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COMESA: A competition regime for the Common Market for Eastern and Southern Africa

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Contents

1. Introduction

1.1 The COMESA Competition Commission (CCC) has been in operation since January 2013. The CCC is charged with enforcing the supranational competition regime of the Common Market for Eastern and Southern Africa (COMESA). In its early years of operation it has developed extensive experience in merger control, and is taking first steps in investigation and enforcement in its other areas of competence. This brochure provides a brief overview of the COMESA competition regime, the CCC's activities and the impact on international business.

2. Competition in COMESA

2.1 COMESA is a supranational organisation of 19 Member States.[1] In 2004 the COMESA Competition Regulations and Competition Rules were adopted to prohibit anti-competitive practices within the COMESA Common Market, to establish a merger control regime for cross-border cases and to address other competition law and consumer protection matters. The merger control regime was supplemented by two amendments to the Rules in 2014 and 2015, and the introduction of non-binding Merger Assessment Guidelines in 2014.

2.2 Two competition bodies have been established for the purposes of enforcing competition law in the Common Market:

- The CCC is responsible for investigating anti-competitive practices and reviewing merger control filings; and
- The Board of Commissioners is intended to make rulings, impose remedies and hear appeals against decisions of the CCC.

2.3 The majority of COMESA's Member States now have operational national competition laws, and others are in the process of adopting and implementing such laws. A number of Member States have adopted competition laws in the last few years and their regimes are still relatively new. The COMESA competition framework envisages that the CCC will have primary jurisdiction over all matters with a regional dimension, and therefore offers a "one-stop shop" within the Common Market. The CCC has made substantial efforts to assert its primary jurisdiction over merger control, and has entered into memoranda of understanding with eight Member State competition authorities to govern the balance of competences across all areas. However, there remains some doubt as to whether Member States recognise the exclusive jurisdiction of the CCC in competition enforcement. The CCC's first antitrust investigation, opened in February 2017, was investigated concurrently by Egypt's competition authority, despite the Egyptian authority having itself referred the matter to the CCC.

[1] Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Tunisia was expected to join COMESA in October 2017, but its accession remained unconfirmed at the time of writing.

3. Antitrust

3.1 The CCC has jurisdiction to take enforcement action against anti-competitive practices and behaviour with a cross-border or regional dimension. COMESA's antitrust provisions are similar to those in effect in a number of jurisdictions around the world, including the European Union:

- **Restrictive business practices:** agreements and practices which have as their object or effect the prevention, restriction or distortion of competition within COMESA are generally prohibited and declared void. However, such practices may be exempted where they fulfil certain conditions such as promoting technical or economic progress while allowing consumers a fair share of the resulting benefit.

- **Prohibited practices:** it is an offence to engage in "hard-core" anti-competitive practices such as price-fixing agreements, market sharing, collusive tendering and bid-rigging.

- **Abuse of a dominant position:** an undertaking will be considered to hold a dominant position where it is able to operate without effective constraints from its competitors or potential competitors. An abuse of such a position may consist of various exploitative and exclusionary practices, including foreclosing market entry, imposing unfair prices and limiting production.

- **Authorisations:** undertakings may apply to the CCC for authorisation of potentially anti-competitive activities on the basis that the public benefits outweigh the anti-competitive detriment. Authorisations may be granted in respect of restrictive business practices, abuses of a dominant position and prohibited practices.

3.2 The CCC is empowered to order parties to cease infringing activities, impose fines and take such other action as is necessary to address the illegal conduct. Maximum penalties that may be imposed vary from US$300,000 to US$750,000 depending on the infringement (with the highest penalties reserved for prohibited practices). Any penalties imposed will be subject to a cap of 10 per cent of annual turnover in the Common Market.

3.3 The CCC has only recently begun to exercise its antitrust enforcement powers, opening its first investigation in February 2017. The investigation, concerning agreements between the Confédération Africaine de Football (CAF) and Lagardère Sports for the exclusive commercialisation of marketing and media rights for African football competitions, was ongoing at the time of publication. The matter was referred to the CCC by Egypt's competition authority, which also investigated the case in parallel.

