



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.:IM094Jul17

In the matter between:

Greif International Holding B.V.

First Applicant

Rheem South Africa (Pty) Ltd

Second Applicant

And

The Competition Commission of South Africa

Respondent

In re the Intermediate Merger between:

Greif International Holding B.V.

Primary Acquiring Firm

And

Rheem South Africa (Pty) Ltd

Primary Target Firm

Panel : Norman Manoim (Presiding Member)
: Enver Daniels (Tribunal Member)
: Imraan Valodia (Tribunal Member)

Heard on : 7, 9, 12 and 20 February 2018; 18 and 20 April 2018;
05 October 2018 and 23 January 2019.

Order issued on : 31 January 2019

Reasons issued on : 21 May 2019

Reasons for Decision

Prohibition

- [1] On 31 January 2019, the Competition Tribunal ("Tribunal") prohibited the proposed acquisition by Greif International Holding BV of Rheem South Africa (Pty) Ltd ("Rheem").
- [2] This merger constituted a merger to near monopoly as Greif and Rheem are the two largest manufacturers and suppliers of large steel drums ("LSDs") in South Africa.
- [3] The reasons for prohibiting the proposed transaction follow.

Background

- [4] On 17 March 2017, the Competition Commission ("Commission") received a notice of an intermediate merger between Greif and Rheem. The proposed merger had previously been notified to the Commission and prohibited in 2004. In that decision the Commission had found that Greif and Rheem were the only manufacturers of large steel drums in the KwaZulu-Natal and Gauteng regions. In addition, it had found that there was limited substitutability between LSDs and other products in the market and that it was likely that post-merger the merged entity would be able to unilaterally increase prices. In the current transaction, the concerns of the Commission are largely the same.
- [5] The Commission assessed the activities of the merging parties and found that they overlapped in respect of the manufacture and sale of steel drums (36 – 235 litres); steel pails (10 – 25 litres) and knock down drums (KDDs). However, the Commission chose to primarily focus on the overlap in respect of LSDs as this constituted the largest proportion of the merging parties' business. LSDs are used in a variety of industrial applications but is used primarily in three industrial sectors of the chemical industry: Petrochemicals and lubricants (P&L sector); Speciality chemicals (SC sector); Paint and paint solvents (P&PS sector). Both the merging parties and the Commission focused their attention on these three sectors as these represented roughly 90% of each of the merging parties 2015 volumes.

- [6] In the market for LSDs, the Commission found the merging parties would, post-merger, enjoy market shares of approximately 88% in the Gauteng region and almost 100% in the KwaZulu-Natal region, based on 2016 sales volumes. In the national market, the merged entity' estimated market share was 90%. The Commission submitted that the transaction would effectively be a merger to monopoly.
- [7] In addition to the finding of high market shares, the Commission also found that barriers to entry were high, with the main barriers to entry being capital cost, experience in the manufacturing process and skills and knowledge.
- [8] Furthermore, countervailing power of customers would also be removed post-merger given that there would be no viable alternative suppliers of LSDs in the market and only limited substitutability between LSDs and other packaging products, making it difficult for customers to threaten to switch. Customers also indicated to the Commission that importing of LSDs was not viable.
- [9] In respect of the public interest, the Commission found that the proposed merger would have a negative effect on employment as well as the ability of small business or firms controlled or owned by historically disadvantaged individuals to become competitive.
- [10] In order to allay the concerns of the Commission, the merging parties proposed a set of conditions related to pricing, divestiture and investment. The merging parties proposed that for a period of 2 years there would be no increase in prices for customers in SC and P&PS sectors. In addition, they committed not to price discriminate between customers by reason of application or otherwise for a period of 5 years. The merging parties further committed to also divest of its pail and cans business. Finally, in terms of investment, the merging parties proposed to invest in the merged entity and expand into other packaging products.
- [11] The Commission considered the proposed remedies and was of the view that these conditions would not be able to address its concerns. More specifically the Commission indicated that the pricing condition would not address the permanent structural change arising from the merger i.e. this was a merger to

near monopoly. Secondly, that the Commission's concerns related to LSDs and not pails and cans, as such the divestiture of the pail and cans business would not address the concerns of this merger. Finally, the decision to invest was not merger specific and Greif did not need the merger to undertake the investments proposed.

[12] It was for the above reasons that the Commission on 19 June 2017 prohibited the proposed transaction.

[13] On 03 July 2017, the merging parties filed a request for consideration of the proposed merger in terms of section 16(1) of the Competition Act. The basis for this request was that the Commission had erred in its Reasons for Decision. The merging parties submitted that the Commission erred in concluding that the proposed transaction would result in a substantial prevention and lessening of competition in the manufacture and sale of new large steel drums in the KZN and Gauteng provinces. Secondly the merging parties submitted that the merger could be justified on substantial public interest grounds; and finally, that there were remedies that would be able to alleviate the concerns raised by the proposed transaction.

Procedural Background

[14] The factual evidence was heard on 7, 9, 12 and 20 February 2018 and the expert evidence was heard on 18 and 20 April 2018.

[15] The merging parties called two factual witnesses, Mr Reinier Hietink ("Hietink"), the Vice President of Global Key Accounts at Greif, and Mr Lwazi Dhlomo ("Dhlomo"), the Managing Director of Rheem.

[16] The Commission called four factual witnesses:

[16.1] Mr Ishaan Haripersad ("Haripersad"), the Procurement Manager of Fuchs Lubricants in South Africa ("Fuchs");

[16.2] Ms Delray Gierdien ("Gierdien"), the Procurement Specialist at Chevron South Africa Proprietary Limited ("Chevron");

[16.3] Mr Budrudeen Mohamed-Yunus ("Mohamed-Yunus"), the Managing Director of Scott Bader South Africa Proprietary Limited; and

- [16.4] Omesh Harinand ("Harinand"), the Sales and Marketing Manager of Anchor Pail and Drum Reconditioners Proprietary Limited. However, while the factual witness statement of Mr Harinand was relied on by both parties, the Commission ultimately opted not to call Mr Harinand.
- [17] Both the merging parties and the Commission also called expert witnesses, Mr Richard Murgatroyd of RBB Economics ("Murgatroyd") and Dr Liberty Mncube the Commission's Chief Economist respectively.
- [18] Subsequent to the factual and expert witness hearing, the merging parties proposed a Partial Divestiture Remedy, which culminated in a further investigation by the Commission to assess the viability of the Partial Divestiture Remedy. The Commission submitted a Partial Divestiture Report on its findings.
- [19] Following the submission of this report, the merging parties filed an affidavit by Adedayo Olowoniyi of Greif ("Olowoniyi") as well as a witness statement from Arnand Moodley ("Moodley") of Infinity Drums on 1 October 2018, in support of the proposed Partial Divestiture Remedy.
- [20] Following the filing of these documents, the Commission requested further information pertaining to Moodley's witness statement and Olowoniyi's affidavit, the receipt of which was on 3 October 2018.
- [21] On 5 October 2018, the Tribunal heard evidence presented by Olowoniyi and Moodley in respect of the Partial Divestiture Remedy. Closing argument was heard on 23 January 2019.

Parties to the proposed transaction and their activities

Primary acquiring firm

- [22] Greif has a global presence in the industrial packaging sector with operations in more than 40 countries. Greif International Holding BV (Greif) is a company incorporated in accordance with the laws of the Netherlands. Greif is controlled by the Greif Group Inc ("Greif Group"), a company incorporated in accordance with the laws of the United States of America.

- [23] Greif provides industrial packaging and services with a full range of packaging products such as LSDs, large plastic drums ("LPDs"), intermediate bulk containers ("IBCs") and drum closures and accessories (through its Tri-Sure closures business)²⁹ to different application sectors.
- [24] Greif operates in South Africa through its subsidiary Grief South Africa (Pty) Ltd ("Grief SA"). Grief SA is a company incorporated in accordance with the laws of South Africa and is controlled by Greif International Holding BV. Grief SA currently employs a total of 140 people, of which 100 are so called "blue collar" employees and 40 are so called "white collar" employees.
- [25] In South Africa, Grief SA provides large and small steel drums, knock-down drum kits (KDDs) for export to Sub-Saharan African countries and small blow moulded plastic drums. Greif SA manufactures the following products and services to customers in South Africa and Sub-Saharan Africa:
- [25.1] LSDs – 200 to 234 litres, though predominantly 210 litres;
 - [25.2] small steel drums – 42 to 67 litres;
 - [25.3] steel pails – 10 to 25 litres;
 - [25.4] medium/ small blow-moulded plastic drums – 20 to 32 litres;
and
 - [25.5] KDDs for export to Sub-Saharan Africa.
- [26] Greif SA's main production sites are in Vanderbijlpark (Gauteng) and in Mobeni (KwaZulu-Natal). In Vanderbijlpark it primarily produces large and small steel drums and small blow-moulded plastic drums, and also carries out steel de-coiling activities. In Mobeni it primarily produces LSDs and KDDs for export. Approximately 80% of Greif SA's LSD volumes are produced at its Mobeni facility, with the remaining 20% being produced at its Vanderbijlpark facility.
- [27] Greif SA's LSDs are used across a variety of different application sectors in South Africa. However, a large majority of Greif SA's demand for LSDs is derived from three particular application sectors, namely petrochemicals and lubricants ("P&L"); specialty chemicals ("SC"); and paint and paint solvents ("P&PS").

- [28] The P&L application sector accounts for the most significant proportion of Greif SA's LSD sales in South Africa, accounting for [REDACTED] % of its volumes in 2016. The P&L sector includes users of industrial packaging that are active in base oil refining, blending and the distribution of finished product into a wide range of applications, markets and countries.
- [29] The SC application sector is the second most significant sector for Greif SA's LSD sales in South Africa. This sector accounted for [REDACTED] % of its volumes in 2016. This sector includes a broad range of chemical products that is comprised mainly of solvent and glycol-based products.
- [30] The P&PS sector accounted for only [REDACTED] % of Greif SA's volumes of LSDs sold in South Africa in 2016. This sector includes customers active in the supply of liquid and powder coatings (i.e. paints), other protective coatings for a range of materials, and the associated chemicals and solvents required for the application of these products.

Primary target firm

- [31] Rheem is a company incorporated in accordance with the laws of South Africa and is wholly owned and controlled by OD Investments (Pty) Ltd ("ODI").
- [32] ODI is 100% owned and controlled by historically disadvantaged persons within the meaning of the Competition Act 89 of 1998. The shareholders comprise the Oscar Dhlomo Family Trust, the Ventia Dhlomo Family Trust, the Lwazi Dhlomo Family Trust, the Mfundo Dhlomo Family Trust and the Khanyi Dhlomo Family Trust ("collectively referred to as the Dhlomo Family").
- [33] Rheem is a supplier of industrial packaging products, including small, medium and large steel drums, steel pails, steel cans, and KDDs for the export market. Rheem has manufacturing facilities in Prospecton (KwaZulu-Natal), Alrode (Johannesburg) and Cape Town¹. Rheem produces LSDs in its Prospecton and Alrode facilities, and it has a steel de-coiling and cutting facility in Vanderbijlpark. Rheem's production of LSDs is heavily concentrated

¹ Rheem's manufacturing plant for pails and cans is situated in Cape Town. See Dhlomo Witness Statement page 25 of the Factual Witness Bundle.

in KwaZulu-Natal, with [REDACTED] of its LSD volumes being produced at its Prospecton facility, and only [REDACTED] at its Alrode facility in Gauteng.

- [34] As with Greif, the two main application sectors supplied with LSDs by Rheem are the P&L and SC application sectors, which accounted for almost [REDACTED] of Rheem's LSD sales in 2016. However, Rheem's LSD sales are more heavily skewed towards the P&L sector ([REDACTED]%), with a much smaller proportion of Rheem's LSD sales attributable to customers in the SC application sector ([REDACTED]%). The P&PS sector comprises the smallest percentage of Rheem's LSD sales which was approximately [REDACTED] in 2016².

The proposed transaction

- [35] The proposed transaction contemplated the combination of the parties' businesses in the Republic of South Africa ("South Africa") and Sub-Saharan Africa ("SSA") by way of a sale of shares, assets and businesses. Post-merger, Greif would own 70% – 74% and ODI the remaining 20 – 26% of shares in the merged entity (the "Proposed Transaction").
- [36] In addition to the issued shares, ODI would also have significant minority protections, including veto rights over the changing of the main business of the merged firm, dividend policies and accounting policies. ODI would also be entitled to have two non-executive members on the board of the merged firm.
- [37] Outside of South Africa, the proposed transaction would combine all Rheem's businesses in Angola and other SSA countries and Greif's operations in Nigeria and Kenya.
- [38] The scope of the proposed transaction would comprise the parties' existing SSA business and current products and would exclude (i) Greif's Trisure closures business, Greif's Flexible business, Greif's operations in Algeria, Libya, Mauritania, Morocco, Tunisia, Western Sahara and Egypt, small Greif export volumes in conical drums and water bottles from its operations in Europe and (ii) possibly the parties steel de-coiling business activities.

² Merging parties Heads of Argument page 18-19.

Rationale for the proposed transaction

Greif's Rationale

- [39] The merging parties' stated rationale for the proposed transaction was two-fold and related to both empowerment and investment.
- [40] In terms of empowerment, Greif recognized that empowerment was essential to its success in the South African business environment, especially in gaining more volume. Given that Greif's existing empowerment partner had exited its business, Greif required a partnership with a new empowerment partner in order to improve its B-BBEE status.
- [41] However, Hietink submitted that the mere introduction of an empowerment partner would not fully address the commercial challenges facing Greif SA. For Greif SA the merger offered it the opportunity to realize synergies across the production facilities of the merged entity by more efficiently utilizing capacity. The realization of these synergies would enable Greif to further invest in the South African market as well as introduce new product lines for expansion into Africa, which would also have a positive effect on employment. Greif explained that its main reasoning for not investing in South Africa in the last ten years had been because of the decline in demand for steel drums in South Africa.
- [42] The proposed merger thus offered Greif an opportunity to improve its profitability and, thereby, render Greif's South African operations a considerably more attractive destination for investment within the Greif global business. By consolidating and rationalizing volumes between Rheem and Greif SA, Greif SA was of the view that it would likely achieve substantial efficiencies by way of reductions in per-unit fixed costs (as a result of spreading fixed costs over greater volume) as well as reductions in per-unit variable costs. As a result of these cost reductions, Greif SA expected to improve its net margins significantly.

