

COMESA Launches Merger Review

As of January 14, 2013, the Competition Commission of the Common Market for Eastern and Southern African States (“COMESA”) has commenced accepting merger notifications under rules adopted by the COMESA Competition Commission (“CCC”) in late 2012 (the “Competition Rules”). The Competition Rules also prohibit restrictive agreements and abuses of dominant positions.

The COMESA merger review regime is intended to be a one-stop shop covering all COMESA members, eight of which already have merger notification regimes. Some of these members, however, apparently do not accept that a COMESA filing will supersede the need for a national filing.

COMESA’s merger notification regime is onerous and overbroad. It purports to require notification of mergers where the target and/or the acquirer “operate” in two or more COMESA Member States, with no turnover-based or other local nexus requirement, and payment of a filing fee equal to at least US\$500,000. COMESA’s notification form requires extensive information, and there is no short-form notification for transactions raising no antitrust concerns. The merger review period is 120 days, subject to extension, and again there is no accelerated procedure for non-problematic transactions. Although the CCC’s position is not entirely clear, however, it appears that notifying parties could close a notified transaction without waiting for approval, if they are willing to bear the risk that the CCC may identify competition issues in the course of its review.

Especially in view of the absence of a local nexus test and the large number of countries involved, it is likely that many international transactions will theoretically trigger the notification thresholds. However, the Competition Rules may provide a basis to argue that transactions with no effect on competition in COMESA Member States are not notifiable. So far, the CCC has received no merger notifications. We will monitor the evolution of the COMESA regime closely to see how it is applied in practice.

I. COMESA

COMESA is a free trade area comprising 20 African countries¹ established under the 1994 COMESA Treaty, which among the other things authorizes the Council of

¹ Burundi, the Comoros, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, South Sudan, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

COMESA to issue regulations to regulate competition.² In 2004, the Council adopted the COMESA Competition Regulations (the “Regulations”) establishing the CCC, which is based in Lilongwe, Malawi, setting up a merger control regime, and prohibiting restrictive business practices and abuses of dominant positions. After adopting the Competition Rules, the CCC announced that it would start accepting merger notifications as of January 14, 2013.

II. JURISDICTIONAL THRESHOLDS

Articles 23 and 24 of the Regulations require pre-merger notification of transactions where “*both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more [COMESA] Member States*” and certain turnover or asset thresholds are exceeded. These thresholds were to be determined by the CCC’s Board of Commissioners, the CCC’s supreme policy body. In November 2012, the Board of Commissioners finally adopted the COMESA Rules on the Determination of Merger Notification Threshold (the “Threshold Rules”), which set the turnover and asset thresholds at COM\$0.³ In addition, the CCC may request the notification of a merger that is not otherwise notifiable if the CCC considers that the merger is likely to substantially prevent or lessen competition or be contrary to public interest.⁴

As a result of the COM\$0 threshold set by the Threshold Rules, whether a merger triggers the filing requirements depends on whether the acquiring or target firm “operates” in two or more COMESA Member States. The type of activity in a COMESA Member State required to meet the “operation” test is unclear. In particular, it would be important to know whether a firm is considered to “operate” in a Member State only when it has a local subsidiary, branch, employees, or assets, or whether it is sufficient to have turnover in the country through sales from overseas.

On the other hand, Article 3 of the Regulations limits the scope of application of the rules to conduct that has “*an appreciable effect on trade between Member States and which restricts competition in the Common Market*”. Accordingly, it could be argued that only transactions that satisfy the Article 3 criteria must be notified to the CCC.

As a result of these ambiguities, it is difficult to predict how COMESA’s filing obligations will be implemented in practice. The CCC has advised that it has not yet received any notifications.

² COMESA Treaty, Article 55.

³ The COMESA dollar, equivalent to the US dollar, is the unit of account for COMESA.

⁴ Regulations, Article 23(6).

