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Regional Competition authorities demand action irrespective of COVID-19

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Introduction

1. Undoubtedly economic uncertainty has been sparked worldwide as governments have ordered their countries into lockdown and it is clear that the COVID-19 pandemic continues to change our lives rapidly and significantly. Merger control has not escaped the confinement measures which have been implemented to fight the pandemic. But this does not mean that the need for regulatory approval prior to the implementation of a notifiable merger has disappeared along with punitive consequences for not notifying the relevant authorities and obtaining approval.
2. A number of competition authorities across the world have put measures in place which affect merger transaction review processes. In terms of merger transactions for which regulatory approval is required, certain authorities have requested that parties delay notifying mergers for the duration of the pandemic and others have in fact completely closed for the duration of the country specific lockdown.[1]
3. A complete standstill in merger control, a prerequisite to qualifying merger activity, can only contribute to economic decline and hardship. As the duration and seriousness of the Covid-19 pandemic varies from jurisdiction to jurisdiction, it is vital that authorities find solutions to this predicament that enables them to protect, as much as possible, the functioning of economic activity in jurisdictions over which they exercise control.
4. Merger control regimes have been introduced across Africa at an unprecedented rate in recent years. In addition to the development of numerous domestic merger control laws, there are a number of regional merger control regimes on the African continent which have developed of late. With more countries in Africa adopting such approaches to merger control, compliance therewith must be front of mind when conducting business, and investing, in Africa.
5. In principle, regional authorities act as a "one-stop-shop" for purposes of merger approval and ought to simplify the merger control process for multi-jurisdictional transactions. While some African merger authorities are young and could be unexperienced, engaging one regional authority could present efficiencies. This is an important consideration for multi-jurisdictional transactions. As is clear from the below, merger control in Africa is not currently at a complete stand still, and regional authorities appear to remain operational on the African continent. However, the question that remains to be answered is if they will continue to remain open if infections continue to rise in the countries in which the regional authorities operate.

Common Market for Eastern and Southern Africa ("COMESA")

6. The Common Market for Eastern and Southern Africa is a free-trade area comprising Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, eSwatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Somalia, Tunisia, Uganda, Zambia and Zimbabwe.
7. On the heels of the COVID-19 pandemic the COMESA Competition Commission ("CCC"), in terms of the COMESA Competition Regulations (2004) ("CCC Regulations") and the COMESA Competition Rules (2004) ("CCC Rules"), issued interim processes for merger reviews. Some of the normally applicable CCC Regulations and CCC Rules have been relaxed to accommodate companies engaged in merger negotiations and transactions during the Covid-19 pandemic. Examples of the CCC Rules and CCC Regulations that have been relaxed are as follows:
7.1 The CCC has advised merging parties who wish to notify and file mergers during the period where specific restrictions are in place as a result of COVID-19, to do so electronically. The CCC has also indicated that all consultations and meetings between the authority and parties will be held through teleconferencing facilities. Under normal circumstances, parties submitting merger notifications to COMESA are expected to submit hard copies to the CCC within 7 days. This will not be the case during the COVID-19 crisis period. Electronic filing will be accepted and deemed sufficient. Parties may however be required to submit the hardcopies on a future date when it becomes possible to do so.

7.2 The CCC has also relaxed the requirement that notifiable mergers are required to be notified by no later than 30 days of the decision to merge. It is accepted by the CCC that that due to restrictions imposed by various governments, that it might be difficult to gather all the information required in terms of the merger process, to enable parties to complete and submit the merger notification within 30 days. What is required during COVID-19 is an initial engagement, this being a conference call, between the CCC and merging parties and this will be regarded as the commencement of the notification process. Following an initial engagement, the merger notification process will be considered to be complete once all the required information has been filed by parties.

7.3 Mergers before the CCC are normally dealt with within a 120 day period. However, one must realise this this could prove to be problematic in the current circumstances. As such the CCC, in those instances where it might not be practical to make a decision on a merger within 120 days after receiving a notification as required by Article 25(1) of the CCC Regulations, indicated that it may, on a case-by-case basis, extend the 120 day timeframe.

8. It remains the responsibility of the merging parties to ensure that the CCC is aware of any merger transactions. Where parties fail to notify the merger, they will in terms of Article 24(3) of the CCC Regulations bear the risk of incurring a penalty not exceeding 10% of either or both of the merging parties annual turnover in the common market for the preceding financial year.
9. It should however, be kept in mind that the COMESA merger control regime is non-suspensory. This means that parties may implement their merger before approval is granted and after a notification has been made. It does however bring about a risk that will have to be addressed, should the transaction not be approved.

