



3RD ANNUAL COMPETITION AND ECONOMIC REGULATION CONFERENCE

THE ROADMAP FOR EAC MERGER REVIEW

**LAICO LEDGER BEACH HOTEL, DAR ES SALAM,
TANZANIA**

14 – 15 JULY, 2017

LILIAN MUKORONIA
EAC COMPETITION AUTHORITY



BACKGROUND

- ❑ Article 75 of the EAC Treaty – Commitment to adoption of competition principles.
- ❑ Article 21 of the Common Market Protocol
- ❑ Article 33 of the EAC Common Market Protocol
 - ❑ Prohibition of practices that adversely affect free trade - prevention restriction or distortion of competition within the Community
- ❑ EAC Competition Act, 2006 (the Act) - assented to by the Summit
- ❑ Competition Regulations, 2010
- ❑ The Act came into force in Dec, 2014



Cont'd

- ❑ Authority is comprised of the Board of Commissioners and staff
- ❑ Process of Recruitment of staff ongoing
- ❑ **Mandate of the Act:** To promote and protect fair competition and to provide for consumer welfare and for related matters
- ❑ **Objectives include:** Promote economic integration and development in the community by (i) enhancing the competitiveness of community enterprises in world markets and (ii) creating a conducive environment to investment



OVERVIEW OF THE MERGER FRAMEWORK

Scope

- ❑ The Act applies to “all economic activities and sectors having a cross-border effect” (the Act, s4)

Notification

- ❑ Any person intending to implement a merger or acquisition must notify the EAC Competition Authority promptly upon conclusion of the merger or acquisition agreement (Act, s11)

❖ Suspensory regime

- ❑ The notification must use the specified notification form (Competition Regulations, s3 & s4)
- ❑ A transaction that is not notified is “void” and it is an “offence” to carry it out (Act, s12)



Cont'd



Notices and timelines

- ❑ Authority must notify its decision on the merger or acquisition within 45 days and if it fails to do so the transaction may be implemented (Act, s12)
- ❑ 45-day period commences after the notification requirements “have been satisfied” (Regulations s5(3))
- ❑ Within 14 days after notification, Authority must publish a notice of the transaction “in at least two newspapers of national circulation in each Partner State and on the Community website”, inviting interested persons to make submissions within a further 14 days (Regulations s7)



Cont'd



Economic test

- ❑ Authority must consider whether the transaction “leads to the creation, or strengthening of an already subsisting dominant position in the relevant market, and thereby substantially lessening competition in the relevant market” (Act, s13)

Decision of the Authority (Regulation 10)

- ❑ Approve the merger with or without conditions
- ❑ Decide that the merger falls outside the jurisdiction of the Act
- ❑ Reject the intended merger or acquisition



Cont'd

Remedy and sanctions

- ❑ Divestiture

Appeal

- ❑ If the Authority objects to the transaction, the undertakings concerned may appeal to the Council of Ministers (CoM) which may approve it if it is satisfied that the transaction “is to fulfil an overriding public interest” (Act, s13)

Regulations

- ❑ The CoM may make regulations “for the better carrying into effect of the provisions of this Act” (Act, s47)



CHALLENGES OF IMPLEMENTING THE MERGER FRAMEWORK

1. The Act requires notification of all mergers and acquisitions with the consequences of a failure to notify being a void transaction and commission of an offence
 - ❑ creates legal uncertainty
 - ❖ Establish the necessary procedures enabling parties to merger and acquisition transactions to make notification under the Act
 - ❖ Engage the necessary resources to review such notifications
 - ❖ Publish a notice of the date from which parties may and shall notify the EACCA of intended mergers and acquisitions.



Cont'd

2. Notification threshold conditions

❑ Every merger or acquisition in the EAC must be notified unless another legally effective instrument provides otherwise:

- ❖ Volume of notifications would be impossible to administer, including purely domestic cases
- ❖ High risk of non-compliance, disregard for the Act
 - ✓ In the short run – Regulations to set thresholds
 - ✓ In the long run- Amend the Act to include notification thresholds
 - ✓ e.g., Tanzania, Kenya, Rwanda, South Africa, Zambia, EU, COMESA



Cont'd



3. 45 day Period

❑ Period too short for cases that need further information and analysis:

❖ High risk of rushed decisions with inadequate information

✓ Amend the Act to allow for extensions and a two-phase process



Cont'd

4. Inter-agency cooperation & referrals

- ❑ Overlap of EACCA with mergers considered by other RECS and national authorities:
 - ❖ Increases costs, time, duplication, inconsistencies and legal uncertainty
 - ✓ Amend the Act to authorise cooperation and referrals among agencies



WAY FORWARD (ROADMAP)

- ☐ Develop operational Guidelines, Manuals and Internal rules, forms, Strategic Plan, etc.)
- ☐ Review of the EAC Competition Act, 2006 and Competition Regulations 2010 in line with the international practice
 - ☐ short-term and long-term measures to address shortcomings of the current framework
- ☐ Develop cooperation mechanisms with regional RECS and Partner States
 - ☐ Tripartite (SADC-EAC-COMESA agreement)
- ☐ Stakeholders' sensitization on competition policy (in line with Council and SCTIFI decisions)



Cont'd

- ☐ Advocacy plan/Outreach strategy – includes market studies, events to create visibility, interaction with universities, interaction with EAC Technical Committees, EABC, etc. – Advisory opinions
- ☐ Conduct market studies
 - ☐ Database
 - ☐ Competition assessment concerns?
 - ☐ Inform on further regional studies
- ☐ Capacity building of staff and partner states agencies
- ☐ Enforcement and prioritization of enforcement actions



One People...One Destiny

