

DENEYS REITZ
M&A AND COMPETITION
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AFRICAN COMPETITION LAW DEVELOPMENTS

In trying economic times, when companies are desperately trying to increase or maintain their bottom-line, Africa is often caught in the investment exploration crosshairs, with its growing economies and valuable untapped resources. It is here, that venture capitalists and large corporations still hope to forge new markets instead of trying to capture their portion of the market pie, which is no longer growing in the current market conditions. Africa could therefore, very well be the bull in the market dartboard that allows companies to survive these trying times.

However, as has been experienced by many investors, “Africa has great opportunities, but first you have to find them!” In addition to this challenge, as the continent develops, so too does its melting pot of legal systems. One particular ingredient in this legal stew that is increasing its influence, and to which investors need to be alerted, is that of Competition and Fair Trade Law.

Recently, many African jurisdictions have moved towards developing and further implementing competition legislation, and the trend seems to be gaining impetus.

In Namibia for instance, it has been clearly stated that the Ministry of Trade and Industry will be focussing on establishing its Competition Commission this year, as well as establishing an

operational Board of Trade to look into issues of pricing, infant industry protection, anti-dumping measures and other trade-related priorities.

Namibia's sentiments are in line with a number of other African jurisdictions, such as Mauritius, which has now established a Competition Commission that is building capacity and drafting Guidelines on the requisite economic and legal analysis required in competition matters, as well as on the principles which shall be used for the determination of penalties or remedies. This Authority is expected to commence its work in the latter half of 2009.

Other African countries that are in the process of establishing competition authorities include Angola, Botswana, Ghana, Lesotho, Madagascar, Mozambique, Nigeria, Togo and Uganda.

In addition to the progress being made by these countries, competition regulatory bodies are active and fully functional in Algeria, Burkina Faso, Egypt, Kenya, Malawi, Morocco, Senegal, South Africa, Tanzania, Tunisia, Zambia, Zimbabwe and very recently, Swaziland. These countries have enacted legislation establishing competition authorities that are empowered to regulate various aspects of competition law such as merger control, abuse of dominance and restrictive practices.

Whilst many countries have forged ahead with enacting comprehensive competition legislation, severe budgetary and other constraints such as the lack of skilled staff have led to the ineffective implementation of the legislation.

Notwithstanding these problems, it is evident that the African landscape of competition policy and enforcement is developing, particularly when faced with the reality that many markets extend beyond the borders of a single country and that an effect on competition may be multi-regional.

Previously, many African nations were not in a position to deal with an effect on competition in their own country which emanated in another state. This however, appears to be evolving, as more African nations begin to promulgate legislation to provide their competition authorities with the necessary teeth to take action in such circumstances. Agreements and conduct which impact on trade on the continent accordingly need to be carefully scrutinized in order to ensure that they do not violate antitrust legislation in any African countries in which they have an effect. Furthermore, as additional

African countries introduce corporate leniency programs, the need to co-ordinate such applications for leniency to various competition authorities has thus become more pressing.

In a further attempt to deal with such multi-regional issues, and recognising that anti-competitive behaviour is likely to prevent economic growth, efficiency and trade liberalisation in its member states, the Common Market for Eastern and Southern Africa's regional Competition Commission was officially opened in Malawi in April this year. Though the apparent leader in African competition law, South Africa, is notably not a member of COMESA.

The COMESA Commission is tasked with the enforcement of fair trade practices, eradication of abuse of dominance and cartel behaviour, and to promote fair competition within the Common Market across its member states.

COMESA has enacted Competition Rules and Regulations governing both the operations of the Commission, and specific conduct within the Common Market. Most notably, the Commission may also investigate conduct that, whilst occurring outside the common market, may nonetheless have an impact on trade between member states.

Most relevant to today's seminar is that the Regulations include provisions requiring notification of mergers to the Commission in certain circumstance, failing which, such mergers will not be legally enforceable in the Common Market and the parties may be liable for a fine of up to 10% of both merging parties' annual turnover in the Common Market.

'Notifiable Mergers', in terms of the COMESA Regulations, occur when the acquiring and target firms, or either the acquiring or the target firm, operate in two or more COMESA member states. In addition, the combined annual turnover or asset value of the firms must exceed the specified thresholds, which are yet to be published by way of Regulation.

What this basically means is that even when a firm that is operating in a jurisdiction that is *not* a member of COMESA, if the other party to the merger transaction is operative in two or more COMESA member states, notification to the Commission is obligatory, if the financial thresholds are met.

An example of a merger that would be notifiable would be where a firm operating in South Africa for instance, would have to notify the COMESA Commission of its intended acquisition of a firm that is operative in both Kenya and Mauritius (provided the financial thresholds are met). This is despite the fact that South Africa is not a member state of COMESA.

Due to the fact that the COMESA Competition provisions have such a far-reaching impact on business in Africa, and in particular those provisions pertaining to merger transactions, it is quite apparent that even African jurisdictions that are not COMESA member states will not necessarily escape scrutiny.

It is therefore imperative that firms, when proposing to merge with a firm operating in any African country (irrespective of whether that country is a member state of COMESA), have regard to the COMESA Regulations, lest the merger should be notifiable. As mentioned, failure to do so may render the merger and any consequent rights and obligations of no legal effect within the COMESA member states and may result in a substantial fine being imposed.

Furthermore, with the significant developments in Competition Law taking place across the continent, it is vital that when conducting due diligence exercises before entering into a transaction, Competition Law compliance on the part of a potential target firm in Africa is carefully scrutinized.

Specific issues which firms will encounter in relation to African merger filings will include: varying time periods, filing requirements, procedures and fees, different standards for merger review and rules on implementation pending approval, and the instructing of suitably qualified local counsel, to name but a few. Furthermore, as the delay resulting from a protracted investigation by one or more African competition authorities could potentially be fatal to a transaction involving companies with operations in a number of jurisdictions, careful planning and co-ordination across the continent is vital.

In conclusion, it is clear that doing business in the African landscape is rapidly changing and the need to be able to adapt to and address new business issues is becoming imperative.

Continually recognised as the African leader in competition law, South Africa, with its fully functional competition authority, and Deneys Reitz, with its legal experts who are well versed in

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competition law practice and principals, will certainly play a major advisory and integrated role in the development and application of competition law throughout the African arena, and perhaps be the key to unlocking Africa's business potential.

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