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Something New OUT OF AFRICA

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THE COMESA COMPETITION LAW REGIME IS BORN

COMESA's 19 Member States cut a swathe across the continent from Libya and Egypt in the north, through central and east Africa as far south as Zimbabwe and Swaziland, and includes the islands of Madagascar, Mauritius, Comoros and the Seychelles. The COMESA Competition Commission is intended to administer a supra-regional competition and consumer protection regime and its sudden appearance on the scene in January 2013 is not without controversy. Commentators have argued that the filing fees are too high and this, together with the fact that thresholds for notification have been set at nil, may stifle M&A activity. As most Member States have not yet incorporated the COMESA competition rules and regulations into local law, there are potential public international law concerns which undermine COMESA's core value proposition as a 'one stop shop'. It would be easy to say that until COMESA shows its teeth, parties can adopt a 'wait and see' approach – but a failure to notify mergers to COMESA purportedly results in merger agreements being unenforceable in COMESA States and introduces considerable transactional risk.

THE PURPOSE OF THIS ALERT IS TO PROVIDE AN OVERVIEW OF THE NEW REGIME, AND TO HIGHLIGHT SOME OF THE IMMEDIATE CONCERNS THAT HAVE ARISEN AS PRACTITIONERS AND BUSINESSES HAVE BEGUN TO WRESTLE WITH THE NEW PARADIGM.

BACKGROUND – TOWARDS REGIONAL COMPETITION LAW ENFORCEMENT

For some time, African nations have been moving towards various forms of economic unity as a means to redress the divisions imposed by colonialism and to more effectively harness the continent's potential in the face of globalisation. This has seen public sector trade barriers gradually lowered through the formation of customs unions, free trade areas, economic communities and the like.

This regionalisation increases the geographic reach of business transactions and along with it, the likelihood that conduct by a firm in one country can (negatively or positively) affect business in other countries. At the same time, globalisation requires firms to be competitive on a global scale, with expansion beyond national boundaries an imperative.

However, with public sector trade barriers removed, private sector barriers to trade can remain an impediment to economic growth. As a result, the United Nations Conference on Trade and Development (UNCTAD) views an effective regional competition law regime as a sine qua non for effective African unity.

With 19 Member States, the most advanced of all Regional Economic Communities in respect of Competition law in Africa is the Common Market for Eastern and Southern Africa (COMESA).

Africa's first supra-national merger control, competition and consumer protection enforcement regime became a looming reality with the announcement from the COMESA Competition Commission (CCC) that it would commence operations from 14 January 2013. This means that prohibited practices are eligible for investigation (and exemption if appropriate) mergers due for notification, and consumer protection ready for enforcement.

SCOPE OF APPLICATION

COMESA's competition law policy is embodied in two legal instruments introduced in December 2004 – the COMESA Competition Regulations (Regulations) and the COMESA Competition Rules (Rules). These documents have been lying fallow pending the establishment of a working CCC, now headquartered in Malawi.

The Regulations apply to "all economic activities conducted by private or public persons within or having an effect within, the Common Market; and anti-competitive business practices, conduct relating to merger and acquisition and to consumer protection, which have an appreciable effect on trade between member States and which restrict competition in the Common Market."

It is clear that COMESA's ambition is to introduce a federal competition law regime similar to that operating in the EU. It will have primary jurisdiction over all matters with a community dimension (ie, where the matter affects competition in more than one Member State).

The COMESA Treaty makes the regulations binding on all Member States and encourages co-operation between COMESA and Member States in respect of competition enforcement. Current Member States subject to the jurisdiction of the CCC are:

Burundi; Comoros; DRC; Djibouti; Egypt; Eritrea; Ethiopia; Kenya; Libya; Madagascar; Malawi; Mauritius; Rwanda; Seychelles; Sudan (South Sudan is exepected to officially join towards the end of 2013); Swaziland; Uganda; Zambia; Zimbabwe. Only eight of these (Currently: Egypt, Kenya, Malawi, Mauritius, Seychelles, Swaziland, Zambia and Zimbabwe) have active (or partly active) merger control regimes so the COMESA regime introduces regulatory hurdles where none existed previously.

