Tanzania Moves From Public To Private Sector M&A

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The M&A activity in Tanzania mainly took off during the mid-1990's with the implementation of World Bank/Government sponsored privatization and market liberalization programs. From 1993 to the end of 2004, 312 public entities were privatized through forms of acquisition that involved domestic and/or foreign companies taking over all or part of the equity of state-owned companies. During the same period the government further disposed of 499 non-core assets. The number of parastatal enterprises with government involvement has now been reduced to 47, most of which represent minority shares in joint ventures.

With the World Bank/government-sponsored "strategic" privatizations for the most part having run their course, the country's M&A activity is now moving more towards private sector transactions, with corporate trade buyers and private equity partners as new players. The "new" M&A market also involves a greater number of small and medium-sized businesses undergoing restructurings or strategic reorganizations.

General framework

The existing legal framework governing mergers and acquisitions in Tanzania mainly consists of:

- the provisions on general agreements in the Law of Contract Act, Cap 433;
- the provisions on merger control in the Fair Competition Act, 2003 (the Competition Act); and
- the provisions contained in the Companies Act, 2002 (the Companies Act)

Share deals have to be structured further taking into account tax provisions mainly incorporated in the Income Tax Act, 2004. Finally, several other laws and regulations might apply to, and have an impact on, specific M&A transactions (such as sector legislation, laws on employment, etc).

Merger control provisions

Under the Competition Act, a proposed acquisition of shares, of a business or of other assets, whether inside or outside Tanzania, must be notified if:

- it results in a change of control of a business, part of a business or an asset of a business in Tanzania; and
- it involves turnover or assets above threshold amounts specified by the Fair Competition Commission created under the Act.

Acquisitions creating or strengthening a position of dominance in a market will be prohibited.

After receipt of the notification, the Commission has 14 days to request more information and to determine whether the proposed acquisition should be examined, failing which the transaction is deemed cleared. If the Commission wishes to further examine the proposed transaction, the acquisition shall be prohibited for a period of 90 days or such further period as the Commission may determine.

Although it is still early stage, on the face of the first acquisitions notified to the Commission, it seems that, in practice, the examination period will often not only be used in full, but that the Commission also easily turns to a request for further information in order to examine a transaction. The Competition Act does not provide for any possibility to speed up the process.

Although the Competition Act was enacted in 2003, the Commission has only been constituted since December 2005. Owing to a lack of supportive infrastructure and funding, this institution enabling the Act to become fully operational has taken a long time to be put in place, thereby creating uncertainty as to the application of the Act in the market. However, the inauguration of the Commission has not completely ended the days of uncertainty, whereas the thresholds for acquisitions to be notified have not yet been decreed. Hence the current prac-

tice of notifying to the commission every single change of control which strengthens the position of one of the firms involved or involves a firm which already has a position of dominance in a market. This delay comes something of a headache with small and medium-sized businesses undergoing restructurings.

Another area of concern in relation to the Competition Act is the issue of its application to foreign mergers and acquisitions. The Act does not expressly limit the powers of the Competition Commission to "direct" changes of control. When coupled with the explicit extraterritorial reach of the Competition Act , the current lack of thresholds and the powers of the Competition Commission, this clearly presents challenges for foreign mergers, ultimately having an economic impact in Tanzania.

Finally, it should be mentioned that the Competition Act contains an escape clause for prohibited mergers in the form of exemption granted by the Commission if:

- the merger is likely to result in benefits to the public such as contributing to efficiency in production and allocation of resources, promoting technical or economic progress, protects the environment, and benefits to the public resulting from the merger outweigh the detriments caused by the merger; and
- in the case of a merger resulting in the change of control of a business, the business faces actual or imminent financial failure and the merger offers the least anti-competitive alternative use of the assets of the business.

Company Law Provisions

In relation to share deals, the Companies Act, 2002 establishes procedures for registration of share transfers and contains disclosure requirements for offer documents issued by 'public' companies in relation to issues of shares, but does otherwise not affect takeovers.

However, the Companies Act does regulate arrangements and reconstructions. Under the Companies Act, where a compromise or arrangement is proposed between a company and its creditors or between the company and its shareholders, the court may, on the application of the company or creditor or shareholder of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or shareholders as the case may be, to be summoned in such manner as the court may direct. The Companies Act provides for certain information obligations in relation to the arrangement.

If a majority in number representing three-fourths in value of the creditors or members are present and voting at the meeting agree to any arrangement, the arrangement shall, if sanctioned by the court, be binding on all of members or creditors and on the company or, in the case of a company in liquidation, on the liquidator and contributories of the company.

The "arrangement" includes a reorganization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both methods. Where an application is made to the court for the sanctioning of an arrangement and it is shown that such arrangement is for the reconstruction of a company so that the whole or any part of the property of the company concerned is to be transferred to another, the court may sanction the arrangement or make provision for certain matters, including the transfer of assets and/or liabilities, the allotment or appropriation of shares and the dissolution without winding up of a transferor company.

The Companies Act therefore facilitates takeovers, as it is one of the methods of reconstructing companies.

Public M&A transactions

Public takeover bids and changes of control of public companies are currently not governed by specific legislation. However, draft "Capital Markets and Securities (Substantial Acquisitions, Takeovers and Mergers) Regulations" (the Regulations) have recently been circulated amongst stakeholders and are expected to be executed and come into force later this year.

The Regulations will mainly apply to acquisitions of an interest of 20% or more in public and listed companies and to mergers involving such a company (Public Transactions). A Mergers and Acquisition Committee will be created within the Capital Markets and Securities Authority and will be responsible for reviewing applications with respect to such transactions.

The draft Regulations provide for principles to be followed when conducting a Public Transaction and seem to be in line with international best practices. As such the Regulations contain:

- lengthy and detailed provisions aimed at ensuring a transparent and efficient offer system for Public Transactions,
- restrictions on dealings before, during and after the offer and
- shareholding disclosure requirements.

Finally, under the proposed Regulations, the acquisition of an interest of more than 90% will trigger the acquirer's duty to either make a mandatory public takeover offer to all shareholders of the target, or disinvest so as to fall below the trigger percentage.