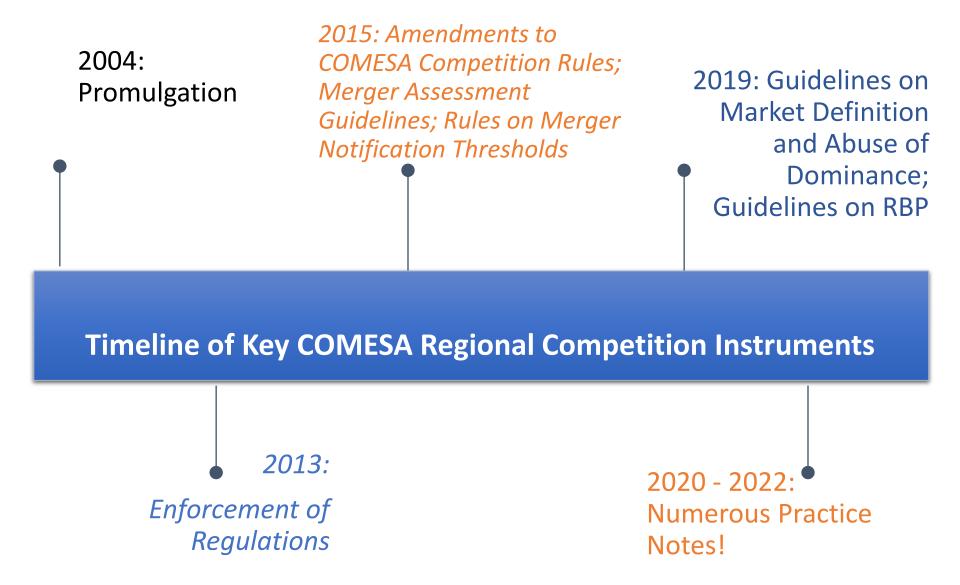
# Assessing the Merger Control Provisions of the COMESA Competition Regulations of 2004: Time for an Overhaul?

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Primary legislation has remained unchanged over 17 years

# Are the COMESA Merger Notification Thresholds fit for Digital Mergers?

#### What is the Issue?

- CCC has assessed over 300 transactions since 2013, however not a single merger involving digital companies
- Thresholds based on asset and turnover in the Common Market;
- Digital industry characterized by multisided markets - large user base may not be reflected in turnover or asset values
- Killer Acquisitions theory
- Fear of missing out on anticompetitive mergers
- Implementation of Catch-all provision: Cautious or Challenged?



### Solutions introduced by Regulators in Europe

#### **Germany and Austria**

- Addition of Transaction Value Threshold + Significant domestic activities
- In Germany, 60 cases dealt under the valuebased threshold – only 4 cases in the technology sector
- Increased administrative burden without desired increase in enforcement impact?

#### **European Commission**

Rejected transaction value

"(...) the overall body of evidence suggests that the absence of complementary jurisdictional thresholds – particularly based on the value of the transaction – has not in itself significantly contributed to impairing the effectiveness of the EU Merger Regulation's jurisdictional thresholds."

- Revised guidance on Art. 22 EUMR referrals
- However, sector-specific regulation: special regime for gatekeepers through Digital Markets Act

### What Lessons for COMESA?

- Current thresholds offer required flexibility to intervene selectively in transactions
  - which threaten competition and
  - where there is a risk of enforcement gap
- However, effective enforcement of Catch-all provision under Article 23(6)
  requires access to information/ data and initial assessment to establish
  grounds for believing merger is potentially harmful
- No powers under Part IV to compel information powers provided under investigation of restrictive business practices
- Merit for EC proposal to support Art 23(6) in relation to requiring large digital companies engaging in acquisitions to inform the CCC
  - Limit to transactions where the regional dimension test and thresholds are met on the acquirer's side?

## Relevance of the CCC Non-Suspensory Regime

#### What is the Issue?

- Strong rationale for suspensory regime
  - ✓ preserve independence of parties during review period
  - ✓ Avoid irreversible insights into sensitive competitive information if merger is rejected or abandoned
- Exchange of commercially sensitive information in a merger involving two competitors "had the potential to harm competition in the interim pre-consummation period and in the event the acquisitions were delayed, modified, or abandoned, may have led to even greater and more long-lasting harm." (US FTC, 1997)
- Popular choice for most competition authorities, including most COMESA Member States
- Timeframe for notification under suspensory regime is irrelevant
- However, need for certainty in timeframe for decision making

- Rationale for Non-suspensory regime delays in implementations of transactions imposes costs on parties
- Parties bear the risks involved if the decision of the authority requires untangling business arrangements or rejection
- CCC not alone in operating non-suspensory regime - however, others (Italy, Mexico, UK, Australia) have powers to impose interim measures to suspend ongoing or further integration
- Enforcement impact seen in imposition of substantial fines for non-compliance with interim orders
- CCC experience fines imposed for failing to notify within 30 days of decision to merge (reasonable timeframe??)
- CCC decision in *Helios Towers/ Airtel* case—breach did not have an impact on the market!

# Experience with Non-Suspensory Regime

# **Options for COMESA**

- CCC non-suspensory regime does not promote effective regulation of mergers
- Two options:
  - 1. Maintain non-suspensory regime?
    - needs to supported by power to impose interim measures and fines for breach of interim measures
    - Resource intensive
  - 2. Shift to suspensory regime
    - Challenges faced by ACCC
    - Requires adjustment to the notification and decision-making process
    - Simplified notification form for mergers with no overlap
    - Reintroduction of Phase 1 and Phase 2 review periods

