

COMESA merger assessment guidelines published

The Common Market for Eastern and Southern Africa (COMESA) Competition Commission on Friday, 31 October 2014, published its long-awaited merger assessment guidelines. The guidelines are aimed at providing clarity as to when a merger needs to be notified.



The guidelines are particularly welcome in view of the fact that the monetary threshold for notification is set at zero, which has the undesired consequence that any transaction which qualifies as a merger* cannot be implemented prior to the party notifying the COMESA Competition Commission of the transaction with the concomitant cost implications of such notification.

The guidelines have provided clarity in respect of a number of issues left unaddressed by the Regulations, however the matters in respect of which clarity has now been obtained are with regard to the requisite 'regional dimension' and monetary threshold.

Requirements are interconnected

The Commission views the regional dimension and monetary value requirements as interconnected, (particularly in view of the requirement in Article 23(5) of the Regulations that, to be notifiable, a merger must have 'an appreciable effect on trade between Member States', and thus deal with both under section 3 of the guidelines.

In conclusion, the Commission is of the view that a merger will only be notifiable if:

- At least one merging party operates in two or more Member States (an undertaking 'operates' in a Member State if it has annual turnover in that Member State exceeding \$5m);
- A target undertaking operates in a Member State;
- It is not the case that more than two-thirds of the annual turnover in the Common Market of each of the merging parties is achieved or held within one and the same Member State.

It is, however, important to note that although the guidelines refer to a minimum annual turnover in a Member State of \$5m prior to a merging party being considered as 'operating' in that Member State, the monetary notification threshold is still set at zero - thus, should a merging party's annual turnover be less than \$5m, the monetary threshold will still be met (as it is set at zero) and notification will not be required as a result of neither merging party 'operating' within a member state.

**Defined in Article 23(1) of the COMESA Competition Regulations, 2004 as "...the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person..."*