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Alert Memo

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COMESA Issues Draft Guidelines on Merger Review and Other Issues

On April 9, 2013, the COMESA Competition Commission (the "CCC") published draft merger assessment guidelines (the "Assessment Guidelines"), as well as four further sets of draft guidelines concerning market definition, the application of public interest criteria, horizontally and vertically restrictive business practices and abuses of dominant positions (respectively, the "Market Definition Guidelines," the "Public Interest Guidelines," the "Restrictive Practices Guidelines" and the "Abuse Guidelines"; together with the Assessment Guidelines, the "Guidelines").

This Memorandum discusses a number of issues arising from the Guidelines and the CCC's clarifications of issues raised in our previous Alert Memo, including the treatment of joint ventures and the calculation of the merger filing fee. Unhelpfully, the Assessment Guidelines confirm that a transaction has a sufficient nexus to be notifiable to the CCC when either the acquiring or the target firm has operations in two or more COMESA Member States, including through exports with no local subsidiary or other presence. Similarly broadly drawn is the "material influence" element of the CCC's definition of "control" whose acquisition can trigger a filing requirement. The CCC has also provided guidance on its approach to market definition and the public interest test in the merger review context, as well as its approach to assessment of restrictive practices and abuses of dominant positions.

I. COMESA

COMESA is a free trade area comprising 19 African countries established under the 1994 COMESA Treaty,[1] which among the other things authorizes the Council of COMESA to issue regulations on competition issues.[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. On January 14, 2013, the CCC announced that it would start accepting merger notifications. One transaction has reportedly been notified

[1] Burundi, the Comoros, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe. COMESA hopes that South Sudan will become a member in the course of 2013.

[2] COMESA Treaty, Article 55.

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to the CCC by Phillips and Funai, even though both parties operate in COMESA countries only through distributors and agents.[3]

II. JURISIDCTIONAL THRESHOLDS

Pre-merger notification to the CCC is required for all mergers with a regional dimension, namely where "*both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more* [COMESA] *Member States*"[4] and where the relevant turnover or asset threshold is exceeded. This threshold has been set at COM$0, meaning that even *de minimis* activities can trigger a notification requirement. The Assessment Guidelines clarify that a transaction has a sufficient nexus to be notifiable even where only the acquiring or target firm has operations in two or more Member States but not where both parties operate in one Member State each.[5]

The Assessment Guidelines have created a broad definition of "*operate*" for this purpose. According to the Assessment Guidelines, the term "*operation*" is to be "*construed widely to include not only the physical presence of merging parties but also their turnover derived from the Common Market"*.[6] Consequently firms do not need to be *"directly domiciled"* in a Member State but can have operations "t*hrough exports, imports, subsidiaries etc.*"[7]

Similarly, the Assessment Guidelines provide an expansive definition of "*control*" for the purposes of defining when a merger has occurred, reflecting the already broad definition found in the Regulations.[8] Control can be either positive (majority beneficial ownership or voting rights) or negative.[9] The Assessment Guidelines also include a catch-all definition of "*control*" as the "*ability to materially influence the policy of an undertaking*", such as the ability to cast or control a majority of votes at a general meeting or to appoint or veto the appointment of a majority of the directors of an undertaking.[10]

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[3] *See*: Comesa receives first merger Filing in *Global Competition Review,* March 27, 2013 (http://www.globalcompetitionreview.com/news/article/33317/comesa-receives-first-merger-filing/)

[4] Regulations, Article 23(3).

[5] Assessment Guidelines, Section 3.9.

[6] Assessment Guidelines, Section 1.5.

[7] Assessment Guidelines, Section 3.10.

[8] Regulations, 24(2).

[9] Assessment Guidelines, Sections 2.2 (a)-(b) and 2.6.

