

HOW PUBLIC INTEREST FACTORS DOVETAIL IN MERGERS AND OTHER LEGISLATION

How the Competition Act promotes enterprise and supplier development initiatives in the agricultural sector and dovetails with the AgriBEE Sector Code and broader Companies Act requirements. By **ANDRIES LE GRANGE**, director – Competition Law, at Cliffe Dekker Hofmeyr



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The merger provisions of the Competition Act require parties to a merger to address public interest consideration, such as the effect the merger will have on employment, the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons to effectively enter into, participate in or expand within the market and the promotion of a greater spread of ownership, particularly to increase the levels of ownership by historically disadvantaged persons and workers in the firms in the market. These considerations must be taken into account when assessing mergers, and conditions have been imposed on many mergers to advance the public interest objectives of the Competition Act.

Similar considerations are echoed in the AgriBEE Sector Code and, in terms of the Companies Act, certain companies must establish social and ethics committees to monitor environmental, social and governance matters. King IV adopts a stakeholder-inclusive approach, requiring boards to ensure responsible corporate citizenship across workplace, economic, societal and environmental dimensions.

HOW DOES IT IMPACT THE AGRICULTURAL SECTOR?

In the agricultural sector, there are many examples of conditions being imposed on mergers that address the public interest aspects. In the VKB/GWK merger, the merging parties undertook to “facilitate the provision of financing, in terms of the merging parties’ applicable credit policies and relevant legislation, to historically disadvantaged persons (HDPs), in the value chains and the geographical areas where the merging parties operate”. The parties also undertook to ensure that certain workers would

become beneficiaries of the parties’ employee share schemes.

In the Senwes/Suidwes merger, a condition was imposed to the effect that for a period of three years following the implementation date, Senwes was required to advance the sum of R20-million annually in the form of production loans to black farmers, in addition to any existing loans to black farmers, in keeping with the relevant provisions of the AgriBEE Sector Code.

For the purposes of scoring under the AgriBEE Sector Code, the Code recognises loan and credit facilities made to beneficiary entities and training and mentoring to beneficiary communities as activities that comprise enterprise and supplier development contributions. The agri-industry undertook, in the Code, to provide access to inputs, credit, infrastructure, markets and technology, and support to land reform beneficiaries. The provision of financial support would often require complementary training and mentoring activities to facilitate the repayment of the loans and the realisation of the developmental objectives of the Code.

Conditions have been imposed in various other mergers outside the agricultural sector, which seek to foster supplier development initiatives, such as support for HDP and small, medium and micro enterprise suppliers, learnership programmes for HDP youth, and skills development initiatives, such as apprenticeships and learnerships, and artisan recognition programmes. The development and implementation of such initiatives would be aligned with the broader strategic objectives of the firms concerned and serve to demonstrate their commitment to supporting the development of the economic and social ecosystems within which they operate.

WHAT COMPANIES NEED TO CONSIDER

It is prudent for firms in the agricultural sector that intend to embark on mergers to start considering what existing initiatives they have in place that could be harnessed to satisfy the public interest objective of the Competition Act. This is because the conceptualisation and implementation of employee share schemes or enterprise and supplier development initiatives takes time and careful consideration.

A process of consultation with role players is also required, as this is in alignment with the requirements of the relevant sector codes. Confronting these aspects for the first time during a merger approval process may be challenging and costly; therefore, advance awareness of the various ways in which public interest considerations feature in the merger approval process is of utmost importance. ●



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