competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 017939

In the matter between:

AgriGroupe Holdings (Pty) Ltd Acquiring Firm

And

AFGRI Ltd Target Firm

Panel	:	Andreas Wessels (Presiding Member) Mondo Mazwai (Tribunal Member) Imraan Valodia (Tribunal Member)
Heard on	:	06 March 2014
Order issued on	:	06 March 2014
Reasons issued on	:	15 April 2014

Reasons for Decision

Conditional approval

[1]. On 06 March 2014 the Competition Tribunal ("the Tribunal") approved an acquisition by AgriGroupe Holdings (Pty) Ltd ("AgriGroupe") of AFGRI Ltd ("AFGRI") subject to conditions.

[2]. The reasons for the conditional approval of the proposed transaction follow.

Merging parties and their activities

[3]. The primary acquiring firm is AgriGroupe, a newly incorporated company. AgriGroupe will be controlled by Joseph Investment Holdings ("JIH"), a company duly incorporated in Mauritius. JIH is wholly owned by AgriGroupe Investments LP (Cayman Islands) ("AgriGroupe Investments"). AgriGroupe Investments is a limited partnership, in which Fairfax Financial Holdings Ltd ("Fairfax") will be the majority partner.[1] AgriGroupe, JIH, AgriGroupe Investments and Fairfax are hereinafter referred to as "the Acquiring Group". None of the firms from the Acquiring Group control any firm in South Africa.

[4]. AgriGroupe is a newly incorporated company and does not offer any goods or services, nor does it have any existing investment portfolios. None of the firms from the Acquiring Group have business activities in South Africa. Internationally, Fairfax is a financial services holding company that is primarily engaged in property and casualty insurance and reinsurance and investment management.[2] In relation to agricultural activities, Fairfax's subsidiary, namely Ridley Inc. ("Ridley"), is a commercial animal health nutrition business that manufactures and markets a full range of animal nutrition products. Ridley operates in North America, serving customers mainly in the United States and Canada.

[5]. The primary target firm is AFGRI, a public company listed on the Johannesburg Securities Exchange Ltd ("JSE") and not controlled by

---

[1] The merging parties have indicated that the other partners have not yet been confirmed. However, the only entity which will exercise any form of control over AgriGroupe will be JIH, which will hold approximately 65% of the shareholding in AgriGroupe. The remainder of the shares will be held by minority shareholders, who are likely to be empowerment groups and/or institutional funders.

[2] Fairfax also has interests in other firms which are involved in a variety of other activities. These include leisure and travel, computer programming, restaurant operations and agriculture, among others.

any other firm. The shareholders that hold 5% or more of AFGRI's issued share capital are: Allan Gray (12.15%), Liberty Group (8.23%), the Government Employees Pension Fund (7.29%) and Sanlam (5.30%). AFGRI directly and indirectly controls the following firms: AFGRI Operations Ltd, OTK Investment House (Pty) Ltd, AFGRI Mauritius Holdings (Pty) Ltd, Afgritech Ltd, and AFGRI Ghana Ltd.

[6]. AFGRI is a South African agricultural commodity trading company that operates through three business segments, namely: AFGRI Agri Services, AFGRI Financial Services and AFGRI Foods. The Agri Services segment comprises of two divisions, namely: the Grain Management, and Retail and Mechanisation divisions. These divisions are active mainly in the maize value chain, but also provide services to producers of wheat, soya and sunflower. This is done within AFGRI's geographical focus area, which includes the Mpumalanga, Gauteng, North West and the Free State provinces.[3]

[7]. AFGRI's Financial Services segment comprises three distinct operating units, namely: the GroCapital Financial Services unit that provides specialised finance to businesses involved in the agricultural value chain, the UNIGRO Financial Services unit that acts as an originator and administrator for the Land and Agricultural Development Bank of South Africa ("Land Bank") in the extension of agricultural credit, and Unigro Insurance Brokers, which provides risk solutions and insurance.

