

HD South Africa: The growing importance of public interest factors in merger control Foreign companies planning acquisitions in Africa need to consider the impact on the public interest

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A recent South African merger decision highlights the need for foreign companies planning to make strategic acquisitions in Africa to consider not only whether their transaction will affect competition, but also whether it will affect the public interest, for example, by leading to job losses or to a strategic African resource falling under foreign control.

An increasing number of African competition laws require competition authorities to take into account not only traditional competition effects (like whether a merger will increase concentration), but also much wider public interest factors. For example, South Africa's Competition Act requires the competition authorities to investigate whether a merger may negatively affect employment, a particular industrial sector or region; the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive; and the ability of national industries to compete in international markets. Similar provisions are contained in the competition legislation in force in Botswana, Namibia, Kenya, Malawi, Swaziland, Zambia, Tanzania and Zimbabwe, as well as the COMESA states.

The South African experience over the last three years illustrates the increasing importance of public interest factors in merger reviews. The South African competition authorities initially tended to focus on investigating job losses as a result of mergers. In the 2012 Wal-Mart decision, however, the South African Competition Appeal Court emphasised that public interest factors are just as important as the competition evaluation in our legislation. However, the Court accepted that its jurisdiction in merger control is not to make the world a better place, but to prevent it becoming worse as a result of a specific merger; not every impact on the interests of the public resulting from an **acquisition** is relevant. This has resulted in the South African competition authorities elevating the public interest analysis, and consequently adopting a more robust investigation of public interest effects.

The AgriGroupe transaction is a good example. It involved the **acquisition** of a South African listed agricultural **company** by a foreign investor, AgriGroupe. Like the Wal-Mart / Massmart merger, it raised no competition law concerns, because the acquirer was a foreign entrant into South Africa. However, in the course of the Competition Commission's investigation and the Competition Tribunal hearing, the authorities intensively investigated the impact of the transaction on employment, food security and on small agricultural businesses controlled by historically disadvantaged South Africans. The African Farmers Association of South Africa raised concerns about the future of loans made available by AFGRI to black farmers on behalf of the Land Bank. They also raised the concern that small black farmers might be denied access to essential agricultural infrastructure like grain silos. The South African Communist Party was also concerned that the consideration for the shares in AFGRI was too low, that strategic grain storage facilities would be controlled by foreign investors and that the merged **firm** might export South African grain.

During the Commission's investigation, the merging parties contended that none of these concerns were merger specific, and none fell within the scope of the issues the Commission has jurisdiction to investigate in terms of the Act. In its recommendation, the Commission concluded that the proposed transaction would be unlikely to have a negative impact on public interest under the standards required by the Competition Act. However, in order to expedite clearance, AFGRI entered into an agreement with various government ministries, led by the Economic Development Department, under which it agreed to continue to be involved in a number of pre-existing corporate social investment projects. In particular, AFGRI agreed to establish a R90 **million** fund to be used for the development of emerging subsistence and small-scale farmers; including the provision of loans, the development of training programs and assistance to poultry farmers, as well as a moratorium on any retrenchments occurring as a result of the transaction. AFGRI stressed that this agreement was not intended to address any public interest effects. At the hearing, the Competition Tribunal questioned the Commission about the impact of the merger on employment, food security and black economic empowerment, but approved the **acquisition** subject to the terms of AFGRI's agreement with the ministries.

This South African case illustrates that foreign firms making acquisitions in Africa should give proper consideration to any public interest concerns that the merger may potentially raise, particularly if their transaction may affect employees, or a sector of an African economy which the government regards as strategically important. It is essential to decide at an early stage whether to engage with the government and interested trade unions in order to avoid a protracted investigation. The alternative is to challenge whether the issues being raised fall within the scope of the public interest provisions in the relevant competition legislation and to argue that no conditions should be imposed. However, as the Wal-Mart

case in South Africa and Namibia demonstrates, choosing this path comes with the risk of protracted and costly litigation.

Adequate time for these discussions needs to be built into the transaction timetable. Parties who need a swift clearance may be forced to tender conditions which adequately address concerns raised by government or trade unions, even if these are not merger specific.

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