COMESA Merger Control: an overview and recent developments

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Categories: Emerging Markets Africa

The Common Market of Eastern and Southern Africa (COMESA) is a supranational organisation with 19 Member States, which are Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

The COMESA Competition Commission (the "CCC") commenced operations on 14 January 2013 and implements a supra-national merger control regime under the COMESA Competition Rules and COMESA Competition Regulations 2004 (the "Regulations"). In response to calls for greater clarity and legal certainty, COMESA published the Draft Merger Assessment Guidelines in April 2013 (the "Draft Guidelines"). While the publication of the Draft Guidelines is welcome, and has helped provide some clarification on certain ambiguities in the Regulations, as will be apparent from the commentary below, a number of issues remain unresolved.

One-stop shop?

It is not clear if the Regulations establish exclusive jurisdiction of the CCC in circumstances where the jurisdictional thresholds set out below are met or whether domestic merger control regimes can be concurrently engaged. The CCC has stated that it believes it has exclusive jurisdiction if the thresholds are met and qualifying mergers can be referred to domestic competition authorities only at the CCC's discretion.

However, the CCC's view is not shared by all domestic competition authorities and the Kenyan Competition Authority has stated that domestic merger control rules continue to apply even if a filing must be made to the CCC.

The system of parallel filings with the CCC and domestic competition authorities significantly increases regulatory costs and administrative burdens and may potentially lead to conflicting rules and decisions. In this respect, it is important to note that eight COMESA Member States have competition authorities (Mauritius, Malawi, Swaziland, Egypt, Seychelles, Kenya, Zambia and Zimbabwe), a number have implemented competition laws and other Member States are in the process of implementing draft competition laws.

Nigeria has recently published its own Competition (Anti-Trust) Bill which is introduced in the "Letter from Lagos" on page 16.

Jurisdictional thresholds

Unlike most merger control regimes, the Regulations set out no turnover or market share thresholds and all mergers must be notified if both the acquiring firm and the target firm or either the acquiring firm or the target firm operate in two or more Member States. This means that where any one of the merging parties operate in two COMESA Member States a merger notification is necessary.

The Draft Guidelines explain that the turnover threshold has been currently set to zero because different Member States are at different levels of economic development and a realistic threshold can only be set after the merger control rules have been tested. However, the zero threshold, combined with other features of the COMESA merger control rules (see below), has understandably raised concerns that the merger regime will hinder transactions which have a minimal effect in the COMESA region.

It is reported that the CCC will make a proposal to the COMESA Council of Ministers to raise the turnover thresholds in November 2013.

Local effects test

As set out above, a transaction has to be notified under the Regulations if at least one of the parties to the transaction operates in two or more Member States. The Draft Guidelines state that the "term operation is construed widely to include not only the physical presence of merging parties but also their turnover derived from the Common Market".

Hence, if any of the merging parties derive any turnover in two or more Member States the transaction will be notifiable. This has the effect of making a number of transactions with minimal impact in the COMESA region subject to a filing notification.

However, the COMESA merger control rules apply only to transactions "which have an appreciable effect on trade between Member States and which restrict competition in the common market." Therefore, in theory, transactions with minimal local effects should not require notification. However, the Draft Guidelines do not clarify how the local effects test will be applied and it would not be advisable to rely on this exception without further clarification.

It is reported that, in response to concerns regarding the requirement to notify mergers with very limited local effects, the CCC will put forward a proposal to the COMESA Council of Ministers not to apply the merger control rules in transactions where the target does not have a physical presence in the COMESA region.

Mandatory non-suspensory filing

If the jurisdictional thresholds above are met, a merger control notification is mandatory and must be made within 30 days of the parties' decision to merge. A 'decision to merge' is defined in the Draft Guidelines as "a concurrence of wills between the merging parties in pursuit of a merger objective".

The CCC can accept a joint notification or notification from either party. The Regulations do not prohibit closing or implementing a merger prior to clearance. However, the Draft Guidelines state that the merger must not be implemented prior to notification.

Closing prior to clearance will expose the parties to the risk that the CCC later blocks the transaction or imposes remedies.

