CLIFFORD CHANCE

Briefing note

November 2014

New COMESA Merger Control Guidelines published

The COMESA Competition Commission (the CCC) – the regional competition authority for the 19-country Common Market of Eastern and Southern Africa (COMESA) – has published new Merger Assessment Guidelines. These address many of the initial problems of the nascent regime, in particular by introducing new (albeit low) filing thresholds and adopting a broadly sensible approach to issues of jurisdiction and procedure.

Thrashing out some thresholds

In January 2013, the CCC launched a merger control regime for the COMESA region with filing thresholds that had been set at zero in the implementing legislation. This meant that any transaction involving parties with sales in two or more COMESA Member States was notifiable, no matter how small those sales.

In a welcome step, the CCC has now introduced some thresholds – albeit low ones – in its Merger Assessment Guidelines, published on 31 October 2014.

The COMESA Member States

Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

A filing is now required only if:

- at least one merging party has turnover or assets exceeding US$5 million in each of two or more COMESA Member States;
- the target has turnover or assets exceeding US$5 million in one or more COMESA Member States; and
- it is not the case that each of the merging parties achieves or holds more than two-thirds of its COMESA-region turnover or assets in one and the same Member State.

Below these thresholds, mergers will not be considered to involve operations that are substantial

Key issues

- What are the new filing thresholds?
- How long does clearance take?
- How will the CCC assess mergers, and requests for referrals from national authorities?
- Why have filing fees not been lowered, and filing thresholds not been set higher?

enough to contribute to an appreciable effect on competition and trade within the COMESA common market.

For transactions that exceed these thresholds, but which nonetheless cannot be said to have likely appreciable effects on COMESA competition and trade – such as deals involving a purchaser with no activities in the COMESA common market, or parties that are active in entirely different Member States – the Guidelines are ambiguous as to whether a filing is required. In such cases, parties can avail themselves of the "comfort letter" procedure described below to clarify their filing obligations.

It remains the case that if no COMESA filing is required, national filings may be required in one or more of the eight COMESA Member States with an active merger control regime. If a COMESA filing is required, we understand that the Kenyan competition authority still requires a parallel filing to be made if its national jurisdictional criteria are also met.

EU inspiration

In many respects, the Guidelines reflect the approach and practice of the European Commission, the enforcer of the only other supra-national mandatory filing regime.

In particular:

- There is a "decisive influence" test for control, and a "full-functionality test" for JVs, which mirror the equivalent EU concepts, although the CCC reserves the right to take other, unspecified, factors into account. The guidelines also provide for a safe harbour for purchases of less than 15% of voting rights held solely for the purpose of passive investment.
- Calculation and geographic allocation of group turnover is carried out in broadly the same way as under the EU rules, subject to some minor differences.

Filing procedure

The Guidelines provide for a "comfort letter" procedure, whereby parties can ask the CCC to confirm within 21 days whether a filing (and fee) is required. Such a request will satisfy the obligation to notify the CCC within 30 calendar days of the "decision to merge", which the Guidelines now clarify as referring to the signing of a binding sale and purchase agreement, or launch of a public bid.

The Guidelines provide that a filing will not be automatically deemed to be late (and subject to penalties) if the CCC decides it is incomplete. Rather, the parties will be given an additional period within which to provide the missing information.

The Guidelines confirm that there is no prohibition on closing of a transaction at any time, including prior to filing.

Timing of clearance

Parties can now expect to receive a Phase 1 decision within 45 calendar days of submission of a complete filing. If the CCC decides to open a detailed Phase 2 investigation, it will issue its final decision within 120 calendar days of the initial filing date. Both Phase 1 and Phase 2 periods are subject to extension in certain circumstances, such as failure to respond to information requests.

Filing amnesty

For parties that have failed to file a notifiable merger prior to 31 October 2014, the CCC has indicated that it will not impose penalties, provided the relevant merger is notified to it (with the applicable filing fee) by 29 January 2015.

The implication is that, having finally introduced filing thresholds, the CCC will now be much more likely to take enforcement action against parties that fail to notify their transactions.

Referrals

The Guidelines set out the procedure and timing for Member States to request referral of a transaction for consideration under their national merger control regime. Usefully, they clarify that Member States will be required to confirm that no penalties will be imposed on a completed transaction if a referral is made, given that closing is permitted under the COMESA merger control rules.

The Guidelines also suggest that no additional filing fees will be required in the event of a referral, as these are covered by the COMESA filing fee.

Substantive assessment

The Guidelines are broadly in line with international economic norms for assessment. However, on the basis of the CCC's published decisions, the CCC has yet to establish a track record in carrying out some of the more sophisticated analyses described in the Guidelines.

Comment

It is clear from the final text of the Guidelines that the CCC has listened to comments and suggestions from practitioners and other competition authorities for improvements to its merger control regime.

There remain areas of concern, but the most important of these are not in the hands of the CCC. In particular, while the new thresholds are low for a region comprising 19 countries (in comparison, the equivalent turnover thresholds in the 28-country region of the EU are around 25 times higher), the CCC has limited scope to introduce higher thresholds through interpretative guidance, given that the relevant legislation still provides for zero thresholds.

Instead, it will be for the COMESA Council of Ministers – comprised of representatives of the governments of Member States – to legislate for thresholds that are more appropriate to the economy of the COMESA region.

That same body also has the power to reduce the very high filing fees that apply at present: 0.5% of the COMESA turnover or assets of the merging parties, subject to a cap of US$500,000. In the first year of the regime's operation, the average filing fee was around US$340,000. In comparison, there are no filing fees in the EU and China, and in the US the maximum fee is US$280,000, and then only for transactions (not parties) valued at more than US$758 million.

It is hoped that the Council of Ministers will legislate for a fee that is more commensurate with those of the CCC's international peers.

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