MERGER THRESHOLDS IN SWAZILAND AND TANZANIA – ABSENCE OF A LOCAL NEXUS?

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LEGAL BRIEF
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It is standard practice for competition regulators, empowered by legislation to monitor and evaluate mergers, to set minimum financial or market share thresholds which must be met or exceeded before parties to a merger are required to notify those mergers for approval.

INTRODUCTION

The International Competition Network's ("**ICN**"), Recommended Practices for Merger Notification Procedures, 2002 ("**Recommended Practices**") states the following regarding merger notification procedures and thresholds:

a. In establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in an appreciable competitive effect *within the specific country.* In other words merger notification thresholds should take into consideration appropriate standards of materiality as to the level of "*local nexus*" required, such as material sales or assets levels *within* the territory of the country concerned.

b. This "*local nexus*" approach does not preclude the use of ancillary thresholds based on worldwide activities of the parties as an additional prerequisite, but revenues or assets attained from worldwide activities should not be sufficient to trigger a merger notification requirement in the absence of a "*local nexus*" such as revenues or assets in the country concerned, exceeding an appropriate materiality threshold.

c. The "*local nexus*" thresholds should also be confined to the relevant entities or businesses that will be combined in the proposed transaction. In particular, the relevant sales and/or assets of the acquired party should be limited to the sales and/or assets of the specific business being acquired.

Overly broad criteria could increase the financial cost of mergers and cause unnecessary delays in implementing transactions. Also, certainty as to regulatory obligations in various jurisdictions is of utmost importance, especially when compulsory merger notification, coupled with the possibility of significant fines for non-compliance, is required.

During December 2016, without any specific announcement by the Swaziland Competition Commission ("**SCC**"), the merger notification thresholds were re-aligned in Swaziland.

SWAZILAND

The Swaziland Competition Act (No. 8 of 2007) and the SCC's External Merger Guidelines ("**SCC Guidelines**") indicate that all mergers, regardless of the merging parties' turnover or asset value or their market share, are notifiable. The Swaziland Competition Act distinguishes between small and large mergers, with small mergers not incurring any filing fee. What is important to note, is that recent amendments to the SCC Guidelines published during December 2016 resulted in a changed approach to merger thresholds.

Previously, companies were required to pay a filing fee based on the value assets or turnover of the merging firms situated in *Swaziland*. However, a small change, through the inclusion of 2 words – and out – changed this methodology overnight.

The relevant provision of the SCC Guidelines provides as follows:

"28. For all other transactions classified as large mergers, the filing fee payable is 0.1% (zero point one percent) of the merging enterprises' combined annual turnover or assets, whichever is greater. The fee is calculated on the assets or turnover of the merging firms situated ***<u>in and out</u>*** *of the country."* (Our emphasis)

It is submitted that the SCC Guidelines evidently do not make provision for assets or turnover of the merging parties <u>outside</u> of Swaziland, but assets or turnover *in and out* of Swaziland. Therefore, the wording *in and out* of Swaziland should be read to denote to import and export activities engaged in by either or both of the merging parties in Swaziland or sales within Swaziland from which turnover is derived, and therein lies the *"local nexus"* in establishing the applicable filing fee.

This subtle change to the SCC's Guidelines has significant consequences, as the SCC now takes into account the merging parties' global turnover and asset values when determining the filing fees payable. The effect of this is that, particularly for multijurisdictional businesses, many mergers in Swaziland are now considered to be large mergers which will incur filing fees as high as E600,000 (approx. US$47,200 at the time of writing this article).

TANZANIA

According to the Fair Competition, Threshold for Notification of a Merger, Order 2006, as published by the Fair Competition Commission ("**FCC**") in Tanzania, the FCC regards the merger thresholds as having been met or exceeded if the merging parties' asset values are above TSh 800,000,000 (approximately US$360,000). Neither the Fair Competition Act (No. 8 of 2003), nor the FCC's Merger Guidelines, stipulate that the merger thresholds must have some "*local nexus*."

Our experience in dealing with the FCC has been that when assessing whether or not the merger thresholds have been met or exceeded by merging parties, it considers the merging parties' **<u>global</u>** asset values. This is contrary to the ICN's Recommended Practices of requiring at least some relevant "*local nexus*" to trigger a merger notification in addition to an assessment based purely on worldwide activities. One can clearly foresee the absurdity of not including a "*local nexus*" requirement in the scenario where a firm owns a dormant company in Tanzania that triggers a merger notification purely on the basis of its holding companies global asset values. This, coupled with the fact that merger filing fees payable to the FCC can be quite high, in some cases as much as TSh 100,000,000 (approximately US$44,700 at the time of writing this article), demonstrates why a "*local nexus*" requirement is so important from a merger assessment perspective.

CONCLUSION

Clearly the ICN Recommended Practices highlight the need for there to be a causal link between the turnover or asset values of the merging parties and the country in which such turnover is generated and/or derived or assets are owned. Therefore, we have to ask ourselves where is the "*local nexus*" in establishing the merger thresholds in Swaziland[1] and Tanzania?

Both the Swaziland and Tanzanian competition regulators are empowered to levy sanctions on merging parties for failing to notify a merger. The sanctions can take the form of financial penalties but may also, in some circumstances, result in the regulators unwinding the transaction by way of a divestiture order.

We therefore recommend that merging parties carefully consider what their legal obligations are when involved in transactions throughout Africa.

1 Notably, Swaziland is not part of the ICN but one would expect globally accepted principles to be considered by all competition authorities.

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