All it takes is the right partner
INTRODUCTION

In 2000, Gleason Publications saw a gap in the M&A and general corporate finance industry: there were league and ranking tables drawn up by international firms that included South Africa as part of Africa, but no one had a South African operation that objectively tracked activity in the industry.

David Gleason defined the industry in the first issue of DealMakers, Q2 of 2000, as ‘The industry of buying and selling businesses, of repositioning and restructuring them and, sometimes, of absorbing them so that their original identities are taken up into that of the buyer…’. Twenty years on, this unambiguous explanation remains cogent to those who may not be au fait with the industry.

The DealMakers figures incorporated, and continue to incorporate, all activity that falls within our definitions – the rules have been set based on industry recommendations.

Concerns about the environment, corporate social responsibility and competition (anti-trust) issues continue to play a role in M&A activity globally. In South Africa greater foreign interest is being hampered by fears of land expropriation, the restrictive BBBEE legislation, corruption, a lack of accountability, the toll taken by loadshedding, the number of SOEs that need to be bailed out – that bottomless pit into which government seems determined to pour money, and the possibility that Moody’s will lower SA’s debt rating. It is expected that companies undertaking M&A will look across borders to first world countries to safeguard company value.

Despite the looming exit from Europe and the challenges that have already sprung up, the sentiment for growth in the UK’s M&A industry during 2020 is positive. Industry commentators note that one important contributor is current CGT legislation, which states that through the Entrepreneur’s Relief scheme, shareholders could potentially pay as little as 10% (previously the figure was up to 40%). The firm hold the Conservative Party has is also anticipated to bolster the market.

Europe’s anticipated deal activity is expected to be more subdued. But there is no crystal ball and most commentators see profitable companies in the EU that might be wooed, if the price is right.

The US M&A industry saw positive growth over the past year, but while President Trump is rumoured to be planning a tax cut later this year to increase his chances of a second term in office, there are other issues to consider, not least his trade war with China.

Globally, 2020 started with positive sentiment. However, there has already been the side-sweep given by the Corona Virus and fears of a global economic downturn if COVID-19 spreads uncontrollably; already reacting to the virus, global markets have had the worst week since 2008. All-in-all, this appears to be a year when predicting M&A and CGF activity is like taking a chance at Blackjack. It may well be easier to look back as we exit 2020. •

Myrle Vanderstraeten
UNRIVALLED
THE LEGAL DEALMAKER OF
THE DECADE BY DEAL FLOW

M&A Legal DealMakers of the
Decade by Deal Flow: 2010-2019

2019 1st by BEE M&A Deal Flow
2019 1st by General Corporate
Finance Deal Flow
2019 2nd by M&A Deal Value
2019 2nd by M&A Deal Flow

The M&A legal partner
for your business.

cliffedekkerhofmeyr.com
## Top Legal DealMakers down the years

<table>
<thead>
<tr>
<th>Year</th>
<th>By Deal Value</th>
<th>By Deal Flow</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>Edward Nathan &amp; Friedland (R33,39bn)</td>
<td>Edward Nathan &amp; Friedland (54 deals)</td>
</tr>
<tr>
<td>2001</td>
<td>Webber Wentzel Bowens (R147,80bn)</td>
<td>Edward Nathan &amp; Friedland (49 deals)</td>
</tr>
<tr>
<td>2002</td>
<td>Sonnenberg Hoffmann Galombik (R31,68bn)</td>
<td>Edward Nathan Frieden (50 deals)</td>
</tr>
<tr>
<td>2003</td>
<td>Cliffe Dekker (R30,11bn)</td>
<td>Java Capital (66 deals)</td>
</tr>
<tr>
<td>2004</td>
<td>Edward Nathan &amp; Friedland (R50,63bn)</td>
<td>Java Capital (64 deals)</td>
</tr>
<tr>
<td>2005</td>
<td>Webber Wentzel Bowens (R120,60bn)</td>
<td>Java Capital (48 deals)</td>
</tr>
<tr>
<td>2006</td>
<td>Bowman Gilli an (R61,40bn)</td>
<td>Werksmans (51 deals)</td>
</tr>
<tr>
<td>2007</td>
<td>Webber Wentzel Bowens (R121,91bn)</td>
<td>Werksmans (46 deals)</td>
</tr>
<tr>
<td>2008</td>
<td>Werksmans (R195,21bn)</td>
<td>Werksmans (42 deals)</td>
</tr>
<tr>
<td>2009</td>
<td>Edward Nathan Sonnenbergs (R281,84bn)</td>
<td>Cliffe Dekker Hofmeyr (70 deals)</td>
</tr>
<tr>
<td>2010</td>
<td>Edward Nathan Sonnenbergs (R153,86bn)</td>
<td>Cliffe Dekker Hofmeyr (60 deals)</td>
</tr>
<tr>
<td>2011</td>
<td>Cliffe Dekker Hofmeyr (R104,73bn)</td>
<td>Cliffe Dekker Hofmeyr (77 deals)</td>
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<tr>
<td>2012</td>
<td>Edward Nathan Sonnenbergs (R53,55bn)</td>
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<tr>
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<td>Cliffe Dekker Hofmeyr (108 deals)</td>
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<td>Webber Wentzel (R1,60tn)</td>
<td>Cliffe Dekker Hofmeyr (79 deals)</td>
</tr>
<tr>
<td>2016</td>
<td>Webber Wentzel (R195,44bn)</td>
<td>Cliffe Dekker Hofmeyr (77 deals)</td>
</tr>
<tr>
<td>2017</td>
<td>Webber Wentzel (R216,30bn)</td>
<td>Cliffe Dekker Hofmeyr (82 deals)</td>
</tr>
<tr>
<td>2018</td>
<td>Cliffe Dekker Hofmeyr (R54,88bn)</td>
<td>Cliffe Dekker Hofmeyr (69 deals)</td>
</tr>
<tr>
<td>2019</td>
<td>Webber Wentzel (R50,86bn)</td>
<td>Webber Wentzel (52 deals)</td>
</tr>
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</table>
DealMakers’ 2019 RANKINGS OF LAW FIRMS

## Mergers & Acquisitions

### RANKINGS BY DEAL VALUE

<table>
<thead>
<tr>
<th>No</th>
<th>Company</th>
<th>Deal Values R’m</th>
<th>Market Share %</th>
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<tbody>
<tr>
<td>1</td>
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<td>15,13%</td>
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<tr>
<td>3</td>
<td>Bowman</td>
<td>29 645</td>
<td>15,04%</td>
</tr>
<tr>
<td>4</td>
<td>ENSafrica</td>
<td>22 010</td>
<td>11,17%</td>
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### RANKINGS BY DEAL FLOW (ACTIVITY)

<table>
<thead>
<tr>
<th>No</th>
<th>Company</th>
<th>No of Deals</th>
<th>Market Share %</th>
<th>Deal Values R’m</th>
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<tbody>
<tr>
<td>1</td>
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<td>52</td>
<td>21,76%</td>
<td>50 860</td>
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<tr>
<td>2</td>
<td>Cliffe Dekker Hofmeyr</td>
<td>44</td>
<td>18,41%</td>
<td>29 818</td>
</tr>
<tr>
<td>3</td>
<td>Bowman</td>
<td>33</td>
<td>13,81%</td>
<td>22 010</td>
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<tr>
<td>4</td>
<td>Worksman</td>
<td>24</td>
<td>10,04%</td>
<td>13 975</td>
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</table>

