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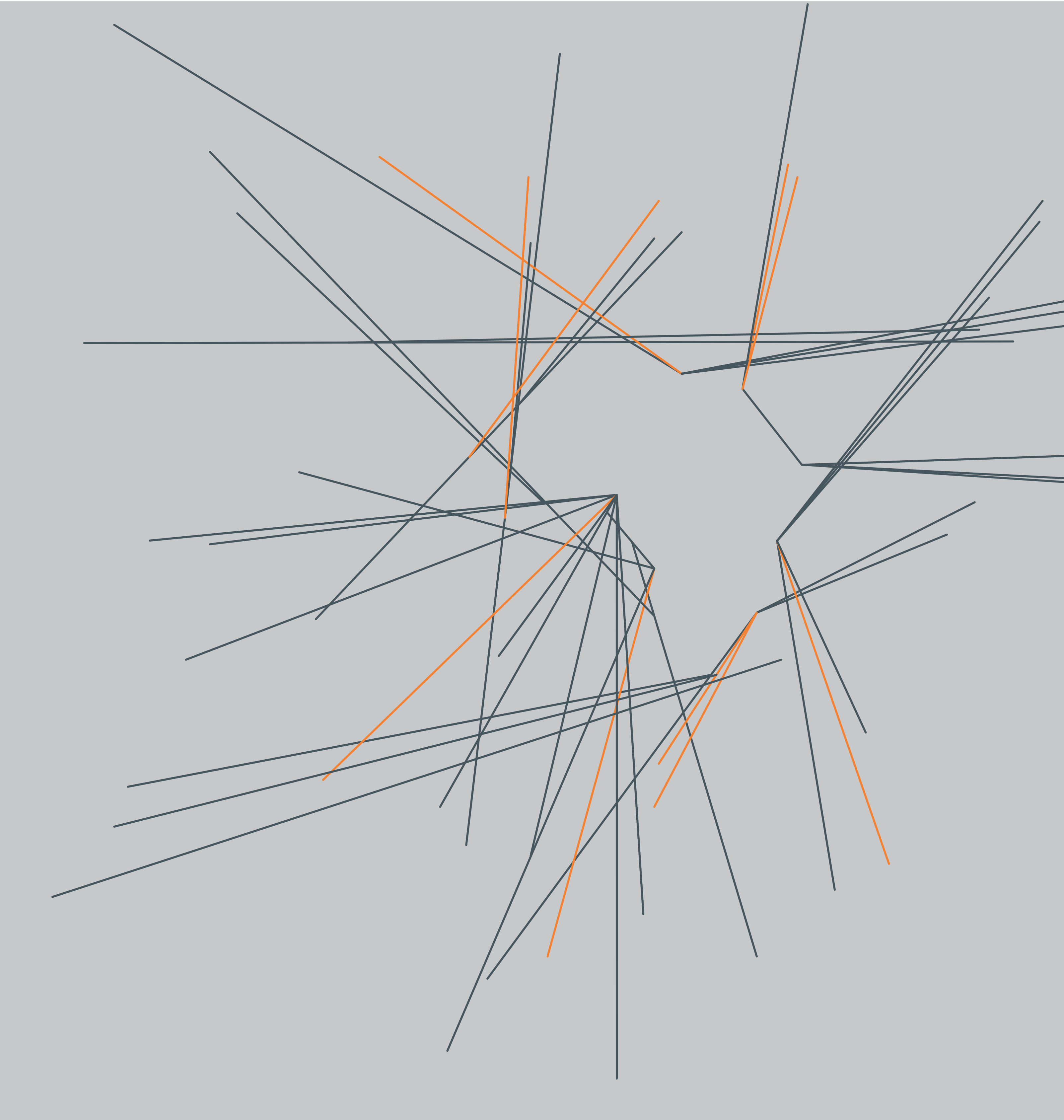
COMESA - MERGER CONTROL

An Essential Guide for Dealmakers - 12 facts you ought to know



1. Which states are Member States of the Common Market for Eastern and Southern Africa (COMESA)?

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

2. What is the legislation and who are the enforcement authorities?

The competition legislation comprises:

- the COMESA Competition Regulations (Regulations); and
- the COMESA Competition Rules (Rules) of 2004.

