

SOUTH AFRICA / JUDGMENT

Oceana Group Ltd and Another v Competition Commission; In Re: Oceana Group Ltd v Foodcorp (Pty) Ltd (018101) [2014] ZACT 35; [2014] 1 CPLR 17 (CT) (11 June 2014)

[2014] ZACT 35

COURT

Competition Tribunal

BEFORE

Yasmin Carrim, Imraan Valodia, Andiswa Ndoni

CASE / FILE NUMBER

018101

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 018101

In the matter between:

OCEANA GROUP LIMITED

First Applicant

FOODCORP (PROPRIETARY) LIMITED

Second Applicant

and

THE COMPETITION COMMISSION

Respondent

In re the intermediate merger between:

OCEANA GROUP LIMITED

Primary Acquiring Firm

And

FOODCORP (PROPRIETARY) LIMITED

Primary Target Firm

Panel : Yasmin Carrim (Presiding Member)

: Prof Imraan Valodia (Tribunal Member)

: Andiswa Ndoni (Tribunal Member)

Heard on : 20-22 January 2014; 4 February 2014; 3 March 2014 and 4 April 2014

Order Issued on : 15 April 2014

Reasons

for Decision

Conditional approval of intermediate merger

- [1] On 15 April 2014, The Competition Tribunal conditionally approved the merger between the Oceana Group Limited (“Oceana”) and Foodcorp (Pty) Ltd (“Foodcorp”).
- [2] The merger involved inter alia an overlap in the market for small pelagic fish which includes pilchards. Both companies are vertically integrated in the catching, processing and marketing of canned pilchards. Oceana is the owner of the Lucky Star brand and Foodcorp owns the Glenryck brand. Both parties are the owners of fishing rights in small pelagic fish awarded by the Department of Agriculture Forestry and Fisheries (“DAFF”).
- [3] In their merger filing the parties had offered to divest of the Glenryck brand (trademark) only. The Commission was of the view that the merger was likely to lead to a substantial lessening of competition in the canned pilchards market and had accordingly approved it on condition that the Glenryck brand, together with Foodcorp’s rights to small pelagic fish, should be divested prior to implementation.
- [4] The parties filed an application for reconsideration under section 16(2) of the Competition Act with the Tribunal. After hearing the matter over a number of days,[1] the Tribunal approved the merger on condition that the Glenryck brand, together with Foodcorp’s fishing rights in small pelagic

fish, should both be divested.

- [5] Our reasons for conditionally approving the transaction are set out below.

Parties to transaction

Primary acquiring firm

- [6] The primary acquiring firm is Oceana, a public company incorporated in terms of the company laws of the Republic of South Africa. Oceana is listed on both the Johannesburg Stock Exchange (JSE) and the Namibian Stock Exchange (NSX) and is therefore not controlled by a single entity. Oceana's more significant shareholders include Tiger Brands Limited; Oceana Empowerment Trust; and Brimstone Investment Corporation Limited. Oceana operates as a holding company and controls a number of firms.[2]
- [7] Oceana has, for the purposes of the acquisition of Foodcorp's pelagic business assets and fishing rights, partnered with Ulwandle Fishing (Pty) Ltd ("Ulwandle"). Ulwandle, while being 100% Black owned and empowered company, has only a single shareholder.[3]
- [8] Oceana operates, through its numerous subsidiaries, in the fishing and allied services sector. It engages in the catching, processing and procurement of marine species including pilchard, sardine, horse mackerel, anchovy, lobsters, squid, tuna, hake and other deep-sea species sold through international and local marketing channels. Of relevance for purposes of these proceedings are

Oceana's pilchard operations which involve the harvesting, processing, importation and marketing of canned pilchards under the Lucky Star brand.

Primary target firm

- [9] The primary target firm is Foodcorp's fishing business comprising all the assets and fishing rights (excluding the West Coast lobster and hake long-line fishing rights)[4] of Foodcorp's entire fishing division ("Foodcorp's Fishing Business"). The subsidiaries housing Foodcorp's Fishing Business are wholly-owned subsidiaries of Foodcorp and as a result Foodcorp's

Fishing Business is controlled by Foodcorp (referred to as the Sellers).[5] Foodcorp is a wholly-owned subsidiary of New Food Holdings (Pty) Ltd which is in turn controlled by Capita Investment Management Limited ("Capita"). Capita is controlled by Rainbow Chicken Limited which is in turn controlled by Remgro Limited.

- [10] Foodcorp operates in the pelagic, lobster and hake fishing sectors. Pelagic fish includes anchovy, pilchards, mackerel, horse mackerel and red-eye or round herring, amongst others. For purposes of this analysis Foodcorp's involvement in the catching, processing and marketing of canned pilchards under their Glenryck brand was assessed.

Transaction

- [11] The transaction involves the acquisition by Oceana of the Fishing Business of Foodcorp as a going concern. The business essentially comprises the entire fishing business of Foodcorp and consists of the business of catching, processing (including the Laaiplek processing facility and employees) and selling deep sea trawl hake, lobster and/or pelagic fish carried out by the relevant Sellers. It also includes the head office of the Cape Town fishing operations which consists of the business assets and liabilities; the business assets of each Seller; and all shares (excluding minority shares where there are minority shareholders) of

certain subsidiaries of the Sellers.

- [12] The hake business will be purchased by Amawandle Hake (Pty) Ltd,[6] the pelagic business will be purchased by Amawandle Pelagic (Pty),[7] Ltd and the lobster business will be purchased by Oceana Lobster (Pty) Ltd.[8]

Rationale for Transaction

- [13] Oceana, as a rationale for the transaction, submitted that the transaction presented it with the opportunity to acquire Foodcorp's fishing quota, and in particular, its pilchard quota. This would allow it to substitute some of its import purchases with the cheaper domestic quota and increase its profit margins.
- [14] Foodcorp wishes to dispose of its fishing operations as these do not form part of its future strategic core investments, which are predominantly centred on grain-based products. In addition, Foodcorp's quota allocations are in jeopardy as a result of a dilution of its empowerment shareholding and the ensuing disputes with DAFF, regarding the tenure of Foodcorp's fishing rights. Thus Foodcorp took the decision to divest itself of its entire fishing division and sell it to an entity that would satisfy DAFF's BEE requirements.

Concurrency

- [15] In accordance with section 3(1A)(a) of the Act the transaction is subject to the concurrent jurisdiction of DAFF and the competition

authorities. During January when the matter was first heard, the merging parties stated in their opening address[9] that DAFF has in fact notionally transferred the pelagic fishing rights in their register to Oceana, subject, it would seem, only to the further issuance of a permit in favour of Oceana in terms of section 13(1) of the Marine Living Resources Act 18 of 1998 ("MLRA").[10] We find this to be a rather unusual step taken by a regulator who had been notified that the merging parties were seeking reconsideration of the transaction by the Tribunal, and who had in fact submitted an affidavit in these proceedings. The merging parties assured us that, notwithstanding such notional transfer, there was no prior implementation of the transaction in contravention of the Act and that they would await the outcome of these proceedings.

Background

- [16] This merger was notified to the Competition Commission ("Commission") on 2 August 2013 as an intermediate merger. On 29 October 2013 the Commission approved the transaction, subject to conditions that ultimately required, before implementation of the merger, the divestiture of both the Glenryck brand and the small pelagic fishing rights that Foodcorp relied on to service that brand.
- [17] On 13 November 2013 the merging parties filed a Request for Consideration of the merger with the Tribunal. The matter was heard on 20-22 January 2014; 4 February 2014; 3 March 2014; and 4 April 2014.

Witnesses

[18] The merging parties and Commission called the following witnesses to give evidence at the Tribunal hearing:

Merging parties

[19] The merging parties called three factual witnesses:

- Mr. Gavin Rhodes-Harrison (“Rhodes-Harrison”), the managing director of Oceana Brands Limited (“Oceana Brand”) who is also a member of the Executive Committee of Oceana Group Limited (“Oceana”);
- Mr. Josias Andreas Van Niekerk (“Van Niekerk”), the managing director of Foodcorp’s Fishing Division (“Marine Products”);
- Mr. Jan Arnold (“Arnold”), the managing director of Bidfish Namibia Fisheries Holdings (Pty) Ltd (“Bidfish”), who gave evidence on the sale agreement concluded between Foodcorp and Bidfish for the acquisition by Bidfish of the Glenryck brand of canned pilchard.