### RANKINGS BY TRANSACTION VALUE

<table>
<thead>
<tr>
<th>No</th>
<th>Company</th>
<th>Transaction Values R’m</th>
<th>Market Share %</th>
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<tbody>
<tr>
<td>1</td>
<td>Webber Wentzel</td>
<td>2 587 505</td>
<td>50,16%</td>
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<tr>
<td>2</td>
<td>Glyn Marais</td>
<td>2 481 438</td>
<td>48,10%</td>
</tr>
<tr>
<td>3</td>
<td>ENSafrica</td>
<td>28 055</td>
<td>0,54%</td>
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<tr>
<td>4</td>
<td>Cliffe Dekker Hofmeyr</td>
<td>17 421</td>
<td>0,34%</td>
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### RANKINGS BY TRANSACTION FLOW (ACTIVITY)

<table>
<thead>
<tr>
<th>No</th>
<th>Company</th>
<th>No of Transactions</th>
<th>Market Share %</th>
<th>Transaction Values R’m</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Cliffe Dekker Hofmeyr</td>
<td>26</td>
<td>29,89%</td>
<td>17 421</td>
</tr>
<tr>
<td>2</td>
<td>Webber Wentzel</td>
<td>15</td>
<td>17,24%</td>
<td>2 587 505</td>
</tr>
<tr>
<td>3</td>
<td>ENSafrica</td>
<td>13</td>
<td>14,94%</td>
<td>28 055</td>
</tr>
<tr>
<td>4</td>
<td>Bowman</td>
<td>9</td>
<td>10,34%</td>
<td>5 575</td>
</tr>
</tbody>
</table>

General Corporate Finance
Behind every BIG DEAL is a partner that understands the business needs of its customers.

Proud sponsor of the Legal Adviser of the Year

www.juta.co.za
Marylou Greig, Editor of DealMakers, observed in the DealMakers’ Gold Medal Issue 2019, ‘In 2000, the value recorded for M&A listed activity, for JSE-listed companies, was R209bn from a total of 534 deals. In 2019, the value of successful M&A deals for South African exchange-listed companies stood at R421bn from a total of 463 deals’.

Taking a walk down memory-lane, in 2000 Edward Nathan & Friedland was the top law firm by both deal value and deal flow – R33587m off 54 deals. Webber Wentzel came second by value – R29066 while Werksmans took deal flow – 43.

In 2009 Edward Nathan Sonnenbergs ranked first by deal value – R281824m and Cliffe Dekker was placed first by deal flow, with 70 deals. In second place by value was Webber Wentzel – R217848 and by flow, Werksmans with 46 deals. In the General Corporate Finance category, Webber Wentzel was first with transactions to the value of R154907m, second was Edward Nathan Sonnenbergs.

By transaction flow, Edward Nathan Sonnenbergs executed 28 transactions while Werksmans, in second place executed 23 transactions.

And the rankings for the 2019 tables put Webber Wentzel in pole position by both deal value and flow, with R50860m off 52 deals. Cliffe Dekker Hofmeyr came second by both value and flow – R29815 off 44 deals. Bowmans was third by value – R29645 and ENSafrica by flow – 33 deals. In General Corporate Finance, Webber Wentzel came first by transaction value – R2587505 – and Cliffe Dekker Hofmeyr by transaction flow 26 deals. Glyn Marais came in second by transaction value, R2481438, while Webber Wentzel took second place by flow – 15 transactions.

The important role played by legal advisers was also recognised by DealMakers at the close of the second decade – Webber Wentzel by deal value of R2370667, 25.13% of market share, and Cliffe Dekker Hofmeyr by deal flow – 782 deals to the value of R906524, 23.92% of market share.

In 2000 the DealMakers of the Year were Credit Suisse First Boston by deal value – R2851bn and, by deal flow, Investec and Brait Advisory Services, both of which executed 35 deals. The total number of deals for the year was 499 and the value amounted to R238.2bn.

Ten years on Goldman Sachs was recognised for deals by value – R259.27bn while Investec again took pole position by deal flow with 30 deals. Although there was a slight drop in the number of deals undertaken, the value was eye-watering.

In 2019 PSG Capital undertook deals to the value of R33.07bn and the lead by deal flow went to Nedbank CIB with 24 deals.

Congratulations to all those who have ranked over the past 20 years and have contributed so importantly to the economy of South Africa.’
Brunswick Deal of the Year awarded to PepsiCo and Pioneer Foods (and advisers) by Rob Pinker, Chair Emerging Markets at Brunswick Group.

Private Equity Deal of the Year: Richard Stewart (Sibanye-Stillwater), Arie Maree (Ansarada), Carl Neethling (Acorn Private Equity), Michael Avery (Catalyst) and Johan van Zyl (Acorn Private Equity).

BEE Deal of the Year: Richard Stewart (Sibanye-Stillwater), Arie Maree (Ansarada), Deon Dhlomo (Kwanda Capital), Simon McGill (Nampak), Shakes Matiwaza (Kwanda Capital) and Mzila Mthenjane (Exxaro).
DealMaker’s Annual Rankings

March 2020

M&A Feature

DealMakers’s Annual Rankings

Bowmans

ENSAfrica

Cliffe Dekker Hofmeyr

Webber Wentzel

ENSAfrica

ENSAfrica

ENSAfrica

ENSAfrica
Legal DealMakers of the Decade
2010 - 2019

Cliffe Dekker Hofmeyr received the Legal DealMaker of the Decade (by deal value). Willem Jacobs accepted the award from Marylou Greig (DealMakers) and Gareth Driver.

2020 DealMakers Annual Awards

A decade of excellence

Proud winners of the Legal DealMakers of the Decade (M&A - by Deal Value)

Winner - Legal Adviser of the Year 2019 - M&A - by Deal Value
Winner - Legal Adviser of the Year 2019 - M&A - by Deal Flow
Winner - Legal Adviser of the Year 2019 - General Corporate Finance - by Deal Value

WEBBER WENTZEL
in alliance with Linklaters
**BEE DEALS RANKINGS AND WINNERS**

### RANKINGS BY DEAL VALUE

<table>
<thead>
<tr>
<th>No</th>
<th>Company</th>
<th>Deal Values R’m</th>
<th>Market Share %</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>ENSafrica</td>
<td>8 304</td>
<td>24.23%</td>
</tr>
<tr>
<td>2</td>
<td>Webber Wentzel</td>
<td>5 036</td>
<td>14.69%</td>
</tr>
<tr>
<td>3</td>
<td>Herbert Smith-Freehills South Africa</td>
<td>4 783</td>
<td>13.96%</td>
</tr>
<tr>
<td>4</td>
<td>Malan Scholes</td>
<td>4 600</td>
<td>13.42%</td>
</tr>
<tr>
<td>5</td>
<td>Cliffe Dekker Hofmeyr</td>
<td>3 306</td>
<td>10.33%</td>
</tr>
<tr>
<td>6</td>
<td>Bowmans</td>
<td>1 944</td>
<td>5.67%</td>
</tr>
</tbody>
</table>

