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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM176Sep18

In the matter between:

Farmisco (Pty) Ltd t/a Kynoch Fertilizers Primary Acquiring Firm

And

The Profert Cluster Primary Target Firm

Panel	: Enver Daniels (Presiding Member) : Mondo Mazwai (Tribunal Member) : Fiona Tregenna (Tribunal Member)
Heard on	: 26 February 2019
Order issued on	: 27 February 2019
Reasons issued on	: 26 March 2019

REASONS FOR DECISION

APPROVAL

[1] On 19 February 2019, the Competition Commission ("Commission") recommended to the Competition Tribunal ("Tribunal") that the large merger transaction whereby Farmisco Proprietary Limited t/s Kynoch Fertilizer ("Kynoch") intended to acquire sole control of the Profert Cluster ("Profert Cluster") be approved with conditions. On 27 February 2019, the Tribunal approved the merger without conditions.

[2] The reasons for unconditional approval follow.

PARTIES TO THE TRANSACTION

Primary Acquiring Firm

[1] Kynoch is an importer, manufacturer and distributer of NPK fertiliser and fertiliser straights in South Africa and in the SADC territories. The majority of products sold by Kynoch are imported, blended, packaged and sold to wholesalers and bulk blenders.

[2] Kynoch is a wholly owned subsidiary of ETG Inputs HoldCo Limited (Dubai) ("ETG Inputs") which is ultimately control by Export Marketing BVI Limited. Kynoch and its controllers are collectively referred to as the ETG Group. ETG Inputs recently attained sole controls Sidi Parani (Pty) Ltd following approval of a merger transaction heard on the same day as this merger transaction.

[3] As a diversified agricultural trading and processing business, the ETG Group has activities in 27 countries in Africa as well as in India, Canada, Singapore, Vietnam and China.

Primary Target Firm

[4] The Profert Cluster is involved in the manufacturing, blending and distribution of NPK fertiliser and fertiliser straights in all provinces except the Western Cape and Gauteng.

[5] The Profert Cluster comprises of certain operations and assets of a group of companies and subsidiaries of which Profert Holdings Proprietary Limited ("Profert Holdings") is the ultimate holding company.

[6] Profert Holdings is currently in business rescue.

PROPOSED TRANSACTION

[7] In terms of the Sale of Assets Agreement, Sale of Business Agreement and Preference Share Subscription Agreement, Kynoch intends to acquire sole control of the assets and business operations of Profert Cluster which includes

equipment and plant in Delmas, Free State. Post-merger, Kynoch will have control and ownership of Profert Cluster.

[8] The ETG Group submitted that the merger transaction is an attractive proposition because Profert Cluster is the owner of a well-established brand, product range and strategic plant locations in South Africa and will be a good strategic fit within the ETG Group's existing business. Profert Cluster submitted that ETG Group's purchase proposal was the most suitable.

COMPETITON ANALYSIS

[9] The Commission considered the activities of the merging parties and found that the merger transaction results in a horizontal overlap in the supply of fertiliser straights, blended liquid NPK fertiliser and granular NPK fertiliser. The Commission further found that the merger transaction results in a vertical relationship as Kynoch supplied the Profert Cluster with fertiliser straights used in fertiliser blending.

[10] As such, the Commission considered the merger transaction in the following markets:

[10.1] the national upstream market for the supply of fertiliser straights;

[10.2] the national downstream market for the supply of granular NPK blended fertilisers and;

[10.3] the downstream market for the supply of liquid NPK blended fertiliser in the Free State, Limpopo, Mpumalanga and North West provinces.

[11] The Commission found that in the market for the supply of fertiliser straights, the merging parties will have a post-merger market share of less than 4% with a *de minimis* market share accretion. In turn, in the market for the supply of granular blended NPK fertiliser, the merging parties will have a market share of less than 16% with a minor market share accretion. The Commission noted that the merging parties will continue to be constrained by the competitors in both markets. The Commission also highlighted that South Africa is a net importer of fertiliser and thus the merging parties can be constrained by imports.

[12] In the downstream market for the supply of liquid NPK blended fertiliser in the Free State, Limpopo, Mpumalanga and North West provinces, the Commission found that the merging parties will have low post-merger market shares in the respective provinces. The Commission noted that the market shares may be overstated as they did not include all the players in the market. A true reflection of the market would indicate much lower market shares.

[13] The Commission received various submissions from customers in the market. In their submissions, no concerns were raised as the market has alternative players which they could source from if the merged entity increased its prices.