[8]. The AFGRI Foods segment is comprised of two divisions, namely: Animal Protein; and Oil, Milling and Protein. The Animal Protein division comprises AFGRI's integrated poultry operation and the Group's animal feed factories. The Oil, Milling and Protein division operates through AFGRI's oil extraction and protein plant situated in Mokopane (Limpopo),

[3] According to the merging parties, these provinces are South Africa's key grain growing areas, especially for maize and wheat but also include soya and sunflower.

namely Nedan. This plant, *inter alia,* processes oil and other raw materials into edible oils, fats and high-protein textured vegetable products for the food processing and animal feed industries. AFGRI Milling comprises three yellow maize mills that are used in the production of various maize based value-added products such as cereals, crisps and thickeners.

Proposed transaction and rationale

[9]. AgriGroupe intends to acquire the entire issued ordinary share capital of AFGRI. Post-merger, AgriGroupe will have sole control over AFGRI.

[10]. AgriGroupe submitted that, through this transaction, it will be able, *inter alia,* to: (i) develop and grow the presence of AFGRI's core business across the African continent, leveraging off the skills and experience of the South African operations, and (ii) increase capabilities and improve efficiencies within the AFGRI food sector operations, increasing the returns achieved on these assets but having due consideration for its impact on the environment.

[11]. AFGRI submitted that it considers the offer made by AgriGroupe to be fair and reasonable to its shareholders and that the acquisition will facilitate continued growth and enhance the competitiveness of its business.

Competition Analysis

[12]. The Competition Commission ("the Commission") found that there were no horizontal or vertical overlaps in the activities of the merging parties since AgriGroupe is not active in South Africa. The Commission therefore concluded that the proposed transaction was unlikely to result in a substantial prevention or lessening of competition in any market. We concur with this analysis and finding.

[13]. The Commission, however, received a number of submissions from third parties, which raised concerns about this transaction. These concerns are discussed below.

Third party concerns

[14]. The third parties who raised concerns regarding the proposed merger were the following: (1) Four government departments, namely: the Department of Rural Development and Land Reform ("DRDLR"), the Department of Agriculture, Forestry and Fisheries ("DAFF"), the Department of Trade and Industry ("the DTI") and the Economic Development Department ("EDD"),[4] (2) the African Farmers' Association of South Africa ("AFASA"), (3) the National African Farmers Union South Africa ("NAFU"), and (4) the South African Communist Party ("SACP") Below is a summary of these concerns, the response from the Commission as well as further submissions made to us.

The Government Departments' concerns

[15]. The EDD raised concerns on behalf of the government departments mentioned above. The departments' concerns were in relation to AFGRI's grain storage, grain trading, infrastructure, AFGRI's tax-related benefits, and the value of AFGRI.

[16]. According to the departments, silos are strategic and essential facilities for food security in South Africa and since AFGRI operates in the major grain producing regions in the country, it plays a vital role in the food value chain. The departments further submitted that AgriGroupe will have approximate 25% market share in the silo market in South Africa and was likely, post-merger, to increase grain storage costs in the

[4] The Land Bank also made submissions. However, the bank did not have any concerns and it further indicated that it supports the proposed transaction.

KwaZulu-Natal, Mpumalanga and Gauteng regions as it will own the majority of silos in these provinces.

[17]. In relation to grain trading, the departments' concern was that AFGRI, under new foreign ownership, was likely, post merger, to export grain to the United States of America, Canada and other countries and increase the price of grain and maize in South Africa. Furthermore, the departments argued that AgriGroupe would adopt a strategy of selling its grain to the market when the price is most favourable to it, thereby increasing food prices. The departments also raised concerns that AgriGroupe may, post-merger, exclude other market participants from access to vital infrastructure such as the railway line that is used to transport of grain to AFGRI silos.

[18]. With regard to tax-related benefits, the departments submitted that AFGRI's establishment and growth has been funded by government using public resources. The EDD therefore suggested that the Commission needed to investigate this and recover these public resources. The departments' other concern was that AgriGroupe was likely to move AFGRI's business to Mauritius because of possible tax benefits in Mauritius. In addition, the departments submitted, in respect of the value of AFGRI, that the company was under-valued and that the Commission needed to investigate the company's fair market value.

[19]. Although the EDD raised these concerns, it indicated that it was not opposed to the proposed transaction but that the transaction should be approved subject to conditions which would address its concerns.

