COMESA Merger Control – Premature or filling significant gaps?

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In addition to having to comply with the merger control requirements of various African jurisdictions, firms implementing mergers in Africa will soon be required to notify certain mergers to a regional body, the COMESA Competition Commission (the "Commission"). The Common Market for Eastern and Southern Africa ("COMESA") is a regional organisation whose mission is to promote economic integration through trade and investment in Eastern and Southern Africa (the "Common Market"). COMESA compromises 19 member states, namely 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 the Egypt and Malawi. Some of these states have no competition law at present.

Considering that many African countries have only recently implemented national competition legislation, it is questionable whether now is the right time for the introduction of a Pan-African competition law regime and whether the Commission will be positioned to deal with the challenges of being a regional regulator. The Commission was launched during December 2008 and is based in Blantrye, Malawi. It has an interim secretariat but is not yet operational. The Commission derives its power from the Treaty establishing COMESA (the "COMESA Treaty") and the COMESA Competition Regulations (the "Regulations") and is responsible for promoting competition within the Common Market.

In terms of Article 55 of the COMESA Treaty, which deals with competition, member states have agreed to prohibit any agreement between undertakings, or concerted practice, which has, as its objective or effect, the prevention, restriction or distortion of competition within the Common Market.

The operations of the Commission will have significant impact in the COMESA region and will affect all firms who are active in member states, both in the ordinary course of business and in the context of acquisitions. Apart from limited exclusions, the Regulations will apply to all economic activity within, or having an effect within, the Common Market. In particular, the Regulations will apply to mergers and acquisitions and to anti-competitive business practices which have an appreciable effect on trade between member states and which restrict competition in the Common Market.

In the case of member states that have domestic competition laws, the Regulations will have primary jurisdiction over an industry, or a sector of an industry, which is subject to the jurisdiction of a separate regulatory entity if that regulatory entity regulates anti-competitive business practices and conduct, and merger control. It is submitted that this provision allows the Regulations to override the domestic competition legislation of member states in relation to merger control.

The Regulations provide for the mandatory notification of mergers in which either the acquiring firm, or the target firm, or both, operate in two or more member states and certain thresholds of combined annual turnover or assets are exceeded. It appears that these thresholds still need to be determined by the Board of Commissioners. This may mean that, for instance, a Belgian entity acquiring a South African entity, with subsidiaries in Kenya and Zambia may need to notify the South African competition authorities (South Africa is not a COMESA member) as well as COMESA. Penalties may be imposed for failure to notify the transaction to the Commission, once it becomes operational, if the thresholds for notification are met.

If a member state has a domestic competition regime, the 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 implemented, is likely to disproportionately reduce competition to a material extent in the member state. The Commission has discretion as to whether or not to refer the merger to the competent authority of the member state concerned.

A party to a notifiable merger must notify the Commission of the proposed merger within 30 days of the parties' decision to merge. Prior implementation of a merger in contravention of the Regulations will result in the merger having no legal effect, and no rights or obligations imposed on the merging parties by any agreement in respect of the merger may be legally enforceable in the Common Market. In addition, a penalty of up to 10% of either or both of the merging parties' annual turnover in the Common Market for the preceding financial year may be imposed.

The Commission reports that it will develop guidelines on the application of the Regulations which will inform the approach of the Commission to mergers and acquisitions under its jurisdiction. Although the establishment of a Pan-African competition law regime is arguably premature, the Commission is expected to fill the gap created by the absence of competition laws in some member states and the lack of effective competition regimes in some member states. A Pan-African competition law regime is also likely to promote economic growth regionally. The Commission is a significant development for competition law in Africa, with a challenging role as a regional regulator.