COMESA Competition Commission
Kang'ombe House, 5th Floor
P.O. Box 30742
Lilongwe 3, Malawi
Tel: +265 1 772 466
Email- compcom@comesa.int

Common Market for Eastern and Southern Africa

Case File No. CCC/MER/8/35/2022

Decision[1] of the Eighty-Eighth (88th) Committee Responsible for Initial Determinations Regarding the Proposed Merger involving Barak Asset Recovery Limited and Seruji Limited

ECONOMIC SECTOR: Cement

18 November 2022

[1] In the published version of this decision, some information has been omitted pursuant to Rule 73 of the COMESA Competition Rules concerning non-disclosure of business secrets and other confidential information. Where possible, the information omitted has been replaced by ranges of figures or a general description.

The Committee Responsible for Initial Determinations,

Cognisant of Article 55 of the Treaty establishing the Common Market for Eastern and Southern Africa (the "**COMESA Treaty**");

Having regard to the COMESA Competition Regulations of 2004 (the "**Regulations**"), and in particular Part 4 thereof;

Mindful of the COMESA Competition Rules of 2004, as amended by the COMESA Competition [Amendment] Rules, 2014 (the "**Rules**");

Conscious of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation of 2015;

Recalling the overriding need to establish a Common Market;

Recognising that anti-competitive mergers may constitute an obstacle to the achievement of economic growth, trade liberalization and economic efficiency in the COMESA Member States;

Considering that the continued growth in regionalization of business activities correspondingly increases the likelihood that anti-competitive mergers in one Member State may adversely affect competition in another Member State,

Desirability of the overriding COMESA Treaty objective of strengthening and achieving convergence of COMESA Member States' economies through the attainment of full market integration,

Having regard to the COMESA Merger Assessment Guidelines of 2014,

Determines as follows:

Introduction and Relevant Background

1. On 11 October 2022, the COMESA Competition Commission ("**Commission**") received a notification for approval of a merger from Kaplan & Stratton Advocates on behalf of their clients, Barak Asset Recovery Limited ("**Barak Asset**") and Seruji Limited ("**Seruji**"), pursuant to Article 24(1) of the COMESA Competition Regulations of 2004 (the "**Regulations**").

2. Pursuant to Article 26 of the Regulations, the Commission is required to assess whether the transaction between the parties would or is likely to have the effect of substantially preventing or lessening competition or would be contrary to public interest in the Common Market.

3. Pursuant to Article 13(4) of the Regulations, there is established a Committee Responsible for Initial Determinations, referred to as the CID. The decision of the CID is set out below.

The Parties

Barak Asset (the acquiring firm)

4. The acquirer is a company incorporated under the laws of Mauritius. In the Common Market, the acquirer carries on the business of investment holding within the Barak group. The acquirer is 100% owned by AGA Investments Holding Limited ("**AGA**"), whose principal business is equally investment holding. AGA holds shares in two unrelated investee companies in the Common Market.

Seruji (the target firm)

5. Seruji is a global business company limited by shares and incorporated under the laws of Mauritius. The target is a non-operating holding company. Seruji owns 60% of the issued share capital of Savannah Cement Limited ("**Savannah Cement**"), a private company limited by shares and incorporated under the laws of Kenya, which carries on the business of manufacturing and sale of cement in Kenya and which it also exports to other countries, including the Democratic Republic of Congo (DRC) in the Common Market.

Jurisdiction of the Commission

6. Article 24(1) of the Regulations requires 'notifiable mergers' to be notified to the Commission. Rule 4 of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation (the "**Merger Notification Thresholds Rules**") provides that:

Any merger, where both the acquiring firm and the target firm, or either the acquiring firm 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 or exceeds COM$ 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 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.

7. The undertakings concerned together have operations in two or more Member States. The undertakings concerned have a combined annual asset value in excess of the threshold of USD 50 million in the Common Market. In addition, the parties each hold an asset value of more than USD 10 million in the Common Market and they do not hold more than two-thirds of their respective COMESA-wide asset within one and the same Member State. The notified transaction is,

therefore, notifiable to the Commission within the meaning of Article 23(5)(a) of the Regulations.

Details of the Merger

8. The transaction entails the acquisition of 100% of the shares in Seruji by Barak Assets. The parties have submitted that Barak Assets hopes to restructure and grow the business of Savannah Cement which has experienced poor financial performance in the recent past.

9. The parties submitted that Savannah Cement is currently in financial distress. In May 2022, Kenya Commercial Bank Limited and Absa Bank Kenya Limited (commercial banks in Kenya) threatened enforcement of various securities issued by Savannah Cement on the basis that Savannah Cement is unable to pay its debts.