Commission

[20] Three factual witnesses gave testimony on behalf of the Commission, namely:

- Mr. Alan Silverman (“Silverman”), the managing director of the Saldanha Group (Pty) Ltd (“Saldanha”);
- Mr. Balindi Sanqela (“Sanqela”), the founding member and director of

Ntshonalanga Fishing (Pty) Ltd (“Ntshonalanga”);

- Mr. Samier Saban (“Saban”), the chief executive officer of Premier Fishing (Pty) Ltd (“Premier”).

Background to the fishing industry

[21] To contextualise the merging parties’ rationale for the transaction and the disputes on the competition issues prevalent in this case, we shall describe certain dynamics and provide background information to the characteristics of the South African fishing industry. These include the regulation of the fishing industry, the market structure and the various sources of fish available to the competitors in the market.

High barriers to entry

[22] The fishing industry is characterised by high barriers to entry. Small pelagic fish, including pilchards, are surface shoaling fish mainly caught in the colder waters off the coasts of the Southern and Western Cape. Apart from significant regulatory barriers to entry, access to fish is constrained by the fact that populations are of limited size and are seasonal in nature. Pilchards are usually caught predominantly in the first half of the year. Fishing in South Africa has in modern times been the subject of regulation in the form of rights, licenses and/

or permits.

[23] The industry in South Africa is regulated by the MLRA. The MLRA provides for the exercise of control over marine living resources, and to this end, confers an array of statutory powers and responsibilities on the Minister and

his delegated officials within DAFF. These include the granting of commercial fishing rights in accordance with section 18(1) and the annual issue of permits in terms of section 13(1).[11] Separate rights are issued for each fishing sector and in 2006 long term fishing rights were awarded to companies, including the merging parties, for the harvesting of pilchards.[12]

[24] The exercise of these rights is however, subject to the issuance of permits (to launch the fishing boats) by DAFF and by the Total Allowable Catch (TAC) determined by DAFF annually. The TAC is determined by specialists on behalf of DAFF. These specialists estimate the possible size of the fish population in the next fishing cycle. Once the population of fish is estimated, the TAC is generally set at a level slightly lower than the estimate in order to ensure sustainable fishing. For example, if the population of small pelagic fish is estimated at 100 000 tons for the next fishing season, DAFF might limit the TAC to 90 000 tons. This is also the practice in Namibia.

[25] The fact that a rights holder has the license to catch a certain amount of tonnage of fish in a particular year, does not mean that in actuality they will be able to fulfil their entire quota, due mainly to the fact that fish are a naturally occurring resource and are influenced by environmental and other naturally occurring phenomena. As a result, the fish population may be smaller than projected in a particular season. Hence the boats might simply not find enough fish. In some years there is the likelihood that the TAC would be adjusted downwards. Were DAFF to formally adjust the TAC downwards in a given year, each right holder's TAC would be adjusted pro rata downwards.

[26] The current TAC for small pelagic fish is 90 000 tons. It is common cause that this TAC does not meet the demand for canned pilchards in the South African market.

Canned Pilchards Market

[27] The Glenryck and Lucky Star brands have been present in the canned pilchards market for more than 50 years. Canned pilchards are a relatively cheap source of protein for South Africans. The low price and convenience of canned pilchards, compared to the price of fresh meat or chicken, represents an affordable alternative of protein for working people and the poor. Pilchards in particular are consumed in the South African mass market in many different can sizes. The most popular offering seems to be pilchards in tomato sauce and pilchards in hot chilli sauce. Lucky Star is by far the most dominant brand in the mass market. Tall cans, as opposed to flat tray-like cans, are also more popular in South Africa than in other parts of the world.

Federal Marine history

[28] Mr. Silverman described how in around about 1964 there were many brands of canned fish in the South African market.[13] Federal Marine was established at roughly this time by the then industry leaders as a joint marketing vehicle. Through this

process they consolidated the number of brands in existence at the time and focus was given to three brands, namely Saldanha, Glenryck

and Lucky Star (which was actually established within the Federal Marine environment). Silverman, who sat on the board of Federal

Marine, described how they would sell and market the canned fish on behalf of the industry.

“MR SILVERMAN: ... I spent many years on the Board it must have been 15 or 20 years there were many different sales and marketing plans put together.

Usually you’ve got a big advertising company it was a very important opportunity to be involved in selling canned fish.”[14]

[29] He further explained how the markets were divided amongst the three brands:-

“MR SILVERMAN: “The strategy that was developed within the management of Federal Marine from my understanding was that they would focus the Saldanha brand on the Cape market, they’d focus the Glenryck brand on the so-called “white” market and the Lucky Star was going to be the sort of brand for the mass market and largely the black consumer market ... in South Africa [15].”

[30] It appears that a strategic decision had been made to promote and build Lucky Star as the largest brand of the three. It was agreed by the parties within Federal Marine that all the individual brands will return to their original owners should it be forced to break up through some form of Government intervention. In 1996, and acting on legal advice in anticipation of the promulgation of the Competition Act, Federal Marine broke up and the Saldanha brand was returned to Saldanha, Glenryck went back to Foodcorp and Lucky Star was sold to Oceana in terms of a bidding process open only to the producers within Federal Marine.[16]

[31] Remnants of the co-operation between the larger players can still be found in present day arrangements. For example Oceana owns the license to market the Glenryck brand in international markets. Both the merging parties, as well as other major players in the industry, were the subject of a recent section 4(1)(b) investigation by the Commission in respect of inter alia an agreement to fix the quota rental fees payable to third party quota holders[17] for the use of their pilchard quota for the 2006 fishing season. Prior to the notification of this transaction, Oceana settled the matter in consent order proceedings confirmed by the Tribunal on 19 June 2012 whereby an administrative penalty was levied against it in the amount of R34 750 050.00. Foodcorp has not yet settled with the Commission in this regard but has expressed an intention to do so.

- [32] The merging parties are vertically integrated firms and are operational throughout the various levels of the supply chain, namely the harvesting, processing and marketing of canned pilchards.[18]
- [33] The market is further characterised by firms which operate only at certain levels of the supply chain but that do not have fully integrated operations.[19] In this regard firms such as Premier Fishing SA (Pty) Ltd (“Premier”), Pioneer Fishing West Coast (Pty) Ltd (“Pioneer”) and Gansbaai Marine (Pty) Ltd (“Gansbaai”) own fishing rights and harvest their own quota, as well as the quota of third party quota holders.[20] There are also processors in the market, such as Afro Fishing (Pty) Ltd (“Afro Fishing”) and Gansbaai, which do not have a significant brand in the downstream market but which primarily process fish for other brands, retailers, wholesalers and traders. There are also retailers,[21] which compete in the downstream market for the marketing and sale of canned pilchards, by means of their own brands,[22] but do not have an allocated quota nor harvesting and processing operations, and instead support their brands with canned product from local producers and imports. [23]
- [34] A further dynamic is the position of rights holders who are not involved in any other aspect of the industry (i.e. they do not harvest or process fish, nor do they market or sell finished pilchard products) but who enter into supply agreements or ad hoc[24] contractual arrangements and sell their allocated quota to other firms to catch, form joint ventures (or other similar arrangements) in order to harvest their allocated quota, or pay other firms to harvest quota on their behalf.[25] These rights holders have been referred to throughout these proceedings as “Third Party Rights Holders” and when sold, these rights have been referred to as “Third Party Quota”.

NB: Picture available in the PDF and the Word Documnet.

- [35] Oceana (Lucky Star brand) and Foodcorp (Glenryck brand) are present at all levels of the industry and compete with each other in the marketing and sale of branded canned pilchards.

Sources of fish

General

- [36] It is clear that those that compete to sell canned pilchards to the end consumer shall require access to fish. It is common cause in these proceedings that the South African demand for canned pilchards is greater than what can be produced from the local TAC. As a result, none of the competitors in the canned pilchard market are able to rely exclusively on their own quota in order to meet the demand for their respective brands. By way of illustration Oceana, pre-merger, has the highest TAC allocation at 15%, yet is reliant on imported fish for roughly 60% of its inputs. Brand owners therefore compete heavily with each other (and with the independent processors) in the market for Third Party Quota and then, as a last resort, source any remaining shortfall in their requirements from imports.

Ranking of inputs

[37] All the witnesses in these proceedings, including those of the merging parties, confirmed that fish from own quota is the most desirable for reasons of price and security of supply.

[26] Fish obtained through own quota locally is in fact considered to be a “free” input. Apart from the costs of harvesting, processing, marketing and permit fees, rights holders are able to obtain their fish without any further charge.

