DLA CLIFFE DEKKER HOFMEYR

AFRICAN
INSIGHTS IN COMPETITION LAW

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AFRICA RULES, OK!

Africa's developing economies present a compelling proposition for investors and companies wishing to expand their horizons and tap new markets. Some anticipate African consumer spending to reach the US$1.5 trillion mark by 2020, others project sub-Saharan Africa's gross domestic product (GDP) to surpass China's within a decade.

Tempering the obvious opportunities are numerous challenges: differing languages, legal systems, cultures and levels of economic sophistication, together with social and political flux, all combine with the sheer size of the continent to indicate a clear need for due diligence when contemplating a push into Africa.

The first scramble for Africa at the end of the 19th century was characterised by a distinct lack of rules and regulations, with colonists making things up as they went along. However, one legacy of the colonial era is an abiding taste for bureaucracy and this time around, those wishing to stake a claim will need to do so within a regulatory paradigm jealously guarded by the State. One particular area of burgeoning regulation is competition law.

The rationale for competition law regulation in Africa lies somewhere between a hunger for foreign currency and a genuine desire to ensure that fledgling but growing economies are responsibly cultivated and free from abuse, monopolisation or extractive foreign investment policies. Between 1990 and 2013, 26 African countries enacted a dedicated competition law regime, and that number continues to grow. Of these, many previously 'toothless' enforcers are now gearing up to actually administer the law, spurred on by treaty obligations, international best practice and the support of global networks such as the Organisation for Economic Co-operation and Development (OECD), the International Competition Network and other organisations.

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A few cases in point:

- Botswana's Competition Authority (Authority) opened its doors in 2011, and now has 33 staff members including 15 economists and four lawyers. The last two years in particular have been prolific, with over 20 dawn raids conducted and market inquiries launched into the retail, poultry and cement industries. On the merger front, the Authority has sought to block mergers that are perceived to narrow citizen empowerment, citing public interest in having sufficient local shareholding in key markets such as insurance and healthcare.

- Kenya's current Competition Act also came into force in 2011. While its enforcement record has been patchy until recently, it is clearly gearing up to make an impact. New filing fees for mergers will alleviate budgetary constraints and in May 2014 the Competition Authority of Kenya announced its intention to probe players in the agricultural sector (tea and coffee) as well as to launch an investigation into the edible oils market, where local prices have been unresponsive to reductions in the cost of imported feedstock.

- The Competition Commissions of Namibia and Mauritius have both announced plans to introduce a formal corporate leniency policy to bolster their cartel-busting capabilities while the Zambian Authority is moving from its preoccupation with consumer protection and mergers to competition enforcement, having recently imposed fines for price-fixing in the auto-repair industry and conducted dawn raids on two fertiliser companies.

- In April 2014, the African Competition Forum (ACF) tabled reports on the key sectors of sugar, poultry and cement in a number of countries including Botswana, Namibia, Tanzania, Kenya, South Africa and Zambia. The ACF began as a loose convention of African regulators, but is now a formal network covering 41 out of 54 African States. Although it has no enforcement powers of its own, it provides a regular forum for regulators to swap notes and get up to speed with enforcement priorities and best practice throughout the continent. The ACF is also likely to help accelerate the introduction of competition laws in countries so far without.

Although there have been various attempts (through regional economic communities and over-arching conventions) to harmonise African competition laws and policy to facilitate free trade and consistency, the fact is that even where the law appears familiar, policy, process and implementation can vary significantly. What is certain is that from Cape to Cairo, local regulators are increasingly setting rules for doing business in Africa. The thrill of flying by the seat of one's pants is being replaced with a need to get to grips with the legal niceties and an understanding that competition regulators are demanding to be taken seriously.

Whether competition law brings regulatory certainty or red-tape is a question of perspective. Either way, as the law of the jungle becomes substituted for the rule of law, companies that take heed and conduct themselves responsibly within the regulatory paradigm can only prosper.