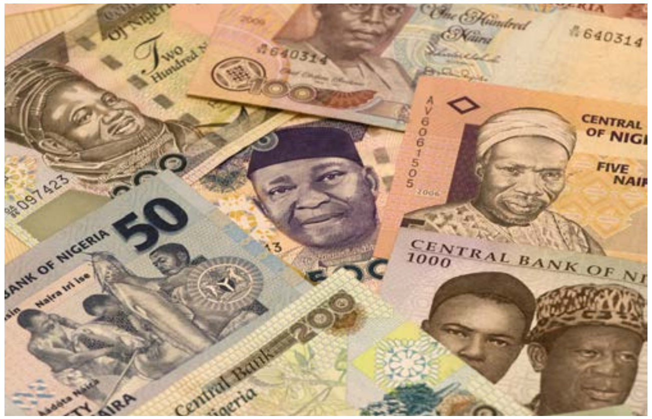
Within COMESA, the CCC investigates breaches (anti-competitive conduct and consumer protection) and mergers and acquisitions. As part of its advocacy and policy review function, the Commission also mediates disputes on policy between Member States. The Board of Commissioners makes rulings, imposes remedies and hears appeals from the Commission. The COMESA Court is a final court of appeal on matters related to the COMESA Constitution (for instance, if the Board or Commission misapplies regulations or exceeds powers under the Treaty).

ANTI-COMPETITIVE PRACTICES

Restrictive and Prohibited Practices

Certain conduct by businesses is prohibited under the COMESA Regulations. Restrictive business practices are defined as "agreements between undertakings, decisions by associations of undertakings or concerted practices" that "may affect trade between COMESA member states" and that "have as their object or effect the prevention, restriction or distortion of competition within the Common Market." These are prohibited and any decision or agreement implementing them is void.

Various other specified practices are outlawed as 'prohibited practices' and include price fixing, bid rigging, market division and quota allocation as to sales and production, collective action to enforce arrangements, concerted refusals to supply or purchase (collective boycotts) and collective denial of access to arrangements or associations that are crucial to competition.



Abuse of Dominance

In addition, the Regulations bar firms from abusing their dominance. An undertaking is in a dominant position if it can:

- unilaterally influence price or output in the Common Market; and
- unilaterally or together with a subsidiary or an associated company operate in the Common Market without being effectively constrained by competitors or potential competitors.

Firms in a dominant position abuse their dominance when, for instance, they:

- Restrict the entry of new undertakings into the market
- Prevent or deter any undertaking from engaging in competition in the market
- Eliminate or removing any undertaking from a market
- Directly or indirectly impose unfair purchase or selling prices, or other restrictive practices
- Limit the production of goods and services for a market to the prejudice of consumers
- Persuade others in the market to sign agreements against their interests
- Exploit customers or suppliers so as to frustrate the benefits expected from the establishment of the common market.

It is clear that the provisions are broad, and it remains to be seen precisely how the CCC will seek to determine whether prices are 'unfair' or if consumers or suppliers are being 'exploited'.

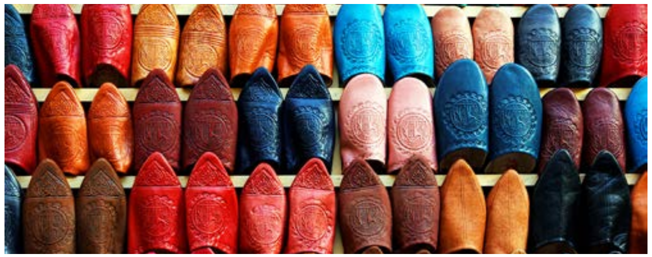
Investigations

Individuals and consumer organisations may request that the CCC investigate allegedly anti-competitive conduct. The CCC may also investigate of its own accord. Where the investigation has been requested by third party, it may be preceded by 30 – 175 days of consultations between the CCC and 'the interested parties'. If the CCC proceeds to investigate the respondent (and any party that brought the matter to the Commission's attention) must be informed and the initial period for investigation is 180 days.

If the investigations indicate a breach, a hearing must be scheduled for the respondent to defend its interests. A decision by the CCC must follow within 30 days, and parties have a right of appeal to the Board.

The CCC is empowered to require a party to cease certain conduct immediately, to pay a fine and/or to 'take whatever action' is deemed 'necessary to remove and/or diminish the effect of the illegal conduct'.

It would seem that, where necessary, enforcement of the CCC's determinations would occur through its applying to the relevant national court 'for an appropriate order'.



Penalties

Maximum penalties for contraventions vary from US$300,000 to US$750,000 depending on the category of the prohibition. Penalties may in any event not exceed 10% of annual turnover.

Exemptions

Exemptions are available for restrictive practices that nonetheless 'contribute to the improving of the production or distribution of goods', or to promoting technical or economic progress. Consumers must receive a fair share of any resulting benefit, though, and any restrictions imposed must be strictly indispensable to achieving these benefits.