Rheem's rationale

- [43] From ODI's perspective, the proposed merger offered it the opportunity to address a long-term decline in its business as a result of the decline in demand for its LSDs and other products.
- [44] Whilst Rheem implemented numerous cost-cutting measures to address its decline, it submitted that it had reached the point where there were no costs left to cut without closing production lines and retrenching employees. Therefore, absent the merger, Rheem would be forced to immediately embark on a process of rationalizing its production facilities, which would likely result in the retrenchment of over 50 employees, and, if the downward trend experienced by Rheem over the years continued, which it expected would be the case, Rheem submitted that it would likely become loss-making and would exit the market within the next five years.
- [45] Accordingly, the proposed merger would assist ODI in achieving significant ownership and meaningful participation in a new merged entity that would ensure the sustainable presence of Rheem's business in the economy.

Legal framework

- [46] The merging parties requested the Tribunal to consider the merger in terms of section 16(1)(a) of the Act and substitute the decision of the Commission by approving the merger without conditions.
- [47] This request was made on the basis that the Commission erred in its Reasons for Decision. The merging parties submitted that the Commission failed to establish on the evidence before the Tribunal that the proposed merger is likely to give rise to a SLC in the relevant market and even if the Tribunal were to find otherwise, any such SLC would be effectively addressed by the behavioural and structural remedies that have been proposed by Greif.
- [48] The Commission remained of the view that its decision to prohibit the merger was correct and could be relied upon and confirmed by the Tribunal, since only prohibition addressed the adverse effects of the proposed transaction.

[49] The Tribunal therefore had to determine whether or not the merger was likely to substantially prevent or lessen competition in the relevant market and whether the conditions would be sufficient to cure the harm.

[50] The CAC has in *Imerys* confirmed the appropriate legal framework to be followed in mergers where remedies have been tendered. According to the judgement, it is not strictly accurate to conclude that the Commission bears the burden of proving a likely SLC. The Tribunal using its inquisitorial powers can on the basis of the evidence determine whether a likely SLC can be found or not. However, the CAC stated that "if on all the evidence before the Tribunal, a likely SLC cannot be found, the Tribunal must approve the merger unless the public interest override is operative."³.

[51] The CAC went further to explain that where the merger is likely to cause a SLC that there can be two possible outcomes either a prohibition or conditional approval. In such a situation the CAC stated the following:

[40] Where, in the situation just mentioned, the Tribunal is asked to approve the merger with conditions rather than prohibit it, the choice of remedies is in the nature of a discretion. I reject the proposition that the Commission bears the burden of proving that the proposed conditions will not adequately address the likely SLC. The Tribunal has the power to prohibit the merger if it is not satisfied that the conditions will adequately remedy the likely SLC. And regardless of where the onus lies in respect of proposed conditions (if it is accurate to speak of onus at all), I do not think that the Tribunal is obliged to approve a merger just because it finds it more probable than not that the conditions will neutralise the likely SLC..." (own emphasis)

[52] Where there is any uncertainty relating to the conditions as concerns duration and or the nature of the SLC, the CAC is clear that prohibition should be favoured over conditional approval. This is because *"if the merger is conditionally approved and the conditions turn out to be inadequate to neutralise the SLC, the harm cannot be reversed. If, on the other hand, the merger is prohibited and with the passing of time it becomes clear that the*

³ *Imerys South Africa (Pty) Ltd and another v Competition Commission* [2017], CPLR 33 (CAC).

merger will no longer give rise to SLC, the transaction can be renewed." (own emphasis).

[53] It was on this basis that the Tribunal considered the merger. As will be explained in the remedies section below, the Tribunal did utilise its inquisitorial powers by requiring the remedies tendered (although provided late in the day) to be road tested with customers in the relevant market. The Tribunal also had regard to the public interest claims by the merging parties and found that these would not be sufficient to outweigh the anticompetitive effects which would arise from the merger. This is also covered in more detail below.

What were the issues we had to consider in this case?

[54] The issues that we had to consider fell into the following broad categories:

[54.1] The relevant product market and whether it should be limited to LSDs only or whether it should be defined broader to include other forms of industrial packaging such as LPDs, IBCs and/or reconditioned LSDs.

[54.2] Whether the correct counterfactual is indeed the status quo or whether Rheem will exit the market as contended for by the merging parties.

[54.3] Whether the merging parties proposed efficiencies would outweigh any adverse impact on the market as a result of the merger.

[54.4] Whether the proposed transaction positively affects the public interest i.e. employment, and/or the ability of firms controlled or owned by historically disadvantaged individuals ('HDIs') to become competitive.

[54.5] Whether the proposed behavioural and/ or structural remedy adequately addresses any potential anti-competitive effects arising from the merger.

The industrial packaging sector

- [55] There are a range of different kinds of industrial packaging products in South Africa. These include, *inter alia*, new LSDs, reconditioned large steel drums, large plastic drums (LPDs), and intermediate bulk carriers (IBCs).
- [56] Prior to the hearing it was agreed by both the Commission and the merging parties' economists that Greif and Rheem operate in the broad industrial packaging sector which included *inter alia* LSDs, LPDs, IBCs and reconditioned LSDs⁴. However, the economists continued to disagree on what constituted the relevant market.

Large Steel Drums

- [57] LSDs typically refer to cylindrical large steel drums which have a capacity of between 210 and 235 litres. Within this broad category of LSD, there are a number of different types of drums, depending on, for example, the closure, gauge, inner, etc. Different industrial applications require the use of different types of drums.
- [58] There are four main types of new large steel drums: tight-head or open-head and lacquered or plain. Tight-head drums have sealed tops with two bungs to store liquid products. Open-head drums have a removable lid that makes them a preferred option for semiliquids and dry products. Drums can have a lacquered inside if the products are sensitive to plain steel.
- [59] The Commission submitted that a key aspect of the drums is the thickness of gauge of the steel. The thicker the gauge the more expensive is the drum, but a better option in the case of hazardous materials. On the other hand, thinner gauge drums are not suitable for reconditioning meaning that it would not be able to be resold or reused. The choice of gauge is therefore typically made based on a cost-benefit analysis, and the application for which the drum will be used.
- [60] There are various advantages and disadvantages associated with LSDs. The main advantages associated with LSDs are their strength, easy storage, being able to withstand high temperatures while being non-flammable and

⁴ Expert Minute dated 31 January 2017.

that they may be the only type of packaging allowed for certain dangerous products. These characteristics have rendered large steel drums the preferred option for petrochemicals such as gear oils, greases and refrigeration oils. Steel drums are also used for solvent-based products, especially in the paints and paint-solvents sector.

[61] It is important when transporting these dangerous goods that they comply with certain minimum standards. According to Hietink when their customers transport these goods, the LSD will contain certain UN markings on it indicating whether their product can be stored and packaged in the LSD. All products stored in LSDs must comply with the United Nations Regulations ("UN Regulations") for packaging non-dangerous and dangerous goods in the packaging groups I, II and III (with UN III being the category for the least dangerous goods⁵).

[62] The main drawbacks of LSDs are that they are heavy and potentially corrosive.

[63] In South Africa, these drums are supplied by Greif and Rheem as well as smaller suppliers such as Kunene (also known as Bona Once Bona Twice) located in Springs and Anchor Pail and Drum (also known as Infinity Drums) located in KwaZulu-Natal.

Reconditioned steel drums

[64] Reconditioned LSDs are LSDs which have been used one or more times previously but have been reconditioned in order to be suitable for reuse. According to UN Model Regulations, reconditioned steel drums are referred to as: "*(1) [previously used steel drums which] are cleaned to original materials of construction, with all former contents, internal and external corrosion, and external coatings and labels removed; and (2) are restored to original shape and contour*"⁶. Therefore, the availability and continuity of reconditioned drums is directly linked to the supply of large steel drums.

⁵ Transcript page 28 lines 18-22 and page 29 lines 1-9. Witness Statement of Hietink, Witness Statement Bundle page 3 paragraph 2.2.3.

⁶ Commission expert report, internal page number 16 paragraph 47.

- [65] In order to be re-used, the interior of the drums must be thoroughly cleaned i.e. either the interior of the drums must be chemically cleaned and the exterior sand-blasted; or drums should be placed in a furnace in order to burn existing residue. Large steel drums can be reconditioned up to eight times.
- [66] While in general, reconditioned drums are considerably cheaper than new large steel drums, they are less aesthetically appealing given that they may have imperfections from previous uses as well as the sand-blasting process which makes the exterior rough and incompatible with the painting on of company-specific branding. As such reconditioned drum suppliers typically only supply a standard painted drum and do not provide customer branding capabilities for the drum. This can often make reconditioned drums non-preferred by the customer especially in cases where brand image of the product is crucial. Most importantly however, despite an exhaustive cleaning process, reconditioned drums may still contain traces of past products or of the cleaning process itself, and as such both the exterior and interior quality of reconditioned drums varies. This means that reconditioned drums are not viable for the transportation of all types of products such as for example human food stuffs as well as hazardous materials. Moreover, a number of large multinationals have inhouse standards which require that their drums must be branded.
- [67] Firms that recondition large steel drums in South Africa include for example Greif, Rheem, Anchor Pail and Drum, Kunene Drums and Peninsula Drums amongst others.

Large plastic drums

- [68] Large plastic drums come in shapes and capacities similar to those of large steel drums but are manufactured using plastic rather than steel. Pragmatically, however, due to differences in the properties of plastic, the dimensions of plastic drums are not the same as those of their equivalent capacity large steel drums. This makes the switch from steel to plastic drums expensive, as it can require investment if the handling is automated by machines.

- [69] Plastic drums, like steel drums, can also be cleaned and reused. They are lighter in weight than steel drums, have a higher degree of internal cleanness in their first use and may have a longer life span. In addition, they are also suitable for water-based products such as products within the paints and paints solvent sector. However, they are not appropriate for corrosive and solvent chemicals. Furthermore, plastic drums are not an alternative if the product is heated prior to being filled into the drum, or if the product is susceptible to heating, as plastic drums can only stand temperatures up to 65°C without losing their properties.
- [70] Warehouse and transporters space also cannot be maximized when using plastic drums. This is because unlike steel drums, the design of plastic drums does not allow for plastic drums to be stacked high⁷.
- [71] Finally, plastic drums have static properties meaning that unless the plastic drum is rendered antistatic, no flammable products can be placed in these drums as they are a fire risk⁸.
- [72] In terms of suppliers in South Africa, these include Peninsula Drums, Polydrum and Megapak.

Intermediate Bulk Carriers (“IBC”)

- [73] IBCs are a large type of industrial container whose capacity corresponds to five times that of a regular large steel drum, typically around 1000L. They can be new or reused and can have the interior made of plastic or steel. Generally, they are used for liquid or granulated substances. IBC's have several advantages over LSDs. Using IBCs instead of LSDs reduces shipping, handling and storage costs. However, they are only suitable for large quantities making IBCs unsuitable for small shipments. Moreover, IBCs may not be used for storage of hazardous products, so its application is restricted to certain products only. IBCs are therefore not an appealing solution for all end users, especially for applications that only require small quantities of the product at a time. In addition, in regions or applications where manual handling is involved, it is simply not plausible to use IBCs.

⁷ Witness Statement of Haripasad, Witness statement bundle page 73 paragraph 12.4.

⁸ Transcript page 618-619.

- [74] Suppliers of IBCs in South Africa include for example Anchor Pail and Drum, Nampak, Paradigm Packaging and Peninsula amongst others.

Relevant market

Relevant product market

- [75] In their request for consideration the merging parties submitted that the Commission had erred in its definition of the relevant product market. The merging parties submitted that the relevant product market was broader than the market for LSDs and included other packaging products such as reconditioned steel drums, LPDs and IBCs. They submitted that the Commission had failed to take into account the competitive constraint exercised by these products, the fact that customers had negotiated their purchases by reference to these alternatives and that no visible strategy existed by which suppliers were able to price discriminate by application. In other words, in the view of the merging parties, the merged entity will be competitively constrained by purchasers of LSDs shifting to these other products if the merged entity increased the price of LSDs.
- [76] The economists undertook two different approaches in assessing market definition. While Murgatroyd opted for a critical loss analysis, Mncube relied on the Gross Upward Pricing Pressure Index ("GUPPI"). We consider each of these analyses in turn.

Critical loss assessment

- [77] Critical loss analysis is used to measure the incentive of the hypothetical monopolist to impose a small but significant increase in price by an amount of for example between 5-10% (the SNNIP test). As Murgatroyd explained⁹:

"An important aspect of the SSNIP test is that it does not require that the hypothetical monopolist over a particular candidate market must lose all, or even most, of its sales following a 5-10% price increase in order for the relevant market to be broader than the candidate market considered. Rather, the hypothetical monopolist must simply lose sufficient sales to render a price

⁹ Merging parties expert witness statement paragraph 86.

increase of 5-10% unprofitable. This is therefore a factor that must always be borne in mind when assessing the scope of relevant markets, or for that matter when assessing whether a merged firm will be in a position to profitably raise prices post-merger." (own emphasis)

- [78] In a critical loss analysis, there are two figures that need to be compared i.e. the critical loss¹⁰ and the actual loss¹¹. The critical loss is calculated to equal the value of the SNNIP (often taken to be 5%) divided by the sum of the price-cost margin and the value of the SNNIP. The critical loss is then compared to the actual loss. There can be many reasons for actual loss which includes for example in this case, loss to other suppliers of LSDs or loss to other suppliers of industrial packaging materials such as LPDs, IBCs and reconditioned drums. If the actual loss exceeds the critical loss, the post-merger price increase would be unprofitable.
- [79] In his analysis Murgatroyd calculated the level of critical loss across all of the merging parties' sales of LSDs. Using a price increase of 5%, Murgatroyd calculated that such a price increase would become unprofitable if it gave rise to a reduction in LSD sales volumes of between 17% (the lower bound) and 25% (the upper bound). According to Murgatroyd, the critical loss level shown above indicated that the actual loss required in order to render a post-merger price increase unprofitable was modest.
- [80] In calculating the actual loss, Murgatroyd explained that such an analysis was not an exact science and that it was not important to know the precise level of the actual loss. Instead he submitted that it was more important to know whether the actual loss was higher or lower than the critical loss level. Murgatroyd explained that an actual loss assessment was always imprecise given the inherently hypothetical nature of such an enquiry as well as the unavoidable data limitations in cases. In the current matter, he submitted that the analysis was as detailed as possible based on the available data.