Enforcement of the Regulations and Rules commenced on 14 January 2013. In April 2013, the COMESA Competition Commission (CCC) published non-binding draft guidelines (Draft Guidelines) for comment. Revised or final guidelines have yet to be published.

COMESA has two competition institutions:

- the CCC; and
- the Board of Commissioners (Board).

The CCC is responsible for reviewing merger notifications and investigating anti-competitive behaviour. It is based in Lilongwe, Malawi. The Board is an adjudicative body which reviews and hears appeals of decisions of the CCC.

3. What types of transactions require mandatory notification?

In order for a transaction to require mandatory notification, the transaction must:

- constitute a "merger" as defined;
- meet the regional dimension test; and
- meet the prescribed financial thresholds.

A "merger" as defined

A "*merger*" is defined as the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person. "*Controlling interest*" in relation to any undertaking means: "*any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking*"; and in relation to any asset means: "*any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset.*"

"*Control*" is not defined in the Rules or the Regulations. The Draft Guidelines provide that the CCC shall deem a person or undertaking to exercise control if the person or undertaking *inter alia*:

- beneficially owns more than half of the issued share capital of the undertaking;
- is entitled to cast a majority of the votes that may be cast at a general meeting or has the ability to control the voting of a majority of votes that may be cast (either directly or indirectly);
- is able to appoint, or veto the appointment, of a majority of the directors of the undertaking;
- is a holding company, and the undertaking is a subsidiary of the holding company; or
- has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice can exercise an element of control referred to above.

A merger may be achieved as a result of the purchase or lease of the shares or assets of a competitor, supplier, customer or other person, or the amalgamation or combination with a competitor, supplier, customer or other person.

Regional dimension

A merger will meet the regional dimension test if "*both the acquiring firm and the target firm or either the acquiring firm or target firm operate in two or more COMESA Member States*". The CCC has also indicated that a party does not need to be domiciled in a Member State in order to be viewed as "*operating*" in a Member State for purposes of the regional dimension test. Generating turnover in or from a Member State will suffice.

The thresholds

The Regulations make provision for a financial threshold for notifiability, however, this is currently set at zero. This arguably means that all mergers that meet the regional dimension test are notifiable.

4. Where the thresholds are met, what is the deadline for notification?

A party to a notifiable merger must notify the CCC in writing of the proposed merger, in the prescribed form and manner within 30 days of the parties' "*decision to merge*". The Draft Guidelines provide that a "*decision to merge*" occurs when "*there is established a convergence of wills between the merging parties in the pursuit of a merger objective*".

5. What are the filing fees?

A filing fee of 0.5% of the merging parties' combined annual turnover or combined value of assets in the Common Market (whichever is the higher) is payable. The fee is capped at US$ 500,000. In other words, if 0.5% of the combined assets or turnover exceeds US$ 500,000, a fee of US$ 500,000 is payable.

6. What are the risks of not filing?

A notifiable merger that has not been notified within 30 days of the "*decision to merge*" will have no legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger will be legally enforceable in the Common Market. The CCC may also impose a penalty of up to 10% of either or both of the merging parties' annual turnover in the Common Market, as reflected in the accounts of any party concerned for the preceding financial year.

7. What is the timeframe for review?

The CCC has an initial period of 120 days after receiving a merger notification within which to finalise its decision. It is unclear whether this review period refers to calendar or working days. To date mergers have been reviewed within 120 calendar days.

The Regulations do not prohibit the implementation of a merger prior to approval being obtained. The merger control regime is non-suspensive.

