COMPETITION LAW AFRICA

REGIONAL COMPETITION ENFORCEMENT IN THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA (COMESA)
MERGERS WITH A REGIONAL DIMENSION REQUIRE APPROVAL FROM COMESA COMPETITION COMMISSION.

THE REGULATIONS CLASSIFY CERTAIN PROHIBITED PRACTICES AS OFFENCES.

THE COMMISSION WILL HAVE INVESTIGATIVE POWERS.

THE REGULATIONS CONTAIN SPECIFIC CONSUMER PROTECTION PROVISIONS.

2. Article 55 of the Treaty provides the basis for a Regional Competition Authority by stating that “The Council shall make regulations to regulate competition within the member states”. Although the COMESA competition regulations were adopted in 2004, the COMESA Competition Commission only became operational on 14 January 2013.

3. The enforcement of the COMESA competition regulations will have major implications for all companies that do business in the COMESA region\(^1\)\(^2\). All indications are that the COMESA Competition Commission will enforce the regulations with vigour and the head of mergers and acquisitions has reportedly stated that “as from 14 January 2013, mergers with a regional dimension, implemented without the COMESA Competition Commission’s permission, shall be null and void”.

4. The substantive provisions of the regulations are contained in Part 3 (Anti-competitive Business Practices and Conduct), Part 4 (Mergers and Acquisitions), and Part 5 (Consumer Protection).

5. The regulations pertaining to anti-competitive business practices and conduct bear significant similarities to the competition rules applicable in Europe and South Africa. There are, however, far reaching provisions, including that any agreement or decision which 1) may affect trade between member states; and 2) have as their object or affect the prevention, restriction or distortion of competition within the common market, shall be automatically void\(^3\).

\(^1\) COMESA’s member states are Burundi, Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Seychelles, Swaziland, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Uganda, Zambia and Zimbabwe.

\(^2\) Article 5 of the Regulations and Obligations of member states which includes that member states shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the regulations or resulting from action taken by the Commission under the regulations. Member states shall also be obliged to facilitate the achievement of the objects of the common market and to abstain from taking any measure which could jeopardise the attainment of the objectives of the regulations.

\(^3\) Certain exceptions are contained in Article 16(4) in this regard.
Further, certain prohibited practices are classified as offences⁴, including price fixing agreements which “hinder or prevent the sale or supply or purchase of goods or services between persons”; agreements which “limit or restrict the terms and conditions of sale or supply or purchase between persons”; or agreements “limiting or restricting the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services”; collusive tendering and bid rigging; market or customer allocation agreements; allocation by quota as to sales and productions; collective action to enforce arrangements; concerted refusals to supply goods or services to a potential purchaser, or to purchase goods or services from a potential supplier; collective denials of access to an arranged association which is crucial to competition. Although there are various overlaps with EU and South African competition law, a number of provisions are unique to the COMESA competition regulations and will require careful consideration and assessment.

The regulations⁵ provide that undertakings may apply to the Commission to enter into or give effect to agreements which would otherwise be anti-competitive, provided that the Commission determines that there are public benefits outweighing the anti-competitive detriment of such agreements. The regulations also set out in some detail the Commission’s investigative processes and powers.

Of particular interest are the regulations relating to merger control⁶. The regulations state that where the acquiring and target firms in a merger transaction operate in two or more member states, the merger will have to be notified to the Commission within 30 days. It is expected that the implications or the merger notification regime will have a very significant impact within the region as notification will have to be given at a regional level rather than at the national level which was previously the case. There are in certain instances⁷, concerns regarding the compatibility of national legislation with the regulations⁸. Of further particular significance is that the thresholds to determine whether or not a particular transaction is a “notifiable merger” have currently been set at zero.
The COMESA Competition Commission’s merger assessment guidelines (“the Guidelines”) were published in 2014. 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 parties 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 main issues in respect of which clarity has now been obtained are with regard to the requisite ‘regional dimension’ and monetary threshold. 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:

(a) 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 US $5 million);
(b) A target undertaking operates in a Member State;
(c) It is not the case that more than 2/3 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 US $5 million 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 US $5 million, 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.

The regulations provide that the Commission shall make a decision in respect of merger notifications within 120 days of receipt.
In addition to the aforesaid typical competition rules, the regulations also contain strict provisions pertaining to consumer protection. Persons are prohibited from making false or misleading representations regarding the standard, quality, value, grade, composition, style or model of goods of services, or making a false or misleading representation concerning the need for any goods or services. Persons are furthermore prohibited from engaging in “unconscionable conduct” whether or not certain conduct is “unconscionable”, will be determined with reference to inter alia:

- the relative strengths of the bargaining positions of the persons and the consumer;
- whether, as a result of conduct engaged in, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the person;
- whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
- whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the person acting on behalf of the person in relation to the supply or possible supply of the goods or services; and
- the amount for which, and the circumstances under which the consumer could have acquired identical or equivalent goods or services from another supplier.

In addition, certain conduct in relation to business transactions will also be regarded as unconscionable. This will include whether or not conduct in relation to business transactions will be classified as unconscionable will depend on, inter alia:

- the extent to which a supplier unreasonably failed to disclose to the business consumer:
  - any intended conduct of the supplier that might affect the interests of the business consumer; and
  - any risk to the business consumer arising from the supplier’s intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer).
- the extent to which the supplier was willing to negotiate the terms and conditions of any contract for the supply of the goods or services with the business consumer.
The regulations prohibit the trade or supply of goods if the goods are of a kind in respect of which there is a prescribed consumer product safety standard and which do not comply with that standard.

The Commission is furthermore empowered to prescribe a Consumer Product Information Standard in respect of particular goods and services pertaining to the disclosure of information relating to the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods.

The Commission is also empowered to issue a compulsory product recall notice in respect of goods. Where such goods appears to the Commission to be of a kind which will or may cause injury to any person or are goods of a kind in respect of which there is a prescribed Consumer Product Safety Standard and the goods do not comply with that standard. The provisions introduce statutory liability in respect of “unsuitable” and “defective” goods.

Adams and Adams has an extensive network of offices and alliances through Africa, including in a number of the COMESA Countries. Our competition and consumer protection teams are actively liaising with the COMESA Competition Commission to gain clarity on various issues which are currently unclear. Should you have any queries, we invite you to address them to:

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4 Although the reference in the regulations is to the incorrect paragraph it is nonetheless clear which activities would constitute an offence.
5 Article 20.
6 Article 23.
7 In particular Kenya.
8 See, in this regard, however the member states’ obligations to bring national legislation in line with the regulations, as referred to above.
9 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...”.
10 Article 25.
11 The consumer protection provisions of the regulations would typically not form part of competition legislation. By way of example, in South Africa, the said provisions would, strictly be included in the consumer protection legislation, including the Consumer Protection Act (2008).
12 Article 27 contains various other prohibitions on representations.
13 Article 31.
14 Articles 36 and 37.
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