[14] In view of the above, the Commission concluded that the merger transaction is unlikely to lessen or prevent competition in the respective markets.

Vertical assessment

[15] When assessing the vertical relationship between the merging parties, the Commission considered whether the merger transaction could result in input foreclosure or customer foreclosure concerns.

[16] The Commission found that the merger transaction was unlikely to result in any input foreclosure because the merging parties have low market shares in the upstream market; there several larger market participants, who would be alternatives to customers if the merged parties engage in input or customer foreclosure strategies and imports, account for over 60% of the market.

[17] In terms of customer foreclosure, the Commission found that the merger transaction was unlikely to have this effect as the merging parties have relatively low market shares and there are other suppliers from whom the merging parties' customers can procure their products, if a foreclosure strategy were implemented.

[18] In view of the above assessments, the Commission concluded that the merger transaction is unlikely to lead to any substantial prevention or lessening of

competition in any market. We had no reason to differ with the Commission's conclusion.

DIVERSTITURE CONDITION

[19] As previously stated, the Commission had recommended that this merger transaction be approved subject to a condition, which the merging parties had accepted. The condition envisaged that the Land and Agriculture Development Bank of South Africa ("Lank Bank") which is a major creditor of the Profert Cluster would acquire Land Bank Equity and following a period of 5 years, the Land Bank would enter into a Divestiture Agreement with one or more Purchasers within the Divestiture Period for the disposal of the Land Bank Equity. The disposal would have been to historically disadvantaged persons, to assist the entry of a BEE established firm in the fertiliser market.

[20] This condition emendated from the first intermediate transaction between Vitas and Profert (Vitas transaction) which was never implemented. The Commission explained that the Land Bank intended to sell the shares to historically disadvantaged persons in the Vitas transaction and that the condition should be imposed in this merger transaction.

[21] The Tribunal wanted to know from the Commission why this condition ought to be imposed in this merger transaction because the Land Bank was neither a party to the merger transaction nor forms part of the Primary Acquiring Firm nor the Primary Target Firm. In other words, did the Tribunal have the power to confirm the condition in these circumstances and, if it did not, does it not risk acting ultra vires its powers envisaged in the Act?

[22] The Commission submitted that since the Land Bank was indeed not part of the merger transaction, it would not be opposed to the Tribunal approving the merger without the condition. The merging parties submitted that it did not oppose an unconditional approval and that the Land Bank was not opposed to giving an undertaking similar to the impugned condition.

[23] The Tribunal was of the view that the condition was not merger specific and that it would not have the power in terms of the Act to impose such a condition. As such, the condition was excluded.

PUBLIC INTEREST

[24] The merging parties submitted that the merger transaction will not negatively affect employment. The merging parties envisaged transferring an agreed number of Profert Cluster's employees located in Potchefstroom to Kynoch's Johannesburg facilities and a certain number of Profert Cluster employees in Delmas to Vilijoenskroon. Those employees who were not willing to relocate would be offered a voluntary separation agreement.

[25] Solidarity, one of the trade unions representing the Profert employees expressed dissatisfaction with this agreement as it would deprive employees of certain benefits. Consequently, the merging parties and Solidarity entered into an agreement in which the merging parties will implement a process of dismissal based on operational retrenchment requirements under section 189 of the Labour Relations Act[1] (LRA) for non-relocating employees. A certain number of employees were part of the process. Several employees elected to be retrenched and some employees elected to be transferred under section 197 of the LRA. This option was also offered to non-Solidarity members.

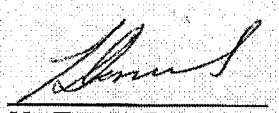
[26] The Commission concluded that it was unnecessary to impose a condition on the approval of the merger to address this particular concern, because of the process between the merging parties and Solidarity.

[1] Act 66 of 1995.

CONCLUSION

[27] In light of the above, we concluded that the merger transaction is unlikely to result in any substantial or lessening of competition in any market. In addition, we were of the view that the divestiture condition was not merger specific and therefore the merging parties need not be bound by it. Lastly, the merger transaction did not raise any employment concerns or issues on any other public interest grounds.

[28] Accordingly, we unconditionally approved the merger transaction.



Mr Enver Daniels

26 March 2019
Date

Ms Mondo Mazwai and Prof. Fiona Tregenna concurring

Tribunal Case Managers: Lumkisa Jordaan and Ndumiso Ndlovu

For the merging parties: M Griffiths of Norton Rose Fulbright South Africa and A van der Westhuizen of Glyn Marais Attorneys

For the Commission: N Msiza and M Aphane