[38] Sources of supply of pilchards in the South Africa market can accordingly be ranked in order of increasing cost as follows:

1. Fish from own quota and own production;
2. Fish from local third party contract quota and own production;
3. Fish purchased from local/Namibian canneries;
4. Frozen fish (cutlets) from imports and own production; and
5. Imported canned fish (finished product).[27]

[39] Fish obtained through own quota is the lowest price input. Margins for the manufacturers of canned pilchards decline proportionately with how far removed the input is from own quota, and whether or not the processing was done by themselves or a third party.

Imports

[40] The merging parties themselves confirm that margin yields were significantly higher for cans produced with inputs from own quota than purchasing imported cans from third parties. In addition imported products are required to comply with prescribed quality regulations by the National Regulator for Compulsory Specifications (“NRCS”). NRCS maintains some of the highest standards in terms of canned fish in the world. Any product imported into South Africa has to meet this very high standard and requires an NRCS certificate of approval before that product may be sold into the South African market. NRCS carries out quality control inspections of not only the product, but also the facilities manufacturing the product being brought into the country.[28]

[41] All the other witnesses confirmed that import of finished cans would yield the lowest margin for a seller of canned pilchards. House Brands or White Labels purchase only the finished canned pilchard from a number of sources, which may include imports from Asia. We discuss the issue of imports in more detail later.

Summary of competition

issues

- [42] It is the Commission's view that Oceana, with a market share of 73.1% in canned pilchards through its Lucky Star brand, ought not to be allowed to obtain Foodcorp's small pelagic fishing quota. The reason for this is that by granting Oceana direct access to a further 26.2% of the cheapest supply source, in circumstances where their biggest competitor would become reliant on fish obtained exclusively from third parties or from fish obtained outside the borders of South Africa, will have the effect of lessening competition in the relevant market.
- [43] The Commission submits that this would affect the ability of the owner of the Glenryck brand to engage in effective price competition with the Lucky Star brand. The position of the potential owner of the Glenryck brand is further exacerbated by the fact that Lucky Star already enjoys a 9-14% price premium over its competitors. Hence it is undesirable for the Glenryck brand to be sold without the fishing rights, as the transaction in the form proposed will have the effect that the Glenryck brand is unlikely to survive in the downstream without the support of the Foodcorp quota, and if it did, it would be a weaker competitor to Lucky Star post-merger.
- [44] The merging parties argued that it is unnecessary for the merged entity to dispose of Foodcorp's small pelagic fishing rights, as the owner of the Glenryck brand will be able to secure the necessary supply of canned pilchards to maintain Glenryck's competitive position in the market for the sale of canned pilchards, from sources other than its own quota. These sources of supply, they contend, can be derived from a combination of supply of contracted quota that the new brand owner may have, from local rightsholders, domestic canned product and imports of both canned and local fish.[29]
- [45] In support of this contention, the merging parties have also pointed to the conclusion of the Bidfish agreement and the evidence of Mr. Arnold that a party is willing to purchase the Glenryck brand absent the pelagic fishing quota currently used to support it. The merging parties contend that the Bidfish agreement is relevant to the question for determination in these merger proceedings, namely whether the Glenryck brand can remain an effective competitor in the canned pilchards market without the support of the Foodcorp quota.[30]
- [46] The merging parties further contend that the effects of the merger at each of the levels of the South African pilchard industry, namely the procurement of pilchards; the market for the processing of pilchards; and the downstream market for the marketing and sale of canned pilchards is largely unaffected by the transaction.³¹

Onus

[47] The merging parties argued that in reconsideration proceedings, the Commission bore the onus of proof to show that the merger was likely to lead to a substantial lessening or prevention of competition because these proceedings involved a consideration of the issues afresh, together with any new evidence that might have been led. The Commission disagreed with this approach arguing that the merging parties bore the burden of proof because they had sought reconsideration of the transaction.

[48] We have previously held[31] that reconsideration proceedings are to be viewed as appeals in the wider sense, and that we are not confined to the record before the Commission when it made its decision. Under this procedure we not only have regard to the Commission's record, but also to other evidence placed before us, by way of documents, witness statements and viva voce testimony. Hence both the merging parties and the Commission are permitted to lead new evidence and the Tribunal is entitled to

consider such new evidence or documents in its deliberations. In such circumstances, either party might bear an evidential onus on an issue-by-issue basis. Furthermore, in light of the inquisitorial powers enjoyed by the Tribunal, it might be undesirable

to utilise the notion of a legal onus as if these were of adversarial proceedings.

[49] In any event there is no need for us to deal with this issue in the abstract. New arguments may have been proffered by both sides but by and large these revolved around the same facts contained in the Commission's record. The only new piece of material evidence was that of the Bidfish Agreement. We discuss this evidence later in these

reasons.

[50] Nevertheless, even if we were to accept that the Commission bore some onus in these proceedings, we have concluded that it has met that burden and has shown that the merger is likely to lead to a substantial lessening of competition in the relevant market.

Relevant market

Overlap and scope

[51] As is evident from the merging parties' activities, there is a horizontal overlap in respect of the harvesting, processing and marketing of SCRL and WCRL[32], hake, and anchovy. The Commission is of the view that the proposed transaction is unlikely to change the dynamics of the market for harvesting, processing and marketing of SCRL, hake and anchovies (note fishmeal is made from anchovy and fish oil is a by-product of this process).[33] We have no reason to doubt these conclusions and do not deal with these markets in any further detail. Therefore, the focus of this hearing has been on the pilchard industry consisting of the market for the procurement of pilchards; the market for the processing of pilchards; and the downstream market for the marketing and sale of canned pilchards.

Vertically integrated market

Commission's views

[52] The Commission concluded, in their initial assessment, that the relevant market in this transaction is the vertically integrated market for canned pilchards.[34] That assessment of the relevant market appears to be consistent with the merging parties' submissions on the relevant market as contained in their competitiveness report, where they –

52.1 in a heading identified the 'market for the harvesting, supply, processing and marketing of pilchards';[35]

52.2 describe the market as a 'narrow' one that comprised the harvesting and processing of pilchards as well as the supply and marketing of pilchard products, namely canned fish, pilchard bait and fishmeal from pilchard off-cuts';[36]

52.3 pointed out that, in the 'market for the harvesting, supply, processing and marketing of pilchard products', the merging parties had vertically integrated operations;[37]

52.4 asserted that 'the great majority of larger players typically vertically integrate throughout the supply chain, i.e. they generally harvest, process, freeze and store, and supply the product themselves so as to achieve economies of scale and to effectively and efficiently harvest and supply to the product market'.[38]

[53] The competitiveness report had been prepared by legal representatives of the merging parties and due consideration had been given to the likelihood of a lessening of competition as evidenced by the tender that they will dispose of the Glenryck brand, post-merger.

[54] As can be seen from the table below[39] the merging parties list the five largest suppliers of canned pilchards in South Africa in terms of estimated market shares. Lucky

Star is the largest competitor with a market share of 73.1%, followed by Glenryck with a market share of 8.2%, Saldanha with 4.6%, Shoprite Brand also with 4.6% and the Spar Brand with 2.0%.

NAME ESTIMATED MARKET SHARE (ACTUAL CAPACITY) OCEANA (Lucky Star) 73.1%

FOODCORP (Glenryck) 8.2% SALDANHA 4.6% RITE BRAND (Shoprite) 4.6% SPAR BRAND 2.0%

[55] While the White Labels/House Brands have been included in this table for purposes of market share analysis, it is common cause that they are not vertically integrated processors of canned pilchards, but simply resellers of third party product.

[56] Surprisingly, in the course of these proceedings counsel for the merging parties disagreed with their own earlier submissions to the Commission and contended that the fact that there are both integrated and non-integrated firms that operate at various levels of the supply chain, precludes a finding of a vertically integrated pilchard market.[40] In other words, despite Oceana's earlier description of the market as a narrow vertically integrated one, it's counsel was now arguing that the Commission had defined the market incorrectly.

