COMESA – New Pan-African Merger Control Regime

On 14 January 2013, the Competition Commission for the Common Market for Eastern and Southern Africa ("COMESA") became operational. This creates a new supranational merger control regime in Africa which companies will now have to navigate.

The new regime contains a number of potentially significant issues for dealmakers, including broad jurisdictional thresholds with extensive reach to foreign companies, a potentially long review period, and very high filing fees.

The COMESA's Competition Commission (CCC) has also started to enforce general competition law provisions which govern anti-competitive agreements and abuse of dominance. Businesses with operations in the region will now need to take this further set of competition law rules into account as part of their compliance programmes.

The COMESA regime adds significant complexity to transactions and business dealings with a potential impact in Africa, and companies should carefully consider the impact of the new regime going forward.

WHAT IS COMESA?

COMESA is a supranational organisation which has 19 member states, namely Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

COMESA has two competition bodies: The CCC and the Board of Commissioners. The CCC is responsible for reviewing merger control filings and investigating anti-competitive practices. The Board of Commissioners is an adjudicative body which will review and hear appeals of decisions of the CCC.

The CCC is headed by director and CEO George Lipimile. The former Head of Mergers of the Competition and Consumer Protection Commission of Zambia, Willard Mwemba, has been appointed as Head of Mergers. The CCC is based in Lilongwe, Malawi.

The competition rules are set out in the COMESA Competition Regulations of December 2004 (the "Regulations"). In November 2012, the COMESA Council of Ministers approved a number of implementing rules (including setting the turnover and asset jurisdictional thresholds to zero), but it appears that a number of guidelines and implementing rules are still yet to be published. The rules took effect from 14 January 2013.

MERGER CONTROL

What transactions need to be notified?

The new rules provide for the mandatory notification to the CCC of "the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part" of a business, provided at least one of the parties operates in two or more COMESA Member States. There are no turnover or asset thresholds. Transactions that meet the "operations" test (at least one party operates in two or more COMESA Member States) must be notified.

What is the deadline for filing?

Merger notifications must be made within 30 days of a "decision to merge". There is no guidance as to when a "decision to merge" can be understood to take place.

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What is the review period?

The merger review deadline is 120 working days, which can be extended. The 120 day clock only starts once the CCC is satisfied that it has received a complete notification. Extensions of the review period are possible if approved by the Board of Commissioners.

What is the substantive test for merger assessment?

The substantive test for assessment is based on both competition and public interest grounds.

First, the CCC must consider "whether or not the merger is likely to substantially prevent or lessen competition". In this assessment, the following matters must be taken into account:

- the actual and potential level of import competition in the market;
- the ease of entry into the market, including tariff and regulatory barriers;
- the level, trends of concentration and history of collusion in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the merged parties having market power;
- the dynamic characteristics of the market including growth, innovation and product differentiation;
- the nature and extent of vertical integration in the market;
- whether the business or part of the business or a party to the merger or proposed merger has failed or is likely to fail;
- whether the merger will result in the removal of efficient competition.

Secondly, if it appears that the merger is likely substantially to prevent or lessen competition, the CCC must then determine:

(i) "*whether the merger is likely to result in any technological efficiency or other pro-competitive gain which will be greater than and offset the effects of any prevention or lessening of competition that may result or is likely to result from the merger and would not likely be obtained if the merger is prevented*"; and

(ii) whether the merger can be justified on "*substantial public interest grounds*".

In considering these grounds, the CCC must take into account "all matters that it considers relevant" and shall have regard to the desirability of maintaining and promoting effective competition; promoting the interests of consumers, purchasers and other users in the COMESA region; promoting the reduction of costs and the development of new commodities; and facilitating the entry of new competitors into existing markets.

In the absence of competition concerns, the CCC does not have the power to prohibit a merger or to impose commitments solely on public interest grounds.

Notification fees

There are very high notification fees. These are <u>the lower of</u>: (i) USD500,000, or (ii) 0.5 per cent of the parties' combined annual turnover or combined value of assets in the COMESA region (whichever is the higher). Thus USD500,000 is the maximum fee.

Who must notify?

The merger notification form states that "all parties to the merger are obliged to individually submit a notification to the CCC with the exception of a hostile bid where only the acquiring party must submit a notification."

The merger notification form

The prescribed notification form sets out burdensome information requirements, including requiring information on all products or services, including turnover, and customer and producer details for each product and service.

What are the consequences of not notifying?

