BIZCOMMUNITY

Comesa Competition Commission issues first ever merger related fine

By Burton Phillips and Elisha Bhugwandeen

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On 6 September 2021, the Common Market for Eastern and Southern Africa (Comesa) Competition Commission (CCC) issued its first fine for failure to notify a transaction to the CCC within the prescribed time period under Article 24 (1) of the Comesa Competition Regulations of 2004 (Regulations).

Source: Dmitri Stalnuhhin – 123RF.com

The fine was imposed in relation to the proposed acquisition by Helios Towers Ltd of the shares of Madagascar Towers SA and Malawi Towers Ltd (the Parties). The Committee Responsible for Initial Determinations (CID) imposed a fine of 0.05% of the Parties' combined turnover in the Common Market in the 2020 financial year.

In terms of the Regulations, a party to a notifiable merger must notify the CCC (in writing) of the proposed merger as soon as it is practicable but in no event later than 30 days of the parties' decision to merge. In this instance, the CCC considered the decision to merge as occurring on the date that the share sale and purchase agreement was signed. The agreements were signed on 23 March 2021, but the merger was only notified to the CCC on 2 July 2021.

Although the CCC had issued a notice in 2020, indicating that certain interim measures were in place as a result of the Covid-19 pandemic, including a slight relaxation of the 30-day rule if the merger parties engage with the CCC timeously, it is not clear if these measures are no longer in place, or if the Parties did not engage the CCC early enough.

It is important to note that the CID considered certain mitigating factors when determining the penalty - the CID noted that the maximum penalty of 10% was not applicable since the breach did not result in any loss or harm in the market, and that the Parties cooperated with the CCC and had no record of contravening the Regulations. The CCC also emphasised that this does not impact is review of the transaction which is ongoing.

Earlier this year, in a podcast discussion with Webber Wentzel, Dr Willard Mwemba, the acting director and CEO of the CCC, signalled a warning to firms operating in the Comesa Common Market that the CCC will be adopting a stricter enforcement stance to ensure compliance with competition laws in the region. Since the CCC began its operations almost ten years ago, it has followed a somewhat soft enforcement approach, focussing on advocacy and raising awareness within the business community.

The imposition of this fine clearly indicates that the CCC is sharpening its enforcement activities and that businesses operating in the Common Market must be aware of, and apply, the applicable merger control and restrictive business practice laws or risk facing harsh enforcement action. The CCC's Registrar stated that the CCC wishes to remind undertakings in the Common Market to be cautious of the prescribed timeline for notifying mergers. In instances where parties wish to acquire businesses or expand operations in Africa, regulatory requirements, such as deadlines for submitting merger filings, must be flagged in the early stages of a potential transactions. Such factors may impact several aspects including the suspensive conditions, proposed closing dates and the conduct of the merger parties until such time as the transaction has been approved by the relevant competition regulator.

ABOUT THE AUTHOR

Burton Phillips and Elisha Bhugwandeen from Webber Wentzel