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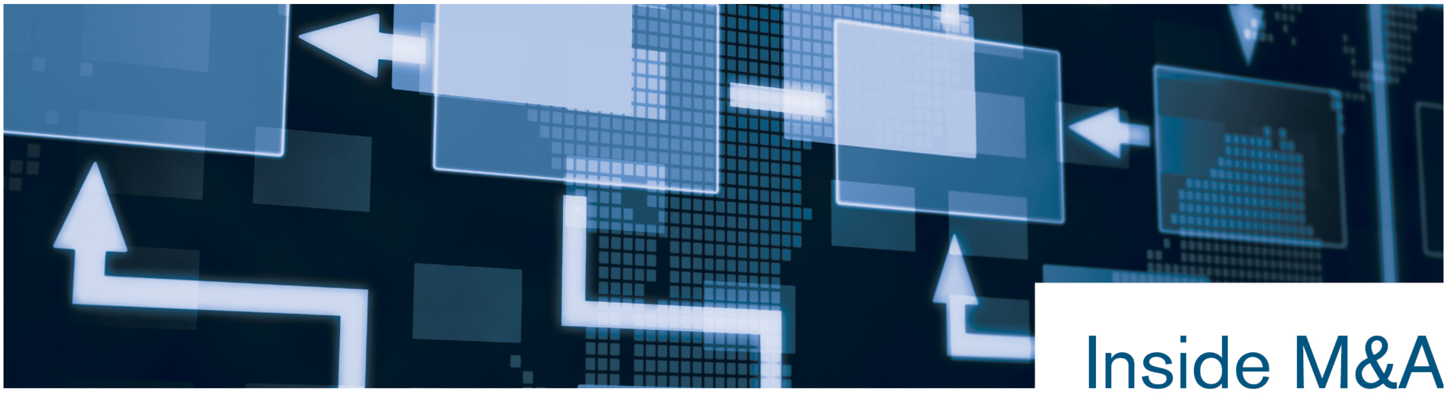

Inside M&A

Recent U.S. Cases Highlight Liability Risks to Executives in Mining, Heavy Industrial Transactions

By James A. Lastowka, Thomas Sauermilch, Daphne W. Trotter and Bethany K. Hatef

Historically, corporate executives rarely faced personal or criminal liability resulting from mining or environmental accidents in the United States. Several criminal cases stemming from two recent disasters, however, indicate that the tide may be turning. These disasters, the repercussions of which have been playing out recently in the U.S. criminal courts, should put private equity and strategic investors in the mining and heavy industrials space on alert. Thorough due diligence into a target's past operations and compliance record is more important than ever before.

In the case of Freedom Industries, a specialty chemical provider for the coal, steel and cement industries, a January 9, 2014, chemical spill from its Charleston, West Virginia, plant reportedly left 300,000 West Virginia residents without potable water for days. The incident, which occurred shortly after Freedom was purchased by Chemstream Holdings Inc. at the end of 2013, caused Freedom to file for bankruptcy eight days after the spill and only shortly after the close of the transaction.

In the case of both Freedom and Massey Energy—at whose Upper Big Branch underground mine an April 2010 explosion killed 29 miners—former corporate officers and employees are under criminal indictment. These disasters and the related prosecutions are instructive for anyone potentially seeking to invest in coal and other industrial assets, as each of the underlying incidents is alleged to be a consequence of unlawful historical environmental, health or safety practices, and resulted in serious consequences to the relevant entities after the closing of important corporate transactions.

Freedom Industries Spill

In December 2014, four former executives of Freedom were charged with criminal violations of the Clean Water Act relating to the January 2014 chemical spill that polluted a river in Charleston, West Virginia. The spill involved the release of 10,000 gallons of 4-methylcyclohexane methanol (a coal-cleaning chemical known as MCHM) from Freedom's facility into the Elk River, caused the governor to declare a state of emergency, and, in addition to leaving a large population without potable water for several days, caused more than 400 people to seek medical treatment for symptoms relating to MCHM exposure.

