FOURTH ARAB COMPETITION FORUM
SESSION III: CROSS BORDER MERGER CONTROL

THE CASE OF COMESA

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Outline of the Presentation

- Introduction
- Merger Regulation in the COMESA Region
- Assistance to COMESA Member States
- Proposed Recommendations

Introduction

- The jurisdiction of the COMESA Competition Commission (the Commission) is derived from Article 3 of the COMESA Competition Regulations (the Regulations) which covers review of mergers and acquisitions; enforcement against anticompetitive business practices and conduct; and consumer protection
- The Regulations confer the Commission with primary jurisdiction to regulate mergers and acquisitions in any industry or sector which is subject to the jurisdiction of a separate regulatory entity whether domestic or regional.
- Article 23 of the Regulations defines mergers that fall under the jurisdiction of the Regulations and provide for the development of merger notification thresholds.
- When the Commission started operations in 2013, it had no merger notification thresholds.
- To address the need for thresholds as is the international best practice, the Commission amended the COMESA Competition Rules to provide for thresholds and the method of calculating the thresholds in 2015.
- Therefore, the Regulations define a merger and provide for notification thresholds.

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Introduction

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- For a merger to be notified under the Regulations, it must first meet the regional dimension requirement. This is met where;

✓ both the acquiring firm and target firm or either the acquiring firm or target firm must operate in two or more Member States; and

✓ The threshold of combined annual turnover or assets should be met.

- Parties to a merger must meet the following monetary thresholds:

✓ the combined annual turnover or combined value of assets, whichever is higher, in the Common Market of all parties to a merger equals or exceeds COM$ 50 million; and

✓ 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 COM$ 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.

Introduction

- Merging Parties are required to notify Mergers to the Commission **within 30 days of the decision to merge.**
- A consummated merger without authorization to the Commission is null and void.
- Parties to the merger can also be fined for not notifying a merger within the stipulated time frame. Two undertakings have up to date been fined for this violation. These are the Merger concerning the proposed Acquisition by Helios Towers Ltd of shares of Madagascar Towers S.A. and Malawi Towers Limited and the merger involving SABIC Agri Nutrients Company/ETG Inputs Holdco Limited. SABIC was fined **USD314,913.56** while Helios was fined **USD102,101.765**
- The Commission is required to make a decision regarding a merger **within 120 days after receiving a complete notification.** This can be extended if the Commission is unable to conclude the assessment due to a number of factors among them insufficient information or need of more market investigation in instances where the merger raises significant competition concerns. This notwithstanding, to avoid abuse of process by the Commission by seeking extended extensions, the Merger Assessment Guidelines provides that the Commission will seek an extension from the Board for not more than 30 days.

Merger Regulation in the COMESA Region

- The elements of merger control at national level can be very diverse, especially when it comes to developing countries. Each national competition law is designed in a way to best meet the needs and interests of the particular country.
- Each country may have diverse priorities and development and social goals. For instance, a developing country may choose to exclude certain of its key sectors from the purview of its competition law, to protect the interests of the stakeholders.
- The definition of mergers can be diverse: certain countries may choose to exclude purchase of assets, joint ventures and so on. The substantive test and assessment of mergers can be different. Thresholds can be set based on different regulatory objectives and the remedies can be diverse.
- To achieve legal certainty in the control of cross-border merger control, especially in the absence of regional competition laws, the harmonization of national competition laws is important. It should be noted though that harmonisation does not mean similar outcomes in a merger assessment. Further, some room should also be left to address certain peculiar issues of the economic and industrial structure of the country. What is important is that there is certainty of what the law requires.

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Merger Regulation in the COMESA Region

- The Commission in regulation of mergers in the COMESA Region has made the following observations:

✓**The sovereignty challenge:** Member States are required to cede jurisdiction when mergers have cross border effect and qualify for assessment by the regional body.

✓Some of the laws are inconsistent and not harmonized with the COMESA Competition merger regulation.

✓Information exchange hampered by limiting confidentiality provisions in the various laws of the Member States.

✓Lack of awareness by some Member States on the importance of cooperation on cross-border merger control.

✓Lack of sufficient information to make good assessment decisions.

✓Different considerations in merger assessment especially when dealing with public interest issues.

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Determination of Mergers

- After an assessment of a regional merger, three possible outcomes are:

✓Unconditional approval of the merger

✓Conditional approval of mergers where remedies are proposed to address the identified potential harm to competition

✓Rejection of the merger.

- The Commission investigates the merger and proposes its recommendations to the Committee Responsible for Initial Determinations (CID) which can agree with its recommendations, reject or amend the recommendations.
- If the parties are aggrieved with the decision of the CID, they have the right to appeal to the Appeals Board within 60 days.
- Further, if the parties are aggrieved with the decision of the Appeals Board, they can appeal the decision to the COMESA Court of Justice which has the Court of First Instance and the Appellate Division.
- Parties may also seek for Judicial Review from the Appeals Board.