3.4 In addition to its antitrust investigation work, the CCC issued a notice in June 2016 calling for businesses operating in the Common Market to notify potentially anti-competitive agreements under its authorisation regime. Following the request, it investigated a number of exclusive distribution agreements notified by Eveready East Africa in September 2016, and cleared all of them in November 2016 having found that they have no appreciable effect on competition. The CCC has also announced its intention to open a market inquiry into the retail food sector, but at the time of writing had taken no formal steps to commence this.

4. Merger control

4.1 The merger control framework establishes a supranational regime for transactions that meet the filing thresholds and have a “regional dimension”. The key elements of the regime are as follows:

- **Filing thresholds:** a transaction will be notifiable where either or both of the acquiring firm and target firm operate in two or more Member States, and:

  - all parties’ combined annual turnover or combined value of assets in the Common Market equals or exceeds US$50 million; and

  - the annual turnover or asset value in the Common Market of each of at least two parties equals or exceeds US$10 million, unless each party achieves at least two thirds of its turnover or assets in the Common Market in one and the same Member State.

  In addition, a transaction is required to have a “regional dimension”, which arises where at least one merger party operates in two or more COMESA Member States, and a target undertaking operates in a Member State. The CCC interprets the word “operate” to mean that a party derives turnover of US$5 million or more from two or more Member States. It is not necessary for the party to be directly domiciled in a Member State for these purposes; the test may be satisfied through exports, imports, representative offices or establishment of subsidiaries in a COMESA Member State. The CCC also has jurisdiction to require notification of mergers that do not fulfil the thresholds, but nonetheless appear likely to have a significant impact on competition or to be contrary to the public interest, although the CCC has not required the notification of any such merger to date. To assist with jurisdictional questions, the CCC is open to pre-notification contacts with merging parties, including to determine whether a notification is required, and parties may apply for a comfort letter confirming that a transaction is not notifiable.

- **Scope of application:** notification is required of the “direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of a business”. This includes acquisitions and mergers. “Control” is defined neither in the Regulations nor the Rules. However, the Guidelines provide that the CCC regards “control” as constituting rights, contracts or any other means which confer the possibility of exercising decisive influence on the undertaking or asset concerned. When determining whether a person has the possibility of exercising decisive influence over an undertaking, the CCC will take into account, among other factors, whether the person directly or indirectly: beneficially owns more than 50 per cent of the undertaking’s issued share capital; has the ability to determine a majority of the votes at a general meeting; is able to appoint or to veto the appointment of a majority of the directors; has the ability to determine the appointment of senior management, strategic commercial policy, the budget or the business plan; or has a controlling interest in an intermediary undertaking that in turn has a controlling interest in the undertaking.

- **Filing fees:** a filing fee is payable based on the lower of US$200,000 or 0.1 per cent of the parties’ combined turnover or combined assets (whichever is highest) in the Common Market.

- **Process:** merger filings are mandatory and must be made within 30 days of a decision to merge. Failure to notify may result in penalties of up to 10 per cent of turnover in the Common Market. The CCC has 120 days to conduct its investigation, which may be extended where required by up to a maximum of 30 days. The 2014 Guidelines introduced a phased review process, consisting of a 45-day Phase 1 review followed by clearance of the transaction or referral to an in-depth

Phase 2 investigation, lasting the remainder of the 120-day review period. The CCC is not bound by the Guidelines, however, and has thus far not consistently abided by the Phase 1 deadline in its review of cases. Parties are free to close their transaction once notified without having to wait for clearance. However, this may expose parties to the risk that the CCC subsequently finds the transaction to be anti-competitive and imposes remedies.

- **Evidence:** the published merger forms require detailed information to be provided on the transaction, including market shares for the parties and their competitors in all markets in which they sell products or services within the Common Market (even in the absence of competitive overlaps).

- **Substantive test:** the CCC will assess "whether or not the merger is likely to substantially prevent or lessen competition". The CCC should also take into account whether the pro-competitive aspects of the transaction outweigh any detrimental effects. The substantive test also requires the CCC to take public interest considerations into account, although it must have regard to the promotion of competition in doing so.

