Regional competition regimes: A comparative study of the COMESA Competition Commission and the European Competition Commission

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Introduction

The COMESA Competition Commission ("COMESA Commission") commenced the enforcement of the COMESA Competition Regulations, 2004 (the "COMESA Regulations") in January 2013. The creation of the COMESA Commission and the enforcement of the COMESA Regulations is a positive step for competition enforcement on the continent. The COMESA Commission is a powerful regulator and appropriate Regulations could potentially result in the creation of a supranational competition authority able to achieve COMESA's aim of regional integration by encouraging trade and securing economies of scale and market access. However, aspects of these Regulations are unclear and give rise to considerable uncertainty for companies doing business in Africa.

This paper will consider two issues raised by the COMESA Regulations, namely (1) whether the COMESA Commission has exclusive jurisdiction to assess mergers having a regional dimension, and (2) the notifiability of merger transactions in relation to the community[3] vs regional[4] dimension tests which consists of (i) a geographical area; and (ii) the setting of notification thresholds.

We argue that in the absence of express wording which authorises the exclusive jurisdiction of the COMESA Commission (and enacting domestic legislation to give effect to the COMESA Regulations), national competition authorities may also have jurisdiction to assess mergers. Furthermore, it is contended that even though the community dimension test of the European Union ("EU") and the regional dimension test of COMESA are similar, there are some gaps in the regional dimension test which should be closed by including an exception in relation to undertakings which achieve more than two-thirds of their turnover within one and the same Member State. Lastly, we conclude that the setting of the monetary thresholds at COM$ Zero, is overly burdensome and inappropriate because this results in transactions having to be notifed which do not have an "appreciable effect" on trade between Member States.

In order for COMESA to achieve its goal of becoming a large economic and trading unit that is capable of overcoming some of the barriers that are faced by individual states through economic prosperity and regional integration,[5] the COMESA Regulations should be amended to afford exclusive jurisdiction to the COMESA Commission to assess mergers having a regional dimension and the Members States must enact legislation to give effect to these Regulations. In addition, the COMESA Regulations must provide clear criteria for notification of transactions and set reasonable thresholds. These amendments will go some way in providing legal certainty to companies wishing to do business in COMESA.

To sustain our conclusions, we will draw on an analysis of the European Merger Regulation which has proven to be a durable and efficient form of regional regulation and a comparison of these questions yields several useful insights on how the COMESA Regulations ought to be amended.

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[3] The community dimension test is contained in Article 1(2) and Article 1(3) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
[4] The regional dimension test is contained in Article 23(3) of the COMESA Competition Regulations, 2004.
[5] http://about.comesa.int/.

Background to COMESA

Before considering the relevant provisions of the COMESA Regulations, it is apposite to consider the background to COMESA, the reasons for its existence and the features of the market that it is intended to address.

Prior to COMESA,[6] a Preferential Trade Area[7] was established with the signing of the Treaty establishing the Preferential Trade Area for Eastern and Southern Africa States (the "PTA Treaty") in December 1981. The PTA Treaty had as its purpose, the promotion of "co-operation and development in all fields of economic activity particularly in the fields of trade, customs, industry, transport, communications, agriculture, natural resources and monetary affairs with the aim of raising the standard of living of its peoples, of fostering closer relations among its Member States, and to contribute to the progress and development of the African continent".[8]

The PTA was later replaced by the Common Market for Eastern and Southern Africa ("COMESA") when a treaty (the "COMESA Treaty") was signed on 5 November 1993 in Kampala, Uganda and was ratified in Lilongwe, Malawi on 8 December 1994.[9] COMESA, as the successor to the Preferential Trade Area for Eastern and Southern Africa was created in fulfilment of the requirements contained in Article 29 of the PTA Treaty which provides for the development of the Preferential Trade Area into a Common Market and eventually an Economic Community for Eastern and Southern African States.

The purpose of the COMESA Treaty as stated in the Preamble is to "mark a new stage in the process of economic integration with the establishment of a Common Market for Eastern and Southern Africa and the consolidation of their economic co-operation through the implementation of common policies and programmes aimed at achieving sustainable growth and development".

The intention of COMESA is therefore to accomplish regional integration through the achievement of African industrialisation and modernisation by encouraging trade and securing economies of scale and market access.[10]

It is argued by Padamja Khandelwal[11] that a well-designed regional trade agreement can contribute to Africa's integration into a global economy.[12] It is submitted that COMESA is likely to be integrated into a global economy if it is successful in the formation of a large economic and trading unit that is capable of overcoming barriers faced by individual States.[13]

As part of the aim to achieve regional integration, the COMESA Treaty, provides in Article 55(3) that the "Council shall make regulations to regulate competition within the Member States". In compliance with this Article, COMESA has adopted a regional competition policy through the publication of regulations in December 2004 known as the COMESA Regulations, which are supplemented by the COMESA Competition Rules, 2004 (the "COMESA Rules"). In addition, there

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[6] Comprising 19 Member States, namely Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe (According to the official website of Government of the Republic of South Sudan (http://www.goss.org/), the Government is negotiating membership in a number of regional and international trade blocs, to ensure access to key markets. One of these organisations is COMESA, accordingly, the number of Member States may increase to 20 in future).

