COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 65/LM/Jun12
(015248)

In the merger between:

NESTLÉ S.A. **PRIMARY ACQUIRING FIRM**

And

THE INFANT NUTRITION BUSINESS
OF PFIZER INC. **PRIMARY TARGET FIRM**

Panel	:	Andreas Wessels (Presiding Member) Lawrence Reyburn (Tribunal Member) Mondo Mazwai (Tribunal Member)
Heard on	:	06 February 2013
Order issued on	:	11 February 2013
Reasons issued on	:	18 March 2013

Decision

Conditional approval

[1] On 11 February 2013, the Competition Tribunal ("Tribunal") conditionally approved the merger in South Africa between Nestlé S.A. ("Nestlé") and the locally conducted infant nutrition business of Pfizer Inc. as part of a worldwide acquisition by the Nestlé group of Pfizer's infant nutrition interests. The reasons for the conditionality follow.

Background

[2] On 14 December 2012, the Competition Commission ("Commission") recommended approval of this merger to the Tribunal, subject to what was called a transitional re-branding remedy. As will be clear from the more detailed explanation set out below, this amounts to a prompt on-sale by Nestlé of the physical assets it acquires in the merger to a third party not yet identified, and the simultaneous licensing of the acquired intellectual property to that party.

[3] The terms of the licence will in effect allow the third party to step into the shoes of Pfizer as regards the importation, manufacture and distribution of the relevant products, but over a period this party will have to re-brand these products and establish market acceptance for them under its own trade marks. After a 'black-out' period, all the rights in the trade marks included in that intellectual property will revert, unencumbered by a licence, to Nestlé.

[4] This arrangement reflects the fact that Nestlé, according to the merging parties, is not looking at the South African assets acquired from Pfizer to grow its business in the relevant products locally, where it already has a large market share. Nevertheless, the proposed merger raises significant competition concerns in South Africa, given the highly concentrated nature of the relevant markets, as explained below. The position is different in China and certain other territories where Nestlé wishes to increase its currently modest market participation, but after the re-branding period has ended, Nestlé wishes to retain control worldwide over the usage of the trade marks hitherto used by Pfizer and which it will be actively using in China and some other countries. A similar transitional re-branding arrangement has been proposed and accepted by the competition authority in Australia. At the time of hearing the matter in South Africa, Nestlé was in advanced negotiations regarding a similar transitional re-branding remedy in Chile, Mexico and Columbia.

[5] A form of transitional re-branding was offered by the merging parties upfront in their filing, and according to the merging parties, has its origins in the European Union where the European Commission has previously approved a merger subject to a conditional remedy of that nature in the infant formula industry due to the peculiarities of that industry.

Parties to the transaction

[6] The primary acquiring firm is Nestlé, a Swiss-listed nutrition, health and wellness group which controls various firms worldwide and is not controlled by any single firm. Nestlé wholly owns its subsidiary, Nestlé South Africa (Pty) Ltd.

[7] Nestlé is involved in the production, marketing and sale of a large variety of food and beverage products. Relevant to this transaction are Nestlé's infant nutrition products, which include infant formula, toddler milks, pre-natal and maternal vitamins and supplements. Some of Nestlé's well-known brands include NAN, Lactogen and Nespray.

[8] The primary target firm is the infant nutrition business of Pfizer Nutrition, which is a business unit of Pfizer Inc. Pfizer Inc. (“Pfizer”) is listed on the New York, London, Euronext and Swiss stock exchanges. Pfizer Nutrition is a global paediatric nutrition business with a portfolio of products such as everyday and specialty infant and toddler formulas. Its brands include the S-26 range of infant formula, SMA, Infasoy and Centrum Materna, which is a range of maternal supplements.

Proposed transaction and rationale

[9] The proposed transaction involves Nestlé’s acquisition on a worldwide basis of the global infant nutrition business of Pfizer Nutrition, which includes certain pre-natal and maternal vitamin products.

[10] Nestlé submitted that, from a global viewpoint, Pfizer Nutrition's strong brands and product portfolio, combined with its geographic presence, complement Nestlé's infant nutrition business. In particular, the transaction will help Nestlé to increase its foothold in the emerging markets and countries with fast-growing populations, especially China and other parts of Asia, where Pfizer has been successful.

