Understanding COMESA

Common Market for Eastern and Southern Africa (COMESA) was formed in December 1994 as a regional organisation whose mission is to promote economic integration through trade and investment in Eastern and Southern Africa (the "Common Market"). It compromises 19 member states – Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe and the Republics of Egypt and Malawi. A regional COMESA competition law regime has been introduced to apply to all member states, some of which already have national competition laws in place while others (specifically, Eritrea, the Democratic Repblic of Congo, Uganda, Libya and Djibouti) have no dedicated domestic competition laws at this stage, which means that COMESA will introduce competition law regimes in these member states.

The relevant competition legislation comprises the COMESA Competition Regulations (the "Regulations") and Rules (the "Rules"). The competition law regime became operative on 14 January 2013 and the current priority at the enforcement agency is dealing with approval applications, in particular, merger notifications, and preparing guidelines on the application of the Regulations.

The enforcer of the legislation is the COMESA Competition Commission (the "Commission"), which is established under Article 6 of the Regulations and is based in Lilongwe, Malawi. The Commission is at the core of the development of the Common Market competition policy and is responsible, *inter alia,* for enforcement of the prohibitions against anti-competitive business practices and merger control. By virtue of the COMESA Treaty, the Regulations are binding on all the member states.

The Commission's operations will have a significant impact in the COMESA region and will affect all firms or businesses that are active in member states, both in the ordinary course of business and in the context of acquisitions. Apart from limited exclusions, the Regulations apply to "all economic activities whether conducted by private or public persons within, or having an effect within, the Common Market....". They also have primary jurisdiction over an industry or a sector of an industry, which is subject to the jurisdiction of a separate regulatory entity, even if that separate regulatory entity regulates conduct covered by the Regulations. In other words, the Regulations trump the domestic competition laws of member states.

Although the Regulations do not expressly state that a single merger filing with the Commission substitutes merger filings with the national authorities in the member states, a reading of the Regulations supports this interpretation and the Commission has confirmed that the regional merger control regime will function as a "one-stop-shop".

Mergers

The Regulations provide for the mandatory notification of all mergers where *"both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more member states*" and the thresholds of combined annual turnover or assets are exceeded. The initial thresholds have been set at zero.

As such, the Regulations suggest that if an acquiring firm operates in two or more member states, a filing is required, even if the target firm does not operate in any member states. This is an aspect of the Regulation that has raised concern.

However, the notification provisions must, presumably, be read in light of Article 3 of the Regulations, which provides that the Regulations apply to conduct which "*ha[s] an appreciable effect on trade between Member States and which restrict[s] competition in the Common Market.*" On this basis, there is also scope to interpret the Regulations as excluding the obligation to notify a merger where the acquiring firm operates in two member states but the target firm does, not on the basis that such a merger (i) would not have an *appreciable effect* on the Common Market; (ii) would not have an effect on *trade between Member States;* and (iii) would not restrict competition. However, the current approach of the Commission is that it will suffice to trigger the thresholds if either of the merging parties operates in two member states.

As at mid-June this year, the Commission has received two merger notifications. As with all notifications, details of the proposed mergers are made available on the Commission's website and the Commission invites comments on proposed mergers from the public.

A "merger" is defined in the Regulations 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, whether that controlling interest is achieved as a result of:

- the purchase or lease of the shares or assets;
- the amalgamation or combination with a competitor, supplier, customer or other person; or
- any means other than those specified in the first two bullet points.

In terms of the Regulations, where a member state attains knowledge of a merger notification submitted to the Commission, the member state may request the Commission to refer the merger for consideration under the member state's national 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 Commission 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, with a view to that member state's national competition law being applied.

A benefit to business is that a single merger filing may replace multiple filings under national legislation. However, there are a number of jurisdictions in Eastern and Southern Africa that are not members of COMESA, including South Africa. This means, for example, that a German entity acquiring control of a South African entity with subsidiaries in Swaziland and Uganda will need to obtain approval from the South African competition authorities (if the thresholds for mandatory notification in South Africa are met) and from the Commission (as Swaziland and Uganda are member states).

Notifying the Commission

A party to a notifiable merger must notify the Commission of the proposed merger within 30 days of the parties' decision to merge. This is potentially problematic as there may be significant delays between the decision of parties to merge and the date on which they sign binding agreements (if ever). However, the obligation to notify arises as soon as a decision is taken.

The Regulations do not create a suspensory merger regime and a merger that is notified to the Commission may be implemented at any stage after notification. However, implementation of a notifiable merger that has not been notified to the Commission will result in the merger having no legal effect, in which case rights or obligations imposed on the merging parties by any agreement will not be legally enforceable in the Common Market.

In addition, the Commission may 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, for failure to notify a merger.

Foreign-to-foreign mergers

The Regulations apply to "all economic activities...within or having an effect within" the Common Market. Foreign-to-foreign mergers are notifiable 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.

The relevance of non-competition factors

The Regulations state that when called upon to consider a merger, "the Commission shall initially determine whether or not the merger is likely to substantially prevent or lessen competition" (by assessing a range of competition and market-related factors), and if it appears that the merger is likely to substantially prevent or lessen competition, the Commission must then determine whether any technological, efficiency or other pro-competitive gain will be greater than and offset the anti-competitive effects; and if the merger can be justified on *"substantial public interest grounds"*.

