

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO: 73/LM/Dec10

CC CASE NO: 2010Nov5445

In the large merger between:

WAL-MART STORES INC.

Primary Acquiring Firm

and

MASSMART HOLDINGS LIMITED

Primary Target Firm

**SUBMISSIONS ON BEHALF OF THE ECONOMIC
DEVELOPMENT DEPARTMENT, THE DEPARTMENT OF
TRADE AND INDUSTRY, AND THE DEPARTMENT OF
AGRICULTURE, FORESTRY AND FISHERIES (INTERVENING
PARTIES)**

I, the undersigned,

RICHARD MICHAEL LEVIN

hereby make oath and say:

1. I am the Director-General in the Economic Development Department (“EDD”).

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2. I am also duly authorised to depose to this affidavit on behalf of EDD, as well as the Department of Trade and Industry (“DTI”) and the Department of Agriculture, Forestry and Fisheries (“DAFF”) (whom I shall refer to collectively, where appropriate, as the “relevant Government Departments”).
3. The facts contained herein are within my personal knowledge, unless the context indicates otherwise. Insofar as I rely on information conveyed to me by others, I identify the source of that information, which I believe to be correct.
4. On 24 February 2011, I sent a letter to the Chairperson of the Competition Tribunal (the “Tribunal”), urgently requesting that EDD and the DTI be permitted to intervene in this matter (a large merger involving Wal-Mart Stores Inc. [“Walmart”] and Massmart Holdings Ltd [“Massmart”]). A copy of that letter is appended marked “**RL1**”.
5. That request was acceded to on the same day, as is apparent from the letter from the Chairperson of the Tribunal to the legal representatives of the various parties, and Mr Robert Shaw, of my Department, dated 24 February 2011, which is attached marked “**RL2**”. I am informed by EDD’s and DTI’s legal representatives that the attorneys for Walmart indicated in writing on 25 February 2011 that they accepted that directive.
6. The Director-General of DAFF also applied for leave to intervene in this matter, and was granted permission to do so by the Tribunal on 25 February 2011.

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7. The Competition Act, 89 of 1998 (the “Act”) in any event permits the “*Minister*” to participate in a merger hearing, “*if the Minister has indicated an intention to participate*” (s53(c)(iv), and s18(1)). “*Minister*” is defined in s1 of the Act as the Minister of Trade and Industry, as at the time the Competition Commission (the “Commission”) fell under DTI. The Ministerial responsibilities under the Act were subsequently assigned from the Minister of Trade and Industry to the Minister of Economic Development, under s97 of the Constitution of the Republic of South Africa (the “Constitution”). The Minister of Economic Development would therefore be permitted to participate in these proceedings anyway, as of right.
8. The purpose of this affidavit is to explain why the relevant Government Departments have sought to participate in these merger proceedings, as well as to explain why the requests for intervention were made as late as they were.
9. By way of a broad summary of what is set out in this affidavit: This proposed merger raises very significant public interest issues. The Commission made its recommendation on the premise and expectation that the merging parties would make commitments with respect to those issues. The Commission anticipated that those commitments might be made a condition of any merger approval by the Tribunal. EDD has facilitated discussions with the merging parties in order to seek to arrive at agreements in this regard. However, it has now (at a very late stage) become apparent that the merging parties are delaying making binding commitments which address these issues. In the view of the relevant Government

Departments, it is self-evident that the question of whether any conditions should be imposed, and if so what those conditions should be, depends on the nature and extent of any commitments made by the merging parties with regard to public interest grounds set out in the Act, such as labour, procurement, food security, and BBEE businesses. I respectfully submit that it would therefore be appropriate for there to be finality on that question (i.e. the degree to which the merging parties are prepared to make firm commitments which address public interest concerns) prior to the merging parties and all other participants having to make representations or provide any expert assessments, and before the Tribunal makes any decision in relation to the merger.

THE NATURE OF THE INTEREST OF THE RELEVANT GOVERNMENT DEPARTMENTS

10. The Act makes it clear that, irrespective of whether a merger is likely to substantially prevent or lessen competition, it is necessary to determine “*whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)*” (s12(1)(a)(ii) and (b)).
11. Section 12(3) in turn provides that:

“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;*

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- (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."*

12. The Act also specifically envisages the "*Minister*" (i.e. the Minister of Trade and Industry, and now the Minister of Economic Development) making representations on "*public interest*" grounds referred to in s12A(3).
13. It is accordingly incumbent on EDD, in particular, to ensure that all public interest dimensions of significant mergers are fully canvassed and considered prior to the merger being approved. EDD and the other Government Departments prefer to address concerns about public interest ramifications of mergers by facilitating dialogue between interested and affected parties, with a view to procuring any appropriate commitments from the merging parties, or addressing concerns of third parties in other ways. In other words, the relevant Government Departments prefer to safeguard the public interest without in every instance formally intervening in Commission investigations or Tribunal proceedings. However, where formal intervention is required, EDD and the other Government Departments are duty-bound to adopt that course.
14. As s12A(3) indicates, there are at least four aspects which must be considered when assessing whether a merger can or cannot be justified on public interest grounds.

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14.1. The first is the effect of the merger “*on a particular industrial sector or region*”. I point out that the provision does not confine the scope of the enquiry to the sector or region in which the merging parties, or at least the target firms, themselves operate. It is therefore necessary to investigate whether a merger could be expected to have a notably deleterious effect on any sector or region. In the present case, one must therefore look not only at the retail sector, but also, and even more critically, at the effect on the turnover and profitability of supplier industries such as food (including suppliers of agro-processed foods), electronics, hardware, clothing and footwear.

14.2. The second issue which has been flagged by the legislature is “*employment*”. Again, the section does not refer merely to employment within a particular sector, or company. It is therefore necessary to look beyond the narrow focus of the specific transaction, and also consider the effect that a merger would have on employment in other affected areas of the economy. What this means in the present case is that a consideration of employment effects must not only take in the retail sector, but also encompass the supply lines. Jobs in the retail sector could also be placed at risk because of the inherent tendency of larger supermarkets and retail outlets to displace smaller shops, including spaza shops, which have a higher labour absorption rate when measured against goods sold. An evaluation of employment consequences would moreover not merely involve an assessment of the quantity of work (and



thus jobs) post-merger, but also the quality of the work available to employees (something which Government has been asked to address by public interest organisations, based on their perception of Walmart's track-record elsewhere in the world).