[7] Consisting of 22 Member States, namely Angola, Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe (http://www.fao.org/docrep/w5973e/w5973e06.htm).

[8] Article 3(3) of the Treaty Establishing the Preferential Trade Area for Eastern and Southern African States.

[9] http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117

[10] Padamja Khandelwal 'COMESA and SADC: Prospects and Challenges for Regional Trade Integration' (2004) *IMF Working Paper WP/04/227* at 6.

[11] At the time of publication of the IMF Working paper, Padamja Khandelwal was an economist for the International Monetary Fund.

[12] Padamja Khandelwal 'COMESA and SADC: Prospects and Challenges for Regional Trade Integration' (2004) *IMF Working Paper WP/04/227* at 4.

[13] http://about.comesa.int/.

are also a number of draft guidelines to assist in the interpretation of the COMESA Regulations and the COMESA Rules, which were issued by April 2013 for comment, but these have not yet been finalised.

International Best Practice

In order to determine whether the COMESA Regulations, the COMESA Rules and the Draft Merger Assessment Guidelines achieve what they set out to do, namely, economic growth, trade liberalisation and economic efficiency in the COMESA Member States, we seek guidance from best practice on merger regulation which have been established internationally.

Guidance of the International Competition Network

The International Competition Network ("ICN") is the "only international body devoted exclusively to competition law enforcement".[14] The ICN's members represent national and multinational competition authorities, one of which is COMESA.[15]

The ICN's mission statement "is to advocate the adoption of superior standards and procedures in competition policy around the world, formulate proposals for procedural and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide".[16] The ICN has a number of working groups, one of which is the ICN Merger Working Group ("the working group") which has as its aim the promotion and the adoption of "best practices in the design and operation of merger review regimes in order to: (i) enhance the effectiveness of each jurisdiction's merger review mechanisms; (ii) facilitate procedural and substantive convergence; and (iii) reduce the public and private time and cost of multijurisdictional merger reviews".[17]

There are two main ICN papers which we draw guidance from, namely the ICN's Recommended Practices for Merger Notification Procedures,[18] and the ICN's paper entitled Setting Notification Thresholds for Merger Review.[19]

In relation to the setting of reasonable thresholds, the ICN Merger Notification and Procedures Subgroup (the "Subgroup"), in conducting a survey on the setting of notification thresholds for merger review, found that in setting thresholds, the following should be considered; (1) the ICN Recommended Practices for Merger Notification Procedures, (2) clear goals of threshold reform, (3) different types of thresholds, (4) benchmark based on past experience, (5) a comparison of thresholds with similarly situated jurisdictions and (6) flexibility for future reform.[20]

The ICN's Recommended Practices for Merger Notification Procedures, state that "merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification".[21] The comments put forward by the merger working group indicate that in establishing merger notification thresholds each jurisdiction should strive to screen out transactions that are unlikely to result in appreciable competitive effects within its territory.[22]

Furthermore, the merger working group states that a notification should not be required unless there are significant local activities by at least two of the parties to the transaction.[23] The reason

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[14] http://www.internationalcompetitionnetwork.org/about.aspx.
[15] The European Commission is also a member of the ICN.
[16] http://www.internationalcompetitionnetwork.org/.
[17] http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx.
[18] http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf.
[19] http://www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf.
[20] International Competition Network Merger Working Group Notification & Procedures Subgroup Setting Notification Thresholds for Merger Review at 2-3.
[21] International Competition Network Recommended Practices for Merger Notification Procedures I.B.
[22] International Competition Network Recommended Practices for Merger Notification Procedures I.B, Comment 1.
[23] International Competition Network Recommended Practices for Merger Notification Procedures I.C, Comment 2.

being, that where only one party is present the requisite nexus is sufficiently distant from the likelihood of adverse effects arising as a result of the transaction. Alternatively, should the competition authority require that a notification be made where only one party has a local presence, the thresholds should be set sufficiently high to ensure that transactions lacking a material effect on competition will not be caught in the net.[24]

Lastly, and perhaps most importantly on this point, it is commented by the merger working group that notification should not be required solely on the basis of the acquiring firm's local activities.[25] In some jurisdictions, competition authorities are entitled to call for the notification of a non-notifiable merger where it is believed that the transaction will result in a substantial prevention or lessening of competition.[26] This provision will therefore allow a competition authority to call for a transaction to be notified where only the acquiring firm has a presence in the relevant jurisdiction if necessary. Alternatively, the working group states, that where the relevant legislation does not authorise the competition authority to call for the notification of non-notifiable mergers, if they want to ensure that all transactions having an appreciable effect on competition are caught (even where only the acquiring firm has a local presence) the thresholds should be set at a very high level in order to minimise unnecessary filings.[27]

The European Union[28]

(a) Exclusive Jurisdiction

The EU Merger control regime was first introduced in 1989 with the adoption of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (the "1989 EC Merger Regulation").[29] This was amended in 2004 by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "EC Merger Regulation") which is the current regulatory regime governing mergers in the EU.