Merger Regulation in the COMESA Region

❑Referral of Mergers

- Members States can request the Commission for a merger to be referred to the national competition authority if they believe that the merger can disproportionately reduce competition to a material extent in such Member State. This is based on the principle of subsidiarity.
- Member States can make such requests **within 14 days from receipt of information about such a mergers.**
- **Within 7 days** of receiving such a request from the Member States, the Commission is required to publish the request on the website.
- **Within 21 days**, the Commission has to make a decision regarding the request.
- The Commission issued Merger Assessment Guidelines in 2014 to provide more clarity on assessment of mergers involving Joint Ventures and the procedures followed by the Commission in merger regulation.

Merger Regulation in the COMESA Region

❑Success stories

- Since inception, the Commission has assessed **over 367 mergers and acquisitions with a turnover of over 210 billon United States Dollars.**
- Some of the cross-border mergers that the Commission has determined:

✓**Proposed Joint Venture involving SAS Shipping Agencies Services Sàrl (SAS), Kenya Ports Authority (KPA) and Kenya National Shipping Lines Limited (KNSL)**

✓**Heineken International B.V., Namibia Breweries Limited (NBL) and Distell Group Holdings Limited Merger**

✓**Merger concerning the acquisition by ATC Heston BV of 100% shareholding of Eaton Towers Holding Limited**

✓**Merger concerning the proposed Acquisition by Helios Towers Ltd of shares of Madagascar Towers S.A. and Malawi Towers Limited**

Merger Regulation in the COMESA Region

- **Proposed Joint Venture involving SAS Shipping Agencies Services Sàrl (SAS), Kenya Ports Authority (KPA) and Kenya National Shipping Lines Limited (KNSL)**

- **Countries affected by the transaction:** Djibouti, **Egypt,** Eswatini, Kenya, **Libya**, Madagascar, Malawi, Mauritius, **Sudan, Tunisia,** Uganda, Zambia and Zimbabwe. **(4 Countries of the Arab Region were affected).**

- The transaction involved SAS acquiring 47% shareholding of KNSL. KNSL was held by KPA and post-merger, KNSL would fall under the joint control KPA and SAS, with 53% and 47% of shareholding respectively. Further, SAS is a wholly owned subsidiary of MSC Mediterranean Shipping Company SA (MSC).

✓ **Observations:**

- It was observed that the provision of container terminal services is vertically linked to the provision of container liner shipping services i.e., a container liner shipping company requires container terminal services to be able to load and off-load its vessel at a port.

- It was observed that SAS, a subsidiary of MSC – a container liner shipping company, will assume joint control over one of the container terminals at the Mombasa port, Container Terminal 2.

- The structural relationship and joint control that MSC, a sole container liner shipping company, will have over Container Terminal Services 2 might put it at a competitive advantage in the use of the facility, especially when considering that Container Terminal 2 is more efficient than Container.

- It was observed that Mombasa port provides container terminal services to a number of container liner shipping companies, which are competitors of MSC. It is further highlighted that no other container liner shipping company has stake in the container terminals in Kenya.

✓ **Concerns:**

- On Terminal 1 the conclusion that the merger is likely to substantially prevent or lessen competition in the relevant markets.

- The transaction would result in vertical links and potential vertical effects in the markets for provision of container liner shipping services and provision of container terminal services.

- The particular concern was that the transaction may create an ability and incentive for the parties to engage in input foreclosure, where despite Container Terminal 2 being run on a common user facility principle, this may not preclude, and may allow, KNSL to gain access to commercially sensitive information about the activities of non-integrated competitors to MSC.

- KNSL would not exclusively allocate the capacity of Container Terminal 2 to one container liner shipping company and shall operate it under a common user facility principle….*This would ensure that the access to Container Terminal 2 is open to all players*

- Employees of KNSL shall not have dual roles within KNSL and MSC simultaneously. *This would curtail sharing of sensitive competitors' information with MSC.*

- **Heineken International B.V., Namibia Breweries Limited (NBL) and Distell Group Holdings Limited Merger**
  - **Countries affected by the transaction:** Eswatini, Zambia, and Zimbabwe,
  - Transaction involved the acquisition by Heineken of a further interest in NBL and the combination (within a newly created entity, Newco) of Heineken's current South African business and Distell's FABs, spirits and wine businesses (excluding certain of Distell's Scotch whiskey and local spirits businesses).