¹⁰ The critical loss is defined as the proportion of sales that the merged entity would need to lose in order to render the price increase unprofitable.

¹¹ The actual loss is defined as the proportion of the merged entity's sales that in fact would be lost following such a strategy.

[81] As mentioned above, there are a range of potential sources of actual loss. Whilst it was common cause in this matter that there were alternative suppliers of LSDs in the market such as Kunene Drums, Anchor Pail and Drums and Peninsula Drums, the parties accepted that these competitors would not alone be enough to constrain the merged entity effectively. Murgatroyd however submitted that customers would be able to switch at least a portion of their LSD requirements to these suppliers in the event of a price increase. It was also common cause that certain LSD demand could be switched to alternative forms of industrial packaging.

[82] The relevant enquiry considered by Murgatroyd was therefore to determine both the functional limitations of customers and the switching costs they would incur in order to assess actual loss.

Can customers switch from LSDs to alternative industrial packaging products?

[83] Murgatroyd conducted a separate analysis of functional substitution for each of the three sectors.

P&L sector

[84] In conducting his analysis of this particular sector, Murgatroyd concentrated on the evidence from Fuchs, Chevron, Hietink and other P&L customers. One of the main concerns of these customers was with regards to the substitutability between LSDs and LPDs given that LPDs were subject to temperature limitations.

[85] Murgatroyd therefore tested the extent to which the temperature limitations of plastic drums referred to earlier would have an effect on switching from LSDs to plastic containers such as LPDs and IBCs. While Haripersad had indicated that he had no personal knowledge of the issue of temperature limitations, he submitted that he had been advised that the plastic drum would soften at temperatures above 60 degrees. Hietink refuted this claim, indicating that Greif's plastic containers could withstand temperatures of up to 80 degrees.

[86] Murgatroyd however calculated on the basis of the filling temperatures provided by Haripasad of the various products produced by Fuch's that over

75% of Fuch's LSD volumes could conceivably be packaged in plastic containers. On Fuch's calculations this estimate was approximately 50%.

[87] In terms of Chevron, Murgatroyd calculated that approximately 70% of its products currently packaged in LSDs could conceivably also be packaged in IBCs. Murgatroyd further submitted that there was no functional reason that Chevron could not switch its product from LSDs to plastic containers given that [REDACTED]

[88] Hietink also testified that [REDACTED] which comprises [REDACTED] of Greif's SA's sales in 2016, were also currently procuring volumes of LPDs from Greif in India. He submitted that there was nothing particularly different between the activities of customers in this sector which would render a switch by some customers and not by others.

SC sector

[89] It was common cause that the SC sector accounted for approximately [REDACTED] of Greif SA's total LSD sales with their major customers being [REDACTED]. In terms of Rheem this sector accounted for [REDACTED] % of Rheem's total LSD sales with the only significant SC customers being [REDACTED]

[90] The evidence given by the customers in the SC sector suggested that certain speciality chemicals cannot be packaged in LPDs as they do not have anti-static properties and pose a fire risk for flammable products. However, IBCs can be produced with anti-static properties and therefore can be used for such products. Furthermore, LPDs can also be made anti-static, however the fluorination technology is only available for small plastic drums and not LPDs in the South African domestic market. According to evidence given by Hietink, several of Greif SA's customers including [REDACTED] have shifted volumes from LSDs to LPDs and/or IBCs.

[91] According to the merging parties, there was also evidence that reconditioned LSDs could be used as alternative packaging for new LSDs in the SC sector.

P&PS sector

- [92] The P&PS sector accounts for only 1% of Greif SA's total LSD volumes and approximately 7% of Rheem's total LSD volumes. Hietink explained that within the P&PS sector water-based paints had historically been transported and stored in plastic packaging, while solvent based paints had historically been transported in steel containers because they would degrade the plastic. However, he submitted that there was now a fluorination process that could be used to treat plastic drums in order to render them resistant to solvent damage. The merging parties indicated that reconditioned LSDs were also widely accepted and used as alternatives to new LSDs in the P&PS sector.

What is the cost to switch to alternative products?

LSDs to LPDs switching costs

- [93] In order to calculate the direct cost of switching from LSDs to LPDs Murgatroyd used the mid-point of the LSD prices charged by Greif and Rheem and found that Nampak's prices for LPDs were currently in line with those for LSDs. More specifically he found that Nampak's LPD prices lay between the prices charged by the two merging parties for LSDs. Murgatroyd calculated that on the basis of these figures, that if prices were to increase by 5% that it would be cheaper to use LPDs rather than LSDs.
- [94] In terms of the indirect costs to switch from LSDs to LPDs, Murgatroyd found that these would also be immaterial. For this he relied on the evidence of Nampak which stated¹², "*plastic and steel drums are interchangeable on the lines*". This was also confirmed by Hietink who submitted that there was no difference between filling LPDs and LSDs on the lines. With respect to storage and handling, Murgatroyd noted that both LSDs and LPDs had their advantages and disadvantages. For instance, while LPDs were lighter and could more easily be stored outside thereby saving on warehouse space, LSDs could be stacked higher than LPDs allowing for saving in warehousing and also transportation costs.

¹² See Supplementary record page 3015

are not sufficiently large to deter that switching because there has clearly been switching.”¹⁴

- [99] In terms of IBC handling costs, Murgatroyd submitted that LSD volumes supplied to customers of Fuchs, Scott Bader and Chevron that were already sourcing product in IBCs had the necessary handling facilities for IBCs.

The merging parties’ conclusions on the critical loss analysis

- [100] Based on the analysis above, Murgatroyd was of the view that neither the functionality nor switching costs appeared to substantially limit the switching of LSD volumes to other industrial packaging such as LPDs or IBCs in the event that the merged entity did increase prices.
- [101] Furthermore, based on the submissions of customers who were not impeded by functionality limitations, they would easily switch as they appeared to be highly price sensitive.
- [102] The merging parties would need to lose between 17-25% of their volumes in order to render a price increase unprofitable. However, Murgatroyd submitted that it was likely that they would lose substantially greater volumes should they increase price, specifically to LSD suppliers and suppliers of alternative packaging materials.
- [103] Therefore, based on this analysis the merging parties were of the view that the relevant product market was not limited to the manufacture and supply of LSDs and that the merger was unlikely to give rise to an SLC in the LSD sector of the market.

Mncube’s criticism of Murgatroyd’s critical loss analysis

- [104] The Commission criticized Murgatroyd’s critical loss analysis for a number of reasons. Firstly, they submitted that such an analysis was anecdotal qualitative evidence and that there was no quantitative evidence of the actual loss that would occur. In their view Murgatroyd did not estimate the actual loss but attempted to draw inferences about the relevant market based only on the critical loss.

¹⁴ Transcript 18 April 2018, page 35 lines 20-22.

- [105] Furthermore, the Commission argued that Murgatroyd's analysis failed to take into account other factors that may inhibit customer switching such as product characteristics and intended applications; customer preferences; characteristics of packaging for the transportation of hazardous substance; and warehousing and stacking considerations.
- [106] The Commission engaged with the customers of the merging parties in order to determine their views on the propensity to purchase LSDs in each of the sectors identified. The Commission found that although there is some shift towards the use of LPDs and IBCs by participants in the P&L sector, such movement was subject to constraints, which renders any packaging (LPDs and IBCs) other than LSDs a weak substitute, this sentiment was echoed by several customers. The evidence from Haripasad supported this by highlighting the limitation posed by certain product temperatures, stacking issues, handling of LPDs, transportation, capital investment in lifting equipment for the IBCs and risk of fire present in the chemical industry.
- [107] Similar to the Commission's finding in the P&L sector, the Commission found that there was some movement towards the use of LPDs and IBCs by customers in the SC sector. However, the movement from LSDs towards IBCs and LPDs was subject to constraints rendering plastic drums an undesirable alternative or option in this application sector. Mohamed-Yunus who is one of the largest customers of the merging parties attested to the fact that LPDs not being anti-static is important when making packaging decisions.
- [108] When asked whether Scott Bader provided any of its product in large plastic drums, he responded¹⁵:
- "MR MOHAMED-YUNUS: Not in large plastic drums, no.*
- ADV LE ROUX: And why is that?*
- MR MOHAMED-YUNUS: Because there are a few issues, one of which is that these plastic drums have to be antistatic, because all of the chemicals that Scott Bader manufactures are flammable and as such with it being plastic and*

¹⁵ Transcript 20 February 2018, page 618 lines 16-22 and page 619 lines 1-3.

non-antistatic, there's a risk, a fire risk as a result of static electricity discharge. So, as such we don't use plastic drums."

- [109] Mohamed-Yunus also indicated other constraints which hinder customers from switching such as stackability, the capital investment required amongst other things. The Commission, considering the evidence presented, categorized the substitutability between LSDs and LPDs as weak due to the constraints facing the customers in the SC sector.
- [110] The Commission under the P&PS sector firstly highlighted that the most important consideration by P&PS sector customers when it comes to packaging material was whether the paint is water or solvent-based. The consideration was made because while water-based products can be stored and transported in plastic packaging, solvent-based products are stored in steel packaging and have historically degraded plastic packaging. Although a fluorination process can now be used to treat LPDs in order to prevent this degradation, this process is currently not available in South Africa. Other constraints in the P&PS sector were identified such as product characteristics, internal standards, end customer requirements, warehousing and stacking considerations. The Commission therefore deemed LPDs and IBCs weak substitutes for LSDs, particularly when assessing the type of packaging to utilize in respect of the solvent based paints.

Gross Upward Pricing Pressure Index (GUPPI) Analysis

- [111] As previously mentioned, Mncube relied on the GUPPI for his assessment of market definition. Rather than focusing on market definition, the GUPPI aimed to directly answer the question of whether the merged firm is likely to increase prices post-merger.
- [112] The GUPPI expresses the price change as a percentage of pre-merger prices by connecting the lost sales of one firm to the increase in revenues of the other. It does not consider the merger synergies nor the competitors' response to the merger. In addition, it does not take into consideration the downward pricing pressure created by merger specific cost savings and/or factors that may enhance the upward pricing pressure. Furthermore, it does not take into account supply responses that may mitigate the upward pricing

pressure such as the potential for entry and repositioning by non-merging firms.

[113] Due to data limitations, Mncube considered four scenarios in an attempt to define the relevant market:

[113.1] Scenario one: the market comprises all industrial packaging products, which are considered as substitutes;

[113.2] Scenario two: this is identical to scenario one but using annual data;

[113.3] Scenario three: the market comprises all firms producing large steel drums, which are substitutes and uses annual data; and

[113.4] Scenario four: which is identical to scenario three but considers only Greif and Rheem as participants in the market given that they are the largest producers of LSDs using monthly data.

[114] Mncube found that the average GUPPI was above 10% meaning that the merged firm would find it profitable to increase prices by 5 to 10% further confirming that large steel drums are considered to be in a market by themselves. While Mncube recognized that the above analysis cannot on its own prove that a merger will lead to a SLC, it was still nevertheless a useful screening tool to illustrate that the merging parties would increase prices post-merger.

Murgatroyd's criticism of Mncube's GUPPI analysis

[115] Murgatroyd disagreed with Mncube's use of the GUPPI analysis. He stated that the analysis did not assist in addressing the likelihood and extent of substitution to other forms of industrial packaging in the event of a post-merger price increase.

[116] Secondly, while Murgatroyd acknowledged that Mncube had recognized that the GUPPI is a first filter test, he reiterated that it cannot be used as dispositive evidence of the likely effects of the merger.

[117] He concluded that the pricing analysis conducted by Mncube was not a sound basis for concluding that the proposed merger is likely to result in negative pricing effects.

Tribunal view

[118] The use of critical loss analysis in market definition is not novel. In this matter however we were faced with how much reliance to place on this analysis given that the merging parties were unable to quantify the actual loss. Mncube also strongly criticized this fact.

[119] According to Farrel and Shapiro (2008), *"Estimating a hypothetical monopolist's Actual Loss is difficult, so that a substantial range of estimates could seem plausible. Incentives in litigation may push parties toward exploiting that range. Thus, it is highly desirable, if possible, to anchor estimates of Actual Loss and to facilitate reality checks based on actual premerger conduct." (own emphasis)*

[120] As the authors acknowledge, *"Estimating the Actual Loss requires evidence about buyer substitution patterns. The controversy over Critical Loss Analysis concerns where to look for such evidence – specifically, how much can be inferred from premerger margins." (own emphasis)¹⁶*

[121] In this matter, Murgatroyd relied on evidence of substitution to draw an inference that the actual loss that would be suffered by the merging parties would be greater than the critical loss, rendering a post-merger price increase unprofitable. For this Murgatroyd relied on the estimates of customer volumes which he submitted could theoretically be switched from LSDs to LPDs or IBCs.

[122] We disagree with Murgatroyd's approach, which in our view was at most an arithmetical estimation to support a substitution argument. In our view, regardless of Murgatroyd's intended analysis he is simply not well placed to make assumptions about substitution on this basis. The reality of this industry is that the choice of packaging whether it be LSDs, LPDs or IBCs is determined by the customer. A mere analysis of the volume data of these

¹⁶ Improving Critical Loss Analysis, Farrell and Shapiro (2008)

customers does not reflect the underlying decision process. In other words, the volume data does not reflect what drives the choice of packaging by the customer which could be due to a range of different factors including the chemical composition of the product, the functionality, and the ease of handling required by the end-user.

