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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM050May17

In the matter between:

SOIHL Hong Kong Holding Limited	Primary Acquiring Firm
and	
Chevron South Africa (Pty) Ltd	Primary Target Firm

Panel	:	AW Wessels (Presiding Member)
	:	Enver Daniels (Tribunal Member)
	:	Anton Roskam (Tribunal Member)
Heard on	:	08 February 2018
Last submission received	:	07 March 2018
Order Issued on	:	08 March 2018
Reasons Issued on	:	27 June 2018

Reasons for Decision (Non-Confidential)

Conditional approval

[1] On 8 March 2018, the Competition Tribunal ("Tribunal") conditionally approved the transaction involving SOIHL Hong Kong Holding Limited ("SOIHL HK") and Chevron South Africa (Pty) Ltd ("CSA").

[2] The reasons for conditionally approving the proposed transaction follow.

Background

[3] On 21 December 2017 the Competition Commission ("Commission") referred the proposed transaction to the Tribunal recommending the approval thereof subject to a detailed set of public interest conditions.

[4] Post referral a group of petroleum wholesalers referred to as the Branded Marketers of CSA raised concerns with the proposed transaction. These Branded Marketers describe themselves as independent wholesalers / distributors of petroleum products. They requested that the proposed transaction be approved subject to certain additional conditions to that recommended by the Commission.

[5] A prehearing was held on 19 January 2018 at which it was agreed by all parties that the Branded Marketers would make written submissions in motivation of their concerns and proposed conditions and that the merging parties would then respond thereto. Subsequently the Branded Marketers, through their legal representatives, made written submissions on 30 January 2018; the merging parties responded to this on 06 February 2018.

[6] The Tribunal also issued a directive prior to the hearing of the matter requesting that representatives of the Branded Marketers address the Tribunal at the hearing on specific issues in order for us to better understand the Branded Marketers' role in the supply chain and business model, as well as their specific concerns in relation to the proposed transaction and the conditions sought to address those concerns.

[7] The Branded Marketers made oral submissions at the hearing of 8 February 2018 and answered questions from the Tribunal.

Parties to the proposed transaction

Primary acquiring firm

[8] The primary acquiring firm is SOIHL HK, a firm incorporated in accordance with the laws of Hong Kong. SOIHL HK is wholly-owned by Sinopec Overseas Investment Holding Limited ("SOIH"), which in turn is wholly-owned by China Petroleum & Chemical Corporation ("Sinopec"), a company incorporated in accordance with the laws of the People's Republic of China.

[9] SOIHL HK does not control any firms. Furthermore, the firms controlling SOIHL HK do not control any firms in South Africa.

[10] SOIHL HK and its controllers will hereinafter be referred to as the "acquiring group".

[11] The acquiring group has no economic activities in South Africa. Outside of South Africa, the group is active *inter alia* in the following areas:

a. the exploration and production, pipeline transportation and sale of petroleum and natural gas;

b. the purchasing of crude oil from third parties and from the Sinopec Group exploration and production division, as well as the processing of crude oil into refined petroleum products;

c. the purchasing of refined oil products from the refining division and third parties, conducting wholesale and direct sales to domestic customers and distributing oil products through the division's retail and distribution network; and

d. the purchasing of feedstock from the Sinopec Group's refining division and third parties and producing, marketing and distributing petrochemical and inorganic chemical products.

Primary target firm

[12] The primary target firm is CSA, a private company incorporated in accordance with the laws of South Africa. CSA is 75% directly owned and controlled by Chevron Global Energy Inc ("CGEI"). CGEI is ultimately controlled by the Chevron Corporation ("Chevron"). Chevron is listed on the New York Stock Exchange.

[13] Off The Shelf Investments Fifty-Six (RF) (Pty) Ltd ("OTS"), a B-BBEE consortium, owns 23% of the issued share capital in CSA, with the remaining 2% held by the CSA Employees Participation Plan.

