

An active merger control regime in Tanzania

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In the context of international mergers and acquisitions, obtaining competition approval across Africa is becoming increasingly important as more African countries implement merger control regimes. Tanzania is no exception. The competition law regime in Tanzania is governed by the Fair Competition Act¹ (the "Act") which came into effect in 2004. The Act is supplemented by the Fair Competition Commission (the "FCC") Procedure Rules, 2010 (the "FCC Rules"), which form a critical part of the merger control regime. The FCC is the regulatory body tasked with the enforcement of the Act.

The Notification Threshold

The Act defines a merger as an acquisition of shares, a business or other assets, whether inside or outside Tanzania, resulting in the change of control of a business, part of a business or an asset of a business in Tanzania. There is a gap in the legislation insofar as a "change of control" is not defined.

Notification is mandatory where the value of the merger is above a value prescribed by an order published in the Gazette². The FCC published the Fair Competition (Threshold for Notification of a Merger) Order 2006, providing that mergers must be notified where the combined turnover or asset value of the merging entities exceeds 800,000,000 Tanzanian shillings ("TZS") (approximately US\$524,188). As there are no specific provisions relating to the calculation of the threshold, it is arguable that the threshold test is not limited to the parties' turnover or assets in Tanzania.

The Substantive Test

The FCC may prohibit a merger where it "creates or strengthens a position of dominance in a market".³ This is a two-part inquiry into whether the merged entity would, (a) acting alone, profitably and materially restrain or reduce competition in that market for a significant period of time; and (b) possess a share of the relevant market exceeding 35%. In addition to other factors, the FCC considers:

- competition from imported goods and services supplied by persons not resident or carrying on business in Tanzania; and
- the economic circumstances of the relevant market, including the market shares of persons supplying or acquiring goods or services in the market, the ability of those persons to expand their market shares and the potential for new entry into the market.

The Notification Procedure

¹ Fair Competition Act, No. 8 of 2003.

² The Government Gazette of the United Republic of Tanzania.

³ Section 11(1) of the Tanzanian Competition Act.

The notification procedure in Tanzania allows for a period within which the authorities determine whether or not they will investigate the merger. Within 5 business days after receiving a notification, the FCC delivers a notice of complete or incomplete filing. An initial period of 14 business days then applies during which the FCC determines if it will examine the merger.. If no communication is received from the FCC within 14 business days, the parties may proceed with the merger. If the FCC decides to examine the merger, the merger may not be implemented for 90 calendar days, during which the FCC will complete its examination. The FCC may extend this by exceeding maximum of 30 calendar days.

The FCC will approve a proposed merger conditionally or unconditionally, or prohibit the transaction. The FCC is an active regulator and it is not uncommon for the FCC to impose conditions on mergers. Merger notification has a suspensory effect and merging parties may not implement a merger that is subject to examination until approval is granted. The Act is silent on whether “hold-separate” arrangements may be put in place for international transactions where approval in Tanzania is pending. Accordingly, it is submitted that, provided that the notification requirements are complied with in Tanzania, it may be possible for merging parties to “carve out” a portion of the merger in Tanzania, which would otherwise delay the closing of an international transaction.

According to the FCC Rules, the fee for filing a merger is calculated on a sliding scale and ranges between TZS25 million to TZS100 million, based on the combined total annual turnover of the last audited accounts of the merging entities. Neither the Act nor the FCC Rules stipulate whether this applies to the global turnover of the parties or is limited to their turnover in Tanzania. This leaves scope for uncertainty, as well as the possibility of exorbitant filing fees being payable, relative to the merging parties' operations or activities in Tanzania.

Penalites for Non-compliance

Where a transaction is implemented without the FCC's authorisation, the FCC may impose a minimum of 5% and a maximum of 10% of the party's annual turnover.

Conclusion

The purchase or sale of a business or shares, having an effect in Tanzania, may well be subject to merger notification and harsh penalties may be imposed for failure to notify. Given this risk, merging parties may decide to notify a transaction even in circumstances where it is arguably not notifiable.

The legislation relating to the notification thresholds and the provisions for the calculation of the filing fee are not clear, which leaves scope for different approaches to be adopted and creates uncertainty for merging parties.

Over time, the competition authorities will likely develop a helpful body of jurisprudence that will provide greater certainty to firms and to legal practitioners regarding the application of the merger control legislation.