

COMESA AMENDS THRESHOLDS AND FILING FEES AND ISSUES FINAL GUIDELINES ON MERGER REVIEW

On April 8, 2015, following a meeting of the COMESA Council of Ministers, the COMESA Competition Commission (the “CCC”) announced amendments to the COMESA Rules on the Determination of Merger Notification Thresholds and Method of Calculation (the “Threshold Rules”) and the COMESA Competition Rules, 2004 (Merger Filing Fees) (the “Merger Filing Fee Rules”). This follows the publication, on October 31, 2014, of the final and revised Merger Assessment Guidelines (the “Guidelines”).¹

This Memorandum sets out the revised thresholds and filing fees for COMESA. It explains the CCC’s approach to determining whether a merger has a sufficient nexus to be notifiable; the formalization of the ‘comfort letter’ procedure, which the CCC had previously offered only on an informal and discretionary basis; and the duration and calculation of the review period. While the revisions provide much-needed clarity on a number of key issues, several concerns remain. For example, the filing fees remain high, and it is unclear whether COMESA will truly be a regional “one-stop shop.” Regulators in several COMESA member countries, including Egypt, have already said that any COMESA filing would not necessarily obviate the need for a separate national filing. Regulators in the East African Community countries (Burundi, Kenya, Rwanda, and Uganda) may also potentially demand separate filings.

I. COMESA

COMESA is a free trade area comprising 19 African countries² established under the 1994 COMESA Treaty, which, among the other things authorizes the Council of COMESA to issue regulations on competition issues.³ In 2004, the Council of COMESA adopted the COMESA Competition Regulations (the “Regulations”). The Regulations established the CCC, which is based in Lilongwe, Malawi, and set out a competition regulation framework, including a merger control regime and regulations prohibiting restrictive business practices and abuse of dominance.

¹ Please see our Alert Memorandum dated April 9, 2013 for a discussion of the draft Guidelines. The key aspects of the final Guidelines are discussed below.

² COMESA comprises: Burundi, the Comoros, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

³ COMESA Treaty, Article 55.

On January 14, 2013, the CCC announced that it would start accepting merger notifications. Since then, the CCC has received around 34 notifications, and published approximately 21 decisions. The CCC has not, so far, prohibited any notified transaction. The CCC's decisions have been comparatively brief, with limited discussion of the affected markets and competitive analyses. However, some of its recent decisions indicate this may belie an increasingly sophisticated analytical approach.⁴

II. JURISDICTIONAL THRESHOLDS

The Threshold Rules clarify the concept of a “regional dimension” in the Regulations and the nexus required for a merger to be notifiable to the CCC. (Previously, the COMESA regime's thresholds were set at zero,⁵ leading to significant criticism of the approach.) Under the Threshold Rules, a merger will be notifiable where at least one of the acquirer and the target operates in two or more member countries if both of the following thresholds are met: (1) the combined annual turnover or combined value of assets in COMESA (whichever is higher) of all parties to the merger exceeds COM\$ 50 million⁶ (c. €47.2m), and (2) the annual turnover or value of assets in COMESA (whichever is higher) of at least two of the parties to the merger exceeds COM\$ 10m (c. €9.4m), unless each of the parties to a merger achieves at least two-thirds of its aggregate or assets in the same member country.⁷

The Guidelines explain that, whether an undertaking “operates” in a member country is determined based on its annual turnover or the value of its assets.⁸ The Threshold Rules set out a detailed methodology for calculating assets and annual turnover. On the purchaser side, the turnover/assets of the entire group are taken into

⁴ See, e.g., [Robert Bosch/Hytec Holdings, Case CCC/Mer, Aug. 29, 2014](#) and [Holcim/Lafarge, Case CCC/MER/6/20/2014, Nov. 18, 2014](#). In *Holcim/Lafarge*, while the CCC cleared the transaction, it expressed concerns expressed about the structure of the cement market in Madagascar. Following a request from the Mauritian Competition Authority, the CCC referred the transaction to it under Article 24(8) of the Regulations for separate review under Mauritian competition law.

⁵ Regulations, Article 23.

⁶ The COMESA dollar (COM\$) is pegged to the U.S. dollar; COM\$1 is equal US\$ 1. See <http://www.boz.zm/publishing/PressReleases/Comesa%20Dollar%20Introduction.pdf>.