III. ONE-STOP SHOP

The Regulations suggest that the CCC is intended to operate as a “one-stop shop” for antitrust review of notifiable transactions.⁵ However, some COMESA Member States apparently do not yet accept that a COMESA filing will eliminate the need for national notifications.⁶

Currently, eight COMESA Member States have merger control regimes.⁷ Not all of these countries have actively enforced their merger control regimes, at least in respect of foreign-to-foreign transactions, but the launch of the COMESA regime may lead to changes in national enforcement to the extent that Member States do not accept the “one-stop shop” principle. Making a COMESA filing may draw Member State authorities’ attention to a transaction and lead to an increased risk of sanctions being imposed by Member States unless national notifications are also filed where filing thresholds are met.

IV. NOTIFICATIONS

The Threshold Rules require all parties to a notifiable merger to submit notifications to the CCC (save in a hostile take-over situation, where only the acquiring party must fulfill the requirement), and each party is responsible for the content of its own notification.⁸ The notification must be accompanied by a filing fee equal to the highest of (i) US\$ 500,000 or (ii) the lower of 0.5% of the parties’ combined annual turnover or value of assets in COMESA.⁹ It is unclear whether this fee is in respect of each transaction or each merging party’s notification.¹⁰ A summary of the merger is to be published on the CCC’s website at the date of the notification.

⁵ As under the EU Merger Regulation, upon a request by a Member State, the Commission may refer the whole or part of the merger case to a Member State for review under its national competition law (Regulations, Article 24(7)-(8)). The CCC shall inform the Member State of its decision within 21 days of receipt of the referral request.

⁶ At the request of the Competition Authority of Kenya, the Attorney-General of Kenya has written to the CCC to seek clarification of the applicability of its Merger Regulation – *See* ‘Kenya questions COMESA’s merger jurisdiction’, *Global Competition Review*, 30 January, 2013 (<http://www.globalcompetitionreview.com/news/article/32989/>).

⁷ Burundi, Egypt, Kenya, Malawi, Mauritius, Swaziland, Zambia, and Zimbabwe.

⁸ COMESA Form 12 Notice of Merger, Notification Requirements. Pursuant to Article 24(3)(4) of the Regulations, parties that fail to notify a merger falling within the jurisdictional thresholds may be fined up to 10% of the parties’ combined annual turnover in COMESA in the preceding financial year.

⁹ COMESA Competition Rules, Rule 55(4). This filing fee is non-refundable even if the parties choose to abandon the merger and file a notice to that effect with the CCC. COMESA Competition Rules, Rule 56(b).

¹⁰ COMESA Form 12 Notice of Merger, Notification Requirements and Form Instructions.

Notification must be made by way of the “Notice of Merger”¹¹ which calls for detailed information on all undertakings directly or indirectly controlled by the parties, as well as on the products or services offered by the parties, the transaction and the relevant markets (*e.g.*, description of entry and exit barriers, trends in entry and exit and the effect of the merger on the regional and local level). Certified copies of an extensive list of corporate documents must also be submitted. The Notice of Merger and the scope of the information required are the same for all transactions; there is no “short form” notification for transactions raising no substantive antitrust issues. Throughout the merger proceedings, the CCC may request additional information from any merging party.

The CCC Notification regime is still at a developmental stage. In particular, the first version of the Notice of Merger made available by the CCC provided that notified transactions could not be closed until approved by the CCC. Recently, however, the CCC revised the Notice of Merger to replace this statement with a cautionary statement that, should parties implement a merger without or prior to CCC’s approval, they do so at their own risk and may find that the merger has no legal effect or is not enforceable within the COMESA Common Market if it is held to be in contravention of the Regulations.¹² As a result, the CCC’s view currently appears to be that COMESA filings are not suspensory.

V. TIMETABLE

A merger shall be notified to the CCC “*as soon as it is practicable*” but in no event later than 30 days of the parties’ decision to merge.¹³ The CCC shall examine the merger notification within 120 days after receiving the completed notification, subject to extension. If the notification is incomplete, the review period starts again after submission of a complete notification.¹⁴ There is no accelerated procedure for transactions raising no substantive antitrust issues.