[10] Assessment Guidelines, Section 2.2

Material influence may derive from minority and other interests "*to the extent that [acquiring firms]are able to influence the policy of the undertakings concerned*".[11] In assessing material influence, the CCC will consider the ability of the acquiring firm to influence the target firm's behavior (particularly in relation to the firm's "*competitive conduct*", which includes "*the strategic direction of the firm and its ability to define and achieve its commercial objectives*") and, with regard to share-ownership, any special voting or veto rights.[12] The Assessment Guidelines do not, however, include an analysis of specific veto rights comparable to the European Commission's Consolidated Jurisdictional Notice. In light of its broad definition of material influence, the CCC may well find an acquisition of control in situations where the EU Commission would not.

The CCC defends the absence of a meaningful local nexus test based on the need to "market-test" the Regulations in a region with marked disparities in economic development.[13] The CCC also argues that the consummation of a merger gives rise to a "*presumption that it would lead to a substantial lessening of competition"*, which can be rebutted only by an *ex ante* assessment of the transaction.[14]

III. MERGER REVIEW PROCEDURE

The Assessment Guidelines address a wide range of issues relating to COMESA's merger review procedure, but many questions remain to be resolved in the final guidelines and/or in the CCC's practical application of the Regulations.

A. NOTIFICATIONS

Notifications, made by way of the CCC's Form 12 (the "Notification Form"), must be made no later than 30 days of the parties' decision to merge.[15] The CCC can accept joint notification or notification by either party.[16] A "*decision to merge*" has been taken where there "*is a concurrence of wills between the merging parties in the pursuit of a merger objective*."[17] Although the Assessment Guidelines are not clear, in practice the starting date

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[11] Assessment Guidelines, Section 2.4

[12] Assessment Guidelines, Sections 2.5 and 2.6(c).

[13] Assessment Guidelines, Section 1.3.

[14] Assessment Guidelines, Section 4.4.

[15] Assessment Guidelines, Section 4.1. If the decision to merge was taken up to 30 days prior to January 14, 2013, the merging parties had 30 days from January 14 to notify the CCC of the merger to avoid penalties under the Regulations.

[16] Assessment Guidelines, Section 4.5.

[17] Assessment Guidelines, Section 4.2.

for the 30-day deadline will likely be the execution of a binding purchase or joint venture agreement.

The Notification Form is to be accompanied by a fee.[18] The Assessment Guidelines clarify that the filing fee is equal to the lower of (i) COM$ 500,000 (approx. €389,166) or (ii) the higher of 0.5% of the parties' combined annual turnover or value of assets in the COMESA Common Market Area (the "Common Market"). Thus, the maximum filing fee is COM$500,000.[19]

B. NON-SUSPENSORY REGIME

The Assessment Guidelines state that COMESA's merger control regime is non-suspensory,[20] meaning that a notified transaction may be closed before approval is received without violating COMESA law, but subject to the possibility that the CCC will require remedies before the transaction is approved or even prohibit the transaction. However, the Assessment Guidelines also authorize the CCC to grant derogations to permit implementation prior to notification and permit acquirors to purchase securities in public bids prior to notification provided the acquirer does not exercise the related voting rights.[21] Thus, it appears that while a notified transaction may be implemented before approval, a notifiable transaction other than a public bid may not be implemented before notification absent an express derogation by the CCC. This approach appears to be modeled on Brazil's merger notification regime prior to its amendment in 2012.

C. REFERRALS

A COMESA Member State may request that a notified merger be referred to the appropriate Member State authority where the authority is satisfied the contemplated merger is likely to disproportionately reduce competition in the whole or part of that Member State. The CCC has 21 days to decide whether to retain jurisdiction or refer the transaction in whole or in part to the Member State.[22]

Unlike the EU Merger Regulation, the Regulations and the Assessment Guidelines do not provide for referrals to the CCC either at the request of the parties to a merger or by a Member State authority.

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[18] Notification Form, Form Instructions.

[19] Assessment Guidelines, Section 4.3.

[20] Assessment Guidelines, Section 10.4.

[21] Assessment Guidelines, Section 10.2.

