁴ Commission's Heads of Argument (5 August 2021), para 49.

competition between them will be restricted post-merger.¹⁸⁵ According to the Commission, this could result in increases in prices and predatory pricing by the merging parties, as discussed above.

[192] The merging parties have, however, refuted the Commission's argument by submitting that due to the existing vertical relationship between Seaboard and Willowton, as indicated above, the merger does not create an opportunity for them to share information. Furthermore, industry information on market trends, such as pricing, is publicly available and so the merger does not allow the parties to have information that they currently do not have.¹⁸⁶ We pause here to note the ease with which Mr Moosa spoke of market trends during his testimony, showing the transparency of the market.

[193] The merging parties also testified that reputation is important in the market, and they would not risk it by engaging in anti-competitive behaviour.¹⁸⁷

[194] During the hearing, the merging parties clarified that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ¹⁸⁸ Furthermore, as [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] This is something the Commission's expert has already accepted in her report.¹⁸⁹

[195] Ms Ranenyeni disputed the merging parties' testimony and while her submissions were confusing in this regard, the crux of her contention was that while Mr Moosa may not know the retail price (i.e., the ultimate price to customers), it is the wholesale price (i.e., the direct input cost of soya meal at RSP) that is relevant and may be used to soften competition between the

¹⁸⁵ Bundle A, Commission's Recommendation, paras 247 – 248.
¹⁸⁶ Bundle D, Witness Statement of Mr Moosa, pages 26 – 27.
¹⁸⁷ Transcript (29 July 2021), page 453 line 18 – page 454 line 18.
¹⁸⁸ Transcript, (29 July 2021) page 494, lines 1 to 4
¹⁸⁹ Bundle E, Ms Ranenyeni's Expert Report. Para 333.

parties.¹⁹⁰ Despite, Mr Moosa testifying that he knows with “99% accuracy the direct input costs of RSP and that he does not need to sit on the board of RSP to work out the costs”,¹⁹¹ Ms Ranenyeni still maintained that Mr Moosa would not know the exact cost and therefore, there is scope for coordination. It is at this point that she submitted that the coordination does not have to focus on pricing, the information obtained may be used to coordinate in various other ways, such as customer allocation.¹⁹²

[196] Prof Mncube testified that firstly, while the parties may know the wholesale price, they do not know the final price to customers, and secondly the market is clearly transparent as a lot of the information the Commission perceives to be commercially sensitive is already in the hands of market participants pre-merger. Ultimately, the final price is where competition takes place, and the impact that hedging may have on the ultimate price settled on by Seaboard, is information that unknown to Willowton.¹⁹³

[197] We have heard, as detailed above, the testimony of the various factual witnesses regarding the transparency of the market and the information that is available in the market. As discussed above, Ms Ranenyeni had also conceded to the market being transparent.

[198] The fact that Seaboard and Willowton have different pricing structures and the final price to customers may not be transparent does not, as the Commission alleges, support the likelihood of co-ordination. What it does support is the contrary – coordination would be unlikely if the final prices to each of their customers are not known or predictable, as in the case of those large customers that would elect to hedge components of their price.

¹⁹⁰ Transcript (2 August 2021) page 738 lines 9 – 16.

¹⁹¹ Transcript (29 July 2021) page 489, line 16 to page 489, line 7.

¹⁹² Transcript (2 August 2021), page 732 lines 3 – 17.

¹⁹³ Transcript (3 August 2021), page 934 line 16 – page 936 line 10.

Conclusion on SLC analysis

[199] On the Commission's own version, the soya meal market will remain competitive post-merger,¹⁹⁴ and customers have indicated they will enjoy countervailing power through their ability to switch to different suppliers in the event of any post-merger price increases.

