

# Kluwer Competition Law Blog

## Updated Merger Filing Rules in COMESA

Gianni De Stefano (Hogan Lovells) · Friday, April 24th, 2015

The Council of Ministers of the Common Market for Eastern and Southern Africa (“COMESA”) has adopted an amendment to the COMESA Competition Rules on the Determination of Merger Notification Thresholds. Companies now have greater clarity as to when they will be obliged to notify mergers under the regional competition law regime in operation across the 19 African countries that constitute COMESA.

The new amendment will have major implications for companies that either do business generally in COMESA Member States and/or are considering undertaking acquisitions or disposals of assets in these States. This is because a failure to comply with the rules potentially involves significant penalties such as fines on the parties concerned and the potential unwinding of their transactions.

### What is COMESA?

COMESA is a regional grouping of 19 African states<sup>[1]</sup> which has its origins in a preferential trade area established by these States in the 1980’s and is headquartered in Zambia.

In 2013 a new regional competition law regime came into operation across the COMESA region, introducing new supranational merger control (as well as business conduct and consumer protection rules) that must now be complied with and is enforced by the COMESA Competition Commission (“CCC”), which is based in Malawi.

The CCC has been relatively active since the entry into effect of the Regulations. For example, in 2013-2014 over fifty mergers were notified to the CCC. Additionally, in some transactions the parties asked the CCC to issue and received “comfort letters” exempting them from the need to file a notification.

### Clearer rules on merger filing requirements

COMESA has introduced significant changes to its merger control regime. In the COMESA Competition Rules on the Determination of Merger Notification Thresholds, 2012 (the “Rules”) in their original form, all mergers in which at least one of the parties operated in at least two COMESA Member States potentially had to be filed with the CCC, regardless of the value of the assets or turnovers of the companies involved.<sup>[2]</sup> Recognising this, the CCC, in the COMESA’s 2014 merger guidelines (the “2014 Guidelines”), formalised the practice, which it had previously adopted in certain cases on an ad hoc basis, of allowing merging parties to request a “comfort

letter”, determining that the merger was not notifiable because it would not have an appreciable effect on trade between Member States or restrict competition in the region. Although this ameliorated the effect of the Rules, it was not satisfactory because the parties were still obliged to provide, and the CCC to consider, an analysis (albeit a less detailed one) of the transaction and its effect on trade between Member States and competition in the region, in every transaction, irrespective of size. Under the revised regime, merging parties now have clear guidance as to whether they need to notify their merger to the CCC.

### **The applicable merger control regime**

According to the amended Rules, effective as of 26 March 2015, a filing is required if:

1. at least one of the parties operates in at least two COMESA Member States (as has always been the case); and
2. the higher of the combined revenues and the combined value of the assets of the parties in the COMESA region is US\$ 50 million or more; and
3. the higher of the revenues or the value of assets in the COMESA region of each of at least two parties are US\$ 10 million or more (unless each of the parties achieves more than 2/3 of its revenues or assets in one and the same COMESA Member State).

An important practical issue is whether a filing could be required based on revenues or assets of the acquiring company even if the subsidiary or assets being acquired (“target company”) have no nexus to COMESA. The requirement that at least one of the parties operates in at least two COMESA Member States was applicable even prior to the March 2015 amendment, and was interpreted in the 2014 Guidelines to reflect the supra-national or regional nature of the CCC’s competence. In that regard, the Guidelines indicate that the target company (i.e., subsidiary or assets being acquired) must operate in a COMESA Member State, and that a company is considered to “operate” in a COMESA Member State if its revenues or the value of its assets in that State is more than US\$ 5 million. However, the March 2015 amended Rules do not cross-refer to the 2014 Guidelines, and therefore it remains to be seen how the requirement set forth in the Guidelines relating to a target company’s operation in a COMESA Member State will apply in practice in the future.

In a separate notice, COMESA has also reduced the maximum fee for merger notifications, from a maximum of US\$500,000 to a lower cap of US\$ 200,000.<sup>[3]</sup>

Parties must notify the CCC of any transactions within 30 days of the decision to merge (e.g. the signing a binding agreement or the announcement of a public bid).

Any notifiable merger which has not been notified within the applicable deadline will be legally unenforceable in the COMESA region. The CCC may also impose penalties on the parties amounting to up to 10% of their revenues in the COMESA region, though so far the CCC has not imposed penalties on any offending parties. If the CCC concludes that a merger is contrary to the public interest (which any merger that has lessened or is likely to lessen substantially competition in the COMESA region, or which has, or likely to result in or strengthen a position of dominance, will be considered to be), the CCC may declare the merger to be unlawful and/or require from the parties to dissolve the merger or take any other steps to lessen or prevent the anticompetitive effects of the merger.

Additionally, the CCC may bring civil proceedings for the recovery of any penalties against the concerned parties, though it is not clear whether the CCC may enforce the applicable rules in the national courts of the COMESA Member States.

The CCC must make a decision on the notified deal within 120 days after receiving the notification (though extensions are possible).

Finally, it is not settled whether the COMESA regime constitutes a “one-stop-shop”, or if parallel national notification of mergers that have a regional dimension is required. The CCC for its part considers that it has exclusive jurisdiction for transactions which meet the conditions described above. Under this interpretation, national competition authorities only have the power to request the referral of a transaction falling within the jurisdiction of the COMESA merger control rules. On the other hand, some national authorities, such as the Kenyan Competition Authority, have publicly stated that they consider that when local filing thresholds are met, a local filing is required, regardless of whether the transaction is also notified to the CCC.

## Conclusion

With the clear definition of thresholds by which parties can determine whether mergers in the COMESA region are notifiable, it is likely that the CCC will take a vigorous look at whether and how deals are notified.

Companies that either do business generally in the COMESA region and/or are considering undertaking acquisitions or disposals of assets in the COMESA Member States need to be aware of the applicable rules, as their deals will be scrutinized by the COMESA Competition Commission. In particular, these companies must be aware of the possible imposition of high penalties for their failure to notify and/or the reputational consequences of non-compliance with the applicable rules.

This is yet another welcome and pragmatic clarification of the COMESA merger control rules. The 2014 Guidelines and the March 2015 Rules have confirmed that the COMESA regime is progressively maturing this tendency. Nevertheless, some ambiguities still need to be resolved, such as the jurisdictional nexus or the one-stop-shop issue mentioned above.

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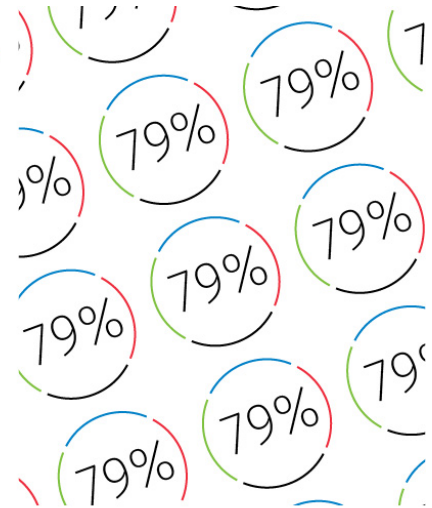
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“>Mergers

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