[14] CSA has the following economic activities in South Africa:

a. it owns and operates a crude oil refinery in the Western Cape. The key refined products produced by the refinery include petrol, diesel, aviation (jet), bunker (marine), kerosene, asphalt, LPG and fuel oil;

b. it owns and operates a lubricants manufacturing plant in Durban. This plant manufactures a range of lubricant products such as base oils, engine oils, industrial oils, fuel additives, coolants and greases. These products are marketed under the *Caltex* master brand with a variety of product brands.

c. it has a nationwide footprint of storage and distribution infrastructure that has been aligned to support its marketing strategy in South Africa and Botswana. In respect of supply terminals, CSA has a mixture of 12 proprietary and JV terminals across South Africa that are supplemented where necessary by third party supply arrangements from other refineries or via buy/sell arrangements.

Proposed transaction and rationale

[15] In terms of the *Sale and Purchase of Shares and Related Interests in CSA Agreement* SOIHL HK intends to acquire CGEI's 75% shareholding in CSA. Post-transaction. SOIHL HK will exercise sole control over CSA.

[16] The acquiring group submitted that the proposed transaction is an attractive opportunity since South Africa has great potential and is the largest producer and consumer of refined products in Africa. Furthermore, CSA's manufacturing and marketing business is an ideal fit for Sinopec's experience.

[17] Chevron submitted that it has in recent years divested several assets in Africa to dispose of non-strategic assets. It is anticipated that CSA would be more strategic in the hands of the new shareholder.

Impact on competition

[18] The Commission found that the proposed transaction gives rise to a horizontal product overlap since the merging parties are both active in the provision of petroleum products. In particular, CSA produces and refines its petroleum products at its Cape Town refinery and manufactures lubricants in Durban. CSA is also involved in the downstream market for the retail, marketing and distribution of petroleum products as well as the commercial wholesale, marketing and distribution of petroleum products. These activities, broadly speaking, overlap with that of the acquiring group outside of South Africa.

[19] However, from a geographic market delineation perspective, the proposed transaction does not result in any geographic overlap in South Africa since the acquiring group is currently not active in South Africa.

[20] The Commission noted that despite the lack of geographic overlap between the merging parties' activities, competition concerns were received from CSA's Branded Marketers. The Branded Marketers submitted that the proposed transaction will result in increased levels of concentration at the wholesale level of the value chain and thus the likelihood of coordination. They, more specifically, averred that in the event that the acquiring group does not renew their existing (wholesale / distribution) contracts with CSA at their expiration dates, this will increase concentration in the wholesale liquid fuel markets and could lead to increased coordination of activities between the oil majors.

[21] To substantiate their claims, the Branded Marketers said that CGEI has a policy of partial vertical integration in its downstream operations since it uses both its own wholesale and distribution networks and independent oil companies, i.e. the Branded Marketers, for the sale of products to its retailers. Furthermore, CSA is not present in the geographic areas where the Branded Marketers are present in wholesale / distribution activities since the Branded Marketers essentially represent CSA in those geographic areas. Sinopec, on the other hand, was said to have a policy of full vertical integration. The Branded Marketers therefore contended that Sinopec has no incentive to follow CGEI's

partially integrated strategy, thus leading to the non-renewal of their contracts and their exit at the wholesale level of the supply chain when their current contracts expire.

[22] In response to the competition concerns raised by the Branded Marketers, the merging parties submitted that the theories of harm on post-merger coordination put forward by the Branded Marketers are speculative and without any merit. They submitted that the Branded Marketers enjoy significant benefits under their current long-term (wholesale / distribution) contracts and that there is no basis for them to get better terms than they have already negotiated by raising concerns in the context of the proposed transaction.

[23] The merging parties furthermore submitted that Sinopec intends to invest in South Africa in order to compete fiercely in every aspect and has no incentive to coordinate conduct with the other oil majors. They argued that given that the transaction is driven by a new investor with a competitive rationale and resources to drive market growth, there is no basis to suggest that the proposed transaction raises any risk of collusion in the market.

[24] The Commission assessed the Branded Marketers' competition, i.e. coordinated conduct, concerns. We discuss this next.

[25] First, the Commission noted that the Branded Marketers' existing contracts will only terminate in [redacted] years.

[26] The Commission further noted that Sinopec has undertaken, as a condition to the approval of the proposed transaction, not to change any of the Branded Marketers' existing contracts post-merger.