14.3. The third consideration identified by Parliament is the ability of "*small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive*". That criterion could be implicated in the present instance in at least two ways. First, the merger could have a negative impact on spaza shops and other small retail enterprises, which ordinarily could be expected to have higher costs per turnover than the merging parties. Then there is the question of the merger's effect on smaller manufacturing suppliers, and particularly BBBEE manufacturing suppliers, who could be prejudiced by the merged entity preferring larger manufacturing suppliers with greater economies of scale, or relying to a greater extent on imports.

14.4. The final consideration in s12A(3) relates to the ability of national industries to compete in international markets. There are again two dimensions to this issue.

14.4.1. The first relates to the threat to local businesses' ability to compete internationally. Successful export companies frequently rely on a solid domestic base, and a critical mass of local sales, to fund their export

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drives (at least in the early stages). If the merging parties were therefore to discontinue purchases of local goods or produce (for example, fruit juice, or canned fruit or fish) which the South African producers also seek to export, this could therefore harm the ability of those companies to compete internationally.

- 14.4.2. The second aspect concerns the opportunity which the merger could potentially afford local suppliers to gain an international profile. The primary acquiring firm (Walmart) has an extensive international profile, and stores in many countries. If Walmart were to agree to integrate some South African products into their global supply chain, this could potentially compensate for some other negative consequences of the merger, and provide some countervailing public interest benefits.
15. It is also important to bear in mind the New Growth Path (NGP) adopted by Cabinet in October last year. That policy gives primacy to employment, given that South Africa has exceptionally high levels of unemployment by global standards. It also emphasizes the shift from consumption-driven growth to growth based on the productive sectors of the economy, the importance of local procurement; and the strategic use of industrial policy. The sectors specifically identified in the New Growth Path as being central to the shift to production are: (i) agriculture and agro-processing; (ii) mining and mineral

beneficiation; (iii) manufactured goods (including forestry, paper, pulp and furniture; plastics, pharmaceuticals and chemicals; electronics, including cabling, appliances and components; clothing, textiles, footwear and leather; food products; home furnishings; white goods (fridges and stoves); household appliances; leisure products; beverages; cosmetics; packed food and meals; non-edible groceries and building supplies); and (iv) the “*green economy*” (for example, solar water geysers and panels). A merger of the size of the proposed Walmart / Massmart transaction, and with the size and leverage of the parties which are involved, could, if not properly regulated, go some way towards undermining the New Growth Path.

16. Government and the Minister of Economic Development are concerned that everything possible is done to secure foreign direct investment, especially into New Growth Path and Industrial Policy Action Plan (IPAP) sectors with high economic and employment potential. Government is also concerned that it play an enabling and facilitating role to ensure that potentially divergent views are mediated in the public interest.
17. The question of food security is another matter of great public importance. If the value chains disintegrate, and agriculture, agro-processing and food production become unviable, then the South African economy will become more vulnerable to international price and currency fluctuations, and more affected by international food shortages.

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SOME BACKGROUND

18. As I believe is well-known, the relevant Government Departments have been engaging with representatives of Walmart and Massmart for some time, with a view to ensuring that the proposed merger is not inimical to the public interest.
19. An initial meeting was held with representatives and financial advisers of Massmart and Walmart on 7 October 2010. That meeting was attended by a government delegation which included both the Minister of Economic Development, and the Minister of Trade and Industry. The merging parties were not only receptive to the concerns voiced by Government, but also indicated a clear willingness to co-operate in an attempt to alleviate those concerns.
20. Following that meeting, I sent two letters to Goldman Sachs, the financial advisers for Massmart, requesting information which was necessary for EDD to evaluate the economic implications and other ramifications of the merger. The first letter was sent on 19 October 2010, and focused mainly on information relating to sales and procurement. I attach a copy of that letter marked "**RL3**". The second letter was sent on 25 October 2010, and requested information on issues such as: the deal rationale and efficiencies; Massmart's competitive strategy post-acquisition; sourcing and suppliers; and labour. I attach a copy of that letter marked "**RL4**".
21. EDD also appointed a working group, or panel of experts, to interact with the merging parties and to make an in-depth assessment of the

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likely impact of the merger on local production, empowerment, capital flows and investment, employment, and competition in the retail sector. That working group met with Massmart for the first time on 26 October 2010.

22. On 10 November 2010 Massmart provided EDD with two spreadsheets, which purported to be a response to my letters. I attach copies of those spreadsheets marked “**RL5**”. As will be readily apparent, the spreadsheets do not provide much detail. The data also only indicated direct imports, not imports through intermediaries. It was therefore inadequate for EDD’s purposes, and did not permit EDD, or its expert advisers, to make any considered assessment of the public interest impact of the merger. (The spreadsheets contain information which Massmart may regard as confidential, and so they will not be included in the non-confidential version of this affidavit.)
23. Massmart only furnished EDD with more detailed information on imports on 28 January 2011. Massmart then sent through various spreadsheets which provided import data for the top twenty suppliers in three categories (general merchandise, alcohol and food), as well as estimated historic import trends. Even then, however, all the information which I had requested was not provided. I attach copies of those spreadsheets marked “**RL6**”. (Those spreadsheets will also not be included in the non-confidential version of this affidavit.)
24. While EDD welcomed that further information, it was furnished much too late for the panel of experts to take it into account prior to briefing Minister Patel. The information was also provided too late

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to permit EDD to prepare a considered evaluation of the implications of the merger prior to the Competition Commission making its recommendation to the Tribunal. As my letters to Goldman Sachs indicate, EDD had in fact required the information in November 2010 – over two months before it was forthcoming.