Filing fee

The COMESA merger filing fee is the lower of:

- 0.5% of the merging parties' combined turnover or assets in the COMESA region (whichever is higher)
- $500,000. This means that whenever the parties have a combined turnover or assets of greater that $100 million in the COMESA region the filing fees will reach the maximum of $500,000. This level of filing fees is amongst the highest in the world (in comparison, the filing fee in the UK ranges from $60,000 – $250,000) and may be a significant barrier to merger activity given the size of the companies operating in the region

Penalties for failure to file

Failure to file the transaction within the 30 day deadline may lead to fines of up to 10% of the parties combined turnover in the COMESA region. In addition, the transaction will be unenforceable in the COMESA region unless it is filed.

Time limits for decisions

The time limit for the CCC to reach a decision is relatively long, at 120 working days. Further, the CCC is able to request an unlimited number of extensions from the CCC Board of Commissioners. Although parties are able to close a transaction prior to filing, such a long review period creates uncertainty and is undesirable.

It is therefore welcome that the Draft Guidelines have now clarified that:

- The CCC will notify to the merging parties within 30 calendar days if the transaction falls within the scope of the merger control rules
- In circumstances where the CCC Director, following a preliminary investigation to be completed in 60 working days, submits a report to the CCC Committee that there is little or no possibility that the merger is likely to harm competition, the CCC will issue a no objection certificate

Substantive test for clearance

The test for clearance is whether the merger would substantially prevent or lessen competition, in particular through the creation or strengthening of a dominant position. The CCC is also able to take into account public interest factors in assessing the impact of a merger.

Unusually for merger control rules, the Draft Guidelines state that whenever a merger is completed there will be a rebuttable presumption that it would lead to a substantial lessening of competition.

Appeals

Initial determinations of mergers are made by a Committee of the CCC Board of Commissioners, composed of three Board members. The decision of the Committee can be appealed to the CCC Board of Commissioners and subsequently to the COMESA Court of Justice (only on a question of law).

Recent developments

Merger notifications and clearance

Following its establishment in January 2013, four merger notifications have been made to the CCC. These are

the:

- Merger of Koninklijke Philips Electronics N.V and Funai Electric Company Limited
- Merger of Cipla Limited and Cipla Medpro South Africa (Proprietary) Limited
- Acquisition of Shell Marketing Egypt/ Shell Compressed Natural Gas Egypt Company by Total Outre Mer S.A
- Acquisition of Cooper Tire & Rubber Company by Apollo Tyres Limited

Of the four notified mergers above, two have been cleared within a relatively short time. Koninklijke Philips Electronics N.V/ Funai Electric Company Limited was notified on 13 March 2013 and cleared on 31 July 2013. Cipla Limited/Cipla Medpro South Africa (Proprietary) Limited was notified on 3 May 2013 and cleared on 31 July 2013.

Proposals to review Merger Regulations

In August 2013 the CCC published a request for a proposal from a team of experts to review the COMESA Completion Regulations and Rules 2004. The CCC notes a number of areas of difficulty in merger control rules, which include:

- The relationship between the Regulations and Member States' national competition laws: do the Regulations take precedence over the national laws
- The potential tension between the Member States national competition authorities and the Commission if the effect of a notification to the Commission is to "usurp" the jurisdiction of national authorities insofar as mergers with a regional dimension are concerned
- The requirement that all transactions to be notified to the Commission as long as both or either the acquiring firm or target firm operate in two or more Member States even where there is no appreciable effect on trade and competition within the Common Market
- The current zero notification threshold is unrealistic and a burden especially on small transactions
- The 120 days period for merger examination is too long especially where national competition authorities also need to present a report on the same merger to their Boards in view of the jurisdictional tussle between the Commission and the National Competition Authorities

The request for a proposal notes that the CCC has encountered challenges in applying the provisions of the Regulations which are closely linked to the issues cited above and, following the review, is likely to change some, or all of these provisions. The request for a proposal notes that the review shall commence on 1 November 2013 and should finish by 30 April 2014 at the latest.

Conclusion

All nascent merger control regimes can be expected to encounter a difficult initial phase of implementation and the COMESA regime is no exception. However, ambiguous drafting of the Regulations, the imposition of unrealistic cost and administrative burdens on the merging parties and a departure from internationally accepted norms has led to increased criticism of the COMESA rules.

In this context it is welcome that the CCC has been very open and transparent about the challenges it has faced in applying the Regulations and that it is prepared to propose business friendly amendments to these rules. It is

hoped that these amendments will be accepted by the COMESA Council of Ministers and the current shortcomings and ambiguities in the Regulations will be rectified.

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