

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

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2004:
Promulgation

*2015: Amendments to
COMESA Competition Rules;
Merger Assessment
Guidelines; Rules on Merger
Notification Thresholds*

2019: Guidelines on
Market Definition
and Abuse of
Dominance;
Guidelines on RBP

Timeline of Key COMESA Regional Competition Instruments

*2013:
Enforcement of
Regulations*

*2020 - 2022:
Numerous Practice
Notes!*

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 multi-sided 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 value-based 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

PRESENTATION FINISHED



NOW ANY QUESTIONS?

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