25. The relevant Government Departments were therefore effectively precluded from analysing the public interest aspects of the Walmart / Massmart merger prior to the expiry of the period afforded the Commission for evaluating the merger – a period which was, in any event, attenuated in practice by the end-of-year holiday period. It was of concern to the relevant Government Departments that the timing of the response from the merging parties and the inadequacy of the information which was provided (even as of the end of January 2011) had the effect of reducing their opportunity to participate in the evaluation process. The concerns of the relevant Government Departments were also heightened by the fact that the information provided in November 2010 did not give a full picture of the true position, and also presented the merger in a more positive light than would appear to actually be the case. For example, the original information (furnished in November 2010) referred in one part to direct imports of only 3.35%, whereas a full reading of the document suggests that the total import content in fact amounts to a possible 64% for general merchandise and 10% for food.
26. The relevant Government Departments were nevertheless still hopeful that the public interest dimensions of the merger could be addressed in a way which did not require any direct intervention by

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them in the merger proceedings. After all, as I have mentioned, the merging parties had assured EDD and DTI at the outset (in October 2010) that they acknowledged Government's concerns, and did not seek to jeopardise local businesses or envisage that they would be undermined if the merger were to be implemented. Further assurances were given by both Walmart and Massmart in meetings with the Government in January and February 2011. EDD therefore did not anticipate any great difficulty in obtaining a suitable commitment from the merging parties with regard to public interest issues set out in the Act, such as procurement, labour and food security.

27. As a result of the Walmart's and Massmart's receptiveness to resolving the concerns raised by Government and public interest groups in South Africa, EDD appointed Gavin Hartford in early February 2011 to engage with representatives of Massmart and certain trade unions about the public interest issues raised by the merger, and in particular the effect on procurement, labour and small businesses. Some progress was made in these negotiations towards the conclusion of an agreement, or "pledge", which would satisfy concerns about the public interest dimensions of the merger, including the loss of jobs in the broader economy pursuant to the merger, by virtue of goods, including food, being procured from overseas rather than from South African suppliers.
28. The late and incomplete information which EDD received from the merging parties essentially precluded the relevant Government Departments from making any specific submission to the

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Commission with regard to the merger by 10 February 2011 (the deadline stipulated by the Commission, in the light of the requirement that it make its recommendation on the merger by Friday 11 February 2011). The relevant Government Departments in any event took the view that, as EDD was still involved in a dialogue with the merging parties and the trade unions, it would not be appropriate to express definitive opinions in the public domain. The Commission was, however, apprised that EDD was facilitating discussions between Massmart and the trade unions, and that it was expected that these would result in an agreement which would address the main public interest issues which the Tribunal would have to consider, under s12A(1) read with s12A(3) of the Act, prior to deciding whether to approve the merger.

29. The Commission placed considerable reliance on those EDD-brokered negotiations, and their anticipated outcome, when deciding on 11 February 2011 to recommend that the merger be approved without conditions. (That recommendation was forwarded to Minister Patel under s14A(1)(b) of the Act.)
30. The executive summary of the Commission's recommendation refers to and quotes, at pages 4 and 5, "*commitments*" which had apparently been communicated to the Commission by the attorneys for the primary acquiring party on 10 February 2011. These "*commitments*" are in general terms, but they do speak to the core public interest considerations which arise from the proposed merger. Thereafter, the Commission states the following at pages 5 and 6:

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“Given the significant public interest issues arising from this matter which includes employment concerns and procurement of local manufactured product the Commission considered making the above commitments a condition to the merger. It was brought to the Commission’s attention that the merging parties were in discussions with various public interest [organisations] (in particular trade unions) with a process facilitated and initiated by the Economic Development Department which sought to clarify these exact public interest issues.

It was further brought to the Commission’s attention that the Economic Development Department had initiated discussions between Massmart and public interest organisations to address a number of public interest issues and clarify certain commitments made by the parties.

However, this process was not concluded at the time the Commission was required to submit its recommendation to the Competition Tribunal. The merging parties did not seek an extension in order to finalise these commitments. It is, however, apparent that such an agreement would be reached prior to the finalisation of the Competition Tribunal hearing.

Based on the outcome of these agreements the Competition Tribunal would have to consider whether it would make these agreements a condition to the merger in terms of Section 12.

Considering the above undertaking the Commission found that it’s on balance difficult in this regard to make an adverse recommendation to the proposed merger.

The Commission therefore recommend that the merger be approved without conditions.”

[underlining added]

31. Since the Commission’s recommendation that the merger be approved unconditionally, the EDD-facilitated negotiations have stalled. For whatever reason, the merging parties’ stance on procurement has shown less flexibility since that favourable

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recommendation. It has now become apparent to the relevant Government Departments that there is only a small probability that a suitable agreement will be reached prior to the Tribunal hearing scheduled for 22 to 24 March 2011.

32. This was communicated to EDD by Mr Hartford on Thursday, 24 February 2011. Mr Hartford informed EDD that discussions which had been held on Tuesday, 22 February had not progressed at all with regard to procurement, although there had been more progress on the labour standards issues. In particular, Massmart was not even prepared to discuss the substance of a pledge which articulated concerns which had been expressed by the trade unions with regard to procurement, BBBEE and small business development, and labour. A copy of that draft pledge is attached marked "RL7".

32.1. Massmart's position, as communicated to Mr Hartford and the trade unions, was (in Mr Hartford's words) that they "*completely and categorically rejected any discussion on setting procurement targets whatsoever for South African manufactured goods*".

32.2. Massmart was merely prepared to make a general statement that it "*is not the Group's intention (regardless of its ownership) to materially switch procurement from locally manufactured / produced to imported product*", and that Massmart "*supports the need to work with all parties to build sustainable local manufacturing and food production capacity*". Massmart also proposed "*that business (retailers*

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and suppliers) work with government and labour representatives to improve transparency by implementing a local procurement scorecard, against which procurement from bona fide local suppliers can be tracked and reported on an industry-wide basis”.