- **One-stop shop?** The legislative framework provides that the CCC should operate as a "one-stop shop" for merger control in the Common Market where the requisite effect on inter-State trade exists. In addition, the framework permits Member States to request the CCC to refer back part, or all, of the transaction to the national competition authority where it may have a disproportionate impact on competition in their jurisdiction. While the CCC has sought to assert its sole jurisdiction over transactions that meet its notification thresholds, the Competition Authority of Kenya continues to require separate notification of transactions that meet the jurisdictional thresholds of both the COMESA and Kenyan regimes.

4.2 In its early years of operation, the CCC focused its activities on merger control. To date, the CCC has reviewed 95 mergers (including open cases), examining a range of markets including in the construction, energy, agriculture, mining, banking, financial services and insurance sectors. In six cases the CCC has progressed to a Phase 2 review, indicating its willingness to undertake detailed competition analysis where appropriate.

4.3 The CCC is yet to prohibit a merger, and the overwhelming majority of cases have been cleared unconditionally. However, the CCC has shown an increasing appetite to impose conditions on clearance as its experience has developed. After imposing conditions in just three cases up to the end of 2015, the CCC issued eight conditional clearances in 2016 and the first half of 2017. Despite the Guidelines providing to the contrary, conditions relating to matters beyond solely the preservation of competition are a frequent feature of the CCC's decisional practice so far. In five cases it has required commitments to preserve employment in particular Member States and in four cases commitments to preserve the obligations of merging parties to local businesses within Member States.

4.4 The CCC has also referred a transaction back to the national competition authority of a particularly affected Member State for specific review in two cases.

4.5 In addition, in September 2017, the CCC launched its first investigation into an alleged "closing without clearance" case. The case involves the termination and re-assignment of a brand licensing agreement by global paint manufacturer AkzoNobel to Crown Paints in respect of Uganda. At the time of writing the investigation was ongoing.

5. Consumer protection

5.1 Consumers in the Common Market may seek redress from the CCC for any consumer protection violations. The CCC may investigate and prohibit matters such as:

- False or misleading representations in advertising and selling;
- Unconscionable conduct in consumer and business transactions;
- Product safety and information standards and unsafe goods;
- Supply of unsuitable goods; and
- Supply of defective goods causing injury and loss.

5.2 To date, the CCC has not exercised its consumer protection powers.

6. Practical guidance and looking to the future

6.1 The Guidelines and amendments to the Rules have provided welcome clarity on merger control procedures in recent years, and the CCC now has relatively extensive experience in merger cases. Merging parties should be prepared for the possibility of an extended Phase 2 investigation in complex cases, and for the CCC to impose conditions – which may relate to non-competition matters – in exchange for clearing transactions. The recent AkzoNobel/Crown Paints investigation further serves as an indication that the CCC is prepared to intervene in non-notified transactions to determine whether a filing is required.

6.2 Although the CCC has worked to establish itself as a one-stop shop regulator in relation to mergers within the Common Market, merging parties should be aware of the possibility that the national competition authorities of some Member States may also require individual filings of transactions that meet the COMESA thresholds.

6.3 Having concentrated on merger control in its opening years, the CCC is also taking first steps in the exercise of its antitrust powers. It has launched its first official antitrust investigation and is likely to look for opportunities to develop its practice in the near future. Businesses operating in the Common Market should be aware of the enhanced possibility of enforcement activity by the CCC in future, and may wish to consider applying for authorisation of agreements that may restrict competition within the Common Market.

6.4 Additionally, the East African Community (EAC), which counts four COMESA Member States among its own members[2], has taken steps to launch its own competition regulator, the EAC Competition Authority. Although the EAC Competition Authority is not yet active, commissioners have been appointed to the body and it is expected to commence work in 2017 or 2018. Given the EAC Competition Authority's claim to exclusive jurisdiction over cross-border transactions within the EAC, its operations may provide a further challenge to the CCC's aim to offer a one-stop shop for merger control and competition enforcement. It remains to be seen whether and how the two authorities will cooperate to minimise duplication in these areas, and merging parties should be aware of the possibility of requirements for multiple filings.