[27] The Commission further found that a number of independent oil brands are active at the wholesale / distribution level of the market where a wholesaler typically purchases fuel and supplies it under its own brand.

[28] With regards to potential post-merger coordination in relation to petrol prices, the Commission found that the price of petrol is regulated at both the wholesale and retail levels. The Department of Energy ("DOE") prescribes the maximum

petrol price or margin that can be charged by the oil majors to the wholesalers through the Wholesale List Price ("WLP").[1] The DOE regulations also guide how the petrol wholesalers charge the retailers. The DOE also prescribes a fixed pump price for petrol.

[29] For all the above reasons, the Commission found it unlikely that the proposed transaction would lead to or enhance post-merger coordination of conduct in relation to the sale of petrol in South Africa. We have no reason to doubt this finding.

[30] With regards to potential post-merger coordination in relation to diesel prices, the Commission found that the diesel price is only regulated at the wholesale level and that there is no fixed diesel pump price or a guide on how the diesel wholesalers should charge the retail station operators. The DOE publishes a maximum price for diesel through the WLP.

[31] The Commission further noted that certain firms have been implicated in an alleged cartel involving diesel. It is alleged that certain firms utilised a mechanism of reaching an understanding of using the WLP in determining the sale price for diesel. The Commission thus submitted that certain characteristics of the diesel market make it possible for the oil majors to engage in cartel conduct.

[32] Given the above, the Commission focused its assessment of potential post-merger coordination on the constraint placed by the Branded Marketers as independent diesel wholesalers in South Africa and, more specifically, the potential impact on (coordination in) the diesel market(s) should the Branded Marketers in the future exit from the wholesale level of the supply chain on the expiry of their existing contracts in [redacted] years.

[33] The Commission found that the Branded Marketers collectively account for less than 10% of the total diesel volume supplied to licensed retail petrol stations in South Africa.

[1] According to the Commission, the WLP would essentially state the maximum Rands per litre that a wholesaler has to pay an oil major to supply them with petrol. The WLP can be viewed as providing a base from which a discount can be negotiated.

[34] The Commission furthermore found competition for the retail sale of diesel to be localized and that a number of independent oil brands, including Excel, Puma, Viva, OVK, Aloe Oil, Quest, Kaap Agri, KLK and Overberg Agri, compete with the retail sites supplied by the Branded Marketers. The Commission also noted that there, relatively speaking, are more independent brands present in the rural and peri-urban areas where the retail service stations are located that the Branded Marketers supply. We further note that the CSA Branded Marketers do not compete with each other at the wholesale level of the supply chain since they each have a specific geographic area located to them by CSA in which they supply / distribute.

[35] The Commission concluded that all factors considered, the Branded Marketers on their own are not a significant constraining influence in the diesel market(s). The Commission said that the presence of the Branded Marketers is unlikely to be the key factor preventing potential coordination among the oil majors from taking place, hence, the likelihood of post-merger coordination in relation to diesel is unlikely to be materially influenced by the potential future removal of the Branded Markets from the diesel market(s), should their current contracts not be renewed in [redacted] years when they expire.

[36] We have no reason to doubt the Commission's above conclusions in relation to coordinated effects and conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market.

Public interest

Background

[37] The Economic Development Department ("EDD") raised several public interest concerns directly with the merging parties which culminated in the conclusion of a *Framework Agreement* between the merging parties and certain Government departments. The raised concerns range from employment, refinery capacity, local procurement and broad-based black economic empowerment. We also note that the DOE highlighted certain positive

outcomes that it, in light of the abovementioned *Framework Agreement*, expects from the proposed transaction These outcomes relate to issues such as the post-merger preservation of jobs, the upliftment of small businesses (particularly those owned by previously disadvantaged individuals), preservation of CSA's refinery capacity and the introduction of clean fuels.

[38] Since agreement was reached between the merging parties and the Government departments, and since the merging parties have agreed that the proposed transaction should be approved subject to the agreed set of conditions between these parties, we do not deal with this any further in these reasons, apart from a brief summary of the set of public interest conditions (see paragraph 92 below).