One of the pillars upon which the EC Merger Regulation is based is "a one-stop shop, according to which the Commission has exclusive jurisdiction to assess a merger having an EU dimension, while other National Competition Agency (NCA) of the EU is precluded from reviewing the transaction".[30]

In terms of the EC Merger Regulations, defined monetary thresholds are set in order to determine whether a merger qualifies as having a "community dimension". The main purpose behind the "bright line" allocation of jurisdiction are the principles of legal certainty and predictability.[31] This enables merging parties to definitively identify whether the merger is required to be notified to the EU or the national competition authority. Furthermore, having one regional body to assess mergers with a "community dimension" means that transactions which might have required multiple filings can now be assessed by one supranational authority having exclusive jurisdiction.[32]

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[24] International Competition Network Recommended Practices for Merger Notification Procedures I.C, Comment 2.
[25] International Competition Network Recommended Practices for Merger Notification Procedures I.C, Comment 3.
[26] International Competition Network Recommended Practices for Merger Notification Procedures I.C, Comment 4.
[27] International Competition Network Recommended Practices for Merger Notification Procedures I.C, Comment 2.
[28] In the EU, there are currently 28 Member States, namely Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom (http://europa.eu/about-eu/countries/index_en.htm).
[29] The Consolidated version of the Treaty on the functioning of the European Union (the "EU Treaty") states in Article 3 that the EU shall have exclusive competence in the establishing of competition rules necessary for the functioning of the internal market. The EC Merger Regulation therefore seeks to give effect to the EU Treaty together with various Notices and Guidelines issued by the European Commission.
[30] Mario Todino, Piero Fattori & Alberta Pera 'European Union' in Ilene Knable Gotts (ed) *The merger control review* 3 ed (2012) at 163.
[31] Michael Harket 'Cross-border mergers in the EU: The Commission v the Member States' (2007) *European Competition Journal* 503 at 507.
[32] Michael Harket 'Cross-border mergers in the EU: The Commission v the Member States' (2007) *European Competition Journal* 503 at 507.

The benefits associated with a one-stop shop competition authority for a specified region are not only in relation to legal certainty but can also result in cost savings and time efficiencies with the avoidance of regulatory duplication. Without a regional competition authority, multiple notifications may be required which would, in addition to spending resources preparing the filings, also entail the payment of multiple filing fees. It is stated by Derek Ridyard[33] that "a unified approach is clearly to be preferred to the situation in which separate inquiries are conducted by different Member State authorities, each judging the merger on the basis of partial information and against slightly different criteria".[34]

(b) The Community Dimension Test

(i) Geographical Area

The EC Merger Regulations provides, in the preamble, that the scope of application of the EC Merger Regulations should be defined according to the geographical area of activity of the undertakings concerned, and be limited by quantitative thresholds. It is stated further, that a merger with a "community dimension" should be deemed to exist where the aggregate turnover of the undertakings exceeds given thresholds.

The EC Merger Regulations provide that a merger has a "community dimension" where the combined aggregate worldwide turnover of all undertakings concerned is more than EUR 5 billion and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million. If the above thresholds are met, a merger will be notifiable to the European Commission unless each of the undertakings concerned achieves more than two-thirds of its aggregate turnover within one and the same Member State.[35]

Furthermore, a merger that does not meet the thresholds above, has a community dimension where: "(a) the combined aggregate worldwide turnover of all undertakings concerned is more the EUR 2 500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State".[36]

(ii) Notification Thresholds

The notification thresholds as set out in the community dimension test are accordingly set at an appropriately high level, providing for both a worldwide threshold and a local community threshold. Furthermore, at least two of the undertakings concerned must meet the community threshold test which would eliminate the scenario of only an acquiring firm having a presence in the Member States. Also, to ensure that the transaction does in fact have an effect on competition between Member States, if more than two-thirds of the turnover of the parties is derived in one and the same Member State, the transaction would not be notifiable.

The aforementioned is a welcome provision in that there could conceivable be a situation where the required threshold is met for both parties in one Member State only, and there is a small presence in another Member State. Since the majority of activity occurs in one Member State only the transaction is unlikely to affect competition or trade between Member States and it would

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[33] Derek Ridyard is a Partner and co-founder of RBB Economics.

[34] Derek Ridyard 'An economic perspective on the EC Merger Regulation' (1990) 11(6) *European Competition Law Review"* 247 at 248.