Chris Charter

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COMESA COMPETITION COMMISSION PROVIDES UPDATE ON MERGER REGIME AT 10TH IBA CONFERENCE IN CAPE TOWN

Members of the competition law department of Cliffe Dekker Hofmeyr Inc. recently attended the 10th International Bar Association (IBA) Competition Conference in Cape Town where practitioners from around the world gathered to share views, knowledge and experience. Of particular interest to all in attendance was an address by Willard Mwemba, head of mergers and acquisitions of the COMESA Competition Commission (CCC), on the latest developments of the Common Market for Eastern and Southern Africa (COMESA) merger regime.

The CCC has been operative since 14 January 2013 and, as at the beginning of March 2014, had been notified of 25 mergers. From a dealmaker perspective, some of the main criticisms of the COMESA merger regime have been the broad jurisdictional thresholds to determine when mergers are notifiable, including:

- the absence of monetary thresholds;
- the exorbitant filing fees;
- the lengthy review period of 120 business days (which may be extended); and
- the uncertainty regarding the parallel applicability of national merger notification requirements.

The CCC indicated to the IBA that, having identified areas of improvement, it has mandated the International Finance Corporation of the World Bank Group to make recommendations regarding the practical aspects of the merger regime. The first workshop discussing the suggested amendments took place in April 2014. Specifically, the consultant will be reviewing the thresholds for notification, the effects based test for notifications and the filing fee.

Once the consultant has made recommendations, these will be subject to the acceptance of the Council of Ministers and will need to be ratified by the individual Member States. Thus whilst reforms are underway, they are not expected any sooner than the end of this year. In the meantime, the CCC also indicated that it is developing guidelines aimed at increasing transparency and certainty in respect of the merger notification requirements, which will be published on its website in the short-term.

Thresholds for notification

Currently, a merger is notifiable to the CCC where both the acquiring firm and the target firm or either the acquiring firm or target firm operate in two or more Member States (referred to as a 'Regional Dimension') and the threshold of combined annual turnover or assets is exceeded.

Whilst the Regulations provide for the publication of a threshold of combined annual turnover or assets in the COMESA region, at or above which a merger will become notifiable, this threshold is currently set at zero, meaning that once a merger has regional dimension, it is notifiable under the Regulations. In April 2013, the CCC issued draft merger assessment guidelines wherein it indicated that a period of 'testing' will need to be endured before the CCC will be in a position to set realistic monetary thresholds.

It is submitted that the introduction of reasonable monetary thresholds for notifiability will add certainty and transparency to the merger regime, which should ultimately facilitate investment into the region. The introduction of thresholds will also assist the CCC in ensuring that its time and resources are not wasted on transactions that do not warrant notification in the first place.

The effects test

The Regulations apply to all economic activities within, or having an effect within, the Common Market. More particularly, the Regulations provide that they apply to conduct covered by the COMESA merger control regime which have an appreciable effect on trade between Member States and which restrict competition in the Common Market.

This requirement of an appreciable effect could conceivably be used to avoid a notification, which would otherwise be caught by the broad jurisdictional thresholds referred to above, with no obvious effect on competition in COMESA. For example, if the transaction in question does not involve any horizontal or vertical relationships between the parties, there ought to be no restriction on competition. Similarly, a transaction involving firms that do not engage in cross-border trade may not affect trade between Member States.

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The CCC's current view is that all transactions with a community dimension are notifiable. In an attempt to prevent self-assessment, the CCC recommends that parties claiming the absence of an appreciable effect, submit a complete merger notification without paying the filing fee. After an assessment, the CCC will inform the parties whether or not they have been excused from notifying and if not, the CCC will request payment of the filing fee. As at the beginning of March 2014, the CCC confirmed that it had provided four clearances on this basis.

A mechanism to provide a quick answer in respect of transactions that are not troublesome will be welcomed. However, given the current process still requires firms to complete the burdensome information requirements of the prescribed merger forms, it is submitted that this is still not an ideal solution.