AFASA's concerns

[20]. AFASA made submissions in relation to the post-merger control of AFGRI by a foreign entity, AFGRI's position in respect of agri-logistics infrastructure, and the impact of the proposed merger on support in the future by AFGRI to black farmers. In relation to support to black farmers

AFASA submitted that, post-merger, black farmers were likely not to receive benefits from AgriGroupe, which they were receiving pre-merger from AFGRI.

[21]. In respect of agri-logistics infrastructure, AFASA submitted that AFGRI holds a dominant position in relation to grain silo storage in South Africa. AFASA further submitted that since the current replacement costs of silo infrastructure were high and AFGRI's facilities fully depreciated (and competitors are not able to match its current market position and facilities), AFGRI could have an undue influence over the market in the areas in which it operates (Mpumalanga, Gauteng, KwaZulu-Natal and some areas of the Free State) as there was no realistic alternative storage solutions.

[22]. AFASA also submitted that the assets of AFGRI had historically been funded from public resources in South Africa and consequently, they argued, these assets needed to remain under South African ownership. Based on these concerns, AFASA initially submitted that this merger should be prohibited.

NAFU's concerns

[23]. NAFU submitted that it understood that black farmers would benefit from the transaction directly by way of shareholding to be made available to them. However, NAFU indicated that it was concerned that these benefits may not be realised as it was not given specific information as to how this would be implemented. NAFU therefore requested the Commission to get a firm commitment from the merging parties regarding the empowerment dimensions of the transaction. NAFU indicated that it would support this transaction on condition that the Commission received commitments from the merging parties regarding the benefits to black farmers, and that this be made a condition of the merger.

The SACP's concerns

[24]. The SACP indicated that it supported the submissions made by AFASA.

[25]. The SACP raised further concerns about the potential for AFGRI to increase the costs of seeds and other inputs in the food value chain post- merger.

[26]. Further, the SACP submitted that the proposed transaction was likely to result in approximately 3 500 employees losing their jobs and that the transaction would lead to the loss of a unique opportunity for effective and broad based BEE in the agricultural production and marketing chain.

The Commission's response to the concerns raised

[27]. In terms of section 12A(3) of the Competition Act, 89 of 1998 (the "Act"), the Commission and Tribunal are required to ascertain whether a merger would have a substantial positive or negative impact on any of the public interest grounds as set out in section 12A(3). Section 12A(3) states that:

> *"(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –*
>
> *(a) a particular industrial sector or region;*
>
> *(b) employment;*
>
> *(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and*
>
> *(d) the ability of national industries to compete in international markets."*

[28]. We summarise the Commission's findings with regards to the effect of the proposed transaction on each of the above public interest grounds below. We begin with employment.

(a) Effect on employment

[29]. According to the Commission, it assessed whether this transaction would result in a duplication of functions and whether the resulting restructuring of the business might, post merger, lead to a negative impact on employment. The Commission, relying on the merging parties' internal strategic documents, concluded that the business operations of both AFGRI and AgriGroupe were likely to continue in their current form and that there would be no duplication of functions as the activities of the merging parties do not overlap in South Africa. The Commission further noted that the merging parties had plans to expand production which would, *inter alia,* boost GDP growth and create job and business opportunities.

[30]. The Commission therefore concluded that the proposed transaction was unlikely to have a negative effect on employment and that the transaction was likely to result in job creation, with a positive effect on employment in the long term.

(b) Effect on a particular industrial sector or region

[31]. The proposed merger takes place in the broader agricultural and agro-processing sectors in South Africa and AFGRI is one of the largest players in these sectors, servicing more than 7 000 farmers in South Africa. The Commission assessed whether the proposed merger could (i) result in the relocation of certain AFGRI operations outside South Africa, (ii) lead to AgriGroupe exporting/diverting grain to other countries (which would impact negatively on South Africa's food security), and (iii) lead to AGFRI and AgriGroupe having the ability and incentive to foreclose or deny access to key strategic resources, i.e. silos, railway infrastructure and agricultural implements and services.

a. *The possibility of relocation of plant/operations outside the country*

[32]. The Commission found that, for a number of reasons, the relocation of AFGRI's plants or facilities was unlikely. First, silos cannot physically be relocated. Second, although Fairfax holds investments in entities that produce animal feed, it might not be economically feasible for it to import animal feed. In addition, the Commission noted that AgriGroupe intends to invest in other African countries, using AFGRI's local operations as a platform.