- 32.3. Mr Hartford reported that Massmart was “*not at all open to negotiate this matter*” despite the understandings communicated in other forums with the merging parties’ executives.
33. In the light of the relevant Government Departments’ realisation at this late stage that an appropriate commitment from the merging parties with regard to public interest issues specified in the Act (such as procurement, and safeguards for small businesses and BBBEE concerns) was not likely to materialise after all – notwithstanding the earlier assurances and “gentlemen’s agreements” in this regard – it was decided to seek to intervene in the merger proceedings as a matter of urgency.

THE RELEVANT GOVERNMENT DEPARTMENTS’ STANCE AND SUBMISSIONS

34. As is apparent from the portion of the executive summary in the Commission’s recommendation which has been quoted above, the Commission’s recommendation was based on the premise that the merging parties would make binding commitments prior to the Tribunal hearing. These commitments would address concerns with

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regard to the merger's effect on suppliers to the retail sector, employment among retailers and suppliers, and the ability of small businesses or firms, controlled or owned by historically disadvantaged persons, to become competitive.

35. The relevant Government Departments also worked on that assumption, and I submit were reasonable in doing so, having regard to the assurances and undertakings which had been provided by the merging parties to Government since October 2010.

36. While the EDD-facilitated negotiations are due to reconvene towards the end of this week, it now appears less likely that the basis on which the Commission made its recommendation, and that the reason why the relevant Government Departments were prepared merely to observe the merger proceedings, will be borne out insofar as procurement, in particular, is concerned. There is a greater possibility of some agreement being reached with regard to labour standards, but even then, it is not yet clear what any labour agreement might involve.

37. The Tribunal is accordingly being asked decide on a merger of considerable public importance and significance:

37.1. on the strength of a recommendation from the Commission which was based on a factual premise which has not materialised,

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- 37.2. in circumstances where the relevant Government Departments (i.e. EDD, DTI and DAFF) have also been labouring under a misapprehension as to what would occur, and are also, for the reasons given above, not in a position at this stage to provide an adequate economic analysis of the consequences of the merger for local suppliers;
- 37.3. where witness statements have had to be filed by third parties in compliance with a strict timeline, prior to the negotiations on which the Commission placed such store being finally concluded, and thus without the third party participants knowing the final parameters against which the merger will have to be decided; and
- 37.4. where the Commission contemplated that the Tribunal would have to consider making the anticipated agreement(s) a condition to the merger – but where the agreements have not been concluded.
38. It is, I submit, self-evident that the question of whether any conditions should be imposed, and if so what those conditions should involve, depends on the nature and extent of any commitments made by the merging parties with regard to the public interest grounds specified in the Act, including labour, procurement, and small and BBBEE businesses. I respectfully submit that it would therefore be appropriate for that issue to be clarified prior to the merging parties and all other participants having to make representations and provide any expert assessments.

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39. While the relevant Government Departments have not at this stage brought an application for a postponement of the Tribunal hearing, it is respectfully submitted that the Tribunal may well consider that in a matter of this significance, and in which there are public interest issues of such magnitude, it would be ill-advised and ultimately counter-productive for the hearing to run on the scheduled dates (22 to 24 March 2011), and on the basis of statements and submissions which have prepared without any knowledge as to whether there would be any commitments or assurances from the merging parties which would be acceptable to the relevant Government Departments. As things currently stand, any proceedings which ran during the week of 22 March 2011 would, in any event, appear likely to have to be postponed.
40. As I have indicated, negotiations between Massmart (representing the merging parties) and various trade unions are still on-going, and are still being facilitated by EDD (through Mr Hartford). The relevant Government Departments continue to adhere to the view that it would be preferable for the merging parties themselves to make concrete proposals which address the public interest dimensions, rather than for the Tribunal to have to impose conditions on unwilling parties, and then find ways of monitoring adherence to those conditions. From the perspective of the relevant Government Departments, the desired outcome would be for there to be negotiation around the kinds of commitments in the "*South Africa Pledge*" appended at "RL7" and for a refined and nuanced position to emerge from that document. EDD remains committed to trying to

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bring the parties together, and to broker some consensus which is acceptable to all.

41. I have provided some background above in order to explain the reasons why the relevant Government Departments are concerned about the proposed merger, and why these Departments have considered it necessary to intervene in the proceedings before the Tribunal. Prior to finality being reached with regard to the EDD-facilitated negotiations, it would seem inappropriate for the aforementioned departments to make further detailed comments, or express more definitive views – insofar as this is possible, in any event, given the lateness of the information provided to EDD by the merging parties, the fact that some of the information sought has still not been provided, and the size of the record (something to which I have adverted above and also revert below). The extent to which the relevant Government Departments would consider it necessary or appropriate to give evidence, or make representations, in the Tribunal would ultimately depend on whether the discussions which have been held at the instance of EDD bear any fruit.
42. In the meantime, I attach marked “**RL8**” a very provisional analysis of some public interest issues arising from the proposed merger, which has been undertaken by the relevant Government Departments, in the extremely limited time available to it since they were granted leave to participate in the merger proceedings. That analysis is of necessity no more than an initial draft, because of the extreme time constraints which I have explained above. I nevertheless submit that it highlights some of the potentially very

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significant public interest consequences of this proposed merger, and thus matters which the Tribunal would wish fully to consider before it makes its decision with regard to the merger. I again reiterate that the third party participants should be placed in a position where they can make adequate representations with regard to such issues before the Tribunal makes its decision – something which is regrettably not the case at present.

43. What I can also say at this stage is that, as things presently stand, the relevant Government Departments consider that the refusal of the merging parties to make any tangible or enforceable commitments particularly with regard to procurement and small (especially BBEE) businesses necessitates their intervening more actively in the merger proceedings, and making submissions on public interest issues. Aside from the undesirability of submitting representations while negotiations facilitated by EDD are still on-going, detailed comments from those departments are, however, impossible at this stage. The record alone runs to almost 4000 pages, and was only received by EDD and DTI on 24 February 2011, and by DAFF a couple of days later. Furthermore, as I have mentioned, the relevant Government Departments have still not received all the information sought from the merging parties back in November 2010. EDD, DTI and DAFF are therefore forced to reserve their rights to seek an indulgence in order to submit fuller submissions at a later stage and, if necessary, to ask for the proceedings to stand adjourned to allow them to do so.