[35] Article 1(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

[36] Article 1(3) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

therefore be preferable for the transaction to be investigated by the local authority in which the transaction is more likely to have an effect. As dealt with in more detail below, it would be appropriate for a similar provision to be included in the COMESA Regulations.

The COMESA Regulations

(a) Exclusive Jurisdiction

In terms of Article 24(7) of the COMESA Regulations, a Member State is entitled to request the COMESA Commission to refer a merger for consideration to the national competition laws of the Member State, if the Member State is satisfied that the merger, is likely to disproportionately reduce competition to a material extent in the Member State or any part of the Member State.

Similarly, Article 4(4) of the EC Merger Regulations provide for the scenario where a merging party is able to put forward a reasoned submission to the European Commission where they believe that the merger may significantly affect competition within the Member State and therefore be examined in whole or in part by the Member State. Member States are also entitled to request that the European Commission assess a merger which does not have a community dimension but which affects trade between Member States and which threatens to significantly affect trade in its territory.[37]

Despite the provisions in the EC Merger Regulations allowing for cases to be referred from the European Commission to a national competition authority and vice versa, it must be borne in mind that referrals are a derogation from the general rules determining jurisdiction. The European Commission and the Member States have a considerable discretion in deciding whether to refer cases or to accept a case which does not fall within their “original jurisdiction”.[38]

The issue arising with referrals is the jurisdiction of the regional competition commission and in particular whether the regional competition commission has exclusive jurisdiction in respect of mergers that have a regional/community dimension.

The EC Commission Notice on Case Referral in respect of concentrations (2005/C 56/02) states in Article 1 that the “Concentrations with a ‘Community dimension’, i.e. those above the turnover thresholds in Article 1(3) of the EC Merger Regulation, fall within the exclusive jurisdiction of the Commission; Member States are precluded from applying national competition law to such concentrations by virtue of Article 21 of the EC Merger Regulation”. Article 21 of the EC Merger Regulations states that “this Regulation alone shall apply to concentrations as defined in Article 3”. The reason for this exclusive jurisdiction is that by determining jurisdiction exclusively by utilising fixed turnover-related criteria, provides legal certainty for parties[39] and avoids duplication of resources.

The “bright line” allocation of jurisdiction is subject to an exception, being that a merger will not have a “community dimension” where each of the undertakings concerned achieves more than two-thirds of its aggregate turnover within one and the same Member State.[40] Professor Michael Harker[41] states that the ‘two-thirds rule is one corrective mechanism for the crudeness of turnover thresholds”.[42]

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[37] Paragraph (15) of the Preamble to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
[38] Section 7 of the Commission Notice on Case Referral in respect of concentrations (2005/C 56/02).
[39] Article 1(3) of the Commission Notice on Case Referral in respect of concentrations (2005/C 56/02).
[40] Article 1(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
[41] Senior lecturer at the UEA Law School.
[42] Michael Harker ‘Cross-border mergers in the EU: The Commission v the Member States’ (2007) 3 *European Competition Journal* 503.

Certainty is obviously crucial for businesses when transacting, and is at the moment, the major concern in relation to the COMESA jurisdiction since it is unclear when a transaction is required to be notified to the COMESA Commission or the national competition authorities, or both.

It is unclear whether the COMESA Commission is in fact a 'one-stop shop'. There is currently no clear provision in the COMESA Regulations which expressly grant the COMESA Commission exclusive jurisdiction to assess mergers having a regional dimension. In fact, the current wording states that the COMESA Regulations shall have "primary jurisdiction over an industry or a sector of an industry which is subject to the jurisdiction of a separate regulatory entity (whether domestic or regional) if the latter regulates conduct covered by Parts 3 and 4[43] of the Regulations".[44] Primary jurisdiction is not the same as exclusive jurisdiction and in fact lends support to the notion that other bodies may also have jurisdiction to assess mergers.

Since there are no clear provisions in the COMESA Regulations, COMESA Rules or the Draft Merger Assessment Guidelines which grant the COMESA Commission exclusive jurisdiction to assess mergers with a regional dimension, the question to look at when determining whether the COMESA Commission has exclusive jurisdiction to assess a merger, would be whether the Member States have ceded their sovereignty to COMESA and the COMESA Commission when having regard to the COMESA Treaty.

As a basic rule, when states enter into a treaty with one another they inevitably contract to achieve or further the stipulated aims or goals of the treaty. Any suggestion to the contrary would serve to render the treaty nugatory and would run counter to the provisions of the Vienna Convention on the Law of Treaties 1969. Furthermore, when states contract in this manner they assign certain matters that previously fell within their reserved domain to the treaty organisation and in this case the COMESA Commission when enacting domestic legislation to give effect to the treaty.

Even taking the above into account and the fact that the COMESA Member States have to some degree limited their sovereignty in favour of the COMESA Commission, it is wise to compare the terms of the COMESA Treaty to those of the EC Treaty. The relevant provisions are dealt with below.

