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# COMPETITION TRIBUNAL OF SOUTH AFRICA

## Case No: 018358

In the matter between:

**FERRO INDUSTRIAL PRODUCTS (PTY) LTD** Acquiring firm

### and

ARKEMA RESINS (PTY) LTD Target firm

Panel : Andreas Wessels (Presiding Member) Mondo Mazwai (Tribunal Member)

Medi Mokuena (Tribunal Member)

Heard on : 14 to 28 July 2014

Order issued on : 04 August 2014

Reasons issued on : 25 September 2014

## Decision

**CONDITIONAL APPROVAL**

1. On 04 August 2014, the Competition Tribunal (“Tribunal”) in terms of section 16(2)(b) of the Competition Act of 1998[[1]](#footnote-1) (“the Act”) conditionally approved the acquisition by Ferro Industrial Products (Pty) Ltd (“Ferro”) of Arkema Resins (Pty) Ltd (“Arkema SA”).
2. The reasons for the conditional approval of the proposed transaction follow.

**Parties to transaction**

1. The acquiring firm is Ferro, a private company jointly controlled by management shareholders (51%) and Investec Bank Limited (49%).
2. Ferro operates within the industrial chemicals sector and its activities comprise six divisions, namely (i) the powder coatings division; (ii) the plastics division; (iii) the enamels and ceramics division; (iv) the glass colours division; (v) the spectrum ceramics division; and (vi) the resins division. Of relevance for the competition assessment of the proposed transaction is Ferro’s resins division which operates through its only wholly-owned subsidiary, NCS Resins (Pty) Ltd (“NCS”).
3. NCS manufactures and distributes a complete range of unsaturated polyester resins (“UPRs”). It also manufactures and supplies ancillary products, gel coats (which are essentially UPRs with pigment), pool coats, flow coats, pigments, catalysts and fibreglass application and release agents.
4. The target firm is Arkema SA. Arkema SA is a wholly-owned subsidiary of Arkema Afrique SAS[[2]](#footnote-2), which is in turn wholly-owned by Arkema, a French company listed on the Paris Stock Exchange. Arkema is the parent company of the Arkema Group of Companies (“Arkema Group”). Arkema SA owns 100% of Harveys Composites (Pty) Ltd (“Harveys”).
5. Arkema SA is active in the manufacture and supply of coatings resins and composite resins, specifically UPRs (including gel coats). It operates an integrated production plant in South Africa at Isipingo, KwaZulu-Natal which manufactures both coatings resins and composite resins. Through Harveys, Arkema SA distributes equipment, raw materials, accessories and ancillary products to its composite customers.
6. We note that neither Ferro nor NCS currently manufactures or supplies coatings resin. The horizontal overlap between the activities of Ferro and Arkema SA thus relates only to thermoset composite resins, also known as UPRs.

**Proposed transaction and rationale**

1. Ferro intends to acquire the entire issued share capital of Arkema SA and its wholly-owned subsidiary Harveys from Arkema Afrique SAS.
2. Ferro stated that its primary rationale for the proposed transaction is that it would enable it to expand and enhance its product range by entering into the manufacture and supply of coatings resin. The proposed transaction will provide Ferro with access to world class coatings based resin technology, as well as a global brand.
3. Arkema indicated that UPR production does not represent a strategic fit for the Arkema Group.[[3]](#footnote-3) The composites business in South Africa is the only such business that the Arkema Group has in the world and is accordingly a complete anomaly within its business portfolio.[[4]](#footnote-4) Arkema further submitted that its rationale for the transaction is to dispose of its underperforming business in South Africa and exit the manufacture of composite resins. Arkema’s core area of operations globally is in coatings resin and in South Africa both its coatings and composites divisions have not operated satisfactorily for a number of years.

**Background**

***Referral and tendered remedies***

1. On 08 May 2014 the Competition Commission (“Commission”) referred the proposed merger, classified as a “large” merger in terms of the relevant thresholds, to the Tribunal. The Commission recommended that the proposed transaction be prohibited since it would result in a substantial lessening of competition in two relevant UPR markets. Market delineation is discussed below.
2. In an attempt to address the Commission’s concerns about the competitive impact of the proposed transaction, the merging parties tendered certain remedies. These tendered remedies evolved over time. First, during the Commission’s investigation phase, the merging parties offered a pricing-related remedy for a two-year period for all UPRs produced and sold by the merged entity for use in mining applications. These mining applications refer to the use of specialised UPR for the production of encapsulated resin grout for underground mines by adding fillers to the resin.
3. Shortly prior to the commencement of the hearing of this matter, the merging parties enhanced their above-mentioned tendered pricing remedy by offering to place the Arkema UPR recipes, know-how and customer lists[[5]](#footnote-5) in a public repository. It was clarified during the merger hearing that this proposed remedy package included access to all Arkema SA’s intangible assets including customer lists, UPR formulations, specifications, certifications and data. These intangible assets would be made available free of charge to any interested third party on a non-exclusive basis which the merging parties argued would facilitate entry/expansion by any interested party.[[6]](#footnote-6) This tendered remedy shall be referred to hereinafter as the “public repository remedy”.
4. At a later stage, after commencement of the hearing and following certain reservations raised by the Commission regarding the effectiveness of the tendered public repository remedy, the merging parties, as an alternative to the public repository remedy, offered to make Arkema SA’s intangible assets available to a single third party purchaser on an exclusive basis, including a toll manufacturing arrangement for a limited period.[[7]](#footnote-7) As indicated below, the merging parties later agreed to extend this period of the tolling arrangement. This tendered remedy shall be referred to hereinafter as the “divestiture remedy”. During the hearing the Commission appeared to favour this remedy above the public repository remedy.
5. Given the merging parties’ tendered set of proposed remedies to address any potential competition concerns resulting from the proposed merger, we shall focus our attention in these reasons on those remedies, and the extent to which they address the concerns raised by the Commission and certain third parties, specifically UPR customers.

***Witnesses called***

1. The Commission called the following factual witnesses to testify at the hearing:
   1. Dr Max Hahn (“Hahn”), the Managing Director of Rocbolt Resins (Pty) Ltd t/a Fasloc Rescaps (“Rocbolt”). Rocbolt is a UPR customer that produces encapsulated resin grouts used for roof support in the mining sector. It is one of only two customers in South Africa of UPR used in the manufacture of encapsulated resin grouts.
   2. Mr Derrick Duma (“Duma”), the Procurement Manager of Minova RSA (“Minova”). Minova uses a specialised UPR to manufacture *inter alia* resin rock-bolting capsules used in mining. Minova is the second customer in South Africa of UPR used in the production of encapsulated resin grouts.
   3. Mr Badruldien Mohamed Yunus (“Yunus”), a Joint Managing Director of Scott Bader Company Limited (“Scott Bader”). Scott Bader manufactures a wide range of products for the composite industry including UPRs and gel coats. Its manufacturing site is located in Hammarsdale in KwaZulu-Natal. It is one of four producers of UPR in South Africa.
   4. Mr Stephen Beal (“Beal”), the Managing Director of ADD Resins and Chemicals (Pty) Ltd (“ADD Resins”). ADD Resins supplies *inter alia* UPR products mainly to the construction, transport, sanitary ware and swimming pool manufacturing industries. ADD Resins imports resin and also buys UPR locally.
   5. Mr Damocles Loukidis (“Loukidis”), the former Managing Director of Niser Composites (Pty) Ltd (“Niser”). Niser was established in May 2002 and has recently integrated with ADD Resins. Loukidis is currently in a management position at ADD Resins.[[8]](#footnote-8) Niser, which has since exited the market, used to import various products including UPR for the fibreglass industry.
   6. Mr Garry Coady (“Coady”), the Managing Director of Profibre Products (Pty) Ltd (“Profibre”). Profibre uses UPR in the manufacture of fibreglass products such as exterior and interior parts for trucks and busses. More specifically, it utilises a general purpose UPR of a slightly higher standard and customised to the needs of specific customers by, for example, adding pigments to gel coats in order to create specific colours.[[9]](#footnote-9) Profibre’s main customers are blue chip automotive customers at the Original Equipment Manufacturing level.[[10]](#footnote-10)
   7. Mr Derek Jean du Plessis (“Du Plessis”), a Managing Member of Swim Spa CC t/a Poolmate (“Swim Spa”). Swim Spa is a manufacturer of pre-moulded fibreglass pools and is based in Pretoria, Gauteng. Swim Spa includes the *Penguin*, *Clearwater* and *Leisure* brands.
   8. Mr Desmond Beemiah (“Beemiah”), the Chief Executive Officer of Gold Reef Speciality Chemicals (Pty) Ltd (“Gold Reef”). Gold Reef, based in Isipingo, KwaZulu-Natal, is a manufacturer of emulsions. Its product range supplies the paint, adhesives, water treatment, carpet, detergent and textile industries.
   9. We note that [...] made a non-binding indicative offer to purchase the entire business of Arkema SA, including its distribution subsidiary Harveys, on 27 August 2013, which offer was rejected by Arkema in favour of Ferro's offer (also see paragraph 67 below).
   10. Mr Mahomed Akhtar Moosa (“Moosa”), the Chief Executive Officer of KZN Resins (Pty) Ltd (“KZN Resins”). KZN Resins is one of four local UPR producers and is based in Jacobs in Durban. It also has its own distribution facilities in Johannesburg and Cape Town.
2. Mr James Hodge (“Hodge”) of Genesis testified as economics expert for the Commission.
3. The merging parties called the following factual witnesses:
   1. Mr Alwyn Neethling (“Neethling”), the Managing Director of Victoria & Albert (“V&A”), a bath manufacturer based in Worcester, Cape Town. V&A’s baths are manufactured from quarrycast material, which consists of finely ground volcanic limestone mixed with specialised resin.



* 1. Mr Eric Stephen (“Stephen”), the owner of Fowkes Brothers (Pty) Ltd (“Fowkes Brothers”). Fowkes Brothers supplies resin to customers who utilise the resin in a wide variety of industries and applications primarily in the Cape region. Its customers include pool builders, canopy builders, boat builders, manhole cover manufacturers and sanitary ware manufacturers.
  2. Mr Riedwaan Khan (“Khan”), one of the founder members of Elite Fibre CC (“Elite Fibre”), a manufacturer of refrigerated truck bodies with its headquarters in Denver, Johannesburg. These insulated truck bodies, used for transporting frozen and chilled goods, consist of fibreglass skins, which consist of resin gel coat, mat, catalyst, polyurethane, foam, plywood, meranti beams, steel and aluminium.[[11]](#footnote-11) Elite Fibre utilises a general purpose resin and has a resin-intensive production process.[[12]](#footnote-12)
  3. Mr Mark Perrow (“Perrow”), the Sales Director of NCS.
  4. Mr Daniel Souchon (“Souchon”), the Managing Director of both Arkema SA and Harveys.
  5. Mr Jean-Christophe Leveugle (“Leveugle”), the Global Strategy, Marketing and Development Director of the Arkema Coating Resins Business Unit embedded in various legal entities of Arkema, the parent company of Arkema Afrique SAS.

1. Mr Patrick Smith (“Smith”) of RBB Economics testified as economics expert for the merging parties.

***Resins, UPR applications and UPR producers in South Africa***

1. A resin is a solid or liquid synthetic organic polymer used as a basis for the manufacture of plastics, adhesives, varnishes and other products. There are essentially two broad types of resin: thermoset and thermoplastic. Thermoset resin can in turn be subdivided into two categories: (i) composite resin, also known as UPR; and (ii) coating resin[[13]](#footnote-13). As stated above, the product overlap associated with this proposed transaction concerns thermoset composite resin or UPR. Thermoset composite resins are supplied as liquids that when catalysed, cure to a solid and form the matrix that holds together and reinforces composite parts.
2. UPR is used in a wide variety of applications including sanitary ware; industrial pipes and chemical tanks; marine; transport (refrigerator truck bodies, bakkie canopies and load bodies); swimming pools; mining (resin capsules for roof bolts); arts and crafts; buttons; sporting goods; manhole covers; electrical insulators and lamp posts; body fillers; enclosures and guard huts; and waterproofing.
3. Apart from the merging parties, NCS and Arkema SA, there are only two other producers of UPR in South Africa, namely Scott Bader and KZN Resins (see paragraphs 17.3 and 17.10 above respectively).
4. There are also certain re-sellers and/or blenders active in the sale of UPR in South Africa *inter alia* ADD Resins, Atlin,[[14]](#footnote-14) Canasia, Dura, Fowkes Brothers and Jushi. Several of the re-sellers import UPR and distribute it in South Africa. The blenders source their base resin from domestic manufacturers and/or import base resin and operate blending plants, i.e. they procure base resin which they then blend to create a range of resins which they sell to end-customers.