[123] Customer evidence was therefore crucial to understand the underlying choice between different drums, and we therefore placed more weight on this evidence in deciding the market definition. The merging parties did not bring a customer as a factual witness to support their contentions. The Commission brought three customers, Fuchs, Chevron and Scott Bader. These customers provided useful insight into what needed to be taken into account when choosing between different types of packaging. This is reflected in the factual witness statements by Fuchs, Chevron and Scott Bader. Their submissions are reflected below.

[124] According to Fuchs:

*"Fuchs packaging requirements are dependent on the manufacturing process, the chemical composition and the end-user's application of the oils and greases that are manufactured. Therefore, not all industrial packaging is suitable to package the various products across Fuchs' product range"*¹⁷

[125] This sentiment was shared by Scott Bader which also submitted that the choice of packaging was dependent on the end-user's application. Chevron stated:

*"The type of packaging that Chevron SA uses is determined by the customers' usability and application. Based on majority of customers requirements the size of packaging is determined. We have a catalogue of products in various pack sizes and the customers will place their orders accordingly. For instance, certain industries require certain types of packaging, e.g. some mines prefer to use steel drums."*¹⁸

[126] Based on customer submissions it appeared that there were two important aspects to bear in mind. The first was the chemical composition of the product

¹⁷ Factual Witness Statement of Haripasad, page 70 of the witness statement bundle, paragraph 9.

¹⁸ Factual witness statement of Gierdien, page 49 of the witness statement bundle, paragraph 8.

to be stored for the end-user and the second was the characteristics of the packaging material. Customers such as Fuchs, Chevron and Scott Bader are in a sense merely intermediaries, manufacturing the product whether it be greases or oils for the end-user based on certain specifications of these end-users needs. For example, as Chevron points out mines often prefer their products to be stored in steel drums which could be due to their durability.

[127] Based on the evidence it was clear that customers tend to be constrained in terms of switching from one type of packaging material to another. For example, when switching from LSDs to LPDs customers have to ensure that the product is not corrosive or flammable given the characteristics of LPDs. When switching from LSDs to IBCs customers have to ensure from a cost-benefit analysis that they have the volumes to efficiently utilize the IBC as well as the correct machinery.

[128] The panel questioned Murgatroyd on this issue and whether he had interrogated this constraint sufficiently:

Mr Murgatroyd: And so yes, so the point of the table is to show that actually there is a material proportion of customers currently buying product in LSDs that could put that product into IBCs. They are buying enough volume to do that and that is shown by the overlap between the distributions. (own emphasis)

Mr Valodia: But is it not precisely the opposite conclusion that one should reach? So there are people who are buying ...product in sufficiently large volume to kind of remove the volume... (as the) reason for ...buying in an IBC so they still have something that is not related to volumes, that is driving why they are preferring to buy sort of buy in LSDs. So I kind of understand the analysis you've done..... I just don't see how you can reach the conclusion that you reach sustainably on the data? (own emphasis)

Mr Murgatroyd: Maybe perhaps I can clarify the conclusion because I think there is misunderstanding of the conclusion, I am trying to take away from this. What this slide says is that let's take for example, you know, the number in the bottom right-hand corner. That is saying that this proportion of volume is bound up with customers who are not limited, are not able or are not

prevented from switching to IBCs on the basis of the volume that they purchase. That is the only conclusion I am trying to make from it, because I think you know, there is a separate question about would these customers switch, okay, but ultimately, before we even start to answer that question we have to understand which customers can't switch because that gives us a bound on our actual loss and...(intervention)

Chairperson: what you are saying is that these- this is just indicating which guys are too small to switch, which guys are big enough to switch?

Mr Murgatroyd: Agreed, agreed.

Chairperson: It is doing no further than that?

Mr Murgatroyd: Agreed, that is absolutely it."

[129] In other words, what Murgatroyd submitted was that his analysis only assessed, based on volumes, which customers could theoretically switch volumes because they purchased sufficient volumes of product to make purchasing in IBCs for example viable. His analysis took no account of any other price and non-price factors – such as technical issues, for example, temperature considerations, and issues such as end-user preferences – which may affect the customers considerations about switching from LSDs to IBCs. His analysis however raised an important question: if there is an efficiency incentive for customers currently to switch to IBCs, and they purchase sufficient volumes to make a switch to IBCs viable, why do they continue to purchase such significant volumes in LSDs? We cannot exclude the possibility that there are important non-price factors and preferences that make it very difficult for those that have not already switched to switch to IBCs in response to an increase in the price of LSDs.

[130] Murgatroyd also placed some reliance on the patterns of purchases abroad, more specifically in India and Pakistan. What this evidence showed was merely changes from the use of LSDs to LPDs but not necessarily reasons behind the switch such as customer reasoning or whether LPDs had been made antistatic in these regions. We also don't know if the final use of the product was in similar conditions – for example, in deep-level mining. Importantly, the evidence was not clear on whether the switch was due to a

change in price of LSDs. This was conceded by Murgatroyd who also confirmed that the evidence was not dispositive even though it was relied on by Hietink¹⁹:

MR MURGATROYD: What, the take away point that I take from the fact that they're using these products in India, is that you can use these products for the applicants that's – for which steel is currently being used in South Africa.

I don't think it's right to take anything more than that, because let's say for example in India, say they're using more LPDs, those LPDs could be much cheaper in India and therefore it's not surprising that more LPDs are then used.

So it tells you about functionality. It maybe also tells you about sort of broader international trends, but it doesn't tell you about this question of would someone switch in response to a 5% price increase.

It's a bit information that might help, it's not irrelevant, but it's not a – it's not dispositive.

[131] In terms of other non-price issues, Murgatroyd seemed to suggest that the substitution between LSDs and LPDs was not constrained by the issue of LPDs not being antistatic given the fluorination process. However, on his own submissions, this process has only been introduced into South Africa for small drums.

[132] In respect to substitutability therefore, the argument put forward by the merging parties that they would not be able to price discriminate by sector given the alternatives available to customers in the market is rejected. There are many considerations that need to be taken into account when choosing between different packaging such as the chemical composition of the product to be stored, the characteristics of the drum itself and other non-price factors such as handling, warehousing and storing which are required by the end-customer. Customers are unable to simply switch between packaging based only in the main on price factors.

¹⁹ Transcript 18 April 2018 page 90.

- [133] The fact that the merging parties considered each other to be its closest rivals in the market and not other plastic drum manufacturers also speaks to the fact that they competed predominantly in respect of the manufacture and supply of LSDs. This was confirmed by all three customers who also indicated their reliance on Greif and Rheem for their LSD requirements. One of the overwhelming concerns brought individually by all these customers was their concern that the merger would remove a second supplier in the market for LSDs forcing customers to purchase all their requirements from the merged entity, raising prices and making them worse off given that they would have no other supplier in the market to efficiently procure from.
- [134] This is an important consideration and speaks to the closeness of competition between the merging parties. This is covered in more detail below.
- [135] With respect to the Commission's GUPPI analysis we simply note its findings but do not place any weight on this analysis either.
- [136] We therefore reiterate the importance of customer evidence in this matter and are of the view that based on these submissions that the relevant market should be defined as the market for the manufacture and supply of LSDs.

Relevant geographic market

- [137] The Commission's merger report found that the relevant geographic market was regional in scope. More specifically, the Commission defined two relevant geographic markets, namely a Gauteng market and a KZN market. The main reasoning for this distinction was based on the Commission's conclusions that the parties predominantly supply customers located within the provincial region of their own manufacturing facilities.
- [138] The merging parties argued that the market should be considered to be at least broader than individual provinces that the Commission focused on.
- [139] Prior to the start of the proceedings the experts met in order to attempt to limit the issues in dispute. It was at this meeting that the experts agreed that whether the geographic market was defined as regional or more broadly that this was not determinative of the merits of the proposed merger.

[140] We therefore do not conclude on the relevant geographic market as we do not consider it to materially impact the outcome of this merger.

Relevant Counterfactual

[141] The second dispute regards the relevant counterfactual. In determining the relevant counterfactual, we compared the likely competitive situation following the merger to that of the competitive situation absent the merger.

[142] In *Life Healthcare*, we noted that *"In merger cases, the assessment of the relevant counterfactual is an essential part of the analysis. Essentially, this involves a comparison of market outcomes; the market that would prevail without the merger, usually taken as the status quo, compared with the scenario that is likely to prevail post-merger. The difference between the two scenarios informs the threshold question raised by section 12A(1) of the Act viz – whether the merger would lead to a substantial prevention or lessening of competition. Usually the status quo serves as the proxy for what the market would be like absent the merger, while the post-merger future requires a predictive analysis"²⁰. (own emphasis)*

[143] While this would be the conventional approach to the counterfactual analysis, there are instances in which the *status quo* or the prevailing conditions remaining constant is not realistic.

[144] In *Pannar* we stated²¹:

"Internationally competition authorities regard the status quo or prevailing pre-merger conditions of competition as the relevant counterfactual- unless there is specific evidence that the prevailing conditions of competition are unlikely to continue in the foreseeable future."

[145] In *Imerys* we noted that *"if a party (whether the merging parties or the Commission – in this case the merging parties) wants to contend for a counterfactual other than the status quo then that party must put up evidence*

²⁰ *Life Healthcare Group (Pty) Ltd/Joint Medical Holdings Limited* [2013] 1 CPLR 227 (CT) at paragraph 20.

²¹ *Pioneer Hi-Bred International Inc./Pannar Seed (Pty) Limited* (CT case number 81/AM/Dec10), para 198.

*on a balance of probabilities of the likelihood of the alternative relevant counterfactual*²²

[146] Further, the UK Merger Assessment Guidelines explained that “... *the CC will typically incorporate into the counterfactual only those aspects of scenarios that appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments; it seeks to avoid importing into its assessment any spurious claims to accurate prediction or foresight. Given that the counterfactual incorporates only those elements of scenarios that are foreseeable, it will not in general be necessary for the CC to make finely balanced judgements about what is and what is not the counterfactual.*” (own emphasis)

[147] As regards the time period over which the counterfactual should be assessed, the UK Merger Assessment Guidelines provides that “*The description of the counterfactual is affected by the extent to which events or circumstances and their consequences are foreseeable, enabling the Authorities to predict with some confidence. The foreseeable period can sometimes be relatively short*²³” (own emphasis)

[148] In the current matter, the merging parties argued that the counterfactual may not be one where the *status quo* is applicable. Rather, the merging parties argued that the target firm, Rheem, would inevitably exit the market in the next five to seven years or alternatively would no longer exert a competitive constraint in the market should the merger not take place. In other words, within five years, Rheem will cease its operations, at which point it will cease to be a competitor of Greif. Importantly, Rheem did not put up a failing firm defense.

[149] The basis for the merging parties' contentions stemmed from Dhlomo's assertions regarding the profitability of his business (shown below).

Table 1: Rheem's financial performance over the period 2011-2016.

²² *Imerys South Africa (Pty) Ltd and Andalusite Resources (Pty) Ltd vs the Competition Commission* (IM013May15), paragraph 196.

²³ Merger Assessment Guidelines of the UK Office of Fair Trading and Competition Commission (2010) paragraph 4.3.2.

[150] Dhlomo testified that:

[150.1] The profitability of Rheem was in a decline as a result of Rheem operating in a sunset industry, for which the negative effects were compounded given the prevailing depressed economic climate in South Africa.

[150.2] Rheem's net profit margin across its business had declined from [REDACTED] in 2011 to [REDACTED] in 2015.

[150.3] Rheem had exhausted all cost cutting measures at its disposal and it could no longer cut costs without closing production lines and retrenching employees.

[151] It was for these reasons that Dhlomo submitted that Rheem would inevitably exit the market.

[152] While the merging parties may not have put up a 'failing firm' defense, it was of the view that the Tribunal should consider the applicability of a 'failing firm' defense by Rheem i.e. the extent to which Rheem is likely to fail in the foreseeable future due to its financial weakness.

[153] The Commission disagreed with the merging parties counterfactual scenario. It argued that the relevant counterfactual was not "*whether Rheem would continue operating at all absent the merger but whether Rheem would continue producing LSDs absent the merger*" (own emphasis). This given that it was common cause that the only competition concern arising from the proposed merger was in respect of LSDs. The Commission also questioned

Dhlomo's assertions that this was a sunset industry, arguing that while this may be a declining industry it was by no means a sunset industry. In its determination of the appropriate counterfactual, the Commission considered trends in industry demand, the previous financial performance of Rheem as well as indicators of the likely financial viability of Rheem in the foreseeable future.

The decline in demand for LSDs and its effects on Rheem's performance

- [154] The merging parties, while not denying that Rheem was not a failing firm, argued that it was evident from the table that its business as a whole had been in decline over the period.
- [155] However, at a glance of Rheem's profitability figures it is clear that Rheem's performance over the period has fluctuated and does not appear to be consistently in decline - its EBITDA margins and net profit percentage figures for example in 2013 and 2016, show an improvement in Rheem's business.
- [156] Rheem explained these improvements as resulting from once off events that took place in these years. In 2013, Dhlomo submitted that there had been a significant increase in the steel price which enabled Rheem to sell excess medium steel drums it had manufactured at low steel prices in 2012, at higher prices in 2013. In 2016, Dhlomo submitted that he was forced to close its steel pails and cans production line at its Alrode facility, which improved the profitability of its steel pails business. However, he explained that while this had helped alleviate some of the strain on Rheem's business, he was of the view that it was not a sustainable solution to improve profitability especially when Rheem's sales volumes were continuing to decline.
- [157] Importantly however, the merging parties argued that neither of these once off events had helped to improve Rheem's LSD business whose EBITDA percentage declined significantly from ██████% to ██████ and its net profit percentage from ██████% to ██████% over the period 2011 to 2016.
- [158] Dhlomo further testified that Rheem's drum volumes had been in a persistent decline for over the past 17 years. This is an important point as Rheem's LSD business contributes to the majority of both Rheem's revenues and total

profits. He emphasized that this decline in performance was mostly due to a decline in demand for all its steel products.