[11] It appears that Pfizer acquired its nutrition business as part of its purchase of the Wyeth company's assets in 2009. Pfizer has since then chosen to focus on its core pharmaceuticals business and has decided to dispose of its nutrition business (as well as its animal health business) via an auction process. Nestlé was selected as the successful bidder in the global auction.

Competition assessment

[12] The Commission identified a horizontal overlap in the activities of the merging parties as they are both involved in infant nutrition, more specifically, in infant milk formula ("IMF") and maternal supplements. In respect of the latter, the Commission concluded that the merging parties' products are complementary rather than competitive as Nestlé's products comprise cereals and shakes whereas Pfizer's supplements comprise vitamins and mineral tablets.

[13] The Commission identified no competition concerns in regard to pre- and post-maternal supplements. We therefore do not consider this market any further.

[14] Regarding IMF, and having regard to the different stages of development and the various needs of babies, toddlers and young children and the various factors (such as brand, cost, how soon the mother weans) which play a role in a mother's final decision as to which product to use, the Commission identified the following product markets:

a. Infant formula (starter stage) for babies aged 0 – 6 months;
b. Follow-on formula for babies aged 7 – 12 months;
c. Growing-up milk ("GUM") for children between the ages of 12 months and 5 years; and
d. Specialty milks for babies and toddlers with special needs (e.g. allergies, digestive problems and reflux).

[15] The merging parties, however, defined the product markets more broadly as:

a. Infant and follow-on milk which comprises milk formula for babies aged 0-6 months and follow-on milk for babies aged 7 – 12 months; and
b. GUM, given to children between 1 – 5 years.

[16] The merging parties disagreed with the Commission's finding that there is a separate market for specialty infant formula but submitted that it is not necessary for the Tribunal to make a determination in this regard as the remedy proposed addresses the competition concerns identified by the Commission regardless of the exact product market delineation.

[17] In respect of the geographic market, the merging parties and the Commission also differed. The Commission defined the geographic market as national, whereas the merging parties defined the market as national, and possibly international. The Commission and the merging parties, however, submitted that in light of the proposed remedy, it is not necessary for the Tribunal to conclusively decide on the exact scope of the relevant geographic market either.

[18] Irrespective of whether the market is defined narrowly or broadly, the South African IMF market is distinctly concentrated: there are only three significant competitors, namely Nestlé, Pfizer and Aspen in the infant, follow-on and GUM markets. The specialty milk market has four competitors, namely Nestlé, Pfizer, Aspen and Abbott.

[19] According to the Commission, Nestlé has a market share consistently above 70% across all of the markets defined by the Commission. Aspen has an

estimated 20% market share across all the markets as defined by the Commission, and Abbot has an estimated [10 – 20]% market share in the specialty segment. Pfizer's market share is estimated at [0 – 10]% across all the markets as defined by the Commission, and at [0 – 10]% in the specialty segment.[1]

[20] On either formulation of the relevant market, the post-merger market shares of the merging parties in each relevant market will be >70%. Given the high market shares and levels of concentration, the Commission considered the transaction essentially as a three-to-two merger, with the only significant competitor being Aspen.

[21] The remedy offered by the merging parties at the time of filing was a somewhat truncated version of transitional re-branding, which the Commission tested with market participants. Following interviews with the market participants,[2] the Commission rejected the merging parties' initial proposed remedy and indicated to the merging parties that it was considering a (permanent) divestiture of the affected businesses as its alternative remedy.

[22] The merging parties reverted with a revised transitional re-branding remedy which was accepted by the Commission and recommended to the Tribunal.

The Remedy

[23] Prior to dealing with the current remedy it is necessary to deal briefly with the version of the remedy initially proposed by the merging parties and the views of the market participants contacted by the Commission.

[24] The merging parties initially proposed a transitional re-branding arrangement in respect of Pfizer Nutrition's infant and follow-on milk ("IFFO Milk"), GUM

[1] Although the merging parties' market definition differs from that of the Commission, the parties provided market shares on the basis of the Commission's market definition in order to facilitate the Commission's review of the matter. The market shares are based on the AC Nielsen report for the period 1 January 2011 to 31 December 2011 and are very similar to the Commission's calculation of the merging parties' market shares.