***Raw materials used in UPR***

1. The raw materials used to produce UPR include styrene; maleic anhydride (“MA”); phthalic anhydride (“PA”); IPA; and glycols. These raw materials account for a very significant share of the production costs of UPRs.[[15]](#footnote-15) Most of these raw materials are imported into South Africa or are sourced by the local UPR producers at import parity prices. MA and PA, which constitute approximately 30% to 40% of the UPR raw material inputs, are sourced locally from Isegen, a monopoly supplier of these two raw materials in South Africa. A number of witnesses indicated that Isegen prices at import parity and in arriving at its import parity price, allegedly also includes the 15% duty which is imposed on imports of MA and PA into South Africa.[[16]](#footnote-16) Furthermore, raw materials such as styrene and glycol are imported. Given these imports, South African UPR producers are heavily affected by exchange rate fluctuations.[[17]](#footnote-17)
2. These raw materials and their prices are therefore of relevance to the pricing of UPR in South Africa and thus are of particular relevance to the pricing remedy[[18]](#footnote-18) (relating to the UPR mining segment) that we have imposed, as explained in detail below.
3. We note that the evidence has shown that, for example, Minova’s global procurement team looks at the range of commodities that are used in Minova’s various inputs and assesses those prices and compares them to the domestic price by conducting benchmarking exercises against the prices which Minova achieves in other parts of the world.[[19]](#footnote-19) For resin, the commodities which are tracked and globally benchmarked are styrene, glycol, MA and PA.[[20]](#footnote-20) As a result of this benchmarking exercise, Minova knows what proportion these raw materials constitute of the costs of UPR production and therefore can use this information in its price negotiation with local resin suppliers.[[21]](#footnote-21)
4. Similarly, Hahn of Rocbolt’s evidence was that he analyses the effect of changes in the exchange rate and international raw material prices on local UPR prices. He stated that he compared the prices that he received from Arkema SA and NCS since late 2012 to date against an equivalent price in the United States. He did this by converting the United States price for a UPR with a 30-second set-time (supplied to the Jennmar Corporation) into a Rand-based price and removing the cost of a sensitiser additive (DMPT) which is contained in the US product but not the UPR purchased locally.[[22]](#footnote-22)

**Relevant product and geographic markets**

***Product overlap***

1. The activities of the merging parties horizontally overlap in the production and sale of UPRs, which, as stated above, are used in a variety of applications. It was common cause that no vertical concerns arise from the proposed merger and we therefore only deal with the horizontal overlap.
2. In terms of UPRs, the merging parties categorised the various UPR customer segments into three broad categories: (i) mining customers, of which there currently are only two in South Africa, Minova and Rocbolt (see paragraphs 17.1 and 17.2 above); (ii) customers with specialised resin requirements or who require resin of a specific quality or formulation, for example customers such as Elite Fibre, Profibre, Paintchem and V&A; and (iii) customers who purchase general purpose UPR in its various forms. General purpose resin is a standard resin that can be used for many different types of applications. It was common cause that the latter segment of the market accounts for a significant portion of the UPR demand in South Africa, although the witnesses before the Tribunal did not agree on the exact size of this segment.[[23]](#footnote-23)

***Product markets***

1. It was common cause that the relevant product market for the competition assessment of the proposed transaction was the production and sale of UPR, including the production and sale of gel coats.
2. The Commission however also defined a narrower product market for UPR produced and sold for use in mining applications (hereinafter “mining UPR”). We deal with this market segment immediately below.
3. The evidence indicated that a specialised UPR resin is used in the production of a rock bolt capsule which is used to anchor rock bolts in the roof of a mine tunnel or shaft. This capsule was described during our proceedings as a “sausage” and comprises a plastic skin and two component parts, a resin component and a catalyst component. These components remain separated from each other in the capsule. When the rock bolt is inserted and “spun” through the capsule, it mixes the catalyst and the resin component and causes the resin to set (there are various setting times) and anchors the rock bolt into the roof of the mine wall.
4. It was further common cause that there is no demand-side substitution between mining UPR and UPRs in general since the mining customers have unique high specifications for the UPR that they use which are not met by other UPRs in the market.[[24]](#footnote-24) Hahn confirmed that the UPR used in the manufacture of the encapsulated resin grout for mines has different specifications from the UPR used in industries such as for boats, pipes and swimming pools.[[25]](#footnote-25) He explained that the resin grout produced using the mining UPR needs to have a longer shelf life and must be in accordance with certain SABS specifications with the required strength parameters when it sets.[[26]](#footnote-26) Duma confirmed that mining UPR requires both high reactivity and high stability and that other types of general purpose, and even more specialised UPR such as that used in automotive, pools, sanitary ware, pipes and other such industries cannot be used in the rock bolting application for which mining UPR is used.[[27]](#footnote-27)
5. The Commission and the merging parties however disagreed on the issue of supply-side substitutability for mining UPR.
6. As stated above, there are currently only two customers of mining resin in South Africa, namely Minova and Rocbolt. Of the four current UPR manufacturers in South Africa, i.e. Arkema, NCS (Ferro), KZN Resins and Scott Bader, only NCS and Arkema are currently qualified to supply mining UPR. Scott Bader and KZN Resins are currently not qualified with either Rocbolt or Minova. This was confirmed by both Duma of Minova and Hahn of Rocbolt.[[28]](#footnote-28)
7. Furthermore, the evidence was that there are significant technical challenges to producing mining UPR, that it involves incurring significant additional costs for developing the formulation and providing samples to the customer and that a stringent qualification process is followed that takes a significant period of time, in any event more than one year.[[29]](#footnote-29) Souchon distinguished the mining segment as follows in his testimony: “*You know, obviously with more specialised companies like Rocbolt or Minova, it’s a different kettle of fish ....*”[[30]](#footnote-30) Duma stated that there are significant challenges for suppliers of more ordinary UPR to qualify to supply mining UPR including a stringent process of qualification as well as significant costs involved in developing the formulation and providing samples to Minova.[[31]](#footnote-31) Hahn submitted that the process of qualifying a new supplier is lengthy and can be expected to take two years.[[32]](#footnote-32) Moreover, a new entrant into the production and supply of mining UPR must further demonstrate the ability to consistently supply UPR that meets the quality specifications of the mining customers in order to be considered a reliable and credible alternative.[[33]](#footnote-33) We provide further details below under the competitive assessment with regards to the process of qualifying a mining UPR supplier, and specifically deal with Scott Bader as a potential mining UPR supplier to Minova and Rocbolt.
8. We have found no compelling evidence that Scott Bader and KZN Resins, which are not currently qualified by the mining resin customers in South Africa, are able to place a timely and effective constraint on a hypothetical monopolist over mining UPR. We therefore concur with the Commission that a separate product market exists for the production and sale of mining UPR. As already indicated above, potential entry into this market will be dealt with under the assessment of the competitive effects of the proposed merger.
9. We shall therefore assess the competitive effects of the proposed merger in two relevant product markets: (i) the production and sale of mining UPR; and (ii) the production and sale of all UPRs other than mining UPR. In the latter (broader) product market we note that the market characteristics do differ between the supply of general purpose resin (see paragraph 30 above), on the one hand, and more specialised and/or customised resin, on the other hand.

***Geographic markets***

1. The Commission and the merging parties disagreed on the scope of the geographic markets for the manufacture and supply of both mining UPR and other UPRs. The Commission contended for national geographic markets in respect of both product markets while the merging parties sought to argue that the constraint of imports is such that an international UPR market exists. The merging parties further argued that if the merged entity were to increase domestic prices by a small but significant amount of say 5% to 10% post-merger then imports would increase significantly such that the price increase would be unprofitable.[[34]](#footnote-34)

*Assessment*

1. Imports of UPR account for approximately 8% of the total UPRs sold in South Africa[[35]](#footnote-35) and approximately 10% if one excludes mining UPR from the calculation.[[36]](#footnote-36) It is however important to also consider the types of UPR that are imported into South Africa, specifically whether the imports are of general purpose UPR or specialised UPR.
2. With regard to mining UPR, we note that there have been no imports of mining UPR for some 20 years. Duma indicated that Minova last imported mining UPR about 20 years ago (in the 1990s) and stopped importing because it became unviable due to the exchange rates and also because the local market became more competitive.[[37]](#footnote-37) Hahn stated that for some years during the 1990s, the then Fosroc imported UPR from the USA. The price of imports however then became higher than local supply as local technology was developed.[[38]](#footnote-38)
3. UPRs are imported into South Africa *inter alia* by resellers or distributors such as ADD Resins, Atlin, Canasia, Dura, Fowkes Brothers and Jushi. Certain UPR customers also import UPR directly from international suppliers. V&A and Paintchem, for example, currently import UPRs from [...] in [...].[[39]](#footnote-39)
4. The majority of imports of UPR into South Africa appear to be from UPR resellers and the overwhelming majority of customers do not currently directly import (also see paragraphs 49 to 51 below). Furthermore, resin imports by the resellers are primarily focused on basic general purpose UPRs. For example, Niser’s imports were dominated by general purpose product[[40]](#footnote-40) and the vast majority of Fowkes Brothers’ imports were of general purpose UPR.[[41]](#footnote-41) The resellers who testified at the hearing also confirmed that they primarily sell to smaller UPR customers.[[42]](#footnote-42)
5. These resellers, from a pricing and competition perspective, have to add a margin onto the landed cost of imports to account for their own costs before setting their price to customers. Loukidis stated that Niser was not able to compete with the local producers for the larger customers, where the prices were too low for imports to be profitable.[[43]](#footnote-43) We note that Niser has closed down.[[44]](#footnote-44)
6. We further note that the evidence was that ADD Resins’ very low priced resin imports have been opportunistic in nature and “*on a very limited scale*” from a specific supplier of “*left over batches*”.[[45]](#footnote-45) It sources the majority of its resins from domestic suppliers.[[46]](#footnote-46)
7. It is also important to note that a substantial portion of the domestic UPR market consists of products that are customized to the needs of specific customers or customer groups. From a customer’s perspective, the witnesses expressly identified the lack of local technical support and service as a barrier to importing, as well as the risk that the quality or specification of the product may not be correct or may not be sustained over time.[[47]](#footnote-47) This is a factor in competition and having a local supplier allows for such support to be more easily accessible.[[48]](#footnote-48) NCS itself pointed to after-sales service provided by South African producers as an advantage over imports and further indicated that local producers may have a wider product range in certain cases.[[49]](#footnote-49) For example, Neethling, a NCS customer, stated that NCS provides very good after-sales customer service in respect of its resin, and has also assisted V&A in learning about the product and supplying it with advice and information.[[50]](#footnote-50)



