COMESA MERGER ASSESSMENT GUIDELINES: WHAT YOU NEED TO KNOW

By Paul Cleland, Director and Maphanga Maseko, Associate

LEGAL BRIEF
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The COMESA Competition Regulations ("Regulations") came into force in January 2013 introducing, amongst other things, a regional merger control regime covering the COMESA Member States.¹

INTRODUCTION

The Regulations gave rise to uncertainties regarding the interpretation and application of the merger control provisions, making it difficult to advise firms engaging in merger and acquisition activity in the COMESA region. These difficulties were compounded by the lack of notification thresholds, which in other merger control jurisdictions are used to exclude non-material transactions from merger notification requirements.

On 31 October 2014, the COMESA Competition Commission ("Commission") published formal Merger Assessment Guidelines ("Guidelines"). They address jurisdictional matters, set out a procedure for obtaining transaction-specific guidance from the Commission (through pre-notification and comfort letter procedures) and set out the Commission’s substantive merger assessment standards. They are a vast improvement on earlier drafts of the Guidelines.

The Guidelines also offer an amnesty period for previously non-notified mergers.

AFFECTED TRANSACTIONS

In stark contrast to the Regulations, the Guidelines recognise that mergers can only have a “regional dimension” if the parties to a merger have material operations within the COMESA region and that those operations are “supra-national” in nature (i.e. they are not limited to a particular Member State only).

Mergers will now be notifiable if the following three requirements are met:

> The target firm must have an annual turnover or have assets of at least US$5 million in one Member State.

AND

> Either the acquiring firm or the target firm must derive annual turnover or have assets of at least US$5 million in two or more Member States.

AND

> Each of the acquiring firm and the target firm must derive at least one third of their annual COMESA turnover from, or have at least one third of their COMESA assets in, two or more Member States.

¹ COMESA comprises 19 Member States, namely: Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.
TRADE BETWEEN MEMBER STATES

Additionally, the merger must have an “appreciable effect on trade between Member States”. In this regard, the third requirement above effectively operates as a “safe harbour”: if the parties do not meet this criterion, the merger cannot have an appreciable effect on trade between Member States and it will not be notifiable to the Commission. However, the fact that the parties do meet this criterion (and the other two criteria) does not mean that the merger will have an appreciable effect on trade between Member States. For example, the parties could meet the third requirement while not competing in the same markets or in vertically related markets. Such mergers would typically not raise competition concerns. To this end, the Guidelines provide for a “comfort letter” procedure in terms of which parties can request the Commission to express a view as to whether the merger meets the appreciable effect test without a formal notification.

The Guidelines do not stipulate that if the parties meet the three criteria above, they must notify a merger unless the Commission issues a comfort letter. Accordingly, it appears that the parties may conduct their own assessment as to whether the appreciable effect test is met.

As before, the COMESA merger notification requirements are non-suspensory: provided that the parties comply with their notification requirements, they may proceed with implementation before the Commission issues its decision (if they are willing to take the risk of a subsequent prohibition or conditional approval). The parties must notify their merger within 30 days of their “decision to merge”. The Guidelines clarify that a decision to merge occurs either as a result of the conclusion of a definitive and binding agreement to carry out the merger, or the announcement of a public bid in the case of listed shares.

AMNESTY PERIOD FOR PREVIOUS NON-NOTIFICATIONS

An important provision is the introduction of a 90-day amnesty period for parties that have failed to notify previous mergers to the Commission. Provided that such non-notification is remedied by a merger notification to the Commission before 29 January 2015, the Commission will not seek penalties for the earlier failure to comply.

The amnesty appears to be a blanket amnesty for all non-notified mergers irrespective of the reasons therefor.

CONCEPT OF CONTROL

The Guidelines provide useful clarity in regard to the various forms of control that may bring about a merger and they adopt principles which will be familiar to anyone who has experience with the European Commission’s interpretation of control.