Central African Economic and Monetary Community ("CEMAC")

10. CEMAC is an economic community of the African Union for the promotion of regional economic cooperation in central Africa. The members of CEMAC are Cameroon, Chad, Republic of Congo, Gabon, Equatorial Guinea and Central African Republic.
11. In terms of Article 9 of the regulation CEMAC n°1/99 UEAC-CM-639 dated 25 June 1999, amended by, *inter alia*, regulation n°06/19-UEAC-639-CM-33 dated 7 April 2019 ("**CEMAC Regulations**") all mergers must be notified to the Regional Council.
12. The CEMAC Competition Commission ("**CEMAC Commission**") based in Malabo, Equatorial Guinea has not issued any official COVID-19 guidance to date but is still operating and merger notifications can still be submitted at their office. Under normal circumstances the CEMAC Commission only accepts hard copies of merger notifications and require a specific number of hard copies. It would however be arguable that electronic notifications ought to be accepted for the duration of the COVID-19 pandemic. It has however been confirmed by the CEMAC that courier deliveries are accepted still.
13. There is no prescribed timeframe as to when parties should notify the CEMAC Commission after they have taken a decision to merge. It is however advisable that merging parties should notify the merger as soon as possible from the time when the decision is taken so as to mitigate the chances of reproach from the CEMAC Commission. The CEMAC Commission will inform the parties concerned of its preliminary decision within 2 months after receiving a notification as required by Article 10 of the CEMAC Regulations. The Commission will thereafter have 5 months to make a final decision. Should no communication be forthcoming from the CEMAC Commission, deemed approval will come about.
14. It is essential for parties to notify the CEMAC Commission of their decision to merge. This is because parties who "jump the gun" by implementing mergers without prior approval will have to bear the consequence of an imposed fine in terms of Article 37 of the CEMAC Regulations. The fine includes an amount not exceeding 5% of the merging parties turnover excluding taxes realized in the common market during the last financial year or 75% of the profit realized during the prohibited operation or alternatively, a fine of an amount not exceeding 5% of the duty-free business carried out in the common market during the last financial year closed or 75% of the Profit in the course of the merger prohibited.
15. It should be noted that a CEMAC merger control regime is suspensory. Mergers may therefore not be implemented in the CEMAC countries until approval is granted by the Regional Council.[2]

Economic Community of Western African States ("ECOWAS")

16. ECOWAS is a regional political and economic union comprising of 15 member states, namely Benin, Burkina-Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Ghana, Guinee Bissau, Guinea, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.
17. There is generally no express merger notification requirement for member states. However, Article 7(3) of the of Supplementary Act A/SA.1/06/08 on the establishment and function of the regional competition authority for ECOWAS ("**Supplementary Act**"), adopting community competition rules and the modalities of their application within ECOWAS, suggests that merger notifications are only required for prohibited transactions that substantially reduce competition, but are still in the public interest.
18. While it remains unclear what the position is regarding merger control in the ECOWAS region during the period of the Covid-19 pandemic, one would assume that mergers cannot be notified because Nigeria, which is where the ECOWAS head office is located has been under lockdown since 30 March 2020.

19. It should be noted that the ECOWAS merger control regime is non-suspensory. This means that parties need not await merger approval prior to closing and implementing a transaction but the risk of unscrambling a merger that is prohibited must be taken into consideration.

West African Economic and Monetary Union ("WAEMU")

20. WAEMU is an economic community comprising of 8 member states, namely Benin, Burkina Faso, Côte D'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo. The head office is located at Ouagadougou in Burkina Faso.
21. Most of the WAEMU states, including Burkina Faso have only implemented night-time curfew's/restrictions. While WAEMU has not released any guidance statements amidst the COVID-19 pandemic (other than those that are hygiene related) we can deduce that they remain operational.[3]
22. As WAEMU has a voluntary and non-suspensory merger notification regime, parties are not required to notify the WAEMU Commission of a proposed merger or to obtain clearance prior to completion of the merger. This means that there will be no adverse consequences should the merging parties fail to notify a merger.
23. It should be noted that Article 4(1) of the Regulation No.02/2002/CM/UEMOA of May 23, 2002 ("**WAEMU Regulations**") prohibits transactions which seek to abuse dominant positions. As a result, the WAEMU Commission may order merger parties to stop the transaction if they are of the opinion that it violates Article 4(1). As a cautionary mechanism, where parties believe that their proposed merger raises potential competition concerns, the parties should notify the WAEMU Commission of the merger and await informal clearance before they complete the merger.
24. In terms of the WAEMU Regulations, the WAEMU Commission must respond within six months after the filing of the merger, either by granting the requested clearance or by communicating objections to the parties if the transaction raises serious competition concerns. In the latter case, the WAEMU Commission must issue a final decision on the merger within 12 months.

Conclusion

25. Re-aligning merger processes to ensure that merger control is not completely at a standstill during this time is to be applauded. It appears that COMESA is the only regional competition authority who has actively taken such steps. It is hoped that other African regional authorities will adopt similar approaches or put measures in place to allow for continued operation, albeit socially distanced. Such an approach supports economic activity and it is in the interest of growth and investment. The financial health of several firms are likely to be significantly impacted due to the current economic environment which is suffering under the negative consequences of the Covid-19 pandemic. Continued merger activity is a necessary tool to ensure that failing or distressed firms, amongst others, survive to the extent possible. This will be important to ensure that employment opportunities are retained and that GDP growth, if only after the passing of COVID-19, is supported.

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[1] The Botswana Competition Authority indicated that the Authority will shut down from 2 April during which period no merger notifications will be accepted.

[2] 'Mergers and Acquisitions under ECOWAS Competition Law' The Africa Policy Journal 12 November 2019 available at https://apj.hkspublications.org/mergers-and-acquisitions-under-ecowas-competition-law/, accessed on 14 April 2020.

[3] Kwasi Gyamfi Asiedu 'West African countries are trying to shut down to contain the coronavirus spread' Quartz Africa 29 March 2020 available at https://qz.com/africa/1827789/coronavirus-ghana-senegal-burkina-faso-shut-down/, accessed on 14 March 2020.



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