1. Furthermore, the evidence was that there is more risk in importing specialized resins since the number of customers for these products is smaller and the reseller must therefore ensure that it has likely buyers for the resin before its shelf life expires (we explain the shelf life of resin below, see paragraph 52.3). Imports of these resin types are therefore less viable.[[51]](#footnote-51)
2. The Commission submitted that as far as direct imports by customers are concerned, two large UPR customers, V&A[[52]](#footnote-52) and Paintchem[[53]](#footnote-53) (a merging parties’ witness who was ultimately not called to testify) represent a significant proportion of the total imports of UPRs into South Africa. Since the merging parties ultimately elected not to call the witness from Paintchem we do not deal further with Paintchem. As far as V&A is concerned, it is a world-leading manufacturer of quality free standing baths which it sells in 35 countries worldwide.[[54]](#footnote-54) It purchases its resin requirements from NCS (locally) and imports from [...], a manufacturer of resin based in [...].[[55]](#footnote-55) The imported resin is of a specialised nature and very high quality. The UPR is imported in a 20 foot container, each of which contains 80 220kg drums of UPR. For V&A it is easy to import[[56]](#footnote-56) and it has been able to secure credit facilities with its global supplier.
3. The Commission however argued that the situation of both the above-mentioned customers, V&A and Paintchem, is fairly unique which has enabled them to overcome the obstacles to direct imports.[[57]](#footnote-57) Given the size of V&A it is able to import in container loads and use the product before its shelf life expires. Furthermore, it imports a base resin and has its own chemist and blending facilities.[[58]](#footnote-58) V&A also gets a rebate on the UPR import tariff due to the fact it exports the final product and, as stated above, it also receives credit terms from its supplier.
4. We concur with the Commission that V&A’s ability to directly import cannot be considered the norm that would apply to smaller users of specialised resin. We note that Perrow conceded that the question of whether or not a customer could switch to imports would be a customer-specific question, depending on the particular facts of a particular customer.[[59]](#footnote-59) This would include the size of the customer’s UPR demand and the type of UPR required.
5. Furthermore, the witnesses who testified identified a number of obstacles, practical considerations and additional costs that make UPR imports less attractive or viable, these are:
   1. Trade barriers in respect of UPR imports from non-European countries in the form of a 10% tariff.[[60]](#footnote-60) In addition, other transport and clearing costs were estimated at around 4% from Asia, which implies a total 14% additional cost added to land foreign UPRs from Asia (where the majority of imports stem from) in South Africa.
   2. The record indicated that an application to ITAC to increase the above-mentioned tariff to 15% for both EU and non-EU countries was contemplated on the basis that raw material inputs attract the 15% tariff.[[61]](#footnote-61) Although NCS/the Durban Chemicals Cluster placed this application on hold,[[62]](#footnote-62) it could be initiated at any time in the future.[[63]](#footnote-63)
   3. Various witnesses confirmed that imports negatively impact the ultimate useable shelf life of the UPR given the lead time involved in importing, as well as additional stock keeping challenges that come with bulk importing. The evidence was that UPR can take between approximately four to ten weeks to get to South Africa, depending on where the resin is sourced from, and resin, specifically specialised resin, has a limited shelf or storage life of usually approximately six months. There is thus a danger in importing large volumes since these may gel before they are sold or used. Once the UPR gels it must be disposed of.[[64]](#footnote-64)
   4. Importing is associated with exchange rate risk, particularly where margins are low.[[65]](#footnote-65) Fluctuating exchange rates may mean that a customer is burdened with stocks bought at high prices. In contrast, the domestic UPR suppliers can deliver within a short period, i.e. a period of 12 to 24 hours up to a week, even for larger customers.[[66]](#footnote-66)
   5. The importation lead times further create working capital costs or cash-flow challenges since the purchase of the UPR needs to be financed well before the imported product is actually sold. Beal indicated that the period between ordering and resultant sales of the UPR can be as much as 150 to 180 days.[[67]](#footnote-67) Given the lead times for imports, this means holding working capital in stock for three to four months. In contrast, domestic manufacturers usually provide credit to their customers, which reduces their working capital requirements. As stated above, although V&A has overcome this problem, it is a particularly large UPR user.
   6. A further barrier that was identified with imported UPR is quality-related risk and challenges in returning product if not bought from a local source. Poor quality imported product cannot necessarily be returned whereas locally sourced product generally can. NCS recognised “*the difficulties associated with returning defective product to the supplier if necessary*”[[68]](#footnote-68) which is a problem with direct importing. This was also recognised by other witnesses.[[69]](#footnote-69)

*Historic price wedge and response from imports*

1. We next consider Hodge’s evidence regarding the past responsiveness of general purpose UPR imports (i.e. landed prices in South Africa) to relative changes in local UPR prices. This evidence is of some value both to market delineation and the potential competitive effects of the proposed transaction.
2. Hodge plotted “*NCS’s pricing premium over imports*” – or put differently, the “*NCS price minus the landed price from Taiwan, for instance, that difference divided by the price from Taiwan*”[[70]](#footnote-70) (see Exhibit 27). Based on import volume data, relative pricing data and this graph, Hodge gave evidence that, notwithstanding the premium in domestic UPR prices over landed UPR imports in 2010 and 2011, there was not a significant influx of UPR imports into South Africa.[[71]](#footnote-71) Currently the landed price of UPR imports from the major sources of imports is priced relatively close to the average domestic general purpose resin price as typified by the UPR prices of NCS. This is the closest they have been and historically landed prices have been significantly lower than domestic prices.
3. According to the Commission, this provides an opportunity to understand how imports respond to a 5% to 10% greater price wedge between domestic and landed UPR import prices by looking at situations where the price wedge was higher than it is currently. We note that Hodge’s economic analysis was however criticised by the merging parties for not controlling for other factors that might have affected demand, supply and the responsiveness of imports differently in this period. The actual data used by Hodge were however not disputed.
4. Hodge explained that across 2013, on average the import UPR prices from the major supplying countries were 6% cheaper than domestic prices[[72]](#footnote-72) and imports constituted 2,492 tons.[[73]](#footnote-73) In 2012, UPR import prices were on average 12% lower than domestic prices and volumes were roughly the same at 2,434 tons. In 2011, average import UPR prices were on average 20% lower than domestic UPR prices yet imports were also similar to 2013 at 2,334 tons. Therefore, the Commission argued that in considering whether UPR imports would change in response to a hypothetical increase in domestic UPR prices of 5% to 10% post-merger, the import volumes in 2012 and 2011 in comparison to 2013, given the price wedges of 6% to 14%, gives some indication of the past responsiveness of UPR imports to higher local prices.
5. The Commission also argued that in the earlier years UPR imports were significantly cheaper than domestic UPR prices yet an insufficient change in imports occurred. Imports in 2006 and 2007 were of similar volumes to current import levels although in those years import prices were roughly 27% to 28% lower than domestic UPR prices. Import volumes were higher in 2009 and 2010 by some 740 and 1400 tons respectively (or only 3% and 5.6% of total supply by domestic producers respectively). However, in these years landed import prices were lower than domestic prices by a remarkable 33% to 36%. Even at these high relative price differences, which are equivalent to a 30% price increase on current domestic prices relative to imports, the response from UPR imports is still such a small proportion of domestic output that it would easily be profitable to increase local prices by a small but significant amount. Hodge testified that for an industry with these margin levels, critical loss analysis shows that domestic producers would need to lose more than 20% to 30% of their customers on a mere 5% to 10% price rise for it to be unprofitable, and therefore a much smaller loss on a significantly greater price rise is clear evidence that imports cannot constrain domestic price increases.
6. These historical economic data, as contained in Exhibits 26 and 27, provide a good first indication, albeit not a conclusive one, of the past response of UPR imports to changing relative UPR prices, i.e. the response from UPR imports in times when there were significant price differences between the prices of local and (landed) imported UPR product.[[74]](#footnote-74) From the above it is evident that historically UPR imports were effectively unchanged despite significant relative price differences in the mentioned years.
7. The limited response of imports discussed above is consistent with the factual evidence which indicated that providing local professional services is of value to many UPR customers, that many customers require customisation of UPRs and that importing is associated with practical and other obstacles, including certain risks related to the quality of the product and exchange rate fluctuations. Furthermore, some of these obstacles may have cost implications, for example importing may create working capital costs or cash-flow challenges.
8. Based on all of the above, we conclude that the geographic market for the production and sale of UPR is national in scope. This conclusion is the same for the narrow product market for the production and sale of mining UPR. Imports appear to be most applicable to general purpose resin and we shall deal with this in the analysis of the competition effects of the proposed merger.

**Competition assessment**

**Counterfactual absent proposed merger**

1. The true counterfactual absent the proposed merger was heavily disputed between the Commission and the merging parties and received significant attention during the merger hearing.
2. The merging parties submitted that the counterfactual absent the proposed merger for purposes of assessing the competitive effects of the merger is that the composites part of the Arkema SA business and consequently also its coatings business will be permanently closed. The Commission however argued that the merging parties had been inconsistent as to what the position would be absent the merger. The Commission argued that the merging parties at certain times indicated that only the composites part of the Arkema business in South Africa will be closed absent the merger and at other times alleged that the closing of the entire Arkema SA business (including both the composites and coatings parts) was the most likely outcome. The Commission ultimately submitted that it cannot be stated with any certainty that the entire Arkema SA business would close absent the merger.
3. There is however no need for us to discuss these disputes regarding the appropriate counterfactual in any great detail in these reasons since the set of conditions that we have imposed on the approval of the proposed transaction adequately address the competition concerns that result from the proposed merger - even if the appropriate counterfactual for the competition assessment is the *status quo ante*, as we have indeed concluded it is.
4. We note that it was common cause that Arkema SA cannot be regarded as a failing firm nor is the composites division a failing division, as confirmed by both the merging parties’ counsel[[75]](#footnote-75) and their economics expert[[76]](#footnote-76).
5. Souchon confirmed that the Arkema SA consolidated business (including both coatings and composites) is profitable[[77]](#footnote-77) and that it has improved its sales and profitability (i.e. its Earnings Before Interest, Taxes, Depreciation, and Amortization (EBITDA)) in the last few years following a number of interventions aimed at improving its performance.[[78]](#footnote-78) Whilst the composites division of Arkema SA has [...], it contributes significantly to fixed costs and has furthermore improved its performance in certain years.[[79]](#footnote-79) This improvement is significant, thus far, in 2014 compared to the 2013 results.[[80]](#footnote-80) The evidence in essence was that the coatings and UPR divisions of Arkema SA are simply [...] the Arkema Group. The consolidated South African business (including both coatings and composites) has reflected an accounting profit, [...].
6. Furthermore, Leveugle testified that (i) the decision-making body regarding Arkema SA’s future is the Executive Committee of Arkema France; (ii) he does not sit on that Committee; and (iii) the Executive Committee has taken no formal decision regarding the alleged potential [...].[[81]](#footnote-81)
7. Arkema launched its initiative to dispose of Arkema SA in July 2013.[[82]](#footnote-82) The Arkema business was however never advertised for sale. [...] indicated that [...] certainly would be [...] and would [...]. Further, he appeared to have the necessary financial backing, but due to the unfortunate fact that he was not aware of the business being for sale, he was never able to make an offer.[[83]](#footnote-83) We further note that the Commission indicated that Arkema had other options available to it absent the merger,[[84]](#footnote-84) specifically that [...] had (and still has) a real interest in acquiring the entire Arkema business[[85]](#footnote-85) (also see paragraph 17.9 above).
8. We have found no compelling evidence that the relevant counterfactual against which to assess the competitive effects of the proposed merger should not be regarded as the pre-merger situation or the *status quo ante*. As indicated in paragraph 63 above, the set of conditions that we have imposed adequately addresses the competition concerns resulting from the proposed merger based on this as the counterfactual.
9. We next deal with the assessment of the likely competitive effects of the proposed merger, starting with the market for the production and sale of mining resin.

**Production and sale of mining UPR**

1. In respect of the mining UPR market, the Commission, after investigation of the proposed merger, found that NCS and Arkema SA were the only two local UPR manufacturers currently capable of supplying UPR of the desired specification to the mining segment and that the proposed transaction therefore would give rise to a monopoly.[[86]](#footnote-86) The Commission further found that the mining segment does not import UPR and that it is solely dependent on the merging parties. The Commission also discounted the possibility of Scott Bader and/or KZN Resins being able, through supply-side substitutability, to produce mining resin.[[87]](#footnote-87) The Commission however did acknowledge that Scott Bader may be “*a potential supplier*” to this market but said that Scott Bader[[88]](#footnote-88) had not provided it with evidence of imminent entry.[[89]](#footnote-89) The Commission concluded that it was not convinced that Scott Bader’s entry would be timely.[[90]](#footnote-90)
2. As stated above, the merging parties tendered a two-year pricing remedy to address the Commission’s concerns in the mining UPR market. This tendered remedy was based on a formula negotiated by Ferro with both Hahn of Rocbolt and Duma of Minova. The Commission however raised two concerns with regards to the tendered proposal. First, that Scott Bader may not be able to enter the market during the two year period of the tendered pricing remedy. Second, that the use of the pricing formula would give rise to the risk of tacit collusion.[[91]](#footnote-91) The latter concern was however abandoned by the Commission during the further course of the matter.