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44. What should be emphasized at this juncture as well is that the relevant Government Departments find it troubling that the merging parties are prepared only to give vague and general undertakings, which have no binding force, and are in any event expressed in aspirational terms, as well that the merging parties are not prepared to commit themselves to anything more concrete and definite. EDD, DTI and DAFF are also concerned that the merging parties initially failed to present a full picture as to the impact of the merger, were extremely dilatory in providing EDD and DTI with further data, and still have not provided all the information sought, or thus spelt out all the ramifications of the merger. Further apprehensions arise from the failure of the merging parties to honour their previous assurances to date. The relevant Government Departments are therefore understandably circumspect about the extent to which non-binding undertakings or handshakes can be regarded as adequate.
45. I should furthermore make it clear that the relevant Government Departments do not consider that the “*commitments*” quoted at page 5 (as well as pages 49 to 50) of the Commission’s recommendation are in any way adequate with regard to local procurement. They will provide no meaningful protection to local businesses or workers, even were they to be made conditions of the approval of the merger. The Walmart / Massmart merger is one which, in the view of the relevant Government Departments raises very significant public interest concerns, which need to be appropriately addressed and managed. As mentioned above, the concerns relate to matters such as: the fate of the local manufacture and supply industry (and, in particular, small businesses and BBBEE businesses involved in

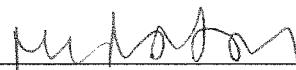
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manufacturing); the level of imports; the shape of the retail sector; food security; consumer interests; labour relations; and local ownership levels in the manufacturing and retail sectors. While the conditions in the “*South Africa Pledge*” appended hereto as “RD7” would themselves need refining and developing (and might, for example, ultimately be considered too rigid in some respects to comply with WTO guidelines), that document shows the kinds of obligations which should be imposed in order for the merger to be capable of being justified on public interest grounds under s12A of the Act.



RICHARD MICHAEL LEVIN

The deponent has acknowledged to me that he knows and understands the contents of this affidavit which affidavit was signed and sworn to before me in my office at _____ on the 28th day of February 2011 in accordance with Regulation No R1258 dated 21 July 1972 as amended by Government Notice R1648 dated 19 August 1977, as further amended by Government Notice R1428 dated 11 July 1980 and by Government Notice R774 of 23 April 1982.



COMMISSIONER OF OATHS

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"RL 1"



**economic
development**

Economic Development Department
REPUBLIC OF SOUTH AFRICA

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Dear Mr Manoim

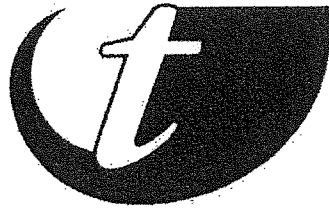
WALMART/ MASSMART ACQUISITION

I write to urgently request an opportunity to table a motion to intervene in the abovementioned proceedings. We make this request together with the Department of Trade and Industry.

Thank you for considering our request.

Kind Regards

PROF RICHARD M LEVIN
DIRECTOR-GENERAL
DATE: 24/2/2011



competitiontribunal
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24 February 2011

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Dear Sirs,

Wal-Mart Stores Inc AND Massmart Holdings Limited
Case No 73/LM/Nov10

Dear All

I have been approached urgently by Mr Robert Shaw of the Director General's office of the Department of Economic Development.

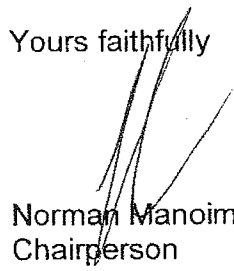
The Departments of Economic Development and Trade and Industry I am advised wish to make representations in respect of the above merger.

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I advised Mr Shaw that if the Departments wished to submit new information, not in the present record, they should do so by no later than 28 February 2011, the date scheduled for witness statements. If they only wished to make submissions on the existing record as supplemented by any witness statements filed on record by others, they would have till 9 March 2011.

Given the limited time periods I gave this direction urgently, but if any party has any objection to them they should notify the Tribunal's case manager Rietsie Badenhorst before 10 am on 25 February 2011.

Yours faithfully



Norman Manoim
Chairperson
Competition Tribunal

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economic development

Economic Development Department
REPUBLIC OF SOUTH AFRICA

Mr. Colin Coleman
Managing Director
Goldman Sachs
Johannesburg
South Africa

Dear Mr Coleman

Walmart acquisition of 100% share equity in Massmart

The meeting held between representatives of Walmart and Massmart, and representatives of the Department of Trade and Industry (dti) and the Economic Development Department (EDD) together with state agencies Khula Enterprises and the IDC on Thursday 7 October 2010 refers.

It was agreed in that meeting to follow up that initial meeting with engagements between yourselves and representatives of the state. I can confirm that Mr Andile Mabizela will be leading a team of experts to deal with the economic implications of this acquisition on several fronts. I am also advised that the first such technical engagement is confirmed for Tuesday 26 October 2010 at your offices.

A number of critical statements were made by various representatives in your delegation that regarding the Whilst I appreciate that the data request below may require more time responses from your side and may not be dealt with at the meeting scheduled for next Tuesday we would nonetheless request that you provide comprehensive responses within the next 30 days. They questions are:

1. Annual sales per division
2. Annual sales by branded stores
3. Percentage of annual sales from locally procured products for resale, per division
4. Percentage of annual sales from locally procured products for resale, per branded stores
5. Details of strategies (implemented or planned) to develop local suppliers and manufacturers?
6. Details of Massmart procurement strategy per branded stores
7. Details of Massmart strategies to increase local procurement for resale

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8. Detailed analysis of Massmart procurement per guideline consumer categories below or per Massmart specific categories (Percentages and Rand amounts of local procurement for resale, combining detailed split per countries sourced from per category):

- Consumer electronics
- Home furnishings
- Homebuilding
- Household appliances
- Housewares & specialties
- Leisure products
- Photographic products
- Apparel, accessories and luxury goods
- Footwear
- Food products
- Beverages (Brewing, Distillers, Soft Drinks)
- Packaged foods and meats
- Tobacco
- Household products
- Personal products

9. Massmart analysis of procurement trends over time in the above categories where available

10. Details of local procurement strategies for stores in the Rest of Africa?

EDD looks forward to a fruitful engagement on the planned transaction between both parties.

