COMESA Competition Commission gives update on merger regime

By Susan Meyer

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Members of the competition law department of Cliffe Dekker Hofmeyr Inc. recently attended the 10th International Bar Association (IBA) Competition Conference in Cape Town where practitioners from around the world gathered to share views, knowledge and experience.

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Of particular interest was an address by Willard Mwemba, head of mergers and acquisitions of the COMESA Competition Commission (CCC), on the latest developments of the Common Market for Eastern and Southern Africa (COMESA) merger regime.

The CCC has been operative since 14 January 2013 and, as at the beginning of March 2014, had been notified of 25 mergers. From a dealmaker perspective, some of the main criticisms of the COMESA merger regime have been the broad jurisdictional thresholds to determine when mergers are notifiable, including:

- the absence of monetary thresholds;
- the exorbitant filing fees;
- the lengthy review period of 120 business days (which may be extended); and
- the uncertainty regarding the parallel applicability of national merger notification requirements.

The CCC indicated to the IBA that, having identified areas of improvement, it has mandated the International Finance Corporation of the World Bank Group to make recommendations regarding the practical aspects of the merger regime. The first workshop discussing the suggested amendments took place in April 2014. Specifically, the consultant will be reviewing the thresholds for notification, the effects based test for notifications and the filing fee.

Ratification by member states

Once the consultant has made recommendations, these will be subject to the acceptance of the Council of Ministers and will need to be ratified by the individual member states. Thus, whilst reforms are under way, they are not expected any sooner than the end of this year. In the meantime, the CCC also indicated that it is developing guidelines aimed at increasing transparency and certainty in respect of the merger notification requirements, which will be published on its website in the short-term.

Currently, a merger is notifiable to the CCC where both the acquiring firm and the target firm or either the acquiring firm or target firm operate in two or more member states (referred to as a Regional Dimension) and the threshold of combined annual turnover or assets is exceeded.

Whilst the regulations provide for the publication of a threshold of combined annual turnover or assets in the COMESA region, at or above which a merger will become notifiable, this threshold is currently set at zero, meaning that once a merger has regional dimension, it is notifiable under the regulations. In April 2013, the CCC issued draft merger assessment guidelines wherein it indicated that a period of 'testing' will need to be endured before the CCC will be in a position to set realistic monetary thresholds.

It is submitted that the introduction of reasonable monetary thresholds for notifiability will add certainty and transparency to the merger regime, which should ultimately facilitate investment into the region. The introduction of thresholds will also assist the CCC in ensuring that its time and resources are not wasted on transactions that do not warrant notification in the first place.

Competition is restricted

The regulations apply to all economic activities within, or having an effect within, the Common Market. More particularly, the regulations provide that they apply to conduct covered by the COMESA merger control regime which have an appreciable effect on trade between member states and which restrict competition in the Common Market.

This requirement of an appreciable effect could conceivably be used to avoid a notification, which would otherwise be caught by the broad jurisdictional thresholds referred to above, with no obvious effect on competition in COMESA.

For example, if the transaction in question does not involve any horizontal or vertical relationships between the parties, there ought to be no restriction on competition. Similarly, a transaction involving firms that do not engage in cross-border trade may not affect trade between member states.

The CCC's current view is that all transactions with a community dimension are notifiable. In an attempt to prevent self-assessment, the CCC recommends that parties claiming the absence of an appreciable effect, submit a complete merger notification without paying the filing fee. After an assessment, the CCC will inform the parties whether or not they have been excused from notifying and if not, the CCC will request payment of the filing fee. As at the beginning of March 2014, the CCC confirmed that it had provided four clearances on this basis.

Not an ideal solution

A mechanism to provide a quick answer in respect of transactions that are not troublesome will be welcomed. However, given the current process still requires firms to complete the burdensome information requirements of the prescribed merger forms, it is submitted that this is still not an ideal solution.

The required filing fees are the lower of $500,000 or 0.5% of the parties' annual turnover or combined value of assets in the COMESA region (whichever is the higher). This means that for acquiring firms that have assets or turnover in COMESA of around R1bn or more, the $500,000 filing fee will be higher than in any other regime.

As a potentially exorbitant addition to transactions costs, it is submitted that the current filing fees are a significant deterrence to investment and must be amended.

According to the CCC, one of the main advantages of the COMESA merger regime, is that it is a 'one stop shop' for COMESA countries, reducing the burden of having to notify in multiple jurisdictions, as well as 'filling the gap' in respect of those member states that do not have their own competition laws.

The regulations bind each member state to take steps 'to confer upon the regulations of the Council the force of law and the necessary effect within its territory'. A significant problem is that not all of the member states have domesticated the regulations to bring it into force as a matter of domestic law, nor have they all amended their local legislation to incorporate the regulations.

Notifications required

Thus there remains a view, amongst some member states, that national notifications will be required in parallel with any notifications to the CCC. Opinions differ on this issue between COMESA member states and given the potential for risks for failing to notify mergers across individual member states, it is necessary to give these requirements careful consideration.

The regulations imposes an obligation on the parties to notify a merger to the CCC no later than 30 days of the parties' decision to merge. In principle, a penalty of up to 10% of either or both the merging parties' annual turnover in the Common Market may be levied if the parties fail to give notice within 30 days of the 'decision to merge' and a notifiable merger carried out in contravention of the regulations shall have no legal effect and no rights or obligations imposed on the participating parties by any agreement shall be legally enforceable in the Common Market.

The regulations do not provide any guidance as to when a 'decision to merge' can be understood to take place. When the CCC commenced operations, it initially advised that all that was needed was a concurrence of minds between the parties to a merger that they would merge. However, at the IBA Conference, the CCC confirmed that it now considers a decision to merge to have been made only when the parties sign a specific agreement to merge, or even when board resolutions are taken.

Practically speaking and given the current state of flux with this new regulator, it seems unlikely that the CCC will seek to prosecute merely for a late filing, and on previous occasions the CCC has indicated that a filing made in good faith will not be met with questions as to when exactly the decision to merge may have taken place.

ABOUT SUSAN MEYER

Susan Meyer is a director in the Competition Practice at Cliffe Dekker Hofmeyr in Cape Town.