- [57] It was submitted by the merging parties that in reality, Oceana was only interested in the Foodcorp quota^[41] and that the Commission had not demonstrated how Oceana's ownership of this quota would raise any competition concerns.
- [58] It was also argued that the Commission ought to amend its market definition due to the significant inroads made by house brands in the canned pilchard market. It was claimed that house brands had 10.4% of the canned pilchards market and that they have been able to achieve this without any quota or processing capacity. The Commission ought to therefore amend its own market definition to include these players as exercising competitive constraints on the merging parties.
- [59] The first argument assumes that Oceana and Foodcorp are merely competing in the market for the procurement of raw fish. Which, as can be seen from the merging parties own documents and submissions, is not the case. They do not compete for quota only in order to sell these onto some other party. On the contrary they seek to hold quota in order to ultimately improve their margins in the downstream product market for pilchards.
- [60] As far as house brands go, these differ materially from competitors like Lucky Star, Glenryck and Saldanha in the market. To group them together as if they were part of a single entity or owned by a single competitor is simply misleading. On the contrary they all operate independently of one another under their respective supermarket retail chains such as Shoprite Checkers, Pick 'n Pay, Spar and the like. In fact they were listed independently in the merging parties' respective competitive reports according to their respective market shares. These 'brands' are housed in organizations that supply, for retail, thousands of products, thus the owners of the brands are not reliant upon the margins obtained on high volume products like canned fish to remain viable; In other words their business is the retail of food, fast moving consumer goods and perishables and not the manufacturing of canned pilchards. Furthermore, the merging parties' own documents, confirm that they (Lucky Star and Glenryck) regard each other, collectively with Saldanha as the nearest competitors in the canned pilchards market.^[42]
- [61] Indeed despite constant assertions now being made by the merging parties' legal representatives that in terms of market share the house brands collectively with a 10.4% market share are the second biggest competitor, their own witness, Mr, Van Niekerk confirmed Glenryck as being the second biggest brand⁴⁴ and when asked to compare the Glenryck brand with the House Brands, replied "No, we don't see them as a brand. We see, I am talking about the three brands in, the three bigger brands."^[43]
- [62] Accordingly, we do not consider house brands to exert any significant competitive constraint on the merging parties and exclude them for purposes of market definition. But even if were to include them for assessment of effects, we are precluded from considering them as one collective, single competitor simply because they are not so. All the evidence points to the fact that Oceana and Foodcorp compete with each other in the selling and marketing of branded pilchard products, but do so at every level of the value chain. They have both been

successful applicants of fishing rights, they harvest and process fish, they compete with each other for third party quota and then ultimately in the marketing and selling of their own brands. Their essential business is not the buying and selling of quota, or the harvesting and processing of fish for the benefit of third parties, but rather an integrated business in the entire value chain of the canned pilchards market, directly from sea, through the factory, to the table. They themselves have conceded that they are vertically integrated in order to achieve economies of scale and efficiencies for the purpose of producing pilchard products.

[63] Hence the relevant market identified by the Commission namely that of a narrow vertically integrated market, is not inappropriate. The Commission concluded that barriers to entry at all levels of the value chain of this vertically integrated market were extremely

high.⁴⁶ This was not disputed by the merging parties. The most significant barrier to entry, apart from capital requirements, was access to quota.

Market shares and concentration

[64] Oceana is the largest fishing company in South Africa which sells canned pilchards under the Lucky Star brand. The Lucky Star brand enjoys a market share of approximately 73.1%. Foodcorp sells canned pilchards under the Glenryck brand and is the second largest competitor in the downstream market for canned pilchards with a market share of 8.2%. The next largest vertically integrated competitor is Saldanha with a market share of 4.6%.

[65] Oceana is also the largest holder of the South African TAC with 15.01% and Foodcorp the second largest rights holder with 11.2%. The combination of the fishing rights held by these two entities means that Oceana's share postmerger shall be 26.2% which gives it a greater rights allocation than the next three quota holders put together.^[44] In addition to this Oceana will, postmerger, have further access to approximately X% [CONFIDENTIAL] of the total South African TAC by way of Third Party Quota in the form of ad hoc contracts, joint ventures and longer term supply agreements. Thus Oceana will have access to approximately X% [CONFIDENTIAL] of the total South African TAC post merger.^[45]

Competition

Analysis

[66] We have not dealt with any effects in the markets for the harvesting or processing of pilchards because neither of these raised any particular concerns. It appears that there is significant spare processing capacity spread out amongst all the different processing plants in South Africa.^[46]

[67] It appears that this excess processing capacity may be attributed to the fact that the TAC in recent years has declined from previous years. Mr. RhodesHarrison described how the TAC was set at extremely high levels in the early

2000's and in fact was as high as 457 000 tons for the 2003/4 season, following which there was a steady decline to the 90 000 ton levels we are seeing now.[47]

Removal of an effective competitor

[68] Pre-merger, the Glenryck brand is supported by its own quota allocation amounting to 11.22% of the TAC, which, as is explained above, is the cheapest and preferred form of input. With this quota Foodcorp currently produces approximately 600 000 cartons of canned pilchards. Once this 11.22% allocation goes across to Oceana, Oceana will have access to an additional 11.22% of the cheapest input for its canned pilchards.

[69] Counsel on behalf of Oceana argued that this will not result in any lessening of competition in the downstream canned pilchards market because, despite Oceana having access to cheaper input, it has no intention of growing its market share. All that it was seeking to do was to substitute its imports with local quota. To suggest that Oceana will not seek to grow its market share ever again is simply not a credible proposition. Indeed Mr Rhodes Harrison, on behalf of Oceana confirmed that at present Oceana finds itself with surplus product due to the fact that their projections of expected sales did not accord with market dynamics and they were therefore not looking to expand their market share at this moment in time.

MS ENGELBRECHT: It sounds right. And what you've been telling us is that the market share of Lucky Star will remain consistent, after this transaction.

MR RHODES-HARRISON: Well we anticipated doing that, we obviously have a fairly limited amount of influence that we can put in the market place, but our intention is not to grow the market specifically, our intention is to in fact we're in a hold back now, we're manning the hatches, we have a massive amount of stock which we actually wanted to move into that market place, so we're certainly not in a growth phase at this moment in time.

MS ENGELBRECHT: Yes. (our emphasis added).[48]

[70] The merging parties nevertheless urged us to consider three facts in this assessment, namely the growth of house or white label brands in the canned pilchard market who rely on finished imports/third party products, alternative sources of fish for the Glenryck brand, and the facts surrounding the Bidfish transaction as evidence that access to local quota was not required to compete effectively in the downstream canned pilchard markets.

[71] We have already dealt with the house brands above and do not consider these to impose any significant competitive constraint on the merging parties. But we do make the observation that owners of house brands are traders in margin in the retail trade. Mr. Rhodes Harrison made the remark that despite Lucky Star having 73% of the canned pilchards market they only enjoyed "3036% of the retail shelf space." [49] It may be that this was said to suggest that house brands exercised some kind of countervailing power which would constrain any

post-merger unilateral conduct such as price increases by Lucky Star. If so the statistic on its own is meaningless without

more details being put up, including evidence from retailers, about the composition of the shelf, whether it was the retail shelf of chain-stores only, did it include other retailers, was it local, national, what method was used to compute the statistic, was it a national statistic, and so forth. In any event, it was not claimed by Mr. Rhodes-Harrison that this statistic somehow suggested that Lucky Star had any difficulty in achieving its desired price points in the retail market. On the contrary, the evidence suggests that Lucky Star was able to fetch a premium in the market.⁵³

[72] All the witnesses who testified at the hearing confirmed that imported product, whether in the form of cutlets or finished canned product were much more expensive than input obtained through own quota. Imports were also subject to currency fluctuations and this would place smaller players or new entrants at a distinct disadvantage, both in terms of capital constraints and consequential supply problems.

[73] Oceana itself is currently importing 60% of its fish supplied to market. It has a sophisticated procurement network that has been established over roughly more than 8 years. It obtains fish from the Atlantic Ocean off the coast of Morocco, transports it to Thailand in the south Asian region for processing where quality assurance standards are maintained through regular audits, and then delivers the finished canned product to South Africa. Mr. RhodesHarrison explained that although it was viable for them to import at those levels and at current exchange rates, doing so meant that there was a 'margin squeeze' brought about from this reliance on imported products.^[50] Upon an analysis of the figures provided in the Lucky Star Costing - Summary it became evident that the average costs of processing and canning fish supplied from local quota was significantly less than against the supply of fish from imports is.^[51]

[74] These figures^[52] were traversed with Mr Rhodes-Harrison under cross examination.^[53] He confirmed that the difference in price of roughly X% ^[54][CONFIDENTIAL] per tall can of pilchards when local and imported prices were compared for the period in question will make a significant difference in a firm's margins.^[55] Further information provided by the merging parties^[56] confirmed that the margins earned from own quota exceeded margins earned from imported cans by roughly between 30%-40% for Oceana and between 15%-20% for Foodcorp.^[57]

[75] Mr. Rhodes-Harrison indicated the key to managing the significant cost differentials between two sources of products lies in getting the correct mix between the various inputs. ^[58] This was increasingly important in times when the Rand is weak. He explained that Oceana as a group would have an internal hedge between imported products (pilchards) and product which they exported (fishmeal) which allowed the company to deal with the effects of the weakening Rand.^[59]

