

SOUTH AFRICA / JUDGMENT

## Imperial Holdings Ltd v Probe Corporation South Africa (Pty) Ltd (02/LM/Jan12) [2012] ZACT 46 (29 June 2012)

[2012] ZACT 46

COURT

Competition Tribunal

BEFORE

Yasmin Carrim, Medi Mokuena, Takalani Madima

CASE / FILE NUMBER

02/LM/Jan12

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### COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:02/LM/Jan12

[013821]

In the matter between:

Imperial Holdings Ltd .....Acquiring Firm

And

Probe Corporation South Africa (Pty) Ltd .....Target Firm

Panel : Yasmin Carrim (Presiding Member) Medi Mokuena (Tribunal Member)

Takalani Madima (Tribunal Member)

Heard on : 14 March 2012

Order issued on : 14 March 2012

### Reasons

issued on : 29 June 2012

Reasons for Decision

Approval

On 14 March 2012 the Competition Tribunal (“Tribunal”) unconditionally approved the acquisition by Imperial Holdings Ltd of Probe Corporation South Africa (Pty) Ltd. The reasons for the approval follow below.

#### Parties to the transaction

The primary acquiring firm is Imperial Holdings Limited (“Imperial”), a company incorporated in terms of the laws of the Republic of South Africa. Imperial is a public company listed on Johannesburg Securities Exchange (“JSE”) Ltd and is not controlled by any single shareholder.<sup>1</sup> Imperial controls the following firms: CIC Holdings Ltd, E-Z-Go Golf Carts, EWC Express SA (Pty) Ltd, Danmar Autobody and Graffiti Designs (Pty) Ltd.

The primary target firm is Probe Corporation South Africa (Pty) Ltd (“Probe”), a company incorporated in terms of the laws of the Republic of South Africa. The shareholders in Probe are Ukhamba Holdings (Pty) Ltd with a 49.95% shareholding and Management with 50.05% shareholding.

Probe controls the following firms<sup>2</sup>: Free State Metals (Pty) Ltd, Fawick SA (Pty) Ltd, Probe Integrated Mining Technologies (Pty) Ltd, Probe Collision Avoidance

Technologies (Pty) Ltd, Probe Electrical Eastern Cape (Pty) Ltd, Probe Nelspruit-Nannum Beleggings (Pty) Ltd, Platinum Battery

Technologies (Pty) Ltd and Probe Auto Electrical (Pty) Ltd.

#### Activities of the Parties

Imperial is a diversified industrial services and retail group which conducts a wide range of activities relating inter alia to transportation, logistics, warehousing, specialised freight, supply chain solutions, car rental, tourism and insurance. The Imperial business relevant for assessment of the proposed transaction is the Imperial Autoparts division. Imperial Autoparts is active in the vehicle aftermarket<sup>3</sup>, focusing on distributing spare parts and accessories for vehicles outside manufacturer’s warranty and service programmes.

Imperial Autoparts’ two divisions relevant for purposes of this transaction are (i) the Midas Group (“Midas”) and (ii) Engine Parts.

Midas supplies non-branded automotive spare parts to independent spare shops, workshops, fleet and various outlets such as engineering

shops and chain stores. Midas operates 16 retail outlets as owner and acts as a franchisor for these brand names: Midas (with 290 outlets), Motolek (with 61 outlets), ADCO (with 40 outlets), ACD (with 43 outlets) and CBS (with 23 outlets). Engine Parts is a wholesaler of various

non-branded aftermarket automotive parts and accessories and supplies non-branded engine parts, such as engine bearings, engine

gaskets and engine valves, to independent spare shops and fitment centres.

Probe is an importer of various non-branded spare parts for heavy duty vehicles in the automotive aftermarket. Probe also supplies certain Original Equipment Manufacturers (OEM) with spare parts and complete units, which are factory-approved and are made strictly to manufacturer's specifications.

#### Description of the transaction

Imperial currently has a 49% indirect shareholding in Probe through Ukhamba Holdings (Pty) Ltd. Through this transaction Imperial intends to increase this indirect shareholding from 49% to a direct shareholding of 51%. Following implementation of the proposed

transaction, Probe will be controlled by Imperial and will continue to operate a standalone business within the Imperial Autoparts

Division.

#### Rationale for the transaction

Imperial submitted that in addition to the proposed transaction providing it with an aftermarket presence in product segments where it is relatively inactive, this transaction will also provide it with the benefit of Probe's technical capabilities in sourcing and supplying a variety of aftermarket spare part brands. From Probe's perspective this transaction offers it with an opportunity to become part of a company that is larger, financially sound and that has a good African distribution footprint.

#### The relevant markets and impact on competition

The Commission identified a limited horizontal overlap as well as a vertical relationship between the activities of the merging parties. The horizontal overlap arises because the merging parties sell batteries to retail customers. The Commission, however, found that Probe's sales of these batteries is insignificant and that Probe is not focused on the retailing of batteries but rather on the wholesaling thereof. The Commission therefore concluded that this limited overlap is unlikely to result in a substantial prevention or lessening of competition.

#### Vertical Assessment

The vertical relationship in the activities of the merging parties arises because Imperial's divisions (Engine Parts, Midas, Imperial Cargo and Tanker Services) purchased limited quantities of certain aftermarket parts from Probe during 2010. In particular, Engine Parts purchased batteries and Midas purchased starters and alternators from Probe which represented about 1.7% and 16% of Probe's total sales in 2010 respectively. Further, Imperial Cargo and Tanker Services purchased starters, alternators and batteries from Probe which represented approximately 0.3% and 0.2% respectively of Probe's total sales in 2010.