Kind regards,

PROF. RICHARD LEVIN
DIRECTOR GENERAL
DATE:19 October 2010

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economic development

Economic Development Department
REPUBLIC OF SOUTH AFRICA

Mr. Colin Coleman
Managing Director
Goldman Sachs
Johannesburg
South Africa

Dear Mr Coleman

Walmart acquisition of 100% share equity in Massmart

Further to my letter dated 19 October 2010 addressed to Goldman Sachs as advisors in this transaction we believe it would be beneficial to the the dti and EDD to receive, in writing, answers to the matters raised in the questions below from your principals.

The working group tasked with engaging yourselves tomorrow will raise these questions and other matters of a technical nature. Whilst we appreciate that the answers may not be readily available at such short notice we again request that your revert to us within 7 (seven) days of receiving this request.

Deal rationale and efficiencies

1. What is the planned post-acquisition incremental investment into Massmart over and above current plans (broken down into key elements such as distribution, new stores, other infrastructure)?
2. What are the expected efficiencies from this acquisition?
 - a. How will any cost savings be achieved (indicate relative importance of rationalising jobs, lowering wages, increasing capital intensity, increasing productivity, cheaper sourcing)?

Concentration and market conduct

3. Are there any overlaps between Massmart and Walmart's activities in South Africa?
 - a. Any market share accretion, if any (does Walmart have control over any operations in SA?)
4. Please provide a summary of anti-trust/competition cases and investigations against Walmart globally.

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Competitive strategy

5. Will the Massmart chains maintain their corporate identity post-acquisition or will some segments be rebranded as Walmart?
6. What are post-acquisition store expansion plans?
 - a. New stores – where will they be located, anticipated store formats (layout, size, product range)?
 - b. Planned changes to current operations
7. How is the product range in the various Massmart divisions expected to change post-acquisition?
 - a. Are any divisions expected to be divested post-acquisition?
 - b. Expected changes in product range across various chains (Masscash, Massdiscounters, Masswarehouse, Massbuild)
 - c. Expected changes in target market strategies across the various chains
 - d. Plans to increase market share in specific customer segments, locations, products – in essence, how is Walmart planning to compete with the incumbents in the retail trade and where is it hoping to gain market share or grow the market?
 - e. Plans to enter the financial services market and other related markets?

Sourcing, suppliers and buyer power

8. What proportion of Massmart product is currently sourced from imports? How is the overall import mix going to change post-acquisition?
9. What proportion of Massmart product is procured from small and medium enterprises? How is this expected to change post-acquisition?
10. How does Massmart's current food value chain operate (farm to shop floor) and how will this be altered post-acquisition?
 - a. Profile of most important food suppliers (volumes, value, local/regional/international split)
 - b. Food distribution mechanisms from supplier to store and anticipated changes

Labour market

11. What are the planned and anticipated employment effects (increases or declines in the workforce) within 1 year, medium term and long term (projections)?
 - a. Please break-down by skill level and nature of employment (contract versus permanent).
12. How much does Massmart currently spend on medical aid, retirement funds and fringe benefits for employees?

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- a. Please break-down by skill level and nature of employment (contract versus permanent).
13. What are the planned and anticipated wage effects within 1 year, medium term and long term (projections)?
14. What are the expected changes in the skills profile of employees?

Kind regards,

PROF. RICHARD LEVIN
DIRECTOR GENERAL
DATE: 25 October 2010

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SOUTH AFRICA PLEDGE

CONTEXT

The company and its social partners endorse and support the government's priority national project interest to secure existing employment and grow jobs throughout the retail supply chain. Within this context the parties have identified potential risks to the national priority to sustain and grow South African employment posed by the acquisition of Massmart by Walmart.¹

Mindful of the social and economic imperative of the country, and the requirements of the public interest in competition law, the social partners have undertaken a sustained process of engagement with government to find mutual consensus to mitigate any risk associated with the acquisition and address the core public interest concerns with the transaction.

WALMART STRATEGY

Walmart strategy is to drive growth when it enters new markets. The company intends to create many new opportunities in terms of affordable options for consumers, sustainable job creation, development of local businesses, workforce training and career development. This pledge provides greater detail on initiatives the company will pursue should the acquisition by Walmart of Massmart be approved by Competition Authorities.

PROCUREMENT FROM SA MANUFACTURING COMPANIES

Walmart and Massmart are committed to sourcing strategy that maintains and grows the percentage and value of South African manufactured goods in South Africa. Currently Massmart sources 60 % of its products from South African manufacturing firms. However the company is aware that this figure disguises the fact that much of the locally sourced product is sourced from package/labeling or assembly businesses which create no significant, competitive, long term manufacturing capacity that is capable of creating and sustaining significant employment.

¹ In addition the social partners are mindful of Clause 12 (3) of the Competition Act which reads: "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) particular industrial sector or region; employment; the ability of small businesses, or firms controlled or owned by historically disadvantaged persons to become competitive; the ability of national industries to compete in international markets."

In view of this and the countries national imperative to create and sustain manufacturing employment levels, the company is committed to building the capacity of SA manufacturing sector to deliver to local and global markets. Towards this end the company will:

1. Apply its sourcing strategy to promote and attract the development of a competitive, sustainable SA manufacturing capacity in preference to any foreign sourced goods. This means that the company will commit to buy South African manufactured products wherever possible and will invite South African manufacturers to quote on producing imported products where the domestic manufacturing capacity for these products already exists.
2. The company commits to support decent work and fair labour practices in the terms of their procurement policies and to procure products from South African manufacturers who comply with South African employment laws and applicable minimum employment conditions.
3. The company commits to make resources available for marketing and in-store promotion of South African manufactured products in accordance with its marketing strategy.
4. The company agrees that the measure for South African manufacturing is any product whose ex factory price includes at minimum of 51% of South African value add in its production. The company will participate with all other interested parties in the determination of any further definition of SA manufactured product and to contribute to the creation of a detailed measurements tool, underpinned by a database that captures and identifies SA manufacturing goods with a visible country of origin label
5. The company and its social partners commit to assisting South African manufacturers to improve their performance in respect of cost, quality and reliability of supply so as to develop the South African manufacturing industry to provide best of breed products and services to domestic and foreign markets.