### RANKINGS BY DEAL FLOW (ACTIVITY)

<table>
<thead>
<tr>
<th>No</th>
<th>Company</th>
<th>No of Deals</th>
<th>Market Share %</th>
<th>Deal Values R’m</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Cliffe Dekker Hofmeyr</td>
<td>9</td>
<td>15.00%</td>
<td>3 506</td>
</tr>
<tr>
<td>2</td>
<td>Webber Wentzel</td>
<td>8</td>
<td>13.33%</td>
<td>5 036</td>
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<tr>
<td>3</td>
<td>ENSafrica</td>
<td>6</td>
<td>10.00%</td>
<td>8 104</td>
</tr>
<tr>
<td>4</td>
<td>Bowmans</td>
<td>6</td>
<td>10.00%</td>
<td>1 944</td>
</tr>
<tr>
<td>5</td>
<td>Werksmans</td>
<td>6</td>
<td>10.00%</td>
<td>1 687</td>
</tr>
<tr>
<td>6</td>
<td>Baker McKenzie</td>
<td>5</td>
<td>8.33%</td>
<td>612</td>
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</tbody>
</table>

Sanjay Kassen received the award on behalf of ENSafrica for the top BEE legal adviser (by deal value).

Cliffe Dekker Hofmeyr was awarded top BEE legal adviser of the year (deal flow). Anita Moolman accepted the award.

Jakob’s Vineyards is a small family owned vineyard in the **Hemel-en-Aarde Ridge** ward, close to Hermanus, and produces a terroir specific Cabernet Sauvignon wine from its **one hectare** under vine.

We are proud to be associated with DealMakers and that our wine was served at the 2020 DealMakers Annual Gala Award Banquet.

**Jakob’s Vineyards Cabernet Sauvignon** is available in limited quantities from our online shop at:

[www.jakobsvineyards.co.za](http://www.jakobsvineyards.co.za)
South Africa is experiencing a prolonged period of political and economic uncertainty. However, the country’s commitment to improving the local investment environment, combined with signs of future economic improvement, have resulted in increases in M&A value and volume predictions for South Africa in 2021 and 2022.

According to Baker McKenzie’s Global Transaction Forecast, produced in conjunction with Oxford Economics, South Africa’s M&A market will remain weak in the near-term, with a projected strengthening of the economy in 2020-21 likely to support a modest recovery in deal-making activity in future years. These figures show merger and acquisition value in South Africa was US$10.1 billion in 2019 but this is expected to drop to US$5.2 billion in 2020, before rising to US$9.4 billion in 2021 and US$12 billion in 2022.

International investors and South African dealmakers often feel discouraged by South Africa’s business and socio-economic environment; currently they are not experiencing South Africa as “open for business”. Dealmakers in South Africa frequently comment on the uncertainty created by BEE laws and regulations which, in their experience, are too complex, inconsistent and unpredictable. The risk of being found guilty of “fronting”, and facing criminal sanction as a consequence, raises an ominous red flag when making investment decisions. This is especially in light of the considerable challenges investors face in not falling foul of anti-bribery and corruption laws.

Further areas of concern include labour market related issues - including costs, productivity and the legislative framework; currency volatility; bribery and corruption; and inadequacies in the justice system - which raise concerns about the rule of law. Investors are also worried about the support and performance of SOEs, including Eskom and Transnet; the socio-economic mandate of the Competition Authorities and the inconsistencies and unpredictability caused by the manner in which this might be applied. Land expropriation without compensation, uncertainty about security of property rights and security of tenure have further eroded business confidence.

A highly regulated business environment also results in uncertainty; too much regulation can cause interference in a free market economy and lead to an unfavourable business environment that is difficult to navigate.

Despite all this, and although there is still a lot of work to do, we believe the country is on the right track for future growth and recovery. Despite all this, and although there is still a lot of work to do, we believe the country is on the right track for future growth and recovery. For the country’s investment environment to improve, the fact that we should and could do better must be acknowledged, and visible action needs to be taken to address the areas of concern.

All stakeholders, including government, labour and business, must work together to create a sustainable, well-functioning and vibrant economy.

Van der Merwe is Managing Partner and Head of Corporate/M&A with Baker McKenzie (South Africa).
MERGERS - A RISKY BUSINESS?

TENISHA BURSLEM-ROtheroe

There are key lessons learnt from recent local and international decisions on gun-jumping and failure to notify.

Competition authorities around the world are cracking down on merger parties who do not take heed of notification requirements. In South Africa, in terms of the Competition Act (89 of 1998) (as amended), parties are required to notify a transaction where it constitutes a merger as defined in the Act, and where it exceeds the prescribed financial thresholds. After notification, parties to an intermediate or large merger may not implement the merger until it is approved by the relevant competition authorities.

The implementation of a transaction before approval is colloquially referred to as “gun-jumping”. Administrative penalties for gun-jumping and failing to notify a merger can be up to 10% of the merger parties’ turnover. This could have serious financial implications for parties who unknowingly take part in activities without the required approval or parties who choose not to notify their transaction.

Merger parties need to ensure that strict compliance protocols are in place during the merger process as competition authorities are watching closely and are holding parties to a much higher standard. It is, therefore, important that merger parties are aware of the circumstances which could place them at the mercy of the competition authorities. As the law in this regard is constantly developing, this article will explore the South African competition authorities’ approach to gun-jumping and failure to notify, and recent key developments abroad.

The South African guidelines

There has long been a need to develop clear guidelines and penalties in cases dealing with gun-jumping and failure to notify. There have been some instances where the punishment for such activities has been viewed as an ineffective deterrent. For example, during May 2008, a proposed fine of R6 million imposed on Netcare and the Community Health Care group for failure to notify was rejected by the Competition Tribunal for being too low. Netcare had agreed to pay the penalty to settle the matter after it had bought a controlling stake in the Community Health Care group without notifying authorities. The Tribunal argued that the settlement did not adequately safeguard public interest.

In April 2019, the Competition Commission (the Commission) issued ‘Guidelines for the Determination of Administrative Penalties for Failure to Notify Mergers and Implementation of Mergers Contrary to the Competition Act’. The Guidelines are designed to deter firms from failing to advise mergers which are notifiable and/or implementing notifiable mergers without first obtaining approval from the competition authorities.

The Guidelines provide examples of activities that could result in administrative penalties for gun-jumping. These include:

- the acquiring firm participating in the day-to-day operations of the target firm before obtaining approval;
- parties marketing themselves as a single entity;
- premature integration and consolidation of the merging firms; or
- the acquiring firm being involved in making and/or executing strategic decisions regarding the future of the target firm.

The minimum penalty (or “Base Amount” as it is referred to in the Guidelines) for prior-implementation for an intermediate and large merger is double the application filing fee for the merger. At present filing fees are R165,000 for an intermediate merger and R550,000 for a large merger, meaning that penalties could start from R330,000 or R1.5 million, depending on the size of the merger. After establishing the base amount, the Commission takes into account the duration of the contravention and a proportion of the base amount is added for each month of the contravention. The amount is then adjusted according to the relevant aggravating and mitigating factors. Accordingly, the penalty could easily run into millions.