[200] In summary, the evidence before us was that –

- 200.1. while soya beans are traded as a commodity on SAFEX, soya meal is characterised by certain quality differences and specifications. Quality is important and customers, especially in the animal feed industry, are willing to pay a premium for high quality meal;
- 200.2. prices in the industry are based on IPP the components of which are transparent;
- 200.3. customers are large, sophisticated players who could influence the final price paid by them by hedging components of the IPP-based price;
- 200.4. there is significant excess crushing capacity in the market and competitors of the merging parties consist of both large and small players;
- 200.5. import competition is still a significant part of the market because it is more cost effective to supply the coastal region with imports rather than inland soya meal due to high transport costs;
- 200.6. the Commission produced no evidence showing that (potential) imports of soya meal would not take place in the event of a post-merger hypothetical small but significant price increase by the merging parties;
- 200.7. it is projected that South Africa's local production of soya beans will increase by 40% in the period 2020/21, which is estimated at 1.7million tonnes;¹⁹⁵
- 200.8. while there are barriers to entry particularly in greenfield crushing plants, there appears to be limited barriers in relation to entry as a trader in the soya meal market;

¹⁹⁴ Transcript (26 July 2021), page 122; Transcript (2 August 2021), page 724.

¹⁹⁵ World Grain.com, available on: <https://www.world-grain.com/articles/15118-south-africa-expects-record-soybean-crop>.

200.9. there are a number of competitors in the market, including large players who are part of multi-nationals with experience in importing soya meal and the financial resources to respond to any likely co-ordinated strategy embarked upon by the merging parties.

[201] No evidence of the history of collusion in the soya meal market was presented although this seems to have been a concern of the Commission.

[202] We see thus that the evidence obtained in the course of the Commission's investigation and from the witnesses who testified at the Tribunal does not support the Commission's theory of post-merger coordination. On the contrary, the evidence thus far supports the likelihood that were the merger parties to engage in such co-ordination they would not be able to sustain it at all or for any significant period of time.

[203] In our view, the Commission, while being concerned about a JV between competitors as any competition authority would, has failed to show that the proposed transaction will increase the likelihood of coordination; that coordination would be feasible; and that there is an incentive on the part of either Seaboard or Willowton to act collusively or in a coordinated manner.

[204] Therefore, we find that the Commission has not shown that the proposed transaction is likely to result in a substantial lessening or prevention of competition, in order to justify a prohibition.

[205] While we find that the Commission's evidence was not convincing in showing how the proposed transaction would give the merging parties access to information which would allow them to coordinate, we accepted the conditions tendered by the merging parties in good faith regulating, *among others*, the exchange of confidential and competitively sensitive information between them. We discuss this in the remedies section below

PUBLIC INTEREST

Employment

[206] The merging parties have provided an unequivocal statement that the proposed transaction will not result in any retrenchments in South Africa.¹⁹⁶ The merging parties also submitted that the second part of the transaction, being the acquisition of the Elangeni Oil refinery, is likely to create jobs.¹⁹⁷ During the Commission's investigation no concerns were received from the employee representatives or trade unions.

Effect on a particular industrial sector or region

[207] The Commission approached the assessment of the proposed transaction on the basis of the importance of soya meal to the poultry sector. As an essential input to poultry feed, the cost of soya meal has an impact on the cost of chicken production and the ultimate price of chicken sold to consumers. This is particularly important because poultry is the cheapest of the available proteins, making it a key food item for South African low-income households. Given the importance of soya meal to poultry feed, the Commission considered whether the proposed transaction would have a negative impact on the poultry sector.

[208] There is a policy recognition that a key challenge faced by the poultry sector is the cost of feed, which makes up a large portion of the cost of chicken production.¹⁹⁸ Additionally, reliance on imported feed inputs and the fact that local feed is based on import parity prices ("IPP") have been identified as the two core constraints on competitive local poultry production.¹⁹⁹ As such, the Government in partnership with stakeholders in the poultry sector have developed the Poultry Sector Masterplan to ensure amongst others the increase of the supply of soya bean products to the poultry sector and reduce prices.

¹⁹⁶ Bundle B, Record, page 652.

¹⁹⁷ Bundle B, Record, page 614.

