

# Introduction

The case for African lawyers to understand the basic tenets of competition law has never been more compelling. The past few years have seen the emergency of competition authorities in a number of African countries. It is therefore expected that African lawyers will be increasingly called upon to opine on competition law aspects of commercial transactions. It is now almost a standard feature of mergers/acquisition due diligence exercises to include enquiries as to the likelihood or otherwise of merger transaction receiving clearance by competition authorities. Joint Ventures may in certain cases require clearance.

# Focus of presentation

With the foregoing comments in mind, this presentation touches on one of the key certain key aspects of merger assessment. “Coordinated Effects in Merger Review”. The theoretical underpinnings of coordinated effects will be discussed and we will end with some practical suggestions and tips on the importance of ensuring that instructions relating to due diligence in merger transactions are clear enough to encompass the key aspects of the lawyers work.

# Coordinated Effects

Merger analysis is concerned with preventing the acquisition or creation of dominance or market power or the ability of a firm or firms to increase prices above competitive market benchmarks. Put differently, mergers that are likely to substantially lessen competition in a market will be refused. There are two main possibilities which are normally considered in merger analysis: The first is where the merger might allow a firm to unilaterally exercise market power and raise prices (Unilateral Effects). The second is where a merger might give rise to market characteristics that favour collusion.

# Unilateral Effects

A merger might have the effect of removing competitive constraints. In an environment of perfect competition, when a firm increases the prices of its goods, its customers will switch to cheaper substitutable products. A fitting example is where a number of competing grocery shops merge. The merger in this scenario effectively removes competition and may result in the merged firm enjoying market power enabling it to increase prices. Unilateral effects are to be distinguished from coordinated effects.

# Coordinated Effects

A merger might create market conditions which increase the scope for mergers to collude. By definition a horizontal merger reduces the number of competitors. Economic analysis recognises that the lower the number of market participants, the higher the scope for collusion in the market. The Coordinated Effects is essentially collusion but this has to be distinguished from overt collusion which is illegal in most antitrust regimes. Generally agreements between undertakings which have the effect or object of preventing or distorting competition are illegal and prohibited. Tacit collusion on the other hand does not involve an agreement between firms but is nevertheless a problem from a competition law perspective because it gives rise to the same outcomes as those that result from overt collusion. The problem of tacit collusion is compounded by the fact that tacitly colluding firms cannot be punished under competition law. The best approach therefore is to prevent tacit collusion from taking place by refusing clearance of mergers that might create conditions essential for tacit collusion to occur.

# Market Conditions Necessary for Tacit Collusion

There are essentially three conditions necessary for tacit collusion to occur.

1. There must be few firms within a given market;
2. There must be transparency in terms of the costs and pricing mechanisms in a market;
3. There must be credible punishments against a firm failing to adhere to tacitly collusive.

# The importance of few players

When players are few in market (oligopoly) it makes it easier for the firms to police tacit collusion

# Transparency

Transparency entails free access to information regarding the pricing, cost and marketing strategies amongst the competing firms

# Credible punishment

Tacit collusion is sustained by the ability of firms to enforce the rules of tacit collusion by punishing players not adhering the rules. The punishment takes the form of price cuts. Where for instance a firm deviates from collusive conduct by lowering prices and thereby attracting away customers from other competitors, this sort of rebellion will be immediately detected because of the transparency and will be punished when the other colluding partners also lower their prices. When this happens all the players will incur losses. This is an effective and credible punishment.

# Conclusion

- A merger that would give rise to the creation of market conditions that might incentivise tacit collusion would be refused unless remedies are imposed. Such remedies usually take the form of behavioral or structural remedies.
- To the extent the lawyer involved conducting due diligence in a merger transaction might be expected to opine on the likelihood of refusal of a merger clearance, it is important to ensure that the scope of instructions are wide enough to cover all aspects of the investigation including competition assessments such as the ones described above

# Tips on taking instructions in a due diligence exercise in a merger transaction

Ensure the scope is broad enough to include all aspects of your work.

You may need to guide the client in terms of the scope. The client may not always fully understand the scope

Ensure you coordinate with local counsel on the timing

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