[159] It was submitted that ODI had become increasingly concerned about Rheem's financial profitability as a result of poor growth and declining sales volumes. According to Dhlomo²⁴ *"there are no costs left to cut without closing production lines and retrenching employees"*. Further the only possible event that could turn Rheem's fortunes around would be a reversal of the long-term decline in demand that it has experienced for its LSDs and other steel products. However, Dhlomo was not convinced that such a change in the economic environment was likely in the near future, as he explained to the Tribunal:

*"It is highly unlikely that the continuing downward trend of large steel drum sales will be arrested let alone reversed. In fact, I expect that declining sales volumes of large steel drums will not only continue but will accelerate given that customers are increasingly seeking substitutes for large steel drums"*²⁵.

[160] Rheem was also cautious to plan for the possibility that the merger may not have been approved. In such an instance, it was submitted that Rheem would have to move its Alrode operations to Vanderbijlpark in order to make its Gauteng operations more sustainable. It was estimated that should this take place there would be a minimum of ● retrenchments (this in addition to the 66 retrenchments which already resulted from Rheem's closure of its steel pail and can production line in Alrode in 2016).

[161] In Dhlomo's view, the merger was the only viable option to assist Rheem in repositioning itself in the market and avoiding a potential exit. He stated:

"The [proposed merger] appealed to me, the shareholders of ODI and my board for the simple reason that it would be preferable to have a significant minority stake in a sustainable and bigger business with greater scope of operations and greater access to capital than to continue as is, with the

²⁴ Witness statement of Dhlomo, Witness Statement bundle page 32 paragraph 6.1.

²⁵ Witness statement of Dhlomo, Witness Statement Bundle page 33 para 6.6.

inevitable result that Rheem would over time in all likelihood go out of business if it does not review its positioning and offering in the market.²⁶"

[162] The Commission contested and disagreed with the view that Rheem was operating in a sunset industry, stating that there was simply no factual evidence to support this averment. Instead, the Commission, argued that Dhlomo's speculation about the future trajectory of Rheem was not supported by the evidence at hand.

[163] The Commission submitted that Rheem's recent financial performance was due to the broader unfavourable economic conditions prevailing in South Africa. LSDs are intermediate goods, and the market for LSDs is highly correlated with the state of the overall industrial sector's performance. To Rheem's detriment this sentiment was expressed in one of Rheem's Exco minutes dated 11 December 2015 in which it was recorded:

"The poor drum sales are not a reflection of us losing any business but a result of how badly our customers are performing in their respective markets"

[164] Further, a closer look at Rheem's market shares to that of Greif showed that it had not been losing market share but was actually able to maintain its market share relative to Greif despite its financial performance. Turning to the financial indicators, the Commission submitted that Rheem's financial performance did improve from 2012-2013, with return on sales increasing from 4 to 6%.

[165] With respect to measures taken by Rheem to address its declining profitability, the Commission noted the R40 million investment in a new steel drum line in 2014. In particular, this investment appeared to suggest that Dhlomo had, in 2014, great confidence in the business and was prepared to make a substantial investment in improving performance. Furthermore, Dhlomo reported that he was able to recoup this investment within 3 years. As the Commission pointed out, it simply did not make rational commercial sense for an investor to plough such a substantial investment into a declining

²⁶Witness statement of Dhlomo, Witness statement Bundle, page 31 para 5.3.

business, and for the investment to have paid off in such a short period. This, the Commission argued cast doubt on the 'flailing' firm argument.

[166] Further while Dhlomo had earlier in his testimony indicated that a merger with Greif was its only chance of remaining in the market, he revealed at the hearing, that [REDACTED]

[REDACTED] According to the Commission, Dhlomo had failed to disclose this to the Commission during its investigation. No adequate explanation was provided by the merging parties for their non-disclosure. The Commission argued that this showed that there were other alternatives to Rheem other than merging with its closest competitor. In addition, it appeared that Dhlomo had been optimistic about the [REDACTED]

[REDACTED]:

The KPMG report and other documents

[167] There are two KPMG valuations of Rheem in the record, one dated March 2016²⁸ and a more recent valuation dated 07 June 2017²⁹. These documents were prepared on the instruction by the merging parties in order to obtain an independent valuation of Rheem's business for purposes of the merger, which valuation would be subject to verification in due diligence by Greif after all merger approvals had been obtained³⁰.

[168] The 2017 KPMG Report provided a forecasted income statement for Rheem for the period FY17 to FY19. This forecast was based on the collation of key information pertaining to Rheem.

[169] A debate arose about whether the KPMG report represented a credible forecast given that it appeared that Rheem would continue to profitably operate in the market until at least 2019 based on these estimates. This in

²⁷ Transcript page 374 lines 10-13.

²⁸ Trial bundle page 1473

²⁹ Trial bundle page 1538

³⁰ Greif did have sight of a redacted version of the full KPMG report.

contrast to the finding on Dhlomo's evidence that Rheem was in a sunset industry and would exit the market in the near future.

[170] During the hot tub, Murgatroyd stated that according to evidence given by Dhlomo, the KPMG report did not contain explicit assumptions around volume change but only took 2017 volumes and assumed that these volumes would remain constant. In other words, the forecasts made for 2018 and 2019 were made on the assumption of volumes remaining the same. He submitted that the report failed to forecast what future demand would be as Dhlomo did not provide information about the expected volumes. For this reason, Murgatroyd contended that the KPMG report did not constitute a reliable forecast of the Rheem business.

[171] Mncube limited his KPMG report analysis on the trends together with Rheem's financial statements for the year ended 2017. According to Mncube the trends suggested that Rheem would remain financially positive up to 2019. Mncube further supported this proposition by referring to Dhlomo's statement in the financial statement³¹:

"The directors have reviewed the company's cash flow forecast for the year to 31 December 2018 and, in the light of this review and the current financial position, they are satisfied that the company has or has access to adequate resources to continue in operational existence for the foreseeable future."
(own emphasis)

[172] Importantly this statement was made as recent as March 2018.

Tribunal Analysis on the relevant counterfactual

[173] We have considered the merging parties claim that Rheem currently operates in a sunset industry. We find on the evidence a number of inconsistencies with this proposition. The first is that of Rheem's profitability. On the figures presented it is true that there have been some fluctuations in the overall profitability of Rheem over the period. Even allowing for special circumstances which may have applied in some years, it is very difficult, on the financial performance, conclusively to reach the view that Rheem is in

³¹ Exhibit P, page 2.

terminal decline or that Rheem is a flailing firm. The period for which we have financial data is very short. Moreover, over this same period Rheem had invested significant capital in a new LSD production line. On Dhlomo's own evidence, the investment had paid off over a three-year period. We agree with the Commission that an investment of this order would not make sense if Dhlomo truly believed that Rheem was in terminal decline. This would only make financial sense for a firm intending to remain active and competitive in the market and to prepare for the future. This investment in our view was not of a firm who is likely to exit in the next 5 to 7 years. Such a substantial investment would need to be recouped. Rheem was, according to Dhlomo, able to recoup this investment.

[174] Secondly, the argument that the LSD industry is a sunset industry is difficult to sustain. A key issue here is that of global players such as Mauser wanting to enter the local market [REDACTED]. The fact that a global player such as Mauser wanted to enter into the South African market showed that there was incentive to enter i.e. that it was profitable to enter. If the merging parties' claims of a sunset industry are to be considered true it is unlikely that large established international players would consider entering the local market.

[175] Moreover, if LSDs were a sunset industry it would make more sense for Greif to seek opportunities in alternatives to LSDs rather than purchasing Rheem. In our view it would appear counterintuitive given that Rheem is allegedly a 'flailing firm' operating in a market in decline. Further, while at the hearing Greif argued that there was a global trend from LSDs to LPDs, Greif was, through the proposed transaction, continuing to invest in steel by purchasing a large steel drum manufacturing firm. The stated rationale of the transaction being for an improvement of its BBBEE status is at most weak. Greif could only be investing in Rheem if it considered that the LSD market had a future.

[176] Another possible argument that could be made for Greif's interest in Rheem could also be due to Rheem's presence in Africa which was growing making Rheem a stronger competitive threat. In the business minutes document dated 23 October 2014, Rheem noted that Greif had become aware of their CD supply to Angola.

[177] In the business minutes dated 25 November 2016, Rheem mentions that pricing at major oil customers had become a major challenge and concern. It would appear as though Rheem may have been in a price war with Greif and which Rheem felt was a possible retaliation for them expanding their business into Africa in competition with Greif. Thus, an alternative explanation for the merger other than empowerment could be that this was a defensive merger – in order to Greif to gain control of its closest competitor and prevent it from expanding and becoming more competitive not only in South Africa but also other parts of Africa.

[178] Thirdly there is the issue of the KPMG report. It is common cause that the KPMG report was prepared on instruction by the merging parties for negotiation purposes. However, one oddity with this was that the KPMG team were not advised by the merging parties that this was a sunset industry. During the hearing the Chairperson raised this question with the merging parties as well as Murgatroyd. Interestingly Murgatroyd also indicated that he agreed that this was odd and that he also found it surprising that no reference was made to future demand³².

CHAIRPERSON: I just found that an interesting feature given that if the view shared by both the buyer and the seller is a pessimistic one about this industry, that that's not somehow conveyed to the people who are doing the analysis.

MR MURGATROYD: No I agree and I think it's something that – what I was actually surprised, to be frank about the KPMG report more generally, is that it doesn't make references to future demand in one way or the other. I mean I think by the same token in a business where, in an industry where you might expect growth, if I was selling a business where I would expect growth I would be saying to my valuation, whoever is doing my valuation, "I'm expecting growth here and you should put that in your valuation." So I do agree. So it's an oddity of the report." (own emphasis)

[179] It is very difficult to dismiss the KPMG report's positive view of the industry as a mere oddity. It was the basis upon which the merging parties began their

³² Transcript 20 April 2018 page 181 lines 10-22.

discussions on the value of Rheem. One can understand, for the seller's perspective, that Rheem would not disclose the declining nature of the industry. However, Greif is one of the largest players in the market and it would both know the state of the industry and have an incentive to have Rheem's outlook as pessimistic as can be. Greif may not know the exact volumes of Rheem but we have had sufficient evidence that players in the market move from between Greif and Rheem so Greif must have a good sense of trends in the market. KPMG at no point indicated after their analysis that this was in fact a sunset industry.

[180] An alternative argument is that of the Commission's i.e. that this is not a sunset industry and Rheem is not likely to exit the market in the near future. In this scenario, the merging parties did not provide the information to KPMG simply because they themselves are aware that it is not a sunset industry.

[181] The directors' statement made by Dhlomo in March 2018 is also damning evidence and a clear contradiction to Dhlomo's testimony that Rheem would have to undergo cost cutting measures which included retrenchments and the closure of a production line in order to remain in the market.

[182] The KPMG report also shed light on the period 2017 to 2019 and shed doubt on whether Rheem was likely to exit by at least 2023 as Murgatroyd predicted.

[183] It is for the above reasons that we consider the merging parties counterfactual analysis to be unlikely. On the evidence it would appear that Rheem would at least continue to remain profitable and or viable in the market. We therefore consider the counterfactual analysis of the Commission to be more likely i.e. that Rheem absent the merger would continue to manufacture LSDs.

Efficiencies

[184] We have in previous decisions held that the onus of establishing an efficiency defense rests on the merging parties. This is because it is difficult at the pre-merger stage to be able to identify and quantify post-merger efficiencies. As such it is the merging parties who would be best placed to provide this information and not the competition authorities.

[185] The merging parties raised a number of synergies which they considered would arise from the proposed transaction and stemmed primarily from the evidence of Hietink. In his witness statement he noted that:

*"The proposed transaction will also present the parties with the means to achieve efficiencies in procurement, production and distribution, which they could not achieve independently"*³³.

[186] Hietink further suggested that the reallocating of volumes between Greif and Rheem was also likely to generate combined cost savings which would not only reduce the fixed and variable cost base of Greif but also contribute to improving their profitability³⁴. He submitted³⁵:

"Specifically, Greif expects to achieve reductions in per unit fixed costs of between [REDACTED]% for large steel drums produced in Mobeni, and between [REDACTED]% for large steel drums in Vanderbijlpark. Per unit variable costs are expected to reduce by between [REDACTED]% for large steel drums in Mobeni and between [REDACTED]% for large steel drums in Vanderbijlpark.

Taking into account reductions in fixed and variable per unit costs, it is expected that Greif will improve its net margins considerably, from [REDACTED] to between [REDACTED]% for large steel drums produced in Mobeni and from 15% to potentially as much as [REDACTED]% for large steel drums produced in Vanderbijlpark. This will render Greif's South African operations a considerably more attractive destination for investment within the Greif Global Business.

In addition, the merged entity will face a reduction in variable costs as a result of the proposed transaction, and at least some portion of this cost reduction is likely to be passed on to customers."

[187] In assessing whether the merging parties claimed efficiencies will outweigh the anticompetitive effects of the merger, the Commission considered whether the claimed efficiencies (i) constitute real efficiencies, (ii) are verifiable, and (iii) benefit consumers. Further these efficiencies needed to be timely, likely

³³ Factual witness statement of Hietink, Witness Statement Bundle, page 10 paragraph 3.2.15

³⁴ Factual witness statement of Hietink, Witness Statement Bundle, page 10-11 paragraphs 3.2.18-3.2.20.

³⁵ Factual witness statement of Hietink, Witness Statement Bundle, page 10-11 paragraphs 3.2.18 – 3.2.20.

and sufficient to prevent a likely SLC. Finally, it was submitted that the claimed efficiencies must be merger-specific.

[188] However, the Commission argued that there was no evidence to support his claims nor that the cost reductions would result in lower prices or better quality, service, choice or innovation. The merging parties had not yet performed a due diligence and could not confirm these estimations. Instead as Hietink submitted this was merely a very “high level” analysis on his part³⁶.

“Adv Le Roux: ...Just to confirm the percentages that are in 3.2.18, you don't have any updated estimates.