In addition to an administrative penalty, the Tribunal could order a divestment or other remedies that seek to address the harm caused to competition because of prior-implementation. The acquiring firm and the seller are generally jointly and severally liable but the Commission may also seek a penalty against either party individually or against their holding companies. The highest penalty to date for prior-implementation has been R10 million but this case also involved alleged cartel conduct.
It is also important to note that the Competition Amendment Act, signed into law by the President in February 2019, increases the maximum penalty from 10% to 25% of annual South African turnover and exports for parties with repeat contraventions.

The Guidelines have, however, been criticised for conflating failure to notify and prior implementation. They do not provide general principles that the Commission will apply in determining whether conduct falls within the definition of failure to notify or prior implementation but merely provide examples of such contraventions. There has also been criticism around the multiplier of the duration in the penalty calculation, as there is generally no correlation between harm suffered and time passed.

In the face of the uncertainty posed by the guidelines, parties need to ensure that every step is taken to prevent contravening the Act. While pre-integration planning is essential to avoid this, it can be complex and risky. For instance, when integrating IT systems and sharing data, merger parties need to ensure that they are not crossing any regulatory lines. Essential steps need to be put in place at an early stage to ensure that the relevant clean teams have been allocated and that proper protocols are adhered to.

Examples of prior-implementation fines in South Africa

The table lists the higher penalties to date for prior implementation and failure to notify in terms of s13A of the Act:

<table>
<thead>
<tr>
<th>Case no.</th>
<th>Case name</th>
<th>Penalty (ZAR)</th>
<th>Description</th>
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<tbody>
<tr>
<td>FTN229Feb16</td>
<td>Competition Commission vs Life Healthcare Group (Proprietary) Limited and Joint Medical Holdings Limited</td>
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<td>Prior-implementation as well as cartel conduct between the parties</td>
</tr>
<tr>
<td>FTN200Dec15</td>
<td>Competition Commission vs BB Investment Company (Pty) Ltd, Bidvest Group Ltd and Adcock Ingram Holdings Ltd</td>
<td>2,000,000</td>
<td>Prior-implementation</td>
</tr>
<tr>
<td>CR076Sep08SA254Mar16</td>
<td>Competition Commission vs Kap Raw Materials (Pty) Ltd, Loungefoam (Pty) Ltd, Steinhoff International Holdings Ltd, Kap Industrial Holdings Ltd and Feltex Holdings (Pty) Ltd</td>
<td>1,750,000</td>
<td>Prior-implementation</td>
</tr>
<tr>
<td>CO095Sep19</td>
<td>Competition Commission vs Lenmed Health</td>
<td>1,250,000</td>
<td>Failure to notify and prior-implementation</td>
</tr>
<tr>
<td>390/XMay11</td>
<td>Competition Commission vs Royal Bafokeng Holdings (Pty) Ltd, Moqs (Pty) Ltd, Elbrcn Mining Products (Pty) Ltd and Steinhoff International Holdings Ltd</td>
<td>1,100,000</td>
<td>Prior-implementation</td>
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<tr>
<td>69/AM/Oct10</td>
<td>Competition Commission vs WBO Construction (Pty) Ltd &amp; Edwin Construction (Pty) Ltd</td>
<td>1,100,000</td>
<td>Prior-implementation</td>
</tr>
</tbody>
</table>

Foreign case law

As South African competition authorities often look to international authorities for guidance, it is important to take note of some of the key developments arising from, and the increasing risk posed by, non-compliance. In the international sphere, gun-jumping is also referred to as the “standstill obligation”. Some recent key judgments illustrate that competition authorities worldwide are showing greater intolerance towards this.

In October 2019, Canon acquired Toshiba Medical Systems Corporation (TMS) through the use of a two-step “warehousing” deal structure. Canon notified the European Commission of its proposed acquisition of TMS. The first step of the transaction took effect when a special purpose vehicle (SPV) was created to buy shares from TMS. Canon bought the remaining shares as well as share options to acquire the SPV’s stake. The second step of the transaction involved the acquisition by Canon of full ownership over TMS. The ownership of the target’s non-voting shares and options to acquire voting shares permitted Canon to acquire effective control of TMS before notification. The European Commission fined Canon EUR 28 million (approximately R448 million) for the pre-clearance implementation. It found that both steps formed part of a single concentration. On 25 November 2019, Canon appealed the decision, arguing that the Commission erred in law by misapplying the tests of partial-implementation.

Another recent key judgement is that of Ernst & Young P/S v Konkurrenserådet, C-633/16, EU:C:2018:37, handed down in May 2018. In this case, KPMG Denmark gave notice of the termination of its co-operation agreement with KPMG International Cooperative (KPMG International) subsequent to the conclusion of a merger agreement with Ernst and Young (EY). The termination notice was given before receiving merger control clearance and would only become effective after six months, by which time the parties would have obtained merger clearance. It was held that KPMG Denmark had not contravened the standstill obligation by giving pre-merger termination notice, as the notice would not give EY control or the ability to exercise influence over KPMG Denmark. The standstill obligation is limited to the actual acquisition of control, or measures that would result in the actual acquisition of control. This judgement gives parties flexibility in agreeing and implementing preliminary measures that don’t confer control or result in the eventual acquisition of control.

In 2014, Altice S.A., a multi-national telecoms and mass media company, entered into a transaction agreement to acquire sole control of PT Portugal, a telecommunication and multimedia operator in Portugal. Altice S.A. notified the European Commission of its plans to acquire PT Portugal. The transaction was conditionally cleared. In 2017, the European Commission notified a Statement of Objections to Altice in which it held that the transaction agreement had granted Altice the legal right to exercise decisive influence. It also
held that Altice had exercised decisive influence over PT Portugal before clearances or notifications to the Commission by granting veto rights over decisions about PT Portugal’s day-to-day business, and by systematically receiving commercially sensitive information from PT Portugal. The European Commission imposed a fine of EUR 125 million (approximately R2 billion) for the breach.

As can be seen from both the local and international case law, competition authorities are taking a stronger stance against failure to notify and gun-jumping, and are analysing transactions in greater detail.

Key lessons:
• Parties to a merger, regardless of size, should ensure the relevant competition authorities receive notification where required.
• The structure and timing of multi-phase transactions should be approached with caution. Composite transactions should be analysed carefully, as the various steps of the transaction could be viewed as forming part of a single merger.
• Pre-integration planning is key. Care should be taken to ensure parties have the necessary clean teams and protocols in place to avoid the accidental sharing of confidential or competitively sensitive information.
• Parties need to be cautious of conduct that could be construed as causing a lasting change of control or decisive influence over a target.

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MORE FOREIGN INVESTMENT AND ECONOMIC GROWTH - LESS RED TAPE

TESSA BREWIS AND ELNALENE CORNELIUS

By the generally established principles of international private law, a body corporate duly created in one country is usually recognised as a body corporate by other countries, although this is not always the case (Delport et al Henochsberg on the Companies Act 71 of 2008, last updated September 2019, commentary to s23 of the Companies Act (71 of 2008)).