While Article 10 of the COMESA Treaty provides *inter alia* that a regulation of the Council shall be binding on all the Member States in its entirety, Article 5(2) of the COMESA Treaty crucially reads as follows:

> *"Each Member State shall take steps to secure the enactment of and the continuation of such legislation to give effect to this Treaty and in particular*
>
> 1. *To confer upon the Common Market legal capacity and personality required for the performance of its functions; and*
>
> 2. *To confer upon the regulations of the Council the force of law and the necessary legal effect within its territory."*

Pursuant to Article 5(2)(b) of the COMESA Treaty as set out above, Article 5 of the COMESA Regulations provides that Member States must "take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of these Regulations or resulting from action taken by the Commission under these Regulations".

This provision indicates that states are required to cede their sovereignty to COMESA, but it is not clear whether all Member States have in fact done so.[45] Furthermore, and perhaps of vital importance is Article 29(1) of the COMESA Treaty which provides that "except where the

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[43] Part 4 deals with merger control.
[44] Article 3(2) of the COMESA Competition Regulations, 2004.
[45] It is not clear whether all the Member States have enacted domestic legislation to give effect to the COMESA Regulations.

jurisdiction is conferred on the Court by or under this Treaty, disputes to which the Common Market is a party shall not on that ground alone, be excluded from the jurisdiction of national courts". This Article implies that even if it is found that the Member States have ceded their sovereignty, the COMESA Commission does not have exclusive jurisdiction unless exclusive jurisdiction is conferred on it.

When paying particular attention to the wording in the COMESA Regulations and the EC Merger Regulations, it is apparent that the COMESA Regulations do not contain the succinct wording which the EC Merger Regulations contain which authorise the exclusive jurisdiction of the European Commission in relation to transactions with a community dimension.[46] The provisions from the COMESA Treaty cited indicate a treaty organisation in which the Member States assign certain designated functions to the organs of COMESA, while reserving a significant domain to the Member States themselves.

In the absence of express wording, the question of exclusive jurisdiction in relation to the COMESA Commission is uncertain. Even though the COMESA Regulations allow for a Member State to request that a merger notified to the COMESA Commission be referred to their national competition authority (a decision which falls within the COMESA Commission's exclusive discretion[47]), it is not clear whether the COMESA Commission has the exclusive jurisdiction to assess the transaction. In addition, and as alluded to above, it is not clear whether all the Member States, have in fact given effect to the COMESA Treaty and the COMESA Regulations by enacting domestic legislation to that effect. In the circumstances, even if the COMESA Regulations were to provide for the exclusive jurisdiction of the COMESA Commission this would not necessarily be binding.

According to reports, the Kenyan Competition Authority has for example, been steadfast in its denial that COMESA has exclusive jurisdiction over mergers.[48]

Exclusive jurisdiction is of paramount importance in a regional competition regime, in that without it, multiple merger filings could be required. This results in multiple filing fees having to be paid as well as unnecessary time being utilised to compile the various filings. Multiple filings also results in different approval dates by the various authorities which creates uncertainty for the implementation of a transaction.

Furthermore, the filing fees payable for a merger notification in COMESA are prohibitively high, reaching a maximum of COM$500 000. This fee alone may deter notification. Coupled with the fact that firms may also be required to notify the transaction to national competition authorities and pay the required national filing fee in addition to the COMESA filing fee, this may result in the failure to notify at all.

Failing legal certainty, firms may be reluctant to conduct business in Africa. Even firms with a culture of compliance may not comply if the laws are unclear since compliance in an uncertain legal regime is challenging. All of these aspects are counter-intuitive to the main reason for the existence of a regional competition regime, being legal certainty and accessibility.

What is needed is a clear statement in the COMESA Regulations or COMESA Rules (as is provided for in the EC Merger Regulations and the EC Commission Notice on Case Referral in respect of concentrations (2005/C 56/02)), that the COMESA Commission has exclusive jurisdiction over mergers having a regional dimension and furthermore, the COMESA Regulations need to be incorporated by all the Member States into their domestic legislation in order to give effect to the COMESA Regulations.

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[46] Article 21 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
[47] Article 24(8) of the COMESA Commission Regulations, 2004.
[48] http://www.trademarksa.org/news/kenya-told-take-grievances-comesa-court

(b) The Regional Dimension Test

(i) Geographical Area

Article 23(3) of the COMESA Regulations relates to the application of merger control provisions and states that the merger control provisions apply where "(a) both the acquiring firm and the target firm or the acquiring firm or target firm operate in two or more Member States; and (b) the threshold of combined annual turnover or assets provided for in paragraph 3 is exceeded".[49]

The first stage of this "regional dimension" test is accordingly, that the acquiring firm or the target firm, or both, are required to "operate" in two or more Member States.