- [76] The importance of getting the mix of imports correct points to the Commission's finding that in order for a brand like Glenryck to be able to compete effectively in the market for canned pilchards it will require direct access to its own local quota in order for it to offset the higher costs of inputs and higher risk attached to product supplied from Third Party Quota and imports.
- [77] Moreover the difference in margins discussed above confirms that for a firm to effectively compete against an established dominant brand such as Lucky Star in the canned pilchards market on the basis of only imported product it would require a large amount of capital sufficient to cover currency fluctuations, establish a stable source of supply, maintain the costs of prescribed quality standards and transport costs. If it relied on third party quota and processing facilities of third parties it would still be at a distinct disadvantage to the Lucky Star brand or to any of the remaining vertical players who have access to own quota.
- [78] Quality control and security of supply were additional barriers. In order to effectively compete in the market with imported product, a new entrant would need large amounts of capital to withstand currency fluctuations and to establish a procurement network that would ensure compliance with South African quality regulations.[60]
- [79] Imports from Namibia could still be considered as an alternative because the currency was pegged to the rand. However, access to fish from Namibia was also not guaranteed simply because that industry faced the same regulatory and fish population constraints as South Africa did. The TAC in Namibia has been set at 30 000 tons, however, the Minister has only allocated 25 000 tons and held back a further 5 000 tons in order to assess how the season progresses.[61] There are currently 22 rights holders sharing the pilchard TAC in Namibia with the largest of these rights holders having a 10.7%

allocation. In any event imports from Namibia would still cost much more than own quota.

- [80] The evidence of the merging parties themselves and indeed Oceana's stated rationale for the acquisition of Foodcorp's quota - namely that it sought to reduce its reliance on imports for better margins - taken together with the evidence of the other witnesses confirms that the Glenryck brand postmerger, without its own quota, will be competing at a significant disadvantage to the dominant Lucky Star, which, should this merger were allowed on the terms proposed by the merging parties, would have further entrenched its already dominant position with increased access to own quota.

Third Party Quota

- [81] The merging parties submit that Glenryck would be able to access third party quota and that this market for Third Party Quota was contestable. This was evidenced by the ease with which Third Party Quota holders could switch between purchasers of quota. In substantiation thereof they relied on the evidence of Mr Balinda Sangela, a quota holder who had a supply relationship with Foodcorp until recently. He testified that he, as a local quota holder, had any number of options to whom he can sell his quota to, and that all that

potential bidders had to do was make an appropriate offer. Once again we find Counsel's description of this as a contestable market somewhat of an overstatement. The fact that parties may contest for third party quota does not render the market contestable. [62] While third party quota holders may have some countervailing power, as suggested by Mr Rhodes-Harrison, they also were reliant on the harvesters to realise their assets in a given season. The competing interests of both parties resulted in a fragile network of contracts and sub-contracts. But these contracts were not as ad hoc as suggested by Counsel of the merging parties. By far the majority of Oceana's contracts with third party local quota

holders required at least a year's notice. This also seemed to be the arrangement that Foodcorp had.

[82] The merging parties own evidence supports that switching was not done as easily and as frequently as suggested by counsel. Mr. Van Niekerk confirmed that third party quota holders did not simply switch to the highest bidder but were also concerned about the relationship between them and the purchaser. This was confirmed by Mr Sanqela who explained that he had had a good relationship with Foodcorp and that he had elected not to "go over" to Oceana in this transaction. This was also confirmed by Mr Silverman and Mr Saban.

[83] Notwithstanding the importance of relationship and contractual commitments, third party quota holders did switch between purchasers from time to time for price but this did not occur often. Saban confirmed that Oceana's ability to offer a higher price had enabled it to secure fish from Premier. Given these dynamics and the fact that the total possible quantity of local pilchards was only limited to 90 000 tonnes, the market for third party quota can hardly be described as a fully contestable one. Barriers to entry in this market are high and the input is a scarce resource. But recall that, post-merger, the Glenryck brand would be without quota and processing capacity. So it would be looking to source both fish and processing capacity from third parties at a price much higher than what it had paid to itself pre-merger. It is axiomatic that for the Glenryck brand post-merger would have less margin available to it to compete effectively for third party quota with the more dominant and profitable vertically integrated players like Oceana, Saldanha and Pioneer. In

fact in such circumstances it would not make any commercial sense for the owner of only a brand to bid for third party quota.

[84] Even if we accept for purposes of argument that the Glenryck brand would go about sourcing third party quota and third party processing capacity postmerger in order to pack pilchards into cans it obtained from yet other third parties, it would be doing so at a cost (for it) which would be much higher than it enjoyed pre-merger.

Bidfish offer

- [85] As indicated above, the central basis upon which the Commission relies upon for its condition pertaining to the disposal of Foodcorp's quota was that the Glenryck brand was unlikely to survive in the downstream canned pilchards market without the support of the Foodcorp quota. This contention was disputed by the merging parties, who maintain that the continued existence of the Glenryck brand will not be impossible absent the Foodcorp quota. The merging parties submit that the subsequent conclusion of the Bidfish Transaction/Agreement and the testimony of Mr. Arnold put paid to the Commission's rationale for requiring the disposal of Foodcorp's small pelagic rights, and rendered the condition the Commission imposed unjustified.
- [86] The Bidfish transaction consists of an offer by Bidvest to purchase the Glenryck brand for [CONFIDENTIAL]. The merging parties submit that the Bidfish Transaction is clearly relevant to the question for determination in these merger proceedings, namely whether the Glenryck brand is capable of being purchased by a company absent the support of the Foodcorp quota and can thereafter remain an effective competitor in the South African canned pilchards market.
- [87] The Commission questioned the value of the evidence concerning the Bidfish Transaction and submitted that this proposed transaction
- merely provided a basis for the merging parties to contend that there might be a party willing to purchase the Glenryck brand without
- simultaneously purchasing the small pelagic fish allocation, and is further not relevant to the determination of the propriety of the transaction at issue before the Tribunal.[63] More pertinently, it argued that the Bidfish transaction had not been evaluated by the Commission nor is it before the Tribunal for consideration. It argued that the evidence that an offer has been made serves to do little more than confirm that there are parties out there who would be willing to purchase the Glenryck brand without the Foodcorp quota.
- [88] The Commission does not quarrel with the fact that there may be parties out there who are willing to purchase the Glenryck brand without the Foodcorp quota, but this was not the transaction they have been asked to evaluate. The Commission has only concerned itself with the competitive effects of the notified transaction and the subject of these proceedings – namely the sale of the Foodcorp fishing business whether including or excluding the Glenryck brand and its small pelagic fishing quota. The merging parties made the allegation that the Commission has changed its case in that initially the contention was that one needs the quota to support the brand. After it was advised of the Bidfish Transaction, the Commission was faced with the proposition that the market had thrown up a buyer of the Glenryck brand without the quota, it changed tack. Mr Unterhalter argued that the Commission had in fact conceded that the brand is sustainable without the quota and was now in these proceedings alleging alternative anti-competitive effects unrelated to the disposal of the brand.[64] However this was shown to be a misconstruction of the Commission's case, as can be seen from the Commission's response to these allegations:

“MS ENGELBRECHT: ... the Commission has not conceded in these proceedings, that the brand would be sustainable as an effective competitor on its own. What it is conceding is the fact that there is a party that will be willing to buy the brand, without the quota. But whether that means that the brand will remain as an effective competitor, and whether it will be sustainable is a quite separate question, that we are not engaging upon, because we don’t know the details of what will happen with Bidfish.

CHAIRPERSON: But you are persisting with your case that in order, that your concern is, your competition concern is that the divested must be a quota with the brand. That in order to ensure that there is effective competition between two close rivals, Lucky Star and Glenryck, it must be, a brand must be divested with a quota? That has always been your case?

MS ENGELBRECHT: Our case has always been that both the brand and the quota must be divested.

CHAIRPERSON: And there has been no change in that?

MS ENGELBRECHT: There is, the only change there is, is that potentially, if a party say with sufficient quota, were to, in South Africa, were to buy the brand, it might mean that the quota could go to another, third party, who did not buy the brand.

But, that Oceana shouldn’t be sitting with both quotas. That is the central proposition (our emphasis).”[65]

[89] We agree with the Commission that the Bidfish transaction has not been notified and has yet to be evaluated by the Commission for competitive effects. Moreover, and assuming that we were in some way assured that the Bidfish offer would enable the Glenryck brand to remain an effective competitor in the downstream market to Lucky Star and on that basis approved the merger, the offer is in the form of a contract and has not been tendered by the merging parties as a binding component in the evaluation of this transaction. Bidfish is not a party to these proceedings and we would have no jurisdiction over it to enforce its contractual arrangements in the event of a breach by either party, post our hypothetical approval.