Filing fees

The required filing fees are the lower of (1) US$ 500,000 or (2) 0.5% of the parties' annual turnover or combined value of assets in the COMESA region (whichever is the higher). This means that for acquiring firms that have assets or turnover in COMESA of around R1 billion or more, the US$ 500,000 filing fee will be higher than in any other regime.

As a potentially exorbitant addition to transactions costs, it is submitted that the current filing fees are a significant deterrence to investment and must be amended.

Impact on national merger regimes

According to the CCC, one of the main advantages of the COMESA merger regime, is that it is a 'one stop shop' for COMESA countries, reducing the burden of having to notify in multiple jurisdictions, as well as 'filling the gap' in respect of those Member States that do not have their own competition laws.

The Regulations bind each Member State to take steps "to confer upon the regulations of the Council the force of law and the necessary effect within its territory." A significant problem is that not all of the Member States have domesticated the Regulations to bring it into force as a matter of domestic law, nor have they all amended their local legislation to incorporate the Regulations.

Thus there remains a view, amongst some Member States, that national notifications will be required in parallel with any notifications to the CCC. Opinions differ on this issue between COMESA Member States and given the potential for risks for failing to notify mergers across individual Member States, it is necessary to give these requirements careful consideration.

When to notify

The Regulations imposes an obligation on the parties to notify a merger to the CCC no later than 30 days of the parties' decision to merge.

In principle, a penalty of up to 10% of either or both the merging parties' annual turnover in the Common Market may be levied if the parties fail to give notice within 30 days of the 'decision to merge' and a notifiable merger carried out in contravention of the Regulations shall have no legal effect and no rights or obligations imposed on the participating parties by any agreement shall be legally enforceable in the Common Market.

The Regulations do not provide any guidance as to when a 'decision to merge' can be understood to take place. When the CCC commenced operations, it initially advised that all that was needed was a concurrence of minds between the parties to a merger that they would merge. However, at the IBA Conference, the CCC confirmed that it now considers a decision to merge to have been made only when the parties sign a specific agreement to merge, or even when board resolutions are taken. Practically speaking and given the current state of flux with this new regulator, it seems unlikely that the CCC will seek to prosecute merely for a late filing, and on previous occasions the CCC has indicated that a filing made in good faith will not be met with questions as to when exactly the decision to merge may have taken place.

Susan Meyer

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KENYA'S COMPETITION AUTHORITY INVITES COMMENTS ON PROPOSED MERGER FILING FEES

Kenya's competition authority (CAK) has announced that it intends charging merger filing fees from July 2014.

The CAK, mandated to approve all mergers and takeovers in Kenya, is authorised by Kenyan competition legislation to make rules prescribing merger filing fees. However since its inception, it has reviewed over 150 merger notifications without charging any filing fees.

The CAK has recently published a notice in terms of which it proposes a tiered fee structure based on the combined turnover or assets of merging parties in Kenya, whichever is the higher:

TIER	COMBINED TURNOVER OR ASSET VALUE (whichever is the highest)	FILING FEE (Kenyan shillings)	ESTIMATED CONVERSION (Rands)
Higher threshold	KSh50 billion or higher	KSh2 million	R238,000
Lower threshold	Between KSh1 billion and KSh50 billion	KSh1 million	R119,000
Health sector	Between KSh500 million and KSh1 billion	KSh500,000	R60,000

Mergers that fall below the lower threshold will not attract a filing fee.

In media reports, the Director General Mr Wang'ombe Kariuki has noted that the fees will enhance the CAK's independence from the Treasury, which currently funds the regulator's operations. He has also defended the fees as being in line with global competition policy best practices. Given the quantum he claims the fees are unlikely to deter investment.

It is not unheard of for competition regulators to charge fees in order to cover their merger analysis costs relating to *inter alia* staff and board member remuneration, office overheads, research and field trips. In comparison with South Africa's current tiered system of R100,000 for intermediate mergers and R350,000 for large mergers, the proposed filing fees do not appear unreasonable.