The Draft Merger Assessment Guidelines divide Article 23(3)(a) into two parts, namely (1) both the acquiring firm and the target firm operate in two or more Member States; (2) either the acquiring firm or target firm operate in two or more Member States.[50]

This division is explained in the Draft Merger Assessment Guidelines using examples[51] and incorporates the following scenarios:

(i) Both the acquiring firm and the target firm operating in the same two COMESA Member States (i.e. both the acquiring firm and the target firm operating in Zambia and Malawi).

(ii) The acquiring firm and the target firm operating in two different COMESA Member States each (i.e. the acquiring firm operates in Zambia and Malawi, and the target firm operates in Zimbabwe and Ethiopia).

(iii) Either the acquiring firm or the target firm operates in two or more COMESA Member States (i.e the acquiring firm operates in Kenya and Seycelles and the target firm has no operations in any COMESA Member States and vice versa).

The first stage of the regional dimension test is that the acquiring firm or the target firm, or both, are required to "operate" in two or more Member States. According to the Draft Merger Assessment Guidelines this envisages a situation where either the acquiring firm or the target firm operates in two or more Member States but not where the acquiring firm and the target firm operate in one Member State each.[52]

Furthermore, the definition of "operate" is given a broad meaning in Section 3.10 of the Draft COMESA Merger Assessment Guidelines to mean not only having a physical presence (assets) in two or more Member States, but it is also sufficient for a firm to derive a turnover (generate sales) in two or more Member States. This is a very broad test.

Once it is determined that the COMESA Regulations apply on the basis of the acquiring firm and/or target firm operating in two or more Member States, one looks to Article 3 of the COMESA Regulations which deals with the scope of application of the COMESA Regulations. Article 3 states that the COMESA Regulations applies only to conduct which has an "appreciable effect" on trade between Member States and which restricts competition in the Common Market. Although there is no definition of "appreciable effect", the inclusion of this wording in the COMESA Regulations presumably envisages a scenario where a merger with a regional dimension and meeting the required thresholds are met would not be required to be notified if there is no appreciable effect on trade. An alternative interpretation is that Article 3 is a precondition to any merger assessment. In other words, if there is no "appreciable effect" on trade, then the COMESA Regulations do not apply at all. For example, a transaction between entities in which only the acquiring firm is present

[49] This is referred to as a regional dimension in Section 1.2 of the COMESA Merger Assessment Guideline, 2013.
[50] Section 3.2 of the COMESA Merger Assessment Guideline, 2013.
[51] Sections 3.3 to 3.7 of the COMESA Merger Assessment Guideline, 2013.
[52] Section 3 of the COMESA Merger Assessment Guideline, 2013.

in COMESA and having minimal sales is unlikely to result in an "appreciable effect" on trade between Member States.

It appears as though the COMESA Commission does not agree with the above interpretation and it is some concern that the Draft Merger Assessment Guidelines state that there is a rebuttable presumption that a merger with a regional dimension would lead to a substantial lessening of competition which can only be rebutted after an assessment of the merger subsequent to notification has been made.[53]

This means that even if there is no appreciable effect on trade between Member States in COMESA, if the merger has a regional dimension it must be notified so that the merger can be assessed and the presumption rebutted. Even in the absence of a definition of "appreciable effect" the COMESA Regulations envisage a scenario where a merger with a regional dimension and meeting the required thresholds (which are currently zero) are met, would not be notified for the reason that there would be no appreciable effect on trade. In such a world it is inconsistent to have a rebuttable presumption of a substantial prevention of competition which can only be rebutted after an assessment is made by the COMESA Commission. In support of the contention that the rebuttable presumption argument cannot be sustained is the fact that this is not included in either the COMESA Regulations or the COMESA Rules. The inclusion of the rebuttable presumption in the Draft Merger Assessment Guidelines is accordingly unlikely to withstand legal scrutiny.

Furthermore, and as indicated above, the ICN Recommended Practices for Merger Notification Procedures state that notifications should not be required unless the "transaction is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned".[54] Having such a requirement ensures that transactions with no appreciable effect on competition will be screened out. It is submitted that the reason the community dimension test in the EU works without specifically stating that there should be no appreciable effect on trade between Member States, is that the thresholds are set at a sufficiently high level to ensure that transactions which are unlikely to raise competition concerns are not notified.

The rationale behind screening out transactions which are unlikely to raise competition concerns is that to impose notification on transactions where no appreciable effect on competition is felt, places unnecessary pressure on the competition authority's resources without any corresponding enforcement benefit.[55] In addition, businesses are reluctant to do business in a region where they face legal uncertainty and unpredictability which in turn is likely to impact on the economy when no new investors are willing to enter the market.

It is furthermore not logical in the absence of reasonable merger thresholds to require that all transactions having a regional dimension should be notified where it is clear that there will be no effect on competition, and in particular, in relation to transactions in which only the acquiring firm or even only the target firm operates in the required number of Member States. Transactions of this nature are unlikely to result in an appreciable effect on trade between Member States.

