Hogan Lovells

New developments in the COMESA merger control regime – on the path to maturity

The Common Market of Eastern and Southern Africa ("COMESA") is a supranational organisation with 19 Member States: Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

The COMESA Competition Commission ("CCC") commenced operations on 14 January 2013 and implements a supra-national merger control regime (as well as other competition provisions) under:

- the COMESA Competition Rules; and
- the COMESA Competition Regulations 2004 (the "Regulations").
- In a nutshell, the COMESA merger control regime is based on the following rules:
- zero turnover or asset thresholds apply. Any transaction where at least one party operates in two or more COMESA Member States may be notifiable (however, see below on Article 3(2) of the Regulations);
- mandatory filings to the CCC must be made within 30 days from the decision to merge. Failure to notify results in the transaction being unenforceable in the COMESA region;
- a filing fee is payable based on the lower of: 1) $500,000; or, ii) 0.5% of whichever of the parties' combined annual turnover or combined asset value in the COMESA region is higher;
- according to the legislation, "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". On a strict reading, each party would therefore be required to submit a filing and pay the full filing fee. However, in its draft guidelines, the CCC has adopted a more lenient interpretation and in practice will accept joint notification or notification from either party and payment of a single fee in respect of that filing. There can be an agreement between the parties as to how to split the fee;
- while there is some discussion around this point, it seems that once the parties notify a transaction they do not have to suspend it pending the CCC's approval;
- the CCC has 120 days to review a notified transaction but it can request an extension;
- the substantive review takes into account competition and public interest grounds.

The regime was heavily criticised from the beginning, which led COMESA to publish draft Merger Assessment Guidelines in April 2013. While these guidelines did provide some clarification, a number of issues remained unresolved.

The main points of criticism are the thresholds being set at zero, the low degree of local nexus required, the high filing fees and the ambiguity as to whether the regime constitutes a "one-stop shop", replacing the need for filing in each of the member states. In response to these criticisms, the CCC, in collaboration with the International Finance Corporation of the World Bank, has engaged a consultant to review the merger provisions of the Regulations, including the zero thresholds, local nexus, effect on competition (see below on Article 3(2) of the Regulations), one-stop-shop, and filing fees. In this regard, a first workshop discussing the suggested amendments took place in April 2014, and a second one is expected to be held over the summer. The first workshop focused on finalising the draft Merger Assessment Guidelines and in particular the interpretation of Article 3(2) – see below. The CCC's intention is to finalise the draft Merger Assessment Guidelines after the second workshop, and eventually issue additional Guidelines.

Key Contacts

Ian Jacobsberg
Partner, Johannesburg
T +27 11 523 6091
ian.jacobsberg@hoganlovells.com

Dimitris Vallindas
Senior Associate, Brussels
T +32 (2) 505 0974
dimitris.vallindas@hoganlovells.com

Published May 2014

These are obviously encouraging steps, but the CCC has also taken informal steps to make its regime more pragmatic with immediate effect. Specifically, the CCC has used Article 3(2) of the Regulations, which provides that the COMESA merger rules apply only to transactions "**which have an appreciable effect on trade between Member States and which restrict competition in the Common Market**". The absence of turnover thresholds could have led to the interpretation that all mergers in which either or both of the parties generates turnover in two or more COMESA members states would be caught by Article 3(2). But this is not the interpretation that the CCC has adopted for parties that decided to approach the CCC to find a practical solution for a transaction which lacked sufficient nexus with COMESA and did not restrict competition. In fact, we understand that the CCC has issued 5 "comfort letters", including one for one of our clients, which in essence exempted the transactions from the need for a complete notification, and therefore from the payment of the high filing fees. The basis for these "comfort letters" was the absence of appreciable effect on trade between COMESA Member States and the absence of any restriction of competition in the COMESA Common Market.

In practice, a three-step process was followed:

- the parties (or one of them) sent an informal letter to the CCC explaining that they/it considered that the COMESA merger rules did not apply because the proposed transaction did not meet the requirements of Article 3(2) of the Regulations;
- the CCC invited the parties (or the party) to submit a "bare bones" filing to enable it to assess whether the requirements of Article 3(2) of the Regulations were met (the "bare bones" filing was not accompanied by any filing fees);
- on the basis of such a "bare bones" filing, the CCC issued a "comfort letter" exempting the proposed transaction from a complete notification, and therefore from the payment of any filing fee.

It is important to note that the assessment whether the requirements of Article 3(2) of the Regulations are met is one that can only be made by the CCC itself. The CCC has explicitly stated that any unilateral self-assessment by the parties or their lawyers of whether the requirements of Article 3(2) are met is therefore not permitted.

This is a welcome and pragmatic clarification of the applicability of the COMESA merger control rules. It is indicative of an approach by the CCC of encouraging companies doing business in the region to engage constructively with COMESA's merger control regime, rather than to seek ways of avoiding it. Hopefully, this informal process will be "codified" with the on-going review procedure, which will also resolve the other ambiguities of this newly operational merger control regime, which seems to be progressively maturing.

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney Advertising.

© Hogan Lovells 2014. All rights reserved.