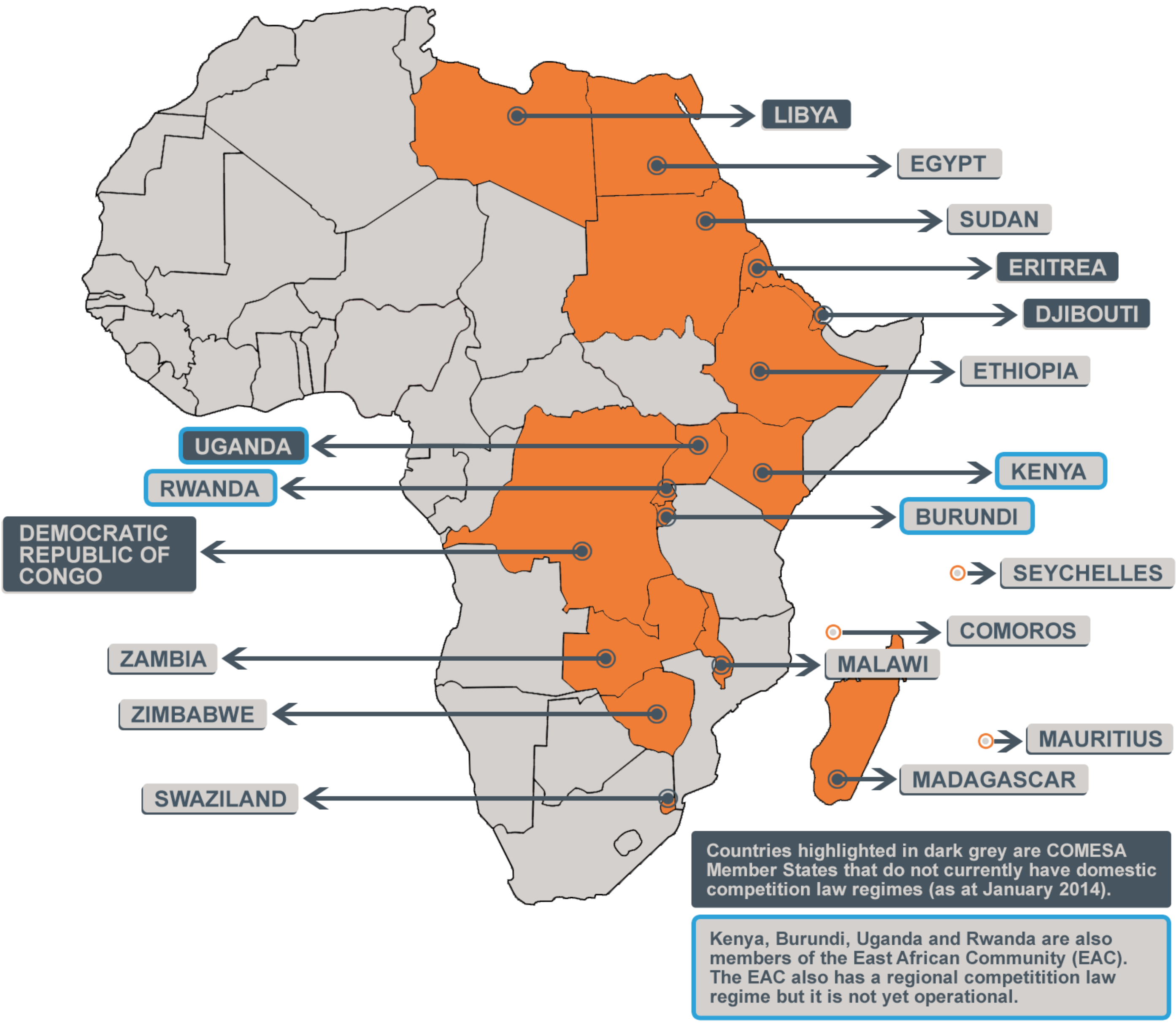
8. What is considered in a merger review assessment?

A merger will be contrary to public interest if the CCC is satisfied that the merger has:

- lessened substantially, or is likely to lessen substantially, the degree of competition in the Common Market or any part thereof; or
- resulted, or is likely to result in, or strengthen a position of dominance which is or will be contrary to the public interest.