Litigation initiated immediately following the spill forced Freedom to file for bankruptcy protection, just eight days after the spill and only a few weeks after its December 2013 sale to Chemstream Holdings. Following the initiation of bankruptcy proceedings, the U.S. Environmental Protection Agency and Federal Bureau of Investigation began investigating Freedom for potential Clean Water Act violations. The indictment charged three Freedom owners and officers, each of whom held management positions at the company until the sale to Chemstream Holdings (and one of whom continued in a management position following the acquisition), as well as Gary Southern, the newly installed president of Freedom, with Clean Water Act violations relating to the spill. Among other violations, the indictment alleged that the executives failed to properly maintain and inspect the tank from which the MCHM leaked; establish spill prevention, control and countermeasures plans; and fund certain improvements required to comply with environmental regulations. Most large industrial facilities that store material quantities of petroleum and other chemicals are subject to these types of requirements.

Southern also has been charged in federal court with bankruptcy fraud, wire fraud and lying under oath in connection with Freedom's bankruptcy proceedings, and faces a potential 68 years in prison if convicted. The other Freedom executives charged face up to three years imprisonment each. Two other Freedom employees, an environmental consultant and tank farm plant manager, face up to one year in prison if convicted. In January 2015, the four executives each pleaded not guilty to the charges. Their respective cases will go to trial in March 2015.

Massey Energy Explosion

Also in West Virginia, federal criminal charges have been brought against several executives and managers of Massey in connection with the April 2010 explosion at the Massey Upper Big Branch underground coal mine. The explosion was the deadliest mining accident in the United States in 40 years. In June 2011, Alpha Natural Resources acquired Massey for $7.1 billion and subsequently settled criminal and civil penalties against Massey relating to the explosion for $209 million. These penalties included a record-breaking $10.8 million penalty issued by the Mine Safety and Health Administration. Several individuals who worked at the mine were convicted of crimes, including a miner who used a fake license required for conducting safety inspections at the mine, a security director who lied to investigators and tried to destroy evidence, and a foreman who gave advance notice of federal mine safety inspections and disabled a methane monitor used to detect and prevent explosions.

In addition to the Upper Big Branch mine employees, a former Massey executive with no direct involvement in day-to-day operations at the Upper Big Branch mine pleaded guilty in 2013 to federal conspiracy charges in connection with operations at another Massey mine. As part of his plea, the executive, who served as the president of a Massey subsidiary, admitted to warning miners at Massey mines of impending surprise safety inspections by mine safety and health officials. The executive was sentenced to 42 months in prison, a sentence that exceeded the top of the federal sentencing guidelines for the crimes for which he was convicted.

Most recently, in November 2014, former Massey CEO Don Blankenship was indicted in federal court on charges of conspiracy to violate mine safety laws, conspiracy to impede and obstruct federal mine safety officials, securities fraud, and making false statements to the U.S. Securities and Exchange Commission (SEC). The indictment charged that Blankenship closely managed the Upper Big Branch mine and that for a period of more than two years he conspired to commit routine, willful violations of federal mine safety standards, failed to provide resources needed to safely operate the mine, knew of safety violations at the mine but caused additional hazards by instructing managers not to conduct safety-related improvements and to instead focus on coal production, and conspired to provide advance notice of federal mine safety inspections. The indictment also charged that after the April 2010 explosion Blankenship made false statements to the SEC concerning Massey's safety practices and also made false statements, representations and omissions in connection with the purchase and sale of Massey stock. If convicted on all counts, Blankenship faces a potential prison term of 31 years. Blankenship's case is set to go to trial in April 2015.

Conclusion

As demonstrated by these events, the importance of conducting thorough due diligence with respect to environmental, health and safety issues at mines and other heavy industrial facilities cannot be overstated. Based on these prosecutions, it appears that both Freedom and Massey had a history of environmental, health and safety violations. These types of issues often can be identified during due diligence and can be addressed, with related financial responsibility negotiated, in the context of the subject transaction.

Options for Buying a UK Company with Multiple Selling Shareholders

By Rupert Weber, Calum Thom and Caroline Thackeray

In the United Kingdom, the issues and considerations involved in the acquisition of a private company with multiple selling shareholders can be complex. Some of the issues that arise in such acquisitions are similar to those that are considered with publicly traded companies, but would not typically be encountered in the acquisition of a private company with few shareholders.