- **Key concerns and remedies**
  - The assessment focused on the clear beer and ciders markets. Specifically, in Eswatini, Zambia, and Zimbabwe, the transaction would have resulted in complete elimination of competition in the ciders market, as the merging parties (Heineken and Distell) were the only two suppliers of ciders. Whilst in Zambia and Zimbabwe, Heineken's brand accounted for a relatively small share of the market, its presence on the market did offer some alternative choice to consumers to the Distell brands.

- There was thus need to prevent any further concentration or complete elimination of competition in markets which are heavily concentrated. In Eswatini, the merging parties were both effective rivals in the ciders markets and the transaction would thus eliminate all effective competition, to the detriment of consumers.

- The transaction was approved subject to a divestiture of Heineken's Strongbow brand that would return competition in the market to the level prevailing pre-merger in the ciders market. For the divestiture to be effective, the parties would need to demonstrate that the identified buyer is capable of ensuring continued sales of the brand in Eswatini, Zambia and Zimbabwe for the foreseeable future and do not have any structural relationship with the merging parties.

- The parties were required to commit that for a period of five years from the approval of the transaction, there would be no requirement on distributors seeking to purchase Distell's cider brands to also purchase Heineken's beers in Eswatini, Zambia and Zimbabwe.

- In the beer markets, the concern was about a potential negative impact of the transaction on the sustainability of the local distribution system in Zimbabwe but also that an obligation on the parties to retain existing distributors, without any further criteria, could result in ineffective competition between distributors, inefficient distribution services which may impact consumers and may impede entry by new local competitors into the existing distribution markets.

- It was therefore cognized that there was a need to balance the public interest considerations against the competition effects. Having regard to the above, the parties, inter alia, committed that they would comply with their obligations under the existing distribution agreements, and that they will submit a list of objective criteria pursuant to which they shall renew contracts with existing local distributors and/or appoint new local distributors.

- The assessment also revealed potential coordinated concerns in Zimbabwe between Heineken and local beer manufacturer Delta, however it was decided that the risk was remote and thus a behavioural remedy regulating the participation of the Heineken director on the board of Afdis was approved as part of the merger clearance as it was deemed to proportionately address the potential risk of collusion.

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Merger Compliance

- Merger concerning the acquisition by ATC Heston BV of 100% shareholding of Eaton Towers Holding Liming

✓ Economic sector: telecommunications

EatonTowers

✓ Merger notified to the Commission on 26 June 2019 pursuant to Article 24(1) of the Regulations

✓ Market for leasing antenna space on towers and the provision of ancillary services

✓ **The Merger was approved on the basis of undertakings submitted by the parties**

- An objective criterion was to be developed by the Uganda Operating Entities for provision of leasing space on its telecommunication towers within 1 month from date of approval of the transaction and submitted to the Commission for consideration.

- The parties submitted the criteria 10 months from the date of approval thus failing to comply with a condition imposed by the Commission.

- The parties were fined for breaching the Regulations, in accordance with Article 8(5) of the Regulations

✓ Decision of the CID:

Taking into account best practices with regard to imposition of fines (gravity of violation, duration of violation & parties' willingness to cooperate) imposed a fine of USD 67,629.98 for non-compliance with the Decision of the Commission.

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❑ **Merger Compliance**

- Merger concerning the proposed Acquisition by Helios Towers Ltd of shares of Madagascar Towers S.A. and Malawi Towers Limited

✓ Merger notified to the Commission on 2nd July 2021 pursuant to Article 24(1) of the Regulations yet the decision to merge was made on 23rd March 2021

- Parties failed to notify the Commission of the decision to merge as required by the Regulations, ***within 30 days of parties' decision to merge***

The parties were fined an amount of **USD 102,101.765**

Assistance to COMESA Member States

❑Bilateral Agreements

✓Despite the regional competition law, the bilateral agreements which the Commission has signed with Member States have been very effective. Out of the 21 Member States, the Commission has signed 14 such agreements.

❑Technical assistance and capacity building

- The Commission provides technical assistance and capacity building to assist Member States in;

✓enacting laws and institutions

✓reviewing existing laws to improve the effectiveness of the national laws and to create uniformity of application with the regional law.

❖Law Review projects of Mauritius, Malawi and Djibouti

❖Ethiopia technical assistance

Proposed Recommendations

❑Recommendation one:

- To consider a uniform and common regional merger regime to guide the application of the laws by the Arab countries in a uniform and coordinated manner.
- The uniform regime could be in form of a trade agreement that contains genesis provisions for the regulation of competition by a regional body.
- The elements of such a legislative framework should consider incorporating the following as a minimum:

✓Extra-territorial jurisdictions for mergers having an effect within a country.

✓Harmonized thresholds.

✓Harmonized substantive elements.

✓Harmonized remedies

❑Recommendation two:

- The Arab countries to explore the effectiveness of regional and bilateral cooperation agreements which can be useful in the drive towards a uniform merger control regime in both the short and long term.

Thank You

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