

COMPETITION LAW

ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Africa update: Enhanced activity from regional competition authorities

There have been a number of recent developments evidencing enhanced activity from regional competition authorities. We set out developments in respect of the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of West African States (ECOWAS) and the East African Community (EAC) below.

In the public interest: No longer negotiable

The Competition Tribunal (Tribunal) recently conditionally approved Dubai-based global logistics giant, DP World Logistics FZE's (DP), acquisition of local Imperial Logistics Limited (Imperial). The merger conditions address a range of public interest themes. Impactful public interest conditions are now a dominant feature in getting deals past the South African Department of Trade Industry and Competition (DTIC) and the independent competition authorities.



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Africa update: Enhanced activity from regional competition authorities

This enhanced activity underscores the importance and emergence of institutional co-operation in the regulation of competition.

COMESA

The COMESA Competition Authority (CCA) and the Competition Authority of Kenya signed a Revised Corporation Framework (RFK) on 1 March 2022.

The RFK broadens the areas for co-operation to now address emerging digital markets which have gained prominence both nationally and regionally; as well as competition law enforcement as provided for by the Tripartite Free Trade Area and African Continental Trade Area (AfCFTA) agreements.

The Director of the CCA highlighted that national competition authorities are the foundation for a strong regional competition authority. Through their collaborative efforts national/regional competition authorities will facilitate information exchange for in-depth analyses of cross-border merger investigations on prohibited restrictive practices and consumer welfare violations, which will aid their ability to detect anti-competitive behavior. The importance and emergence of institutional co-operation in the regulation of

competition, particularly with respect to emerging markets, was addressed in a previous alert (accessible [here](#)).

ECOWAS

On 28 February 2022, the ECOWAS Regional Competition Authority (ERCA) held an advocacy and sensitisation workshop on the ECOWAS Regional Competition Framework (Framework) in Sierra Leone. The aim was to create awareness for Sierra Leone's competition stakeholders about the existence of the Framework, the ERCA and its future interventions. It also highlighted the importance of collaboration between regional and national competition authorities on competition policies.

The workshop took the form of an interactive session that allowed participants to make contributions and recommendations on ways to domesticate the Framework as well as to strengthen the institutional/co-operative relationship between the ERCA and Sierra Leone.

The Sierra Leone Director of Export Promotion and Regional Integration

noted that the workshop was an initiative linked to the AfCFTA and aimed to facilitate a dialogue between the public and private sectors in order to achieve the Africa Agenda. He added that Sierra Leone has adopted a Consumer Protection Act which will in turn lead to the establishment of a Consumer Protection Commission in the country.

EAC

Following an application by the Democratic Republic of Congo (DRC) in 2019, and subsequent negotiations with the EAC, the EAC Council of Ministers (Council) has approved the admission of the DRC into the EAC regional bloc. In terms of next steps, the Council has directed certain steps to facilitate the integration of the DRC into the EAC (such as the development of a roadmap which must be approved by the Council). The DRC is expected to be officially admitted into the EAC at the next EAC Heads of State summit on 30 April 2022.

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In the public interest: No longer negotiable

The Competition Tribunal (Tribunal) recently conditionally approved Dubai-based global logistics giant, DP World Logistics FZE's (DP), acquisition of local Imperial Logistics Limited (Imperial). The conditions address a range of public interest themes, namely enterprise and supplier development; corporate social responsibility initiatives; the establishment of an employee share ownership program (ESOP); maintenance of existing employee numbers and protection against job losses; and capital expenditure commitments.

Impactful public interest conditions are now a dominant feature in getting deals approved by the South African Department of Trade Industry and Competition (DTIC), and the independent competition authorities.

Whenever required to consider a merger, the competition authorities must be satisfied that the transaction passes both a competition and public interest test. These assessments are co-equal and independent. Based on recent amendments to the legislation, the Minister of the DTIC has a right to make representations on any public interest ground and may participate as a party to merger proceedings.

In this matter, the transaction did not raise any competition concerns. On the issue of public interest, whilst the merger parties had undertaken not to engage in any merger-related retrenchments, the Competition Commission (Commission) and DTIC sought further assurances in this regard, ostensibly based on the fear that DP could engage in cost-cutting measures post-merger which may

impact jobs. There was apparently also a concern that there would be a minimal dilution of shareholding by black employees as a direct result of this merger. To address these concerns, the merger parties committed to:

(1) Enterprise and Supplier Development and Corporate Social Responsibility:

Increasing its enterprise and supplier development expenditure in South Africa; its spend on corporate social responsibility initiatives and on training and development of black persons; and its procurement expenditure targets in various categories as defined in the relevant codes of good practice published in terms of the Broad-Based Black Economic Empowerment Act No 53 of 2003, as amended.

(2) ESOP:

Within two years of implementing the transaction, establishing an ESOP for an effective 5% interest in Imperial Logistics South Africa Group (Pty) Ltd (ILSA), a subsidiary of Imperial, through an employee trust, for the benefit of Imperial employees (excluding top or senior management). The value of the 5% is to be determined by an independent and suitably qualified valuer, appointed by the merged entity, which appointment must be approved by the Commission.

The following *essentialia* were agreed to: Imperial employees will not be required to pay to participate in the ESOP; the ESOP shareholding should not substitute the existing HDP shareholding in ILSA; and prior to the establishment of the ESOP, the merged entity will consult with the Commission on the finer details of the proposed ESOP (it will also not implement the final ESOP prior to the Commission's written approval).

In the public interest: No longer negotiable

CONTINUED

(3) Employment:

For three years from the approval date, and subject only to disposals made in the normal course, Imperial will maintain at least the same number of employees in South Africa as at the approval date. In addition, there will be no merger related retrenchments for a period of 3 years from the implementation date of the merger.

(4) Capital Expenditure:

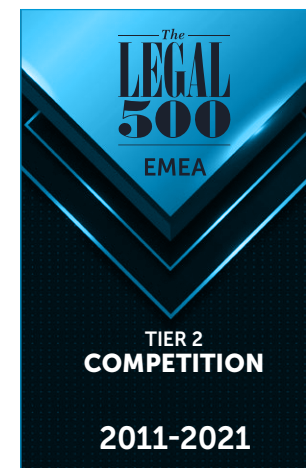
Over a four-year period, incurring no less than R2.1 billion of capital expenditure in Imperial's South African operations.

Based on its recent efforts, the DTIC and competition authorities appear to be fashioning a unique merger control model, with an enhanced focus on protecting against any diminution (and in some instances purely achieving an enhancement) of public interest.

Only time will tell whether merger decisions will remain sources of impactful remedies to guard against merger-specific public interest harm. An agenda pushed too hard may lead to foreign investors recoiling at, what may start to appear to be, unwarranted rent-seeking.

What is clear is that careful up-front consideration of the public interest in deal structuring is no longer negotiable.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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