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Briefing note July 2013

Early experiences of the new COMESA Competition Regime

The competition regime for the Common Market for Southern and Eastern Africa (COMESA) was launched in January 2013. George Lipimile, Director and Chief Executive Officer of the COMESA Competition Commission, talks to Clifford Chance about the Commission's approach to implementing the new supranational competition regime and intended future reforms.

Interview by Jenine Hulsmann and Alastair Mordaunt of Clifford Chance's Antitrust Practice in London

You have been involved in setting up various competition and intellectual property authorities in Africa. How is the COMESA experience different?

I think the COMESA experience comes at the best time, when we can proudly say that 80% of the COMESA countries have national competition authorities. That makes it easier now to go to the next level, which is a regional competition regime. What we have experienced so far is that member states answered the question of whether we need a regional competition authority with a clear "yes". Member States' experiences of enforcing competition law at a national level means that they understand the need for a regional competition authority, and this helps us a lot in terms of enforcement at the regional level.

So far the difference between enforcing at the national and regional levels is that at the regional level we tend to be more careful because we are dealing with member states. Issues of public interest become more sensitive than at national level, because there is a need for us as a new regional regulator to be accepted, and the only way you can be accepted is to be consistent, to be transparent and to have due process. The institutions which you build and the procedures you implement should be very transparent, with decisions taken at the regional level.

Key points

- Subject to approval of the COMESA Council of Ministers, various reforms of the merger regime will be introduced in November. These may include:
  - filing thresholds for mergers, replacing the current zero thresholds;
  - a stronger requirement for a nexus with the COMESA region; and
  - procedures for parties to seek advice from the Commission on whether to file, without necessarily having to notify and pay the filing fee.
- The introduction of revised filing fees that reflect the size of the notified transaction.
- Amended draft guidelines, including guidance on the merger regime, are likely to be issued for a limited consultation in July.
- A fast track in merger assessment is under consideration, with a likely period of 4-6 weeks for Phase 1 and an additional 90 day Phase 2 period for complex cases.
- The Commission's current thinking is that public interests are relevant only in so far as they reflect the regional objectives of the COMESA Common Market.
- The emphasis of the Commission's approach is to facilitate business, not to frustrate it. A consultative, collaborative approach is encouraged.

The COMESA merger regime only came into force relatively recently. What has been the experience so far for you in this new role?

The merger control regime has been the most controversial. Sometimes I have to remind stakeholders and lawyers that the competition regime is not just about mergers, but also the various other anticompetitive practices that we have to take on. But it is true that the merger regime is particularly important. First, the focus of the COMESA Treaty is to bring economic integration through trade and investment, and mergers have become the most important vehicle for Africa in terms of attracting investment. Mostly this investment is coming through joint ventures and acquisitions. It is rare that you get "green field" investments any more, except in areas like mining, so acquisitions are an important source of investment.

The Commission is based in Malawi and at the moment you have a technical staff of nine, with five support staff, but you also have a mandate to increase the team to the size of 35. Will that happen over a period of years or do you expect to be up to the 35 level in a matter of months?

The staff we have at the moment is sufficient, but as notifications increase they create momentum, so we may need to increase our staff numbers. However, it is important, in a competition authority, that you can deal not only with the in-house expertise that you have, but also that you can contract out to hire experts, and this entails having funding to be able to do that when it is needed.

Do you have a view at the moment of the type of experts you might need to bring in?

Yes. At the moment we have got lawyers and economists, but experts will become important when we have completed initial studies, for example in the telecommunications sector. In those sectors, we will need to be able to hire experts who know the sector very well.

For example, one area where experts can have a role is sector studies. They are important because they tell us things about that sector and how that sector can be improved and they can guide our intervention in those sectors that people expect us to improve.

Would those studies be conducted using formal legislative powers, or would they be voluntary?

Currently, the legislation allows us to carry out sector studies in a sector where we see there are competition problems. Right now, we are looking at the airline sector, because in our region we have a few large airlines and we have seen that the small airlines are failing to grow. We have also seen airlines folding up, like Zambia Airways, which was a national carrier and is no longer there, Malawi Airlines is no longer there and Zimbabwe Airlines, which suspended operations for some time, so we will try to find out what are the problems. Are there competition issues, and if there are how do we deal with them? Or is it other factors which do not concern competition, such as purely financial issues?

We understand that in terms of merger notifications, you have had two notifications so far. How have you found those working in practice?

