COMPETITION LAW
ALERT

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CLIFFE DEKKER HOFMEYR

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COMESA Competition Commission issues notice of withdrawal of its practice note *"CCC-MER-Practice Note 1 of 2021"*

The Common Market for Eastern and Southern Africa (COMESA) Competition Commission (CCC) has withdrawn its "*Practice Note on the Commission's Application of the Term "Operate" under the COMESA Competition Regulations" and the "Application of Rule 4 of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation*", which was initially published on 11 February 2021 (Practice Note). The notice of the withdrawal was published on the CCC website on 9 August 2022. A link to the notice can be found here.

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According to the CCC's notice, the withdrawal of the Practice Note follows several requests for clarifications sought by stakeholders regarding the CCC's application of Rule 4 of the Rules on Merger Notification Thresholds and Method of Calculation (Rules).

The Practice Note was intended to provide clarity to merging parties and their legal representatives in relation to the application of certain merger control rules, specifically on the application of the term "operate" under the COMESA Competition Regulations, 2004 (Regulations) and the Rules.

In summary, Article 23 of the Regulations establishes the jurisdiction of the CCC to assess cross-border mergers where the term *"operate"* is central to the application of Article 23 of the Regulations which, inter alia, applies where *"both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more member states"*.

The Practice Note further provides that for purposes of merger notifications and in line with Article 23 of the Regulations, all stakeholders should be referring to Rule 4 of the Rules on the Determination of Merger Notification Thresholds which stipulates that:

"Any merger where both the acquiring firm and target firm, or either the acquiring or the target firm, operate in two or more member states, shall be notifiable if:

a. *the combined annual turnover or combined value of assets, whichever is higher in the common market of all parties to a merger, equals to or exceeds USD 50 million; and*

b. *the annual turnover or value of assets, whichever is higher, in the common market of each of at least two of the parties to a merger equals or exceeds USD 10 million unless each of the parties to a merger achieves at least two-thirds of its aggregate turnover or assets in the common market within one and the same member state."*

The above is to be considered with reference to the CCC's guidelines on the method of calculating merging parties' asset value and turnover for the relevant year. However, the Practice Note further states, *"Whether to use the annual turnover or annual asset value depends on the higher of the two. It should also depend on the measure (turnover or asset) used in Rule 4(a)."*

LACK OF CLARITY

This distinction between *"the higher of the asset value or turnover"* and also relying on the *"method used in Rule 4(a)"* has created a lack of clarity for parties.

On a strict reading of the Practice Note, where the merger parties' combined turnover is the higher of their combined turnover value and asset value for purposes of the test in 4(a), then the measure to be used in 4(b) will be the turnover of each of the merger parties and hence if one of the party's turnover is below the USD 10 million threshold, then even though that same party's asset value is above the USD 10 million threshold,

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the test in 4(b) is not deemed satisfied. Or vice versa where the merger parties' combined asset value is the higher of their combined turnover value and asset value and hence used for purposes of the test in 4(a), the measure to be used in 4(b) will be the asset value of each of the merger parties and if one of the party's asset values is below the USD 10 million threshold then even though that party's turnover is above the USD 10 million threshold the test in 4(b) is not deemed satisfied.

Interested parties have sought clarification from the CCC on how the test in the first limb of the test in Rule 4(b) is to be applied given that the Rules provide that it is to be based on the *"annual turnover or value of assets, whichever is higher"* while the Practice Note indicates that *"it should also depend on the measure (turnover or asset) used in Rule 4(a)"*.

As a result of this contrariety, the CCC has withdrawn the Practice Note as it contemplates the various requests for consideration received from stakeholders. Stakeholders have been advised to remain guided by the relevant provisions under the Regulations, the Rules, and the Guidelines.

Notably, since the Practice Note was issued, according to the CCC merger statistics, approximately 63 mergers have been notified to the CCC. This begs the question as to whether the number of notified mergers would have been higher depending on the method of interpretation applied by parties to a merger; given that all the tests prescribed under Rule 4 of the Rules are cumulative and failure to satisfy one test would deem a merger not notifiable. Consequently, where either the acquiring undertaking or target undertaking fails to satisfy the test under 4(b) (i.e. annual turnover or asset value of at least USD 10 million in the COMESA region) as read with the Practice Note, the proposed merger would not be notifiable.

While the COMESA regime is not suspensory as the Regulations do not prohibit parties from implementing a notifiable merger before making a notification or before receiving the CCC's approval; a failure to notify the CCC on the other hand may attract penalties up to a maximum of 10% of the combined turnover of the merging parties in COMESA and the merger would have no legal effect without approval. In addition, if the CCC disapproves of an implemented merger, the merger would have to be unwound.

It will be interesting to see how the CCC treats ex facto mergers that were implemented without approval where the parties can demonstrate that they were guided by the Practice Note.

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