PROCUREMENT FROM SOUTH AFRICAN MANUFACTURERS

The current levels of procurement of South African goods by Massmart and the commitments in respect of processes and targets are detailed hereunder

Category 1: General Merchandise excluding cellular phones (Top 20 representing 40% of total sales) commitments:

- For the purpose of ensuring a common understanding of this clause and the commitments therein, all parties have agreed that a South African manufactured product is any product whose ex factory price has a minimum of 50% plus one of value addition by a South African producer.

- The Company confirms that the current level of procurement of South African manufactured goods in the General Merchandise Category (ex Cellular phones) is 34.8%. The company will commit to raising the procurement of South African manufactured general merchandise by 5 % per annum such that:
 - 2011 = 34.8% of South African manufactured goods
 - 2012 = 39.8% of South African manufactured goods
 - 2013 = 44.8% of South African manufactured goods
 - 2014 = 50% of South African manufactured goods
 - 2015 onwards an additional 2% per annum of South African manufactured goods

Category 2: Food and Tobacco (Top 20 representing 58% of total sales)

- The Company confirms that the current level of procurement of South African manufactured goods in the food and tobacco category is 94.9%. The company commits to sustaining a 95% local procurement for food and tobacco

Category 3: Liquor (top 7 representing 91% of total sales)

- The Company confirms that the current level of procurement of South African manufactured goods in the liquor is 74.4%. The company commits to sustaining a 75% local procurement for liquor

OPENING UP OPPORTUNITIES FOR SA GOODS TO ACCESS WALMART GLOBAL SUPPLY CHAIN

The entry of Walmart into SA creates opportunity for locally produced products to be distributed globally around the world. For example: skin and hair care products or the export of South African produced wine or fruit and vegetable products or food processing all are important opportunities.

The company is committed to a program that connects local suppliers with Walmart's global supply chain, creating new and growing sales opportunities for the South African producers. Walmart is already driving international export of South African-produced wine and fruit and vegetable products. (PROVIDE DETAIL OF THESE PROGRAMS AND THE EXPANSION OF THEM TO NEW PRODUCT RANGES)

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BBBEE AND SMALL ENTERPRISE DEVELOPMENT

Massmart is totally committed to the South African BBBEE law and practice and Walmart has encouraged Massmart to take more of a leadership role in expanding the BBBEE and small and medium enterprise program for the benefit of local citizens. We will foster stronger relationships with local manufacturers including small and medium sized suppliers; BEE and black owned suppliers. The agricultural sector is fundamental to South Africa's economic development and we will also utilize Walmart's significant experience in working directly with small and local farmers to help improve the quality of their produce, become more efficient, competitive and sustainable, and grow their businesses and their incomes. Walmart has been recognized as a leader in sustainable agriculture practices around the world, and particularly in emerging economies. (PROVIDE DETAIL OF THESE PROGRAMS)

LABOUR STANDARDS

Labour agreement to be inserted here

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CONCERNS OF THE DEPARTMENTS OF ECONOMIC DEVELOPMENT, TRADE AND INDUSTRY AND AGRICULTURE, FORESTRY & FISHERIES WITH REGARD TO THE MASSMART / WAL-MART MERGER

Some initial views and comments

1.

1.1 Wal-Mart is the largest company in Fortune 500 2010 rankings, it operates in 15 countries with 55 different brands and has 8 838 stores. Its revenue is put at \$408 billion (by comparison the GDP of South Africa is \$354 billion). In 2004, if measured as a country, Walmart would have been China's eighth-largest trade partner.

1.2 Due to its size, buying power and procurement capabilities, Wal-Mart is able to offer significantly lower prices in its stores. Wal-Mart has a philosophy of offering the best possible pricing to its customers ('everyday low prices') and utilizing its world wide experience, supply chain and economies of scale for purchases to achieve these goals. Walmart has made increasingly centralised procurement a critical part of its business, which in turn fosters rising imports especially from Asia to the US, as well as to other countries in which it has established itself..

1.3 In the early '00s, Wal-Mart established an internal global procurement organisation in Shenzhen, which expanded to operate in Shanghai, Bangladesh, Dubai, India, Indonesia, South Korea and Pakistan. In the mid-'00s Wal-Mart's global procurement division had 1500 employees sourcing from 6,000 factories. Some 80% of these factories were in China, but Wal-Mart had merchandise buyers in United States, Puerto Rico, Canada, Mexico, Argentina, Brazil, China, Korea, Japan, Germany, and the United Kingdom.

1.4 The growth and profitability of Wal-Mart in recent years has accompanied its shift to cheap imports whereby in 1995 only 6% of Wal-Mart's goods were imported, but by 2005 this ratio had increased to 60%.

1.5 In some countries, notably Germany, UK and the USA, the effectiveness of Wal-Mart's pricing strategy has been challenged and they were accused by Competition Authorities of anti-competitive practices and predatory pricing to drive out competition (particularly small and medium competitors) in the short-run.

1.6 It was stated unequivocally during the Competition Commission investigation that Massmart would utilize the procurement and supply chain capabilities of Wal-Mart, "the transaction will enable Massmart to gain access to Wal-Mart's procurement capabilities through a buying agreement and various other services (i.e. technology software and hardware, merchandise skills and other technical skills and services)" (Competition Commission report; 11 Feb 2011; item 2.2.2 pg 9).