Mr Hietink: No.

Adv Le Roux: Ja, and perhaps also for your information we didn't do a due diligence yet. So, this is really high level.”

[189] The Commission concluded that based on the above testimony, it was clear that Greif could not quantify nor verify the efficiencies claimed and concluded that there were no efficiencies which would be able to counter the anti-competitive effects of the merger. In the Commission's view the merging parties claimed efficiencies simply fell short of the test set out in *Trident/Dorby*³⁷.

[190] The US Horizontal Merger Guidelines also provides useful insight on the role of competition authorities when considering these claims³⁸:

“Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging parties may not be realized. Therefore, it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing

³⁶ Transcript page 196 line 9-15.

³⁷ Tribunal's Decision: Case no: 89/LM/Oct00, para 81, p20

³⁸ United States Federal Trade Commission 'Horizontal Merger Guidelines' (2010), Accessed: <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.

Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means. Projections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process. By contrast, efficiency claims substantiated by analogous past experience are those most likely to be credited." (own emphasis)

[191] According to the EU Merger Guidelines³⁹:

"Efficiencies have to be verifiable such that the Commission can be reasonably certain that the efficiencies are likely to materialize and be substantial enough to counteract a merger's potential harm to consumers. The more precise and convincing the efficiency claims are, the better the Commission can evaluate the claim. Where reasonably possible, efficiencies and the resulting benefit to consumer should therefore be quantified. When the necessary data are not available to allow for a precise qualitative analysis it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one." (own emphasis)

[192] Based on the above guidelines, we are inclined to agree with the Commission that the merging parties have not applied themselves to quantifying and verifying the efficiencies claimed. It was incumbent on the merging parties to provide this evidence. Instead, the merging parties have simply relied on estimations of potential cost efficiencies. The evidence of Hietink was at most speculative in our view and based on his evidence fell short of constituting real efficiencies. The efficiencies claimed were not proved to be likely or timely, nor was it proved that the impact on consumers would be more than marginal.

[193] We therefore do not consider the merger to give rise to any efficiencies as claimed by the merging parties.

³⁹ Official Journal of the European Union, "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings" (2004), Accessed: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN).

Other competition considerations

[194] Apart from some of the issues raised above which were in dispute between the parties there were three additional competition issues which we needed to consider, these were the removal of an effective competitor, barriers to entry and the countervailing power of customers.

Removal of an effective competitor

[195] It is common cause in this matter that the proposed transaction would have resulted in the merger between two close competitors in the market for the manufacture and supply of LSDs.

[196] According to the European Commission Merger Guidelines, a merger which neutralizes the influence of a significant competitor can have a substantial impact on competition, especially when the market is already concentrated, as is the case in the current matter.

[197] The Commission sought to analyze the extent to which the merger would result in the removal of an effective competitor. The Commission showed that the parties closely competed with one another and regularly monitored and reported on each other's sales and marketing activities. The Commission put up a non-exhaustive but substantive list of various strategic documents of the merging parties which spoke to this issue⁴⁰, extracts from these documents are shown below from Rheem and Greif respectively.

Rheem Exco Minute Dated 21 November 2013. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴⁰ See pages 70 to 78 of the Commission's Heads of Argument.

⁴¹ Rheem Exco Meeting Minutes, 21 November 2013 (TB, p 1611).

Rheem Exco Minute dated 19 March 2014. [REDACTED]

Rheem Exco Minute dated 23 October 2014:

[REDACTED]⁴⁴

[REDACTED]⁴⁵

Rheem Exco Minute dated 18 November 2015. Rheem recorded, [REDACTED]

Rheem Exco Minute dated 11 December 2015. Rheem recorded, [REDACTED]

⁴² Rheem Exco Meeting Minutes, 19 March 2014 (TB, p 1184).
⁴³ Rheem Exco Meeting Minutes, 23 October 2014 (TB, p 1198).
⁴⁴ Rheem Exco Meeting Minutes, 23 October 2014 (TB, p 1198).
⁴⁵ Rheem Exco Meeting Minutes, 23 October 2014 (TB, p 1199).
⁴⁶ Ibid.
⁴⁷ Ibid.
⁴⁸ Rheem Exco Meeting Minutes, 26 February 2016 (TB, p 1659).

Rheem Exco Minute dated 26 February 2016, Rheem recorded that, [REDACTED]
[REDACTED]

Rheem Exco Minute dated 21 July 2016, Rheem recorded, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Rheem Exco Minute dated 23 November 2015, Rheem recorded, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Greif's Management Performance Report dated June 2012 recorded, [REDACTED]
[REDACTED]
[REDACTED]⁵³

Greif's Management Performance Report dated August 2012 recorded,
[REDACTED]

⁴⁹ Rheem Exco Meeting Minutes, 11 December 2015 (TB, p 1257).
⁵⁰ Rheem Exco Meeting Minutes, 26 February 2016 (TB, p 1659).
⁵¹ Rheem Exco Meeting Minutes, 21 July 2016 (TB, p 1715).
⁵² Rheem Exco Meeting Minutes, 23 November 2016 (TB, p 1740).
⁵³ Greif Africa Performance Report, Period Ended June 2012 (TB, p 1772).
⁵⁴ Greif Africa Performance Report, Period Ended August 2012 (TB, p 1825).

Greif's Management Performance Report dated January 2013 recorded,

[REDACTED] 55

Greif's Management Performance Report dated September 2013 recorded,

[REDACTED]
[REDACTED].

Greif's Management Performance Report dated November 2013 recorded,

[REDACTED]
[REDACTED].

Greif's Management Performance Report dated August 2014 recorded,

[REDACTED] 56

Greif's Management Performance Report dated October 2014 recorded,

[REDACTED]
[REDACTED] 57

Greif's Management Performance Report dated December 2015 recorded,

[REDACTED]
[REDACTED] 58

Greif's Management Performance Report dated November 2016 recorded,

[REDACTED]
[REDACTED]
[REDACTED]

[198] Importantly the Commission submitted that the evidence above showed that customers often switched volumes between the two competitors or

⁵⁵ Greif Monthly Performance Reporting, January 2013 (TB, p 1895).
⁵⁶ Greif Monthly Performance Reporting, August 2014 (TB, p 2295).
⁵⁷ Greif Monthly Performance Reporting, October 2014 (TB, p 2346).
⁵⁸ Greif Monthly Performance Reporting, December 2015 (TB, p 2668).
⁵⁹ Greif Monthly Performance Report, November 2016 (TB, p 2817)
⁶⁰ Lines 16 – 22 to lines 1 – 9 (T, pp 231-232).

alternatively split their volume requirements for their businesses between the two competitors.

[199] This was also confirmed through the factual witness statement of Gierdien, recall she stated the following:

"In the event that Greif and Rheem are to merge, this would mean that we will not have a secondary supplier for large steel drums. Should they not fulfil any orders or have sufficient floor stock as per our forecast, it may have a negative impact on meeting our customer demands and could lead to us being in breach of supplier agreements to our customers"

[200] The Commission also posited the view that Greif and Rheem were the only realistic alternatives for customers. Gierdien explained to the Tribunal about what happened in periods of non-supply⁶¹:

"Adv Le Roux: When you are having these difficulties with Greif, what ends up happening? What do you then do to make sure you get large steel drums?"

Ms Gierdien: So, what we did in 2015, in 2014 there was the large steel strike, which obviously left a bitter taste in Chevron's mouth, because we had a non-supply issue. We have then, when we went into 2015 where we had other challenges, we then went to our global team and asked for an exception where we brought on a secondary supplier. We signed Rheem up in, I think it was June 2015 as an alternative supplier so that we could have continuous supply. The initial discussion was really for supply of black drums, but when we went and renegotiated the contract extension that was effective 1st January 2016, we then changed the supply from single supply to primary supply and had allocated Rheem more volumes so that could be our secondary supplier". (own emphasis)

[201] This concern was reiterated by Fuch's which stated⁶²:that

"should the merger go through, this will effectively result in there being a single supplier that has no competition as no other supplier can match its capability. I believe that this will result in the likelihood of increased costs

⁶¹ Transcript pages 651-655.

⁶² Factual Witness Statement of Haripersad page 78 paragrapg 24.

and/or even lower quality drums from a combined Greif and Rheem." (own emphasis)

- [202] The Commission submitted that based on the evidence above, it was clear that not only were the merging parties' close competitors, but they also competed on both price and non-price factors, such as quality of service. The Commission was therefore of the view that removing Rheem as a competitor to Greif would likely lead to a substantial lessening of competition leading to unilateral anticompetitive effects.

Barriers to entry

- [203] It has been well established in the literature that barriers to entry can have a profound effect on competition and the ability for competitors or potential competitors to constrain the behaviour of the merged firm post-merger.
- [204] During the hot tub Murgatroyd conceded to Mncube that barriers to entry in the market for the manufacture and supply of LSDs was relatively high – with the main barrier to entry being the substantial capital outlay required to manufacture LSDs. It was found that in order for a new entrant to enter the market it would only be able to do so with a second hand or new specialized machinery to manufacture new LSDs. However, this machinery is not manufactured in South Africa and would require the new entrant to import it.
- [205] In addition to the issue of machinery, a new entrant would also require specialized knowledge in order to operate the machinery successfully meaning that it would have to incur the cost of training and upskilling workers.
- [206] In dealing with this issue the Commission deferred this argument to the discussion of the proposed remedies. We therefore deal with this issue later on in the reasons.

Countervailing power

- [207] Countervailing power or buyer power refers to the customer's ability or negotiating strength to effectively constrain the merged entity from increasing prices for example by switching to an alternative supplier. The ability to switch away from a supplier is stronger if there are several alternative suppliers to which the customer could credibly switch or if the customer has the ability to

sponsor new entry or enter the supplier's market itself by vertical integration. An assessment of the countervailing power of customers is therefore a useful tool in determining the competitive pressure that the merging parties would experience post-merger.

[208] The merging parties indicated that customers would have a significant degree of countervailing power post-merger due to three main factors:

[208.1] Firstly, the demand for large industrial packaging products is highly concentrated amongst a relatively small number of key customers;

[208.2] A number of these customers are large multinational firms; and

[208.3] Major customers do not enter into minimum volume commitments when awarding tenders and are not bound to purchase from the winning supplier(s).

[209] The Commission obtained the views of a number of customers regarding their knowledge of alternative suppliers in the market and whether they have purchased from alternative suppliers of LSDs. These customers included

[REDACTED] The responses received by the Commission varied. Whilst some customers were aware of other suppliers, others were not. For example, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³.

[210] Of the customers who were aware of alternative suppliers in the market, these customers indicated that they had not actually purchased from them. The reason for not doing so appeared to be firstly, because Greif and Rheem were considered the only viable suppliers in the market and secondly, that these

⁶³ See Table 34 of the Commission's Expert Report

alternate suppliers had not been tested for capability and capacity amongst other things. Importantly to take note of was [REDACTED]⁴:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[211] Based on the above submissions the Commission submitted that while it appeared that customers were aware of other competitors in the market, they were not convinced of their capability or capacity, meaning that they viewed Greif and Rheem as being the only viable suppliers of LSDs. Customers were also found to only dual source from the merging parties.

[212] However, having identified that there were other suppliers in the market, the Commission considered the extent to which these suppliers considered themselves to be competitors of the merging parties. The Commission obtained responses from Anchor Pail, Bona Once Bona Twice and Peninsula Drums. Of the three, only Peninsula Drums considered itself to be a competitor of Greif and Rheem. The remaining suppliers cited their lower capacity level as well as their limited buying power as reasons for not being viable competitors.

[213] The Commission submitted that these submissions re-affirmed that customers would be limited in their ability to exert their countervailing power post-merger as they would effectively face only one viable supplier of large steel drums in the market. In other words, the removal of Rheem from the market would have a detrimental impact on customers.

[214] As stated above, the merging parties had argued that a number of their customers were large multinational firms. To reiterate this point they cited two of their major contracts being with [REDACTED] which resulted in the merging parties dropping their prices of large steel drums to these customers.

⁶⁴ See Table 34 of the Commission's Expert Report.

While the Commission agreed with the above proposition, it held the view that even these types of firms would have limited countervailing power post-merger as they would only face one viable firm in the market for large steel drums as opposed to two.

[215] Furthermore, the Commission took account of the fact that negotiations are bilateral, the bargaining strength of suppliers and customers being determined by their mutual dependency. The Commission contended that in this case, this merger would have effectively shifted the bargaining strength to the supplier as a result of the loss of an alternative independent supply option i.e. Rheem.

[216] The Commission concluded that based on this evidence, buyer power would be insufficient to mitigate any competitive harm arising from the merger.

[217] At the hearing, Murgatroyd confirmed that there was no dispute on countervailing power⁶⁵.

Public Interest

[218] In line with the Greif's rationale for the transaction, the merging parties alleged that the proposed transaction would have public interest benefits in the form of empowerment, investment and employment.

[218.1] In terms of empowerment, the merging parties submitted that the transaction would ensure that Rheem would hold approximately 26% of the issued shares in the merged firm together with significant minority protections. These minority protections included veto rights over the changing of the main business of the merged firm, dividend policies and accounting policies. ODI would also have been entitled to have two non-executive members represented on the board of the merged firm.

[218.2] In terms of the investment, Greif committed should the merger be approved to invest in a new LPD line in South Africa with a capacity of at least [REDACTED] drums per annum.