[39] The Commission concluded that the merging parties' tendered conditions, including those agreed with the Government departments, address all potential public interest concerns - particularly in relation to the effect of the proposed transaction on employment and certain concerns related to CSA's retired employees.

[40] We next briefly discuss the employment-related concerns and proposed remedies in that regard.

Employment

[41] In relation to the effects of the proposed transaction on employment, the merging parties agreed to a condition that no retrenchments will take place as a result of the proposed transaction. In addition, Sinopec has undertaken to maintain at least the number of employees as are employed in aggregate by CSA for a period of no less than five years from the implementation date of the proposed transaction.

[42] The Commission was of the view that the above undertakings adequately address any employment concerns relating to retrenchment arising from the proposed transaction.

[43] Furthermore, we note that Sinopec has also undertaken, as part of the remedy package offered, to ensure that CSA encourages any third parties involved in the value chain for the production and sale of CSA's products to expand their levels of employment wherever reasonably possible.

[44] Sinopec has also undertaken to ensure that CSA uses all reasonable efforts to increase indirect employment through the investment in production and the establishment of a Development Fund, as provided for in the conditions.

[45] However, concerns were received from CSA's retired employees in relation to their medical aid subsidy. These retired employees submitted that they have a right to a 75% medical aid subsidy from CSA, which is to run from retirement until the death of the retiree and his / her spouse. They submitted that as a result of the proposed transaction the period of the medical aid subsidy will be reduced from perpetuity to two years after the closing of the proposed transaction. This they said goes against their rights and benefits of employment since their expectation was that this benefit would endure until the death of the retiree and his / her spouse.

[46] To address the above concern, the merging parties agreed that SOIHL HK will ensure that CSA will post-merger continue to fully comply with all existing legal and contractual obligations to its retirees. The Commission was satisfied with this undertaking.

[47] We are satisfied that the merging parties' tendered employment-related remedies adequately address any employment concerns associated with the proposed transaction.

[48] We next, from a public interest perspective, deal with the concerns raised by the Branded Marketers.

Branded Marketers' concerns

[49] In addition to the competition concerns raised by the Branded Marketers, the Commission, from a public interest perspective, considered certain concerns raised by them. These concerns largely centre on three issues: (i) the effects of the potential termination of the Branded Marketers' current contracts when they expire in [redacted] years; (ii) the potential renewal of the contracts at their future expiry dates on worse terms than the current terms; (iii) the re-branding of the Caltex service stations in South Africa to a Sinopec brand.

Existing contracts of the Branded Marketers and their terms

[50] The Branded Marketers submitted that they post-transaction no longer have the assurance that their assets and the goodwill that they have invested in will be preserved. They argued that if the acquiring group does not renew their current contracts in [redacted] years, they may be forced to exit the wholesale market, harming their service station customers and consumers. To this end, the Branded Marketers sought approval of the proposed merger subject to a number of additional conditions to that proposed by the Commission, including that the Branded Marketers' contracts should post-merger be extended by an additional [redacted] year period.

[51] We note that on contractual terms the Branded Marketers' contracts lapse upon the expiry of a [redacted] year period, [redacted].

[52] In response to the concerns raised by the Branded Marketers, Sinopec gave an undertaking to ensure that CSA will not change any of the existing contracts with the Branded Marketers that would be to their detriment. This includes that CSA will let the Branded Marketers' current contracts run their course for the remainder of the contract periods.

[53] The Commission was of the view that the above condition sufficiently addresses the Branded Marketers' concern since their contract terms will remain in force for the duration of the existing contracts as commercially negotiated. This,

according to the Commission, would give the Branded Marketers ample opportunity to plan accordingly.

Post-merger rebranding i.e. replacement of the Caltex brand in South Africa

[54] We note the merging parties' intention to phase out the Caltex brand in South Africa post-merger and replace it with a Sinopec brand.

[55] The Branded Marketers submitted that the replacement of the Caltex brand will harm them since Sinopec at present has no brand value or brand equity in South Africa. They alleged that it will be extremely difficult, expensive and take a considerable time for Sinopec to build its brand in the face of strong competition by established brands in South Africa such as Engen, Shell, BP, Total and Sasol. The Branded Marketers submitted that this could have several negative consequences for them.