The Companies Act follows this principle. The definition of “person” in the 2008 Companies Act refers to a “juristic person” which is defined to include a “foreign company”. A “foreign company” is defined as an entity incorporated outside of South Africa, irrespective of whether it is inter alia a profit company or carrying on business in South Africa (Foreign Company). A Foreign Company that carries on business or non-profit activities in South Africa is required to register as an “external company” in terms of s23 of the Act.

However, the definition of “company” in the 2008 Companies Act does not specifically include a Foreign Company or an External Company. This was confirmed by the Pretoria High Court in the recent judgment of Cooperative Muratori & Cementisti-CMC Di Ravenna Societi Cooperativa A Responsabilita Limitata (External Company Incorporated in Italy) and Others v Companies and Intellectual Properties Commission and Others (15454/2019) [2019] ZAGPPHC 529 (15 October 2019). Therefore, not all the provisions of the 2008 Companies Act applicable to “companies” apply to Foreign Companies and External Companies, and only specified sections of the Act apply to External Companies.

The 10 May 2019 version of the Companies Amendment Bill does not include reforms to s23 of the 2008 Companies Act and it does not appear to be a means through which the South African government aims to increase FDI.
In the Cooperative Muratori judgment, the court referenced s2(2) of the Companies Act (61 of 1973) which expressly provided that all the provisions of the 1973 Companies Act applied to every External Company. Moreover, the court quoted from Cassim’s Contemporary Company Law (2012) 97, noting that there was a specific legislative intent in not including this provision in the 2008 Companies Act, namely to reduce the strict regulation of External Companies in order to promote investment in South African markets. The general interpretation provisions of the 2008 Companies Act support this argument, requiring the 2008 Companies Act to be interpreted and applied in a manner that gives effect to the purposes set out in s7 of the 2008 Companies Act, including inter alia promoting investment in South African markets and continuing to provide for the creation and use of companies in a manner that enhances the country’s economic welfare as a partner within the global economy.

A Foreign Company is required to register as an External Company in terms of s23 of the 2008 Companies Act if:

(i) It is a party to one or more employment contracts in South Africa; or
(ii) If it is subject to s23(2A) of the 2008 Companies Act, where it is engaging in a course of conduct or has engaged in a course or pattern of activities within South Africa over a period of at least six months, that would lead a person to reasonably conclude that the company intended to engage in business or non-profit activities in South Africa.

In s23(2A) of the 2008 Act, certain activities typically associated with foreign companies investing in South African markets, or being party to M&A transactions in South Africa, are specifically excluded as indicating that the foreign company is conducting business activities in South Africa as contemplated in s23(2)(b). Having a shareholders meeting in South Africa, establishing or maintaining any bank or other financial accounts in South Africa, creating or acquiring any debt in South Africa, or acquiring any interest in any property within South Africa are not necessarily indicative of conducting business activities in South Africa for purposes of s23(2)(b). The term ‘property’ is not defined in the 2008 Companies Act and appears to refer to the broader concept of property, which includes shares in a South African private company. The mere fact that a Foreign Company raises South African debt and acquires shares in a South African private company as a passive investor would, therefore, not result in this Foreign Company “conducting business activities in South Africa” and therefore would not be required to register as an External Company.

Although not all the provisions of the 2008 Companies Act that apply to "companies” apply to Foreign Companies, given the definition of person (which includes a juristic person and therefore a Foreign Company), certain provisions of the 2008 Companies Act do apply. This is the case even though such Foreign Companies do not conduct business in South Africa and are not required to register as External Companies. For example, Chapter 4 of the 2008 Companies Act is applicable to Foreign Companies that offer securities to the public in South Africa.

Even if a Foreign Company is required to register as an External Company, the Cooperative Muratori judgment confirms that the effect would be to make only certain provisions of the 2008 Companies Act applicable to such a Foreign Company, consequently the regulation is low. A Foreign Company that fails to register as an External Company could, however, receive a compliance notice from the Companies and Intellectual Property Commission requiring it to cease carrying on its business or activities in South Africa if it fails to register within 20 business days after receiving the notice. This is very onerous.

The United Nations Conference on Trade and Development (UNCTAD) Investment Trends Monitor Report Issue 32 of October 2019 (UNCTAD Report) indicates that foreign direct investment (FDI) flows to South Africa dropped from US$4 billion in the first half of 2018 to US$2.6 billion in the first half of 2019; a significant drop in FDI, which is critical for the South African economy and also one of President Ramaphosa’s key focus areas. There are many factors that contribute to the drop in FDI flows but it is interesting to note that the UNCTAD Report also records significant foreign investment increases in Nigeria as a result of reforms in regulations for oil and gas companies and the lowering of mandatory public ownership requirements. This is an example of how a country’s legislative and regulatory reforms are linked to changes in its FDI.

The 10 May 2019 version of the Companies Amendment Bill does not include reforms to s23 of the 2008 Companies Act and it does not appear to be a means through which the South African government aims to increase FDI.

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THE IMPORTANCE OF NEGOTIATION IN M&A TRANSACTIONS

JASON JANSE VAN VUUREN

To some extent, we have all had the experience of having to negotiate something: the purchase price of our homes, annual leave with a boss or even, the often robust “whose turn it is to pick the Sunday night movie” with our significant others. A result of its regular occurrence, negotiation may be considered common cause and not necessarily something that requires much attention. When it comes to commercial negotiation, however, I have found the following useful when trying to get a deal done.

1. Set up the rules early
Where the transacting parties are operating under a different set of perceived unwritten rules, an innocent move may well set the parties off on the incorrect footing at best and possible deadlock at worst. Differing styles of negotiation may easily be the unassuming culprit here.

To illustrate the point, one party adopting an approach that nothing is agreed until everything is agreed, will be prepared to revisit points previously discussed. This is a subtle distinction to the position that, once an aspect of a transaction has been agreed, it is a closed item and no longer open for further negotiation and all that is left to close out the transaction or agreement, would be individual points not yet settled.

The US–China trade negotiation comes to mind and, although I am sure there are many complex variables at play, the US allegations of bad faith on China’s part – for example, reneging on agreed positions, does make one wonder whether the differing styles of negotiation may have been the cause of some of the delay in closing out the agreement between the parties.

2. Preparation
This may seem obvious, of course we are going to prepare for the negotiation, but what is actually being prepared?

A useful tool is the consideration of the counterparty’s potential position on items and the importance they attribute to these aspects. An understanding of the importance a party attributes to the items ordinarily serves as a good indication of the resistance one can expect from the counterparty to move from their initial position. A prep session, mapping the issues and their importance to each party, is helpful as it may offer up a few quick wins through the possibility of trading less important issues (that may be more important for the counterparty) for those aspects which are more important for the team (which similarly may be less so for the counterparty).

Where the transacting parties are operating under a different set of perceived unwritten rules, an innocent move may well set the parties off on the incorrect footing at best and possible deadlock at worst.

The exercise may well be intuitive for the most part but it serves as a valuable reminder that items of less importance to the team still attract the value the counterparty attributes to them and, as a result, should not simply be offered up without something in return during negotiations.