The first published version of the CCC's merger filing form stated that parties to a notifiable transaction could not implement the transaction until it had been approved. This suspensory obligation went beyond what is contained in the primary legislation, namely the Regulations, which do not explicitly provide that merging parties must suspend completion of the transaction until clearance.

The CCC now appears to have removed the suspension requirement. It has published a revised merger filing form which deletes the explicit statement that "the parties to a notifiable merger shall not implement the merger until it has been approved", and replaces this with a new cautionary statement that a notifiable merger which is carried out in contravention of Part IV of the Regulations (i.e. which is not notified) "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". It also states that "the CCC may by decision impose on a party to a merger a fine not exceeding 10% of the aggregate turnover of the party in question, where, intentionally or negligently, it fails to notify a merger…before its implementation…" It appears, therefore, that parties may close a notifiable transaction before clearance as long as it has been notified.

A one-stop shop?

From reports in the press, it appears that the CCC intends the new regime to be an efficient one-stop-shop, so that transactions notified to the CCC will usually not have to be notified to local national competition law authorities in the COMESA region. The procedures provide for a transaction to be referred back to a local competition authority at its request if the transaction is likely disproportionately to reduce competition to a material extent in all or part of a member state. The decision whether or not to refer back is ultimately made by the CCC within 21 days of receipt of a request. However, the Regulations only state that the CCC is to have "primary jurisdiction", and it is not clear whether COMESA national competition authorities will retain parallel jurisdiction. It has been reported that Kenya's competition authority is seeking to clarify the extent of the CCC's jurisdiction, and is advising parties to continue to notify transactions to the Kenyan Competition Authority as well as to the CCC.

Is there a residual power to review mergers?

The CCC has a discretionary power to review a non-notifiable merger if it is likely substantially to prevent or lessen competition or if it is likely to be contrary to the public interest.

WORDS OF CAUTION ABOUT THE MERGER CONTROL REGIME

It is to be seen how the new regime will operate in practice, but it is already possible to identify a number of significant potential issues for businesses:

- The merger notification thresholds are very broad, and may not be compliant with the International Competition Network's ("ICN") recommended practices for merger notification procedure. There are no turnover or asset thresholds. Article 3 of the Regulations state that the rules apply to "conduct…which have an appreciable effect on trade between Member States and which restrict competition in the Common Market". It is not clear whether it will be possible to argue that this provision means that there must be a physical presence and/or significant sales in a COMESA member state before a notification requirement is triggered.

- Completing the merger notification form is likely to be burdensome because of the information requirements of the current prescribed form.

- The merger notification form must be submitted separately by each merging party.

- The statutory review period is very long and may be extended. It is hoped that in practice the review period will be shorter, especially for transactions which raise no competition law issues.

- There is no simplified procedure for transactions that raise no competition issues.

- The filing fees are extraordinarily high—much higher than those imposed in the few other countries that require filing fees, such as the US.

- It is not yet clear whether COMESA national competition authorities will require notifications to them in parallel with any to the CCC, how the referral process will work in practice, and whether requests by local competition authorities to review transactions which are notifiable to the CCC will lead to significant delays to the merger review process.

- It is unclear whether the CCC will in practice exercise its discretionary power to investigate non-notifiable transactions, and what implications this may have for the merger timetable and for completed transactions.

- While the CCC must look at competition effects and there is no power to prohibit a merger or impose commitments purely on public interest grounds, the public interest factors are broad and include "all matters that it considers relevant in the circumstances". This broad test will create uncertainty for the merger clearance process.

ANTI-COMPETITIVE PRACTICES REGIME

The CCC has now started to enforce general competition law provisions which prohibit anti-competitive arrangements and abuse of a dominant position. There are potential fines for infringement of up to 10% of annual turnover in the COMESA region.

The CCC can launch investigations following a complaint or on its own initiative. It has dawn raid powers, power to send requests for information (RFIs), and to conduct general sector inquiries.

The CCC has invited businesses who have agreements which may infringe the competition law provisions to apply to it for authorisation or exemption on the basis that public benefits outweigh the anti-competitive effects.

It is not clear whether COMESA national competition authorities will apply their national competition rules in parallel when the CCC is investigating concurrently.

IMPACT

Companies entering into global transactions or transactions in Africa now need to take into account a new supranational merger control regime, and carefully consider the impact this has on their deal timetable.

Companies may also want to review their current arrangements and check whether they are COMESA compliant, and if necessary approach the CCC for a relevant exemption.