[56] The Commission was however unconvinced that the replacement of the Caltex brand is likely to have a significant negative effect on the Branded Marketers and on competition. The Commission gave a number of reasons for this:

a. First, Sinopec is not a static firm and it is growing its exposure as it opened 466 petrol stations in China in the past year alone. Sinopec has also had positive international recognition.
b. Second, the transition from the Mobil brand to the Engen brand in 1993 in South Africa did not result in those retail petrol stations losing business and/or closing down. At the time the Mobil brand was successful in South Africa but the Engen brand was unknown. Currently the Engen brand is one of the leading petroleum products in South Africa.
c. Third, Sinopec is making a significant investment through this transaction and as such Sinopec is unlikely to simply let its brand equity value diminish post-merger as this could severely impact the significant investments it intends to make in South Africa.

[57] The Commission also noted that Sinopec has given an undertaking to ensure that CSA will bear the cost of rebranding to a Sinopec brand all service stations

falling under CSA's Branded Marketer footprint that have already been upgraded to the latest Caltex standards.

[58] For those service stations falling under the Branded Marketer Programme in respect of which branding has not yet been upgraded to the latest Caltex standards and where the branded signage is typically owned by the Branded Marketers, Sinopec has undertaken to ensure that CSA will cover 20% of the rebranding costs into a Sinopec brand, as an incentive to rebranding.

[59] Ultimately the Commission concluded that the set of remedies tendered by the merging parties sufficiently addresses any legitimate merger-specific concerns raised by the Branded Marketers.

[60] We next discuss the submissions of the Branded Marketers at the Tribunal hearing and our assessment thereof.

Tribunal process and assessment

[61] As already mentioned above, the Tribunal gave the Branded Marketers the opportunity to make written submissions prior to the hearing, oral submissions at the hearing and also asked representatives of the Branded Marketers to address it on specific issues (see paragraphs 5 to 7 above).

[62] Furthermore, in our directive of 07 February 2018, we specifically requested that the Commission, the merging parties and the Branded Marketers address us at the hearing on the effects of the proposed transaction in terms of section 12A(3)(c) of the Competition Act, 89 of 1998 as amended, i.e. on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive, given that the Branded Marketers from a BEE perspective appear to fall within this category.

[63] In the Branded Marketers' written submissions they argued that the proposed transaction should be approved subject to a number of additional conditions to that tendered by the merging parties and recommended to the Tribunal by the Commission. These additional conditions were *inter alia*: (i) ensuring that the

contracts of the Branded Marketers are extended by an additional [redacted] year period; and (ii) in respect of service stations that must be fully branded by 2020 and have not been fully branded by such period, CSA must cover 50% of the cost of rebranding in respect of such service stations.

[64] The motivation advanced by the Branded Marketers for imposing further conditions was that the effects of the merger are likely to reduce levels of competition in the downstream markets for liquid fuels and their complementary products especially in rural and peri-urban areas to the detriment of consumers as well as stakeholders of SOIH.

[65] We have above already dealt with the competition assessment of the proposed transaction and found that the proposed transaction is unlikely to raise competition concerns, either from a unilateral or coordinative effects perspective. We however, from a public interest perspective, further consider the concerns raised by the Branded Marketers.

[66] The Tribunal wanted to know more about the Branded Marketers *inter alia* how they operate, their business model, what assets they own, the terms of their current contracts and what is likely to happen if their current contracts are not renewed at their expiry.

[67] The Branded Marketers were represented at the hearing by Mr. Clive Gerald Berlin ("Mr. Berlin") and Mr. Mohammed Fuhar Johnson[2] ("Mr. Johnson").