Given that Kenya is a Common Market for Eastern and Southern Africa (COMESA) Member State, there is some concern that firms doing business in more than one Member State may, to the extent that national competition authorities retain parallel jurisdiction, face filing fees in both COMESA and the relevant Member State(s). For example, the current indications are that the CAK is advising parties to notify transactions to it as well as the COMESA Competition Commission as Kenya has not yet amended its own national legislation to allow the COMESA merger regime to trump its national requirements. The risks of having to notify and pay filing fees to both regional and national jurisdictions increases the costs and uncertainty of doing business in Africa and, if not adequately resolved, may well deter investment.

Susan Meyer and Jennifer Begg

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FAILURE TO NOTIFY IN KENYA MAY RESULT IN CRIMINAL SANCTIONS

During the latter half of 2013, guidelines were published in Kenya which set out that proposed mergers between firms with a combined turnover or asset value (whichever is the highest) of KSh1 billion (approximately US$11,520,000 or R121,000,000) requires compulsory notification to the Kenyan competition authority (CAK). Effectively, therefore, prior to the introduction of this compulsory notification threshold, all transactions which met the definition of a merger required notification to the CAK.

Under the Kenyan Act No 12 of 2010 (Kenyan Act) implementing a merger without obtaining approval from the CAK is an offence and the party concerned "shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings, or both". Moreover, the CAK may seek to impose a financial penalty of up to 10% of the gross annual turnover derived by the merging parties in the preceding financial year.

Earlier this year, the CAK sought to criminally penalise (by lodging a complaint with the Director of Public Prosecution, which subsequently referred the matter to the Directorate of Criminal Investigations) the executives of Ipsos for failing to secure such regulatory approval prior to implementing its £525 million acquisition of the Synovate division of the Aegis Group Plc's in Kenya. The acquisition dates back to October 2011 and is reported to have created the world's third-largest global market research company.

The CAK's decision to seek criminal sanctions for failing to obtain regulatory approval demonstrates that competition law enforcement in Kenya is on the rise. At this stage, it is unclear whether the Directorate of Criminal Investigations will also require that the merger be unwound. The unwinding of a merger which was implemented in 2011, will place the merging parties in the unenviable position of having to unbundle a merged business which has been operating as such for almost three years.

In transactions involving firms with operations in Africa (and in certain instances even sales alone into a particular African country is enough to confer jurisdiction), it is imperative for transacting parties to determine whether the transaction will have an effect in any African jurisdictions which have merger regulations and then to ensure that the relevant authorities are notified accordingly. Given that Kenya has not yet incorporated the Common Market for Eastern and Southern Africa (COMESA) regulations into its own national laws, it remains to be seen whether the CAK will seek to impose similar penalties on firms failing to notify domestically in Kenya where those firms have notified the COMESA competition authorities. Clearly, there an urgent need for clarity in this regard.

Kayley Keylock and Christelle Wood

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COMESA APPROVES MERGER BETWEEN COURIER COMPANIES

The transaction involved the purchase by the FedEx Group, the global courier delivery services provider, of the business operations and assets of its licensees in the Supaswift Group in a number of countries in Africa, including three Common Market for Eastern and Southern Africa (COMESA) Member States: Malawi, Swaziland and Zambia. The Supaswift Group companies concerned, offer small package and freight express delivery services under license from the FedEx Group, under the FedEx brand in Swaziland, Malawi and Zambia.

From FedEx's perspective the rationale for the transaction was to enable FedEx to own its operations in the countries concerned as so to improve service levels on a global scale to meet the growing needs of customers in Africa by providing an improved value proposition and comprehensive range of services.

On 19 March 2014, COMESA's Committee of Initial Determination (Committee) approved the merger finding that the proposed merger is not likely to substantially prevent or lessen competition and will not be contrary to public interest in the Common Market. Moreover, the Committee was satisfied that the merger is in line with the objectives of the COMESA Treaty in that it does not negate the single market objective.

Cliffe Dekker Hofmeyr Inc. acted on behalf of the FedEx Group in obtaining unconditional approval of the merger from the COMESA Competition Commission.

Kayley Keylock

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