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Merger Control in Africa

Created in 1994,[1] the Common Market for Eastern and Southern Africa (the "**COMESA**") is an organisation currently comprised of 19 African countries[2] which aim at promoting regional integration in Eastern and Southern Africa (the "**Common Market**") notably through development of trade and investment.

To achieve its objectives, the COMESA has notably implemented the COMESA Competition Regulations (the "**Regulations**") which apply to all economic activities that might prevent, restrict or distort competition within the Common Market and especially target anti-competitive business practices and mergers and acquisitions.

A regional competition authority: the COMESA Competition Commission (the "**Commission**") located in Lilongwe, Malawi,[3] was also launched to promote fair competition within the Common Market and to monitor compliance with the Regulations.

As announced by the Commission on 22 November 2012, the merger control requirements provided for by the Regulations became effective on **14 January 2013**.

Considering the major impact that these Regulations could have on companies involved in cross-border merger and acquisition transactions in Africa, it is important to summarise briefly the main provisions of this regional competition policy.

It should be noted, however, that the Regulations do not address various important issues and contain insufficiently precise definitions or wordings which create uncertainties and leave many questions unanswered at this stage.

This situation requires companies to be particularly cautious when assessing whether their contemplated mergers or acquisitions fall under the Regulations and whether they require prior notification.

WHICH TRANSACTIONS FALL UNDER COMESA'S MERGER CONTROL?

Mergers and acquisitions

Pursuant to article 23 of the Regulations, a merger is defined as "the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of :

- the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;
- the amalgamation or combination with a competitor, supplier, customer or other person; or
- any other means".

The definition of mergers which fall under the Regulations is very wide and does not provide for exemptions. For example, it does not provide for an exemption or a specific treatment regarding a merger taking place between two entities of the same group of companies which would not result in a change of control.

Mergers with regional dimension

Companies contemplating mergers with a "regional dimension", meaning when both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more Member States, are now required to comply with mandatory merger notifications.

However, the Regulations remain silent on the interpretation that shall be given to the term "operate" as they do not precise whether a corporate presence in two or more Member States would be required or whether activities without a commercial presence would be sufficient to trigger the merger notification.

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In addition, it may be concluded from the Regulations that when a merger occurs between two entities which have a physical presence in one member state only and which have no operations in the other member states, such merger would not fall under the scope of the Regulations and would not require a merger notification.

However, one must keep in mind the fact that the COMESA has the discretionary power to investigate on non-notifiable mergers if it considers that such merger is likely to substantially prevent or lessen competition in the Common Market or is likely to be contrary to public interest.

Absence of filing thresholds

Although article 23 (3.(b)) of the Regulations refers to turnover or assets thresholds to be met for transactions to be governed by the Regulations, the Commission recently announced that the financial threshold for merger notification would be 0$ which means that all merger transactions, irrespective of their size or turnover, must be notified to the Commission.

WHICH TEST IS APPLIED BY THE COMESA TO DETERMINE WHETHER A NOTIFIED TRANSACTION MAY OR MAY NOT BE APPROVED?

The substantive test for merger review to be applied by the Commission is to determine firstly whether the merger is likely to substantially prevent or lessen competition by assessing various matters such as the actual or potential level of import competition in the market, the ease of entry into the market, the level, trends of concentration and history of collusion in the market and whether the merger will result in the removal of efficient competition.[4]

When considering the effect of the contemplated merger, the Commission shall also consider other matters that may outweigh the anti-competitive effects of the merger such as any technological efficiency or other pro-competitive gain that would result from the merger.

Then, and if it considers that the merger is likely to substantially prevent or lessen competition, the Commission shall take into account public interests grounds such as the interests of consumers, purchasers in regard to the prices, quality and variety of commodities and services.[5]

Further to this substantive test, the Commission can approve the merger, declare the merger unlawful, restrict the merger or prescribe prohibitions and restrictions regarding the manner in which the business is carried out.

WHICH PROCEDURE APPLIES TO THE MERGER NOTIFICATION?

The notification must be made in writing by each party to the transaction within 30 days of their decision to merge.[6] The COMESA filing form requires extensive information and documents to be provided by the merging parties.

The Commission indicated that merger notifications shall be accompanied by a filing fee which is the lower of:

(i) 0.5% of the merging parties' combined turnover in the COMESA region or 0.5% of their combined assets in that region, whichever is the higher; or
(ii) COM$500,000.[7]

The Commission shall examine the merger upon its notification and must make a decision within 120 days further to the notification; however extension of this period can be sought from the Board of Commissioners. It should be noted that there is no consequence attached to the lack of decision at the end of the review period which creates some uncertainty should the Commission fails to meet the above mentioned timeframe.

In addition, it is unclear whether the merger notification has a suspensive effect or not. The Commission recently clarified that if the parties decided to close the merger prior to the Commission's approval, they should do so at their own risks and thus they should bear the risk of a later refusal of the merger by the Commission.

Sanctions

Failure to comply with merger notification will result in the merger having no legal effect[8] and exposes the contravening party(ies) to a penalty of up to 10% of their actual turnover in the Common Market.[9]

Any party aggrieved by the orders of the Commission may appeal to the Board of Commissioners which has powers to uphold, reject or amend the orders made by the Commission.[10] However, the procedure and timing of the appeal is not provided by the Regulations.

IS THE COMESA A ONE-STOP SHOP?

It is intended that the COMESA competition regime would work as a one-stop shop regime but the question of the potential parallel jurisdiction of the Member States remains outstanding.

Therefore, and in addition to the compulsory notification to the Commission, companies contemplating a merger, whether with a regional dimension or not, shall also have to comply with the potential domestic competition laws that might be applicable in the COMESA Member States.[11]

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1 The Treaty establishing the Common Market for Eastern and Southern Africa was ratified on 8 December 1993.

2 The Member States are Republic of Burundi, Union of the Comoros, Democratic Republic of the Congo, Republic of Djibouti, Arab Republic of Egypt, State of Eritrea, Federal Democratic Republic of Ethiopia, Republic of Kenya, Libya, Republic of Madagascar, Republic of Malawi, Republic of Mauritius, Republic of Rwanda, Republic of Seychelles, Republic of the Sudan, Kingdom of Swaziland, Republic of Uganda, Republic of Zambia and Republic of Zimbabwe

3 The COMESA postal address is PO Box 30742 Lilongwe 3, Malawi

4 Article 26 .2 of the Regulations.

5 Article 26. 4 of the Regulations.

6 Article 24 of the Regulations.

7 The basis for the unit of account for the COMESA is United States Dollars and is termed COMESA Dollars.

8 Pursuant to article 24 (1) of the Regulations “any notifiable merger carried out in contravention (…) shall have no legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger shall be legally enforceable in the Common Market”.

9 Pursuant to article 24 (2) of the Regulations the penalty faced by the contravening party “may not exceed ten *per centum* of either or both of the merging parties’ annual turnover in the Common Market as reflected in the accounts of any party concerned for the preceding financial year”.

10 Article 26 (13) of the Regulations.

11 The Member States with a national merger review regime are Kenya, Egypt, Zambia, Malawi, Zimbabwe, Swaziland, Mauritius and Burundi.