¹⁹⁸ The South African Poultry Sector Master Plan – developed in a partnership between Government and a number of stakeholders in the industry, drawn from poultry farmers, processors, exporters, importers and organised labour. It provides a framework for a determined effort to grow the output (and jobs) in the industry through various measures.

¹⁹⁹ Industrial Policy Action Plan 2018/19 – 2020/21, by the Department of Trade and Industry.

According to the Commission, should the proposed transaction result in an increase in prices of soya meal through coordinated effects, this will have an immediate and negative impact on the poultry sector, and be contrary to the objectives of the Poultry Sector Masterplan.²⁰⁰

[209] This concern could be seen as both a competition concern (higher prices of soya meal) or a public interest concern (impact on a particular industrial region or sector).²⁰¹ Given that the Commission has not shown likely coordinated effects resulting from the proposed transaction, there is no support to the Commission's contention that the proposed transaction is likely to negatively impact the poultry sector.

[210] The proposed transaction also does not raise any other public interest concerns.

REMEDIES

[211] The merging parties argued that the merger ought to be approved unconditionally. However, they had tendered conditions in the event that the Tribunal found these to be necessary

[212] We are alive to the reality that the acquiring firms are two competitors that will have an interest in a JV in the same market in which they continue to compete namely soya meal. In such instances, competition authorities are obliged to act with caution as it is recognised by competition authorities across the world that JVs may in certain instances have the effect of chilling competition between the partners in a JV.²⁰² This issue was canvassed with the merging parties during the hearing who accepted this proposition²⁰³ and offered up a range of conditions.

²⁰⁰ Bundle A, Commission's Recommendation, page 122.

²⁰¹ Section 12A(3)(a).

²⁰² OECD Policy Roundtable (2000), Competition Issues in Joint Ventures [DAFFE/CLP (2000), pages 9 – 10.

²⁰³ Transcript (6 August 2021), page 1026 line 7 – page 1029 line 14.

[213] Acting prudently, we accepted, albeit with some amendments, the conditions willingly tendered by the merging parties.

[214] The conditions initially tendered by the merging parties included confidentiality obligations to prevent the exchange or sharing of competitively sensitive information between the merging parties, [REDACTED]

[215] The Commission in commenting on the tendered conditions still maintained that the proposed conditions would not effectively address the harm that would result from the merger and prevent a substantial lessening of competition between the competing firms. The Commission submitted that the weakness of the proposed conditions lies in the structural conditions which would effectively amount to market division in contravention of section 4(1)(b)(ii) of the Act; in the information exchange provisions which only focus on prices and customers and as such, do not prevent the discussion of strategy in respect of the RSP business; and in the lack of a suitable provision to prevent cross directorship.²⁰⁴

[216] We agreed with the Commission's concern regarding the structural undertakings and did not impose a structural condition that allocates products amongst competitors the duration of which is unknown, and which could lead to unintended consequences.

[217] We however accepted the tendered confidentiality obligations. Although the concern identified is in respect of soya meal (which is the market in which the merging parties currently compete), we extended the confidentiality obligations to also apply to soya hulls and crude soya oil as the merging parties contemplate that they might compete in all three products in future.

²⁰⁴ Commission's letter to the Tribunal, dated 24 August 2021.

[218] As the Commission could not put up a case to support the theory of harm of coordination, we do not find it necessary to include a condition to prevent cross directorship. We are satisfied with the condition that Seaboard would not appoint a director involved in the sales activities of Seaboard to the board of RSP.

[219] The conditions also require notification of the said conditions to the directors and employees of the respective parties. The merging parties have also undertaken to adopt policies to ensure compliance with the conditions, and programmes to promote compliance with the Competition Act.

MERGING PARTIES' APPLICATION TO COMPEL

[220] We turn now to consider the procedural issue of discovery applications that were heard prior to the hearing of the main matter.

[221] Before the commencement of the hearing of the matter, both the Commission and the merging parties brought an application to compel the production of documents.

[222] In relation to the Commission's application for the merging parties' marketing and pricing documents of the merging parties, the Tribunal dealt with this in accordance with the established principle of relevance for merger proceedings. There is accordingly no need for us to deal with this application any further.