[2] The Commission interviewed Danone, Perrigo, Aspen, Tiger Brands and Abbott.

and specialty milk brands. The specific products to be subject to licensing and then re-branding in the hands of a purchaser of the physical assets of the Pfizer nutrition business were those currently sold under Pfizer's S-26, SMA and Infasoy brands. In terms of the transitional arrangement, the trade marks would be exclusively licensed to the purchaser of the physical assets for a period of five years, at the end of which the trade mark licence would terminate. A second period of five years (the "black-out period") would follow during which the purchaser would be expected to implement its own branding but Nestlé would undertake not to use the Pfizer trade marks. Thereafter, at the end of the black-out period, if Nestlé wished to use the Pfizer trade marks in its own operations, it would be free to do so.

[25] The stated expectation was that the purchaser of the physical assets would by the end of ten years have achieved stability and permanence in its own branding of the products and would have gained market acceptance under that branding. Nestlé would after ten years have no position in the South African market in products under these trade marks but would have ownership of the trade marks and be able to prevent others from using them and could, if it chose to do so, use them in South Africa in its operations.

[26] The assets to be acquired by the purchaser who would in this fashion take over the Pfizer business would include the necessary trading licences and rights to employ the relevant Pfizer personnel.

[27] The market participants contacted by the Commission raised the following key concerns in relation to the merging parties' initial tendered remedy:

a. Customers of infant formula are very sensitive to product changes and are loyal to their preferred brands. The sensitivity of infant formula thus makes re-branding a difficult and risky exercise, especially given the heritage enjoyed by the Pfizer brands. In light of this, market participants expressed concern that five years was too short a period for the purchaser to re-brand the Pfizer products.

b. Moreover, given the strength of the Pfizer brands, there was a risk that Nestlé would be able to regain market share quickly following the "black-out" period, when Nestlé would be entitled to re-introduce the Pfizer brands. This risk, it was said, might reduce the incentives for the purchaser to invest significantly in the business to be divested in order to become a meaningful participant in the market.

[28] The Commission also contacted Lactalis, a French company which purchased Danone's infant formula business in France following a divestiture that was subject to a re-branding arrangement of the sort contemplated in this merger. The time period for re-branding in that case was five years, followed by a five-year black-out period. Lactalis, which was in its fourth year of the five-year re-branding period (to be followed by a five-year "black-out" period during which Danone would not market or sell the divested brands in France), advised the Commission that the five-year re-branding period was not sufficient.

[29] Some of the reasons given by Lactalis for the insufficiency of the time period included the fact that health care professionals ("HCP"), who constitute a significant route to market, tend to recommend the same brands year after year regardless of market events, making it difficult to gain market acceptance for a new brand. Lactalis also indicated that some of the large competitors invest heavily in research and development, which has impeded Lactalis' success in the market. Be that as it may, Lactalis indicated that the re-branding remedy enabled it to enter IMF categories in which it was previously not involved.

[30] For the above reasons, the Commission rejected the initial tendered remedy. The merging parties revised the remedy and this led to the Commission's recommendation. A full description of the revised remedy is contained in Annexures X and Y to our order. The main elements of the remedy are:

a. an exclusive ten-year paid-up licence to use the Pfizer trade marks on products that are currently being marketed in South Africa, followed by

a ten-year "black-out" period during which Nestlé will not be allowed to use those trade marks in South Africa;

b. an exclusive ten-year licence to use Pfizer's product formulations for the relevant products;

c. a non-exclusive perpetual licence under process technology relating to the relevant products, including trade secrets and the know-how necessary to develop and manufacture the divested products and products in the pipeline;

d. at the purchaser's option, a [confidential]-year agreement to supply the purchaser [confidential] with the divested and pipeline products, hence ensuring continuous supply of these products during the transitional period;

e. Nestlé will provide the purchaser with access to pipeline products (including the necessary licences) for development and sale in South Africa;

f. Nestlé will provide the purchaser with detailed information regarding key or unique product ingredients used in the divested and pipeline products and their sources of supply;

g. Nestlé will provide the purchaser with clinical trial results and product trial results relating to the divested and pipeline products for [confidential] years after the approval of the transaction. Nestlé will also provide the purchaser with access to appropriate Nestlé representatives and technical assistance to assist with the interpretation of the results of clinical and product trials;

h. Nestlé will provide [confidential][3] information to the purchaser for use in South Africa;

i. Nestlé will sell all advertising, marketing, sales and promotional materials related to the divested business to the purchaser;

[3] [confidential]

j. Nestlé will also transfer an inventory of finished products and packaging components specific to the divested business, customer and vendor lists, legal and financial records and all permits, consents, permissions and other documents relevant to the divested business;

k. Nestlé will use reasonable endeavours to ensure that employees of the Pfizer nutrition business are transferred to the purchaser. They will include the employees who are involved pre-merger in the marketing and sale of the Pfizer products in South Africa; and

l. Provision is made for the appointment of a trustee to arrange and manage the on-sale of the Pfizer nutrition business in South Africa if Nestlé is unable to bring this about within the stipulated time period.