Similarly, anti-competitive arrangements may be authorised by the CCC, on application, where it has been determined by the CCC that public benefits provided by the anti-competitive arrangement outweigh the detriments to competition. Decisions by the CCC regarding these authorisations are appealable by any undertaking concerned and by 'any other person with a substantial financial interest affected by the decision'.

The CCC may now be approached to investigate allegedly anti-competitive conduct and for the granting of an exemption or authorisation. In the notice indicating that it has commenced operations, the CCC invites firms to approach it regarding agreements and practices currently in place which may fall foul of the Regulations. Firms wishing to avoid being investigated, and potentially found liable for anti-competitive conduct, would be prudent to review their current business arrangements, particularly with a view to engaging the CCC regarding potential exemptions or authorisations.

MERGER CONTROL

Merger defined

A 'merger' is defined as the direct or indirect acquisition or establishment of a 'controlling interest' in the whole or part of a business. A controlling interest is widely defined as the ability to exercise 'any control whatsoever over the activities or assets of an undertaking'.

Notifiabilty

With regard to mergers and acquisitions, the CCC claims primary jurisdiction where there is 'regional dimension' – that is, whether the transaction involves an acquiring and/or target firm that 'operates' in two or more Member States – and provided that certain financial thresholds (turnover or asset values of the merging parties) in the COMESA region is exceeded. As it happens, the thresholds have been set at zero, meaning that all mergers with a regional dimension are notifiable.

However, it is arguable that the Regulations include a further jurisdictional test, based on whether the transaction has an appreciable effect on trade between Member States and restricts competition in the Common Market (that is whether the transaction falls within the scope of application of the Regulations). In addition to the broad reference in Article 3 to "all economic activities… within, or having an effect within, the Common Market" the Regulations appear to further limit the ambit of their scope of application insofar as merger control is concerned to conduct which has an (appreciable) effect on trade between Member States. As may be expected, the CCC is not supportive of such an 'effects test' as a basis for jurisdiction, as this allows merging parties to determine, ex ante and without notification, the effect of the merger on the Common Market and where that is determined to be immaterial, to withhold notification.

Parties to a merger must notify the CCC "as soon as it is practicable but in no event later than 30 (thirty) days of the parties' decision to merge". A 'decision to merge' is not defined but the CCC has indicated that signature of a sale agreement would be a likely indication of such a decision.

No transitional provisions have been provided for and a question yet to be tested is whether the effective date of 14 January 2013 for the coming into operation of the CCC gives it retroactive power to consider mergers where the decision to merge was taken prior to 14 January 2013. The CCC has indicated that such mergers need not be notified only if they have already been notified to a national authority in COMESA. This creates a problem for mergers with a regional dimension agreed before 14 January 2013, but which did not require notification in any national jurisdiction.

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Implementation

The Regulations only impose an obligation to notify. In principle, parties do not need to wait for approval before implementing the merger. This is good news for multi-jurisdictional transactions as COMESA filings will not hold up closing. Of course, parties that proceed pending approval run the risk that they will need to unwind if the transaction is prohibited.

Concurrency of Jurisdiction with National Regulators

Where a merger is notifiable to the CCC, the clear intention is that separate national authorities are not required in addition to a COMESA filing (COMESA views itself as having 'primary jurisdiction' and indeed, the CCC has sought to justify its filing fee requirements based on the advantages of a 'one stop shop' for merger notification).

The Regulations however provide a claw-back whereby a Member State that is satisfied that the merger may disproportionately reduce competition in the Member State may request that the CCC refer the merger to it, in which case the CCC may (within 21 days) either refuse the request or refer the whole or part of the case to be determined under the relevant national law.

The question has also been raised in certain jurisdictions as to whether COMESA can oust the national jurisdiction, in the absence of an amendment to local legislation to incorporate the Regulations.

The COMESA Treaty establishes, amongst other organs of the Common Market, a Council consisting of Ministers designated by each Member State. The Council of Ministers has the power to make regulations. Under article 10 of the Treaty any regulation "shall be binding on all the Member States in its entirety."

The CCC avers that this is sufficient to render the regulations binding and enforceable in all Member States. However, Article 5 of the COMESA Treaty binds each Member State to take steps "to confer upon the regulations of the Council the force of law and the necessary effect within its territory." This suggests that some form of domestication of the regulations may need to take place before they have the force of law. This may make enforcement difficult as a matter of practice, as COMESA will look to Member States with jurisdiction over companies to enforce the regulations – something that will not be possible where domestication of the regulations is a prerequisite.

