Merger Review in Africa: a Practitioner's Perspective

Presentation by

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Introduction

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- To some practitioners, competition regulation has come to slow down the implementation of transactions
- Competition legislation in much of Africa is a thing of the recent past
- The explosion that occurred in the 1990s marked a new era
- Mainly sponsored by international lending institutions such as the World Bank and the International Monetary Fund
- Has also seen the involvement of Unctad and other agencies

Competition Legislation in the 1990s

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- Kenya appears to have been the first in this era to come up with competition legislation in 1990
- This was soon followed by Zambia and Tanzania in 1994
- Zimbabwe followed suit in 1996
- Malawi and South Africa joined the band wagon in 1998
- South Africa, like Tanzania, has had competition legislation since 1955

Review of competition legislation

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- 2001 saw the review of the Zimbabwean legislation with a view to clarifying the merger provisions of their legislation
- South Africa fine-tuned its own merger review programme in respect of thresholds and the issue of concurrent jurisdiction
- Tanzania completely revamped its own legislation in 2003

More competition legislation

- Namibia enacted its legislation in 2003
- Swaziland followed suit in 2005, although the bill approved by parliament is apparently awaiting royal assent by the King
- Botswana and Lesotho may have started the drafting process
- Angola, the Democratic Republic of Congo and Mozambique had at various times expressed an interest in formulating competition legislation

Challenges facing the legal practitioner

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- The trigger to notification varies from country to country
- South Africa, Zimbabwe and Namibia employ essentially the same trigger
  - This is the acquisition of control and a definition of control is actually offered in respect of Namibia and South Africa.
  - The parties must satisfy pre-determined financial thresholds. This is also applicable to Tanzania

The trigger in Kenya, Zambia and Swaziland

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- Kenya, Zambia and Swaziland employ a different notification regime
- Notification is dependent on the substitutability of the products
  - There are no financial thresholds required, which means that everything that satisfies the preceding test is notifiable
  - What about the geographic aspect of the market?
  - Who determines substitutability between the parties and the Competition authorities?
  - If the parties take the view in good faith that their products are not substitutable, are they obliged to notify?

Others have a second trigger

- Tanzania has a notification regime as well as an exemption regime for mergers
- There are mergers that are prohibited per se
- Apparently you may apply for exemption for these
- Main problem is that the exemption is for a fixed time period which may not exceed one year
- Not clear if the exemption is renewable
- Zambia has a catch all provision in Section 7 of its Act

Differences in analytical framework

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- South African employs the substantial lessening of competition test
- Others employ the dominance test
- Some seek to employ both tests
- In small markets, the dominance test is likely to catch many players
- Where it is based on market share, the absence of investment by similar entities may work against those already in the market as they are presumed to be dominant
- It is unclear what others employ in the assessment of a merger. For instance, Tanzania has a dominance test but it is unclear whether the test is applicable to the assessment of a merger in terms of section 11 of the Fair Competition Act

Competition Assessment and public interest inquiry

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- South Africa sets out a clear public interest test in addition to the competition test
- Namibia seems to embrace the public interest inquiry within the competition assessment
- Some recognise the role of efficiencies and the failing firm defence whilst others don't

Time frame for investigations

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- Some legislation impose time lines within which investigations should be finalised
- Many say nothing about the time lines but prohibit the prior implementation of a transaction
- Where specific time lines are imposed, in many instances they are very flexible

Consequences of non compliance

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- Most jurisdictions prescribe a fine linked to turnover
- Some specify not only a ceiling but also a floor
- Criminal penalties are also prescribed for directors and officers
- In some jurisdictions a merger agreement is regarded as unenforceable

Guidance on legislation

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- Absence of guidelines, with the exception of Zambia
- Few authorities publish detailed reasons for their decisions
- In the absence of guidelines and detailed reasons for decisions, practitioners have very little to rely on
- In many instances, practitioners are left with no choice but to call the officers for guidance
- Many authorities do not offer written advisory opinions

Jurisdictional issues

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- Many authorities do not appreciate arguments on jurisdiction
- A competition agency advised recently in respect of a proposed transaction that the parties should file although there were no published thresholds
- In the jurisdictions that rely on substitutability, parties are invariably asked to notify in order to enable the authorities to determine whether the parties are in a horizontal relationship

Soft Issues

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- Electronic communication
- Websites
- Some officers inaccessible
- Some reluctant to speak on the record on what some provisions in their law actually mean

Way Forward

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- Many of the issues are being tackled under the ICN
- Unclear whether African authorities are willing to accept and implement the ICN initiatives
- There is room for an African Competition Network
- Harmonisation of the substantive provisions of the law and investigation procedures may be called for