Assessment of the Remedy

[31] At the pre-hearing convened on 16 January 2013, the Tribunal directed the merging parties and the Commission to address it regarding the proposed conditions, how the conditions would work in practice, why the conditions would address the competition concerns in the matter, as well as why the conditions were preferred to permanent divestiture.[4]

[32] It bears mentioning that at the date of the hearing, Nestlé had already acquired the infant nutrition business of Pfizer in various countries outside South Africa. Being a worldwide transaction, the transaction was notified in 15 countries, and unconditional approval had been obtained in nine of those jurisdictions.[5] In those countries, the merger became effective on 30 November 2012.[6]

[33] In the remainder of the jurisdictions including South Africa, save one,[7] Nestlé proposed remedies similar to those under consideration in this matter. As at

[4] See Tribunal order dated 16 January 2013.
[5] The jurisdictions are China, Brazil, Ireland, Italy, Portugal, Taiwan, India, Turkey and Saudi Arabia.
[6] See page 6 line 25 and page 7 line 1 of the transcript.
[7] In Pakistan, the competition authority accepted Nestlé's undertaking to continue distributing the Pfizer products in that country for a period of three years after the merger, and granted approval on that basis.

the date of the hearing, the conditions had been accepted in Australia, and the merging parties were in advanced negotiations with the regulators in Mexico, Columbia and Chile.[8]

[34] Although the proceedings were not contested, both the Commission and the merging parties called witnesses to speak to the specific issues that the Tribunal requested the Commission and merging parties to address. The merging parties called two witnesses, Mr Patrick Scott Beringer, who is the general counsel of Nestlé Nutrition, as a factual witness; and Mr Andrew Graham Rice, chairman of Yellowwood, a marketing and branding strategy consultancy, as an expert witness. The Commission called Mr Tapera Gilbert Muzata, an economist employed by the Commission, as its expert witness.

[35] Although several market participants made submissions to the Commission during the investigation and indicated that a permanent divestiture would be preferable to a transitional re-branding remedy, none of them intervened in the proceedings.

[36] Prior to dealing with the question whether the remedy addresses the competition concerns identified, we deal first with the reasons why, according to the Commission and the merging parties, the re-branding remedy is preferred to a permanent divestiture, in a transaction which the Commission essentially viewed as a three-to-two merger.

[37] In its witness statement, the Commission emphasised that a permanent divestiture without a re-branding obligation on the purchaser might amount in effect to a licence in perpetuity (with the licensee paying royalties), making the remedy in essence a behavioural remedy based on intellectual property, rather than a structural remedy. The risks of such a behavioural remedy include the potential for co-ordination between Nestlé and its licensee, with whom it would be a perpetual competitor (through its own brands) in the South African market. An alternative risk is that Nestlé might weaken the

[8] See Mr Beringer's witness statement at page 5 paragraph 4.3.

purchaser's competitive position in the market through manipulation of the licensing arrangements.

[38] According to the Commission, the alternative to resolving the potential intellectual property challenges raised above would be a divestiture of the relevant IP rights. However, this would lead to the risks of split ownership of the trade marks discussed by Mr Beringer in his testimony and acknowledged by the Commission.

[39] As was indicated earlier, by the time the hearing of this matter took place, Nestlé had already become the owner of the Pfizer trade marks and other assets in nine countries as part of Nestlé's global acquisition of the Pfizer nutrition business.

[40] Mr Beringer testified that the essential rationale for Nestlé's acquisition was to expand its footprint in China and other Asian markets where Pfizer has been successful. According to Mr Beringer, South Africa constitutes approximately [...]% of the total turnover of the assets acquired globally. Consequently South Africa was not a core element in the transaction.

