25 APRIL 2018

COMPETITION ALERT

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COMPETITION AUTHORITIES SEEK TO REGULATE ‘BUYER POWER’

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CLIFFE DEKKER HOFMEYR

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It is an accepted competition law principle that firms are not prohibited from being dominant in a market. What is prohibited: an abuse of that dominance. Typically, competition legislation regulates, among others, the business practices of dominant suppliers of goods and services to ensure that they do not engage in conduct which amounts to an abuse of dominance. Some countries are now attempting to regulate the business practices of dominant purchasers of goods and services to make sure that they are not anticompetitive. This is certainly the case in South Africa and Kenya which seek to regulate 'buyer power'.

In South Africa, the Competition Amendment Bill 2017 (Bill) seeks to prohibit dominant buyers from "buying goods or services on condition that the seller accepts an unreasonable condition unrelated to the object of a contract" and/or "requiring a supplier to sell at an excessively low price".

A conventional interpretation of buyer power refers to a situation where demand in a market is sufficiently concentrated, allowing buyers of goods and services to exercise market power over selling firms by forcing them to reduce prices and/or output below levels that would ordinarily emerge in a competitive market.

In South Africa, the Competition Amendment Bill 2017 (Bill) seeks to prohibit dominant buyers from "buying goods or services on condition that the seller accepts an unreasonable condition unrelated to the object of a contract" and/or "requiring a supplier to sell at an excessively low price". Moreover, if there is a prima facie case that a dominant buyer "required a supplier to sell at an excessively low price, the dominant firm must show that the price was reasonable." Save for requiring the Competition Commission to publish guidelines on the relevant factors and benchmarks for determining whether a price is excessively low, the Bill takes the concept of buyer power no further.

In Kenya, the proposed rules on abuse of buyer power (Rules) do go further, providing a list of acts which would amount to buyer power. These include: (i) delayed payment by a buyer without reasonable justification; (ii) unilateral termination or the threat of termination by a buyer of a commercial relationship without notice, short notice or without objectively justifiable reasons, (iii) refusal to accept returns without justifiable reasons, (iv) transferring costs or risks to suppliers in relation to promotional advertising; and (v) demand for preferential terms by buyers which are unfavourable to suppliers or demand limitations on suppliers to other buyers.

SEXUAL HARASSMENT IN THE WORKPLACE

CLICK HERE here for the guideline.

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In the South African context, the proposed amendments therefore increase the risk of large buyers being accused of buyer power and having to defend what may be an unjustified multiplicity of complaints.

The foundation for the abuse of supplier power, leading to adverse competitive effects, is well established, for example, dominant suppliers charging an excessive price, entering into exclusive supply/dealing arrangements with specific firms to the exclusion of others, refusing to supply scarce goods/services). The exertion of buyer power will, however, not necessarily result in anti-competitive effects. What the Bill and Rules seek to do is place supplier power and buyer power, on equal footing.

Buyer power may have pro-competitive benefits. For example, buyer power may place a firm in a better negotiating position, incentivises supplier firms to be more competitive, which in turn may result in lower prices and other benefits for consumers.

While the Kenyan legislation seeks to identify the criteria to determine the basis for buyer power, the proposed South African amendments are less clear. In the South African context, the proposed amendments therefore increase the risk of large buyers being accused of buyer power and having to defend what may be an unjustified multiplicity of complaints simply because they attempted to negotiate competitive terms with suppliers or took a business-savvy decision. The ease with which a supplier could allege an abuse of power if a large firm seeks to negotiate on price, declines to contract or switches supply to a cheaper source exposes larger firms to a risk of buyer-power accusations, which, it is submitted, may have a chilling effect on commercial negotiation and competition.

Andries Le Grange and Nabeela Edris

KENYA TO INTRODUCE FINANCIAL THRESHOLDS FOR MERGER NOTIFICATION

Certain African countries still require notification of all mergers regardless of their effect. In Kenya, this is set to change.

Merger notification is not required where the parties to the merger have a combined annual turnover and/or gross asset value in Kenya, whichever is the higher, of below 500 million Kenyan Shillings.

It is widely agreed that competition authorities should only assert jurisdiction over merger transactions if the transactions have an appreciable competitive effect. Yet certain African countries, almost a decade after implementing competition rules, still require notification of all mergers regardless of their effect.