For purposes of assessing the vertical effects of the proposed transaction, the Commission defined the aftermarket spare parts market at its narrowest level i.e. by product e.g. batteries, alternators and starters as the three products are the areas of overlap between the activities of the

merging parties. The Commission further defined the upstream market as the market for the manufacture and supply (importation) of non-branded batteries, starters and alternator and the downstream market as the market for the wholesale distribution of non-branded batteries, starters and alternators. The geographic market for both the upstream and downstream markets is defined by the Commission as being national.

#### Upstream market

The merging parties submitted that Probe focuses its activities of importing non-branded aftermarket spare parts in order to service the heavy-duty trucking, mining, construction and commuter aftermarket. In respect of the importation of batteries Probe has a market share of 3% and competes with local manufacturers such as First National Battery ("FNB") (45%), Powertech (35%), Dixon Batteries (8%) as well as with other importers such as Deltec (2%).

In respect of starters and alternators the Commission found that there are very few local manufacturers and that these aftermarket parts are mostly imported from overseas manufacturers by wholesalers/distributors such as Probe. Probe has a market share of approximately 4% and competes with firms such as Bosch (20%), Arrow (16%), Electro Part (15%), Elgin (10%) and Delco Remy (6%).

#### Downstream market

The wholesale distribution of batteries takes place through two main channels, i.e. through fitment centres as well as over the counter ("OTC") sales through spares shops. In this market, Probe has a market share of 5% for the fitment centre channel and 2% for the OTC channel whilst Imperial's business division i.e. Midas, has 10% share and 35% share for the fitment centre and over the counter channels respectively. In relation to distribution of starters and alternators Midas has a share of 13% and 5% respectively.

In relation to the foreclosure effects of the proposed transaction the Commission found that the merging parties neither have the incentive nor the ability to foreclose customers and competitors. With regards to input foreclosure the Commission is of the view that wholesalers of aftermarket automotive spare parts will not be foreclosed because

- (i) Probe is a small player in relation to the importation of batteries, starters and alternators (ii) the wholesalers also distribute a wide range of automotive aftermarket spare parts and accessories such as brake parts, cooling systems, filters and are not reliant on the import of batteries, alternators and starters for their business and lastly (iii) the wholesalers are able to import directly from overseas manufacturers, bypassing local manufacturers and importers.

In regard to customer foreclosure the Commission found that upstream competitors of Probe have their own distribution networks and as such access to their customer base will not be foreclosed as result of this transaction. In respect of the distribution of starters and alternators the Commission found that although Midas stocks various brands (such as Arrow, Bosch, DAC and Motopart), these brands do not solely rely on Midas as their main route to the market as they are also stocked by Midas' competitors.

### Third Party Views

The Commission contacted customers and competitors of the merging parties in order to get their views regarding the transaction. Three firms raised concerns namely, Auto Fuel (a franchisee of Midas), Trysome (a competitor of the merging parties) and FNB (a competitor of the parties).

Auto Fuel submitted to the Commission that it is concerned that it currently purchases genuine Delco Remy products not from Probe directly but through Imperial, which is more expensive than when independent franchisees purchase directly from Probe. In response to this concern the merging parties submitted that Midas does not have any ability contractual or otherwise to compel its franchisees to purchase from any particular firm. The parties further submitted that Imperial Group did not send out a directive to its franchisees stating that the Delco Remy products must be sourced from the Midas network as opposed to sourcing directly from Probe.

Trysome, which together with Probe is the appointed distributor of genuine Delco Remy products, stated that it is concerned that its contract with Delco Remy might not be renewed and that Probe is likely to be the exclusive distributor of the Delco Remy products post-merger. In response the merging parties submitted that they do not have any insight into the relationship between Delco Remy and Trysome or what Delco Remy's intentions are regarding its contact with Trysome. The parties further pointed out that the market shares of Delco Remy are not high (6%) to warrant any concern or have any significant impact.

FNB, which procures about 20% of spent batteries from Midas, is concerned that post-merger Probe will have access to spent batteries from Midas franchisees and then use them to produce refined lead for export purposes. According to FNB, this will result in less lead for local manufacturers of batteries who will then have to import more expensive virgin lead (should Probe decide to use batteries from Midas shops and networks for their smelter) to offset Probe's lead exports. The merging parties responded by stating that Midas franchisees are the ones who determine what they want to do with their batteries i.e. the batteries do not go to Midas. Further, the merging parties indicated that Midas does not have the requisite infrastructure to collect and return large volumes of spent batteries and that Probe's lead refining capacity is limited and cannot absorb all spent batteries. In addition, the parties indicated that it is more cost effective to purchase lead directly from scrap dealers as opposed to purchasing spent batteries, owing to the fact that battery cores tend to be sold at a far higher price.

### Public interest

The merging parties submitted to the Commission that the proposed transaction will not have any significant effect on employment.

## Conclusion

In light of the above, we agree with the Commission that the vertical relationship between the activities of the merging parties is unlikely to give rise to any foreclosure of customers or competitors of the merging parties. Furthermore, the proposed transaction raises no public interest concerns. Accordingly we approve the transaction unconditionally.

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29 June 2012

Yasmin Carrim Date

Medi Mokuena and Takalani Madima concurring.

Tribunal researcher: Ipeleng Selaledi

For the merging parties: Anton Roets of Nortons Inc.

For the Commission: Mogau Aphané

1For a list of Imperial's largest shareholders see form CC4(2) filed by the merging parties.

2These firms form part of this transaction.

3Aftermarket parts are vehicle parts and accessories that are not produced by Original Equipment Manufacturers ("OME") but are alternative/generic parts which are produced by other automotive part manufacturers such as Bosch and are not specific to any type of vehicle.

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