New Regional African Merger Regulation: Impact on Private Equity

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The impact of new merger regulations enforced by the Competition Commission (CCC) of the Common Market for Eastern and Southern Africa (COMESA) must be considered by PE investors eyeing potential deals in the COMESA countries of Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, South Sudan, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

The CCC is a regional competition authority created by treaty, which is tasked with the review of all mergers that have a regional dimension in the COMESA countries.

The CCC began merger reviews in January 2013 and by February 2014 had reviewed more than 25 merger filings. The regulations provide that a “merger” is defined as the direct or indirect acquisition or establishment of a “controlling interest” in the whole, or part, of the business of a competitor, customer or other person. The definition includes a merger by way of amalgamation or combination with another entity or the purchase or lease of its shares or assets. Investors should note that an acquisition of joint control, or even the acquisition of a minority shareholding together with veto rights over important strategic decisions of the target company, is likely to be viewed as a notifiable transaction.

This accords with the approach adopted in several of the COMESA member states, which have established merger control regimes. If one of the firms involved operate in two or more COMESA member states, the transaction must be notified to the CCC. For example, last year the CCC cleared the acquisition of Egyptian automotive fuel companies Shell Marketing and Shell CNG by Total Outre Mer SA, which operates in several other COMESA states.

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Even investments directly into companies outside of COMESA may be notifiable if the target business also operates in more than one COMESA state. Acquisitions by a joint venture of control over the assets or business of a competitor operating in two or more COMESA states would similarly require notification. However, ‘greenfields’ or start-up joint ventures are unlikely to trigger a filing if there is no acquisition involved, although JV partners need to be careful that they do not contravene any restrictions set out in the COMESA competition regulations on competitors, such as the prohibition on price fixing.

There is currently no financial threshold for notification, so all mergers with a regional dimension must be notified, even if the companies involved are relatively small. Filing fees are steep (a maximum of US$500,000).

Notifications to the CCC must be filed no later than 30 days after the parties decide to merge. Parties do not have to wait for clearance before they can implement their transaction, but there is the risk that the merger will need to be unscrambled if it is prohibited, or the parties may have to comply with unanticipated conditions imposed on the merger by the CCC.

The intention is that the CCC is a 'one-stop-shop' for merger filings, like the European Commission; if a merger is filed with the CCC, it does not also need to be notified with competition regulators in any of the individual member states. This will avoid the cost and inconvenience associated with notifying mergers in multiple jurisdictions by different authorities. However, some local counsel, particularly in Zambia and Kenya, have expressed concerns about whether, in the absence of an amendment to their local legislation, parties can avoid filing locally if they have filed with the CCC. However, no fines for failing to notify regulators in an individual COMESA state have been imposed when a CCC filing has been made. It is advisable for parties’ counsel to communicate directly with the regulators in each state where a filing might otherwise be necessary, to confirm their position.

To date, the CCC has not levied any fines for failing to notify a merger and has adopted an approach of active engagement to encourage companies to file, rather than pursuing regulatory measures for non-compliance.

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It is also worth noting that some African states with developed competition law regimes, including South Africa, Namibia and Tanzania, are not part of COMESA. Accordingly, it may still be necessary to file mergers with the CCC as well as other African jurisdictions. This needs to be carefully coordinated by the competition law advisors leading the filing process and built into the transaction timetable.

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