[68] Mr. Berlin explained that for all intents and purposes the Branded Marketers run as mini oil companies.[3] He said that the Branded Marketers' tankers would typically go to a terminal, would load in terms of pre-deliveries and then distribute product to the retail sites.[4] He further explained that the Branded Marketers supply a parcel of retail sites, some that they own and some that are

[2] The Branded Marketer for the Northern Cape.
[3] Transcript, page 52, lines 13 and 14.
[4] Transcript, page 52, lines 1 to 3.

owned by third parties.[5] He said that the Branded Marketers therefore are not merely commission agents, but have a total infrastructure.[6]

[69] In relation to their BEE credentials, Mr. Johnson pointed out that of the 10 CSA Branded Marketers "*four of us are 100% BEE, Chevron made sure all the others are 51% BEE and some more.*"[7]

[70] In relation to the duration of the existing contracts, Mr. Berlin confirmed that the Branded Marketers' contracts still have between [redacted] years to run before the issue of potential renewal arises.[8]

[71] Mr. Berlin further confirmed that the existing commercial agreements between the Branded Marketers and CSA contain an option at the end of the agreements for CSA to either renew the agreement on renegotiated terms or to buy the assets.[9]

[72] As already indicated above, Sinopec has undertaken, as a condition to the approval of the proposed merger, to ensure that CSA does not terminate the Branded Marketers' contracts before their expiry in accordance with their respective terms. Consequently the merger will not affect the rights of the Branded Marketers to maintain their contracts with CSA until the end of their terms. We further note that the Branded Marketers had no guarantee of renewal when they concluded their agreements with CSA initially and must therefore have anticipated making a return on their investment within the initial contract period.

[73] In relation to what is likely to happen post-merger at the end of the contract periods in the event that they are not renewed by the acquiring group, Mr. Berlin said that if the acquiring group does not "*take them back and they decide to abandon the programme, we as marketers would probably then be able to*

[5] Transcript, page 47, lines 18 to 20.
[6] Transcript, page 52, lines 3 to 13.
[7] Transcript, page 105, lines 3 and 4.
[8] Transcript, page 44, lines 9 to 11.
[9] Transcript, page 44, lines 11 to 19.

approach another supplier or another brand and continue with the operation."[10] He explained that should the Branded Marketers become "*free agents*" or "*were cut loose*", i.e. if CSA elected not to buy any assets from them, they would "*have a very attractive asset to go to one of the other majors and say what deal can we do, very typical as the American model is at the moment*". [11] The above scenario would therefore not be a concern.

[74] In the event that CSA does elect to buy assets at the expiry of the Branded Marketers' contract periods, Mr. Berlin said that if CSA bought back any retail sites, it would be at market value[12] and confirmed that if CSA bought the assets, an independent third-party valuer will value the assets[13].

[75] His remaining concern however was that Chevron could effectively "*cherry pick*" which assets it would buy at the expiry of the contracts.[14] According to Mr. Berlin, this could mean that the retail sites currently serviced by the Branded Marketers in certain outlying areas and associated with very significant distribution costs, would post-merger not be supplied and would then have to close at the expiry of the current contracts (if not renewed). Mr. Johnson shared this concern.[15]

[76] The merging parties however submitted that withdrawing from smaller towns in South Africa would not be in keeping with CSA's vision of creating and maintaining a national footprint, and would undermine the way in which the Branded Marketers' clusters have been developed in order to optimise operational costs.

[77] We also note that Sinopec has undertaken to ensure that CSA maintains the baseline number (being 615) of independently owned service stations as a minimum; and further, that as CSA grows its business, Sinopec will also ensure that CSA will, in aggregate, ensure a ratio of independently owned service stations of at least 65%.

[10] Transcript, page 44, lines 20 to 23.
[11] Transcript, page 47, lines 20 to 24; page 68, lines 7 to 20; and page 69, lines 12 to 14.
[12] Transcript, page 69, lines 6 and 7.
[13] Transcript, page 86, lines 5 to 7.
[14] Transcript, page 44, lines 14 to 19; also see page 68, line 21, to page 69, line 5.
[15] Transcript, page 116, line 14, to page 117, line 7.

[78] Furthermore, as indicated above, the Commission found that there are currently a number of independent wholesalers and retailers in the rural markets in which the Branded Marketers operate (see paragraphs 27 and 34 above).

