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Mergers and acquisitions in Tanzania

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The legal framework for mergers and acquisitions in Tanzania consists of the Fair Competition Act 2003, the Companies Act 2002, the Capital Markets and Securities (Substantial Acquisitions, Takeovers and Mergers) Regulations 2006, sector legislation such as the Energy and Water Utilities Authority Act 2001, the Tanzania Communications Authority Act 2003 and other more general statutes such as the Income Tax Act 2004 and the Employment and Labour Relations Act 2004.

The Fair Competition Act

Mergers and acquisitions are regulated by the Fair Competition Act 2003 ('the Competition Act') through its implementing bodies: the Fair Competition Commission and the Fair Competition Tribunal. The Competition Act defines 'merger' as an acquisition of shares, a business or other asset, 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. The Commission must be notified of any merger or acquisition in which there is a turnover of assets in excess of TSh 800,000,000 (approximately US$600,000). The notification must include basic corporate information and a merger/acquisition plan.

After notification the Commission has 14 days to request more information and to determine whether the proposed merger or acquisition should be examined in more detail, failing which the transaction is deemed approved. If the Commission decides to further examine the transaction, the acquisition will be prohibited for 90 days and is extendable for an additional 30 days. During this period the Commission will determine whether the merger or acquisition creates or strengthens a position of dominance in the market. The Competition Act defines a position of dominance as where a person acting alone, can profitably and materially restrain or reduce competition in that market for a significant period of time; and the person's share of the relevant market exceeds 35 percent.

Failure to notify is an offence which is punishable by a fine of between 5 and 10 percent of the annual income of the company that fails to notify the Commission. In addition, every director, manager or officer of the company at the time the offence was committed may be charged jointly in the same proceedings and may be deemed to be jointly guilty unless he/she proves that the offence was committed without his/her knowledge or that he/she exercised all due diligence to prevent the commission of the offence.

If the Commission determines that the merger or acquisition does create or strengthen a position of dominance in the market, it may either prohibit the merger or acquisition outright or suggest changes so that the proposed transaction does not contravene the Competition Act.

Since the establishment of the Commission in 2006 until 30 May 2009 there have been 18 notifications of which 17 were approved and one is pending before EWURA, the utility regulatory agency. The first notification took seven months to be approved but thereafter most were approved within 14 days.

Extraterritorial impact of the Competition Act

Since the definition of merger under the Competition Act extends to transactions whether inside or outside Tanzania, it requires foreign companies to also notify and obtain the consent of the Commission. Thus a very important consideration regarding the extraterritorial reach of the Competition Act is what constitutes 'change of control': Under the Competition Act a body corporate is viewed as controlling another if it: (i) owns or controls a majority of the shares carrying the right to vote at general meetings; (ii) has the power to control the composition of a majority of the board of directors or other governing organ of the other company; or (iii) has the power to make decisions regarding the conduct of affairs of the other company.

The change of control definitions and requirements under the Competition Act are very similar to their counterparts under the European Community Merger Regulations.

The Companies Act 2002

The Companies Act 2002 establishes procedures for registration of share transfers and contains disclosure requirements for offering documents issued by public companies.

The Companies Act also regulates reorganisations. If a reorganisation is proposed between a company and its creditors or shareholders, the court may, upon application (or upon liquidation), order a meeting of the creditors or shareholders. The Companies Act sets out disclosure requirements regarding the reorganisation. If a majority of the creditors or members agree to the reorganisation, when sanctioned by the court, it will become binding on all the shareholders and creditors.

Capital Markets and Securities (Substantial Acquisitions, Takeovers And Mergers) Regulations 2006

As of 12 June 2009 the Tanzanian exchange had 10 listed companies with one pending (CRDB Bank) and four cross-listed companies worth approximately US$4bn. Acquisitions and mergers involving public listed companies are governed by the Capital Markets and Securities (Substantial Acquisitions, Takeovers and Mergers) Regulations 2006 ('the Regulations') which came into force in December 2006.

The Regulations mainly apply to acquisitions of an interest of between 20 and 75 percent in public or listed companies and to mergers meeting such thresholds. A specialised committee, the Prospectus Evaluation Committee, is responsible for reviewing applications, pending the creation of a specialised Mergers and Acquisition Committee.

The Regulations contain: (i) lengthy and detailed provisions that ensure a transparent and efficient offering system; (ii) restrictions on dealings before, during and after the offering; and (iii) shareholder disclosure requirements.

The acquisition of an interest of more than 90 percent triggers the mandatory takeover and delisting sections of the Regulations. This means that the acquirer must either make a mandatory public takeover offer to all shareholders of the target or disinvest through an offer for sale or by a fresh issue of capital to the public in order to fall below the threshold.

Sector legislation

In order to balance the interests of consumers and investors in industry sectors characterised by natural monopolies the Government of Tanzania enacted legislation such as the Energy and Water Utilities Authority Act 2001, the Surface and Marine Transport Authority Act 2001 and the Tanzania Communications and Regulatory Authority Act 2003.

Most of these Acts require the parties in a proposed merger or acquisition to obtain the consent of the relevant regulatory body if the proposed transaction entails a change in the ownership of a licence. For instance the transfer of a telecommunications licence requires the consent of the Tanzania Communications Regulatory Authority.

Restrictions on foreign participation in certain sectors

Although most industry sectors are open to foreign participation, in a few sectors there are limits to foreign participation. For instance a telecommunications license can only be granted to an entity in which a local shareholder possesses 35 percent of the shares. A shipping agency license can only be granted to a citizen of Tanzania or a company incorporated in Tanzania in which more than 50 percent of the share capital is held by a citizen of Tanzania. An insurance company must be incorporated in Tanzania and at least one-third of the controlling interest must be held by citizens of Tanzania and at least one-third of the members of the board of directors must be citizens of Tanzania. Certain types of mining licenses, namely primary mining licenses, can only be issued to Tanzanian citizens.

Other general legislation

The Income Tax Act, 2004 has an impact on mergers and acquisitions depending on the structure of the transaction. If the underlying ownership of the acquiring entity changes more than 50 percent compared with its ownership during three years prior to the acquisition, the event is treated as a taxable acquisition. However, the exact form of tax treatment will depend upon the form of consideration, the relationship of the tax base in the vendor's assets to the tax base of its shareholders, whether there is a built in gain and whether the vendor will liquidate all its shares.

In addition the Employment and Labour Relations Act, 2004 governs the entitlement of employees in the event the merger or acquisition leads to redundancies or other labour related changes.

Prospects

Although the wave of privatisations that occurred from 1993 through 2004 saw the height of acquisition and merger activity in Tanzania there are still healthy prospects for mergers and acquisitions in the private sector.

However there are concerns that that the Fair Competition Commission, which currently has fewer than 10 staff members in the department whose task it is to investigate proposed mergers, may not have the capacity to fully investigate mergers.

In addition to the lack of capacity there is still uncertainty in relation to the extraterritorial reach of the Competition Act. The Director General of the Commission by making statements that foreign mergers technically fell under the jurisdiction of the Commission has not assuaged these fears.

Despite this fact some of the uncertainty surrounding merger and acquisition activity has been allayed by the setting of the merger notification threshold at TSh 800,000,000.00. Nevertheless, to properly navigate through the uncertainties of competition law in Tanzania it is desirable to hire a reputable law firm to advise on the proposed merger or acquisition. ■

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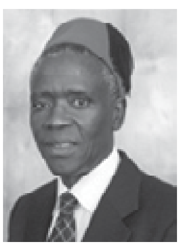

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