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1.7 In 2009, Massmart was South Africa's third-largest retail conglomerate by turnover, the largest wholesaler of basic foods and the largest retailer of building supplies for the public. It had nine wholesale and retail chains with 232 stores in South Africa (up from 95 outlets in 2000). It employed 25,000 full-time equivalents, twice as many as in 2000. Its turnover in rand had climbed from R10 billion in 2000 to approximately R50 billion today.

1.8 Massmart pre-merger announcements had indicated that it had plans to expand by up to 20% per year and to increase its presence in the retailing of grocery products. With the backing of Wal-Mart it is possible that these expansion plans would intensify and include expansion into SADC and sub-Saharan African countries.

1.9 Massmart has a significant influence in the market and a change in its procurement practices would have a knock-on effect in the market. In recent years there has been a trend for supermarkets to facilitate imports, which could be further aggravated by this merger.

2.

2.1 In general terms mergers are (amongst other reasons) undertaken to improve market share; diversify into new markets; utilize excess cash reserves profitably; create competitive advantage through sharing of knowledge, systems and processes; and generate costs savings for both companies thereby improving the return on capital. While there are clearly several factors driving the merger of Massmart and Wal-Mart, by their own admission, sharing of knowledge, systems and processes and generating costs savings are strong drivers in this merger.

2.2 An impact of a shift in the procurement patterns of Massmart to draw on the buying power and systems of Wal-Mart means that the merger has the strong potential or likelihood to result in 'a race to the bottom' or cause a 'knock on effect' for all of the large South African retailers. Large retailers in South Africa procure a significant proportion of their products from local suppliers, as does Massmart. Should Massmart utilize the Wal-Mart supply chain, as would be expected as an outcome of the merger, and there is an increase in imports of cheap products that were previously procured locally then competing retailers would equally need to source similar imported cheap products in order not to lose market share.

2.3 The impact of a shift from local production to imported goods would negatively affect the industrial capacity of South Africa and result in job losses in production value chains and suppliers to Massmart. The impact has the potential to be broader than just the direct jobs lost from a cancellation of a contract but may result in an entire industry closing down as all major retailers shift their procurement to imports. The electrical goods sector including white goods, agro-industrial, and agriculture sectors, and the general merchandise products sectors including those with supply chains into, plastics, steel, wood and paper have the potential to be adversely affected. Precise information would be submitted once Massmart has provided a list of all the products that it sources locally and in what quantities.

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2.4 From their own data Massmart currently procures 97% from local suppliers, of which it is estimated 65% is manufactured locally (ranging from 95% to 5% local content / value addition). The Competition Commission found in their investigation that the electrical goods industry is most at risk as Massmart is the largest customer for almost all of the companies that manufacture or part manufacture electrical goods. To this end the Competition Commission report states that “the Commission acknowledges a potential concern in terms of the impact that the transaction may have on local manufacturing employment should any foreclosure occur post-merger”. The Commission was not concerned about the potential negative impact to supplier industries due to the parties commitments that local procurement would not significantly change post merger and because of the engagements the parties were having with the Economic Development Department to resolve any outstanding issues.

2.5 In addition, the situation as outlined above would apply to goods in the agro-processing and general merchandise sectors and a shift to imports could compromise South Africa’s food security. The milk shortage experienced in South Africa in 2007 is evidence of the dangers of imports undercutting local agriculture or pushing prices down and thereby causing farmers to go out of business, shift to other product lines or move to non-food agricultural activities (e.g. game farms); however when the imports are no longer available due to external factors then extreme shortages can occur. During May 2007 the international milk shortage was compounded by a local drought for those farmers remaining in the industry.

2.6 The production, supply and sale of agricultural products as well as the supply and value chain of these products in the agro-industrial sector constitutes a significant proportion of GDP and employment in South Africa. In addition, the broad sector is critical to maintaining food security, reducing the negative trade balance and growing the sector to support job creation and rural development.

2.7 The government is therefore compelled to ensure that local procurement of primary agriculture products and value added agriculture products is maintained and increased over time, and contribute to the countries prospects for sustainable economic development.

2.8 Dependency on imports of agricultural or agro-processed goods creates a vulnerable situation for a country when external policy changes occur; such changes may include export bans by agriculture exporters and have occurred during times of distress.

3.

3.1 Wal-Mart has publically expressed a commitment to continuing Massmart’s practice of sourcing a significant portion of its products from local suppliers.

3.2 Wal-Mart has confirmed these public commitments in meetings with the Minister of Economic Development.

3.3 Massmart has confirmed publically and to the Competition Commission that they will continue with their practice of sourcing a significant portion of their products from local suppliers.

3.4 Massmart has confirmed in meetings with and correspondence to the Economic Development Department that they will continue with their practice of sourcing a significant portion of their products from local suppliers.

3.5 The Economic Development Department alongside the Departments of Trade and Industry and Agriculture are making this submission to the Competition Tribunal because despite the abovementioned assurances, the specific confirmation requested by the Economic Development Department during the dialogue process has not been given by the merging parties and Massmart has not honoured its commitment to provide a full breakdown of all the products which are locally sourced.

3.6 The department is not opposing the merger but is concerned that the parties intend to backtrack on their vague commitments once the deal is confirmed by the competition authorities; and it is looking to the Competition Tribunal to impose conditions on the merger relating to local procurement practices based on substantial public interest grounds as per 12A of the Competition Act.

3.7 It is the contention of the Government Departments making this submission that the potential negative outcomes of the merger have substantive public interest and could gravely impact on South Africa's production and manufacturing sectors, employment and food security.

3.8 The conditions sought by the Government departments submitting this application are for the merging parties to at least maintain or increase the percentage of pre-merger local procurement by product category (as per data provided by Massmart); and to increasing it over time as the company further expands into the retailing of groceries (which currently have a higher local manufactured content at 76%) and other geographical areas, as well as, in support the industrial development goals of the South African government.

3.9 That such a commitment finds expression in an appropriate and legally binding form which includes a binding commitment to maintain and scale up local procurement and to exclude all imported products which do not conform to standards as described by the South African Bureau of Standards (SAB's).

28 February 2011

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