⁶⁵ Transcript of 18 April 2019 page 156

- [218.3] Finally, turning to the issue of employment, the merging parties submitted that the merger would ensure that Rheem would not have to exit the market, or engage in any further cost cutting measures such as retrenchments in order to remain viable.
- [219] The Commission rejected the merging parties' submissions on empowerment. Instead it was of the view that this case was a threat to competition and that there were other players in the market other than Rheem, which Greif could merge with. One example was Infinity. Furthermore, according to the Commission, Rheem could exit its investment after 10 years, with the effect of the empowerment rationale being temporary rather than a permanent effect of the merger.
- [220] The merging parties second public interest benefit was also rejected by the Commission. The Commission submitted that this was not merger specific and that Greif could invest in the new LPD line absent the merger. This in their view was just a commercial decision and was self-imposed.
- [221] In considering the issue of employment, the Commission submitted that the retrenchments envisaged could not be verified and was based purely on the premise that Rheem would exit the market in the next 5 to 7 years – which the Commission strongly disagreed with. In their view the *status quo* would prevail i.e. Rheem would continue to be an effective competitor and remain in the market into the foreseeable future.
- [222] While we largely agree with the Commission's critique of the merging parties public interest considerations, we are also of the view that the merging parties claims in relation to empowerment are at best weak. Rheem is a well-established, competitive black owned firm prior to the merger. This transaction would have effectively resulted in the reversal of empowerment by reducing the share of its shareholders and offering them only limited veto rights and influence in the company post-merger. We are therefore of the view that the merging parties public interest claims should be rejected.

Remedies

The evolution of the remedies proposed

[223] The merging parties tendered various remedy proposals during the course of this matter. The first set of remedies were tendered during the Commission's merger investigation following the Commission's concerns regarding the proposed merger. These remedies read as follows:

"the merged firm will commit not to price discriminate between customers by reason of application or otherwise for a period of 5 years, other than on the basis of objective factors in line with those contemplated by section 9 (2) of the Act. Furthermore, the parties are prepared to commit to a behavioural remedy that there will be no increase in the price of large steel drums used for solvent based applications and certain (to be determined) specialty chemicals post-merger for the next 2 years. Outside those attributable to inflationary increases in costs and the price for inputs.⁶⁶

[224] At this time, Greif also submitted that the:

"Parties are committed to grow the business and invest in other product lines on the basis of customer needs and requirements. Based on today's assessment of the market, there will be customer demand for large plastic drums, small plastic drums and on the long term for IBC's, reconditioning products and services, and FIBCs. Based on today's assessment Greif is committed to the following:

Invest in a large plastic drum line in a selected Durban plant (subject to further operational assessment), in year 1- 2 post-merger;

Carry out a study for investment in small plastic drums products for agro- and food business, in the near future;

Review opportunities for further expansion in the mid to longer term, in fibre drums, IBCs, FIBCs and other products;

⁶⁶ Bowmans letter to Commission dated 30 May 2017, para 5.1, p436, Competition Commission merger record.

Review opportunities for expansion in the SSA region in the next 1-2 years, specifically in adding KDD business, creating additional production of KDD kits volumes in South Africa; and

It is envisaged that the cans business in Durban, and cans and pails business in Cape Town, may be divested entirely. The aim would be to do this through management buy-out, or to a BEE player in the pails and cans market, under the conditions of certain job guarantees. The parties will commit to providing technical support to this business after divestiture.”

[225] However, prior to the start of the factual evidence the merging parties amended the remedies initially offered. More specifically, the merging parties provided the following commitments⁶⁷:

“Greif commits that the merged firm will provide a behavioural remedy in the form of a cap on prices for all large (200-220L) steel drums to South African domicile customers for a period of 7 years. In this regard, the merged firm will commit to maintaining prices charged for these products in South Africa at that same price level as at the date of clearance of the Proposed Transaction. This cap on prices would adhere to the following principles:

The cap would be specific to each of the merging parties’ customers, such that each customer will be the subject of a specific price cap for large steel drum products that it purchases, based on the price paid by that customer at the date of the clearance of the Proposed Transaction; and

The cap would be subject to appropriate customary adjustments to reflect the volume of purchases, and changes in raw material input prices and other inflationary adjustments. In respect of new customers, such customers would adopt the most favourable price cap structure applicable to existing customers in the same sector.”

[226] In terms of this remedy proposal the merging parties amended its position from not price discriminating to placing a cap on prices for all large steel

⁶⁷ Refer to factual witness statement of Reinier Cornelis Hietnick, para 5.1. – 5.2, p23.

drums for a period of 7 years (the time period being selected on the basis that Rheem would exit the market in the next 5 to 7 years).

[227] The remedy also provided for various protections of non-price competition which included quality, service and security of supply.

[228] In respect of quality and service levels, Greif committed that:

"The merged firm will provide quality and service levels to all customers on standards no less favorable than those provided to such customers as at the time of approval of the transaction and commits that the merged firm will continue to improve its quality standards as an ongoing process."

[229] Similarly, in respect of security of supply, Greif submitted that:

"The merged firm will ensure that a contingency plan will be in place, ensuring that for each LSD facility in South Africa, in the event of quality issues or unavailability of supply from one facility which cannot timeously be remedied by that facility, products will be supplied from another facility in South Africa. The additional costs for transport will be borne by the merged firm."

[230] Furthermore, Greif also committed to invest in a large plastic drum product line in South Africa with a capacity of at least 180 000 drums per annum. This investment would require an estimated investment of over one million euros, within two years of the date of approval of the transaction.

[231] On 06 April 2018, the Tribunal learnt of an additional structural remedy which had been communicated by the merging parties to the Commission on 28 March 2018. According to the merging parties this structural remedy was proposed in order to provide further comfort to the Tribunal and the Commission that the proposed transaction would not give rise to any anti-competitive effects.

[232] In terms of the structural remedy, the merging parties proposed the divestiture of an entire large steel drum manufacturing line situated at Greif's Vanderbijlpark facility. This manufacturing line had a production capacity of [REDACTED] drums per annum. In the merging parties view this line would enable a third-party purchaser to produce tight-head, open-head and UN approved large steel drums.

[233] The Commission however rejected the abovementioned structural remedy and provided that they were of the view that the divestiture of Greif's Vanderbijlpark facility would not remedy the anti-competitive effects arising from the merger.

[234] To summarize, the key aspects of this divestiture remedy were the following:

[234.1] Greif was prepared to divest of the line currently situated at Greif's Vanderbijlpark facility which had a production capacity of [REDACTED] drums per annum (on the basis of a double shift).

[234.2] The proposed structural remedy would have the consequence that the rationale for the behavioural/pricing remedy previously proposed by Greif would no longer be necessary.

[234.3] However, the merging parties were willing to retain the pricing remedy for a period of two years to enable the third-party purchaser to become fully operational.

[234.4] The proposed structural remedy was a further material measure to address the Commission's concerns regarding the proposed merger, to be included as a post-approval divestiture condition affording the merging parties a timeframe within which to identify a suitable purchaser to be approved by the Commission, failing which, the divestiture process would be placed in the hands of a divestiture trustee.

[235] On 29 May 2018, the merging parties informed the Commission that it had found a suitable third-party candidate. Infinity Drums, which had agreed to purchase the Vanderbijlpark large steel drum line. The merging parties provided the Commission with the "Agreement for Sale and Purchase of Used Equipment" (the "Sale Agreement"), a signed contract between Greif and Infinity Drums with respect to the proposed divestment. The proposed transaction of used equipment was to be purchased for the amount of [REDACTED] Included in the package, Greif would have, at its own expense,

disassembled and transported the equipment to Infinity Drums' premises in Durban, South Africa.

[236] While an initial agreement had been signed by both the parties, the terms of the written agreement were subsequently revised in certain aspects to provide further benefits to Infinity Drums:

[236.1] The [REDACTED] agreed for the staggered payment of the [REDACTED] purchase price set out in clause 3.2 of the sale agreement was extended to [REDACTED].

[236.2] Greif SA agreed to provide Infinity Drums with all the assistance it required in order to have the VDBP line transported from Vanderbijlpark to Infinity Drums' premises in Durban, and to have it installed and commissioned at Infinity Drums' premises.

[236.3] Greif SA agreed to provide [REDACTED] to Infinity Drums, [REDACTED] for a period of [REDACTED].

[236.4] Greif confirmed that its accessories business, Tri-Sure, would supply accessories directly to Infinity Drums on the same commercial terms as Tri-Sure supplies to the rest of the market.

[236.5] Greif, in light of the subsequent decline in the value of the Rand, agreed to fix the exchange rate for the purchase of the VDBP line as at the date of the sale agreement.

The Commission's criticism of the proposed behavioural remedy

[237] In considering the adequacy of the proposed behavioural remedy, the Commission raised two main objections. The first objection was in relation to the adequacy of price caps to cure permanent structural harm created by the proposed merger. The second objection related to the adequacy of the remedy in respect of non-price competition concerns.

[238] Overall the Commission considered the proposed condition to be insufficient to address its concerns. However more specifically, the Commission

submitted that this merger would result in a permanent structural change to the market – for which a behavioural remedy would be inadequate to cure.

[239] According to the Commission price caps override market signals and may actually reduce the effectiveness of the remedy over time. In addition, price caps can be circumvented, for example a price may be circumvented by a firm reducing the quality of the controlled products. Monitoring and enforcement may thus be costly and lack effectiveness. In this regard the Commission relied on the evidence of Gierdien and Mohamed Yunus. What is common to both these customers is that Greif and Rheem have a history of not adhering to their quality, service levels and supply standards even though they were already contractually required to do so i.e. without the remedy in place. When probed as to whether the above remedy would cure their concerns regarding supply, both Gierdien and Mohamed Yunus were clear that this was not a guarantee given their current experience with the merging parties.

[240] In addition to this, the Commission also considered the default 7-year period to be inadequate given that Rheem is likely to remain an effective competitor of Greif SA absent the merger.

[241] The merging parties argued that the 7-year period was more than adequate in the circumstances given that Rheem was likely to exit in this period. In the event, that the structural remedy was preferred over the behavioural remedy, Greif was still willing to maintain the behavioural remedy for an interim period of two years during which time the structural remedy could be implemented.

[242] As regards the issue of non-price competition, the merging parties were of the view that the proposed structural remedy was more than sufficient to address any concerns. Further, that in respect of quality, this was an internal standard which both Greif and Rheem, would absent the merger, be required to comply with in order to meet their obligations to their respective clients i.e. to avoid the replacement of faulty drums and/or pay other forms of contractual penalties. According to the merging parties this issue was confirmed by Murgatroyd who submitted that the quality of the LSD was not driven by competition between different suppliers. Instead LSD suppliers needed to

ensure that they maintained their requisite quality standards in order to be productive at all. In addition, Hietink explained that Greif was a global company whose local and international quality standards did not depend on the extent of competition in any particular market.

[243] Importantly the merging parties argued that Greif and Rheem have not permanently lost customers to each other or any other supplier as a result of production or quality standards. Instead customers temporarily move between suppliers in the event of quality issues. Critically in their view, Mncube could not point to evidence to contradict this i.e. that quality standards are affected by the state of competition between suppliers. Further, they submitted that there was no evidence to demonstrate that security of supply was a parameter of competition.

[244] In conclusion, the merging parties were of the view that non-price issues were not a function of competition between the merging parties at all. As such, the commitments made in the remedy were more than adequate to remedy any potential concerns regarding non-price issues that may arise post-merger.

[245] Finally, although not a major objection, the Commission noted that that Greif's commitment to a new drum line in South Africa was not merger specific and that Greif could still invest in this line absent the merger. The Commission surmised that the fact that Greif SA had been able to solicit funding from Grief in Netherlands showed that this was a commercial decision which was self-imposed.

[246] In response to this criticism the merging parties submitted that the investment commitment with respect to a new LPD line was a major investment with substantial competition and public interest benefits, which would not be made in the absence of the merger.

[247] The Commission submitted that the concerns raised by the merger are structural in nature and a Price Cap Remedy is behavioural, therefore, it would not address the permanent structural nature of the harm by the proposed merger.

The Commission's criticism of the proposed structural remedy

[248] The Commission analyzed the divestiture's design under the following broad headings:

[248.1] The scope of the divestiture

[248.2] Identification and availability of suitable purchasers; and

[248.3] Ensuring that the divestiture is effective and there is an effective divestiture procedure.

The scope of the divestiture

[249] With respect to the structural remedy the Commission cautioned the Tribunal against the implementation and irreversibility such a remedy could have on the market. In terms of the divestiture, the remedy proposed that Greif would divest of an asset and not the entire business comprising personnel, customer lists, suppliers, information systems, intangible assets, and management infrastructure which would be necessary for the efficient production and distribution of the relevant product. In other words, Greif proposed to divest of the VDBP line 'voetstoots' to Infinity Drums.

[250] Importantly to note here was that the line being divested of is 40 years old. When the Commission assessed the total maintenance costs of the line incurred by Greif from November 2014 to June 2017 this amounted to [REDACTED]. When the Commission compared this to the purchase price to be paid by Infinity Drums of [REDACTED], this amount became significant. More specifically the Commission found, for example, that the replacement of a major component such as an oven would actually render the purchasing of the drum line futile as the cost of this replacement alone was estimated to be around R9.5 million.

[251] What was also important for the Commission in its analysis of this remedy was the fact that Rheem had replaced its 45-year-old drum line in Moberi with a state of the art R40 million LSD line as recent as 2014. In other words, Rheem had recognized the unreliability of a 45-year-old drum line and the need to upgrade it to an automated production process with reduced maintenance costs, improved reliability and with sufficient capacity to be able to enter new markets.

- [252] Based on the above, it therefore appeared to the Commission that the divestiture of the drum line was just part of the merging parties rationalizing plan post-merger. Further the sale of this drum line was the sale of the acquiring firm's asset and not the target firm's (which had a significantly more efficient drum line). This therefore failed to address the substantial lessening and prevention of competition which will arise from the acquisition of Rheem's productive capacity and not Greif's existing productive capacity.
- [253] While the merging parties have claimed that the divestiture of the drum line would empower a new effective competitor in the South African LSD market, the Commission argued that this was not the case. Instead, the Commission argued that this divestiture was a distraction in order to keep the most efficient drumline, i.e. Rheem's new LSD line, while getting rid of the worst drum line i.e. the VDBP line. The Commission stated: *"the sale to Infinity Drums has been dressed up as an appropriate remedy when it is just an accelerated sale of an unwanted 40 year old drumline⁶⁸".*
- [254] The merging parties refuted the Commission's conclusion regarding the viability of the drum line. The merging parties argued that this drum line currently produced approximately [REDACTED] drums per day for Greif SA and was capable of producing more than [REDACTED] drums per year on the basis of a double shift. It further had a proven track record of viability and quality especially given that it was being used by Greif to supply its customer base from its Gauteng operations.
- [255] It was the merging parties' submission that with this drum line, Infinity Drums would be able to serve the entirety of Rheem's demand and still have approximately 50% spare capacity to meet a large proportion of the balance of the market demand.