3. Negotiate your interest, not your position
When engaging with the counterparty, it’s worthwhile negotiating one’s interest as opposed to one’s position. The easiest way to distinguish between these two, is to think of the position as the ‘ask’ and the interest as the ‘reason’ for the ‘ask’. A thorough appreciation of a counterparties’ rationale for a particular position allows for more creative solutions to matters, as opposed to a back-and-forth on positions that do not address the underlying concerns and amounts to little more than negotiating for negotiating’s sake.

A simple example, which comes up often enough, relates to time frames in agreements. One party may draft for 20 days to complete a particular task, whereas the other only requires 10 days for the same task. The change remains marked up for a number of drafts, and in finalising the last few outstanding items. The parties on either side, trade off days by splitting the difference or applying a standard number of days across the board. In this example, if the underlying rationale for the time requested was specifically required to finalise the administration of the purchase price payment, it may not be practical to reduce the timing. A better solution may have been to agree to the 20 days but to have included an obligation to invoice the party earlier, thereby allowing for the time required to process the payment but still achieving a payment of the purchase price on the requisite date.
4. Incentivise the right actions

Ever seen that toddler “escalating an “ask” (read throwing a tantrum) in the sugar aisle because the answer was no to an initial request for chocolate? Most parents would agree that to give in at that point is to invite a tantrum whenever an unwanted “no” arises in the future. Suffice to say, it is wise to consider the consequences when one capitulates on a particular issue.

For example, escalating a sticking point in a corporate negotiation to an executive of the organisation may not be the behaviour to incentivise. It must be said that it is not unusual for the respective deal teams to agree an escalation on an issue to be resolved. The real risk is a unilateral escalation by the counterparty within one of the organisations where the executive then negotiates or agrees items with the counterparty’s deal team. This disempowers the executive’s deal team and the decisions made may negatively impact the transaction if the executive does not have a full appreciation of all the underlying variables in the transaction. Most executives should, of course, alive to this and refer the counterparty back to the deal team thereby eliminating the risk of the same behaviour in the future.

The intricacies of negotiation are, of course, vastly more nuanced, however, I hope this article will play a small role in assisting those new to this area.

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PRE-TRANSACTIONAL FORENSIC VETTING

GEOGINA NIVEN

When a mysterious individual offers to buy a stake in your company with R40 million in foreign currency stashed in the trunk of a car, the most trusting of business owners would probably realise that this is an ill-advised transaction.

In recent years, mergers and acquisitions (M&A) in South Africa have declined in both volume and value. This is partly the public sector’s fault. According to industry experts, there are a host of factors behind the decline which South Africans can now recite by rote: economic sluggishness; political instability; poor service delivery; policy uncertainty; and state capture. But the relatively recent spate of corporate scandals, including the likes of African Bank and Steinhoff, have also eroded the public’s trust in the integrity and ethics of the private sector.

The good news is that South Africa, having been tirelessly educated on what can go wrong, is now well-placed to introduce not just forensic auditing but also holistic pre-transactional vetting practices into its business culture. Such measures, which empower business owners to identify and navigate risks efficiently, will go a long way to protect our corporate sector from the shockwaves of recent years.

African Bank Investments: The importance of forensic auditing

The importance of forensic auditing cannot be understated. Few companies are more aware of this than African Bank Investments Ltd (Abil). In 2014, Abil’s banking branch, African Bank Ltd (African Bank), collapsed under the weight of billions in stuttering loans. Abil’s share price tanked, plunging to 31c in August 2014, from R28.15, just 18 months earlier.

In a report commissioned by South Africa’s banking regulators and led by Adv JF Myburgh SC, Adv Myburgh attributed the Abil/African Bank collapse to a variety of factors. Most notable of these, for our purposes, was Abil’s R9 billion acquisition in 2007/2008 of Ellerines Holdings, a South Africa-headquartered furniture outfit. Despite its magnitude, little to no due diligence preceded the acquisition.

Abil certainly came to regret the transaction. By 2014, Ellerines had experienced multi-million-rand losses year-on-year, propped up only by Abil’s sizeable unsecured loans and costly value share arrangements. Far from being attributable to a declining furniture sector, Adv Myburgh indicates that only two months after the acquisition of Ellerines, Abil’s executives identified a veritable shopping list of concerns which would have placed any board well beyond the realm of buyer’s remorse: Ellerines was over-branded, over-stored and over-structured; its market share was declining and over-structured; its market share was declining; trading profits were forecast below Abil’s budget; Ellerines’ accounting methods were legally flawed and needed correction; and all of this had to be artfully communicated to the public and a fleet of market regulators.

It does not take much to imagine the difference a robust forensic audit on Ellerines would have made to Abil’s corporate course.

Steinhoff International Holdings NV: Why forensic auditing is not enough

More recent company collapses in South Africa have shown that forensic auditing may be insufficient. Private sector players should be investing in more holistic vetting, inclusive of ethics checks and corporate governance reviews — along with a healthy dose of scepticism. This is well-illustrated by Steinhoff.

In 2017, Steinhoff International Holdings NV, once a darling of the JSE, collapsed. Despite the market-rocking panic which ensued, Steinhoff’s collapse should not have been such a surprise. Had the same intensity of investigation into Steinhoff post-collapse been applied to Steinhoff pre-collapse, there may well have been a different outcome.

To illustrate: routine regulatory due diligence would have shown that Steinhoff’s German offices were raided by German tax authorities in 2015, prior to Steinhoff’s listing on the Frankfurt Stock Exchange. In economies with more developed due diligence processes, alarm bells would have sounded, regardless of reassurances from the Steinhoff board. Deeper and more holistic due
diligence would then have raised a cumulative set of concerns, warranting caution amongst investors:

- Steinhoff was on an aggressive, debt-fuelled acquisition spree before its collapse (not to labour the point, but little due diligence appears to have preceded these).
- Despite buying up distressed businesses, Steinhoff consistently reported improved results.
- Steinhoff’s business structure was highly complex, making proper analysis difficult.
- The chairman of Steinhoff was also the primary shareholder, making the independence of governance questionable.
- Standard reputational checks on Steinhoff’s board would have revealed a host of concerning allegations against some of its key members.
- Steinhoff’s financial statements evidenced a lack of proper commitment to developing ethical awareness and ethical compliance within its structures. The benefit of hindsight amply illustrates the meaninglessness of the following statement which appeared year on year in Steinhoff’s annual reports: “All Steinhoff stakeholders and, more specifically, directors and employees are required to observe the Steinhoff Code of Ethics to ensure that business practices are conducted in a manner which is beyond reproach…This requires commitment by management to acknowledge and ensure that our long-term sustainability is based on delivery to all stakeholders.”

Although a more complex matter than Abil’s acquisition of Ellerines, the Steinhoff saga offers valuable lessons to the M&A sector. To put it bluntly: legal and financial checks are not enough. To assess the feasibility of a transaction, a business should be pressure tested from all angles, from its tax affairs to its corporate governance structures.

McKinsey & Co: The value of proper intelligence

Although briefly highlighted in the Steinhoff example, the case of McKinsey & Co provides a good example of why acquiring companies should include rigorous background and reputational checks on all the company’s major players, including their executives and ultimate beneficial owners.