[223] The merging parties' application to compel was unusual in that it sought discovery of various of the Commission's internal documents. The documents sought included:

223.1. the draft report by the Commission team investigating the merger and submitted to the Executive Committee for discussion on 10 November 2020;

223.2. minutes of the Executive Committee Meeting of 10 November 2020 relating to the consideration of the merger and/or draft report;

223.3. all documents reflecting the feedback from the Executive Committee following the meeting of 10 November 2020;

- 223.4. all documents reflecting the reasons at the time for not accepting the remedies proposed by the merging parties in November 2020;
- 223.5. the draft report by the Commission team investigating the merger and submitted to the Executive Committee for discussion on 2 March 2021;
- 223.6. minutes of the Executive Committee Meeting of 2 March 2021 relating to the consideration of the merger and/or draft report; and
- 223.7. documents reflecting the feedback from the Executive Committee following the meeting of 2 March 2021.

[224] The merging parties' reasons for seeking these documents was a concern that in prohibiting the merger the Commission had taken into account irrelevant considerations and had placed an inordinate emphasis on the "*familial relationships*" between the shareholders of Willowton and other firms that are active in the soya meal, sunflower meal and edible oils market.²⁰⁵

[225] The merging parties furthermore were of the view that the deliberations of the Commission's Executive Committee and ultimate conclusions were driven by the irrelevant consideration that Willowton was a respondent in a cartel investigation initiated by the Commission in December 2016. The merging parties contend that the Commission may have been "*influenced by the inappropriate and unfounded suspicion that Willowton has been engaged in cartel conduct.*"²⁰⁶

[226] In their view the Commission had not produced any evidence to support its claim that Willowton has been involved in collusion and was biased in its assessment of the merger.

[227] The Commission opposed the application to compel on three grounds, namely the documents sought constitute restricted information in terms of rule 14(1)(d)(i) and (ii) of the Rules for the Conduct of Proceedings in the Competition

²⁰⁵ Founding Affidavit, para 4.21.

²⁰⁶ Founding Affidavit, para 4.18.

Commission (“Commission rules”), contain legally privileged information, and are not relevant and admissible in the Tribunal’s large merger proceedings.²⁰⁷

Evaluation

[228] Before turning to consider the merging parties concern of bias we highlight here that the Commission is *obliged* under section 12A to have regard to a number of relevant factors in its consideration of whether a merger is likely to significantly lessen or prevent competition in the market.²⁰⁸ These include factors such as the history of collusion in the relevant market, the extent of ownership by a party to the merger in another firm or other firms in related markets;²⁰⁹ and the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors.²¹⁰

[229] The merging parties’ case essentially turns on the allegation that the Commission has acted with bias in its consideration of the merger.

[230] Even if we were to accept for arguments’ sake that there might have been some bias on the part of the Commission in its assessment, we show below that there are sufficient checks and balances in the large merger framework of the Act to alleviate any concerns of real or perceived bias on the part of the Commission.

[231] Sections 13A(3), 14A and 16(2) and 12A together provide that a large merger may not be implemented until such time as the Tribunal has approved it. Unlike in intermediate mergers, the Commission’s recommendation in large mergers, while being of significant importance, retains its status as a recommendation and not a final decision. The Commission’s recommendation is then vigorously tested in Tribunal merger proceedings, especially so in contested proceedings where the Commission has recommended a prohibition. In Tribunal proceedings the evidence of witnesses is tested through a process of cross-examination by the other side and by the Tribunal itself through its inquisitorial powers. Hence

²⁰⁷ Commission’s Answering Affidavit, paras 18, 19, 26 and 27.

²⁰⁸ Section 12A(2)(c).

²⁰⁹ Section 12A(2)(i).

²¹⁰ Section 12A(2)(j).

new evidence may come to light or the same evidence may be cast in a different light.