In terms of Article 171 of the Treaty, sanctions (including financial penalties) can be imposed on Member States that default in performing obligations under the Treaty. Given the uncertainty over enforceability in individual territories, a sensible approach may have been to require Member States to confirm, prior to the CCC coming into operation, that the Regulations have the force of law in their territories, and to invoke Article 171 for those that default. This would have gone a long way to address current concerns around enforceability and concurrency of jurisdictions.

Fees

A filing fee is set at the lower of 0.5% of combined assets or turnover in the Common Market or 500,000 COMESA Dollars (effectively US$ 500,000).

The magnitude of the fee has caused much consternation and it is perhaps telling that it can cost as much to notify a merger as to engage in a blatant abuse of dominance, since the latter currently attracts a maximum penalty of US$500,000. Although the CCC has sought to justify that with reference to the convenience and reduced transaction costs of a 'one-stop shop', the fact remains that relatively small transactions can attract massive filing fees, due to the acquirer or seller having significant operations in COMESA. Not only is this likely to deter investment into COMESA, but it is likely to chill voluntary compliance with the merger notification regime at a critical juncture.

Investigation

The Commission has an initial period of 120 days to make a decision on a merger notified to it. It is not clear whether the period is calculated with reference to calendar or business days (and in the latter case, whether Malawian business days are to be used). This period can be extended on application to the Board of Commissioners.

The CCC is required to first determine whether the merger is likely to substantially prevent or lessen competition. If that is found to be the case, then efficiency defences can be considered, along with any substantial public interest grounds that may justify the merger. However, the Regulations also suggest that mergers contrary to public interest may be prohibited or made subject to conditions – although in this context the Regulations appear to conflate public interest with competition concerns.

A merger inquiry will be preceded by notice to all relevant Member States calling on interested parties to submit written representations to the CCC. The CCC may call on Member States to assist in the investigation.

The CCC's powers with regard to merger decisions are wide ranging. Apart from approving, prohibiting (along with a dissolution order if the merger has been implemented) or approving with conditions, the CCC may generally make "such provisions as, in the opinion of the Commission, are reasonably necessary to terminate or prevent the merger or to alleviate its effects."

Penalties for Failing to Notify

A penalty of up to 10% of turnover can be imposed for failure to notify. Again, a large firm might perversely prefer to be caught price fixing (with a maximum penalty of US$750,000) than fail to notify a merger.

An additional consequence of non-notification is that the merger shall have no legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger shall be legally enforceable in the Common Market. This is currently of greater concern, insofar as it appears to be an ex lege consequence and thus not discretionary or negotiable with the CCC, as would be the case with a penalty.

CONSUMER PROTECTION

The Regulations also provide for robust consumer protection. Provisions include those relating to:

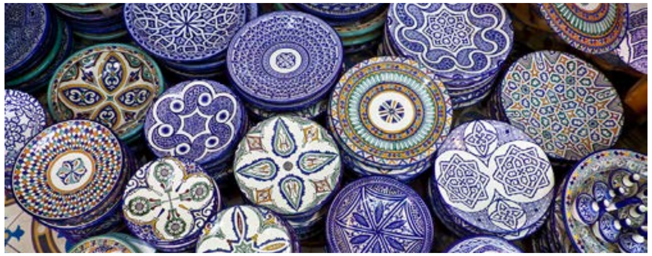
- False or misleading misrepresentations
- Unconscionable conduct in consumer or business transactions (the latter extending protection to so-called 'business consumers')
- Product safety standards and unsafe goods
- Liability for loss sustained due to the supply of 'unsuitable goods' (being not fit for purpose)
- Liability for defective goods causing injury or loss
- Compulsory product recall

The Regulations are currently sparse in regard to a process and procedure for enforcing consumer protection rights.

Conclusion

COMESA's competition and consumer protection regime will have its challenges. Effective cooperation between Member States is essential for it to work effectively and the bureaucracy inherent in many regional communities may reduce the efficiency of any decision making powers. The differing levels of regulatory competence in the Member States could also pose a challenge as could political posturing and interference by Member States. The costs associated with enforcing regulation and competition policies in the Member States might be difficult for less developed states to meet. Finally, a balance will need to be drawn between fostering small local firms and developing national and regional champions fit to compete on a global stage.

In the meanwhile, implementation of the regime is subject to the usual fits and starts of a new regulatory regime. The CCC has indicated that it intends to issue guidelines on various practical and procedural issues which will either clarify matters or introduce new concerns. What is clear, is that there is a strong political will to make COMESA competition law work and its arrival on the regulatory stage cannot be ignored. If it proves a success, the rest of Africa's regional economic communities will surely follow suit.



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