This article briefly considers four possible ways of structuring an acquisition of the entire issued share capital of a company by a potential purchaser where there are multiple selling shareholders:

- Obtaining signatures or powers of attorney from each selling shareholder
- Using the drag-along provisions (if they exist) contained in the company's articles of association or shareholders' agreement
- Carrying out a scheme of arrangement
- Making a contractual offer to all of the shareholders

Determining which method is preferable will depend heavily on the facts of the individual transaction, and consideration should be given to a number of factors, including the number of shareholders of the target company, the ease of identification and communication with these shareholders, the timing requirements of the transaction and the importance to the buyer of obtaining full warranties from all selling shareholders.

The main focus of this article is how to ensure that all selling shareholders are bound by the deal in a practical, cost-effective way. This article also briefly touches on other relevant considerations, such as timing and buyer recourse. It does not cover situations where the UK Takeover Code applies to the target company or where the target company's shares are listed, nor does it cover any listing or Takeover Code requirements applicable to a buyer.

Powers of Attorney

If the shareholders are a homogenous and cooperative group, each shareholder could simply sign the sale agreement (SPA). In practice this seldom happens, because it is often undesirable and unwieldy to negotiate the details of an SPA with a large number of shareholders, and because the buyer doesn't want to wait until the SPA is almost fully negotiated and finalized only to find that one or two shareholders are unwilling to sign.

As an alternative, it is possible to obtain powers of attorney (PoAs) from each of the shareholders in favor of a third party (often the majority shareholder leading the sale process) once the main terms of the deal are commercially agreed upon, but prior to finalizing the SPA. Doing so allows the buyer and the parties driving the sale to enter into detailed negotiations of the SPA with the assurance that the shareholders will proceed with a sale of the target company.

PoAs are best entered into at a relatively early stage in the transaction. The drafting of the PoAs therefore should be specific enough to cover the contemplated transaction and ensure that the signature on the transaction documentation by the person acting under the PoA is valid, and at the same time broad enough to accommodate changes in the structure or deal terms during the course of the negotiations.

The use of PoAs is limited to the sale and purchase of a target company where the shareholder base is relatively confined, and those shareholders are readily identifiable and reachable at the outset. The shareholders also must be willing to cooperate for this method to be successful and to avoid having to rely on alternative methods (for example, drag-along rights) to complete the acquisition.

Where all shareholders sign the SPA themselves or by the person appointed under the PoA, the approach to warranties may be quite similar to that on a "normal" private M&A deal, with all shareholders giving fairly extensive warranties, but on the basis that each shareholder suffers proportionately if there is a breach. A buyer will not want to have to pursue a multitude of defendant shareholders in the event of a breach. An escrow for warranty claims or other deferred consideration mechanism can be useful in these circumstances.

One great advantage of all shareholders signing the SPA (either themselves or by a person appointed under a PoA) is that once all signatures are obtained, the buyer gains control of 100 percent of the target company, often on the same day.

Drag-Along Rights

Drag-along rights are often contained in a company's articles of association or shareholders' agreement and are common in companies with multiple shareholders. A drag-along right typically applies where a buyer makes an offer to buy a target company and a majority of the shareholders (the precise threshold varies) wish to accept the offer. In such scenarios, the majority shareholders would have the right to force the remaining shareholders to accept the offer and to transfer their shares to the buyer on the same terms.

Using the drag-along procedure can be the most straightforward and cost-effective way to acquire 100 percent of a target company from multiple shareholders. The buyer need only negotiate with the majority shareholder(s). Once the requisite majority has agreed upon the terms, the minority shareholders would be required to transfer their shares on the same terms without further negotiation or delay. This assumes that (i) one or a small number of shareholders own enough shares to reach the drag-along threshold, and (ii) the drag-along right is correctly drafted, which is not always the case.

Many drag-along clauses fail because the drafting does not properly cover a situation where a minority shareholder fails to execute a transfer, leaving the buyer at risk of ending up with less than 100 percent of the target company. Similarly, some drag-along clauses contain prescriptions on the type of consideration offered in order for the right to apply, meaning there is no drag-along right if the consideration offered by the buyer contains a non-cash element.

Relying on a drag-along procedure might delay the completion of the acquisition because, for example, certain time periods might need to elapse before the authority to sign on behalf of an unwilling shareholder comes into effect. As a practical matter, the use of drag-along rights might make it more difficult to obtain warranty protection than some of the other routes, and might also make escrow or deferred consideration arrangements more difficult. However, if properly drafted, the drag-along right has the great advantage of enabling the buyer to purchase the shares of dissenting shareholders (or shareholders who cannot be found).