Interestingly, the Guidelines adopt an approach which excludes many transactions that in South Africa would be regarded as mergers, and is thus more business-friendly to such transactions: In relation to “full-function” joint ventures and other contractual arrangements (such as management agreements), such arrangements constitute mergers only where the joint venture or the contract will be for a “long duration”, which the Guidelines indicate must typically be for at least five years. Accordingly, there must be some relative permanence to the arrangement, a pragmatic approach which has not as yet been adopted in South Africa.

There are exceptions for internal restructurings, control rights exercised by liquidators and even acquisitions by “interim buyers” with a view to onward sale within a period of less than one year (subject to certain provisos). The Guidelines also contemplate that the Commission may, on a case-by-case basis, exempt mergers which arise as a result of financing transactions (which presumably will apply to banks and financial services providers seeking to exercise security rights). The need to seek such an exemption on a case-by-case basis is unfortunate, as such transactions often need to occur in urgent circumstances.

Finally, the Guidelines adopt the “decisive influence” standard for joint and negative control situations, which is consistent with the European Commission approach and has, in some instances, proven not to capture certain transactions that are caught by the “material influence” standard adopted by some national merger control regimes (e.g. the United Kingdom and South Africa).

COMFORT LETTERS AND PRE-NOTIFICATION PROCESSES

The Commission has already engaged in pre-notification meetings and issued comfort letters in response for requests as to whether specific transactions meet the notification requirements. The Guidelines seek to formalise this process. Notably, they recognise confidentiality of information disclosed in those interactions and they commit the Commission to a maximum response time for comfort letter requests (21 days for a response or a request for further information).

INVESTIGATION TIME PERIODS

The Guidelines clarify that the time periods referred to for the Commission’s investigation are now 120 calendar rather than 120 business days. Within this overall time period, the Commission will now adopt a Phase 1 and Phase 2 approach to mergers: only mergers likely to raise substantive concerns (or which indicate a need for extensive evidentiary enquiries to examine potential concerns) will be classed as Phase 2 mergers. Mergers resolved at Phase 1 should be cleared within 45 calendar days.

SUBSTANTIVE ANALYSIS

The Guidelines also set out the Commission’s approach to the substantive analysis of horizontal and vertical mergers. This provides useful guidance to parties preparing COMESA merger filings as to how the Commission will view the competition effects of a merger.

FILING FEES

The notification fee payable to the Commission has been a contentious issue as the fee is significant: 0.5% of the merging parties’ aggregate revenue within the COMESA Member States, or a maximum of US $500,000. The Guidelines do not address this issue but it is understood that a COMESA Council meeting is due to take place early in 2015 which should hopefully address this.

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ABOUT THE AUTHORS

PAUL CLELAND
Title: Director
Office: Johannesburg
Direct line: +27 (0)11 535 8239
Email: pcleland@werksmans.com

Paul Cleland is a Director at Werksmans Attorneys in the Competition practice area and the Media & Communications practice area.

He specialises in obtaining approval for mergers and takeovers from the competition authorities, conducting compliance audits and developing compliance programmes - including search & seizure (dawn raid) guidelines and “mock” dawn raid preparedness. Paul also advises on alleged anti-competitive conduct e.g. cartels, abuse of dominant position and price discrimination.


Paul is named as a recommended lawyer in Competition by the Legal500 (2012) and an up-and-coming lawyer in Competition by Chambers Global: The World’s Leading Lawyers for Business (2013).

He holds a BA (LLB) from the University of the Witwatersrand.

MAPHANGA MASEKO
Title: Associate
Office: Johannesburg
Direct line: +27 (0)11 535 8111
Email: mmaseko@werksmans.com

Maphanga Maseko joined Werksmans Attorneys as a Candidate Attorney in 2011 and in 2013 became an Associate in the firm’s Competition practice area.

He specialises in various aspects of competition/anti-trust litigation, including advising on obtaining approval of mergers and takeovers from the competition authorities, laying and defending complaints of alleged anti-competitive conduct e.g. cartels, abuse of dominant position and price discrimination, and defending individuals against allegations of being participants in cartels.

Maphanga was part of a team assisting SANRAL to recover possible damages in the High Court from the construction firms that participated in cartels.


Maphanga holds an LLB from the University of South Africa.
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