*Assessment*

1. The evidence has shown that although Arkema SA at present does not supply any mining UPR, the merging parties historically have supplied the overwhelming majority of UPR in the mining UPR market.[[92]](#footnote-92) They currently are the only two UPR producers that have mining UPR products qualified.
2. As stated above, there are currently only two mining UPR customers in South Africa, namely Minova and Rocbolt. Both Minova and Rocbolt have expressed concerns over the impact of the proposed merger on their ability to negotiate terms that could ultimately lead to a reduction in UPR supply post-merger and/or increased UPR pricing.[[93]](#footnote-93)

*Minova*

1. With regards to Minova, Arkema SA was until 2004 Minova’s only mining UPR supplier. In 2004 Minova also qualified NCS. In 2010 there was however a product failure with the Arkema SA product[[94]](#footnote-94) and NCS has been Minova’s sole supplier for the past two years.[[95]](#footnote-95) However, Arkema SA has recently (in December 2013) re-qualified as a supplier. It took three years to qualify Arkema SA.[[96]](#footnote-96) We note that Minova is not currently purchasing from Arkema, due to the uncertainty created by the proposed merger.
2. We further note that Duma of Minova indicated that he considers the Arkema UPR product superior to the NCS product with the ability to reduce Minova’s production costs. Duma testified as follows: “*it’s [Arkema’s product] superior in the sense that we use less at the plant. It flows smoother on the machines and so on and so forth and our cost of producing the product is low*”. [[97]](#footnote-97)
3. More importantly however from a competition perspective is that according to Minova the threat of supply from Arkema SA has always been an important element in its ability to negotiate prices with NCS. This is because Minova was very well known in the industry and had historically been capable of consistently supplying this highly technical product. The following exchange indicates Duma’s view of Arkema SA’s role:

*“MR NORTON: ... during the last 5 to 6 years, Arkema certainly wasn’t acting as a competitive constraint against NCS, correct?*

*MR DUMA: The threat was there*”.[[98]](#footnote-98)

1. Duma further testified that “*the advantage is always there that Arkema can crack it. That’s why we’ve always allowed them [Arkema] to come in with samples, to knock at the door ..., because the history that they have is that at some point they got it right. So, the threat is there*”;[[99]](#footnote-99) and NCS “*always considered them [Arkema] a threat ... At the back of their minds they were always aware that I’m testing another supplier and I’m going to be looking into two suppliers*.”[[100]](#footnote-100)
2. Regarding Scott Bader as a potential supplier of mining UPR, we note that Scott Bader is not currently a qualified supplier to Minova. Scott Bader however supplied significant quantities of resin to Minova in 2010 and 2012 (and significantly less in 2011 and insignificant batches in 2013 and 2014 respectively). The evidence has shown that Scott Bader’s product failed within short periods of being qualified due to viscosity problems.[[101]](#footnote-101) Although Duma indicated that Minova was confident that it knows the source of the difficulties experienced by Scott Bader,[[102]](#footnote-102) it has not been re-qualified. Whilst Minova testified that it believes it can qualify Scott Bader in the future, this will not be a quick process and Scott Bader will further have to demonstrate that it is a real alternative (to the merged entity) over the longer term.[[103]](#footnote-103)
3. With regards to KZN Resins as a potential supplier, Minova indicated that it did not consider KZN Resins a possible alternative source of supply, at least over the short- to medium-term. KZN Resins has never shown any interest in supplying Minova and to date, Minova has tested no samples from KZN Resins whatsoever.[[104]](#footnote-104)

*Rocbolt*

1. Historically Arkema SA was Rocbolt’s primary supplier.[[105]](#footnote-105) Prior to 2010, Arkema SA had been a major supplier to Rocbolt and, in fact, there were periods when Arkema SA was Rocbolt’s sole supplier. Whilst not supplying Rocbolt between for 2010, 2011 and much of 2012, Arkema SA was requalified at the end of 2012. Hahn did however indicate that the requalification might have been quicker if Rocbolt had not been satisfied with the quality of the NCS product it was purchasing.[[106]](#footnote-106) Hahn emphasised that the process of qualifying a previous supplier “*shouldn’t be confused with the process that’s involved in qualifying a brand new supplier who has never supplied us before*.”[[107]](#footnote-107) Arkema supplied Rocbolt throughout much of 2013,[[108]](#footnote-108) [...] that year.[[109]](#footnote-109)
2. From a competition perspective, Hahn confirmed that Rocbolt, prior to the proposed merger, was able to play the merging parties against each other and get the best possible price; and that he was concerned that this negotiating power may be lost after the proposed merger.[[110]](#footnote-110)
3. Scott Bader is not currently qualified to supply Rocbolt. Scott Bader however in 2013 supplied Rocbolt with a small sample of UPR for preliminary testing. Thereafter, upon approval of that small sample, a drum was provided for shelf life testing and that was successfully completed. In April 2014, Rocbolt ordered a one-tonne sample for production testing.[[111]](#footnote-111) Scott Bader will next be required to provide a ten-tonne and then a twenty-tonne sample. Samples need to be left to stand for six months to determine whether they satisfy the requirements regarding shelf life. Hahn explained “*we’ve still got to make the samples and sit them for 6 months and wait to see that they make shelf life*”.[[112]](#footnote-112) Regarding the current quality of the Scott Bader product he stated “*we’re worried that its strength is only just piping the line and we’d like it to get a better margin of safety on the strength aspect, but ... it’s close*.”[[113]](#footnote-113)
4. With regards to KZN Resins as a potential supplier, Rocbolt indicated that it does not consider KZN Resins a possible alternative source of supply of mining UPR, at least over the short- to medium-term. Hahn said that Rocbolt tested one sample from KZN but found that it was not near meeting the required specifications.[[114]](#footnote-114)
5. With regards to imports of mining resin, although Minova is part of an international enterprise with a global procurement function, it is not currently importing resin. [...] Rocbolt having explored the option of imports for over 18 months, it has [...]. This is in part because it has been [...].[[115]](#footnote-115)
6. We have found no compelling evidence that imports are currently a constraint on the domestic manufacturers of mining UPRs or that they will effectively constrain the potential ability of the merged entity to raise prices by a small but significant amount after the proposed merger.
7. We conclude that the proposed merger is likely to substantially prevent or lessen competition in the mining UPR market since it will remove the ability of the mining customers to negotiate prices and other terms since Arkema was effectively used pre-merger for constraining NCS. Although Scott Bader is part of a global group which produces UPRs and is thus able to access global technology from its parent company, it has to date not qualified to supply Rocbolt or re-qualified to supply Minova. We therefore find that Scott Bader does not represent a competitive threat of the same magnitude as Arkema SA, which has historically shown the ability to supply, is currently qualified to supply the market and has been used as a threat by the mining customers in their negotiation of prices and other terms with NCS.

*Remedies*

*Pricing remedy*

1. As stated above, the merging parties offered a two-year pricing remedy to address the competition concerns raised by Minova, Rocbolt and the Commission. The remedy takes the form of a pricing formula, which caps any potential price increase and regulates pricing based on *inter alia* raw material pricing considerations (see paragraphs 25 and 26 above) and the cost of labour.
2. The essential terms of the proposed pricing remedy are the following: (i) the remedy will endure for a period of two years from the merger approval date; (ii) the pricing formula amounts to an index-based price cap (but no floor) on the prices that NCS may charge to the mining UPR customers during the two-year period; and (iii) there are no minimum purchase obligations imposed upon the mining UPR customers.
3. This pricing formula, after having made certain suggestions as to its formulation, specifically regarding the elements that should be included,[[116]](#footnote-116) was accepted by both mining customers. Although Hahn initially (and subsequently Hodge) expressed some concern that the base price in the proposed pricing formula might have already been inflated in anticipation of the merger, the underlying facts and raw materials costs were put to Hahn to explain the current price build-up and Hahn stated that he understood the explanation provided and that it was “*a reasonable position*”.[[117]](#footnote-117)
4. Duma of Minova and Hahn of Rocbolt, currently representing the entire customer market, also testified that the two-year pricing remedy addressed their initial concerns regarding the proposed transaction, given that they, at a date in the future, would likely qualify Scott Bader.[[118]](#footnote-118) Both customers were confident that Scott Bader would be qualified within the duration of the pricing remedy, i.e. within the two-year period.[[119]](#footnote-119) This was further confirmed by Yunus of Scott Bader.[[120]](#footnote-120) Hodge accepted that these customers are able to act in their own best interests.[[121]](#footnote-121)
5. With regards to pricing, Duma was confident that Scott Bader should be able to supply mining UPR at a competitive price.[[122]](#footnote-122) He indicated that the product which he had received from Scott Bader was priced “[...]” than that he had received from both Arkema and NCS.[[123]](#footnote-123) Hahn indicated that he had not yet tried to [...] price(s). He further indicated that the Scott Bader price(s) did not [...].[[124]](#footnote-124)
6. We have further considered the fact that Scott Bader’s UPR production facility in South Africa has significant surplus capacity of approximately [...]%[[125]](#footnote-125) and the evidence furthermore demonstrated that Scott Bader’s international operations, particularly its Dubai plant, also have significant excess capacity.[[126]](#footnote-126) Scott Bader also confirmed that it is able to import UPRs [...].[[127]](#footnote-127)
7. We have imposed the merging parties’ tendered pricing remedy, as accepted by Rocbolt and Minova, as a condition to the approval of the proposed transaction. The imposed pricing condition, which provides a formula for the calculation of a maximum price that may be discounted, will apply for a period of two years from the approval date of the proposed merger in respect of Rocbolt, Minova and any new mining resin customer who may enter the mine resins capsule market within the two year period. The pricing formula and its application are set out in “**Annexure C**” to our order.[[128]](#footnote-128)