Schemes of Arrangement

Schemes of arrangement are an increasingly popular means of acquiring a private company with multiple shareholders. A scheme of arrangement is a court-sanctioned process whereby a company makes a compromise or arrangement with its shareholders. A buyer typically negotiates with major shareholders and/or the board of the target company to agree upon the terms of the acquisition, then the target company proposes the scheme to its shareholders and recommends that they approve it. The terms of the acquisition are published to the shareholders in a scheme document that is lodged with and approved by the court. A general meeting of shareholders is held to approve the scheme, and a further court hearing is held to sanction the scheme. There are two principal types of schemes used for acquisitions:

- A cancellation scheme, whereby the existing shares in the target company are cancelled and new shares are issued to the buyer
- A transfer scheme, whereby a transfer of shares from the target company's shareholders to the buyer takes place

Cancellation schemes are more common because currently no stamp duty is payable by the buyer—the shares are cancelled and reissued rather than transferred. However, the UK government has indicated that new regulations, planned for early 2015, will prevent the use of cancellation schemes for acquisitions, so this particular tax advantage will almost certainly no longer be available in the future.

A scheme's principal advantages are (i) that it delivers certainty that a buyer will acquire 100 percent of the target company on completion, and (ii) that only 75 percent of the shareholders by value, as well as a simple majority by number of those represented and voting at the shareholders' meeting, must approve a scheme in order for 100 percent of the shareholders to be bound by it. This test often makes a scheme easier to achieve than a statutory squeeze-out, where the threshold of acceptance is 90 percent. However, because of the test's two-part nature, a number of small shareholders working together can derail the process by voting against the scheme at the shareholders' meeting (even if more than 75 percent by value are in favor of it). Care must be taken at the outset to address this risk (for example, by use of irrevocable undertakings to vote in favor).

If the acquisition is structured as a share-for-share exchange, or if a portion of the consideration is composed of shares in the buyer, another major advantage of a scheme is that a prospectus is not required (broadly, a prospectus would otherwise be required if shares are offered to more than 150 people in the United Kingdom).

The principal disadvantage of a scheme is that it can be a lengthy (and costly) process. The shortest possible timeframe to complete a scheme is approximately eight weeks from the date the scheme document is sent to shareholders to the final court sanction. This does not include the time spent prior to this date on negotiating the deal terms and drafting the documents. The stamp duty saving available on a cancellation scheme has typically been thought to outweigh the timing and cost implications. However, since this saving will almost certainly soon no longer be available, the popularity of schemes will likely soon diminish.

Warranties as to the ownership and transfer of the shares will usually be given as part of the scheme documents. However, if extensive business warranties are required, these will generally be dealt with outside of the scheme by way of a separate warranty deed. Who gives the warranties, how the liability will be shared by the selling shareholders and what redress is available to the buyer will depend on the facts of the deal. In a cash deal, monetary damages could be sought, whereas in a share-for-share deal, a warranty claim could instead be addressed by way of adjustment of the parties' relative shareholdings. Again, a buyer will not want to pursue multiple shareholders in the event of a warranty claim, so escrow or deferred consideration arrangements might also be appropriate in this context, particularly in a cash deal.

Offers

A buyer can choose to make an offer for the entire issued share capital of a target company where there are multiple shareholders and then rely on the statutory squeeze-out procedure to ensure that if a certain level of acceptance is received, the remaining shareholders are bound. There are strict rules that must be complied with in order to ensure that the offer qualifies. For example:

- It must be made for the entire issued share capital (other than any shares which are already held by the buyer).
- The terms must be the same for all shareholders (or the same for each class of share).
- It must be communicated to all shareholders (or class of shareholders), subject to certain limited exceptions.

There are further legal complications where there are foreign shareholders, where there are a number of share options or where the offer is not for cash consideration. Discussion of these topics is outside the scope of this article.

The risk of the offer not being accepted by the requisite number of shareholders can be mitigated by having the shareholders enter into irrevocable undertakings, in advance of the offer being made, that create a binding agreement that they will accept the offer. In comparison with the PoA method, which requires the positive consent of the entire shareholder pool, a buyer only requires 90 percent of the shareholders (or where there are different classes of shares, 90 percent of the shareholders of each class of shares) to have irrevocably undertaken to accept the offer in order to be sure that it will acquire 100 percent of the target. Once the offer has been made and accepted by 90 percent of the shareholders (which could happen on the same day), a buyer will be in control of the target company and will also be able to exercise its statutory right to compulsorily acquire the shares of the remaining minority shareholders under the Companies Act 2006 (squeeze-out).