⁷ Threshold Rules, Rule 4.

⁸ Guidelines, Para. 3.9.

account.⁹ On the seller side, only the turnover/assets of the target business is relevant.¹⁰

The value of turnover and assets must be calculated in accordance with GAAP or, if companies' audited financial statements are not prepared in accordance with GAAP, must be adjusted in light of the GAAP principles set out in the Threshold Rules.¹¹ Financial Statements which are not in USD should be converted into USD (and thus COM\$) using the relevant Central Bank rate.

Annual turnover comprises the sales of products in member countries or provision of services provided to firms or consumers in member countries (after the relevant tax deductions).¹² Assets comprise all assets in member countries, including assets arising from activities within COMESA, and are to be determined using the gross balance sheet value (including any assets acquired or divested since the preparation of the balance sheet).¹³

III. MERGER REVIEW PROCEDURE

The Guidelines and the Merger Filing Fee Rules have clarified many issues of concern highlighted in our previous memoranda. The below sets out the key changes following the release of the draft Guidelines and our last memorandum.

A. Pre-Notification

The Guidelines codify the CCC's previous informal and discretionary practice of offering pre-notification consultations and comfort letters. Parties may consult with the CCC to determine whether a merger is notifiable and to clarify questions of turnover or asset calculations, market shares, filing fee levels, or the information required for a comfort letter request or a notification.¹⁴ Further, an acquiring party (or both parties jointly) may request a comfort letter confirming that a merger is not notifiable due to its lack of an appreciable effect within COMESA.¹⁵ The requesting party or parties must

⁹ Special rules apply to state-owned enterprises ("SOEs"). Where the SOE is the acquirer, its turnover/assets will not include the turnover/assets of the relevant member country. Threshold Rules, Rule (5)(3)(2).

¹⁰ *Id.* at Rule (5)(2)(1.3).

¹¹ *Id.* at Rule 5(3)(3).

¹² Rule 5 (2) (3)-(5) of the Threshold Rules provides specific rules for the calculation of turnover of financial Institutions and insurance companies. This approach is similar to that taken by many other regimes, including the European Commission.

¹³ Threshold Rules, Rule 5(1).

¹⁴ Guidelines, Para. 4.1.

¹⁵ *Id.* at Para. 4.2.

submit a reasoned request with the relevant information and supporting documentation no later than 30 calendar days after the merging parties' decision to merge. The Guidelines indicate that the CCC is keen for parties to consult them on the form and contents of comfort letter requests. The CCC will, if requested, keep the comfort letter request confidential.¹⁶

The CCC will either provide a comfort letter, request further information, or inform the requesting parties that a full notification is required within 21 calendar days.¹⁷ Where further information is requested, the CCC will respond within 14 calendar days after the receipt of the requested information.¹⁸ If the CCC decides that a full notification is required, unless the parties notify the CCC they do not wish to submit a notification within 14 calendar days,¹⁹ the comfort letter request will be deemed to constitute the merger notification, with the assessment period having begun on the date of its submission and the requesting party being considered the notifying party.²⁰ Within 30 calendar days, the notifying party will have to supplement the comfort letter request with a full notification form (Form 12) and all supporting documents.²¹

B. Notification

Notification of a merger must be made within 30 calendar days of the merging parties' decision to merge and must be made by way of the CCC's Form 12.²² The notification carries a filing fee. Before the most recent revisions, the filing fee was the greater of 0.5% of the parties' combined annual turnover or assets, with a cap of COM\$ 500,000. The Merger Filing Fee Rules have significantly lowered these thresholds

¹⁶ *Id.*, at Para 4.3. This mirrors the CCC's approach to the confidentiality of merger notifications, where the notifying party must request that specific documents or information submitted as part of notification be treated as confidential. Parties are encouraged to consult the CCC prior to notification about confidentiality concerns. Confidential information will only be disclosed to COMESA member country authorities where such authorities come under similar confidentiality obligations as the CCC. Guidelines, Paras 5.7-5.12. Based on the Guidelines, only minimal information regarding the notification is published on the CCC's website: the parties, their country of origin, the nature of the merger, and the economic sector involved. Guidelines, Para.5.5(a). In addition to this information, recent notices have also included market shares. See, e.g., [Cargill Holdings/ Zamanita, CCC Merger Inquiry Notice No.1 of 2015](#).