[22] Assessment Guidelines, Sections 4.7-4.9.

D. REVIEW PROCESS

Prior to notification, the Assessment Guidelines permit the CCC to have pre-merger notification meetings with the merging parties *"to ensure that it* [the CCC] *completes its merger assessment in the quickest possible manner*". These meetings are intended to permit the CCC and the merging parties *"to address matters requiring clarification and whether or not a merger should be notified*".[23]

Within 30 calendar days after notification, the CCC must notify the merging parties whether the merger falls with the scope of the Regulations.[24] The CCC must determine whether a merger "*is likely to substantially prevent or lessen competition*".[25] The Assessment Guidelines clarify and expand this basic test set out in the Regulations, providing guidance as to market definition and the effects analysis of horizontal, non-horizontal and conglomerate mergers.[26] From the date of the receipt of a completed Notification Form, the CCC has 120 working days to reach a final decision, subject to the Board of the CCC granting of an extension for what the Board determines to be a reasonable period of time.[27] If no decision is taken within 120 working days, the merger shall be deemed to have been declared compatible with the Common Market. [28]

If the CCC decides to investigate a merger, the Assessment Guidelines suggest that the approach to be taken is broadly similar to the two-phase process in EU merger law. In Phase 1, the CCC has 60 working days to carry out a preliminary assessment and to submit a report to a committee of three members of the Board of the CCC (the "Committee"). If *"there is little or no possibility that the merger is likely to harm competition",* the CCC will issue a "no objection" decision.[29] Otherwise, the CCC will continue into a Phase 2 investigation (termed a "second-stage" investigation in the Assessment Guidelines).

In Phase 2 cases, where it appears likely that the merger will give rise to anti-competitive consequences, the CCC will produce a report providing an economic and legal assessment of the merger and its proposed findings. The Committee may then decide to

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[23] Assessment Guidelines, Section 5.7

[24] Assessment Guidelines, Section 5.2.

[25] Regulations, Article 26(1).

[26] Assessment Guidelines, Section 7.2.

[27] Assessment Guidelines, Sections 5.5, 5.6 and 5.8.

[28] Assessment Guidelines, Section 5.12.

[29] Assessment Guidelines, Sections 6.1–6.2.

declare a merger lawful, declare a merger lawful subject to commitments or declare the merger unlawful and, in that case, if the merger has been already consummated, order it to be dissolved.[30] Neither the Regulations or the Assessment Guidelines provide guidance on the procedure for submission of commitments or the CCC's assessment of proposed commitments.

E. APPEALS

The CCC's decisions may be appealed to the full Board of Commissioners of the CCC and then to the COMESA Court of Justice (the "CCJ"), seated in Khartoum.[31] The CCJ, modeled on the European Court of Justice, consists of a First Instance Division and an Appellate Division; the latter may only hear appeals on points of law, lack of jurisdiction or procedural irregularities.[32] No indication has been given as to the applicable time-limits or procedure for appeals to the Board of the CCC or the CCJ.

IV. JOINT VENTURES

The Regulations do not discuss the treatment of joint ventures under COMESA's merger control system; the CCC's approach to this issue has now been set out in the Assessment Guidelines. To be notifiable under the Regulations, a joint venture must involve an acquisition of a joint controlling interest by two or more undertakings (the parent companies) and "*perform, on a lasting basis, all the functions of an autonomous economic entity*".[33] A joint venture must operate in a manner similar to an undertaking operating on the same market and cannot merely take over one specific function of its parent's operations (such as R&D or distribution) without access to the market.[34] The CCC's approach thus appears to be similar to the treatment of joint ventures under the EU Merger Regulation.

V. THE NON-MERGER GUIDELINES

In addition to the Assessment Guidelines, the CCC has published Market Definition Guidelines, Public Interest Guidelines, Restrictive Practices Guidelines and Abuse Guidelines.

[30] Assessment Guidelines, Sections 6.3–6.4

[31] Assessment Guidelines, Sections 16.1-16.3.

