

Competition Law

ALERT

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COMESA: Are partnerships notifiable mergers? A discussion of the Kenya Airways and South African Airways partnership

What is a merger?

Although each competition authority may have its own definition of a merger, it can broadly be defined as a combination of the operations of two or more entities into a single new operating entity.

Mergers can be concluded for a number of reasons, including gaining access to more resources, obtaining a larger market or access to a larger customer base, reducing competition in a relevant market, or achieving economies of scale.

Type of mergers

A **horizontal merger** is the combining of firms that operate within a relevant market as actual or potential competitors to one another. This type of merger can result in both positive and negative effects in the relevant market, such as the merging parties:

- combining their respective market share and establishing dominance within a relevant market;
- gaining access to a larger customer base;

- removing a competitor from the relevant market;
- creating an oligopoly market; and/or
- creating unemployment due to the duplication of roles which may occur in their operations.

A **vertical merger** is the combining of firms that operate within the same market, but at different levels of the value chain. Like horizontal mergers, this type of merger may give rise to either positive or negative effects in a relevant market, such as:

- forming an integrated supply chain;
- achieving supply chain control and efficiency; and/or
- market foreclosure.

Why notify a merger

In general, it is important to notify the relevant competition authority of a merger as it grants the authority an opportunity to analyse the merger and any implications it may have in the relevant market. The notification also facilitates engagement between



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the merging parties and the relevant competition authority on the merger and allows them to agree on conditions that will mitigate any anti-competitive effects the merger may have on the market.

Engagement with competition authorities also mitigates the risk of competition authorities imposing penalties on merging parties for failure to notify, this can include an order for divestiture or a declaration of the merger as void.

Kenya Airways and South African Airways partnership and COMESA's approach to mergers

On 23 November 2021, Kenya Airways (KA) and South African Airways (SAA) signed the Strategic Partnership Framework, which is a key milestone towards the co-establishment of a Pan-African Airline Group.

The framework promotes the co-operation of the airlines in the exchange of knowledge, expertise, innovation, digital technologies and best practice to increase passenger traffic, cargo opportunities and general trade by taking advantage of strengths in South Africa, Kenya and Africa as a whole. It is also expected that the partnership will improve the financial viability of the two airlines, and that customers will also benefit from more competitive price offerings for both the passenger and cargo segments.

The CEO of the Common Market for Eastern and Southern Africa (COMESA) Competition Commission (CCC), Willard Mwemba, has said that the proposed partnership between KA and SAA would have to be presented to the CCC should it be found that the substance of the partnership amounts to that of a merger, despite the form that the transaction may take.

In analysing a merger, the CCC would typically consider its effects (both positive and negative) on competition in the relevant market. As discussed above, these effects would vary based on the type of merger being proposed.

Although the COMESA Regulations (Regulations) do not specifically mention partnerships or joint ventures, the Regulations define a merger as: *"the direct or indirect acquisition or establishment of a controlling interest by one or more persons in whole or part of the business of a competitor, supplier, customer or other person"*.

Once it is established that a proposed transaction constitutes a merger in terms of the Regulations, it is mandatory to notify the CCC of the proposed merger if it meets the prescribed regional or monetary thresholds.



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Failure to notify the CCC about a proposed merger will result in it being void and unenforceable in any of the COMESA member states and the CCC may impose an administrative penalty of up to 10% of the turnover derived from the member states.

In September 2021, the CCC issued an administrative penalty against the merging parties in a transaction where Helios Towers Limited proposed to acquire the shares of Madagascar Towers S.A and Malawi Tower Limited, for a failure to notify the transaction within the period prescribed in the Regulations.

It is thus important for parties to a partnership or joint venture to have regard to the substance of their arrangements when assessing merger notifiability to the CCC as it is not sufficient to rely on the form of the arrangement as confirmation that it does not constitute a notifiable merger. This assessment should be conducted for all jurisdictions where a proposed merger may be notifiable.

**Njeri Wagacha and
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The Legal 500 EMEA 2022 recommended **Chris Charter** as a leading individual for competition.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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