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ALERT
19 FEBRUARY 2014

AFRICAN
INSIGHTS IN COMPETITION LAW

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MERGER NOTIFICATION THRESHOLDS INTRODUCED IN KENYA

Despite certain interpretational difficulties, the introduction of merger thresholds in Kenya should be welcomed. This will hopefully assist the Kenya Competition Authority (Authority) in allocating its resources more efficiently to those transactions which may be more likely to affect competition. From a business perspective, it ensures that deals which do not meet the thresholds can be implemented without the additional costs and delays of having to wait for approval.

The introduction of thresholds

The Competition Act, No 12 of 2010 of Kenya (Kenyan Act) defines a merger as occurring when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. Since the commencement of the Kenyan Act on 1 August 2011, there have been no financial thresholds to determine the notifiability of mergers, such that all transactions meeting the definition of a merger were notifiable to the Authority.

The first published merger notification thresholds are applicable from 1 August 2013 (thresholds).

General test

The thresholds provide a two-pronged general test for notifiability. Firstly, the combined turnover of the merger parties must meet or exceed one billion shillings. Secondly, the turnover of the target firm must exceed one hundred million shillings. In the event that the merger parties do not derive any turnover from Kenya, but have assets in Kenya, the Authority will consider the value of the assets '*in lieu* of turnover'. It is not clear whether parties must also have regard to asset value if they do derive turnover from Kenya, albeit which is below the thresholds.

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Sector specific thresholds

Different thresholds however apply for certain sectors:

- Healthcare sector (including hospitals, hospital management and health maintenance organisations): The combined threshold is five hundred million shillings and the turnover threshold for the target firm is fifty million shillings. This lower threshold indicates that the Authority seeks to keep a closer eye on mergers in the healthcare sector.

- Carbon based mineral sector (including oil, natural gas or coal, excluding the downstream retail of these products): The value of the reserves, rights and exploration assets must exceed four billion shillings. This higher threshold is suitable for promoting investment in respect of Kenya's natural resources.

- Oils sector transactions (involving pipelines and pipeline systems which receive oil and gas from processing fields belonging to and passing through the meters of the target firm): These transactions are notifiable even where the value of the reserves is below four billion shillings. It is not clear from the thresholds whether the aforesaid mineral exploration and processing is still subject to the general threshold test referred to above.

The thresholds also set out certain instances in which the parties may request the Authority to consider excluding a transaction from investigation despite meeting the aforesaid thresholds. If the Authority does not confirm within fourteen days that the transaction need not be notified, it can be presumed to be notifiable.

Annual turnover and asset value is assessed as at the end of the parties' immediately preceding financial year.

Risks

In terms of the Kenyan Act, prior implementation of a notifiable merger may result in the merger having no legal effect and the unenforceability of legal obligations. Prior implementation is also considered to be an offence and on conviction, parties may be liable to imprisonment for a term not exceeding five years and/or to a fine not exceeding ten million shillings. In addition, the Authority may impose a financial penalty not exceeding ten per cent of the gross annual turnover derived by the firms in their preceding financial year.

Given that Kenya is a member state of the regional body, the Common Market for Eastern and Southern Africa (COMESA), even if a transaction does not meet the thresholds, advice should be sought on its potential notifiability to COMESA.

Susan Meyer and Nazeera Ramroop

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NAMIBIAN COMPETITION COMMISSION PROHIBITS MERGER IN ROAD SURFACING MARKET

The Namibian Competition Commission prohibited a proposed merger in terms of which Colas South Africa Proprietary Limited and Road Contractor Company (RCC) Limited were to acquire equal shareholding in Guinea Fowl Investments (which would be renamed Oryx Surfacing Proprietary Limited).

RCC, in the road surfacing market, holds a contract with the Namibian Road Agency which has been in effect for over 10 years (through habitual renewal) and the Commission was sceptical of RCC's contention that the contract will come to an end in early 2014. The Commission was, accordingly, of the view that it is most likely that RCC would, through its joint control of Oryx, tender for more road surfacing contracts (and would be able to do so more successfully as Oryx would contribute to the RCC's capacity and negate the need for RCC to subcontract), which it would obtain by virtue of its good relationship with the Road Agency.

The Commission paid special attention to the upstream market for the supply of bituminous products. In this upstream market a subsidiary of Colas South Africa (Colas Namibia) was one of only two competitors and had the lion's share of the market. The Commission was of the view that Oryx would enjoy more competitive prices for its bitumen inputs from Colas Namibia by virtue of Colas South Africa's joint interest in Oryx – to the detriment of Oryx's competitors.

The Commission concluded that this situation would, in turn, lead to the foreclosure and ultimate exiting of the market by Colas Namibia's only competitor in the bitumen market resulting in Colas Namibia obtaining a monopoly.

The Commission, accordingly, prohibited the proposed transaction based on concerns of foreclosure in both the road surfacing market and the upstream bitumen supply market and concerns relating to the dominance of a subsidiary of one of the merging parties.

Leana Engelbrecht

continued

COMPETITION AUTHORITIES INVESTIGATE CONDUCT OF BANKERS ASSOCIATION OF MALAWI

Bankers Association of Malawi (BAM) is a group of commercial banks, discount houses and other financial institutions licensed under Malawi's Banking Act and established to *inter alia* provide a forum for its members.

In 2009 BAM entered into an exclusive three year agreement with a Kenyan-based credit bureau, CRB-Africa Limited (CRB) for the provision of credit referencing services. This agreement allowed BAM members to gauge the credit worthiness of customers in return for members being obliged to only deal with CRB.

In 2011 the Reserve Bank of Malawi licensed Credit Data CRB Limited (Credit Data) as a credit reference bureau in Malawi. However, Credit Data alleged that it was unable to provide its credit profiling services because the exclusive agreement between BAM and CRB meant that it could not access information from BAM's members, being the most important source of credit data in Malawi.

Credit Data lodged a complaint with the Malawi Competition and Fair Trading Commission (**CFTC**) citing that it was refused access to an arrangement or association which is crucial to competition, in contravention of the Malawi Competition Act.

In response, BAM cited confidentiality concerns as the reason for not sharing its information with Credit Data. The CFTC apparently contended that the right to privacy is not an absolute right and can be limited by specific legislation or in furtherance of the public interest.

The CFTC's investigation found that by obliging the members, who are the main customers of credit referencing services, to use only CRB, the agreement acted as a barrier to entry and created an artificial monopolistic environment which constrained opportunities for competition in Malawi. Credit Data or any other potential player allegedly did not have an opportunity to compete in this market until expiry of the agreement. The CFTC also found that by refusing to provide information to Credit Data, whilst giving similar information to CRB, BAM provided CRB with an unfair competitive advantage. The CFTC also alleged that BAM had awarded the contract to CRB despite some of its shareholders being members of BAM and that this may have been anti-competitive conduct, *albeit* it is unclear whether an actual finding was made in this regard.

However, the CFTC also acknowledged that a major stumbling block is the absence of regulations to safeguard credit data holders from liability of breach of confidentiality rights of customers and noted that the Reserve Bank needed to establish regulations to remedy this.

At this stage, it is not clear whether the CFTC has proposed any other remedies or penalties. However, this does illustrate that competition authorities in Africa are moving beyond the confines of merger investigations and are sharpening their teeth in terms of prohibited practice investigations.

From a South African perspective, exclusive agreements which are limited to three years in duration are generally regarded as benign from a competition law perspective unless they are proven to substantially lessen or prevent competition.

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