[232] In this process the Tribunal will consider the totality of all the evidence and if the evidence does not support the Commission's views the Tribunal will not accept the Commission's recommendation to prohibit.²¹¹

[233] Indeed, it has happened on occasion that the Tribunal has differed with the Commission's views and conditionally approved a merger which the Commission has recommended to be prohibited. In other instances, the Tribunal has agreed with the recommendation of the Commission to prohibit on the basis of the evidence put up in its proceedings.

[234] It has also happened that during the course of merger proceedings the Commission has obtained further information from witnesses or had an opportunity to consider evidence in a different light, causing it to change its recommendation during the course of Tribunal proceedings.²¹²

[235] Notwithstanding the debate between the parties on whether the documents were protected by Commission rule 14 or were legally privileged, in our view the overarching principle for determining whether documents sought by an applicant ought to be discovered is whether the documents are relevant to the main proceedings.²¹³

[236] In *Jacobus*, the Tribunal held that it is not enough for an applicant to merely allege that the documents it seeks are relevant. An applicant must fully make out a case as to why the documents sought are relevant to the dispute.²¹⁴ It is

²¹¹ *Senwesbel Limited & Senwes Limited and Suidwes Holdings (Pty) Ltd*, Case No.: LM001Apr20.

²¹² *Sasol Limited, Engen Limited, Petronas International Corporation Limited and Sasol Oil (Pty) Ltd* Case No: 101/LM/Dec04, para 12.

See also, *British American Tobacco Holdings South Africa (Pty) Ltd and Twisp (Pty) Ltd*, Case No.: LM262Jan18; *Senwesbel Limited & Senwes Limited and Suidwes Holdings (Pty) Ltd*, Case No.: LM001Apr20.

²¹³ *Competition Commission v Sasol Chemical Industries Ltd* (48/CR/Aug10), paras 35, 43,45 and 48.

²¹⁴ *Jacobus Petrus Hendrik Du Plessis and Another v Linpac Plastics Ltd (UK) and Others* (CRH126Nov11/DSC091Jun16), paras 18-20.

for the Tribunal to determine the scope and breadth of discovery in accordance with principles of relevance to ensure a fair and effective hearing for litigants.

[237] In *Industrial Development Corporation of South Africa Ltd and Anglo-American Holdings Ltd (“IDC/Anglo American”)*,²¹⁵ the Tribunal noted that documents would only be relevant if they relate either to the factors set out in section 12A or if they have a bearing on the Tribunal’s jurisdiction to hear the merger.²¹⁶ In this case, the Tribunal found that the applicant had failed to persuade it that the documents sought to be produced (the advisory opinion of the Commission and all minutes of meetings; internal memoranda and discussion notes relating to the advisory opinion) were “*necessary for the purposes of the hearing*” and failed to prove that the documents were relevant in the determination of the merger.²¹⁷ Here too we find that the merging parties failed to meet the relevance threshold. They have failed to show that the documents would be relevant and would take the Tribunal’s consideration of the merger any further.

[238] In our view the merging parties failed to establish how the production of internal Commission documents, even if they did indicate bias, would have any influence on the outcome of the merger in contested Tribunal proceedings where the Commission’s recommendation and the evidence it puts up is vigorously tested. Ultimately if the Commission is unable to put up the evidence to support its recommendation for prohibition it will be unable to persuade the Tribunal.

²¹⁵ Case No.: 46/LM/Jun02.

²¹⁶ *Ibid*, page 5.

²¹⁷ *Ibid*, page 9.

[239] We, accordingly, dismissed the merging parties' application to compel further and better discovery.

Signed by: Yasmin Tayob Carrim
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Ms Yasmin Carrim

29 October 2021

Date

Mr AW Wessels and Mr. H Cheadle concurring.

Tribunal case managers: Duduetsang Mogapi and Mpumelelo Tshabalala

Tribunal economist: Junior Khumalo

For the merging parties: Adv Bhana SC, Adv Gotz and Adv Kessery instructed by Vani Chetty Competition Law (Pty) Ltd

For the Commission: Candice Slump, Ipeleng Selaledi, Bukhosibakhe Majenge, Jabulani Ngobeni and Luke Rennie