[33]. The Commission therefore concluded that it was unlikely that any of the AFGRI operations could or would be relocated or replaced through imports.

b. Diversion of resources (grain) resulting in food security concerns

[34]. In South Africa grain is traded on the South African Futures Exchange ("SAFEX").[5] The Commission considered how the SAFEX platform for trading grain operated and how this platform could be affected by the proposed merger. The following are the Commission's findings. The price of grain is determined by the SAFEX price, which is subject to market forces. Price movements on SAFEX are driven by domestic demand and supply, regional demand and supply, international prices and exchange rates. Thus, AFGRI and AgriGroupe have no ability to influence prices.

[35]. The Commission also found that AFGRI is not currently active in trading and therefore does not export grain, nor is it able to influence whether and to which markets grain is exported. According to the Commission, even if AFGRI becomes active in the grain trading market, it is not likely to have a significant influence on SAFEX pricing.[6]

---

[5] SAFEX was bought in 2001 by the Johannesburg Securities Exchange and now forms part of its Agricultural Products division ("APD").

[6] It was revealed at the hearing that between the period April to July 2013 that it would have been profitable to export grain to the U.S. However, the Commission pointed out that the

[36]. The Commission concluded that the merged entity would not have the ability or incentive to transfer grain to other countries to the detriment of food security in South Africa.

c. *The ability and incentive to foreclose or deny access to key strategic resources (silos, railway infrastructure and agricultural implements and services)*

[37]. In relation to access to silos the Commission considered whether AFGRI would have an incentive to deny black farmers or any other farmers access to its silo infrastructure. The Commission found that AFGRI has excess storage capacity in each of the provinces considered i.e. the Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, North West and the Western Cape. The Commission further found that even during the harvest period, AFGRI's storage capacity utilisation was significantly below capacity. The Commission therefore found it unlikely that AFGRI would deny farmers access to its silos and was of the view that, in fact, AFGRI had an incentive to increase the amount of grain passing through its storage facilities due to the revenue that it can earn from the grain management operations.

[38]. In relation to rail infrastructure, the Commission was informed by farmers that they did not generally make use of the railway infrastructure for transporting grain to AFGRI's silo structures. These farmers instead make use of trucks and tractor-trailers to transport grain from their farms to the silos as it is cheaper and more efficient.

[39]. Moreover, AFGRI does not have any exclusive arrangements with Transnet, the owner of the national railway infrastructure. Thus, AFGRI cannot 'lease' control over any portion of the railway line for its own use.

---

incentive to export was not merger specific as AFGRI could have done so anyway, given the fact that market conditions were favourable at that time.

The Commission therefore concluded that the merged entity will not have the ability or the incentive to restrict access to rail infrastructure.

[40]. In relation to the retail side of the business, AFGRI has 65 retail outlets and John Deere agencies (15 stores). This business was merged with that of Senwes Ltd ("Senwes") in 2013 when the two companies formed a joint venture.[7] Farmers currently purchase a significant amount of their agricultural inputs (fertilizers, oil and diesel, and other consumables) from AFGRI's retail outlets in order to produce a crop, which they will then store at AFGRI silos.

[41]. The Commission found that AFGRI's retail business contributed significantly to the group's total revenue. Consequently, the Commission found that it was unlikely that the merged entity would have the incentive to reduce access to agricultural inputs as the retail business contributes significantly to revenue. In addition, the Commission was of the view that as AFGRI was in a joint venture with Senwes (on the retail side of the business), AFGRI cannot unilaterally take a decision to close operations or not to supply certain customers. The Commission therefore concluded that the proposed transaction would not lead to any negative impact on the particular industrial sector or region.