[90] But the merging parties have led the evidence of Mr Arnold, and in these proceedings have sought to rely on it to support their contention that a party will be interested in purchasing the Glenryck brand without its quota. Yet the Bidfish offer as it stands, does not in our view, alleviate the concerns raised by the Commission namely that the Glenryck brand, absent the Foodcorp quota, will be rendered a less effective competitor to the more dominant Lucky Star who would now have access to more local quota. Rather the evidence tends to support the Commission’s concerns.

[91] In the first instance, this is an offer by a party that already has some own quota and not by a party that has no own quota. Furthermore, Mr Arnold on behalf of Bidfish Namibia, confirmed that while it owned

some quota, the TAC allocations of both the companies they own in Namibia would not be sufficient to maintain the existing volume of 600 000 cartons of Glenryck in the South African market, let alone for its expansion.[66] In other words it would have to procure third party quota – at a cost higher than own quota – to fulfil the existing volumes of the Glenryck brand, let alone for its expansion, which we were told was being planned by Bidfish.

[92] Moreover, Namibia suffered the same fate as South Africa. Its total TAC of 25 000 tonnes was in fact significantly lower than the South African TAC. More importantly, as confirmed by Rhodes-Harrison, Oceana, the largest competitor of Glenryck, through its activities in the Namibian market has control over a little less than 50% of the fish that is processed in Namibia.⁷¹

[93] But in order to satisfy even the lower volumes for the Glenryck brand, Bidfish would have to withdraw supply from its existing [CONFIDENTIAL] customers, [CONFIDENTIAL]. Bidfish could of course also import finished product but according to Mr Arnold this was not desirable due to the higher costs of imports. Arnold was also somewhat circumspect about whether there was a good business case for the Glenryck brand given the price that was being asked for it by Foodcorp. In his view the asking price was too high and they had been ‘bullied’ into it. In order to justify the price they would need to look at [CONFIDENTIAL] in South Africa in order to grow the [CONFIDENTIAL]. However, he conceded that no market research had been undertaken by Bidfish to assess whether such [CONFIDENTIAL] would be successful in the South African market. What was certain is that Mr Arnold was contemplating growth of the Glenryck brand not in the [CONFIDENTIAL].

[94] It was confirmed by all the witnesses, including Mr Arnold from Bidfish that the Glenryck brand, without own quota, will have to rely on either third party quota (if it was acquired by Bidfish) or third party finished products. If it survived at all post-merger it would be competing with the larger dominant, margin rich Lucky Star, at a much higher cost and was likely to be a weaker competitor than it was pre-merger.

Barriers to entry and expansion

[95] The merging parties advanced the contention that there shall be no effect on the upstream input (raw pilchard) market when the Foodcorp quota (comprising of both its allocated quota as well as the Third Party Quota currently contracted to Foodcorp), which was not available for sale to third parties, goes across to Oceana, as it will similarly not be available to third parties.

[96] The merging parties submit that they have no intention of growing or increasing their market share, but that the purchase of Foodcorp’s quota is in line with an import substitution strategy which will allow it to reduce its dependence on more expensive imports, and reap the benefit of higher margins that inputs from local quota brings. Thus Oceana, post-merger, will still be heavily dependent on contracted quota and will continue to actively pursue its strategy, like all its other competitors, of trying to obtain as much of the

Third Party Quota as possible.

- [97] Sanqela on the other hand disagrees. He submitted that it was not desirable for such a large percentage of a very scarce resource to be placed in the hands of a single entity. In his view the increased quota in the hands of Oceana, already the largest single holder of fishing rights, would increase barriers to entry and expansion for the smaller entrants. This was so because the prevailing trend in the industry was that the regulator would tend to renew the rights of the larger vertically integrated players in the industry in more or less the same proportions held by them previously, simply because it would have regard to the fact that they had made large investments in the harvesting, processing and marketing levels. This evidence was not refuted.
- [98] In his view the sale of the Foodcorp quota to Oceana, instead of to a smaller player such as himself, would make it extremely difficult for the small player to gain access to that quota. Oceana was further likely to hold onto it in the next round of rights applications. Access to local quota for smaller players in the industry is critical for both entry and expansion in the downstream canned pilchards market.
- [99] An affidavit submitted in these proceedings by the acting director of DAFF at the time suggests that issues of transformation, resulting from Foodcorp's reduced BEE shareholding were uppermost in their assessment of this transaction.
- [100] DAFF, in the Steven's Affidavit, further alluded to other factors that it took into consideration in assessing the transferability of the relevant rights, namely Oceana's proven track record and its ability to optimally utilise the relevant rights as well as a level of consolidation which the transaction would bring to the small pelagic fishing industry.
- [101] One glaring omission from the listed considerations and further highlighted by the fact that this affidavit was filed for purposes of these proceedings, was that no regard was given to the position of smaller players or the promotion of competition in the industry. The only reference one can find is that in terms of the Transfer Policy DAFF shall give consideration to the concentration levels in a fishing sector when it deliberates on the transfer of rights. [67]
- [102] In spite of the omission above, in Sanqela's view, if transformation was indeed the goal, he would have expected the regulator to have approved the sale of the quota to a smaller BEE player such as himself, noting that he had also submitted an offer to purchase Foodcorp's fishing business. At the very least Sanqela would have preferred that Foodcorp's quota should have been made available to smaller players in the market instead of being given to the single largest holder of quota in the industry, because in his view the sale of the quota to Oceana would enable the creation of a virtual monopoly -

"MR SANQELA: ...So it is something to me it would be ideal if the quota if they are selling it they are selling it with the brand. Not necessarily to me, it could be to anyone.

CHAIRPERSON: But not Oceana?

MR SANQELA: That is monopoly.

CHAIRPERSON: Well that is what I am asking you, that you don't want – the so-called unfairness that you are talking about is you saying it could be sold to other players, other smaller players.

MR SANQELA: Yes. That will shoot Oceana's quota now to 25%.

CHAIRPERSON: And that selling it to Oceana means that it is not available to other smaller players.

MR SANQELA: No it is not.

CHAIRPERSON: Is that what your complaint is about?

MR SANQELA: Yes.”[68]

[103] Counsel on behalf of the merging parties argued that the transfer of Foodcorp's quota to Oceana would make no difference to third parties such as Sanqela because the quota was not in any event available in the market. This argument is misplaced and begs the question. The counterfactual is not that Foodcorp's quota is not in the market. The quota has now become available for redistribution to the market. Indeed the question that we are

concerned with is whether or not the transfer of Foodcorp's quota to Oceana will lead to a reduction in competition in the canned pilchards market.

[104] In light of all the evidence put up we agree that the sale of the Foodcorp quota to Oceana, already the holder of 15.1% of the TAC, shall result in a likelihood of increased barriers to entry for smaller players in the market, including players with BEE credentials, for entry and expansion. And for that matter, the sale of Foodcorp's quota is likely further to increase barriers for expansion for Oceana's existing vertically integrated competitors in the downstream canned pilchards market.

Procurement effects

[105] Two possible procurement effects were explored by the Commission. The first of these was that Oceana, with increased local quota would have increased bargaining power vis-à-vis third party quota holders and would be able to drive prices down. This particular proposition was not supported by any of the witnesses. Saban, whose company Premier sells its quota to Oceana, in response to questions put to him by the Tribunal panel stated that this was unlikely to happen because they “benchmarked” by looking at what was out there in the market, so that they would obtain the maximum value for their fish.

- [106] Even if at the level of principle this proposition was a likely one, the evidence of pricing levels and bargaining dynamics was somewhat muted in these proceedings to enable us to arrive at any firm view. Even if there was such pricing information available it might still be distorted due to the fact that until recently fish was purchased in terms of an agreed formula between the buyers and sellers, and which formula has been the subject of a section 4(1)(b) investigation by the Commission.
- [107] The second effect, and the more likely one, submitted by the Commission is that Oceana's increased local quota, and improved margins as a consequence, would enable it to offer better prices than its competitors for third party local quota in the South African market, thus making it more difficult for its competitors in the downstream canned pilchards market to compete for local quota. This would translate in a 'margin squeeze' for its competitors.
- [108] While at the level of principle this argument cannot be faulted, once again evidence of price competition was somewhat muted in these proceedings, to enable us to arrive at any firm conclusions. This may of course also be related to the continuing effects of the previously agreed formula. However, the fact that there was some evidence by Saban[69] and Silverman of Oceana's ability to secure fish by offering higher prices suggests that this was a more likely effect in the procurement for third party quota. More so in the light of the confirmation by Rhodes-Harrison that Oceana would still be actively pursuing third party quota post this acquisition.