Relying on the offer and squeeze-out procedure provides a clear advantage where it is known that at least 90 percent of the shareholders will accept the offer. The advantage over schemes in particular is that, provided the required 90 percent majority is secured in advance, the deal can be closed much earlier to give a buyer control (but not 100 percent ownership) of the target company. Obtaining 100 percent ownership will take approximately six weeks more. However, the buyer can be confident that this will be achieved.

Notwithstanding the foregoing information, it is important that the offer is structured and executed correctly and that the squeeze-out is carried out in accordance with the Companies Act 2006 to prevent procedural challenges from disgruntled shareholders. Although this method can be more streamlined than a scheme where there is a large shareholder base, a buyer should consider the advantages against the different acceptance threshold needed on a scheme.

The issues (and solutions) relating to warranties under an offer are similar to those under a scheme.

Conclusion

None of the structures described above is necessarily preferable to the others. The best approach will be determined by the facts of the deal. In any event, early thought should be given to this issue and advice sought as appropriate.

Merger Control in Africa

By Matthieu Adam and Stuart Mathews

Many African countries have enacted competition law legislation in order to improve market conditions and attract investors. These regimes differ from one country to another, depending on the country's history, culture, economic development, and whether its legal system is based on common law or civil law. While most African competition regimes contain rules addressing anticompetitive practices (such as collusive practices, abuse of dominance and unfair state aid), the legislation does not always provide for a merger control regime.

Most competition regimes have been introduced in the last 15 years, and some are still at an early stage of development. Some still require implementing rules and institutions to be introduced in order to be fully effective.

Several African countries have formed regional communities that have supranational tasks, such as the promotion of free trade areas and the development of monetary or customs unions. Some of these organizations also have the power to control mergers and concentrations taking place within the territory of their member states.

From a merger control perspective, the most important regional organizations are the Communauté Economique et Monétaire de l'Afrique Centrale (CEMAC), the Common Market for Eastern and Southern Africa (COMESA), and the Union Economique et Monétaire Ouest Africaine (UEMOA):

- CEMAC includes Cameroon, Republic of Congo, Gabon, Equatorial Guinea, Central African Republic and Chad.
- COMESA includes Burundi, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.
- UEMOA includes Benin, Burkina Faso, Ivory Coast, Guinea Bissau, Mali, Niger, Senegal and Togo.

As a result of the different legal cultures among their respective member states, the merger control regimes enacted by these organizations have different scopes and conceptual bases. They differ from a procedural point of view in whether there is voluntary or mandatory control, regional authorities or courts in charge of the control, and prior or subsequent control of concentrations. They also differ in substance in relation to thresholds, control criteria, remedies and sanctions. Sometimes even within the same regional organization, the national merger control legislations of its member states are based on totally different concepts.

CEMAC: Precise Control

The CEMAC Regulation of 1999 provides that concentrations of a community dimension are subject to a prior notification and merger control review carried out by the CEMAC Organe de Surveillance de la Concurrence. Concentrations meeting one of the following alternative thresholds are considered to be of a community dimension:

- At least two of the undertakings involved have a turnover in the common market of more than a billion CFA francs each.
- The undertakings together have an aggregate market share in the common market of 30 percent.

The CEMAC Regulation sets out the applicable review procedure and states that the CEMAC Regional Council is to issue a provisional decision within two months of the notification date and a final decision within five months.

As is the case in the European Union, the CEMAC Regulation provides that a concentration of a community dimension must be reviewed exclusively at the CEMAC level, thereby clearly indicating that member states do not have separate authority to review concentrations meeting the regional thresholds.

COMESA: Low Thresholds and a Costly Procedure

The COMESA Merger Control Regulation of December 2004 provides for mandatory merger control to apply to all concentrations that have an appreciable effect on trade between member states or that restrict competition in the common market. This Regulation does not apply to conduct expressly exempted by national legislation. The Regulation came into force in January 2013 and has prompted more than 30 notifications to date.

