

COMESA – update on new draft merger assessment guidelines

As reported in the [previous edition](#) of this newsletter, the new merger control regime for the Common Market for Eastern and Southern Africa ("COMESA") became operational in January 2013. This creates a new supranational merger control regime in Africa which companies will now have to navigate. COMESA's Competition Commission (CCC) has already received two merger filings – from the multinational electronics companies, Philips and Funai, and from the pharmaceutical companies, Cipla India and Cipla Medpro South Africa.

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

In April 2013, COMESA issued draft merger assessment guidelines. Whilst these have provided some helpful clarifications, they unfortunately confirm that the current jurisdictional thresholds are very broad. The consultation period has recently closed. The International Bar Association has made a detailed submission to the CCC – it is to be hoped that further clarifications will be made in accordance with their recommendations. Other interested parties may also have made submissions.

Nevertheless, as things stand, the key points arising from April's draft guidelines are as follows.

Very broad jurisdictional thresholds

The Regulations 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, where "*both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more [COMESA] Member States*" and where the relevant turnover or asset threshold test has been exceeded. The current turnover or asset threshold is set at zero.

The problem with the way the current thresholds are drafted in the Regulations is that even de minimis activities can trigger a notification requirement. Whilst the draft guidelines provide additional detail on the thresholds, they unfortunately provide little comfort for four main reasons:

- (i) They provide a broad definition of the term "*operation*". They state that: "*the term operation is construed widely to include not only the physical presence of merging parties but also their turnover derived from the Common Market*" (See Section 1.5). A company does not have to be "*directly domiciled in a Member State but it can have operations through exports, imports, subsidiaries etc in a Member State*" (See Section 3.10).
- (ii) They seem to give little weight to the provision in one of the early scoping articles of the Regulations that restricts the regime's jurisdiction to mergers that have "*an appreciable effect on trade between [COMESA] Member States*". Practitioners hope that this clause would be used to prevent the application of the regime to transactions with no obvious effect on competition in COMESA, which would otherwise be caught by the broad jurisdictional thresholds.
- (iii) They indicate that businesses will have to endure a period of testing before turnover or asset thresholds can be set. They state: "*The reason why the threshold has been currently set at zero is because different Member States are at different levels of economic development and hence a realistic threshold can only be determined after the Regulation has been tested on the market. Therefore, the threshold shall be raised after a period of implementation of the Regulations*" (See Section 1.3).



Key Contacts



Peter Citron
Of Counsel, Brussels
Hogan Lovells International LLP
peter.citron@hoganlovells.com
T +32 (2) 505 0905



Thomas Smith
Senior Associate, London
Hogan Lovells International LLP
thomas.smith@hoganlovells.com
T +44 20 7296 5766

-
- (iv) They do not address the uncertainty over whether the requirement for a filing to the CCC precludes the need to make filings to any national competition authorities. Opinions differ on this issue in the COMESA Member States. For example, the Kenyan competition authority has stated that it believes it retains primary jurisdiction over mergers in Kenya; the Egyptian competition authority has referred the issue to its Ministry of Justice for guidance; and the Regulations do not currently have force of law in Zimbabwe because they have not been incorporated by Act of Parliament.

Who must notify?

The draft guidelines state that the CCC can accept joint notification or notification from either party. This is a welcome clarification as 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*".

Notification fees

The draft guidelines clarify that the filing fee is equal to the lower of (i) COM\$500,000 or (ii) the higher of 0.5% of the parties' combined annual turnover or value of assets in the COMESA Common Market Area. They state that "*COM\$500,000 is the maximum fee payable for merger notification*".

Joint ventures

The draft guidelines clarify that the treatment of joint ventures is to be comparable to that under the EU Merger Regulation. The joint venture must "*perform, on a lasting basis, all the functions or an autonomous economic entity*". A joint venture will not meet this definition if it only takes over one specific function within the parent companies' business activities without access to the market.

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 2013. All rights reserved.