*Divestiture remedy*

1. We next discuss the additional “divestiture remedy” tendered by the merging parties which we note specifically includes Arkema’s mining UPR intangible assets and all other UPR product formulations and recipes of Arkema SA. In other words, the remedy relates to both the mining and non-mining segments of Arkema SA’s UPR business. More specifically, the assets to be divested include - in respect of both Arkema SA’s mining and non-mining products:
2. all Arkema’s base resin formulations;
3. all Arkema’s blended resin formulations;
4. specifications for all intermediate base resins and finished products;
5. job cards for all formulations and products;
6. batch process records for all formulations and products;
7. test methods for all parameters measured to ensure compliance to specifications;
8. technical data sheets for all products, resale materials and raw materials used in the manufacturing process;
9. product development laboratory knowledge;
10. composites application laboratory knowledge;
11. process laboratory knowledge for the resin plant and polyester blending;
12. all customer lists (and contact information relating to specific customers) and sales histories including product codes relating to specific customers applicable to Arkema SA’s UPR products (which would allow matching products to customers);
13. all information pertaining to contact details of existing suppliers of raw materials to Arkema SA (both domestic and international), and copies of all existing supply agreements (subject to applicable contractual confidentiality provisions, if any); and
14. the specific entitlement to use the term “*UPR formerly made by Arkema Resins (Pty) Ltd*” for a certain period on all packaging labels, order confirmations and invoices.[[129]](#footnote-129)
15. The tendered remedy further makes provision for a toll manufacturing agreement on ordinary commercial terms for a certain period.
16. The proposed remedy excludes tangible assets such as industrial assets, warehouses, land, buildings, plant and equipment and other fixed assets. The tendered divestment remedy also excludes the employees which are employed in the UPRs component of Arkema SA’s operations.
17. Leveugle explained the purpose and value of the proposed divestment remedy as a package, specifically the benefit of having the tendered intangible assets available immediately, as follows: “*the principle is that we make available basically three things that are connected in a customer list; the recipe of the products that are sold, the knowledge of the application of the customers and all technical background of those applications and the channel to the customers. The channel to the customers means the history, the sales, contacts of course and everything linked to those customers. So, each individual information separately might be of little interest. However, it is the connection of all those pieces of information that are manufacturing data, marketing data, technical marketing in our business and channel to the customer. So, it is all that together, a package, that makes sense and value, because if you have only the product and no channel to the customers, you have an issue. If you have the channel but no products, it’s a pity, but if you have everything together, then you can do business and then it has a value*”;[[130]](#footnote-130) and “*what is proposed here is the connection between the manufacturing knowledge, the technical marketing knowledge around the applications, which allows the owner of that knowledge to sell immediately a product that fits and the channel. So, obviously it’s a combination of those three knowledges or set of data that makes sense and you could reverse engineer the products, but then if you don’t know the application, you would have difficulty to sell, to have the right agreement to the customer to sell it and to propose a service after the first sale. Moreover, it takes time, reverse engineering. We spoke about more than [...] recipes. So, it’s a hell of a time to do that product-by-product and then to be able to go to the customers and to sell it in the right packaging, with the right service. Yes, after three or four years’ of work, it might be possible maybe. I’m not sure, but maybe, but here the value is available immediately. So, you can make business immediately. This is totally different than working during years, because working during years, in fact, it is the equivalent of a development project*.”[[131]](#footnote-131)
18. Perrow also held the view that the tendered remedy would be of significant value to a party seeking to enter or expand within the UPR market in South Africa, specifically mentioning the benefits of having access to input supplier as well as customer details and effectively being the “*incumbent*” supplier in the market. He testified: *“the customer list for me is the cherry for myself and the sales history and the matching products. So, you’ve got you carrying the range for all of their existing products. So, the acquiring [firm], NCS would have to requalify their products, whereas the new entrant has got the product. He is the incumbent supplier rather than NCS. So, they are on the front foot ... Number two [all product formulations, specifications and knowhow] would be of significant assistance to the production and technical guy ... They would welcome that information ... and they would be able to start up immediately ... Then for the purchaser they know exactly where to purchase. Should they want to start up on their own, they’ve got the manual on how to succeed in the polyester resin industry, the A to Z, and if they can’t crack it with this information, then they shouldn’t be in the industry ....*”[[132]](#footnote-132)
19. Beal of ADD Resins also considered the offered intangible Arkema SA assets in terms of the proposed remedy to be of benefit.[[133]](#footnote-133) Yunus of Scott Bader agreed that access to Arkema SA’s recipes would provide Scott Bader with virtual immediate access to a [...] of formulations.[[134]](#footnote-134) Moosa was of the view that the offered Arkema SA recipes relating to mining UPR “*would add value*” to KZN Resins’ resin base, but would not guarantee the business of the mining sector customers.[[135]](#footnote-135) The evidence of the mining UPR customers was however that the proposed merger, if approved, would force them to look for alternative sources of supply of mining UPR.[[136]](#footnote-136)
20. With regards to the exclusive nature of the divestiture remedy, Hodge was of the view that the likelihood of new entry in the UPR markets would be enhanced by exclusive access to the Arkema SA formulations, recipes and customer details, and that capital expenditure would be less likely should the information be made available publicly in a repository.[[137]](#footnote-137) Hodge’s view was that “*the alternative with the toll manufacturing and the like may encourage someone like ADD or another reseller to up their game and become a more significant competitor in the market and that may have positive long-term outcomes*”.[[138]](#footnote-138) We concur with the view that a significant investment by the relevant acquirer of the offered intangible assets is more likely under the divestiture remedy (as compared to the public repository remedy).
21. The potential and ideal parameters of the divestiture remedy, in the context of NCS’ and Arkema SA’s UPR operations, were explored at length during the hearing. The Commission explored whether the remedy could be enhanced by, for example, including certain physical assets (i.e. plant and equipment, including a reactor and/or blending equipment) and a licensing agreement to utilise trademarks. While in theory this seemed a plausible suggestion, the question ultimately became whether doing so was practically feasible. The Commission also raised a practical concern relating to confidentiality, i.e. that the relevant acquirer of the product formulations and customer information in terms of the proposed remedy, who then concludes a toll manufacturing agreement with NCS would be at a competitive disadvantage as it would have to divulge competitively sensitive information to NCS, its competitor. Thus, the relevant acquirer’s confidential information would have to be protected from NCS.
22. With regards to the abovementioned potential transfer of physical assets, the Commission ultimately accepted that the evidence depicted that it is not practical to sever the plant and equipment utilised for the manufacture of UPR from the plant and equipment used to manufacture coatings resin at Arkema SA’s factory at Isipingo. Leveugle’s evidence was that it is structurally impossible to separate the assets of Arkema SA’s coatings and composites division and we have no evidence to the contrary.[[139]](#footnote-139)
23. With regards to a licensing agreement, the evidence indicated that Arkema SA had acquired a licence from *inter alia* [...], to utilise [...],[[140]](#footnote-140) but that these pertain only to coatings products and not to UPRs.
24. In regard to the composites products the position is different. Leveugle explained the history as to how and why the licensor of UPR products is an entity known as “CCP”, which was a Total subsidiary, and which was the result of combining the businesses of Cray Valley and Cook Composites and Polymers.[[141]](#footnote-141) The evidence was that Total has disposed of CCP and that, with effect from June 2014, it has a new owner. [...] is the licensor of the UPR products and owner of the technological know-how. The licence is therefore [...].[[142]](#footnote-142) There was no evidence to suggest that the licence is available for transfer.
25. However, as stated above, the proposed (and imposed) remedy gives the relevant acquirer thereof the ability to utilise the Arkema SA name by stating that the products were “*formerly made by Arkema Resins SA (Pty) Ltd*”. The merging parties initially offered this for a period of only one year, but after concerns were raised in this regard, they later extended it to [...] years.
26. As indicated above, the proposed (and imposed) divesture remedy also includes a toll manufacturing agreement on appropriate commercial terms. The rationale for such requirement is that it would allow the relevant acquirer time to invest in its own UPR production and/or blending capacity.
27. Given the clear evidence that NCS is currently operating at below capacity, in principle, there was no reason why Ferro could not conclude a tolling agreement with the relevant acquirer. Souchon confirmed that there would be a significant advantage to a domestic manufacturer that has excess capacity to toll-manufacture a base resin for a blender since it will “*certainly help fill the reactors and the capacity*”[[143]](#footnote-143) and confirmed that post-merger it would be logical to conclude that the merged entity would have excess capacity and that to enter into a toll manufacturing agreement could be to its benefit.[[144]](#footnote-144) Perrow also confirmed that NCS has in the past entered into toll manufacturing arrangements with entities such as FRC and Canasia in order to displace imported volumes and increase NCS’ production volumes and thus “*mop up ... excess capacity*”.[[145]](#footnote-145)
28. In terms of potential interest in the tendered divestiture remedy, [...] confirmed that [...] would be interested in such divestiture.[[146]](#footnote-146) He was of the view that an appropriate divestiture remedy package “*would make us probably pretty competitive in the market, plus there would [be] more competition ... in the market ....*”[[147]](#footnote-147)
29. The Commission held the view that ADD Resins is a credible potential entrant. Beal has a long history in the UPR market and has considerable experience in UPR manufacturing. He was the chairman of NCS in 2007. Furthermore, ADD Resins employs a team of people with experience in the UPR industry, has grown into a successful business in a short period of time and has a national footprint.[[148]](#footnote-148) Perrow referred to Beal as “*probably perceived as one of the doyen’s of the industry*”[[149]](#footnote-149) and described ADD Resins’ sales team in Johannesburg as “*potent*”.[[150]](#footnote-150) ADD Resins has since entering the market in 2010 acquired a national market share of approximately 5% to 10% (on its own version)[[151]](#footnote-151) and also has significant excess blending capacity.[[152]](#footnote-152) We further note that ADD Resins has also shown an interest in acquiring the Harveys distribution business[[153]](#footnote-153) of Arkema SA in the past.[[154]](#footnote-154)

*Imposed conditions*

1. We have imposed the tendered divestiture remedy as a condition to approving the proposed transaction. Although there were a number of disputes between the Commission and the merging parties regarding the exact formulation of the remedy, these were, to a large extent, ultimately resolved, and we therefore do not deal with that in any detail in these reasons. Our final conditions are contained in **Annexures A, B, C and D** to our order. We do however highlight certain elements of the imposed conditions below.
2. In terms of the conditions that we have imposed on the approval of the proposed merger, the toll manufacturing component of the remedy provides for a tolling or similar agreement (on ordinary and reasonable commercial terms to be mutually agreed) in order to assist the relevant purchaser, if required by that purchaser, in continuing to supply Arkema SA’s current customer base until such time as its own manufacturing operations are operational.
3. Beal indicated that if ADD Resins were the relevant acquirer, it would require a toll manufacturing agreement of [...] years[[155]](#footnote-155). This would allow ADD Resins to decide, in time, on the potential investment in [...].[[156]](#footnote-156) Beal further indicated that he had acquired his current blending equipment [...]. New UPR blending equipment would cost between R500 000 and R1million, depending on the quality of the equipment.[[157]](#footnote-157)
4. Although the merging parties initially tendered a tolling agreement to endure only for a period of one year, it was later extended to a period of up to [...] years after concerns were raised regarding its duration.
5. We have further ordered that once the terms of the toll manufacturing agreement have been agreed with the relevant purchaser, a copy of the toll manufacturing agreement must be provided to the Commission for its consideration and approval to ensure that the agreement complies with the terms and spirit of the merger approval conditions that we have imposed.
6. Furthermore, during the course of the tolling agreement, the acquirer shall be entitled to consult with any Arkema SA employee(s) by prior arrangement and for a reasonable period of time (subject to appropriate compensation as agreed or determined on a reasonable basis) in order to gain the necessary knowledge required to produce the Arkema SA UPR products which form the subject of that agreement.
7. In addition, Ferro must not, for a defined period, enforce any existing non-compete or similar restraint of trade obligation, nor will it require any existing employee(s) of Arkema SA to conclude any new restraints which would preclude them from taking up employment with the acquirer or from participating in the purchase of the divested business.
8. With regards to the protection of confidential information (see paragraph 101 above) our order requires Ferro to, within a limited time frame, ensure that (i) all Arkema employees sign a confidentiality undertaking that they will not disclose any of the information contained in the assets relating to the divestment business to any employee(s), including management, of Ferro, its shareholders and/or its subsidiaries; and (ii) any employee who is employed at the Arkema plant and who is involved in the toll manufacturing of the previous Arkema formulations on behalf of a third party, will sign a further confidentiality undertaking that they will not disclose any of the information contained in the assets relating to the divestment business to any employee(s), including management, of Ferro, its shareholders and/or its subsidiaries.
9. Regarding potential alternative tolling arrangements available to the relevant acquirer, we note that Moosa indicated that KZN Resins would be prepared to toll manufacture – “*if someone wanted to toll manufacture it and we were given a fair opportunity to toll manufacture it as well, I would be fine with that*”.[[158]](#footnote-158) In a different but analogous context, Moosa indicated that adding additional volumes to KNZ Resins’ plant would enable him to increase his efficiencies and therefore his overall profitability. He stated “*obviously if you are adding more capacity, then you are increasing your volumes, which brings down your per kg … it makes you a bit more efficient and brings down your cost per kilo as well, so economy of scale as well*.” [[159]](#footnote-159)
10. Thus, the relevant acquirer of the to be divested intangible assets would have certain options regarding immediate and future tolling arrangements. In practical terms this will permit the relevant acquirer to supply Arkema SA’s UPR customer base until such time as its own manufacturing operations are operational or it has concluded a supply agreement with another domestic or international UPR manufacturer, if it so wishes.

***Conclusion***

1. We conclude that the tendered two-year pricing remedy, after certain refinements/enhancements, together with the divestiture remedy (which specifically includes the mining UPR intangible assets of Arkema SA), again after certain comments from the Commission and further refinements/enhancements, adequately addresses the competition concerns arising from the proposed transaction in relation to the production and sale of mining UPR in South Africa.

**UPR market other than mining segment (“UPR market”)**

1. With respect to UPRs other than mining UPR, the Commission found that the proposed transaction can be classified as a so-called “four-to-three” merger. The Commission also found that imports are not an effective alternative for these UPR customers in South Africa.
2. The merging parties argued that the proposed merger will not result in a substantial prevention or lessening of competition in the UPR market, primarily because the merged entity will continue to face competitive constraints in the form of price-aggressive local producers with significant excess capacity, and imports of UPR.