[41] Against this background, a permanent divestiture of the local Pfizer infant nutrition business to a third party would mean that Nestlé would be the owner of the Pfizer brands (specifically S-26, SMA and others) in other jurisdictions in the world except in South Africa, where the trade marks and other IP would be owned by the third party.

[42] Mr Beringer summarised the risks that would arise from this split ownership, which he called dual branding, as follows:

> *"I think to understand the risks concerning dual branding one has to take a step back and think of the industry that we operate in and I think the key thing here is it's a very sensitive product category and also one that is characterised by regional and global brands, if one looks at the various participants in the market they would generally use regional or a global brand. This gives rise I think to three concerns I've set out in 7.4, each of which we think that a transitional remedy would resolve.*

The first of those concerns is the risk of reputational damage to either party, clearly as long as there are dual brands in the marketplace there is a risk that an incident, whether that be to do with a safety incident, whether that be to do with a reputational incident concerning the marketing of the products which again is sensitive due to the WHO Code, an incident involving one brand by one of the participants can clearly have an effect on the reputation of brand of the other innocent party ."

[43] According to the merging parties, a further risk of split ownership is "free-riding" by either of the two brand owners. Mr Beringer described the risk as follows:

"I think the issue that we're facing here is clearly, again because the brands are international, there is a feeling that if the dual branding mechanism stays that one party could actually just sit back, not invest in the brands and not invest in the R&D and rely on the other party to have made that investment and effectively to piggy-back on the investment that the other party has done. That is something actually we don't think is in the interest of consumers or from a competitive point of view is something that should prevail for a lengthy period of time but we understand that in a short period of time, and we'll come probably to pipeline products, that a certain amount support [sic] does need to be available for a short period of time but in the medium to long term that must be the obligation of the brand owner and we think that this actually dis-incentivises the new brand owner from making those investments going forward."

[44] In the circumstances, the Commission and the merging parties concluded that the transitional re-branding remedy was a superior remedy to a (permanent) divestiture.

[45] We acknowledge the risk of reputational damage and free-riding that can result from split ownership of the trade marks. We also acknowledge that these risks would exist in perpetuity in a permanent divestiture; whereas they

will be cured under the re-branding remedy as the danger of confusion in the market regarding to the origin of products will be eliminated. The purchaser/licensee will be obliged to adopt its own trade marks within ten years and concomitantly cease using the Pfizer trade marks. In the 'black-out' period the public will not be exposed at all to the Pfizer trade marks and market recognition in South Africa of products bearing those trade marks will dwindle to nothingness. The purchaser/licensee will however have the benefit of the Pfizer process technology to use in the manufacture of its re-branded products so that the quality of the re-branded products will be no less than when these products bore the Pfizer trade marks.

[46] Moreover, the re-branding remedy creates an opportunity for the emergence of a viable, stand-alone competitor, independent of Nestlé and without any association or link to the Pfizer brands in the long run.

[47] For these reasons we believe that the re-branding remedy in this case addresses the competition concerns identified whilst avoiding the practical dilemmas associated with a permanent divestiture.

[48] At the hearing, the Tribunal asked the Commission whether it had considered the potential for co-ordination given that there will be a contractual relationship between the merging parties and the licensee.[9] The Commission indicated that there was discomfort regarding the on-going interaction between competitors. However, such interaction would be short-lived (at worst, it will be for 10 years). It will end when the re-branding has occurred.[10] In this regard, the Commission would be well advised, when reviewing the merger notification involving the proposed purchaser, to also review the licence agreement between Nestlé and the purchaser, as provided for in the conditions imposed on the merged entity.[11]

[49] Turning then to the question whether the conditions address the competition concerns in the matter, both the short-and long-term competition effects must be assessed i.e. does the remedy maintain or preserve the pre-merger

[9] See page 62 lines 17-20 of the transcript.
[10] See page 62 lines 21-24 of the transcript.
[11] See clause 1.3.18 of Annexure X.

market structure and in the long term, does the remedy create conditions for a competitive market?

[50] In his witness statement, Mr Beringer stated that he believed that the remedy satisfactorily addressed any competitive concerns arising from the merger as it will maintain the market structure that existed prior to the merger, and will ensure no increase in market share, market concentration or reduce the number of competitors in the relevant markets.[12]

[51] The Commission's view is that the remedy will in the short to medium term ensure that products known in the relevant markets under the existing Pfizer Nutrition trade marks will remain on the markets under new ownership (by the approved purchaser/licensee) and will continue to impose a competitive constraint on Nestlé and other market participants.

