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The New COMESA Merger Control Regime: All Filings Welcome?

The supra-national merger control regime of the Common Market of Eastern and Southern Africa (COMESA) came into force on 14 January 2013. It has long review periods, potentially high filing fees and no jurisdictional thresholds, but does not prohibit closing prior to clearance. While the early indications are that the COMESA Competition Commission (CCC) will apply its new powers pragmatically, important uncertainties remain.

Key issues

- If a company has operations in two or more COMESA countries, must it notify every acquisition it makes, anywhere in the world?
- How are filing fees calculated?
- Is the new regime a one-stop-shop for mergers in the COMESA region?
- When can a notifiable deal close, and what are the risks of early closing?

A 20-stop-shop?

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

The legislation is unclear whether the new regime will operate as a one-stop-shop for filings in the region. The COMESA Competition Commission (CCC) considers that it does, but that view is not (yet) shared by all the national authorities to which filings would otherwise be made. In particular, the Kenyan Competition Authority has sought legal advice regarding the extent to which the COMESA rules take priority over Kenyan competition law and we understand that similar legal concerns have been raised in Zambia. It is therefore possible that (unlike the other supranational regime, in the EU) a merger may have to be notified at both the COMESA level and to the national authorities of those member states that have an active merger control regime (at present, these are Egypt, Kenya, Malawi, Mauritius, Seychelles, Swaziland, Zambia and Zimbabwe).

In any event, the legislation is clear that the CCC has a discretion to refer mergers back to competition authorities which request such referral, if the merger would disproportionately reduce competition to a material extent in all or part of the country of the requesting authority. The CCC also has a discretion to investigate mergers that are not required to be notified to it, if it considers them likely to be anticompetitive or contrary to public interest. Consequently, multiple parallel reviews will be a potential feature of the new regime, regardless of the outcome of the present jurisdictional tussles.

No Filing Thresholds

The COMESA Council of Ministers exercised its power to set turnover and asset thresholds for notifiable mergers, by setting them all at zero. This means that all mergers must be filed if "both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more member states". This implies that a transaction would be notifiable even if the target had no activity in the

COMESA region, and the purchaser operated a small shop in two different COMESA countries. However, the legislation is expressed as applying to conduct that "ha[s] an appreciable effect on trade between Member States and which restrict[s] competition in the Common Market", which leaves the CCC scope to clarify that no filings are required for deals having insignificant nexus with the COMESA Common Market. Whether this "effects" exemption will be interpreted this way (or more widely) remains to be seen.

Timing of review

The CCC has 120 days to complete its review, subject to the possibility of extending this deadline if it requires more time. At present there is no shorter "Phase 1" review timetable for mergers that clearly pose no competition concerns, but it is hoped that this will be a priority for the CCC.

No standstill obligation post-filing

The legislation provides for mandatory filing but does not prohibit implementing or closing a merger prior to clearance. The CCC has confirmed that closing prior to clearance will not result in penalties, but will expose the parties to the risk that the CCC later finds the transaction to be anticompetitive and imposes remedies or orders it to be unwound. The absence of standstill obligations will substantially mitigate the implementation risks for deals raising no competition issues that would otherwise have been caused by the regime's long review periods.

Filing deadline

Filings must be made within 30 days of the "decision to merge". While this has not been confirmed by the CCC, it would appear reasonable to interpret this as meaning that the "decision" to merge occurs at the point of signing the SPA.

Filing fee

The CCC has now confirmed that the filing is the lower of:

- 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
- US$ 500,000.

This means that filing fees will never exceed $500,000, but will reach that maximum wherever the parties have combined turnover or assets in the COMESA region of more than $100 million. Accordingly, purchasers with substantial sales or operations in the COMESA Common Market will face high fees even when acquiring targets with only minor activities in the region. The maximum fee is almost twice as high as the next most expensive regime (the US, which applies a $280,000 fee, payable per transaction, for deals involving assets or voting securities with a value of more than US$ 709.1 million). A cost of this magnitude is likely to be a significant proportion of overall costs of M&A, given the typical size of deals in the region.

Penalties for failure to file

Penalties for failing to file within the 30 day deadline are up to 10% of the parties' combined annual turnover in

the COMESA Common Market. In addition, transactions concluded in breach of the filing obligations will be legally unenforceable in the COMESA region.

Test for clearance

The test for clearance is whether the merger is likely to: (i) substantially prevent or lessen competition; or (ii) strengthen a position of dominance contrary to the public interest.

While the clear focus of this test is on the competitive effects of a merger, the ability for the CCC to consider public interest factors (including "all matters that it considers relevant in the circumstances") might make it difficult to predict clearance outcomes, in certain circumstances.

Filing burden

The filing form (not yet published) must be submitted separately by each merging party. It requires provision of extensive information on every market in which the parties are active, as well as various internal documents and details of customers, competitors, suppliers and group structures. At present, there are no lighter filing requirements for transactions raising no potential competition concerns, although the CCC is expected to be receptive to requests for waivers in these circumstances.

Comment

The CCC has recently issued important clarifications of a number of points, which should help to ensure that the new regime does not act as a significant brake on M&A in the COMESA region. This is a useful sign that the CCC is listening to concerns raised by businesses and practitioners and will exercise its new powers pragmatically. However, important issues remain outstanding, notably those relating to filing requirements for transactions having no nexus with the COMESA Common Market, and those having no conceivable effects on competition in that region. A reconsideration of the decision to set all turnover and asset filing thresholds at zero would go a long way to addressing these issues.

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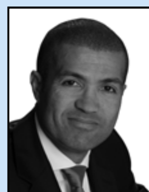

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