*Assessment*

1. In terms of the overall supply of UPR in South Africa, NCS is the dominant supplier with a national market share of approximately 50% to 60% and Arkema SA has a national market share of approximately 10% to 20%. Scott Bader has an estimated national market share of 10% - 20% and KZN Resins an estimated share of 0% - 10%. As already indicated, imports account for approximately 8% to 10% of the market (see paragraph 41 above).[[160]](#footnote-160)
2. The merged entity will therefore have a market share of approximately 60% to 70]% in the national market for the production and sale of UPR. This represents not only a very significant market share, but also a significant increase in concentration levels as a result of the proposed transaction.
3. The evidence has shown that the market for the manufacture and supply of UPR (excluding the mining UPR segment) is constituted of thousands of customers[[161]](#footnote-161) and many different products, i.e. over one hundred products.[[162]](#footnote-162) In the case of Arkema SA, for example, each product is depicted by a unique UPE code. Souchon agreed that each code represents a different product with a different formulation.[[163]](#footnote-163) It is for this reason that there are many different individual codes for base resin and other formulations contained in “**Annexure B**” to the Tribunal’s order. Furthermore, Perrow testified that no single resin grade accounts for more than 0% to 10% of NCS’ total sales by volume.[[164]](#footnote-164)
4. The evidence has furthermore been that the UPR manufacturers produce a broad variety of products ranging from general application resin through to specialised and customised resins. These product ranges and specific specialised products target different groups.
5. The evidence was that the market participants do not have exactly the same product ranges, specifically with regards to specialist and customised resins. Where the firms do produce a UPR for the same application, it is not the case that each firm’s products are homogenous at homogenous prices at the point of supply to the customer.
6. The evidence was further that not every UPR producer is necessarily able to replicate and supply every product on a consistent basis or of the quality required by the customers. Some examples are: NCS indicated that it cannot produce a certain fire retardant resin (i.e. a speciality resin), but “*Scott Bader does have the technology and is able to produce this specialised resin*”;[[165]](#footnote-165) Perrow identified a particular Arkema SA product that NCS has, notwithstanding repeated attempts, been unable to replicate;[[166]](#footnote-166) and identified a certain application where Arkema has the best resin for that application. He testified “*as hard as we’ve tried we haven’t managed to match Arkema on that particular product*”;[[167]](#footnote-167) Profibre indicated that it uses different suppliers for different UPR/gel coat products as no one supplier can provide the entire range it requires;[[168]](#footnote-168) and V&A indicated that neither [...] nor [...] has been able to provide the specialist resin that it requires. Neethling indicated that these players have not been successful in “*securing the necessary consistency of finished product when it comes to the full scale quantity production of the specialised resin*”.[[169]](#footnote-169)
7. Many witnesses referred to the quality of a UPR supplier’s product relative to another supplier, quality issues with particular UPR products and/or the need for technical support from suppliers to address quality issues with the UPRs supplied or service delivery issues.[[170]](#footnote-170) Quality challenges (including maintaining consistency of quality) are a common phenomenon and each of the four local producers has suffered quality issues over the years with particular UPR products. Moreover, even if a producer is able to supply a particular product, it may not be able to do so as cost-effectively as another producer. For instance, Perrow indicated that Arkema SA is considerably cheaper than NCS for a certain resin type.[[171]](#footnote-171)
8. Thus, even where the producers have UPR products that broadly target a certain customer group, differences in quality, technical specifications and costs of production/price differ between the manufacturers and therefore the product offerings are not homogenous. Smith of RBB Economics confirmed the differences in both the costs and pricing between producers.[[172]](#footnote-172)
9. Furthermore, any attempt at replicating a competitor’s product requires time and involves incurring costs associated with research and development (“R&D”), which may be significant. Perrow explained that “*each resin has got its own little tweak. So I think the years and years of R&D that Arkema have put into the product and to put into their truck body resin or their bath or their casting resin, or all the work that’s been done on a customer like Betcrete who makes window and door frames, we’ve all incurred massive costs on R&D to get their formulation righ*t.”[[173]](#footnote-173)
10. Perrow also explained the changes that can be made to general purpose resin to meet particular customer needs: “*Certainly customers will require slight changes, which we can make by either adjusting the percentages of the acids or the glycols or whether we single cook or double cook the products or whether we use terephthalic, isophthalic, orthophthalic. There is a number of changes we can make. Then if we change the addition of styrene, it affects the shrinkage of the product and how well the product flows and how it wets out the fibreglass. Then we also change by adding accelerators and retarders, how fast we want the resin to go hard or by retarding it, we can push out the gel time. We can push it out .... if we want to extend that to half an hour, [we] would add a retarder. If we wanted to bring it forward to cure within 5 minutes, we would add an accelerator. With each change there is a positive and a negative. So, if you add too much accelerator, it will be brittle and it will cure very quickly. We might add a plasticiser, because we want the product to be a little bit more rubbery. I can go on and on*”.[[174]](#footnote-174) He also agreed that R&D is “*absolutely*” important in UPR manufacturing.[[175]](#footnote-175)
11. If each competitor had a precise homogenous replica product for each customer (at the point of supply), or could easily and quickly replicate it then there would be no value to the merging parties’ proposed public repository/divestiture remedy. However, as already indicated above, the merging parties’ own witnesses saw significant value in the remedy. Perrow stated that the product formulations and recipes that form part of the tendered remedy are “*of huge value and again I realise we’ve had to offer it, we’ve had to offer this and I personally think we’ve given away too much. It’s a lot that we’ve given away*”[[176]](#footnote-176) and “*So for someone coming into that market with the recipe for [...], that’s worth a significant amount of money, but for each different customer, there will be a different value as to what the recipe is worth. But for that particular customer like [...], and another one is [...], where they make [...], Arkema’s got the best resin for that application*”.[[177]](#footnote-177)
12. Furthermore, from a customer’s perspective, switching is not costless, nor necessarily timely nor without risk. The witnesses confirmed the need for testing a product sample and performing production trials to determine how it performs on their production lines prior to adopting any new product. Moreover, consistent supply of the correct quality, without variation, is important. Switching between suppliers implies additional costs for the customer (both purchasing samples but also the cost of cleaning out and doing production runs with a new product to ensure the suitability and quality of the UPR product) and also takes considerable (management) time and effort. This indicates that switching is both costly and time consuming.[[178]](#footnote-178)
13. In conclusion, each producer is not equally able to offer homogenous products at homogenous prices, as argued by the merging parties. Rather the market is far more complex with a range of general application, specialist and customised resins sold to thousands of customers. The product ranges, qualities, capabilities and pricing differ between the various producers and each producer’s share of the UPR market therefore provides a good first indication of its overall capabilities.
14. However, given the divestiture remedy tendered by the merging parties, there is no need for us to deal extensively with all of the disputes between the Commission and the merging parties regarding the likely competition effects in the UPR market. We shall however deal briefly with two specific issues raised by the Commission. The first is that the Commission sought to characterise KZN Resins as a “low quality” producer and Scott Bader as a “high-priced” competitor.
15. With regards to KZN Resins the Commission asserted that KZN is perceived as a “*low quality*” producer with limited technological capacity. It is true that KZN Resins is a family-run business with no international technological links.[[179]](#footnote-179) It focuses on supplying resellers who buy general purpose resins[[180]](#footnote-180) and further services smaller customers.
16. Although the balance of views was that KZN Resins is competitive on price, some reservations were expressed regarding the quality of its UPR products. Despite a seemingly general perception of KZN Resins possibly being a lower quality producer lacking the same capabilities as the other market participants,[[181]](#footnote-181) we have found no actual substantive evidence to support this.[[182]](#footnote-182) Beal’s testimony, for example, was that “*Arkema is more consistent in quality, high quality*” and said that “*the main thing is the market perception, the market perceives KZN as inferior quality. If it’s in other packaging, they see it’s okay*”.[[183]](#footnote-183) Beal stated “*There are some that would not buy KZN Resins, which they see as inferior and they …* [...].”[[184]](#footnote-184) With regards to repackaged resin, Du Plessis could not dispute that he might be receiving KZN Resins’ product (Autho GP Resin) [...] and indicated that he was satisfied with the tests of that product.[[185]](#footnote-185) Coady testified that he “*perceived”*” KZN Resins as being of low quality, but also indicated that there is at least one specification in respect of which KZN Resins was the first (and so far the only) resin supplier to successfully develop the required specification. In that instance KZN Resins was able to come up with a solution to a problem experienced with the Arkema SA product and to date, neither NCS nor Arkema SA have been able to match this.[[186]](#footnote-186) We further note that Moosa disputed any allegation that KZN Resins produces poor quality products.
17. With regards to its current capacity utilisation, KZN Resins indicated that it currently has limited excess capacity in the order of approximately [...]%.[[187]](#footnote-187) Moosa however also indicated that current production could be expanded by [...].[[188]](#footnote-188)
18. The Commission further argued that Scott Bader is a “high-priced” competitor and therefore not an effective competitor. Although Beal suggested that Scott Bader “*have* *tended*” in his experience to be more expensive than the other producers,[[189]](#footnote-189) this view was not shared by other witnesses. Du Plessis, for example, conceded that, certainly in respect of certain product applications, Scott Bader provided a better price than NCS.[[190]](#footnote-190) We shall not deal with all of this evidence in these reasons. Ultimately we have found no empirical data or cogent factual evidence to support a conclusion that Scott Bader is a higher-priced UPR producer. We specifically have no evidence relating to analytical analyses of the relative costs of production of the four UPR producers in South Africa.

***Conclusion***

1. In conclusion, it is not the case that every current market participant is equally capable to provide every customer with a homogenous product at an equally competitive price. The evidence has shown Arkema SA to be an effective competitor in the national UPR market. In the words of Souchon: “*We’ve been fierce competitors ....*”[[191]](#footnote-191)
2. Furthermore, Arkema SA has the largest range of UPR products[[192]](#footnote-192) relative to its competitors, which reflects its range of technical capabilities and witnesses considered Arkema SA to have very high quality products. Leveugle candidly stated that Scott Bader cannot manufacture half the UPR resin products that Arkema SA is able to (without actually acquiring Arkema SA) and that KZN Resins cannot produce Arkema SA’s UPR grades.[[193]](#footnote-193) Furthermore, as indicated above, Perrow identified Arkema products that NCS has either been unable to replicate technically or replicate at the price points that Arkema is able to produce them at, including [...] products.[[194]](#footnote-194)
3. We conclude that the proposed merger removes Arkema SA as an effective competitor from the market for the production and sale of UPR, specifically with regards to specialised and customised UPR. Furthermore, for the market segments other than general purpose resin, we have found no credible evidence that the resellers and blenders that are active in the market impose a competitive threat to the UPR producers, nor that imports would place a significant constraint on a hypothetical small but significant post-merger price increase or service deterioration. We therefore find that the proposed merger substantially prevents or lessens competition in the market for the production and sale of UPR, specifically with reference to specialised and customised UPR.
4. With regards to general purpose UPR (as opposed to specialised or customised resins), however, any significant competition concerns resulting from the proposed merger appear less compelling since general purpose resin can be sourced from a broader range of suppliers, including the UPR producers and a range of resellers/blenders. The evidence has been that the pricing of general purpose resins is competitive and customers will switch suppliers based on price considerations rather than on quality considerations.[[195]](#footnote-195) Loukidis referred to general purpose resin as “*baked beans in tomato sauce*”[[196]](#footnote-196) and explained why he could not charge more for general purpose resins than he did: “*unless I’ve got some wonderful benefit on a general purpose resin, I cannot expect a customer to pay more*”;[[197]](#footnote-197) and “*price sensitivity is the name of the game. No matter how much better a product is, these guys change for 5c a kilo, 10c a kilo*.”[[198]](#footnote-198) Furthermore, current UPR imports appear to be predominantly general purpose resins and, based on the available evidence, potential further imports of general purpose UPRs may be possible.[[199]](#footnote-199)
5. We have already discussed the divestiture remedy as ultimately tendered by the merging parties and imposed by us as a condition. We conclude that this divestiture condition adequately addresses the competition lost due to the merger since it enables a third party (either an existing player or a new entrant) to utilise the Arkema SA formulations, alongside a toll manufacturing arrangement if necessary, to compete with the merged entity post-merger. Although the remedy is not ideal, since it excludes both tangible assets and employees, we find that it is proportional to the competition concerns resulting from the proposed merger since two other competitors, i.e. KZN Resins and Scott Bader, remain active in the specialised and customised market segments, albeit that they do not have the extensive product range of Arkema SA (see paragraph 142 above).

**Public interest**

1. The proposed transaction raises no other public interest concerns other than in relation to employment. We discuss the effect of the proposed merger on employment below.

