Platforms are back in vogue

Not the shoes! In recent months, the Trinity M&A team has seen an uptick in, and advised on an increasing volume of, African energy and infrastructure M&A platform transactions (Platform Transactions). The reference to platform, in this context, is to a holding company which is used by investor(s) as a platform to hold multiple assets and/or subsidiaries in one or more jurisdictions (Platform Company) . Such structures come with specific peculiarities in the context of M&A transactions, several of which we will be exploring in this short article.

There are numerous reasons why an investor would choose to acquire a Platform Company. Principal amongst these are the efficiencies that can be exploited from holding several similar assets simultaneously. These efficiencies range from streamlining management to efficient management of contractors (such as EPC contractors) and, over the lifetime of projects, may result in significant cost savings for the equity investors. In addition, having a portfolio of projects may also de-risk investments to a certain extent; if one project is not as successful as initially envisaged, the other projects in the portfolio may be able to compensate for any such underperformance. Conversely, an unsuccessful asset in a portfolio may drag down the value of the platform on a proposed exit by investor(s) and may need to be carved out of any such exit.

There is no consensus amongst investors on where the Platform Company should be located. Historically, Mauritius has been a popular jurisdiction to locate holding companies with inbound African investments. However, this practice was disrupted when Mauritius was included on the Financial Action Task Force (FATF) Grey list for strategic deficiencies in effectiveness. Although Mauritius has since been removed from the grey list, some clients remain wary of routing any investments through it. We have therefore encountered, and advised on, a range of jurisdictions for holding structures, from “traditional” jurisdictions such as Mauritius, Delaware, Luxembourg or Netherlands, to others such as the United Kingdom or France, where the relevant investor has its main place of business. The choice of jurisdiction will be based on, among other things, tax considerations, available investment protection (such as bilateral investment treaties) and reputational considerations.

In many aspects, the approach to a Platform Transaction is identical to the approach to the acquisition of a single asset company. In both instances, the purchaser(s) will simply be purchasing the shares of a company through a sale and purchase agreement (SPA). The SPA, and other transaction documents, will contain the negotiated positions of the parties, including provisions in relation to the purchase price (and how it is allocated across the sale assets and how and when payments are made). In relation to the purchase price, we have encountered locked box mechanisms on the recent Platform Transactions on which we have advised; this is a mechanism through which the purchaser(s) and the seller(s) agree on a price payable for the sale shares, usually based on a balance sheet drawn up and settled between the parties to an agreed date in advance of signing. In the period between signing and completion, only certain permitted and agreed leakages out of the target group to the seller(s) (or their related persons) would be permitted. The transaction documents will also typically include provisions in relation to warranties, indemnities and other customary provisions.

As with any M&A transaction, legal (as well as tax, financial and technical) due diligence is critical for the assessment and the valuation of the asset(s) being purchased. For Platform Transactions, there are several approaches that can be taken in relation to due diligence. We are advising on a significant number of Platform Transactions which have undergone a vendor due diligence review as part of the auction process. In these instances, the role of the adviser of the potential purchaser has

been to perform confirmatory due diligence on the vendor due diligence; this role has involved reviewing the vendor due diligence reports together with certain of the key underlying agreements. For due diligence, if there are a number of jurisdictions in which the sale assets are located, we would recommend focussing on the key (revenue-generating) jurisdictions and framing the due diligence around these. However, the steer for any focus will come directly from the relevant client. For example, it may be the case that value is given by the investor to project(s) which are in the pipeline (as opposed to projects which are being developed or in operation) and we may therefore be instructed to frame our due diligence around these projects. We have also advised on transactions in which two or more investors agree to acquire a Platform Company with the intention that immediately following the relevant acquisition, one or more of the subsidiary companies is to be on-sold to one of the investors. In such on-sale transactions, the coordination of the multiple purchasers vis-à-vis the seller(s) is of great importance as even though they may not be aligned in terms of which assets they will be acquiring, the lowest common denominator, in terms of limiting factors to completion or positions taken with the seller, is the one that will typically be adopted between all of the parties. In all of these instances, the international legal adviser needs to work closely with counsel in each relevant jurisdiction together with the tax, financial and other advisers. The key issues to consider with these advisers will include any consent or notification requirements (including in relation to relevant competition rules and laws) and any taxation issues. The SPAs (for both the primary and the on-sale transactions) would be drafted to cover these issues in that consents and notification would be included as conditions precedents whereas the treatment of any past, current or potential future tax issues would be a subject that is usually hotly debated and negotiated between the parties.

If debt financing is required for funding the acquisition of a Platform Company or its operations, lenders and investors will need to consider how best to structure the security package since, in many cases, it is likely that senior lenders will already have taken security over the shares and assets of the operating companies sitting underneath the Platform Company. As a result, the security package provided pursuant to such financings is often more limited than a project financed transaction but, at a bare minimum, will usually comprise a share charge over the shares of the Platform Company and an account charge over the bank account in which distributions from the operating group are made. Other considerations relevant to such financings should be: (i) the most appropriate ratio test required to measure the financial health of the Platform Company, given that it is typically solely reliant on cashflows generated by the operating group companies, (ii) how such cashflows can best be ringfenced for repayment to the Platform Company's lenders in the context of competing debt (e.g. any intra-group and project finance loans), and (iii) the covenant and default package as it relates to the performance of the underlying operational companies.

Trinity has a specialist corporate practice, comprising one of the most experienced teams globally for its corporate work in Africa. We have acted on a number of M&A, private equity and joint venture transactions throughout Africa and other emerging markets, including for investors who have acquired, sold or invested in projects in Africa such as Meridiam, AIIM, Climate One, AFC, AP Moller Capital, AMEA Power, Inspired Evolution and others.

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