Identification and availability of suitable purchasers

- [256] Turning to the issue of whether the merging parties had identified a suitable candidate to ensure that the divestiture would be successful, the Commission submitted that this candidate needed to be independent of the merging

⁶⁸ Commission's heads of argument, page 123 paragraph 260.

parties and have at its disposal the appropriate financial resources to run the business efficiently and effectively.

[257] More specifically the Commission indicated that in order to ensure that the Divestiture remedy would be able to achieve its intended effects, a divestiture would need to be made to a purchaser who satisfies the following suitability criteria⁶⁹:

"21.1 Independence: the purchaser should have no significant connection to the merging parties that may compromise the purchaser's incentives to compete independently from Greif. Continued connection may include for example, an equity interest, shared directors, or continuing financial assistance by Greif to the purchaser.

21.2 Capability: the purchaser must have access to appropriate financial resources, expertise and assets to enable the divested business to be an effective competitor in the market. This access should be sufficient to enable the divestiture package to continue to develop as an effective competitor.

21.3 Commitment to the relevant market: the purchaser should have an appropriate business plan and objectives for competing in the relevant market."

[258] Of significance to the Commission's argument relating to the financial readiness of Infinity Drums can be found in an email dated 25 May 2018 sent by Mr Moodley to Greif following receipt of the draft sale agreement. The excerpt from the email reads as follows:

"... [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁶⁹ Structural remedy bundle page 9

[REDACTED]

[REDACTED]

[259] [REDACTED]

[260] Following from this email on 30 June 2018, Moodley wrote an email to Ms Lital Avivi of Bowmans (Greif's external legal counsel) [REDACTED]

[261] The Commission submitted that the above emails were clear evidence that Moodley had rushed into the Sale Agreement with Greif without fully considering the implications for his business – a point he conceded to.

[262] Insofar as the assessment of the viability, reliability and costs associated with the VDBP line, Moodley also did not conduct a due diligence report nor did he request documents pertaining to the historical performance, maintenance costs, management accounts, breakdown and financial history of the drumline.

[263] Importantly, however, the Commission raised concerns about Infinity's financial position, and its ability to be an effective competitor. The Commission found that its profit margins were [REDACTED] and its costs of sales were, [REDACTED] for a production facility of its size and turnover. This meant that [REDACTED]

[264] As regards Infinity Drums method of financing the VDBP Line the Commission found a number of flaws associated with its sources of funding. Before

⁷⁰ Competition Commission Heads of Argument page 128-129, paragraph 269.8

agreement to this effect had been provided to the Commission in order for the terms and cost benefits to be considered.

[270] The Commission therefore concluded that Moodley failed the test as an independent purchaser with the appropriate financial resources. Firstly, as discussed above, Moodley would be heavily dependent on the merging parties support in order to compete effectively – as he would rely on them for a critical input i.e. steel. Secondly, Moodley failed to conduct an independent evaluation of the VDBP line and its associated costs. In addition, he did not conduct a due diligence. Infinity's financial situation is also precarious with uncertainty regarding its sources of financing. This together with its unknown variable costs means that this deal would have actually been to Infinity's detriment.

[271] On the issue of the VDBP line and whether Infinity would be in a financial position to purchase the VDBP line, the merging parties reiterated their commitments made in the remedy i.e. that they would provide Infinity with all the necessary means to install and successfully commission the VDBP line at Infinity's premises in Durban. Further that Moodley had indicated to them that he had in his employ, a number of ex-Greif employees who would be familiar with the VDBP line and how it operated.

[272] To answer the question of whether Moodley had regard to the maintenance records of the VDBP line, Moodley explained that he had sight of the line himself and was satisfied that it was in good working order. As stated above he also had in his employ ex-Greif employees. Moodley assumed from his experience that the maintenance costs would then simply be typical to that of any other plant of the sort.

[273] Moodley estimated that the commissioning of the VDBP line would take approximately 6 months from the date of approval and thus it was the merging parties view that he would have no difficulty in achieving operability of the VDBP line in a relatively short period of time.

[274] In terms of costs, the merging parties argued that it was unrealistic for the Commission to assume that Greif and Infinity would have the same economies of scale and thus comparing the two would be a futile analysis. It

was also incorrect to assume that just because a firm operates at a lower scale than its rivals that it would therefore be subject to higher input costs. In their view there is simply no evidence that input costs would disadvantage Infinity Drums to such an extent that it would not be able to compete effectively with Greif.

[275] Dealing first with the issue of steel, it is important to note that Infinity currently purchases steel on a de-coiled and cut basis from a secondary supplier called Allied Steelrode. Greif, post-merger, agreed to provide de-coiling and cutting services to Infinity [REDACTED] for a period of [REDACTED]. According to Infinity this would generate significant cost savings. Moodley also argued that as far as other accessories needed for the production of LSDs, Infinity would, post-merger, easily be able to import these from Greif's international supplier, TriSure at a lower unit cost. Tri-Sure was to supply the accessories on the same commercial terms as it supplies to the rest of the market.

[276] Moodley further explained that Infinity Drums' costs were considerably lower than Greif. This is so given that Infinity Drums was a more flexible business and would be located on the same premises as Anchor Pail and Drum thereby lowering its after-production cost base. As Moodley explained:

"I don't need to have a production manager; operations manager; I'm combining even my [HR], my health and safety officers [with] the existing Anchor [business]. So Infinity is free of those costs."

Customer perceptions

[277] The Commission approached a number of customers in the market to gauge their perception of the proposed merger and remedy, and whether they considered Infinity to be an alternative supplier in the market. These customers included [REDACTED]

[278] The main concerns raised by customers regarded lead times, risk of supply in times of production downtimes and possible price increases. While none of the customers raised concerns regarding Infinity Drums as a new supplier, they submitted that tests on its suitability as a new supplier would need to be done. Based on the customers responses, the Commission concluded that

the likelihood of Infinity rising as an effective competitor post-merger was, at best, uncertain.

[279] Another issue of significance was whether Infinity Drums could supply to other parts of the country. According to [REDACTED] it had previously explored purchasing from Infinity Drums as well as another large steel manufacturer based in Durban. However, these plans were abandoned as the cost to transport the drums from Durban to Johannesburg would ultimately add to the drum costs and make it unrealistic. The additional cost of the drums was estimated to be in the region of [REDACTED].

[280] The Commission was of the view that the proposed divestiture package as well as the identified buyer were unlikely to address the likely effect on competition which will arise from the proposed transaction.

[281] The merging parties argued that there was simply no basis for this concern given that Moodley had experience, skills and customer connections as well as him being a successful participant in the industrial packaging market through Anchor Pail and Drum. Moodley had initially founded Anchor Pail and Drums in 1990 and in 2015 recognized an opportunity to enter the LSD market. He commenced sales in November of 2016.

[282] Moodley had successfully grown Infinity Drums and had only been constrained by his limited and inefficient production plant. Infinity Drums current production capacity is only approximately [REDACTED] LSDs per month.

[283] Contrary to the Commission, Moodley submitted that while it was true that customers were uncertain of volume, price and quality, none of the customers had indicated an unwillingness to purchase from Infinity provided their specifications and requirements were met.

Is the divestiture package sufficient?

[284] The Commission was of the view that based on the analysis above, the divestiture package would be insufficient to allow for a viable competitor to emerge post-merger and be able to constrain the behaviour of the merged entity.

- [285] The evidence further revealed to the Commission that even Infinity recognized that the mere purchase of the divested assets would not be sufficient for it to survive in the market and that it also required customer volume commitments. The Commission learnt of a verbal agreement given by [REDACTED] According to the Commission, this verbal commitment is indicative of the likely inappropriateness of the proposed divestiture package and also raises concerns regarding the lack of competitor independence which Infinity Drums will have from Greif post-transaction.
- [286] In addition, Infinity would not be completely independent of Greif – it requested a formal supply agreement for cut-to-size steel to be supplied.
- [287] Overall the Commission was of the view that Greif had not adequately explained how the divested assets could be operated as a viable and competitive business in the relevant market.
- [288] While the Commission raised a number of objections to the proposed remedy, Moodley in his evidence identified four key advantages that would enable him to grow his sales quickly and effectively.
- [289] Firstly, he had already established connections with a vast number of large customers in the LSD segment through Anchor Pail and Drums. Secondly, customers would have an alternative supplier in the market. Infinity would be able to be a 'back-up' supplier. The third advantage was that Infinity would be able to provide a one stop shop for customers by offering new LSDs as well as reconditioned LSDs. In his oral evidence Moodley submitted:
- "Infinity Drums manufactures the drum; Anchor Drums comes and does the laundry, cleaning up your waste drums, collecting the drums that you use, reconditioning and putting them back into the market. So there is a cycle of responsibility within my company which is a great asset compared to the merger of Rheem and Greif. Rheem and Greif cannot provide that separately to companies. So I've got a leading edge over the marketing factors as well."*
- [290] Finally, Infinity Drums has a B-BBEE rating of level 1 as a 100% black-owned company.

Tribunal view

- [291] In the case of *Imerys*, it was held that where the Tribunal is asked to approve a merger with conditions rather than prohibit it, the choice of remedies is in the nature of a discretion. It was held that the Tribunal has the power to prohibit the merger if it is not satisfied that the conditions will adequately remedy the likely SLC.
- [292] Based on the evidence before us, the Tribunal is of the view that neither the price remedy nor the structural remedy addresses the competition concerns that arise from this merger. From a competition perspective, the proposed merger consolidates the activities of a duopoly, who vigorously compete in the market, into a near monopoly. This gives rise to significant competition concerns.
- [293] The pricing remedy offered by the merging parties does not address the market structure concerns that arise from this proposed merger. For this reason, the Tribunal is of the view that a behavioural remedy, of a price cap, is an inappropriate remedy for addressing structural concerns that arise from this merger.
- [294] The merging parties also offered a structural remedy. It is noteworthy to mention that this was provided quite late in the course of the proceedings and in the end, the lateness of this offering delayed the conclusion of the proceedings as the final proposed remedy needed to be road tested with customers in the market. In our view the lateness of these remedies was a last resort to push through the deal.
- [295] It is quite clear from the evidence that Moodley did not fully consider the implications of the sale agreement, as he himself acknowledges. Instead the proposed sale of the VDBP plant appeared to be expedited in order for this merger transaction to be approved. Moodley had not even drafted a business plan.

CHAIRPERSON: Mr Moodley, there may be some questions from ourselves. Have you developed a business plan for your business with the Vanderbijlpark line?

MR MOODLEY: Not as yet, no. [REDACTED]

[REDACTED] another business plan with the Vanderbijlpark – I did a virtual business plan. I think I must have forwarded it. Is it not in the papers? Yes.

CHAIRPERSON: You say you've done a virtual business plan?

MR MOODLEY: I've done – yes, yes. For the six months the number of drums; nine months, number of drums. That was forwarded.

MR PHALADI: For the record, the Commission has never been provided with this.

MR WILSON: Chair, we can follow up with the attorneys.

CHAIRPERSON: Have they got it or haven't they? They're next to you.

MR WILSON: Chair, I think I understand what Mr Moodley is referring to.

So I know there was a document which was forwarded for purposes of understanding his strategy, but I can see to what – I don't know if it's been discovered and what its status was. I know it was under discussion.

MR PHALADI: Sorry, just to be clear, Chair. The Commission did request a lot of these documents, and business plans, strategic plans, regarding this sale, due diligences, and what we've received is what's in the record.

So just to make it clear that if this document is not something that's in the record then the Commission has never received such.

MR WILSON: Chair, just to be clear, what I'm referring to, is not a discovered document, in other words, it's not an original document. It was a working that was done in the last few days. So it's not a pre-existing document. It was created for purposes of the litigation. I think that's what Mr Moodley is referring to.

CHAIRPERSON: Alright, so there is no documents that is in the record and that is available of the business plan.

MR WILSON: That's correct.

[296] Moreover, as highlighted by the Commission, it is not at all clear that Moodley had the necessary financial resources to fulfil his obligations in the sale agreement. He himself raised some concerns in this regard with the seller.

[297] Importantly, the merger would have allowed Greif and Rheem to consolidate their production of LSDs using Rheem's state of the art production facilities which is three years old. The structural remedy proposed by the merging

party disposes of Greif's 45 year old VDBP line – a significantly less efficient line than that which the merging parties will use. We heard evidence in the proceedings of the significant maintenance costs that Greif is having to incur to keep the line operational. Moreover, the disposal is of the line alone – not including the management and production staff and capabilities and not a customer base.

- [298] In our view, there remained serious questions both about Moodley's capacity to implement the proposed remedy and, assuming he did master the financial resources to purchase the VDBP plant, his ability to effectively compete with the merging parties remained in doubt. In our view Moodley appeared to be more of a dependent rival rather than an independent competitor.
- [299] In addition to the above it is noteworthy to point out that while the Commission was given limited time to road test the remedies proposed, the overwhelming response of customers was that they did not think the remedies were adequate to allay their concerns of there being no alternative supplier of LSDs in the market post-merger. While they recognized that there were technically other suppliers in the market, they were not convinced that these suppliers would be able to supply their needs. While some customers had attempted to procure from other suppliers in the past this did come to fruition due to the increased costs to procure from them. In the view of customers, Greif and Rheem therefore represented the only viable and cost-efficient suppliers of LSDs.
- [300] The Tribunal is therefore of the view that the merger will give rise to an SLC and there is reasonable possibility that the proposed conditions will fail to remedy the likely SLC.

Conclusion

[301] In light of the above, we conclude that the proposed transaction is likely to substantially prevent or lessen competition in the relevant market. Accordingly, we prohibit the proposed transaction.



Prof. Imraan Valodia

21 May 2019

Date

Mr Norman Manoim and Mr Enver Daniels concurring

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