10. In response, Savannah Cement filed a suit in HC COMM NO. E174 OF 2022 - Savannah Cement Limited vs KCB and Absa Bank seeking to stop the taking of enforcement actions (including the appointment of a receiver). Together with the main suit, Savannah Cement filed an application seeking for amongst others, interim orders barring the banks from continuing with the enforcement, pending hearing and determination of the application. The court issued an interim injunction on 23 May 2022 stopping enforcement by the banks, pending hearing and determination of the application. The court is due to issue a ruling on the application in December 2022.

11. The Commission was informed by the parties that the acquirer is desirous of turning around Savannah Cement and recovering the money that it lent out to the Seller. The acquirer believes that it has the necessary skills, expertise and competence to turn around the business of Savannah Cement and bring it back to profitability. In view of the current financial distress of Savannah Cement, the acquirer is in the process of formulating a restructuring plan with a view to allowing the acquirer to bring back the company to profitability.

Competition Assessment

Relevant Product Market

12. The target is active in the manufacture and supply of Portland cement. Cement is the binding material used to bind together the components of building materials. It is a fine powder produced from limestone, alumino-silicate, and other constituents.[2] Cement is used in the building and construction sector because it

[2] EC Case M.7550 CRH/Holcim Lafarge Development Business, paragraph 13

has a superior power to harden once mixed with water, and to bind other materials for stability and strength.[3]

13. Portland cement is the most common type of cement used and is manufactured from limestone and clay with lower amount of gypsum. There are a variety of cement used in the construction industry, including:

- ordinary portland cement, which when mixed with aggregates and water produces concrete which is widely used in construction of buildings. Also used for joining masonry and as plaster to give smooth finish to walls.
- Portland pozzolana cement, which has a high resistance to different chemical assaults on concrete, and is used in construction such as marine structures, sewage works, bridges, piers, dams.
- Rapid hardening cement, which is used in rapid constructions such as pavements.
- Low heat cement, which is used in mass concrete construction such as gravity dams. This type of cement is less reactive and the initial setting time is greater than ordinary Portland cement.
- White cement, which is manufactured by using raw materials that are free from iron and oxide. White cement has lime and clay in a higher proportion and is more expensive than ordinary Portland cement. White cement is mostly used for architectural beauty, interior, and exterior decorations, floorings, ornamental concrete products; whereas the grey cement is mostly used for construction purposes such as bridges, buildings and others[4]. White cement is reported to be more expensive than grey cement as a result of "*higher selectivity of the raw materials and the increased production complexities involved*"[5].

14. The key difference between each type of cement are its properties, uses and composition materials used during the manufacturing process.

15. Cement can thus be differentiated according to strength development and setting times[6], which are reflected in the grade or class of the cement, which in turn determines the use of the cement. For instance, quick setting cement are popular in fast-pace construction work as it develops early strength more quickly, thus

---

[3] *Ibid*
[4] *Ibid.*
[5] Global Cement, White Cement Review, accessed at https://www.globalcement.com/magazine/articles/890-white-cement-review. In particular, it was stated that for white cement, "*the iron oxide and iron sulphate content in the limestone must be as low as possible as each 0.1% increase in iron oxide reduces cement reflectivity by 2.5%, producing darker cement. To ensure that all of the raw materials are fully converted in the kiln in the absence of iron oxide, mineralisers are added and higher temperatures are used, which uses more fuel. Additionally, the white clinker must be cooled rapidly, often with water, to prevent the oxidation of trace iron impurities that would darken the cement*", which makes white cement more costly to produce.
[6] http://www.cement.org/cement-concrete-basics/concrete-materials/cement-types

reducing the time that precast concrete elements must remain in their forms. This notwithstanding, it is reported that the differences in the chemical composition of the various grades of cement are fairly subtle, with most cement types containing at least 75 wt% calcium silicate minerals[7]. First, there is a large degree of supply-side substitutability among different grades. As such, it is expected that in the event of a small but permanent increase of 5–10 % in the price of a certain grade of cement, cement producers would be able to switch to the production of different cement grades within a short period of time and without incurring significant costs. Moreover, cement producers also tend to have the range of cement types for all typical cement applications available.

16. Further, from a demand side, it is noted that consumers, in particular, individual or retail customers primarily focus on prices, rather than the technical differences or grades of cements.

17. Thus, while there exist potentially narrower sub-product markets within the broader cement market, to the extent that there are no overlaps in the activities of the parties in the cement market, for the purposes of this competitive assessment, the CID has considered that the relevant product market is the supply of cement.