COMPETITION LAW REGIONAL REGIMES - EASTERN AND SOUTHERN AFRICA

THE 19 COMESA MEMBER STATES ARE HIGHLIGHTED IN ORANGE BELOW.



The CCC must determine "*... whether or not the merger is likely to substantially prevent or lessen competition*" by assessing:

- the actual and potential level of import competition in the market;
- the ease of entry into the market, including tariff and regulatory barriers;
- the level, trends of concentration and history of collusion in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the merged parties having market power;
- the dynamic characteristics of the market including growth, innovation and product differentiation;
- the nature and extent of vertical integration in the market;
- whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
- whether the merger will result in the removal of efficient competition.

If it appears that "*the merger is likely to substantially prevent or lessen competition*", the CCC must determine whether:

- the merger is likely to result in any technological, efficiency or other pro-competitive gain, greater than the anti-competitive effects, which would not likely be obtained if the merger is prevented; and
- the merger can be justified on "*...substantial public interest grounds ...*".

In determining whether a merger is or will be contrary to the public interest the CCC is required to "*take into account all matters that it considers relevant in the circumstances*" and have regard to the desirability of:

- maintaining and promoting effective competition between persons producing or distributing commodities in the region;
- promoting the interests of consumers, purchasers and other users in the region, in regard to the prices, quality and variety of such commodities and services; and
- promoting, through competition, the reduction of costs

and the development of new commodities, and facilitating the entry of new competitors into existing markets.

9. What orders may be made and how will they be enforced?

If the CCC is satisfied that a merger will be contrary to the public interest, the CCC may make any one or more of the following orders:

- declaring the merger unlawful, except to such extent and in such circumstance as may be provided by or under the order;
- prohibiting or restricting the acquisition of the whole or part of an undertaking or the assets of an undertaking;
- requiring the dissolution of any organisation, whether corporate or unincorporated, or the termination of any association;
- imposing prohibitions or restrictions in regard to the manner in which a merging party carries on business;
- generally making such provisions as, in the opinion of the CCC, are reasonably necessary to terminate or prevent the merger or alleviate its effects.

An order made in respect of a merger may provide for any of the following matters:

- the transfer or vesting of property, rights or obligations;
- the adjustment of contracts, whether by their discharge or the reduction of any liability or obligation or otherwise;
- the creation, allotment, surrender or cancellation of any shares, stocks or securities;
- the formation or winding up of any undertaking or the amendment of the memorandum or articles of association or any other instrument regulating the business of any undertaking.

The CCC will have to attempt to enforce its orders through the national courts of jurisdictions where the parties have a presence. The possibility exists that the national courts could refuse to enforce CCC orders, particularly in jurisdictions where the COMESA competition legislation has not been domesticated.

10. What are the opportunities for appeal or judicial review of a merger decision?

Any "*person aggrieved*" by the decision of the CCC may appeal to the Board.

11. Are notifications to the COMESA Member States with domestic regulators still required?

The CCC considers that it has exclusive jurisdiction in respect of mergers that fall within its jurisdiction and that it is a 'one-stop-shop'. The Regulations do not, however, expressly exclude the jurisdiction of the national competition authorities. Some Member States have confirmed that the jurisdiction of their national authorities is not ousted by virtue of the fact that a transaction is notified to the CCC and continue to require filings notwithstanding the fact that a merger notification has been filed with the CCC. This stems primarily from the fact that some of the Member States have not domesticated the COMESA competition legislation.

12. Are other COMESA Member States involved in the CCC's merger review?

The CCC may conduct an inquiry for the purposes of determining whether or not to approve any merger. Before embarking on an inquiry, the CCC is required to take all reasonable steps to notify all the relevant Member States. Where a Member State attains knowledge of a merger notification submitted to the CCC, the Member State may request the CCC to refer the merger for consideration under the Member States' domestic competition law if the Member State is satisfied that the merger, if carried out, is likely to disproportionately reduce competition to a material extent in the Member State or in any part of the Member State. The CCC must then decide whether to deal with the merger itself or to refer the merger (in whole or in part) to the competent authority of the Member State concerned.

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