***Employment***

1. The merging parties indicated to the Commission that there would be a “*rationalization of functions*” as a result of the proposed merger, but gave no specific evidence of job duplication caused by the merger. The merging parties did however offer a two-year moratorium on job losses resulting from the proposed merger. As explained below, this period was later extended to three years for all employees other than management.
2. The Tribunal received a written submission from CEPPWAWU[[200]](#footnote-200) and also allowed it to make an oral submission at the hearing. CEPPWAWU indicated *inter alia*, with reference to the percentage unemployment rates/absorption rates per region, race, age and gender for January to March 2014, that its members employed by the merging parties in KwaZulu-Natal are highly vulnerable in the labour market should they be retrenched and are likely to have significant difficulty in finding alternative employment.
3. We heard Ms Van Meelis who indicated that CEPPWAWU was supportive of the proposed merger in the interests of preserving jobs at the Arkema plant in South Africa. She said that the union was given the assurance of the above-mentioned employment-related undertaking of the merging parties.[[201]](#footnote-201)
4. Perrow[[202]](#footnote-202) testified that the proposed merger would have no negative effect on employment as provision would be made within NCS for all Arkema employees post-transaction and that the amount of job duplication would be minimal. Perrow stated “*the area of the overlap between NCS and Arkema/Harveys comes on my side of the business. It’s on the polyester resin supply, that’s where the overlap is, the coatings is completely separate and I can’t imagine that would be affected much at all.*”[[203]](#footnote-203) Furthermore, Perrow’s evidence was that they have not hired any new staff since the proposed merger was announced.[[204]](#footnote-204)
5. We have imposed the following employment-related condition:
   1. Ferro shall not effect any retrenchments of any non-management employee(s) as a consequence of the implementation of the proposed merger for a period of three years from the approval date of the merger.
   2. Insofar as management employees are concerned, no retrenchments will be effected as a consequence of the implementation of the proposed merger for a period of two years from the approval date of the merger.[[205]](#footnote-205)

**CONCLUSION**

1. We approve the proposed merger subject to the above-mentioned pricing remedy with regards to mining UPR, the divestiture remedy (that relates to both mining UPR and UPRs in general) and the employment remedy. “**Annexure A**” to our order of 04 August 2014 contains the merger conditions that we have imposed; “**Annexure B**” the Arkema SA intangible assets to be divested to an independent third party; “**Annexure C**” the two-year pricing formula for mining UPR and its application; and “**Annexure D**” the trustee’s mandate relating to the divestiture of the Arkema SA intangible assets.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ 25 September 2014