Of relevance, and perhaps a mechanism for not being required to file a merger where only one firm operates in COMESA is the fact that part (b) of the thresholds state the aggregate annual turnover or assets in the Common Market is calculated in relation to at least two firms to the merger.[56] Although there is no definition of "firm" it can be argued that if the relevant turnover or asset value in the Common Market (even if it meets the threshold) is only derived from one party to the merger, the transaction would not need to be notified. This analysis is consistent with the "appreciable effect" provision in the COMESA Regulations and also the ICN Recommended Practices for Merger Notification Procedures which provide that "merger notification thresholds should

[53] Section 4.4 of the COMESA Merger Assessment Guideline, 2013.
[54] International Competition Network Recommended Practices for Merger Notification Procedures at pg 2.
[55] International Competition Network Recommended Practices for Merger Notification Procedures at pg 2.
[56] Rule 4(b) of the Rules of the determination of merger notification thresholds.

incorporate appropriate standards of materiality as to the level of “local nexus” required for merger notification”.[57]

This is also the approach adopted by the EU in Article 1(2) of the EC Merger Regulations. Hogan Lovells[58] states that transactions are notificable when the firms have a combined worldwide turnover of €5 billion and each of them has turnover of more than €250 million in the Community (unless the two-thirds rule applies).[59]

This lends support to the interpretation that the provision in the COMESA Rules requires that both firms operate in COMESA and not only one of them. This is further supported by the merger working group who state that a notification should not be required unless there are significant local activities by at least two of the parties to the transaction.[60] This COMESA Rule is contradictory to Article 23(3) which envisages the scenario that only one party to the transaction is required to operate in two or more COMESA Member States for a transaction to be notifiable. Including this wording which is framed in the same manner as the EC Merger Regulations will go some way to alleviate the concerns raised by Article 23(3)(a) of the COMESA Regulations discussed above.

(ii) Notification Thresholds

The second stage of the regional dimension test is in relation to the merger thresholds which are set out in Rule 4 of the Rules of the determination of merger notification thresholds as “(a) the combined worldwide aggregate annual turnover or the combined worldwide aggregate value of assets, which whichever is higher, of all firms to the merger in the Common Market equals or exceeds COM$ Zero; and (b) the aggregate annual turnover or the aggregate value of assets, whichever is higher, of each of at least two firms to the merger in the Common Market equals or exceeds COM$ Zero”.

The thresholds set by the COMESA Rules are similar to those set by the EC Merger Regulations but differ in two regards. The first gap is in relation to the safeguard for non-notification where more than two-thirds of the turnover is derived in one and the same Member State. Furthermore, and as indicated above, the merger thresholds in the COMESA Region are set at COM$ Zero.

The setting of notification thresholds at COM$ Zero effectively means that all transactions meeting the requirement of “operate in two or more Member States”[61] are required to be notified. If realistic thresholds are set, this will not be the case.

The COMESA Commission has, in the Draft Merger Assessment Guidelines, indicated that the failure to set appropriate thresholds is due to the fact that different Member States are currently at different levels of economic development. Accordingly, it is argued that a realistic threshold can only be determined after the COMESA Regulations have been tested on the market.[62]

It is submitted that setting reasonable thresholds is not an insurmountable task in that the EU, which had similar constraints was able to set a reasonable threshold. It is submitted that COMESA should undertake a comprehensive economic study detailing the comparative revenues of Member States in an attempt to determine what a reasonable threshold for the COMESA region is likely to be.

When thresholds are set, they must be calculated at a level which minimises the number of transactions that are notified to those that raise competition concerns only. This is imperative in order to avoid the notification of *de mimimis* transactions having to be notified. The thresholds

[57] International Competition Network Recommended Practices for Merger Notification Procedures at pg 1.
[58] Internationally based law firm.
[59] http://m.hoganlovells.com/files/Publication/b2edf23a-8933-4fa3-a277-4460a8a29369/Presentation/PublicationAttachment/b8e25516-4e60-43cf-9c12-46e95a4f2988/EU_Merger_Control_-_September_2010.pdf.
[60] International Competition Network Recommended Practices for Merger Notification Procedures I.C, Comment 2.
[61] Article 23(3)(a) of the COMESA Competition Regulations, 2004.
[62] Section 1.3 of the COMESA Merger Assessment Guideline, 2013.

should reflect reasonable monetary thresholds as is the case with the EC Merger Thresholds, which can be changed should they be set at a level which is found to be unrepresentative of the economic market in future. It is submitted that the thresholds should rather be set at a higher level, than too low to prevent transactions between two firms with large worldwide turnovers being caught in the net, where there is no effect in the market and the competitive effect of the transaction is negligible.

