

COMESA - MERGER CONTROL QUICK FACTS

1. WHICH STATES ARE MEMBER STATES OF THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA (COMESA)?



3. WHAT TRANSACTIONS REQUIRE MANDATORY NOTIFICATION TO THE CCC?



A “merger” (defined 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) must be notified to the CCC where both a regional dimension test and prescribed financial thresholds are met.

A merger meets the regional dimension test if both the acquiring and the target firm or either the acquiring or target firm operate in two or more COMESA member states. The Merger Guidelines, however, provide that a merger will only be notifiable if:

- at least one merging party operates in two or more member states (and an undertaking ‘operates’ in a member state if it has annual turnover in that member state exceeding USD 5 million);
- a target undertaking operates in a member state; and
- 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.

The financial thresholds are met where:

- the combined annual turnover or value of assets (whichever is higher) in the common market of all parties to a merger equals or exceeds USD 50 million; and
- the annual turnover or value of assets (whichever is higher) in the common market of each of at least two of the parties to a merger equals or exceeds USD 10 million, unless each of the parties to a merger achieves at least two-thirds of its aggregate turnover or assets in the common market within one and the same member state.

4. MAY THE PARTIES IMPLEMENT BEFORE MERGER APPROVAL IS PROVIDED BY THE CCC?

The COMESA merger control regime is non-suspensory and parties may implement prior to approval being provided.

2. IS THERE REGIONAL COMPETITION LAW REGULATING MERGER CONTROL?



- YES

The COMESA Competition Regulations and the COMESA Competition Rules. The legislation is enforced by the COMESA Competition Commission (CCC). Merger Guidelines have also been published. Enforcement commenced on 14 January 2013.

5. WHAT ARE THE RISKS OF NOT NOTIFYING?

A merger that has not been notified to the CCC will have no legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger will be legally enforceable. The CCC may also impose a financial penalty of up to 10% of either or both of the merging parties' annual turnovers in the common market.

6. WHAT ARE THE NOTIFICATION FEES?

0.1% of the merging parties' combined annual turnover or combined value of assets in the common market (whichever is higher), capped at USD 200,000.

7. WHEN MUST A MERGER BE NOTIFIED?



Within 30 calendar days of the parties' "decision to merge". The Merger Guidelines provide that a 'decision to merge' must either be:

- a joint decision taken by the merging parties and so comprise the conclusion of a definitive, legally binding agreement to carry out the merger (which may or may not be subject to conditions precedent); or
- the announcement of a public bid in the case of publicly traded securities.

8. WHAT IS THE CCC'S TIMEFRAME FOR REVIEW OF A MERGER?



The CCC has 120 calendar days after receiving a merger notification within which to finalise its decision. This period may be extended.

9. ARE NOTIFICATIONS TO THE COMESA MEMBER STATES WITH DOMESTIC REGULATORS STILL REQUIRED IF THE CCC IS NOTIFIED?



Although a notification to the CCC should negate the need to notify with a member state's domestic regulator, there is still disagreement amongst member states:

- some have not expressly addressed the issue;
- some have expressly stated that domestic notifications should be made in addition to the COMESA notification; and
- some have issued 'acceptance letters' stating that domestic notifications are not required in addition to a COMESA notification.

10. ARE THERE CIRCUMSTANCES IN WHICH EXEMPTIONS FROM THE MERGER NOTIFICATION REQUIREMENTS MAY BE GRANTED?

The Merger Guidelines provide that the CCC may issue "comfort letters" (where parties can apply for an 'exemption' from mandatory notification which may be granted at the CCC's discretion). Exemptions may be granted where the merger would not have an appreciable effect on trade between member states or restrict competition in the common market.

JOHANNESBURG

90 Rivonia Road, Sandton, Johannesburg, 2196
PO Box 61771, Marshalltown, Johannesburg, 2107,
South Africa

t: +27 11 530 5000

www.webberwentzel.com

CAPE TOWN

15th Floor, Convention Tower, Heerengracht, Foreshore,
Cape Town, 8001
PO Box 3667, Cape Town, 8000, South Africa

t: +27 21 431 7000