[79] In the context of the above and given the merging parties' undertakings, specifically the undertakings to maintain and grow the existing baseline of independent service stations, as well as to ensure that the current ratio of independent to company owned service stations is maintained, we have no reason to believe that even if Sinopec were to "cherry pick" the service stations to buy back when the current contracts expire [redacted] years hence, that wholesale or retail competition ultimately would likely be substantially prevented or lessened.

[80] The other issue that concerned Mr. Berlin was that of brand change and potential post-merger brand degradation and a loss of value in the Branded Marketers' businesses.[16] As noted above, the Commission rejected this argument (see paragraph 56 above). We also have found no cogent evidence pointing to likely post-merger brand degradation and subsequent harm to the Branded Marketers. We note that Sinopec will be investing a large amount in acquiring CSA; and furthermore Sinopec has committed to invest in excess of a further R6 billion in the CSA business post-closing of the proposed transaction. There is no reason for us to believe that having invested substantial sums of money in acquiring the business and having given various public interest undertakings, Sinopec will not take the steps necessary to ensure the success of the business.

[81] In relation to the issues of retail site upgrades and post-merger rebranding and who ought to pay for that, Mr. Berlin confirmed that the Branded Marketers " *... are required over a period of time to move all our sites to what Chevron referred to as 2020 signage, it's a Vision 2020, but in the interim period we are allowed to what they call mix-and-match ...".*[17] Mr. Johnson also confirmed

[16] Transcript *inter alia* page 71, lines 16 to 18; page 74, lines 14 to 16.
[17] Transcript, page 79, lines 1 to 5.

that the Branded Marketers have an obligation to do Caltex signage at the moment and that 2020 was CSA's new level.[18]

[82] Mr. Jeffrey Podawiltz ("Mr. Podawiltz") of CSA testified that "*all of our branded Marketers have the same responsibility and therefore if they have not been updated to 2020 those sites would be required to convert to 2020, the investment would have to be made*."[19]

[83] However, in relation to post-merger rebranding to a Sinopec brand, Mr. Berlin said that it is not clear if contractually CSA could compel the Branded Marketers to rebrand any of their retail sites post-merger.[20]

[84] As already indicated (see paragraphs 57 and 58 above), the merging parties proposed two conditions, distinguishing between two scenarios, in relation to the post-merger rebranding of service stations and what portion of the costs thereof the acquiring group would carry.

[85] In respect of the service stations which have already been upgraded to the Caltex 2020 standard, the principle that underpins the merging parties' tendered condition is that Sinopec will procure that CSA pays for <u>all</u> rebranding costs that relate to these service stations, as the rebranding costs are merger-specific. There is therefore no dispute in relation to these service stations.

[86] However, the merging parties offered a different remedy in relation to the service stations falling under the Branded Marketer Programme where the branding has not yet been upgraded to the latest Caltex standards. In relation to the latter, Sinopec tendered to post-merger ensure that CSA, as an incentive to rebranding, shall cover <u>20%</u> of the rebranding costs necessary in order to rebrand these service stations in line with Sinopec's branding.

[87] In relation to the issue of the rebranding costs of the latter category of service stations, we exercised our inquisitorial powers and requested both the merging parties and the Branded Marketers to submit information regarding the costs of

[18] Transcript, page 110, lines 9 to 14.
[19] Transcript, page 164, lines 12 to 14.
[20] Transcript, page 90, line 19, to page 91, line 22.

(i) upgrading of these service stations to the latest Caltex standards; (ii) post-merger rebranding to a Sinopec brand.

[88] From the responses received it was clear that the image upgrade elements may vary significantly by service station and could include items such as a refaced canopy, updated signage, lighting, decals, paint, trash valets, pump advertising toppers and other items. These costs are therefore best determined on a case-by-case basis depending on the conditions per individual retail site. We thus in relation to the latter service stations where the branding has not yet been upgraded to the latest Caltex standards, imposed the condition that Sinopec shall ensure that CSA, as an incentive to rebranding, shall cover <u>a minimum of 20%</u> of the rebranding costs necessary in order to rebrand these service stations. The final percentage will have to be negotiated between the merging parties and each Branded Marketer on a site-per-site basis.