In determining the latter, the Commission is required to *"take into account all matters that it considers relevant in the circumstances"* and to have regard to the desirability of maintaining and promoting effective competition between persons producing or distributing commodities and services 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; promoting through competition the reduction of costs and the development of new commodities; and facilitating the entry of new competitors into existing markets.

The Regulations state further that a merger shall be contrary to the public interest if the Commission 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 it has resulted, or is likely to result in, or strengthen, a position of dominance which is or will be contrary to the public interest.

Inquiries in the merger review process

As part of the merger review process, the Commission may contact customers and competitors of the merging party to conduct an inquiry for the purposes of determining whether or not to approve a merger.

Before embarking on an inquiry, however, the Commission will take all reasonable steps to notify all the relevant member states. The notice will include a) the nature of the proposed inquiry; b) calling upon any interested persons who wish to submit written representations to the Commission in relation to the subject matter of the inquiry. In addition, the merger notification forms for a notification to the Commission require the contact details of the parties' competitors and customers.

Options for aggrieved persons

Any person aggrieved by a decision of the Commission may appeal to the Board of Commissioners. The Board may hear appeals from, or review any decision of the Commission that may, in terms of the Regulations, be referred to it, and may make any ruling or order necessary or incidental to the performance of its functions in terms of the Regulations.

The Regulations do not specifically refer to joint ventures. Joint ventures that are classified as mergers fall to be notified to the Commission if they constitute a "merger" and have a regional dimension.

Cartel Conduct

Cartel conduct is prohibited by the Regulations where the following practices undertake to *"engage in the market in rival or potentially rival activities"*:

- agreements fixing prices, which agreements hinder or prevent the sale or supply or purchase of goods or services between persons, or restrict the terms and conditions of sale or supply or purchase between persons, or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services;
- collusive tendering and bid-rigging;
- market or customer allocation agreements;
- allocation by quota as to sales and production;
- collective action to enforce agreements
- concerted refusals to supply goods or services to a potential purchaser, or to purchase goods or services from a potential supplier; or
- collective denials of access to an arrangement or association which is crucial to competition.

The Regulations do not provide for a leniency policy and do not specify criminal sanctions for cartel conduct. Rule 79 provides the following maximum monetary penalties for a contravention by a corporation:

- for each contravention of Article 19 (which deals with prohibited practices between competitors), 750,000 units;
- for each contravention of Article 18 (which deals with the abuse of a dominant position), 500,000 units;
- for each contravention of Article 16 (which deals with restrictive business practices), 300,000 units; and
- for each contravention of Part 5 of the Regulations (which deals with consumer protection), 300,000 units.

  For these purposes, a unit is equivalent to COM$1 or US$1.

Legislation exemptions

The Commission may, upon application by or on behalf of an undertaking, grant an authorisation to the undertaking to enter into and/or give effect to contracts, arrangements or understandings even if they are anti-competitive, if the Commission determines that there are public benefits outweighing the anti-competitive detriment of the contract, arrangement or understanding. While the authorisation remains in force, no party to the contract, arrangement or understanding will be in breach of the applicable Articles of the Regulations by entering into or giving effect to the contract, arrangement or undertaking. The authorisation may be granted to cover those who subsequently become parties to the contract, arrangement or understanding.

The undertaking concerned, or any other person with a substantial financial interest affected by a decision of the Commission in this regard, may appeal that decision to the Board of Commissioners in the manner set out in the Regulations and the Rules.

Powers of investigation

In conducting its investigations, the Commission may, in accordance with the Regulations and in keeping with the principles of natural justice, order any person to appear before it to give evidence; require the discovery or production of any document or part thereof; and take any other reasonable action which may be necessary to further the investigation.

Exclusive Agreements

An exclusive agreement between undertakings (like any other agreements between undertakings) will be prohibited if it may affect trade between member states and has as its object or effect the prevention, restriction or distortion of competition within the Common Market. This is only applicable if an agreement is, or is intended to be, implemented within the Common Market.

The Abuse of Dominance

The abuse of dominance is prohibited by the Regulations. An undertaking is considered dominant in a market if by itself or together with an interconnected company, it occupies such a position of economic strength that would enable it to operate in the market without effective constraints from its competitors or potential competitors. A dominant position refers to the ability to influence unilaterally price or output in the Common Market or any part of it.

Any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market in so far as it may affect trade between member states, if it:

- restricts, or is likely to restrict, the entry of any undertaking into a market;
- prevents or deters, or is likely to prevent or deter, any undertaking from engaging in competition in a market;
- eliminates or removes, or is likely to eliminate or remove, any undertaking from a market;
- directly or indirectly imposes unfair purchase or selling prices or other restrictive practices;
- limits the production of goods or services for a market to the prejudice of consumers;
- as a party to an agreement makes the conclusion of such agreement subject to acceptance by another party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the agreement; or
- engages in any business activity that results in the exploitation of its customers or suppliers, so as to frustrate the benefits expected from the establishment of the Common Market.

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