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# Tread carefully when merging: tribunal imposes massive fine for failure to notify

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In the intricate process of acquiring another business or forming a joint venture, firms often forget to check whether the transaction requires the approval of the competition authorities in South Africa, the rest of Africa or the rest of the world. Such failure can lead to severe consequences, including the imposition of an administrative penalty up to 10% of the firm's annual turnover and an order to reverse the acquisition.

## INTRODUCTION

However, until recently, the South African competition authorities did not pursue such severe remedies and the highest penalty imposed for failure to notify a merger was R1 million.

That was the past. In a recent matter, the South African competition authorities have signalled that they take failure to notify a notifiable merger very seriously and imposed a record R10 million penalty on two hospital groups for their failure to notify their merger.

On 7 April 2016 the Competition Tribunal announced that Life Healthcare Group (Proprietary) Limited (LHG) and Joint Medical Holdings Limited (JMH) have entered into a consent agreement in terms of which they admit to contravening the South African Competition Act 89 of 1998 ("Competition Act") by failing to notify the Competition Commission of their merger before implementing it. The parties agreed to pay an administrative penalty of R10 million. In addition, LHG agreed to disinvest its shareholding in JMH.

## WHAT IS A "MERGER"?

In terms of the Competition Act a merger occurs where one or more firms, directly or indirectly, establish direct or indirect control over the whole or a part of the business of another firm. However, what constitutes a "merger" is not always clear–cut and the concept of "control" may include the mere ability to materially influence the policy of a firm. Whilst LHG only had a 49% shareholding in JMH, the Competition Commission found that LHG had the ability to approve JMH's budget, the appointment of its employees and items of major capital expenditure (even if LHG had no contractual right to do so). LHG and JMH also agreed that their prices would be set jointly and all price negotiations, including designated service provider arrangements, would be conducted by LHG on behalf of both the hospital groups.

The Competition Commission found that these influences by LHG over JMH's business vested in it a "quality of control" which is more than a mere passive minority shareholding. Effectively this type of control constituted "joint" control in terms of the Competition Act and the acquisition should therefore have been notified to the Competition Commission. LHG should not have exercised this type of control without the prior approval of the competition authorities. The Competition Tribunal agreed with the Competition Commission's finding and confirmed the consent order and penalty of R10 million.

## WHEN IS A MERGER NOTIFIABLE?

All "mergers" which fall above certain financial thresholds may not be implemented without the prior approval of the South African competition authorities. These thresholds relate only to the size of the merging parties; the quantum of the purchase price has no bearing on this issue. The financial thresholds are as follows:

- The target firm's South African turnover or gross asset value must equal or exceed R80 million.
- The combined South African turnovers or gross asset values of the target firm and the corporate group comprising the acquiring firm must equal or exceed R560 million.

Each country or regional authority has its own thresholds for determination of whether a transaction is notifiable in the jurisdiction of that country or authority.

It is important to remember that not only corporate transactions or "sales of a business as a going concern" constitute a merger in terms of the Competition Act. In certain circumstances, acquisition of an asset (for instance, a debtors' book) or the formation of a joint venture may also constitute a notifiable merger.

## CONCLUSION

The failure to notify a notifiable merger has serious financial implications and it is therefore imperative for companies to obtain competition law advice when an acquisition or amalgamation is contemplated. This is especially the case in the current environment where the competition authorities have sounded a warning that they intend to clamp down on the unapproved implementation of notifiable mergers. The penalties can be expected to be particularly severe where –

- the merging parties are competitors of each other;
- the merging parties intentionally avoided a merging filing;
- the merged entity operated for a long time before discovery that there was a failure to notify the merger; and
- the merging parties did not volunteer their failure to notify but waited for the competition authorities to discover it.

Competition authorities in other African jurisdictions also appear to be taking an increasingly active interest in investigating whether firms are notifying mergers. Under the Kenyan Competition Act, for example, the implementation of a merger without the Kenyan competition authority's approval is an offence and the party concerned shall be liable on conviction to an imprisonment of maximum 5 years or a fine of 10 million shillings (equivalent to approximately R1.5 million), or even both. In addition, the Kenyan competition authority may impose a fine of up to 10% of the gross annual turnover derived by the merging parties in Kenya in the preceding financial year. According to media reports[1], the directors of a Kenyan company are reportedly facing jail terms for their failure to seek competition approval when the company acquired businesses in four countries, including Kenya, in October 2011. Although the company said that it informed the public about the acquisition through media and therefore had no intention of hiding the merger, the matter has been referred to the Director of Public Prosecutions in Kenya who advised the Directorate of Criminal Investigations to handle it.

In conclusion: acquisitions, amalgamations and joint ventures must be carefully analysed in order to determine whether they qualify as notifiable mergers in terms of the competition legislation of South Africa and other jurisdictions, as the consequences of not notifying a merger could be severe.

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[1] Daily Nation, 30 January 2014 (see https://www.nation.co.ke/business/corporates/Ipsos-Synovate-Competition-Authority-of-Kenya-Fines-/-/1954162/2166528/-/c7b793z/-/index.html) and The Star (Nairobi), 4 December 2015 (see https://www.the-star.co.ke/news/2015/12/04/ipsos-seeks-to-stop-probe-over-its-merger_c1254313).



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