I call it a success. We opened our doors in January and we have got to that number of notifications in spite of some negative publicity which we received. That shows that our legal practitioners have got a culture of compliance. In most of our countries the problem we have is to develop

this culture of compliance with laws, whether they are domestic or regional.

So we have got two fully notified mergers which came about in January and early February, and we are in pre-notification discussions regarding three other mergers, one of which I think will be notified very soon. But the issue has been why are we discussing these three mergers? There are some areas of the law which are not clear – for example Article 3 of the [COMESA Competition] Regulations, which deals with their scope of application, provides that the Regulations apply to conduct which has an appreciable effect on trade between Member States. Some of the lawyers advising on the COMESA regime think it is up to them to tell their client whether their merger has an appreciable effect or not and therefore does not need to be filed with the Commission. But this cannot be, since lawyers do not have the mandate, tools or the knowledge to make that assessment. That's why we're saying "bring the notification to us first and we will be able to tell you whether it has anticompetitive effects". But we appreciate that once a merger is notified that means that the parties have got to pay the notification fees of up to 500,000 dollars. What if a notification attracts such a fee and then at the end you are told that it has got no appreciable effect? So we are considering amending the Regulations to make it clearer as to when a transaction is likely to have an appreciable effect on trade between Member States.

Then there is also Article 23(3), which says that even when you are acquiring a firm which is outside of the Common Market, then as long as you operate in two member states then you will need to notify. That again has left us in a quandary, because we have to apply the law as it is. We appreciate that the Regulations were crafted about 10 years ago and we are considering amending the Regulations to align them with international best practices.

Finally, we have received some concerns about the amount of merger notification fees payable. So we are looking into that as well.

So those are the issues that I think are holding up a lot of the mergers which are supposed to be notified. I think people are waiting to see how we react, but the important thing is that by November when the next meeting of the Council of Ministers will take place in Kinshasa, Congo, we should be able to go to our constituencies - who are the Member States - and put before them the amendments or the new regulations, which we feel will make the whole process more clear and more user friendly.

At the same time will you issue the guidelines that you recently put out for consultation?

We don't need approval from the Council of Ministers for the guidelines. With the guidelines, we have received comments from various stakeholders, so we hope that in a few weeks time we should have revised versions of the guidelines which we are going to circulate to targeted stakeholders. And then once we put them officially on our website, then those guidelines will be able to assist our relationship with practitioners and other stakeholders.

Depending on the changes to the regulations in November would you then have to think about amending the guidelines again?

Yes we will need to, since the Regulations form the basis of the guidelines. The good thing about competition law is that there are established best practices and a lot of precedents internationally, and you can just go looking to find the appropriate guidance which will suit our circumstances. The principles are there and we have got a lot of goodwill from our stakeholders, especially lawyers. It's a sign of this goodwill that Clifford Chance has invited me to talk to them. It is a sign of goodwill and that you want the whole process to work well.

Can we ask you about timing? The review period for your decision is 120 days. For the two transactions that that have been formally notified do you think you'll use all of that 120 day period, or do you think you'll come in quicker than that?

They will come quicker than that. 120 days is just the maximum. It doesn't mean that we are going to use the full 120 days. We have got too much goodwill, as partners in enforcement. What we are also going to make clear is that we are looking at this 120 day period, because the legislation doesn't specify whether it is working days - which translates into 6 months - or calendar days. 6 months really doesn't augur well for business, as it

means placing a brake on the wheels of industries and bringing them to a halt for 6 months waiting for the approval. I think we agree with you that it is unacceptable. So we are looking into that. How we are going to do it? We are going to introduce a fast track in merger applications, alongside a detailed track. So the first track will carry take about 4-6 weeks, and should apply to a lot of mergers, those which don't give rise to complicated competition concerns. The second track will come to about 90 days. Right now we are looking at the way it is going to work but I think the 90 days may stand alone, so they would be in addition to the phase 1 period.

Introducing these two phases of investigations is a must. We have to do it and it has been supported by the Board [of the COMESA Competition Commission] and it is one of the amendments that we are going to introduce.

You mentioned public interests. Early on, that is likely to be one of the sensitive areas. What sort of public interest issues are you likely to be looking at in the context of mergers?