[2] Burundi, Rwanda, Kenya and Uganda.

Coulson Harney LLP

Coulson Harney LLP is a full service law firm in Kenya providing legal advice and transaction services to a wide range of international and local clients. The firm has 17 partners inclusive of a director and over 65 lawyers with qualifications and work experience drawn from private legal practice and both the public and private sectors in Kenya, the United Kingdom and Australia.

It is highly-ranked in major international legal directories such as Chambers Global, Legal 500 and IFLR 1000, and has earned several accolades such as Gold Category, World Trademark Review (WTR) 2017, Competition Award 2016 and Africa Legal Awards IP team of the year 2016. Various members of the firm have also been recognised individually in these directories. The firm's main areas of practice are corporate and commercial, mergers and acquisitions and projects, real estate and construction, banking and finance, intellectual property and dispute resolution. It operates under the brand Bowmans, with six offices in four African countries (Kenya, South Africa, Tanzania and Uganda) and over 400 specialised lawyers.

Profiles

Joyce Karanja-Ng'ang'a

Joyce is a partner and the head of the Competition practice at Bowmans Kenya (Coulson Harney LLP). She is an established competition, antitrust and M&A expert in Kenya. She also has vast experience in banking and finance, real estate development, securities, corporate re-organisations, project management and privatisations.

Her work is consistently recognised by international legal directories such as Chambers Global (2017) and the International Financial Law Review - IFLR 1000, where market commentators say they would be "happy to recommend her." Under her direction, Bowmans was named the only Elite firm in Kenya for competition work by Global Competition Review in 2016.

Joyce has also been lauded as a Top 40 Under 40 lawyer and recommended as "very thorough and very hard-working" by the Business Daily, a regional newspaper. She has written various publications and is frequently sought after to speak on competition-related matters.

Joyce holds an LLB (Hons) from the University of Luton (2000), an LLM (Tax Law) from Queen Mary, University of London (2001), completed the Legal Practice Course (LPC) at the College of Law in London in 2003 and obtained a Postgraduate Diploma from the Kenya School of Law in 2005.

Michelle Kimonye

Michelle is an associate at Bowmans Kenya (Coulson Harney LLP) and a member of the Corporate department.

Michelle specialises in competition law. She also has experience in capital markets, which extends to securities law, capital markets compliance and general commercial law. She has advised on listings and the issuing of medium-term notes, as well as on the establishment of a commercial bank in Kenya.

She is admitted as an advocate of the High Court of Kenya and is a member of the Law Society of Kenya.

Michelle has an LLB (Hons) from the University of Nairobi, an LLM degree from Cardiff University and a Postgraduate Diploma from the Kenya School of Law.

Slaughter and May

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Profiles

Lisa Wright

Lisa has been a partner at Slaughter and May since 2013, having joined the firm as a trainee in 2003. She spent a year seconded to the firm's Brussels office during 2009-2010.

Lisa has extensive experience across a wide range of competition, regulatory and EU work, including merger control, antitrust, market investigations, State aid, public procurement and sector regulation. She is also a member of the firm-wide Africa Practice Group.

Lisa featured in the 2016 edition of Global Competition Review's top '40 under 40' leading competition lawyers in the world. She has also been noted to be "a superstar in the making" with "superb technical knowledge" by the Legal 500 UK and recognised as a "future leader" by Who's Who Legal: Competition (2017).

Lisa is the author of the UK chapter of Getting the Deal Through's 'Cartel Regulation' publication.

Sam Buchdahl

Sam joined Slaughter and May as a trainee in 2014 and qualified as an associate into the firm's Competition Group in 2016. In 2015-16 he was seconded to Hengeler Mueller in Düsseldorf for six months.

Sam advises on a broad spectrum of work, including merger control, sector-specific regulation and State aid. He is also responsible for the Group's ongoing legal awareness and business development work in relation to sub Saharan Africa, and a member of the firm-wide Africa Practice Group.

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