VI. SUBSTANTIVE APPRAISAL

The CCC must determine whether a merger is likely substantially to prevent or lessen competition¹⁵ by taking into account a number of factors, mostly relating to the features of the market, but also including the particular situation of the parties (*e.g.*, the

¹¹ COMESA Form 12 Notice of Merger.

¹² COMESA Form 12 Notice of Merger, Notification Requirements.

¹³ Regulations, Article 24(1). It is unclear if the filing obligation applies to mergers that have been “decided” or agreed before January 14, 2013, when the CCC started to accept merger notifications. It is also unclear whether a complete agreement is required to constitute a “decision” or whether a memorandum of understanding or similar document could be interpreted as a decision to merge.

¹⁴ Regulations, Article 25(1).

¹⁵ Regulations, Article 26(1).

failing firm defense).¹⁶ If the CCC determines that a proposed merger is likely substantially to prevent or lessen competition, the CCC must consider factors that may nonetheless justify the merger: (i) whether the merger will result in any technological efficiency or other pro-competitive gains sufficient to offset the perceived anti-competitive effect and (ii) whether the merger may be justified on substantial public interest grounds.

In assessing the compatibility of a merger with public interest grounds, the CCC may take into consideration any factor it considers relevant, including: (i) the maintenance of effective competition, (ii) the interests of consumers, and (iii) the promotion through competition of the reduction of costs, the development of new commodities, and the entry of new competitors into existing markets.¹⁷ After having considered the relevant public interest grounds, if the CCC is satisfied that an actual or proposed merger has or will lead to a substantial lessening of competition, the merger will be found to be contrary to the public interest and may be subject to the extensive prohibitory or remedial powers of the CCC.¹⁸ A decision of the CCC can be appealed to the Board of Commissioners of the CCC who, under the Regulations, possess very broadly defined powers of review and remedy.¹⁹

VII. ANTI-COMPETITIVE AGREEMENTS AND PRACTICES

In addition to merger control, as of January 14, 2013, the CCC has started enforcing Parts 3 and 5 of the Regulations, which prohibit:

- Agreements or concerted practices between undertakings that may affect trade between COMESA Member States and have as their object or effect the prevention, restriction or distortion of competition within the COMESA common market.²⁰
- Abuses of dominant positions insofar as they may affect trade between COMESA Member States.²¹
- Unfair practices in the area of consumer protection.²²

¹⁶ Regulations, Article 26(2).

¹⁷ Regulations, Article 26(4).

¹⁸ Regulations, Article 26(3)(7). The powers of the CCC under Article 26(7) of the Regulations include prohibiting the transaction by declaring it unlawful or requiring that a merger may take place only subject to remedies.

¹⁹ Regulations, Article 15(1)(c)(d)

²⁰ Regulations, Article 16.

²¹ Regulations, Articles 17 and 18.

²² Regulations, Articles 27-38.

The CCC invites firms to apply to the CCC for the authorisation or exemption of potentially restrictive agreements,²³ a procedure that seems to be based on the former EU procedure under Regulation 17/62, which provided for applications for negative clearance or exemptions to be filed with the European Commission on Form A/B. This procedure was abolished in the EU a decade ago by Regulation 1/2003.

The maximum fine per infringement that COMESA can impose is between COM\$ 300,000 to COM\$ 750,000 depending on the infringement, provided that it does not exceed 10% of the relevant company's annual turnover.²⁴

* * *

For additional information, please feel free to contact any of your regular contacts at the firm if you have any questions.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

²³ Regulations, Article 20.

²⁴ Competition Rules, Rule 79.

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME

Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN

Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG

Cleary Gottlieb Steen & Hamilton (Hong Kong)
Bank of China Tower, 39th Floor
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING

Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES

CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO

Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI

Al Odaid Tower
Office 1105, 11th Floor
Airport Road; PO Box 128161
Abu Dhabi, United Arab Emirates
T: +971 2 414 6628
F: +971 2 414 6600

SEOUL

19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099