A further reason for the setting of high rather than low thresholds, is that the COMESA Regulations provide that the COMESA Commission may "require parties to a non-notifiable merger to notify the Commission that the merger is likely to substantially prevent or lessen competition or is likely to be contrary to the public interest".[63] Therefore, if the COMESA Commission were to become aware of a transaction which fell outside the regional dimension test and they believed that the merger would have an appreciable effect on trade between Member States, the COMESA Commission would be entitled to request that the transaction be notified. This will give the COMESA Commission an opportunity to analyse the effect on competition in relation to such a transaction if necessary.

The impact of having zero thresholds is substantial. Until thresholds are set all transactions, even those having no effect on competition but meeting the "regional dimension" test are currently required to be notified. This would include, for example, a transaction between two large international firms where assuming, the acquiring firm and the target firm, in the preceding financial year, delivers a once off consignment to Zambia and Zimbabwe for their clients in that region thereby deriving a small turnover. If the two international firms were to merge, the transaction would be caught in the net due to the fact that there are no thresholds. It is clear that this type of transaction where the parties make ad hoc sales into the region, deriving minimal turnover from the region, is unlikely to result in a substantial prevention or lessening of competition and accordingly should not be notified. However, as the COMESA Regulations currently stand, such a transaction is notifiable.

In the absence of thresholds, the effect on firms seeking to do business in COMESA is impacted. The uncertainty which arises will make firms weary of entering into any transactions with African entities, thereby impacting on the growth of the African economy. In addition, firms which are currently part of COMESA may wish to comply with the relevant Regulations, however, may be discouraged from doing so on the basis that it is not clear whether a transaction is or is not notifiable. The uncertainty surrounding notification, places a huge risk on businesses, since non-compliance leads to reputational risk which must be avoided at all costs.

In addition, even if a firm decides that the transaction is notifiable, they are hit with a large filing fee which is calculated at 0.5% of the combined annual turnover or the combined value of the assets of the merging parties, whichever is higher; or COM$500 000, whichever is lower.[64] This filing fee, is prohibitively expensive.

Considering the current Eurozone crisis, Africa provides significant opportunity for investment and growth in the economic market. However, restrictive and uncertain regulatory regimes are counter-intuitive to the investment opportunity and may result in investors seeking to invest elsewhere. If investors do decide to invest in Africa, and are burdened with significant costs to do so, these costs will inevitably be passed on to consumers, resulting in harm to the market as a whole which cannot be the intention of a regional competition regime.

Taking into account the broad meaning of the word "operate", the Draft Merger Assessment Guidelines, and the fact that the merger thresholds are currently set at COM$ Zero, a large number of transactions will be caught in the net, including for example where a large international company based in the United Kingdom with minimal sales into two COMESA Member States purchases shares in another internationally based firm with no operations in any COMESA Member States. In

[63] Article 23(6) of the COMESA Competition Regulations, 2004.
[64] Rule 55(4) of the Amended COMESA Competition Rules, 2004.

this scenario, although the target firm does not operate in any COMESA Member State, and there is therefore unlikely to be any effect on trade between Member States, the transaction is still required to be notified to the COMESA Commission. This cannot be the intention of the COMESA Commission and accordingly lends support to the view that the Regulations require reform.

Conclusion

The creation of the COMESA Commission and the enforcement of the COMESA Regulations is a positive step for competition enforcement on the continent. The COMESA Commission is a powerful regulator; and appropriate Regulations could potentially result in the creation of a supranational competition authority able to achieve COMESA’s aim of regional integration by encouraging trade and securing economies of scale and market access.

However, as we point out, the COMESA Regulations, as they currently stand, are flawed in a number of respects. This leads to uncertainty for firms subject to the Regulations, significant transaction costs and this in turn may impact on the likelihood of investment in the COMESA region. If investors do decide to invest in Africa, and are burdened with significant costs to do so, these costs will inevitably be passed on to consumers, resulting in harm to the market as a whole which is not the intention of a regional competition regime.

A reform of the COMESA Regulations and COMESA Rules is required in order to bring them in line with the ICN Recommended Practices for Merger Notification Procedures, the EC Merger Regulations, and in particular in relation to the exclusive jurisdiction of the COMESA Commission over mergers having a regional dimension and the provision of a clear regional dimension test.

If the COMESA Commission has exclusive jurisdiction to assess mergers having a regional dimension, this will remove the concern associated with the duplication of filings and the payment of multiple filing fees. Furthermore, being able to definitively state whether a transaction is required to be notified will ensure that transactions having no appreciable effect on trade between Member States will not require notification and free up the resources of the COMESA Commission to focus on transactions that do.

In addition, a reform of the COMESA Regulations and the COMESA Rules will ensure that the efficiencies associated with a regional competition regime are achieved and in particular will provide for greater legal certainty for both local and international firms who do business in Africa. This reform is likely to result in a business friendly environment where less time is spent compiling unnecessary filings. This will result in fewer resources being utilised and ultimately lead to the creation of a culture of compliance with regulatory regimes in Africa.