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Understanding the Common Market for Eastern and Southern Africa (COMESA) Merger Control Regime

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The Common Market for Eastern and Southern Africa (COMESA) was formed in 1994 by a treaty among 19 African countries: Burundi, Comoros, the Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi (where COMESA is based), Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Its objective was to create a common market. COMESA has a wide range of priorities, but its primary focus is achieving regional economic integration.

Competition law is one of the specific mechanisms envisaged to achieve regional economic integration. The COMESA competition regime is rapidly evolving, and given its broad reach, companies engaged in international transactions are well advised to monitor its development and the potential obligations it may impose.

The COMESA Merger Control Regime

COMESA's merger control jurisdiction has an undeniably broad reach. Transactions are caught if they have an "appreciable effect" on trade between COMESA member states and restrict competition in the COMESA common market. In relation to which transactions are caught, COMESA's competition regulations apply to

> 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 operate in two or more Member States and where the relevant turnover or asset threshold has been exceeded.

As noted in "Investors in Africa Benefit from Regional Trading Blocs" on page 4, the current jurisdictional thresholds are set at zero. This means that any transaction where one party is active in two or more COMESA countries is reportable, and the actual size of the parties, the extent of their business in the COMESA region and the impact of the deal do not matter.

If a transaction is subject to COMESA Competition Commission (CCC) review, the parties must notify it to the CCC within 30 days from their decision to merge. The transaction will be subject to a review of 120 days which, under draft merger guidelines, is composed of a 60-day Phase 1 period and a 60-day Phase 2 period. This 120-day review period may be extended for an undefined amount of time. When making their filing, the parties must pay a fee of whichever is lower: 0.5 per cent of the merging parties' combined annual turnover or assets in the COMESA region (whichever is higher), or US$500,000.

The COMESA Competition Regulations contain no suspension requirement; once parties notify their transaction to the CCC, they can close the transaction at any time. Failure to notify a transaction can trigger fines of up to 10 per cent of the parties' combined turnover in the COMESA region, although no fines have been imposed to date.

If a transaction is notifiable under COMESA's merger control rules, the CCC is meant to act as a one-stop shop; transactions notifiable to the CCC are not also subject to review by individual COMESA member states under their national rules. This principle faced an early test when certain COMESA member states asserted national jurisdiction over transactions notifiable to the CCC. It should, however, be confirmed following the August 2013 ruling in Polytol v Mauritius, in which the COMESA Court of Justice affirmed the superiority of community rules over inconsistent national legislations.

With a view to interpreting the merger control rules and addressing the early and understandable criticism of several elements of the COMESA merger control regime (notably the zero thresholds, the high filing fee and the lack of a requirement that the transaction have a nexus with the COMESA region), over the course of 2013 the CCC issued draft guidelines covering its approach to mergers and other selected topics, and initiated a first wave of reforms.

Revisions to the merger guidelines can be made by the CCC, but any reforms to the Competition Regulation, such as to the zero jurisdictional thresholds, will have to be made by the COMESA Council, which meets once a year. By amending the merger guidelines, however, the CCC intends to introduce reforms that can have an immediate impact. To our knowledge, at the time of going to press the approval of the new merger guidelines by the board of commissioners was still pending, although it had been tabled for early August this year.

Among other things, the new merger guidelines are expected to include interpretation of certain elements of the COMESA jurisdictional test. The requirement to have "operations" in two or more COMESA member states and the requirement that a transaction have an "appreciable effect" on trade between COMESA member states should be clarified. The introduction of thresholds and criteria could limit the jurisdictional reach of the COMESA merger regime to the transactions that actually have an impact in the COMESA region. The filing fee, and the mechanism to determine it, may also be clarified.

COMESA Enforcement to Date and Current Trends

Nearly two years after it became operational, the CCC has received more than 30 notifications, 12 of which were received in 2013, and more than 18 to date since January 2014. The rate of notifications in 2014 shows a dramatic increase over the prior year.

To date, the CCC has not prohibited any transactions. While it has issued several written decisions, these remain relatively brief with regard to its competitive analysis. It has also been reported that in some cases the CCC is providing parties with “comfort letters” reassuring the parties that, even though their transactions fulfil the COMESA jurisdictional thresholds, the transaction does not have an appreciable effect on trade.

It therefore does not restrict competition in the Common Market and subsequently does not meet the requirement of Article 3(2) of the COMESA Competition Regulations. It is understood that, by issuing comfort letters, the CCC is exempting certain transactions from filing full notifications and paying the high filing fees. This approach should be clarified by the revised merger guidelines on the concepts of “appreciable effect on trade” and “operations”.

Next Steps and Practical Implications

Companies engaged in international mergers and acquisitions must be aware of COMESA in connection with multijurisdictional transactions. While the number of mergers notified to the CCC is relatively low, it is growing.

It is worth bearing in mind that, although fining companies is not the CCC’s current priority, it is clear that blatant disregard for its rules may be punished. In addition, while the CCC has not yet prohibited any transactions and is taking steps to reform contentious elements of its regime, businesses should not make the mistake of thinking it has no bite.

Transactions involving businesses operating in the COMESA region, which comprises much of southern and eastern Africa, should be assessed in every case to determine whether or not obligations arise under COMESA.

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