[32] Assessment Guidelines, Section 16.5.

[33] Assessment Guidelines, Section 8.1.

[34] Assessment Guidelines, Section 8.3.

The Market Definition Guidelines outline the CCC's approach to defining the relevant product and geographic markets in relation to mergers, restrictive practices, and consumer protection. Product markets will be defined based on the SSNIP test, while geographic markets will be determined by considering the homogeneity of the conditions of competition within the whole or parts of the Common Market, in particular based on market share and pricing data. Additionally, in considering geographic markets, the CCC can take into account COMESA's objective of market integration and, particularly, the potential for a transaction to lead to wider geographic markets as a result of market integration. Guidance is also given on the types of evidence used by the CCC for defining product and geographic markets.

The Public Interest Guidelines briefly describe the CCC's concept of "public interest" in the context of merger control and the authorisation or exemption of potentially restrictive agreements. For mergers, the CCC suggests that only pro-competitive outcomes promoting the interests of consumers, the opening of markets or product development satisfy the public interest criteria. In relation to the authorization of restrictive business practices, it must be demonstrated that the benefit will inure to the Common Market as a whole and that it falls within the limited categories of benefits identified by the CCC.

The Restrictive Practices Guidelines provide extensive guidance on horizontally and vertically restrictive agreements and business practices (Articles 16 and 19 of the Regulations). The CCC will apply a cumulative test requiring a showing that, *inter alia*, the agreement or concerted practice appreciably affects trade between Member States, its effect on competition is appreciable and that it is or intended to be implemented within the Common Market. The Guidelines provide safe harbors for horizontal agreements (where the parties' combined market share does not exceed 20%) and vertical agreements (30%). Above these thresholds, there is no presumption that an agreement is a restrictive business practice. However, undertakings may apply for exemption of specific contracts or proposed contracts under Article 20 of the Regulations.[35] The Restrictive Practices Guidelines provide guidance on specific categories of agreements and practices: information exchange; R&D cooperation; production, purchasing and commercialization agreements; resale price maintenance; single branding; exclusive and selective distribution; and exclusive supply and franchise agreements.

The Abuse Guidelines perform the same function in relation to the abuse of a position of dominance under Article 18 (similar to Article 102 TFEU). For the actions of an undertaking or group of undertakings to infringe Article 18, it or they must first be found to have a dominant position, which is defined as "*an ability to influence unilaterally price or output in the Common Market or any part of it*". The dominance test set out in Article 17 of the Regulations states that an undertaking holds a dominant position when "*it occupies a*

[35] Application is made by way of the CCC's Form 7 "Application for Exemption/Authorisation".

position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors".[36] Dominance is determined by considering at least the relevant product and geographic markets, the levels of actual or potential competition, barriers to entry and the history of competition in the relevant sector. The Abuse Guidelines state that there is a rebuttable presumption of dominance where an undertaking holds a market share of at least 50% and, conversely, that an undertaking having less than 35-40% of the market share is unlikely to be found dominant (although the possibility of dominance in these circumstances and, indeed, with even smaller market shares, is expressly not excluded).

A dominant undertaking's conduct will be held to be abusive where it has an appreciable effect on trade between Member States, satisfies at least one limb of the Regulations' broadly phrased effects-based analysis[37] and harms competition and consumer welfare. The Abuse Guidelines analyze specific forms of abusive conduct, namely exclusive purchasing agreements, conditional rebates, tying and bundling, predatory pricing, excessive pricing and refusal to supply. Undertakings may justify otherwise abusive conduct on the basis that it is pro-competitive or is objectively necessary and proportionate.

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If you have any questions with respect to the issues addressed herein, please contact James Modrall at the Brussels office of Cleary Gottlieb or any of your regular contacts listed at http://www.cgsh.com/.

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[36] Regulations, Articles 17(a)-(c).

[37] Regulations, Article 18(1).

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