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AFRICA SERIES COMPETITION ALERT

IN THIS **ISSUE**

CDH
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COMESA COMPETITION COMMISSION AND MALAWIAN COMPETITION AUTHORITY SIGN MOU

The MOU aims to increase cooperation between the national and regional authority.

Malawi's Competition and Fair Trading Commission is the first competition authority of a COMESA member state to enter into a memorandum of understanding (MOU) with regional watchdog, the COMESA Competition Commission (CCC).

The MOU aims to increase cooperation between the national and regional authority. Any instrument promoting consistency in the enforcement of competition policy is to be welcomed. Although the CCC has primary jurisdiction over competition matters with a regional dimension, the CCC Rules provide for cooperation with local authorities and where a matter has a particular impact in a COMESA Sate, the local authority can apply to spearhead the investigation.

Some of the anticipated benefits include:

- the sharing of information in relation to competition matters;
- increased advocacy of the benefits of competition law and policy;
- joint training opportunities, which will enable the transfer of skills; and
- the opportunity to pool resources to enhance the effectiveness of investigations and enforcement.

Malawi is currently the seat of the CCC and so it is fitting that the local regulator and regional body be aligned. It is understood that similar MOU's between national competition authorities of other COMESA member states and the CCC are on the horizon.

George Miller and Susan Meyer

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NAMIBIAN COMMISSION CLARIFIES AND INCREASES ITS MERGER THRESHOLDS

As a result of the NCC's interpretation of the historic thresholds, very small transactions were being notified, often with minimal or no impact on the Namibian economy.

In a recent and welcome development, the Namibian Competition Commission (NCC) clarified and increased its monetary thresholds for merger notifications.

As a result of the NCC's interpretation of the historic thresholds, very small transactions were being notified, often with minimal or no impact on the Namibian economy. This arguably resulted in a misdirection of the NCC's focus and resources. For example, offshore transactions involving a foreign acquirer with no presence in Namibia would trigger a Namibian notification, even if the target firm operated primarily outside Namibia, but derived just N$10 million in annual revenue from Namibia.

After reviewing international best practices, thresholds of comparable jurisdictions and reflecting on its own experiences over the last three years, the NCC has moved to address these shortcomings by publishing the below superseding thresholds, effective 21 December 2015.

In terms of the current regime, a merger will only be notifiable if:

- the combined values of the merger parties, being the highest combination of assets or revenue of the acquiring and target groups, meets or exceeds N$30 million; and
- either the gross assets or revenue of the target group meets or exceeds N$15 million.

The changes slightly raise the monetary thresholds (from N$20 million and N$10 million respectively) but more importantly, clarify that both thresholds need to be met to trigger a merger. Whether however the new thresholds manage to capture a material presence remains open for debate!

Susan Meyer

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TANZANIA'S FAIR COMPETITION COMMISSION THREATENS TO WITHDRAW APPROVAL OF MERGER

It is worrying to think that a regulator would look to unwind a merger five years after approval on the basis that the business is not growing sufficiently.

The Tanzanian Fair Competition Commission has threatened to withdraw its approval of East African Breweries Limited's (EABL) merger with Serengeti Breweries Limited (SBL) due to an alleged breach of the conditions for the approval that growth in the acquired business be achieved.

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It is worrying to think that a regulator would look to unwind a merger five years after approval on the basis that the business is not growing sufficiently. Merger approval ought to provide certainty to businesses and, unless there is evidence that the regulator has been misled in granting the approval, it should not second-guess whether a merger turned out to be successful or whether the business is being run effectively.

Parties embark on a merger based on expected returns and growth prospects, but sometime facts and circumstances conspire against the firm and the rationale for the transaction is not fully met. That should not be grounds for unwinding a merger. If a business is less successful, that gives opportunities to competitors to grow in or enter the market or leads to further acquisition by those who might do better with the assets in question.

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In this instance, upon acquiring its stake in SBL, EABL did not have a presence in Tanzania, so there should be no question of it deliberately impeding SBL's growth in favour of another entity. Indeed even if the merger was horizontal (ie EABL had an existing presence in the Tanzanian beer market) a regulator ought to assess the merger based on the notion that competition between the two firms is removed.

It is not clear whether the merger was approved based on an express condition that growth be achieved or if the regulator believes disclosing the rationale for the acquisition is tantamount to an undertaking to meet the rationale. Either way, such action does not bode well for regulatory certainty.

Chris Charter

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TRANSGRESSORS FINED FOR FAILING TO NOTIFY MERGERS IN SWAZILAND DESPITE NO MONETARY MERGER THRESHOLDS

The statutory remedies for a failure to notify a merger in Swaziland are a fine up to 250,000 Emalangeni and/or imprisonment up to five years.

The Swaziland Competition Commission (SCC) reported in 2015 that it detected two failures to notify mergers, which is a contravention of Swaziland competition legislation. This is despite the competition regime still not having monetary merger thresholds in place.

Swaziland's competition regime has only been in existence for a few years and the merging parties claimed their omission to notify the transactions was because they were unaware of the competition laws.

While the SCC reported that the offending parties paid penalties, the amounts were not disclosed. The statutory remedies for a failure to notify a merger in Swaziland are a fine up to 250,000 Emalangeni and/or imprisonment up to five years. The SCC also required the parties to notify the mergers post implementation so that it could have an opportunity to assess the impact of the transactions on the relevant markets.

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The SCC's remedial action will no doubt serve to deter firms from electing not to comply with merger notification obligations in Swaziland, but will also hopefully create greater awareness of these obligations, especially in respect of smaller transactions that may not seem to warrant notification. Although one cannot fault a regulator for enforcing its jurisdiction to consider mergers, a key lacuna remains the failure to set monetary thresholds for notification, which would go some way to draw a balance between effective regulation and unnecessary red-tape.

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