

SOUTH AFRICA / JUDGMENT

Government Employees Pension Fund v ETG Inputs Holdco Limited (LM200Jan17) [2017] ZACT 10; [2017] 1 CPLR 274 (CT) (20 February 2017) [2017] ZACT 10

COURT

Competition Tribunal

BEFORE

Andiswa Ndoni, Enver Daniels, Imraan Valodia

CASE / FILE NUMBER

LM200Jan17

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM200Jan17

In the matter between

THE GOVERNMENT EMPLOYEES PENSION FUND Acquiring Firm

(REPRESENTED BY THE PUBLIC INVESTMENT

CORPORATION SOC LIMITED)

And

ETG INPUTS HOLDCO LIMITED

Target Firm

Panel

: Ms Andiswa Ndoni (Presiding Member)

: Mr Enver Daniels (Tribunal Member)

: Prof Imraan Valodia (Tribunal Member)

Heard on

: 08 February 2017

Order Issued on : 08 February 2017

Reasons

Issued on : 20 February 2017

REASONS

FOR DECISION

Approval

[1] On 08 February 2017, the Competition Tribunal ("Tribunal") approved the large merger between The Government Employees Pension Fund ("GEPF") represented by the Public Investment Corporation SOC Limited ("PIC") and ETG Inputs Holdco Limited ("ETG").

[2] The reasons for the approval follow.

Parties to the transaction and their activities

Primary Acquiring Firm

[3] The primary acquiring firm is the GEPF, represented by PIC. PIC acts as the fund manager to the GEPF, which is a juristic person established by section 2 of the Government Employees Pension Law, 21 of 1996. The GEPF is governed by statute and not controlled by any other firm.

[4] The GEPF's core business is to manage and administer pensions and other benefits for government employees in South Africa, investing its assets in various asset classes.

[5] The PIC is controlled by the South African Government and, in addition to its functions with respect to the GEPF, acts in its capacity as the duly authorised representative of the Unemployment Insurance Fund and the Compensation Fund.

[6] The activities of the PIC, as the principle asset management vehicle for the South African public sector, are regulated by the Public Investment Corporation Act, 23 of 2004. All of the PIC's investment decisions are directed by detailed client mandates, individually negotiated in line with their investment profile and risk appetite. PIC, on behalf of its investors, thus has interests in a variety of different sectors. Relevant to the proposed transaction,

the PIC holds a non-controlling shareholding of 13.96% in Omnia Holdings Limited,[1] a company which, through its subsidiary Omnia Fertilizer Ltd, is active in the importation, manufacturing, blending and distribution of fertiliser commodities .

Primary Target Firms

- [7] The primary target firm is ETG, a company incorporated and registered in Dubai. ETG is a wholly owned subsidiary of ETC Holdings (Mauritius) Limited ("ETC Mauritius").[2] In South Africa, ETG controls Sidi Parani (Pty) Ltd ("Sidi Parani") and Farmisco (Pty) Ltd, trading as Kynoch Fertilizers ("Kynoch"). Kynoch in turn solely controls Fermentech (Pty) Ltd ("Fermentech").
- [8] All three South African subsidiaries of ETG are involved in the importation, manufacturing, blending and distribution of fertiliser commodities.
- [9] Kynoch imports, manufactures, blends and distributes fertiliser commodities in South Africa and the SADC territories. Kynoch produces raw material stock which Fermentech blends, packages and distributes on a tolling basis.
- [10] Sidi Parani supplies an extended range of plant nutrition products within South Africa.

Proposed transaction and rationale

- [11] In terms of the share purchase agreement, the GEPPF intends to acquire 49% of the issued shares in ETG from ETC Mauritius. Upon implementation of the proposed transaction, GEPPF will jointly control ETG with ETC Mauritius.[3]
- [12] In terms of rationale, the GEPPF submits that the proposed transaction is aligned with the GEPPF's mandate to invest in African assets which are essential to unlocking Africa's economic potential whilst presenting valuable return on investment.
- [13] ETC Mauritius submits that the proposed transaction will serve as a cash injection, presenting a favourable opportunity to capitalize on the value it has created through ETG.

Relevant market and impact on competition

- [14] The Commission, in its recommendations, found that the proposed transaction would not result in any horizontal overlaps. The Commission brought the fact that the GEPPF holds a non-controlling 13.96% share in Omnia, a competitor of ETC in the fertiliser industry to the Tribunal's attention. The Commission submitted that GEPPF's stake in Omnia was too small to allow it to influence Omnia in any way. The Commission concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. [4]

Public interest

- [15] The merging parties submitted, which was confirmed by the Commission, that the proposed transaction will not have a negative public interest effects.[5]

Conclusion

[16] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, no public interest issues arise from the proposed transaction. Accordingly, we approve the proposed transaction unconditionally.

20 February 2017

Date

Prof Imraan Valodia

Ms. Andiswa Ndoni and Mr. Enver Daniels concurring

Tribunal Researcher: Alistair Dey-van Heerden

For the Acquiring firm:

Tanya Macdonald of Norton Rose Fulbright

For the Target Firm:

Judd Lurie of Bowmans

For the Commission:

Zintle Siyo and Xolela Nokele

[1] Statement of Dr Daniel Matjila, dated 27 January 2017.

[2] ETC Mauritius is, in turn , wholly controlled by Export Trading Group PTE Limited.

[3] In terms of the ETG shareholders agreement , GEPF will be able to appoint 2 out of a total of 5 directors to ETG's board. Certain matters will then specifically require the approval of the two directors appointed by GEPF to pass.

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[4] Tribunal Transcript , page 4.

[5] Page 2 and 43 of the Merger record. Page 9 of the Competition Commission's Recommendations .

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