**ANDREAS WESSELS**  **DATE**

**MONDO MAZWAI and MEDI MOKUENA concurring**

#### Tribunal researcher(s): Shannon Quinn and Ipeleng Selaledi

#### For the Commission: M Du P Van Der Nest SC

#### For the merging parties: A Gotz, J Wilson and S Pudifin-Jones instructed by Nortons Incorporated

1. Act No. 89 of 1998, as amended. [↑](#footnote-ref-1)
2. Arkema Afrique SAS is a global manufacturer of chemicals and chemical products which operates under three business segments, namely: industrial chemicals; performance products; and coating solutions. [↑](#footnote-ref-2)
3. Leveugle’s witness statement, paragraphs 5.9, 5.10 and 6.2, record pages 2508 and 2509; see also transcript pages 1289 to 1291. [↑](#footnote-ref-3)
4. Leveugle’s witness statement, paragraph 5.2, record page 2505; transcript pages 1290, 1332 and 1333. [↑](#footnote-ref-4)
5. See “**Annexure B**” to the Tribunal’s order. [↑](#footnote-ref-5)
6. See letters received from Nortons Inc dated 03 July 2014 (without prejudice) and 11 July 2014 (with prejudice). [↑](#footnote-ref-6)
7. See letter received from Nortons Inc dated 15 July 2014. [↑](#footnote-ref-7)
8. Loukidis’ witness statement, paragraph 4, record page 2339. [↑](#footnote-ref-8)
9. Coady’s witness statement, paragraph 6, record page 2346. [↑](#footnote-ref-9)
10. Coady’s witness statement, paragraph 4, record page 2346. [↑](#footnote-ref-10)
11. Transcript, page 1017. [↑](#footnote-ref-11)
12. Transcript, page 1019. [↑](#footnote-ref-12)
13. Thermoset resins for coatings are used to manufacture paint. [↑](#footnote-ref-13)
14. Atlin (also referred to as FRC) was established by a former NCS employee, Mr Naas Ferreira. [↑](#footnote-ref-14)
15. See *inter alia* Moosa’s testimony at transcript page 326. [↑](#footnote-ref-15)
16. Moosa, transcript pages 367 to 370; Duma, transcript pages 100 to 102; Perrow’s witness statement, paragraph 47, record page 2484. [↑](#footnote-ref-16)
17. Moosa, transcript pages 326 and 366 to 368; Duma, transcript pages 100 to 102; Loukidis, transcript page 454; Perrow’s witness statement, paragraph 47, record pages 2483 and 2484. [↑](#footnote-ref-17)
18. See “**Annexure C**” to the Tribunal’s order. [↑](#footnote-ref-18)
19. Duma, transcript page 97. [↑](#footnote-ref-19)
20. Duma, transcript pages 97 and 98. [↑](#footnote-ref-20)
21. Duma, transcript pages 98 and 99. [↑](#footnote-ref-21)
22. Hahn’s witness statement, paragraphs 25 and 26. [↑](#footnote-ref-22)
23. See *inter alia* Stephen, transcript page 1035; Hodge, transcript page 1430; Du Plessis, transcript page 750; witness statement of Perrow, paragraph 33, record pages 2478 and 2479; witness statement of Beal, paragraph 25, record page 2379. [↑](#footnote-ref-23)
24. Genesis Report, paragraphs 43 to 45, record pages 2688 and 2689; RBB Report, paragraph 86, record page 2769. [↑](#footnote-ref-24)
25. Hahn’s witness statement, paragraph 10, record page 2304. [↑](#footnote-ref-25)
26. Hahn’s witness statement, paragraph 11, record page 2305. [↑](#footnote-ref-26)
27. Duma’s witness statement, paragraphs 8 and 9, record page 2314. [↑](#footnote-ref-27)
28. Hahn’s witness statement, paragraphs 18 and 19, record page 2306; Duma’s witness statement, paragraphs 18 to 20, record page 2316. [↑](#footnote-ref-28)
29. Duma’s witness statement, paragraphs 9 and 14, record pages 2314 and 2315; Hahn’s witness statement, paragraphs 11 and 17, record pages 2305 and 2306. [↑](#footnote-ref-29)
30. Transcript, page 1099. [↑](#footnote-ref-30)
31. Duma’s witness statement, paragraph 9, record page 2314. [↑](#footnote-ref-31)
32. Hahn’s witness statement, paragraph 17, record page 2306. [↑](#footnote-ref-32)
33. Duma’s witness statement, paragraph 25, record page 2317. [↑](#footnote-ref-33)
34. RBB Report, *inter alia* paragraph 130, record page 2789. [↑](#footnote-ref-34)
35. Including mining UPRs in the calculation of the total UPRs sold in South Africa. [↑](#footnote-ref-35)
36. Genesis Report, Table 2, record page 2694. [↑](#footnote-ref-36)
37. Duma’s witness statement, paragraph 28, record page 2318. [↑](#footnote-ref-37)
38. Hahn’s witness statement, paragraph 29, record page 2308. [↑](#footnote-ref-38)
39. Neethling’s witness statement, paragraph 21; Perrow, transcript, pages 826 and 977. [↑](#footnote-ref-39)
40. Loukidis’ witness statement, paragraph 9, record page 2340. [↑](#footnote-ref-40)
41. Transcript, page 1069. [↑](#footnote-ref-41)
42. Beal’s witness statement, paragraph 11, record page 2376; Stephen, transcript, page 1053. [↑](#footnote-ref-42)
43. Loukidis’ witness statement, paragraph 23, record page 2342. [↑](#footnote-ref-43)
44. Loukidis’ witness statement, paragraph 29, record page 2343. [↑](#footnote-ref-44)
45. Transcript, page 1211. [↑](#footnote-ref-45)
46. Beal’s witness statement, paragraph 6, record page 2375. [↑](#footnote-ref-46)
47. Moosa’s witness statement, paragraphs 36 and 37, record page 2394; Yunus’ witness statement, paragraph 16, record page 2370. [↑](#footnote-ref-47)
48. *Inter alia* Neethling, transcript pages 588 and 589. [↑](#footnote-ref-48)
49. Perrow’s witness statement, paragraph 68, record pages 2489 and 2490. [↑](#footnote-ref-49)
50. Neethling’s witness statement, paragraph 35, record page 2413. [↑](#footnote-ref-50)
51. Yunus’ witness statement, paragraph 16, record page 2370; Du Plessis’ witness statement, paragraph 25, record page 2356. [↑](#footnote-ref-51)
52. Transcript, pages 598 and 599. [↑](#footnote-ref-52)
53. Pravesh Singh’s witness statement*, inter alia* paragraphs 3, 14 and 15. Also see questions put to Moosa at transcript, pages 384 and 385. [↑](#footnote-ref-53)
54. Neethling, transcript page 541. [↑](#footnote-ref-54)
55. Neethling’s witness statement, paragraph 11. [↑](#footnote-ref-55)
56. Neethling, transcript, pages 545 to 549. [↑](#footnote-ref-56)
57. Hodge, transcript pages 1412 and 1518. [↑](#footnote-ref-57)
58. Transcript, page 589. [↑](#footnote-ref-58)
59. Transcript, Perrow, pages 966 and 967. [↑](#footnote-ref-59)
60. South Africa has a free trade agreement with the European Union under which UPRs are zero-rated from a tariff perspective. [↑](#footnote-ref-60)
61. *Project Duty*, see merger record page 1640. For the rationale see record pages 1656 and 1657. [↑](#footnote-ref-61)
62. Exhibit 22; Minutes of the Durban Chemicals Cluster’s Executive Committee meeting of 22 January 2014. [↑](#footnote-ref-62)
63. Transcript, page 965. [↑](#footnote-ref-63)
64. Loukidis’ witness statement, paragraphs 24 and 25, record page 2342; Coady’s witness statement, paragraph 23, record page 2349; Moosa’s witness statement, paragraph 35, record page 2394; Beal’s witness statement, paragraphs 15 and 39, record pages 2377 and 2381; Neethling’s witness statement, paragraph 15, record page 2408; Khan’s witness statement, paragraph 23, record page 2465; and Stephen’s witness statement, paragraphs 35 to 37, record page 2426. [↑](#footnote-ref-64)
65. Coady’s witness statement, paragraph 23, record page 2349; Beal’s witness statement, paragraph 41, record page 2382; Loukidis’ witness statement, paragraphs 28 and 29, record page 2343; Duma’s witness statement, paragraph 28, record page 2318; Hahn’s witness statement, paragraph 31, record page 2308; Loukidis, transcript, page 549. [↑](#footnote-ref-65)
66. Perrow, transcript page 1002; Neethling’s witness statement, paragraph 24, record page 2410. [↑](#footnote-ref-66)
67. Loukidis’ witness statement, paragraph 24, record page 2342; Beal’s witness statement, paragraph 40, record page 2382. [↑](#footnote-ref-67)
68. Perrow’s witness statement, paragraph 63, record page 2488. [↑](#footnote-ref-68)
69. Coady’s witness statement, paragraph 23, record page 2349; Yunus’ witness statement, paragraph 16, record page 2370; Neethling’s witness statement, paragraph 23, record page 2410; Du Plessis’ witness statement, paragraph 23, record page 2356. [↑](#footnote-ref-69)
70. Hodge, transcript pages 1418 and 1419. [↑](#footnote-ref-70)
71. Hodge, transcript pages 1420 and 1421. [↑](#footnote-ref-71)
72. Average mark-up over a combination of imports from Singapore and Taiwan. [↑](#footnote-ref-72)
73. Genesis Report, Table 2, record page 2694. [↑](#footnote-ref-73)
74. For Hodge’s explanation of these data and his interpretation, see transcript pages 1418 to 1423. [↑](#footnote-ref-74)
75. Transcript, page 22. [↑](#footnote-ref-75)
76. Transcript, page 1634. [↑](#footnote-ref-76)
77. Souchon’s witness statement, paragraph 11.2, record page 2667. [↑](#footnote-ref-77)
78. Transcript, page 1140. [↑](#footnote-ref-78)
79. Exhibit 28: Arkema’s UPR and gel coat sales volumes for 2011, 2012 and 2013; transcript, page 1143. [↑](#footnote-ref-79)
80. Souchon’s witness statement, paragraph 11.3, record page 2667. Transcript, page 1143. [↑](#footnote-ref-80)
81. Leveugle, transcript, page 1355. [↑](#footnote-ref-81)
82. Leveugle’s witness statement, paragraph 12.1, record page 2524. [↑](#footnote-ref-82)
83. Counsel for the merging parties raised the spectre of competition problems relating to a possible purchase by this party. However, it seems likely, on the evidence before us, that the potential purchase by this third party would be a less anti-competitive alternative. However, nothing regarding our final decision to conditionally approve the proposed transaction turns on this. [↑](#footnote-ref-83)
84. Commission’s Report, page 11. [↑](#footnote-ref-84)
85. Beemiah, transcript page 678. [↑](#footnote-ref-85)
86. Page 8 of the Commission’s Recommendation. [↑](#footnote-ref-86)
87. Pages 38 and 39 of the Commission’s Recommendation. [↑](#footnote-ref-87)
88. At page 56, the Commission states “*Scott Bader is, if at all, a weak competitive constraint to the merging parties*”. [↑](#footnote-ref-88)
89. Page 9 of the Commission’s Recommendation. [↑](#footnote-ref-89)
90. Page 52 of the Commission’s Recommendation. [↑](#footnote-ref-90)
91. Page 12 of the Commission’s Recommendation. [↑](#footnote-ref-91)
92. Exhibit 31, Slide 23. [↑](#footnote-ref-92)
93. Duma’s witness statement, paragraph 33, record page 2319; Hahn’s witness statement, paragraphs 32 and 33, record page 2309. [↑](#footnote-ref-93)
94. Duma, transcript page 83. [↑](#footnote-ref-94)
95. Duma, transcript *inter alia* pages 52 and 83. [↑](#footnote-ref-95)
96. Duma’s witness statement, paragraphs 14 and 15, record page 2315. [↑](#footnote-ref-96)
97. Transcript, pages 138 to 140; also see Duma’s witness statement, paragraph 38, record page 2320. [↑](#footnote-ref-97)
98. Transcript page 82. [↑](#footnote-ref-98)
99. Transcript, pages 129 and 130. [↑](#footnote-ref-99)
100. Transcript, page 130. [↑](#footnote-ref-100)
101. Duma’s witness statement, paragraphs 16 and 17, record pages 2315 and 2316. [↑](#footnote-ref-101)
102. Duma, transcript page 61. [↑](#footnote-ref-102)
103. Duma’s witness statement, paragraph 35, record page 2319. [↑](#footnote-ref-103)
104. Duma’s witness statement, paragraph 20, record page 2316. [↑](#footnote-ref-104)
105. Hahn, transcript, page 153: “*So prior to 2010, I believe Arkema was our major or only supplier.”* [↑](#footnote-ref-105)
106. Hahn, transcript page 154. [↑](#footnote-ref-106)
107. Transcript, page 154. [↑](#footnote-ref-107)
108. Transcript, page 159; Exhibit 31, Slide 23. [↑](#footnote-ref-108)
109. At the end of 2013, Rocbolt [...]. [↑](#footnote-ref-109)
110. Hahn’s witness statement, paragraph 33, record page 2309. [↑](#footnote-ref-110)
111. Hahn, transcript page 218. [↑](#footnote-ref-111)
112. Hahn, transcript page 219. [↑](#footnote-ref-112)
113. Hahn, transcript page 220. [↑](#footnote-ref-113)
114. Hahn’s witness statement, paragraph 19, record page 2306. [↑](#footnote-ref-114)
115. Transcript, pages 185 to 190. [↑](#footnote-ref-115)
116. *Inter alia* Hahn, transcript pages 270, 288 and 289. Duma, transcript page 114. [↑](#footnote-ref-116)
117. Hahn, transcript pages 252 and 289. [↑](#footnote-ref-117)
118. Duma, transcript page 93; Hahn, transcript page 289. [↑](#footnote-ref-118)
119. Hahn, transcript page 288; Duma, transcript page 145. [↑](#footnote-ref-119)
120. Transcript, page 497. [↑](#footnote-ref-120)
121. Transcript, page 1474. [↑](#footnote-ref-121)
122. Duma, transcript page 78. [↑](#footnote-ref-122)
123. Duma, transcript page 78. [↑](#footnote-ref-123)
124. Hahn, transcript page 302. [↑](#footnote-ref-124)
125. Transcript, pages 473, 505, 506 and 524. [↑](#footnote-ref-125)
126. Transcript, page 503. [↑](#footnote-ref-126)
127. Yunus, transcript page 526. [↑](#footnote-ref-127)
128. The exact pricing formula is confidential, but a non-confidential version of “**Annexure C**” to our order is available. [↑](#footnote-ref-128)
129. See Exhibit 13. [↑](#footnote-ref-129)
130. Transcript, page 1352. [↑](#footnote-ref-130)
131. Transcript, pages 1353 and 1354. [↑](#footnote-ref-131)
132. Transcript, pages 1013 and 1014. [↑](#footnote-ref-132)
133. Beal at transcript pages 1215 to 1218. [↑](#footnote-ref-133)
134. Yunus at transcript pages 513 and 514. [↑](#footnote-ref-134)
135. Moosa at transcript pages 313 and 314. [↑](#footnote-ref-135)
136. Duma, transcript pages 53, 55, 76, 93 and 94; Hahn, transcript pages 150, 151, 153, 184, 187, 192, 218 and 219. [↑](#footnote-ref-136)
137. Transcript, at pages 1540 and further. [↑](#footnote-ref-137)
138. Transcript, page 1540. [↑](#footnote-ref-138)
139. *Inter alia* Leveugle’s witness statement, paragraph 5.8. [↑](#footnote-ref-139)
140. *Trademark Licence Agreement*, record pages 1439 and further. [↑](#footnote-ref-140)
141. See, for example, the Arkema Annual Report at pages 214 and 411 to 415. [↑](#footnote-ref-141)
142. Record pages 2553 to 2555. [↑](#footnote-ref-142)
143. Souchon, transcript page 1162. [↑](#footnote-ref-143)
144. Souchon, transcript page 1164. [↑](#footnote-ref-144)
145. Perrow, transcript page 937. [↑](#footnote-ref-145)
146. Transcript, pages [...] to [...]. [↑](#footnote-ref-146)
147. Transcript page [...]. See also transcript, pages [...] to [...]. [↑](#footnote-ref-147)
148. Transcript, *inter alia* page 1225. [↑](#footnote-ref-148)
149. Transcript, page 833. [↑](#footnote-ref-149)
150. Transcript, page 833. [↑](#footnote-ref-150)
151. Transcript, page 1224. [↑](#footnote-ref-151)
152. Transcript, page 1279. [↑](#footnote-ref-152)
153. Specifically the distribution business and customer base. [↑](#footnote-ref-153)
154. Transcript, pages 1212 and 1213. [↑](#footnote-ref-154)
155. Transcript, *inter alia* page 1281. [↑](#footnote-ref-155)
156. Transcript, page 1281. [↑](#footnote-ref-156)
157. Transcript, pages 1268 and 1269. [↑](#footnote-ref-157)
158. Moosa, transcript page 1312. [↑](#footnote-ref-158)
159. Moosa, transcript page 312. [↑](#footnote-ref-159)
160. See *inter alia* Genesis Report, Table 3, record page 2704 which reflects the views on market shares submitted by Ferro and RBB. [↑](#footnote-ref-160)
161. Souchon’s witness statement, paragraph 6.2, record page 2658. [↑](#footnote-ref-161)
162. Transcript, Perrow, page 858. [↑](#footnote-ref-162)
163. Transcript, Souchon, pages 1128 and 1129. [↑](#footnote-ref-163)
164. Transcript, Perrow, page 857. [↑](#footnote-ref-164)
165. Perrow’s witness statement, paragraph 23, record page 2474. [↑](#footnote-ref-165)
166. Transcript, page 867. [↑](#footnote-ref-166)
167. Transcript, page 992. [↑](#footnote-ref-167)
168. Transcript, pages 630 and 631. [↑](#footnote-ref-168)
169. Neethling’s witness statement, paragraph 25, record pages 2410 and 2411. [↑](#footnote-ref-169)
170. Loukidis’ witness statement, paragraph 10, record page 2340; Coady’s witness statement, paragraphs 9, 11, 12 and 20, record pages 2346, 2347 and 2349; Yunus’ witness statement, paragraphs 17 and 19, record page 2370; Beal’s witness statement, paragraphs 28 and 33, record pages 2379 and 2380; Neethling’s witness statement, paragraphs 8 and 22, record pages 2407, 2409 and 2410; Du Plessis’ witness statement, paragraphs 7, 10 and 11, record pages 2352 and 2353. [↑](#footnote-ref-170)
171. Perrow, transcript, pages 942 and 943. [↑](#footnote-ref-171)
172. RBB Report, *inter alia* Figures 19 and 20, record page 2825. [↑](#footnote-ref-172)
173. Transcript, page 992. [↑](#footnote-ref-173)
174. Transcript, page 791. [↑](#footnote-ref-174)
175. Transcript, page 896. [↑](#footnote-ref-175)
176. Transcript, pages 992 and 993. [↑](#footnote-ref-176)
177. Transcript, page 992. [↑](#footnote-ref-177)
178. Coady’s witness statement, paragraph 18, record page 2348; Beal’s witness statement, paragraph 28, record page 2379; Neethling’s witness statement, paragraphs 25 and 26, record pages 2410 and 2411. [↑](#footnote-ref-178)
179. Moosa’s witness statement, paragraph 4, record page 2389. [↑](#footnote-ref-179)
180. Moosa’s witness statement, paragraph 14, record page 2390. [↑](#footnote-ref-180)
181. Coady’s witness statement, paragraph 17, record page 2348; Yunus’ witness statement, paragraph 13, record page 2369, Beal’s witness statement, paragraph 29, record pages 2379 and 2380; Du Plessis’ witness statement, paragraph 20, record page 2355. [↑](#footnote-ref-181)
182. See, for example, Khan’s testimony, transcript pages 1022 and 1023; Neethling, transcript page 601; Du Plessis, transcript pages 737 to 739. [↑](#footnote-ref-182)
183. Transcript page 1204. [↑](#footnote-ref-183)
184. Transcript, page 1231. [↑](#footnote-ref-184)
185. Transcript, pages 732 to 734. [↑](#footnote-ref-185)
186. Transcript, pages 634 and 635. [↑](#footnote-ref-186)
187. Moosa’s witness statement, paragraph 27, record page 2393; transcript *inter alia* page 314. [↑](#footnote-ref-187)
188. Transcript, *inter alia* pages 315, 318 and 319. [↑](#footnote-ref-188)
189. Transcript, page 1208. [↑](#footnote-ref-189)
190. Transcript, *inter alia* page 708. [↑](#footnote-ref-190)
191. Transcript, page 809. [↑](#footnote-ref-191)
192. See *inter alia* Exhibit 14, Annexure A. [↑](#footnote-ref-192)
193. Leveugle’s witness statement, paragraph 12.9, record page 2528. [↑](#footnote-ref-193)
194. Transcript, page 871. [↑](#footnote-ref-194)
195. *Inter alia* Khan, transcript pages 1021 and 1022. Souchon, transcript, pages 1098 to 1100. [↑](#footnote-ref-195)
196. Transcript, pages 420 and 451. [↑](#footnote-ref-196)
197. Transcript, page 432. [↑](#footnote-ref-197)
198. Transcript, page 451. [↑](#footnote-ref-198)
199. *Inter alia* Du Plessis, transcript page 750; Khan, transcript page 1025; Loukidis, transcript page 412. Also see Hodge, transcript page 1410. [↑](#footnote-ref-199)
200. CEPPWAWU is affiliated to Cosatu and represents members in both Ferro and Arkema SA. [↑](#footnote-ref-200)
201. Transcript, pages 877 and 878. [↑](#footnote-ref-201)
202. Relating specifically to staff employed in distribution. [↑](#footnote-ref-202)
203. Transcript page 1000. [↑](#footnote-ref-203)
204. Transcript, pages 1000 and 1001. [↑](#footnote-ref-204)
205. This moratorium expressly excludes voluntary separation arrangements, voluntary early retirement packages, unreasonable refusal to be redeployed in accordance with the provisions of the Labour Relations Act, or dismissals of employees for disciplinary infractions. [↑](#footnote-ref-205)