[89] Mr. Berlin also raised the concern of "*not having engaged with Sinopec and not understanding what their business model is and their strategy is going forward*".[21] Mr. Johnson likely complained about the general lack of engagement by the merging parties with the Branded Marketers, specifically in relation to concerns regarding a future change of brand.[22]

[90] The Tribunal questioned the merging parties regarding its engagement with the Branded Marketers, specifically in relation to the Branded Marketers' concerns and proposed conditions to address those concerns. The merging parties then gave certain undertakings regarding post-merger engagement with the Branded Marketers. We have imposed these engagement commitments as conditions to the approval of the proposed transaction. These conditions are the following:

a. Sinopec undertakes to meet with the Branded Marketers as soon as reasonably practicable after the implementation date of the proposed transaction to engage with the Branded Marketers in regard to any aspects

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[21] Transcript *inter alia* page 75, lines 16 to 18; transcript, page 93, lines 18 to 23.

[22] Transcript, page 100, lines 12 to 17; transcript page 100, line 21, to page 101, line 13; transcript page 107, lines 4 to 25; transcript page 109, lines 6 to 9 and lines 23 to 25; transcript page 112, lines 18 to 20; transcript, page 113, lines 3 to 5 and lines 12 to 16.

of its evolving long term strategy for CSA that may affect the Branded Marketers.

b. Further, Sinopec undertakes to procure that CSA will continue with its current levels of engagement with the Branded Marketers, including regular operational discussions, every other month meetings between CSA management and the individual Branded Marketer representatives (which will include mid-year and end of year business plan discussions); and one or two meetings per year that include all of the Branded Marketers and CSA management.

[91] The above conditions in our view adequately address the concerns raised by the Branded Marketers in relation to future engagement with them.

[92] We further note that the merging parties have committed to a wide range of (other) public interest conditions, subject to which the proposed transaction has been approved, including the following:

a. Sinopec will establish its head office in South Africa;
b. Sinopec must within a period of 5 years invest R6 billion, over and above CSA's current investment plans, to develop the Western Cape refinery;
c. Sinopec shall ensure that CSA maintains a baseline number of independently owned service stations;
d. Where independently owned service stations are to be established CSA shall give preference to Small Businesses, especially Black-owned businesses;
e. CSA must increase its level of supplies of LPG to Black-owned Businesses in an amount in excess of 15%, following the expiration of current contractual arrangements;
f. Sinopec will procure that CSA shall maintain or increase the current level (as a proportion) of expenditure on local procurement of goods and services;
g. CSA must establish a development fund of approximately R215 million over a period of 5 years to support Small Businesses and Black-owned Businesses which are involved in CSA's value chain;

h. CSA shall use all reasonable endeavours to increase its current Broad Based Black Economic Empowerment scorecard rating by two levels, from level 4 to level 2 within 2 years;

i. Sinopec undertakes to procure that, over a period of 5 years, it shall increase the Broad Based Black Economic Empowerment shareholding in CSA from 25% to 29%, and retain it at no less than 29%; and

j. Sinopec will use reasonable endeavors to promote the export of South African manufactured products for sale in China.

[93] We are satisfied that the merging parties' tendered conditions adequately address and are proportional to the Branded Marketers' legitimate merger-specific (public interest) concerns.

[94] As already indicated above, the merging parties agreed to the approval of the proposed transaction subject to the full set of tendered conditions, which we have imposed with certain enhancements thereto. We conclude that the imposed conditions collectively adequately address any public interest concerns arising from the proposed transaction.

Conclusion

[95] We approve the proposed transaction subject to a detailed set of public interest conditions, attached hereto marked as **"Annexure A"**. The imposed set of conditions adequately addresses any public interest concerns arising from the proposed transaction.

Mr AW Wessels

27 June 2018
DATE

Mr Enver Daniels and Mr Anton Roskam

Tribunal Researcher:	Kameel Pancham and Jonathan Thomson
For the merging parties:	Adv. Mark Wesley and L Sisilana instructed by Cliffe Dekker Hofmeyr and Bowmans

For the Branded Marketers:	Adv Arnold Subel SC instructed by Fluxmans Attorneys
For the Commission:	Maya Swart