Between 2015 and 2016, McKinsey contracted with Eskom on a deal with a potential value of US$ 700 million for the supply of management consulting services to the limping state power utility. During its 2015 negotiations with Eskom, McKinsey took on a local partner, Regiments Capital, under the directorship of Eric Wood, for supply development and localisation. Through intervention by the Guptas, Wood left Regiments to establish Trillian, together with a Gupta loyalist, Salim Aziz Essa. Despite Trillian having no record to speak of, and despite it reportedly refusing to divulge its ownership structure, McKinsey continued to contract with it. Due diligence checks on Trillian ex post facto alerted McKinsey to several red flags, causing it to disassociate with Trillian. By then, however, it was too late. The consultancy has since suffered humiliation and reputational damage at an international level for its role (intended or otherwise) in the South African state capture scandal.

When a mysterious individual offers to buy a stake in your company with R40 million in foreign currency stashed in the trunk of a car, the most trusting of business owners would probably realise that this is an ill- advised transaction.

Quite apart from the need to run reputational assessments, McKinsey also provides a good example of why:

1. acquiring companies should insist on full disclosure of all information from the target company;
2. acquiring companies should be advised by individuals who are au fait with the regional and sector-specific risks that may impact a transaction more broadly.

In summary

As illustrated, the risks in a potential transaction are not always as obvious as the cash-stuffed trunk of a car. Yet the wave of corporate scandals which have contributed to the depression in M&A activity need not be cause for despair. South African companies are well-equipped to learn from the failings of the current system. One of the first steps in addressing those weaknesses is to introduce thorough and comprehensive forensic due diligence which covers a target company from all angles. While important, forensic auditing is only one part of a broader process which should include (at the bare minimum) assessment of the target company’s financial, legal, regulatory, ownership, reputational and governance affairs and (ideally) all tax, insurance, labour, customer, supplier, intellectual property, real estate, environmental and related party concerns. Such due diligence has become a matter of course in more developed economies, and improvements in the sector will go a long way to encouraging inbound, outbound and domestic M&A activity in the country.

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AN ONEROUS DUTY

ALIDA CRONJE

Accountable institutions know that they play an integral part in the prevention of money laundering and terrorism financing. Compliance with regulations and executing their responsibility enables them to act in the best interest of their organisation at all times. Changes to the South African regulatory environment to increase the level of responsibility institutions play in their accountability has caused many executives to feel overwhelmed, expressing the view that they want to comply but, “don’t kill my business with compliance”.

So what has changed, and how can accountable institutions embrace both the spirit and the letter of the law to meet their obligations?

The journey to a risk-based approach

In 2012 the Financial Action Task Force (FATF) identified limitations in the Anti-Money Laundering and Counter Terrorism Financing (AML/CFT) preventative measures in place at the time. It recognised that different institutions could not use identical measures to fight money laundering and terrorist financing. As a result, the concept of a risk-based approach was introduced and, among other recommendations, the FATF recommended that a risk assessment should be performed as the first step in all efforts to combat money laundering and terrorist financing.

Following this, in 2017, an amendment of the South African Financial Intelligence Centre Act (38 of 2001) (FIC) caused legislation to evolve from the long-standing rules-based approach to a risk-based approach. This required that accountable institutions understand their exposure to money laundering and terrorist financing risk, ultimately to protect and maintain the integrity of their businesses and to contribute to the integrity of the South African financial system.

In addition, s42 of the FIC Act, titled “Risk Management and Compliance Programme” or referred to as RMCP, stipulates the requirement that accountable institutions establish unique programmes for AML/CFT risk management and compliance. It further determines that the responsibility rests with the board of directors or senior management, in the absence of a board of directors, to ensure compliance with the FIC Act and the RMCP.

The practicalities of implementing a risk-based approach

The main objective for the accountable institution is to ensure that clients are sufficiently assessed to prevent or deter unscrupulous operators from using the organisation to legitimise ill-gotten gains and to ensure that the process is intrusive enough to detect any suspicious activities at the initiation stage, and for the duration of the business relationship.

The board of directors must ensure compliance with the FIC Act but it does not necessarily have the knowledge to exercise this responsibility efficiently. In approving the proposed RMCP, the board is faced with the dilemma that should the measures be unduly onerous, it might deter not only unscrupulous operators but also valuable clients, which will impact negatively on the business as a whole. On the other hand, should the measures not be effective, it could expose the business to unnecessary risk.

A risk-based approach should enable accountable institutions to focus their resources on the services and client segments which pose the highest level of risk. This allows a more efficient allocation of resources in addressing compliance obligations.

A need to review the RMCP

The deadline for implementation of the FIC Act amendments was 2 April 2019. By then, all accountable institutions should have been complying with the requirement for an RMCP.

A risk-based approach should enable accountable institutions to focus their resources on the services and client segments which pose the highest level of risk. This allows a more efficient allocation of resources in addressing compliance obligations.

The implementation and successful execution of the processes contained in the RMCP are important as this will be the measure used by the regulator to determine compliance with the Act. At this stage, it is wise to conduct a review to determine if the RMCP is fit for purpose. The board should possibly consider the services of an independent evaluator to assess the effectiveness of the RMCP and its subsequent implementation.

It is important to remember that fulfilling compliance requirements not only protects the institution itself but helps to deter economic crime. Expert support is on hand to determine the right approach and to ensure obligations are achieved.

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DUE DILIGENCE INCORPORATING AI – THE PROS AND CONS

THATO MASHISHI

4IR (the fourth industrial revolution) has become a buzzword, and in all material aspects, the crux of it is efficiency. Professional services firms, in an attempt to provide services to their clients more efficiently, have started to adopt and incorporate artificial intelligence (AI) in due diligence investigations.

Importance of due diligence investigations in M&A transactions

In most M&A transactions, a proper due diligence investigation is arguably the most important part of the transaction, from the perspective of a buyer. Not only does the due diligence lay bare and quantify material risks which a client may not be aware of, but the findings can arm clients with greater bargaining power in the negotiation phase of M&A transactions.

Traditional due diligence investigations

Typically, the due diligence investigation process entails uploading information related to finance, legal and governance of entities into a virtual data room which can be accessed by due diligence teams reviewing information and reporting on their findings.

The review process in particular is not only time-consuming but it is also labour-intensive, expensive and, depending on the scope, can take months to complete.

Pros of AI incorporation in due diligence investigations

Incorporating AI in due diligence investigations provides swifter turnaround times when reviewing documentation. This is premised on AI being used to review material clauses and other relevant information in agreements where it is far faster than humans. Consequently, due diligence investigation teams can focus less on extracting material provisions in the documentation. The incorporation of AI in due diligence investigations provides an accurate, efficient and fast review of information, which is cheaper for clients.

Cons of AI incorporation in due diligence investigations

An over-reliance on AI in extracting information from documentation may lead to instances where certain information is missed as a result of poor quality of the documentation reviewed. This may be material in the due diligence investigation and expose clients to risks which would not be mitigated.

The incorporation of AI in due diligence investigations may lead to a decrease in the human capital required, redundancies and an increase in the unemployment rate unless clients are serviced differently and new skill sets are acquired by teams conducting due diligence investigations. Another consideration would be the costs associated with the incorporation of AI, including licensing of software used where it is not built in-house by professional services firms and the costs related to technical support required to ensure that the software performs optimally.