In Kenya, this is set to change.

Presently, all mergers in Kenya, irrespective of their value, require mandatory notification to the Competition Authority of Kenya (CAK). Upon notification, the CAK assess the merger and advises whether the merger is one which will be excluded from a full investigation (meaning the merger can be implemented in Kenya), or one which qualifies for a full investigation (meaning that further information will be required and a deeper investigation of the merger will be conducted). Whichever way it goes, the parties incur the costs of filing a notification and experience delays caused by the CAK's assessment of the notification (since implementation prior to approval is prohibited).

The CAK's new proposal to merger notifications is set out below.

Mergers exempt from notification

Merger notification is not required where the parties to the merger have a combined annual turnover and/or gross asset value in Kenya, whichever is the higher, of below 500 million Kenyan Shillings (KSh).

Converting this value to South African rands (R), equates to only some R60 million. This value is a stark contrast to the minimum combined threshold of R600 million applicable in South Africa (plus the additional hurdle that the South African target firm on its own must have a value of R100 million). It nevertheless does offer some reprieve, particularly in situations where merger parties are concluding a purely South African transaction (that is, one involving only South African firms), and it is found that during the preceding financial year, the South African target firm sold some products from South Africa directly to customers in Kenya. Under the current Kenyan law, the South African firms would need to notify their merger to the CAK, regardless of the fact that the Kenyan sales may have been entirely negligible. In terms of the proposed new law, only if the combined value of these sales exceed KSH 500 million, will the merger become notifiable in Kenya.

Mergers may be excluded from notification

Merger transactions between undertakings which have a combined annual turnover or gross asset value in Kenya of between KSH 500 million and KSH 1 billion may be considered for exclusion. This means that the undertakings will still need to notify the CAK of their merger. The CAK will then decide whether to approve the merger or call for a full investigation. The CAK will now have 14 days to make this decision.

Full mergers subject to notification

It is mandatory to notify a merger where the target firm has an annual revenue or gross asset value of KSH 500 million, and the parties' combined annual turnover and/or gross asset value, whichever is the higher, meets or exceeds KSH 1 billion.

KENYA TO INTRODUCE FINANCIAL THRESHOLDS FOR MERGER NOTIFICATION

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Merger notifications triggered in Kenya and COMESA should be notified only to the COMESA Commission. In other words, there is no need for businesses to make dual-filings.

Notwithstanding the above, where the acquiring firm has an annual revenue or gross asset value, whichever is the higher, of KSH 10 billion, and the merger parties operate in the same market and/or the merger gives rise to vertical integration, then regardless of the value of the target firm, mandatory notification to the CAK is required. An exception to this rule is that if the merger transaction meets the thresholds for notification in the Common Market for Eastern and South Africa (COMESA), then the CAK will accede to the jurisdiction of the COMESA Competition Commission (COMESA Commission) and no merger filing will be required in Kenya.

By way of explanation, Kenya is a member state of COMESA. The COMESA Commission came into operation during 2014, and is a regional competition authority having jurisdiction over competition law matters within its nineteen member states (comprising Zambia, Zimbabwe, Swaziland, Mauritius, Kenya, Burundi, Comoros, DRC, Djibouti, Eritrea, Ethiopia, Libya, Madagascar, Rwanda, Seychelles, Sudan, Uganda, the Republic of Egypt and Malawi). The CAK and COMESA Commission have reached an understanding in terms of which, among others, merger notifications triggered in Kenya and COMESA should be notified only to the COMESA Commission. In other words, there is no need for businesses to make dual-filings.

Interestingly, Kenya is also a member state of the East African Community (EAC) and, in April 2018, the East African Community Competition Authority (EACCA) became operative. The EACCA is charged with investigating competition law matters within its five partner states (comprising Burundi, Kenya, Rwanda, Tanzania and Uganda (South Sudan is not yet fully integrated into the EAC)). The CAK and EACCA have not entered into any memorandum of understanding similar to the one between the CAK and COMESA Commission, and it remains to be seen how merger transactions implicating both Kenya and the EAC will be treated.

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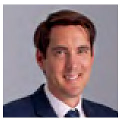
For more information about our Competition practice and services, please contact:



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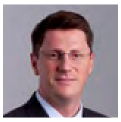

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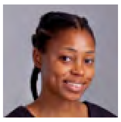

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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