(c) Effect on small, medium enterprises or firms owned/controlled by historically disadvantaged individuals ("HDIs") in becoming competitive

[42]. The Commission considered in its assessment the various forms of assistance that AFGRI currently provides to small farmers or farms owned by historically disadvantaged individuals and whether, post-merger, there was an incentive for AgriGroupe to discontinue this assistance. Pre-merger, small farmers were receiving the following benefits from AFGRI: Emerging Farmer Development Programme ("the

[7] The joint venture was approved by the Tribunal in May 2013.

Development Programme") established in 2012 and Land Bank funding programmes.

[43]. The Development Programme spans five years and is designed to provide farmers with both practical and theoretical training in order to equip them with the necessary skills and expertise to ensure sustainable, viable and independently successful farmers. AFGRI's Land Bank funding programmes include the provision of funding at a preferential rate to farmers. The Commission found that AFGRI plays a vital role in assisting the Land Bank with its mandate and in providing assistance to emerging farmers and that it has assured the Land Bank that it would continue with its obligations in terms of the Facility Agreements.[8]

[44]. The Commission did not find any evidence to suggest that the proposed merger was likely to erode or prevent AFGRI from continuing with small farmer development or to discontinue the assistance provided to emerging farmers.

[45]. Pre-merger, the Government Employees Pension Fund has a 7.29% shareholding in AFGRI. Post-merger, AFGRI will have Bafepi (Pty) Ltd ("Bafepi"), a special purpose investment vehicle representing the Bafepi Consortium, as a BEE shareholder. Bafepi will own 20% of the shares in AgriGroupe. The Government Employees Pension Fund (represented by the Public Investment Corporation ("PIC")), will own 15% of the shares in AgriGroupe. At the hearing, however, the Commission noted that it could not confirm the status of the Government Employees Pension Fund in relation to BEE accreditation.[9] Accordingly, the Commission found that this transaction did not dilute the BEE shareholding in AFGRI but increased it.

---

[8] These are agreements entered into between the Land Bank and AFGRI that regulates their relationship in terms of the funds managed by AFGRI for the benefit of farmers.

[9] Transcript pages 34 and 35.

(d) Other concerns raised

[46]. There were a number of other concerns raised, which the Commission considered to fall outside the ambit of the Act and were thus not investigated by the Commission. These included the allegation that AgriGroupe was likely to move AFGRI's business to Mauritius because of tax benefits in Mauritius, the argument that AFGRI was funded from public resources, and the concern that AFGRI was under-valued.

The Commission's overall conclusions

[47]. The Commission concluded that the merger was unlikely to substantially prevent or lessen competition in the relevant markets. It concluded further that the merger raised no public interest concerns and recommended the unconditional approval of the merger.

Tribunal process and assessment

[48]. Following the Commission's recommendation, and in the normal course, the Tribunal wrote to the parties that had made submissions to the Commission and asked them whether they wished to make any further written submissions. We further requested the parties to indicate whether they would be making oral submissions at the hearing of this matter.

[49]. NAFU indicated that it would not make any further written or oral submissions as its concerns had been adequately addressed by the Commission, and that it will abide by the decision of the Tribunal.[10] NAFU was, however, represented at the hearing.

[10] See letter received from NAFU's attorneys dated 18 February 2014.

[50]. The EDD was also represented at the hearing and confirmed that it did not wish to make any oral submissions.[11]

[51]. Although the SACP did not make any further written submissions, it requested an opportunity to make oral submissions at the hearing, which we allowed. We summarise the SACP's oral submissions below (see Paragraph 55).

[52]. No other third party, other than the SACP, wanted to make oral submissions at the hearing.

[53]. During the hearing, members of the Tribunal raised a number of queries and concerns about the analysis conducted by the Commission, especially on the effect of the proposed transaction on employment, trade and the ability of small and/or historically disadvantaged farmers to become competitive in agriculture.

[54]. With regards to employment, more specifically, we note that the Commission's focus was exclusively on the potential duplication of functions resulting from the merger. However, it was rather obvious that this "no product overlap merger", combined with the fact that the Acquiring Group has no activities whatsoever in South Africa pre-merger, would not result in job duplication. Job losses stemming from job duplication was, however, not the concern raised by the third parties. The Commission seemed to have exclusively considered the strategic documents submitted by the merging parties that deal with the longer term strategic goals of the merged entity and not the potential shorter term employment effects resulting from AFGRI being under new ownership. The merging parties at the hearing confirmed that AFGRI currently employs approximately 4 000 persons.[12] The Commission, furthermore, did not investigate if a potential move of AFGRI's head

[11] Transcript pages 2 and 3.
[12] Transcript page 12.

quarters to outside of South Africa will have implications for employment in South Africa.

