

DATE: 6TH SEPTEMBER 2021

DECISION/MER/20.2/2021

PRESS RELEASE

THE COMESA COMPETITION COMMISSION IMPOSED A FINE FOR NON-COMPLIANCE WITH ARTICLE 24(1) OF THE REGULATIONS

The COMESA Competition Commission (the “**Commission**”) wishes to inform the general public that the Seventy Eighth (78th) Committee Responsible for Initial Determinations (**CID**) meeting held on 3rd September 2021 imposed a fine in relation to the proposed acquisition by Helios Towers Limited (“**Helios Towers**”) of the shares of Madagascar Towers S.A (“**Madagascar Towers**”) and Malawi Towers Limited (“**Malawi Towers**”) (together the “**Parties**”) for failure to notify the transaction to the Commission within the prescribed time period under Article 24 (1) of the COMESA Competition Regulations of 2004 (the “**Regulations**”) which reads as follows:

“A party to a notifiable merger shall notify the Commission 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.”

Background to the Proposed Merger

The Parties have operations in the Common Market. In particular, Helios Towers operates in the Democratic Republic of Congo and is incorporated in Malawi and Madagascar as Helios Towers Malawi Limited and Helios Towers Madagascar Limited. The target firms, Madagascar Towers and Malawi Towers are part of the Airtel Africa Group Companies which provide passive telecommunication infrastructure in Madagascar and Malawi, respectively.

The CID at its 78th meeting observed that a decision to merge was executed on 23rd March 2021, being the date the Share Sale and Purchase Agreement for the proposed transaction was signed, but the proposed merger was only notified to the Commission on 2nd July 2021 pursuant to Article 24(3) of the Regulations. The CID observed that the Parties were required to complete the merger notification on 22nd April 2021 in accordance with Article 24 (1) of the Regulations. In this regard, the CID concluded that the Parties breached Article 24 (1) of the Regulations since the merger notification was filed to the Commission more than 30 days after they executed the decision to merge.

In view of this, the CID considered Article 24 (4) of the Regulations which confers jurisdiction upon the Commission to impose penalties where parties to a merger fail to give notice as required by Article 24 (1) of the Regulations. The CID also considered that Article 24 (5) of the Regulations provides that such penalties may not exceed ten percent of either or both the merging Parties' annual turnover in the Common Market as reflected in the accounts of any Party concerned for the preceding financial year.

Therefore, the CID determined and concluded that the Parties be fined a fine of 0.05% of their combined turnover in the Common Market in the financial year of 2020, for breaching Article 24 (1) of the Regulations taking cognizant of the following:

- The primary objective of penalties is to deter future violations by the undertakings concerned and other would-be offenders;
- The maximum penalty of 10% is not applicable in this scenario given the nature of the contravention and having considered the factors stipulated under Article 26 (6) of the Regulations that:
 - o The breach did not result in any loss or harm in the market;
 - o The Parties cooperated with the Commission from the time they were engaged leading to the merger being notified on 2nd July 2021 following their initial engagement; and
 - o The Parties have no record of contravention with the Regulations.

The CID further concluded that if the Parties are aggrieved by its determination, they may appeal to the full Board of Commissioners in accordance with Article 15 (1) (d) of the Regulations as read together with Rule 24 (e) of the COMESA Competition Rules of 2004.

The Commission's Registrar, Ms. Meti Disasa, stated that "the fine was the first of a kind for breach of the Regulations. The Commission therefore wishes to remind Undertakings in the Common Market to be cautious of the prescribed timeline for notifying mergers in under Article 24 (1) of the Regulations." She further cautioned undertakings operating in the Common Market to comply with all other parts of the Regulations especially with respect to anti-competitive conduct as the Commission shall henceforth not take lightly any breaches of the regional competition law.

The Commission further wishes to inform the general public that the decision to fine has no impact on the Commission's assessment of any competitive effects of the merger, which is still ongoing.

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