¹⁷ *Id.* at Para. 4.6.

¹⁸ *Id.* at Para. 4.7.

¹⁹ The Guidelines do not explain the meaning of this provision. The CCC may be referring to a scenario where the parties may require more time than permitted by Para. 4.8(c) to prepare a full notification or for other reasons are unable to file within this timeframe.

²⁰ The CCC's standard approach is to require that at least one of the acquiring parties be one of the notifying parties. The target may also choose to be one of the notifying parties.

²¹ *Id.* at Para. 4.8.

²² See <http://www.comesacompetition.org/wp-content/uploads/2015/04/Revised-Form-12.pdf>.

(though the filing fee remains high). Under the new rules, the filing fee is equal to the lower of (i) COM\$ 200,000 (c. € 189,070) or (ii) the higher of 0.1% of the parties' combined annual turnover or value of assets in COMESA. Thus, the maximum filing fee has been reduced to COM\$ 200,000. The CCC will calculate the filing fee within 7 calendar days of notification and payment must be made within 7 calendar days thereafter.²³

C. Review Process

Under the Guidelines, the CCC must make a decision on the merger within 120 calendar days of notification, or send notice to the parties and obtain permission from the Board of Commissioners to extend review (such extensions cannot cumulatively exceed 30 calendar days).²⁴ Phase 1 will commence on the first day following the submission of a complete notification.²⁵ The parties can expect to receive a Phase 1 decision within 45 days of submission.²⁶ If the CCC opens Phase 2 (in-depth review), the process will continue to the end of the 120 calendar-day review period (subject to any suspensions or extensions).²⁷

IV. CONCERNS AROUND COMESA AS A 'ONE-STOP SHOP'

Although the recent legislative changes and guidelines discussed above have addressed several concerns raised by stakeholders, it remains to be seen whether COMESA will be a "one-stop shop," or whether its individual member countries will insist on separate notifications. Such a dual notification regime would introduce a significant additional burden, uncertainty, and potential for delays and inconsistent decisions. In particular, it appears that if the East African Community Competition Act 2006 comes into force,²⁸ mergers that affect two or more of the four country members of

²³ The Rules do not specify responsibility for payment, appearing to leave the issues to the parties.

²⁴ Guidelines, Paras. 6.2-6.3.

²⁵ As noted above, if, following the submission for a request for a comfort letter, the CCC requires a full notification, Phase 1 is deemed to have commenced on the day the request was submitted. In this scenario, as explained above, the notifying party would be expected to supplement the comfort letter request with a completed Form 12 and all supporting documents in accordance with the standard notification requirements within 30 days of being informed of the CCC's decision on the request for a comfort letter. Guidelines, Para. 4.8(c).

²⁶ *Id.* at Para. 6.8.

²⁷ *Id.* at Para. 6.13. The CCC may extend Phase 1 or Phase 2, as long as such extensions do not cumulatively exceed 30 calendar days. The CCC may only stop the clock and suspend the period of the applicable phase where, following a request for information, a party does not provide such information within a reasonable time. No limit is put on the latter suspension period. Instead of suspending the review period, the CCC may elect to proceed with its analysis and draw adverse inferences from the parties' failure to produce the requested information.

²⁸ This was expected to occur in December 2014, but has been postponed for an unspecified period.

the East African Community (Burundi, Kenya, Rwanda, and Uganda), which are also members of COMESA, would require notifications to both the CCC and the East African Community Competition authorities. Additionally, Egypt is moving toward implementing its own active merger control for transactions affecting the Egyptian market. The current Egyptian notification form expressly states that notification of a transaction to the CCC does not obviate the need to report an otherwise notifiable transaction to the Egyptian Competition Authority.

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If you have any questions with respect to the issues addressed herein, please feel free to contact any of your regular contacts at the firm listed at <http://www.cgsh.com/>.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Office Locations

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)
Hysan Place, 37th Floor
500 Hennessy Road, Causeway Bay
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING

Cleary Gottlieb Steen & Hamilton LLP
45th Floor, Fortune Financial Center
5 Dong San Huan Zhong Lu
Chaoyang District
Beijing 100020, 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 Sila Tower, 27th Floor
Abu Dhabi Global Market Square
Al Maryah Island, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL

Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099