Public interest

Employment at Laaiplek

- [109] Counsel for the merging parties argued that Oceana is willing to purchase Foodcorp's fish processing facility at Laaiplek, where approximately 1000 people are employed but only if it is allowed to also purchase the small pelagic fishing rights. We were told rather dramatically that in the absence of the approval of this transaction "... and should DAFF succeed in acting against Foodcorp as a result, Marine Products will be unable to conduct business and will be forced to close down." [70] This would have a devastating effect on the community in Laaiplek where Foodcorp is by far the biggest employer.
- [110] A closer examination of the facts at hand, confirm that the Foodcorp's entire fishing business employs about 1000 employees, and that the permanent employees at Laaiplek and Port Elizabeth together amount to 590 jobs. We were given the assurance that while DAFF had notionally transferred the rights to Oceana the merger had not been implemented. In this regard we have assumed in favour of the merging parties that there was no prior implementation and that the Foodcorp fishing division was carrying on business as usual and that this would be in the interest of both Oceana and Foodcorp. No evidence to the contrary was put up.

[111] Furthermore, while there was uncertainty - created by the actions of DAFF and the merging parties themselves - there was no suggestion that Foodcorp was a failing firm and that jobs would be lost but for the approval of the sale to Oceana. Furthermore, both Sanqela and Saban confirmed their respective companies were still willing to purchase the entire Foodcorp parcel which included the quota, the processing facility at Laaiplek and the Glenryck brand. They had both previously offered to do so. Hence there is no need to assume that the jobs would be simply lost if the sale to Oceana is not approved. Other interested and willing buyers are waiting in the wings.

Transformation

[112] The merging parties argued that the transaction would promote transformation and ownership by historically disadvantaged groups. However, we note that the real concern for DAFF was the issue of Foodcorp's BEE shareholding that had declined and not Oceana's. Hence a sale to any other interested buyer with equivalent or better BEE credentials would address that concern.

[113] Indeed here we find that there are other interested buyers with equally good if not better BEE credentials. Mr. Sanqela had put in an offer to purchase the entire fishing division of Foodcorp. He confirmed that he was not in partnership with any other largely white grouping and that the business would have been 100% black owned had he been successful. However, his efforts at putting in a bid were rebuffed by Foodcorp. He had made two separate offers for the business, both of which were turned down without a satisfactory explanation. In fact he had been told by Foodcorp to go and meet with Oceana "the third party that they were talking to but he said they are short of 30% in the funding can you two talk together and come up with some agreement that you will buy the business together". [71] Mr. Saban confirmed that Sekunjalo had also shown an interest in the business but negotiations had broken down at that time because

agreement could not be reached on an appropriate valuation. Saban further confirmed they were still interested in purchasing it.

[114] Mr. Van Niekerk's evidence seems to suggest that issues of financing and an indication by DAFF that they did not support that transaction, led to a rejection by Foodcorp, of an interest by a consortium consisting of Military Veterans. However, his evidence on this issue was rather vague. Van Niekerk further claimed that the reason that Foodcorp rejected Sanqela's offer to purchase

Foodcorp's fishing business was due to his failure to secure funding. Sanqela explained that Investec, with whom he arranged financing for the deal, had put in an expression of interest to fund the transaction by way of a letter addressed to Foodcorp, subject to Foodcorp providing it with the requested financial information.

[115] In this regard we refer to an extract from the letter by Investec which was incorporated into the Record as Exhibit 4 page 16:

“We hereby express an interest in providing Newco with the requisite funding in respect of the Proposed Transaction.

In order to assess whether we will provide Newco with such finance, we require information, including but not limited to:-

- Financial, legal and compliance information in order to conduct a due diligence on Newco;
- Receipt of all relevant and/or material agreements;
- Discussions and interviews with Marine Products management team regarding historical and forecast financial information.”

[116] The above requests are not at all unusual in transactions of this nature. In spite of this Sanqela testified to the fact that Foodcorp stalled the request for the above information by Investec. When he subsequently approached Foodcorp directly on the issue he was advised that they had accepted another offer and that he should approach Oceana regarding a negotiation of a 30% empowerment stake in the company to be formed to house Foodcorp’s fishing business.

[117] Nevertheless both Saban and Sanqela indicated to the Tribunal that were still interested in purchasing the business and were able to provide indicative values to the Tribunal. Hence the public interest of transformation would be as easily, if not better achieved, with any of these potential buyers without presenting any competition concerns. In any event given the stance adopted by DAFF, in that it would not approve any transaction that did not result in transformation of the Foodcorp business, the issue of transformation becomes a “neutral” factor in our assessment, simply because all or any potential transactions involving the Foodcorp fishing division would have to satisfy that requirement and all that we would be required to do is assess the relative competitive consequences of such transactions.

[118] Thus there is no need for us to approve a transaction that is likely to lead to a lessening of competition in the canned pilchards market when the same goal or level of transformation could be achieved by a transaction that does not lead to such lessening of competition.

Overall Conclusion

[119] In conclusion we find that post-merger, the Glenryck brand once divorced from its quota is unlikely to be an effective competitor in the canned pilchards market. The Glenryck brand owner would have to source pilchards from a variety of third parties at a much higher cost than pre-merger. Reliance on imports for Glenryck is not a reasonable option post-merger and even if it did import product post-merger, its margins would decline significantly.

[120] The evidence of Mr Arnold confirms that a party seeking to maintain the Glenryck brand at pre-merger competitive levels would have to have some own quota, obtain the balance of their requirements from third parties or imports at higher costs and would further need to [CONFIDENTIAL] such as

[CONFIDENTIAL] to keep the brand alive. The Glenryck brand's lower retail margins would not be able to effectively compete with that of Lucky Star. The brand, without own quota, would at best be reduced to nothing more than a margin trader. At worst it will die out.

[121] On the other hand Lucky Star (Oceana) the already dominant player in the market would gain additional advantages through increased access to local quota which would enable it to increase its dominance in the downstream canned pilchards market.

[122] Barriers to entry for hopeful entrants such as Premier and Ntshonalanga are likely to increase. They will now have to compete with a dominant firm, who would post merger be placed in a more advantageous position with increased volumes of cheaper input. This transaction if approved as sought by the merging parties will not only serve to entrench the position of the dominant firm Oceana in the canned pilchards market. Indeed it is likely that this transaction were it permitted to proceed would serve to undermine recent efforts by the Commission to introduce competition in the sector through its section 4(1)(b) initiations.

[123] The Bidfish offer has not been notified to the Commission and has not been evaluated and hence no conclusions can be drawn about whether it addresses the Commission's concerns. Moreover, Bidfish is not a party to these proceedings and we have not been asked to extend our jurisdiction to that offer, either as an undertaking by the parties or a proposed condition. But even if we were to have some regard to the evidence of Mr Arnold, as a party willing to purchase the Glenryck brand, we note that his evidence tends to confirm the Commission's concerns that the Glenryck brand post-merger without its own quota, would not be an effective competitor to Lucky Star in the canned pilchards market and that the merger was likely to lead to a removal of an effective competitor and increase barriers to entry and expansion.

[124] There were no public interest grounds justifying a different conclusion. Hence the merger was approved on the conditions contained in Annexure A hereof.

11 June 2014

DATE

YASMIN CARRIM

Andiswa Ndoni and Prof Imraan Valodia concurring

Tribunal Researcher:Derrick Bowles

For the merging parties: Adv David Unterhalter SC briefed by Webber Wentzel –

Daryl Dingley (Acquiring Firm)

Adv Jerome Wilson briefed by Cliffe Dekker Hofmeyr – Chris Charter (Target Firm)

For the Commission: Adv MJ Engelbrecht, Jabulani Ngobeni, Kholiswa Mnisi and Nompucuko Nontombana

- [1] The matter was heard on the following dates: 20-22 January 2014; 4 February 2014; 3 March 2014; and 4 April 2014.
- [2] See merger record page 30 and 31. Also see <http://www.oceana.co.za/divisions/default.php>.
- [3] Rhodes-Harrison Witness Statement page 4 para 3.2.
- [4] These rights are excluded from the transaction as ownership in respect of these rights is to be determined by Foodcorp in consultation with the Department of Agriculture, Fishing and Forestry (“DAFF”).
- [5] The subsidiaries housing Foodcorp’s Fishing Business are Foodcorp Fishing (Pty) Ltd; Bongaletu Fishing Enterprises (Pty) Ltd; Emachibini Fisheries (Pty) Ltd; Ezintlazini Fishing (Pty) Ltd; Ezolwandle Fishing (Pty) Ltd; Orgel Vismaatskappy (Pty) Ltd; Sea-ice Manufacturers (Pty) Ltd; Siysebenza Fishing (Pty) Ltd; and Umfondini Fishing (Pty) Ltd (collectively referred to as the “Sellers” in the transaction).
- [5] The subsidiaries housing Foodcorp’s Fishing Business are Foodcorp Fishing (Pty) Ltd; Bongaletu Fishing

Enterprises (Pty) Ltd; Emachibini Fisheries (Pty) Ltd; Ezintlazini Fishing (Pty) Ltd; Ezolwandle Fishing (Pty) Ltd; Orgel Vismaatskappy (Pty) Ltd; Sea-ice Manufacturers (Pty) Ltd; Siysebenza Fishing (Pty) Ltd; and Umfondini Fishing (Pty) Ltd (collectively referred to as the “Sellers” in the transaction).