Taking into account that we are the regional competition authority, the issue is whether in the Common Market, labour and employment issues are relevant to the public interest assessment for merger control purposes. If we have to look at the impact of a merger on employment, we are going to need the consent of Member States, so that is the paradox. So we asked a consultant to look at that and they advised that if you look at national public interests then your decisions will be diluted. So we will look at the objectives of the Common Market and ask whether a public interest affects the objectives of the Common Market. If we said we are going to look at each individual country, then one country will talk more about labour, another one will talk about poverty issues and another will have other priorities, which would be very difficult to reconcile. We need consistency in these things and we need the people we are dealing with to know that when they take this issue to our competition authority, we are thinking always in the same way. So we are going to approach these issues at the regional level vis-a-vis the Common Market objectives.

We understand that you are looking at jurisdictional thresholds at the moment and that you have someone from the EU advising you on what they might be. What can you tell us about that at the moment?

Yes. When we came up with the [current] zero thresholds, that was with the intention that it was only going to be for an initial period. The recommendations we got from the consultant last year were not well received by the Member States. Firstly, they were complicated and secondly they tended not to take into account the interests of our small economies like Comoros and Djibouti. So in that scenario, we said OK let's put the thresholds at zero. It's not a new thing in our region. At a national level, Zambia, Zimbabwe, Kenya are some countries which started with zero thresholds and all mergers were notifiable. It was only after enforcing for some time, that they were able to come up with thresholds. I think Zambia came up with thresholds after 4 or 5 years, same as Zimbabwe. Malawi and Swaziland - up to now they don't have thresholds. Namibia is not a Member State but it's only two years ago that they were asking for a consultant to come and give some guidelines on their thresholds. So it has been a practice in the region that you start at zero, you look at the type of applications you get and then you will be able to determine the level at which they raise competition concerns. So that was the approach and we hope that by November this year we should come up with viable thresholds for both mergers and abuse of dominance.

Is there anything you can tell us at the moment about what the new thresholds might entail? Will there be some nexus to COMESA required, through the target's turnover?

The formula we are going to propose will be very comprehensive. There are going to be changes to Article 23(3) of the Regulations in relation to the position of the target firm. But suffice to say that what is of interest to us is what happens in the Common Market. What is outside the Common Market is not of interest, unless the effect is so much that it affects the structure of the Common Market. But otherwise, in the situation whereby a firm in the Common Market is acquiring a firm outside the Common Market, there are rules that may be relevant to whether that should be

notified, such as rules stating that the proceeds should not come back into the Common Market, so that it can be shown that there isn't much relationship with the Common Market. All those rules will be looked at. At the national level, we found that some countries are applying those laws, so that where, for example, there is an acquisition at national or international level with subsidiaries at national level in the country, they look at issues of control - who controls the subsidiary. So they have come up with a lot of rules and when we come to draw up our threshold guidelines all these issues will be taken into account.

Because of the terms of reference, it is quite imperative that we have something very comprehensive. And fortunately it appears that in the EU after having a merger control regime in existence for some time, they know already what the problems are, and they have addressed those problems.

You mentioned the EU, and you have been very active in engaging in various different organisations – not just the EU, but also the OECD and the ICN. Do you expect to be an active participant in those broader network competition networks?

Yes we intend to participate more in these international competition organisations. There are so many advantages which come with that, such as our visibility. But most important are the discussions which go on in those organisations and the networking. You meet people who are ready to assist you and we want ourselves to start organising events of that nature back home, so that we have more participation of our people. Competition law practitioners can have an important role in that. They know the information that is put in the filing and the documentation that goes with it, and we may not know the information that is "behind the doors" and which determines how important the transaction is. You can say that this transaction will bring employment of 1500 people and that is a statement on paper. Nobody would know how you came up with that and how the whole process works. But when you come to our events and indicate to us what are the commercial imperatives for your transactions, and how these things are structured, that becomes very important to us. So that's why we participate in these international events and that's why we seek views from people in practice also. You know enforcement of competition law is not just for competition authorities. What you as practitioners are doing is also enforcing competition law. So we should agree at least that both of us we are doing the same thing.

Do you have any practical tips for our clients when they are thinking about doing a transaction and investment in the COMESA region which will require a filing?

The first tip is that the COMESA Competition Commission is there to facilitate business not frustrate business. Secondly, we need full disclosure of the transaction so that we can expedite the assessment. Finally, let's construct this regional competition law regime together. It's a consultative approach, so let's construct it together.

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For more information on the COMESA Merger Control Regime, see our February 2013 briefing, available at:

http://www.cliffordchance.com/publicationviews/publications/2013/02/the_new_comesa_mergercontrolregimeallfiling.html

If you would like to receive copies of our other Antitrust publications on these topic, please email: **lisa.bunker@cliffordchance.com**

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