SACP

[55]. The SACP submitted, at the hearing, that its main concern was that although AFGRI was not involved in commodity trading on SAFEX, it had a dormant trading licence[13]. Thus, if it were to decide to trade in the future, this could have a major impact on food security. The SACP therefore requested that AFGRI make a firm commitment that it will not trade in the future and that the Tribunal make this a condition of the approval of the merger. The SACP's other concern was that since AFGRI provided both finance and silo storage services to farmers, this placed AFGRI in a powerful position vis-a-vis the farmers.

[56]. In response, the merging parties explained that trading on SAFEX did not require a licence. They further explained that AFGRI was previously involved in the trading business but had taken a decision a few years ago to close this business, having lost significant amounts of money in trading activities. They submitted further that the trading business was competitive and consisted of many large South African, as well as international traders. In addition, the parties submitted that even if AFGRI were to be involved in trading, it would not have any influence in relation to the trading prices on SAFEX as these vary depending on local conditions of supply and demand as well as on other markets. Responding to questions of the Tribunal, Mr. Venter of AFGRI confirmed that grain is traded on the SAFEX and that AFGRI had no influence on the trading prices.

[57]. Based on the evidence presented about the nature of the maize market and the mechanics of the SAFEX, we believe that there is no basis to

[13] According to the merging parties AFGRI's trading business was closed in April 2010.

impose any condition relating to grain trading by the merged entity post-merger.

[58]. With regards to the SACP's concern that AFGRI's involvement in both loan financing and silo storage ownership places it in strong position vis-à-vis the farmers, the merging parties responded that AFGRI was a small player in the market for loan funding to farmers and it competes with other, much bigger, financial institutions. The parties further submitted that the security that AFGRI takes on its loan financing is not related to grain stored in its silos and that its debtor's book is ceded and assigned to the Land Bank in back-to-back transactions, and the Land Bank then holds the loans and security.

[59]. We are of the view that the imposed conditions (see below) sufficiently address any potential negative effect of the proposed transaction on the ability of small and/or historically disadvantaged farmers to become competitive.

The Agreement between Government departments, AFGRI and AgriGroupe

[60]. The EDD informed us that it had engaged with AFGRI in an effort to address the concerns raised by the government departments mentioned. Following this, the EDD and AFGRI concluded an agreement which addressed the departments' concerns. The agreement deals, *inter alia,* with provisions such as loans to emerging farmers[14] from the Land Bank, the enrolment of participating emerging farmers in a development programme, grain storage discounts to qualifying emerging farmers, technical support and advice to the departments on alternative storage facilities and potential retrenchments. Thus the agreement reached

[14] In terms of the agreement 'emerging farmer' means subsistence farmers or small-scale farmers who are attempting to become commercial farmers or such additional category of farmers as approved by the Advisory Board.

essentially relates to sections 12A(3)(a), 12A(3)(b) and 12A(3)(c) of the Act.

[61]. The agreement, more specifically, creates a fund called the AFGRI Fund, which will make an aggregate amount of R90 million available over four financial years to be utilized in accordance with the provisions of the agreement. The purpose of this fund is to secure a number of objectives.

[62]. The overall purpose of the agreement is to define specific benefits for emerging farmers, through making available loan funding, mentorship, practical and theoretical training, as well as to protect the interest of AFGRI employees from possible negative consequences arising from the proposed transaction and to establish a mechanism for advice, oversight and interaction between the parties to the agreement through an advisory board.

[63]. Grain storage discounts will be provided to qualifying emerging farmers for the duration of the agreement. This entails a 40% discount on storage rates in respect of grain stored in AFGRI's existing grain storage facilities. This discount will not be funded from the AFGRI Fund (see clause 6 of the agreement).

