

COMESA Merger Control

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Presentation Outline

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- Rational for regional merger control
- Benefits of Regional Merger Control
- Gun jumping
- Engagement with Member States in merger assessment
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Introduction and Background

- The COMESA Competition Commission (“the **Commission**”) is a regional body established under Article 6 of the COMESA Competition Regulations (“**the Regulations**”).
- As stipulated under Article 2, the Regulations aim to:
 - ✓ promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operations of market, thereby enhancing the welfare of the consumers in the Common Market,
 - ✓ protect consumers against offensive conduct by market actors, and
 - ✓ **Among the role of the Commission is to regulation cross-border mergers in the Common Market**

Rational for Merger Regulation

- The basis for competition enforcement, including merger regulation in COMESA is anchored under the COMESA Treaty,

Article 55(1) of the Treaty provides - “*Member States agree that any practice which negates the objective of free and liberalized trade shall be prohibited. To this end, the Member States agree to prohibit any agreement between undertakings or concerted practices which has its objective or effect the prevention, restriction or distortion of competition within the Common Market.*”

- Anti-competition mergers have the potential to prevent, restrict or distort competition, hence the need for regulation.

Rational for Merger Regulation

- To ensure that these mergers do not have a negative effect on trade between Member States which may erode the welfare of consumers in the Common Market.
- To identify and remedy/prohibit mergers that result in a significant lessening of competition on the market through the creation or strengthening of market power
- To accomplish goal #2 without unduly obstructing mergers that have a neutral or positive effect on competition and benefit consumers

Benefits of Regional Merger Control

- The Commission has jurisdiction over **cross-border** mergers which meet the prescribed thresholds.
- Provides a **one-stop shop** for mergers that meet regional dimension and prescribed thresholds.
- **Eliminates multiple filings**, thus leading to reduced cost of doing business, increased foreign direct investment and business opportunities in the Common Market.
- Limits incentives for lobbying by special interest groups, ensuring fairness and equity in the marketplace.
- Merger fees shared with national competition authorities to improve national competition laws and build capacity

Collaboration in Merger Review

- In its assessment of mergers and acquisitions, the Commission takes a robust consultative approach pursuant to Article 26 of the Regulations including:
 - Publication of a Notice calling on any interested persons to make representations (***Published for a Period of 21 days***)
 - Commission's website and Social media platforms
 - Notification to all affected Member States (***Member States given 30 days to respond***)
- Cooperation with competition authorities outside the Common Market.
- Cooperation with other agencies established to regulate or recognised by COMESA to monitor and regulate any specific sector

Collaboration in Merger Review

- Affected Member State – where party/parties operate in the territory – derive turnover or hold assets
- Notification takes the form of a letter and sharing of merger filing documents upon receipt of confidentiality waivers
- Member State has to give same confidentiality treatment to the merger filing documents as the Commission
- Notification letter and relevant notification documents are translated into the official language of the Member State
- Member State invited to provide its views within 30 days of the notification

Collaboration in Merger Review

- National competition agency is a key stakeholder to assist the Commission's information gathering in relation to notified mergers.
 - Can be useful in providing contact details of other stakeholders
 - Can facilitate meetings – physical or virtual
 - Can be instrumental in gathering information from relevant Ministries, regulatory bodies, consumer protection organizations, competitors and customers,
- In relation to mergers raising competition concerns:
 - National competition agency's input is key in the formulation of remedies.

Collaboration in Merger Review

- National competition agency knows best the competition dynamics of the affected sector within its territory.
- Member State conducts an assessment of the competitive effects of the notified transaction within its own merger analytical framework
 - Assess effects of the notified transaction within its own territory
 - Assistance to collect views of stakeholders in its territory
 - Views of how the transaction may affect Common Market are welcomed.

Collaboration in Merger Review

- Submissions of the Member State are incorporated in the Commission's report to the Committee Responsible of Initial Determinations
- Open communication channel between the COMESA Competition Commission and the National Competition agency in relation to a notified merger
 - Clarification on any aspects of the notification and assessment
 - Open discussion on any competition concern identified and proposed remedies

Collaboration in Merger Review

- Referral mechanism
 - **Art 24(8)** – requested by a Member State to assess the merger under national competition laws where the transaction is likely to disproportionately reduce competition to a material extent in the Member State or any part of it
 - Granting of referral at the discretion of the Commission

Statistics on Mergers

Statistics

- Close to **500 Mergers** assessed since inception
- Since inception, in **35** transactions, the Commission attached conditions to the merger approval to remedy competitions concerns which were likely to arise post-merger. This included a divestiture requirement in **1** merger transaction.
- Since inception, the Commission has prohibited **1** merger transaction
- Most mergers reviewed by the Commission affected Kenya, Zambia, Mauritius, Zimbabwe, Uganda and DRC.
- 6 merger referrals issued since inception
- 63 Comfort letters granted since inception

Merger Case Studies

■ SAS/KPA/KNSL

- SAS, wholly owned subsidiary of MSC. Active in container liner shipping services, sea freight forwarding services and in-land transportation services.
- KPA - Kenyan State-owned organisation responsible for the operation and management of all the port terminals in Kenya.
- KNSL – subsidiary of KPA and offers in-land transportation services and freight forwarding services, which activities are negligible at the moment.
- Joint Venture between SAS, KPA and KNSL – MSC increase its shareholding in KNSL and will operate Container Terminal 2 (CT2) at Mombasa Port.
- Mombasa Port – two terminals where CT 2 more modern and efficient.
- Provision of container terminal services is vertically linked to the provision of container liner shipping services.
- Transaction leads to competition and public interest concerns and is likely to have an appreciable effect on trade between MS.

Note: The Commission collaborated closely with the Competition Authority of Kenya during the merger investigation

Merger Case Studies

- **Akzo Nobel NV/Kansai Plascon East Africa Proprietary Limited/Kansai Plascon Africa Limited (2 September 2023)**
 - 1st merger prohibition by the Commission
 - Parties were active in industrial and decorative coatings markets
 - No competition concerns identified in the industrial coatings markets.
 - Concerns identified in the decorative coatings market the following remedies were imposed:
 - Remedies included,
 - *in Malawi parties were required to continue production at the manufacturing plant in Malawi for 3 years*
 - *in the geographic cluster affecting Burundi, Kenya, Rwanda and Uganda, parties were to divest of the Sadolin brand within 6 months of the merger approval*
 - *in each of Eswatini, Zambia and Zimbabwe the merger was prohibited*
- ***Note: Notwithstanding the remedies imposed by the Commission, the merger collapsed as such the Commission not enforcing the remedies***

Milestones and Achievements

Gun jumping Cases

- Obligation to notify a Merger - the Regulations
 - ✓ Article 24(1) of the Regulations requires the notification “***...as soon as it is practicable but in no event later than 30 days of the parties’ decision to merge...***”.
 - ✓ Any merger carried out in contravention of Art 24(1) of the Regulations shall be null and void
 - ✓ Article 24(5) of the Regulations empowers the Commission to impose a penalty of not more than ten percent of either or both of the merging parties’ annual turnover, if parties contravened Article 24(1).
- COMESA Cases of Gun jumping:
 - [Airtel-Helios-Merger-Decision](#) – Parties fined **USD 102,101.765**
 - [SABIC-ETG-Merger](#)- Parties fined **USD 314,913.56**

Questions

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