Mergers and acquisitions in Tanzania

A guide to mergers and acquisitions in Tanzania, including merger notification, FCC examination of a merger and penalties for non-compliance.

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Introduction

The legal and regulatory framework for mergers and acquisitions in Tanzania is contained in the Fair Competition Act 2003 (the Act). The Act came into force in 2004. 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 implementing bodies for mergers and acquisitions are the Fair Competition Commission (the FCC) and the Fair Competition Tribunal.

Section 11(1) of the Act prohibits a merger where it "creates or strengthens a position of dominance in a market". The "position of dominance" concept is fleshed out at section 5. This is a two part assessment involving an 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 exceed[ing] 35%*

Dominance is an economic concept and must be treated as such. The notifying parties will need to explain to the FCC whether there are any barriers to market entry which could lead to the merging parties being able to act independently to a significant degree from their customers and/or competitors. This can, in the absence of specialist legal and economic knowledge, be a tricky exercise. Similarly, assessing the parties' market shares is often fraught with difficulty, requiring as it does the identification of the relevant market or markets, as well as trying to work out how much of those markets "belongs" to the merging parties.

The adoption of this dominance test is helpful, insofar as it is consistent with the approach taken by other competition authorities around the world. While the jurisprudence from other jurisdictions may provide persuasive approach that may be taken in Tanzania, such jurisprudence may not necessarily be adopted in Tanzania, Their consideration may be subject to Tanzanian needs to develop and strengthen a market economy. It is therefore essential to have advisers who are conversant with the economic and legal concepts attendant in notification, but who also understand the priorities and policies of the FCC.

Merger notification

A proposed merger, must be notified to the FCC by providing the memorandum and articles of association of the merging companies, copies of their annual financial statements, strategic business plans, outline of their product market, a list of all their operating offices, market share of their businesses in Tanzania, income statement projections of the resulting merger and a copy of the merger plan at least 14 days before the implementation of the proposed merger or acquisition if:

- it results in a change of control of a business, part of a business or an asset in Tanzania, and
- it involves turnover or assets above threshold amounts specified by the Fair Competition Commission under the Act (currently this figure is 800,000,000 Tanzanian Shillings (about US$500,000).

After notification the FCC has 14 days to request more information and to determine whether the proposed merger or acquisition should be examined, failing which the transaction is deemed cleared. If the FCC wishes to further examine the transaction, the acquisition will be prohibited for 90 days, extendable once for a period of 30 days. During this period the FCC will investigate if the merger or acquisition creates or strengthens a position of dominance in the market as defined above.

FCC examination of a merger

Once a merger has been notified, the FCC has tended to use the examination period in full. During the examination the FCC may call for further information related to the transaction. There is no fast track process. The ensuing delay in the proposed merger may act as a disincentive for firms seeking to engage in the merger activity.

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

The FCC will grant an exemption to the merger prohibition if:

- the merger is likely to benefit the public, for example, contribute to efficiency in production and allocation of resources, promote technical or economic progress, and protect the environment, and the benefits to the public 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 financial failure and the merger offers the least anti-competitive use of the business assets.

So far there have been no instances where a merger notification has been rejected or modified by the FCC.

The FCC has been keen to stress that its policy is not to prohibit mergers as a matter of course but to ensure that they do not impinge upon competition in the markets which they affect. The acquisition of local firms within Tanzania is an important part of attracting foreign direct investment into the country as well as facilitating market entry. Many foreign companies that wish to start up in Tanzania will find that the easiest way to do so is to acquire a firm which is already established, with a ready list of customers, employees and suppliers, as well as perhaps benefiting from local licences and domestically registered intellectual property rights.

The Tanzanian system is a relatively straightforward regime, and this bodes well for the notifying parties. The 14 day timescale is a relatively short period in which the parties will find out where they stand and whether a more in-depth assessment will be necessary. Some may of course fear that faced with such a brief period for its preliminary examination, the FCC will seek to protect its position by insisting that the merger proceed to a Phase II examination in all but the most obviously innocuous cases, though this has not been the position taken by the FCC thus far. It is also helpful to notifying parties that the "Phase I" and (if required) "Phase II" examination will be carried out by the same body.

On the other hand, some may argue that the 14 day turnaround requirement for the FCC to decide whether or not to take the notification to Phase II is inadequate to allow third parties to make their concerns known over a proposed merger. To date, it has not been the FCC's practice to publish notifications it receives in the same way that certain other competition authorities do (for example, the EC Commission), but rather it consults internally in order to make the decision. Even if it did move to a public consultation process, a fortnight is probably not long enough for organizations' to learn of the deal and respond to the FCC with their thoughts.

At the end of a Phase II investigation, the FCC will either

- clear the proposed merger on an unconditional basis
- clear the proposed merger with conditions, or
- block the transaction.