The influence of POPI in Al incorporation in due diligence investigations

Professional services firms need to consider the regulation of personal information in terms of the Protection of Personal Information Act (4 of 2013) (POPIA) when including AI in due diligence investigations. As POPIA has not yet come into full force and effect, professional services firms need to be forward-looking in their approach and should consider the impact of international data protection legislation, such as the General Data Protection Regulation, in addition to POPIA.

Professional services firms must ensure that all conditions provided for in POPIA are adhered to. These include the processing, collection, retention and restriction of records, security measures and compromises in respect of personal information. Failure by professional services firms to comply with POPIA may, in certain circumstances, lead to imprisonment or the imposition of fines on the firms.

The introduction of AI in due diligence investigations should be welcomed. However, before professional services firms decide on its adoption in due diligence investigations, the pros and cons should be meticulously considered and should include the associated costs and the socio-economic impact.

The 4IR is here and there is a clarion call for professional services firms to embrace its benefits.

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Despite global economic uncertainty and political and regulatory issues, Africa remains the next big market for many multinational companies. This is because economic growth continues due to the growing investment in private equity and the untapped markets provided by Africa’s growing middle class, with financial technology and telecommunications showing potential to be key growth areas on the continent.

Along with this, China continues to play a major part in investments in South Africa, with commitments in the region of R193 billion in new investments in the country. This brings the potential for further mergers and acquisitions in South Africa in the near future.

However M&A transactions, by their very nature, contain unknown elements and unforeseeable risks. Once viewed as a novelty, M&A insurance is becoming an increasingly valuable and popular tool that can help deals and transactions progress more smoothly. Both buyers and sellers gain confidence knowing that the risks associated with the transaction have been mitigated.

The benefits of M&A insurance

M&A insurance offers buyers and sellers a solution designed to cover breaches in representations and warranties provided by sellers in the process of the transaction. This form of insurance has the potential to reduce both parties’ inherent risk in completing a transaction, and help minimise the time needed to reach an agreement and close the deal.

When initiating a transaction, parties often believe that their particular deal may be a “perfect fit”. However, despite conducting the best due diligence processes, the unknowns remain until the dust settles, long after the deal is closed. Such incidents can occur when the post-acquisition revenue falls short of projections, or the buyer incurs successor liability exposures such as unpaid income taxes, undetected environmental contamination or liabilities stemming from criminal or fraudulent activity discovered after a deal closes.

M&A insurance can also provide protection and coverage for areas such as intellectual property, data, assets, accounts, contracts, and property. It can be structured to protect buyers and sellers in claims arising from specific inaccuracies in representations and warranties made by the seller in an M&A transaction. Such inaccuracies can potentially create costly liabilities, leaving buyers with little or no recourse.

The potential advantages associated with M&A insurance can therefore be summarised as follows:

- It can speed up the negotiations of a business sale by mitigating the liabilities of future representations and warranties claims;
- It removes the worry of not being able to collect on a seller’s promised indemnification; and
- It can allow the buyer to maintain a good relationship with the seller, who may become the buyer’s employee or business partner after the transaction.

Merger and acquisition insurance in the South African insurance landscape

With the introduction of the Insurance Act (18 of 2017) on 1 July 2018 and an insurance landscape that is ever-evolving, the time is ripe for more insurers to begin offering M&A insurance products in South Africa.

The construction of M&A insurance policies is not without its challenges. Insurers would be wise to tailor M&A insurance products to cover, within carefully defined limits, the unique risks which arise in M&A transactions.

As deal-making continues to increase in South Africa and on the African continent as a whole, M&A insurance can provide sophisticated buyers and sellers with a comprehensive tool that reduces risk and assists them in reaching their transactional goals faster and with fewer headaches. This in turn has the potential to increase the number of M&A transactions taking place in South Africa. ●

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ARE MANDATORY OFFERS ALWAYS MANDATORY?

YANIV KLEITMAN, BOIPELO DIALE AND MURENDENI MASHIGE

The acquisition of a beneficial interest in securities of 35% or more in a regulated company, as contemplated by s123 (2) of the Companies Act (71 of 2008), triggers a mandatory offer by the person or persons in whom the beneficial interest vests, to the holders of the remaining securities in that regulated company. While it is fairly straightforward to determine indirect share transactions when a mandatory offer is triggered, the scenario of indirect acquisitions of control is unclear.

For example, assume Company A has a controlling interest in Listco B. Company C then acquires all the shares in Company A (but acquires no shares directly in Listco B). Assume too that for various reasons a mandatory offer is not triggered under the related party rules in regulation 83 of the Companies Regulations, nor under the pyramid rules in regulation 85 of the Companies Regulations.

Section 123 applies where:

“(2) …
(a) either—
(i) …; or
(ii) a person acting alone has, or two or more related or inter-related persons, or two or more persons acting in concert, have, acquired a beneficial interest in voting rights attached to any securities issued by a regulated company;
(b) …; and
(c) as a result of that acquisition, together with any other securities of the company already held by the person or persons contemplated in paragraph (a) (ii), they are able to exercise at least the prescribed percentage of all the voting rights attached to securities of that company."

Company C will not acquire a direct interest in Listco B as a result of the transaction. Instead, Company C will acquire an indirect controlling interest in Listco B, as a result of acquiring 100% of Company A. Whilst the position in respect of an acquisition of direct control in a regulated company seems to be quite clear, the position is murky and uncertain in respect of an acquisition of indirect control in a regulated company.

A key question is whether, post the implementation of the transaction, Company C (as the new sole shareholder of Company A) will hold a “beneficial interest” in Listco B for the purpose of s123.

“Beneficial interest” is defined in s1 of the Companies Act as:

- “when used in relation to a company’s securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to—
  (d) receive or participate in any distribution in respect of the company’s securities;
  (e) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company’s securities; or
  (f) dispose or direct the disposition of the company’s securities, or any part of a distribution in respect of the securities…”

It is clear that after the transaction, Company A will remain the registered and beneficial owner of the Listco B shares, and the holder of the voting rights attached thereto.

There are cogent arguments that could be made in support of a contention that, for purposes of s123, Company C should be considered to hold a beneficial interest in the Listco B shares held by Company A – mainly in that, effectively, Company C has the same level of control as a direct shareholder. However, there are also cogent arguments to the contrary – that Company C should not, for purposes of s123, be considered to have a “beneficial interest” in the Listco B shares, merely by virtue of the fact that Company A is its wholly-owned subsidiary and that it is therefore able to control the constitution of its board. After all, Company A is a separate juristic person and its board must act in the best interests of Company A when exercising the voting rights attached to the Listco B shares.

In any event, even if Company C was considered to hold such a beneficial interest in Listco B, such beneficial interest should not confer on Company C the actual legal ability to exercise the voting rights attaching to the Listco B shares, as envisaged in s123(2)(a)(c).

Other jurisdictions, such as the UK, have specific guidance on this aspect of indirect acquisitions of control, where it is referred to and dealt with as the “chain principle”. It is hoped that clarity will be brought to the situation in our takeover law by a future amendment to the Companies Act and/or the regulations thereunder.

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