[64]. Provision is also made for AFGRI to provide the relevant government departments with technical support and advice in respect of the development and utilisation of alternative grain storage facilities (see clause 7 of the agreement).

[65]. Clause 8 of the agreement provides for the enrolment of participating emerging farmers in the Development Programme. This programme refers to the Emerging Farmer Development Programme as established by AFGRI in 2012. The Development Programme is designed to optimise the utilisation of land by emerging farmers.

[66]. Clause 9 of the agreement makes provision for loan finance to emerging farmers. AFGRI will manage the Land Bank Facility for as long as this facility remains in place.

[67]. Clause 10 of the agreement provides for the provision of poultry farmer assistance. This includes assisting emerging farmers with, *inter alia,* funding for technical and veterinary skills development, access to a comprehensive laboratory service and full technical and nutritional services.

[68]. With regards to employment, AFGRI has undertaken to ensure that there will be no retrenchments as a result of the proposed transaction (see clause 11 of the agreement).

[69]. AFGRI shall further not relocate its head office to outside the Republic of South Africa for the duration of the agreement or thereafter (see clause 12 of the agreement).

[70]. In terms of the agreement, an advisory board, constituted by four representatives nominated by AFGRI and one representative nominated by each of the four relevant government departments, will, *inter alia,* be entitled to call for and receive reports from AFGRI regarding the implementation of the agreement, as well as to make recommendations and advise AFGRI on the implementation of the agreement and the achievement of its objectives (see clause 13 of the agreement).

[71]. The agreement is to be implemented over a period of four years, commencing on the date of approval of the proposed transaction by the Tribunal.

[72]. Both AFGRI and AgriGroupe confirmed at the hearing that they accepted the agreement reached with the above-mentioned government departments.

[73]. The Tribunal noted that AgriGroupe was not a signatory to the agreement and queried this with the merging parties. The merging parties confirmed by letter[15] and again at the hearing that AgriGroupe supported the agreement, was involved in the negotiation of the agreement and will honour the agreement through AFGRI.[16]

[74]. The merging parties further confirmed that they were in agreement with the departments that the entire agreement could be made a condition of the approval of the proposed transaction.[17]

[75]. As stated above, the agreement relates to sections of the Act. The Tribunal took the view that, broadly, matters covered in the agreement fell within the ambit of sections 12A(3)(a), 12A(3)(b) and 12A(3)(c) of the Act.

[76]. Though we had some reservations about the Commission's level of investigation, analysis and conclusions, we believe that the agreement reached by the merging parties and the government departments adequately addresses possible public interest concerns about the merger.

[77]. Given that the EDD and the merging parties had agreed on the terms of the agreement, we did not have to decide on any dispute or pronounce on the scope of any of the issues raised as public interest issues.

[78]. The Tribunal, however, asked the merging parties a number of questions about the agreement relating, *inter alia,* to the dispute resolution clauses in the agreement and recourse should the merged entity not comply with the agreement,[18] as well as the oversight role of the envisaged advisory board and monitoring of the conditions, if imposed.[19]

---

[15] See letter received from Norton Rose Fulbright dated 05 March 2014.
[16] Transcript page 66.
[17] Transcript pages 65 and 66.
[18] Transcript pages 66 to 68.
[19] Transcript pages 68 and 69.

[79]. In relation to the monitoring of the imposed conditions, we note that the agreement makes provision for an advisory board that includes representation from the relevant government departments. Further, the imposed conditions will be made public and affected farmers, to the extent that the conditions relate to them, can monitor the merged entity's compliance with the agreement themselves. We therefore do not foresee any concerns regarding the Commission's ability to monitor the imposed conditions. The Commission also did not raise any such concerns at the hearing.

Conclusion

[80]. We approve the proposed transaction subject to the conditions annexed herein, marked as Annexure "A".

15 April 2014

Prof. Imraan Valodia

Andreas Wessels and Mondo Mazwai concurring

Tribunal researcher	: Ipeleng Selaledi
For the merging parties	: David Unterhalter S.C. instructed by Norton Rose Fulbright and Webber Wentzel
For the SACP	: Dr. Stephen Grech
For the Commission	: Xolela Nokele, Jabulani Ngobeni and Thulani Mandiriza