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BRIEFING

MERGER CONTROL IN AFRICA -
REFORM TO COMESA COMPETITION
COMMISSION RULES
OCTOBER 2015

- NEW MERGER CONTROL RULES HAVE BEEN ISSUED BY THE CCC
- THESE RULES ARE INTENDED TO ADDRESS THE HIGH LEVEL OF NOTIFICATION FILING FEES AND THE ABSENCE OF FINANCIAL THRESHOLDS TO TRIGGER THE NOTIFICATION REQUIREMENT



THE REFORM PROCESS

The Common Market of Eastern and Southern Africa (“COMESA”) Competition Commission (“CCC”) is the competition law arm of COMESA which comprises 19 member states (Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe). It began operations in January 2013.

In previously published briefings¹, we described the early history of COMESA and the practical issues encountered by businesses with the merger notification process, notably:

- The high level of notification filing fees; and
- The absence of financial thresholds triggering the notification requirement.

At a meeting of the Council of Ministers at the COMESA summit in Ethiopia in March this year, these two challenges were discussed at length and the CCC issued new rules (the “Amended Rules”):

- The “Rules on the Determination of Merger Notification Thresholds” (repealing and replacing the previous rules enacted in 2012); and

¹ <http://www.wfw.com/wp-content/uploads/2014/09/WFW-MergerControlCOMESA.pdf>
<http://www.wfw.com/wp-content/uploads/2014/10/WFW-COMESAUpdateSeptember2014.pdf>

- The “COMESA Competition (Amendment) Rules, 2014”, which principally amend the merger notification process and lower the notification fees.

WHAT HAS CHANGED

Merger notification filing fees

These were set at the higher of US\$500,000 or 0.5% of the combined annual turnover of the merging parties.

Now they are as follows:

- 0.1% of the combined annual turnover or the combined asset value in the Common Market, whichever is higher; and
- Subject to a cap of US\$200,000.

“ALTHOUGH THE FILING FEES CAP REMAINS HIGH, ITS SIGNIFICANT LOWERING IS TO BE WELCOMED FOR BUSINESSES OPERATING IN THE REGION.”

Although the filing fees cap remains high, its significant lowering is to be welcomed for businesses operating in the region.

Moreover, the Amended Rules clarify how the combined annual turnover or the combined asset value in the Common Market are to be determined, and they are now broadly in line with international standards.

Thresholds

Although Article 23² of the COMESA Competition Regulations provides that the CCC shall, through its board, prescribe a financial threshold triggering a notification requirement for mergers with a regional dimension occurring within the Common Market, the CCC initially decided to set the threshold at zero (in 2012).

This resulted in parties concluding that all mergers required to be notified to the CCC as long as they were of a regional dimension within the Common Market, i.e. where either (or both) parties generate turnover in two or more COMESA member states.

Through the Amended Rules, new notification thresholds have been introduced whereby:

- The combined turnover of the merging parties in the COMESA zone must be at least US\$50,000,000; and
- Each of at least two parties to the merger must have a turnover or assets of US\$10 million or more in the Common Market.

The merger must be notified to the CCC alone when the merger has a regional

² “Article 23 of the COMESA Competition Regulation:
[...]

4. The Board shall, subject to approval by Council, prescribe:

(a) a threshold of combined annual turnover or assets in the region, either in general or in relation to specific industries, at or above which this Article will apply with regard to mergers with a regional dimension; and

(b) a method for the calculation of annual turnover and assets.

5. For the purposes of this Article:

(a) “notifiable merger” means a merger or proposed merger with a regional dimension with a value at or above the threshold prescribed in terms of paragraph 4; and

(b) “non-notifiable merger” means a merger or proposed merger with a value below the threshold prescribed in terms of paragraph 4.

[...].”

dimension, that is to say:

- At least one merging party operates in two or more member states; and
- The parties do not achieve more than 2/3 of their annual turnover in the Common Market within one and the same member state.

THE FUTURE FOR MERGER FILINGS IN COMESA

Historically, the CCC has issued comfort letters which have exempted many transactions from the duty to file.

The risks and uncertainties for mergers and acquisitions of businesses in the common market have been reduced.

Nevertheless, it is still a concern that the CCC may require parties to notify deals which – on the basis of the legal thresholds – would otherwise not be notifiable³.

To date, according to the CCC website⁴, 50 mergers have been notified, none have been prohibited and two have raised issues serious enough to require remedies (the decisions were not available for 14 notifications and for five other notifications, the CCC has not rendered its decisions yet).

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.

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³ Article 23 of the COMESA Competition Regulation:

[...]

6. The Commission may require parties to a non-notifiable merger to notify the Commission of that merger if it appears to the Commission that the merger is likely to substantially prevent or lessen competition or is likely to be contrary to public interest.

[...]."

⁴ http://www.comesacompetition.org/?page_id=639