Relevant Geographic Market

18. The relevant geographic market consists of all areas where the conditions of competition are substantially similar for all traders.

19. The geographic scope of the market for cement is largely determined by transportation costs as cement is a heavy product to transport, which affect the radius within which a typical cement plant is competitive. With technological advancements in recent years, the CID noted that the distance over which cement can be competitively transported is likely to be significant. For instance, it is noted that cement manufacturer Dangote exports from Ndola in Zambia to Lilongwe in Malawi, a distance of about 900 km. There are also exports from Zambia to the DRC and the great lakes region, covering distances of over 300 km.

20. The CID noted that there are significant trade flows of cement across certain Member States in the Common Market[8], in particular across the borders of Kenya-Uganda, Malawi-Zambia, and Rwanda-Uganda, given the relatively close geographic proximity of these countries and the fact that cross-border trade of cement benefits from tax exemptions under the COMESA trade liberalisation programme. This is supported by the activities of the target company itself, who

[7] http://iti.northwestern.edu/cement/monograph/Monograph3_8.html
[8] https://www.comesa.int/wp-content/uploads/2021/01/2019-Annual-Report_online.pdf, discussing cement among main products for intra-COMESA trade,

manufactures in Kenya but exports to the DRC (and Rwanda in 2020). The relevant geographic market is therefore construed as the Common Market.

21. Based on the foregoing, the CID considers that the relevant market can be construed as the **manufacture and supply of cement in the Common Market.**

Market shares and Concentration

22. The parties provided their market shares and those of their main competitors in the national markets for Kenya and DRC for the supply of Portland cement. It is noted that the target is a relatively small player, with an estimated market share of [5-10]% in Kenya. Further in the export markets, the target is an insignificant player, with market share of [0-5]% in DRC.

Table 1 – Market Shares of Players manufacturing and supplying Portland Cement in Kenya and DRC

Member State	Competitor	Estimated share
Kenya	Bamburi Cement Limited	[25-30]%
	National Cement Company Limited	[25-30]%
	Mombasa Cement Limited	[15-20]%
	East Africa Portland Cement Limited	[10-15]%
	Savannah Cement	***[5-10]%***
	Ndovu Cement Limited	[0-5]%
	Rai Cement Limited	[0-5]%
DRC	PPC Barnet	[25-30]%
	Nyumba Ya Akiba SARL	[25-30]%
	Cimenterie de Lukala (CILU)	[15-20]%
	Carriere de Lualaba (CARRILU)	[10-15]%
	Cimerwa Cement Limited	[0-5]%
	Savannah Cement	***[0-5]%***

23. It is recalled that the acquirer is not active in the cement market. As such, the transaction will not result in any market share accretion. Further, the target is a relatively insignificant player at national level and will continue to face strong competition from regional players.

24. The CID observed that the market structure will remain unchanged since there was no overlap in the parties' activities pre-merger. The CID is of the view that competition will not be affected as there will be no removal of a strong competitor.

Third-Party Views

25. Submissions were received from the national competition authorities of Kenya, Mauritius, and Rwanda which did not raise any concerns in relation to the transaction. This is consistent with the CID's assessment, as presented above.

26. Submissions were further received from other stakeholders, including suppliers and former employees of the Savannah Cement and a financial institution which

advanced various facilities to Savannah Cement. The CID however noted that the concerns raised did not fall within the scope of application of the Regulations. Nonetheless, the CID noted that a merger approval will not relieve the parties from their obligations to comply with other prevailing laws. Merger transactions should not be used as a gateway by merging parties to avoid or to neglect to perform their legal and other related obligations.

Determination

27. Based on the foregoing reasons, the CID determined that the merger is not likely to substantially prevent or lessen competition in the Common Market or a substantial part of it, nor be contrary to public interest. The CID further determined that the transaction is unlikely to negatively affect trade between Member States.

28. The CID therefore approved this transaction. However, the CID observed through third parties the concerns arising in Kenya with regard to matters outside the scope of the Regulations. The CID noted that its approval of the transaction is only as it relates to competition and related matters under the Regulations. This notwithstanding, the CID determined that the approval does not give the parties unfettered guarantee not to comply with other relevant laws and obligations in jurisdictions where they have operations.

29. This decision is adopted in accordance with Article 26 of the Regulations.

Dated this 18th day of November 2022

....

Commissioner Mahmoud Momtaz (Chairperson)

....

Commissioner Lloyds Vincent Nkhoma

....

Commissioner Islam Tagelsir Ahmed Alhasan