[52] We agree with the Commission and the merging parties that, to the extent that the proposed remedy does not increase the levels of market concentration, the remedy would maintain the pre-merger competitive landscape. This however ultimately depends on the identity and characteristics of the purchaser of the divested business.

[53] The Commission solicited the views of market participants regarding the revised re-branding remedy. According to the Commission, the market participants were of the view that the revised remedy (of 10 years +10 years) provides sufficient opportunity to re-brand the divested Pfizer products. Indeed the merging parties and their expert, Mr Rice were of the view that the re-branding period provides *"…a generous window and a window that is probably greater than is needed for the purposes of migrating consumers from one brand to another."*[13] We have no reason to doubt this.

[54] Furthermore, the extension of the black-out period from five to ten years was regarded as a sufficient opportunity to create goodwill in respect of the new brands and credibility with customers and health care practitioners (who are regarded as an important route to market).

[12] See Mr Beringer's witness statement at page 14 paragraph 7.3.
[13] See page 77 lines 10-12 of the transcript

[55] The market participants were also of the view that the time periods in the revised remedy created incentives for the purchaser to invest in the divested business in a market where there is a continuous need to invest in R&D to remain competitive. Moreover, the expanded geographic scope of the remedy provides the necessary economies of scale for the purchaser to undertake the required investment (in the revised remedy Nestlé will not only be divesting the Pfizer infant nutrition business in South Africa, but will also offer the purchaser Pfizer's infant nutrition businesses in [confidential].

[56] Some of the comments from the market participants which the Commission took into account in finalising the agreed remedy between itself and the merging parties were:

a. Access to pipeline products was regarded as essential for the purchaser to remain competitively relevant.

b. A lack of access by the purchaser to Pfizer's process technology relating to the divested brands, pipeline products, clinical trial and product trial results, might hinder the purchaser's ability to effectively compete.

c. There was a risk that Nestlé might tweak the formulations to the divested brands to develop copycat products for sale in South Africa in competition with the divested brands.

d. Pfizer employees who are responsible for maintaining the competitive strength of the brands might not be available to the purchaser.

e. There were differing views among the market participants regarding the duration of the interim supply agreement.

[57] A synopsis of the revised remedy as described above indicates that the merging parties and the Commission have sought to address these concerns. Specifically regarding the potential for Nestlé to introduce copycat brands in South Africa, the remedy precludes Nestlé from using the divested brands or any other brand that may be associated with the divested brands

in South Africa for 20 years after the approval of this merger.[14] Nestlé is also enjoined from licensing any third party the divested brands for use in South Africa.[15]

[58] At the hearing, the Tribunal asked the merging parties regarding the minimum sales which the parties averred Nestlé would have to make in the "black-out" period to maintain the validity of the relevant trade mark registrations. Specifically, the Tribunal asked how the purchaser could be assured that such sales will occur at levels that do not destroy the competitiveness of the purchaser.[16]

[59] Nestlé undertook to notify such sales as it makes under the trade marks for this purpose to the Commission. This undertaking forms part of the conditions.[17]

[60] Turning to the concerns raised regarding the lack of access by the purchaser to Pfizer's process technology, the remedy provides for Nestlé to provide a non-exclusive perpetual licence to process technology in South Africa. This will enable the purchaser to manufacture, package, sell, offer for sale, market, promote, advertise, dispose of and distribute products in South Africa under any brand, including the manufacture and packaging of products outside South Africa for sale in South Africa.[18] Process technology also applies to pipeline products.[19] Nestlé is also required to provide the purchaser with developments to process technology for a period of [confidential] years following the date of disposal.

[61] Regarding pipeline products, the remedy provides for Nestlé to give the purchaser access to pipeline products for sale in South Africa.[20] In the ten-year re-branding period, Nestlé will grant an exclusive ten-year licence to the purchaser to use the relevant trade marks on pipeline products.[21] As

[14] Clause 4.2.3 of Annexure X.
[15] Clause 4.2.2 of Annexure X.
[16] See page 41 lines 11-15 of the transcript.
[17] See clause 4.2.1 of Annexure X.
[18] Clause 2.3 of Annexure X.
[19] Clause 2.11 of Annexure X.
[20] Clause 2.9 of Annexure X.
[21] Clause 2.10 of Annexure X.

indicated at paragraph [60] access to process technology includes process technology to pipeline products.

