

Something New OUT OF AFRICA



JUNE 2013

NEW MOZAMBIQUE COMPETITION ACT TO COME INTO FORCE ON 10 JULY 2013

Following a recent flurry of activity in terms of the enactment and development of competition law regimes in Africa, the Mozambican Competition Act, Law no. 10/2013 of Mozambique (Mozambique Act), was published on 11 April 2013.

The Mozambique Act comes roughly six years after the Mozambican Council of Ministers approved the Competition Policy and is expected to come into force on 11 July 2013 (ie 90 days after its publication). A copy of the final Mozambique Act has not yet been published in English, with the official version only available in Portuguese.

The Mozambique Act applies to all economic activities in, or having an effect in, Mozambique and further provides for the creation of the Competition Regulatory Authority (CRA) who will be responsible for the supervision, enforcement and regulation of competition law in the country. The CRA is expected to publish its own rules, which must then be approved by the Mozambican Council of Ministers before coming into effect.

Similar to our Competition Act, the Mozambique Act deems horizontal and vertical agreements restrictive of competition, to be anticompetitive. However, it is not clear as to which conduct exactly, if there is any distinction at all, will be subject to the rule of reason and which conduct will be deemed to be a per se prohibited act. Abuse of dominance is also proscribed under the Mozambique Act; this may become especially relevant in future in light of the liberalisation of various previously state controlled industries in Mozambique, such as telecommunications, ports, railways and banking. Abuse of dominance can include refusal to deal, tying and predatory pricing, among others.

In terms of merger control, the Mozambique Act provides that an acquisition of shareholdings, an acquisition of ownership or the right to use of assets and any agreements granting a decisive influence on the composition or resolutions of corporate bodies, all amount to 'mergers'. Mergers which meet the prescribed thresholds must be subsequently notified to the CRA within 'seven working days after the agreement' and cannot be implemented until a 'non-opposition decision' is made. However, the exact thresholds have not yet been decided and must still be established by the Council of Ministers, within 90 days from 10 July 2013. The thresholds are likely to be based on turnover and/or market share.

Sanctions that may be imposed under the Mozambique Act include criminal liability for certain conduct. The CRA is also able to impose fines of up to 5% of a company's turnover in the previous year for any breach of the articles relating to prohibited practices, as well as for prior implementation of a merger. The CRA may further impose fines of up to 1% of turnover for lesser offences. The CRA is vested with other sanctions, including fines for 'lack of co-operation' and exclusions from participation in public tenders.





NAMIBIAN COMPETITION COMMISSION SET TO FOCUS ON CARTEL INVESTIGATIONS

Since cartel activity is generally secretive, competition authorities face difficulties in procuring the evidence necessary to prosecute those involved.

One response has been to incentivise those participating in cartels to spill the beans and co-operate with competition authorities in exchange for leniency and/or immunity. In March 2012, the Namibian Competition Commission's (NCC) board adopted its own Corporate Leniency Policy (CLP). The NCC's newsletter for September / October 2012 states that the NCC board has directed that the CLP "be referred to the ... Minister of Trade and Industry, with the purpose of seeking consent on prescribing rules for the granting of leniency/immunity."

Under the CLP, immunity from prosecution would be offered to the first cartel member to approach the NCC. The remaining cartel members are encouraged to co-operate with the NCC outside the CLP, as such co-operation may lead to a reduction in the fine imposed. The CLP appears to still be awaiting sign-off by the Minister of Trade and Industry. Nonetheless, the NCC's CEO has indicated that the CLP is one of the reasons that the NCC will focus on cartel investigations in 2013. Companies / entities with interests in Namibia may wish to watch this space closely.

MERGER GUIDELINE FOREWARNS OF PROHIBITIVE FILING BURDEN

Having caused much fanfare with its sudden commencement of operations in January, the Common Market for Eastern and Southern Africa (COMESA) Competition Commission (CCC) is in the process of clarifying how the COMESA Competition Regulations (regulations) shall be enforced.

The draft merger assessment guideline (guideline) contains several practical concerns worth noting.

Troublingly, neither the regulations nor the guideline provides for a robust confidentiality regime. Full disclosure to competition authorities is jeopardised where merging parties are unsure of whether information which they claim as confidential shall be accordingly protected. The guidelines promise only to "tak[e] account of the [parties] legitimate interest...in the protection of [such] confidential information." It is hoped that a default position shall be established that information claimed as confidential will be respected as such, with the party claiming confidentiality being given an opportunity to respond to any applications for the information to be publicised.

The absence of provisions allowing for electronic filing is rather puzzling, especially given the cumbersome nature of the filing process outlined in the guideline. The regulations require mergers with a COMESA dimension to be notified to the CCC within "30 days of the... decision to merge." The guideline indicates that this filing shall comprise one original and three copies of the requisite form. In addition, originals or certified copies of all

supporting documentation must be submitted. This could prove quite costly since certification requirements may differ from state to state. Moreover, these documents would need to be couriered to the CCC's offices in Lilongwe, Malawi, further delaying merger assessments. It is hoped that the CCC shall promptly notify parties if their filings are incomplete.

The CCC already has substantial time at its disposal to consider a merger, with the regulations allowing up to 120 business days (ie 6 months) for this assessment. Furthermore, the CCC may seek an extension from the Board of Commissioners. Neither the regulations nor the guideline suggest that the merging parties shall be notified when an extension is sought. Ideally, this should be amended so that merging parties are provided with an opportunity to oppose the granting of an extension.

Since the CCC has engaged with a variety of stakeholders concerning its draft guidelines, these practical constraints may be fixed going forward. Nonetheless, those contemplating mergers with a COMESA dimension should factor these logistical hurdles into their calculations.



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