- [6] Name changed to Vaxograph (Pty) Ltd.
- [7] Name changed to Vaxobase (Pty) Ltd.
- [8] All three of these companies are controlled by Oceana.
- [9] See Transcript 20 January 2014 page 21 lines 10-20 and 25; page 22 lines 1-2; page 23 lines 1-3 and 11-16.
- [10] Rights holders still require permits to fish their catch. The merging parties assured us that they would not seek to exercise

these rights pending the finalization of these proceedings.

- [11] See Affidavit of Desmond Stevens page 17 and 18, paragraph’s 5 and 6, filed as annexure “GRH1” to the Rhodes-Harrison Witness statement (hereinafter referred to as the “Steven’s Affidavit”).
- [12] Silverman – Transcript 4 February 2014 page 4 lines 22-25.
- [13] Silverman – Transcript 4 February 2014 page 4 lines 22-25.

- [14] Silverman – Transcript 4 February 2014 page 5 lines 14-19.
- [15] Silverman – Transcript 4 February 2014 page 5 lines 19-25.
- [16] Van Niekerk – Transcript 22 January 2014 page 19 line 10-25, page 20 lines 1-25.
- [17] See paragraph 34 below.
- [18] In this regard, the Saldanha Group (Pty) Ltd, in particular its pelagic fishing division competes with the merging parties as a vertically integrated competitor – see Alan Silverman Witness Statement page 78 paragraph 7.
- [19] Transcript 4 February 2014 page 47 lines 17-25 and page 48 lines 1-18; Commission’s original report page 30.
- [20] See discussion below at paragraphs 81-84 regarding Third Party Quotas
- [21] For example Shoprite Checkers, Pick n’ Pay and Spar.
- [22] Referred to in these proceedings as “White or Private Labels” or “House Brands”.
- [23] Commission’s original report page 41; Transcript 22 January 2014 page 50 lines 10-16; Transcript 21 January 2014 page 77 lines 18-25; Transcript 22 January 2014 page 133 lines 3-7.
- [24] Negotiated on an annual basis.
- [25] Transcript 20 January 2014 page 36 lines 10-21.
- [26] Transcript 20 January 2014 page 66 lines 4-5; See also Rhodes-Harrison Witness Statement page 10 paragraph 6.9.
- [27] See document entitled “Lucky Star Costing – Summary” produced by the Merging Parties as requested by the Tribunal
(hereinafter referred to as “Lucky Star Costing – Summary”).
- [28] Rhodes-Harrison – Transcript 20 January 2014 page 79 lines 6-25 and page 80 lines 1-6.
- [29] See Request for Consideration of Intermediate Merger page 98-98 paragraph 16; Merging Parties’ Supplementary Heads of Argument
page 2 paragraph 2.3.
- [30] See Merging Parties’ Supplementary Heads of Argument page 2-3 paragraph 2.4. 31 See Merging Parties’ Heads of Argument page 14-28.
- [31] See Primedia Limited and Others v Competition Commission [2007] 1 CPLR 113 (CT).
- [32] Note: WCRL does not form part of the transaction.
- [33] See Commission’s Report pages 18-20.
- [34] Merger Report Record File 1 page 7, 3rd unnumbered paragraph.

- [35] Competitiveness report Record File 2, page 113, paragraph 8.3.
- [36] Competitiveness report Record File 2, page 114, paragraph 8.3.6.
- [37] Competitiveness report Record File 2, page 115, paragraph 8.3.7.
- [38] Competitiveness report Record File 2, page 138, paragraph 10.6.5.1.
- [39] Supplied by the attorneys for the merging parties, and contained at page 87 of the Merger Record.
- [40] Merging Parties' Heads of Argument page 14, paragraph 6.3.
- [41] Oceana submitted that it would "walk away" from the transaction if it was not able to purchase the quota. It would only need to acquire Laaiplek to process additional fish from the Foodcorp quota.
- [42] See table above submitted by the merging parties regarding the market shares of the five largest suppliers of canned pilchards read with the abovementioned evidence of Van Niekerk. 44 Van Niekerk – Transcript 21 January 2014 page 152 line 7.
- [43] Van Niekerk – Transcript 21 January 2014 page 152 line 15-16. 46 See page 43 of The Commission's Report.
- [44] See Transcript 20 January 2014 page 146 lines 6-12.
- [45] See Merging Parties' Heads of Argument page 20-21, paragraph 7.22.
- [46] See Rhodes-Harrison Transcript 20 January 2014 page 38 lines 4-15.
- [47] See Rhodes-Harrison Transcript 21 January 2014 page 38 line 19 to page 39 line 10.
- [48] Rhodes-Harrison – Transcript 20 January 2014 page 146 lines 12-22. See also Rhodes-Harrison – Transcript 20 January 2014 page 147 lines 1-9.
- [49] Rhodes-Harrison – Transcript 20 January 2014 page 138 lines 12-20. 53 Rhodes-Harrison – Transcript 20 January 2014 page 89 lines 4-18.
- [50] Rhodes-Harrison Transcript 21 January 2014 page 70 lines 4-5.
- [51] See also Exhibit 2 pp1-2 and Exhibit 2 page 1 for a further extrapolation of the cost of imports versus fish supplied from local quota.
- [52] As contained in Exhibit 1 and 2.
- [53] Rhodes-Harrison Transcript 21 January 2014 page 19 line 20 and page 24 line 17.
- [54] This figure was obtained from the Lucky Star Costing Summary. See also Exhibit 2 pp1-2 and Exhibit 2 page 1 for a further extrapolation of the cost of imports versus fish supplied from local quota.

- [55] Rhodes-Harrison Transcript 21 January 2014 page 24 line 17.
- [56] Lucky Star Costing Summary.
- [57] See also Rhodes-Harrison Transcript 21 January 2014 page 24 lines 22-25
- [58] Rhodes-Harrison Transcript 20 January 2014 page 126 line 15-24.
- [59] Rhodes-Harrison Transcript 20 January 2014 page 125 line 4 to page 127 line 2.
- [60] See Rhodes-Harrison Transcript 21 January 2014 pages 81 line 25 – page 84 line 4.
- [61] See Arnold Transcript 21 January 2014 page 98 lines 14-24.
- [62] The common characteristics of a contestable market are no barriers to entry and no cost of exiting the market. See Gunnar Niels, Helen Jenkins and James Kavanagh - Economics for Competition Lawyers 2011 paragraph 3.4.6 pages 138-140.
- [63] See Commission's Heads of Argument page 13 paragraph 13.
- [64] See Transcript 21 January 2014 page 3 lines 19-25, page 4 lines 1-25, page 5 lines 1-13. See also Transcript 4 April 2014 page 13 lines 9-25, page 14 lines 1-25, page 15 lines 1-24, page 106 lines 10-25, page 107 lines 1-25, page 108 lines 1-17.
- [65] See Transcript 21 January 2014 page 5 lines 14-25, page 6 lines 1-16. See also Transcript 4 April 2014 page 75 lines 12-25, page 76 1-12, page 105 lines 14-25, page 106 lines 1-8.
- [66] Transcript 21 Jan 2014, page 119. 71 Transcript 21 Jan 2014, page 52.
- [67] Transfer Policy page 14.
- [68] Sanqela – Transcript 22 January 2014 page 112 lines 10-23.
- [69] Saban – Transcript 3 March 2014 page 11 lines 7-22.
- [70] Van Niekerk Witness Statement page 41 paragraph 3 of the Witness Statement Bundle. See also Van Niekerk – Transcript 21 January 2014 page 159 lines 3-19.
- [71] Sanqela – Transcript 22 January 2014 page 82 lines 7-10.

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