[62] The remedy also provides for Nestlé to provide the purchaser with clinical trial and product trial results relating to the divested and pipeline products for a period of [confidential] years.[22]

[63] At the hearing the Commission and the merging parties advised that in line with the remedy offered by the parties in Australia, the Commission and the parties had agreed to include [confidential] in the remedy. In this regard, Nestlé must, *inter alia*, provide to the purchaser [confidential] which was in existence at [confidential] which was acquired pursuant to Nestlé's global acquisition of the Pfizer nutrition business, for use in South Africa.[23]

[64] Nestlé is also required to use reasonable endeavours to procure the transfer of Pfizer's employees to the purchaser. For instance, Nestlé is obliged to release any employees that may have restraints of trade, from such restraints.

[65] Given the above facts, we are satisfied that the business to be divested contains the necessary elements for the purchaser to step into the shoes of Pfizer.

[66] However, as acknowledged by the merging parties and the Commission, the success of the remedy depends ultimately on the characteristics of the purchaser of the divested business. There would be no purpose in providing a viable business and affording the purchaser the incentives contained in the remedy if the purchaser lacks the capacity to manage the business and its transition.

[67] The ultimate aim of the remedy is to provide an opportunity for entry by a credible, viable and stand-alone competitor in the long run. In this regard the remedy provides, *inter alia*, that the purchaser must be independent from Nestlé or any of its affiliate members and possess the necessary financial

[22] Clause 2.6 of Annexure X.
[23] Clause 2.13.1 of Annexure X.

resources, proven expertise and the incentive to maintain and develop the divested business as a viable and competitive force in competition with Nestlé.[24]

[68] At the hearing, Mr Beringer informed the Tribunal of the progress Nestlé has made in finding a purchaser in relation to the tendered remedy. He described the bidding process and disclosed the identities of the bidders, each of whom, according to Nestlé, would be a [confidential] in the market with a [confidential].[25] The Tribunal asked whether Nestlé had considered the competition implications of Nestlé's short-listing of potential purchasers.[26] Nestlé responded [confidential].[27]

[69] Given the stated objectives of the remedy i.e. to maintain the pre-merger competitive landscape in the short term while creating an independent and viable competitor in the medium to long term, the Commission and the merging parties would be well advised to assess the proposed purchaser in that light.

[70] Ultimately the proposed purchaser, to the extent and in the manner required by the Competition Act No. 89 of 1998, as amended ("the Act") will go through a merger notification process as contemplated in section 13A of the Act .[28] This is a condition of the approval of this merger.[29]

[24] See clause 6 of Annexure X.
[25] See transcript, page 45 lines 18-20.
[26] See page 47 lines 14-17 of the transcript.
[27] See page 47 lines 18-21 of the transcript.
[28] See page 87 lines 1-6 of the transcript.
[29] See clauses 1.3.21 and 3.2 of Annexure X.

Public Interest

[71] The merging parties confirmed that there will be no adverse effect on employment as a result of the proposed transaction.

[72] No other public interest issues arise as a result of this transaction.[30]

CONCLUSION

[73] It was common cause between the Commission and the merging parties that the transaction raised competition concerns which required a remedy. It is therefore not necessary for the Tribunal to consider whether the proposed transaction and remedy would be likely to substantially prevent or lessen competition in the relevant markets (which were not conclusively defined). The merging parties offered conditions which were acceptable to the Commission and which we too, after some enhancements by the merging parties following questions raised by the Tribunal, found acceptable. Accordingly, we approve the proposed transaction subject to the merging parties' final set of tendered conditions. They are set out in full in **Annexures X and Y** to our decision.

MONDO MAZWAI **18 March 2013**
DATE

Andreas Wessels and Lawrence Reyburn concurring

Tribunal Researcher: Nicola Ilgner

For Nestlé: Adv J Wilson, instructed by Edward Nathan Sonnenberg

For Pfizer: Bowman Gilfillan

For the Commission: Bukhosibakhe Majenge and Werner Rysbergen

[30] See page 109 of the record.