Where conditions are to be attached to clearance, the FCC may draw up a compliance agreement with the notifying parties or make a compliance order which will be aimed at addressing the FCC's concerns over the merger.
In practice, a compliance agreement or order is likely to include behavioural and/or structural undertakings from the merging parties. A behavioural remedy could include, for example, prohibiting a newly merged entity from imposing prices that are above a certain level. A structural remedy usually involves a requirement that the merged entity sell off part of its business to prevent it from becoming too powerful economically.

From the point of view of the merging entities, behavioural or structural remedies can have a far-reaching impact on their business going forward. It is worth bearing in mind in relation to structural remedies that where an FCC order is made to sell off all or part of a business or its assets, this will be published in the Tanzanian Public Register. The publication of the requirement for a sale to take place (and perhaps by a required date) could adversely affect the sale price of the business or assets in question. It is therefore important to have a team which is able to cope with the economic concerns that the FCC may have regarding the proposed merger and to negotiate clearance terms which do not wreck the merged business or the parties' plans.

Any decision of the FCC can be subject to an appeal to the Fair Competition tribunal.

Penalties for non-compliance

Parties must be aware of the significant risks of failing to comply with the merger regime. Where a person commits an offence under the Act or is involved in such an offence, that person may be subject to a fine exceeding not less than 5% of his annual turnover and not more than 10% of its annual turnover. This poses a serious threat to companies thinking, for example, of not notifying or of pushing ahead with a deal which the FCC has not cleared.

Even by the standards of longer-established competition authorities, the financial penalties of the Tanzanian regime are severe. By way of comparison, for failure to notify a relevant merger to the European Commission, parties can be fined periodic penalty payments not exceeding 5% of "average daily turnover" for each day that the infringement persists. The maximum financial penalty in the EU is less than the starting point for the Tanzanian jurisdiction.

As stated above, the Act allows the FCC to make "compliance orders" of its own initiative where it is satisfied that this is required to avoid an infringement of the Act. This could include an order not to proceed with a pending merger which has not been notified to the FCC.

Where the FCC is satisfied that a person has acquired shares or other assets in breach of the Act, it may within three years make an order that:

- the acquirer dispose of some or all of the shares or assets within such time as the Commission specifies in the order, or
- declare the acquisition to be void, require the acquirer to transfer some or all of the shares or assets back to the vendor and require the vendor to refund some or all of the amounts received by the vendor in respect of the acquisition, as the FCC specifies in the order.

The time limits are quite generous and allow for the possibility of an unscrambling order up to three years after the deal has been done. At that time, assets may have been integrated into different parts of the purchaser's business and complying with the order may prove significantly more difficult.

The Compliance orders under the Act pose a threat to the seller as well as the purchaser of a business. The sale of a business in

breach of the merger rules could be construed as an "involvement" in an infringement by the seller. This in itself could expose the seller to a financial penalty. Furthermore, any vendor will surely want to avoid an order under the Act to repay all or part of the purchase price.

In addition, it is not only bodies corporate who are at risk for non-compliance. Where a body corporate is guilty of an offence under the Act, every director, manager or officer of the body corporate may also be charged jointly in the same proceedings. Such persons could be fined between 5% and 10% of their annual income. Furthermore, given that orders of the FCC are enforceable as orders of the High Court of Tanzania the failure to comply with such an order gives rise to contempt proceedings against the individuals concerned.

Finally, companies must also be aware that completing a merger illegally could result in a lawsuit for damages from parties alleging loss or damage as a result. A compensatory order can also be made by the FCC. In Tanzania, it is possible for an additional penalty to be imposed on offenders, equal to double the amount of the loss or damage suffered by a victim of the illegal conduct.

Conclusion

Given the risk of the imposition of harsh penalties for failing to comply, there is a real incentive for parties to a merger or acquisition to ensure that the law is observed.

Whilst the Act is relatively clear in terms of the procedure to be followed by notifying parties and in terms of when a deal becomes notifiable, there is still a fair degree of fine-tuning to be undertaken in order to bring about legal certainty within the regime. For example, the Act makes numerous references to "turnover" whilst not specifying how this is to be calculated. In the absence of such guidelines, there is a risk of confusion and divergent practice in different cases. As with other merger jurisdictions, further clarification is likely to be given in the form of guidelines and further orders made by the FCC under the Act.

The Act has been praised as having been well-drafted and presenting a good basis for a workable competition policy regime. But with any competition law regime, there will be difficult concepts to deal with, such as dominance, market assessment and barriers of market entry. For parties involved in the notification of a deal in Tanzania, the need could not be clearer for advice from a local law firm with an excellent working relationship with the FCC.

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