Two cumulative conditions trigger the requirement to notify a concentration with the COMESA Competition Commission (CCC):

- One or both of the acquiring firm and the target firm operate in two or more member states.
- The threshold of combined annual turnover or assets prescribed by the COMESA Board is exceeded. This threshold is currently fixed at zero, which means that a notification is necessary once the activities of one or more of the parties take place in at least two member states.

Under the COMESA Regulation, the CCC must make a decision within 120 days from the notification date. It may seek an extension from the COMESA Board if a longer review period is necessary, but only after having informed the parties.

The CCC may also require the parties to a non-notifiable merger to file a notification if it appears that the merger is likely to substantially prevent or lessen competition or is likely to be contrary to public interest. Notification under the COMESA Regulation is a costly procedure, with administrative notification fees reaching up to U.S.$500,000.

On October 31, 2014, the CCC issued helpful Merger Assessment Guidelines, which state that a merger will only be notifiable if the following are true:

- At least one merging party "operates" in two or more member states. A party will be considered to operate in a member state if its annual revenue in that member state exceeds U.S.$5 million.
- The target undertaking operates in a member state.
- More than two-thirds of the annual turnover in the common market of each of the merging parties is not achieved or held within the same member state.

These cumulative criteria should allow transactions that have only a marginal effect on the COMESA common market to avoid burdensome and costly filing obligations.

Prior to issuance of the Merger Assessment Guidelines, the CCC had developed an informal practice of issuing comfort letters upon request if it was satisfied that the transaction would not have an appreciable effect on trade in the COMESA common market. The Merger Assessment Guidelines formalize this practice and clarify that the CCC will respond to requests for comfort letters within 21 days of receipt of the request. If a comfort letter is granted, the parties to that transaction are exempt from filing full notifications and paying the high filing fees.

Under the COMESA regime, member states do not have separate authority to review concentrations meeting the regional thresholds. Although certain member states, such as Kenya, have resisted such interpretation, thereby requiring investors to consider filing a notification at the national level in addition to the COMESA filing, it is expected that the one-stop-shop mechanism will prevail and be confirmed by the COMESA Court of Justice.

UEMOA: Persisting Uncertainties

Unlike the CEMAC and COMESA regimes, the UEMOA Regulation of 2002 does not contain any procedure for the *prior* control of merger transactions. Nonetheless, article 4§1 of the UEMOA Regulation provides that a concentration will be regarded as an abuse of a dominant position where it creates or reinforces a dominant position leading to a significant hindrance of effective competition within the common market. When such a concentration comes to the UEMOA Commission's knowledge, the latter can order the parties involved not to proceed with the transaction if it has not been completed, order the parties to reverse the transaction and re-adopt the status they had before the transaction (the equivalent of an order of de-concentration), or order the parties to modify the transaction or take any necessary measures to ensure or re-establish sufficient competition. These are obviously strong remedies that parties cannot ignore with impunity.

While no prior consent is required, parties are able to seek advance clearance for a transaction. Parties to a concentration may ask for the UEMOA Commission's opinion on the compatibility of a concentration with the aforementioned rules and seek a negative clearance. Such a request must be initiated by one or more of the relevant parties and can be filed at any time before or after the signing and the closing of the contemplated transaction.

The UEMOA Commission must respond to the filing within six months, either by granting the parties the requested negative clearance or by communicating objections to the parties if the transaction raises serious competition concerns. In the latter case, the Commission must issue a final decision on the transaction within 12 months.

Given the strong remedies available to the UEMOA Commission, negative clearance is highly advisable if the transaction might be considered to create or reinforce a dominant position in the common market.

UEMOA member states do not have separate authority to review concentrations meeting the regional thresholds. National competition authorities and courts have subsidiary authority, mainly to assist the UEMOA Commission in investigating concentrations that raise competition concerns.

Conclusion

Companies involved in M&A deals in Africa should take careful account of the constraints and requirements imposed by regional and national competition rules. Effective enforcement of competition laws is increasingly a priority in African countries. Compliance with merger control rules is of the utmost importance, because large administrative and/or penal fines and other sanctions may be imposed on those that fail to comply at the national and/or regional level. In some circumstances, the transaction also may be declared void in the case of non-compliance.

Solid knowledge of merger control rules is necessary for investors operating in the African continent, both for compliance purposes and to understand where such rules provide an advantage over competing bidders (or perhaps to challenge M&A deals made or proposed by competitors.

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