



COMESA: A Competition  
Regime for the Common  
Market for Eastern and  
Southern Africa

Detail from sea Hook by Trevor Bell

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# COMESA Competition Regime - Open for Business

## 1. INTRODUCTION

Following a decade in the making, the COMESA Competition Commission (the “CCC”) finally opened its doors for business in January 2013. Charged with enforcing the supranational competition regime of the Common Market for Eastern and Southern Africa (“COMESA”), the first few months of the CCC’s operational existence have seen challenges to its legal standing and questions raised over key practice issues. This article provides a brief overview of the regime and the impact it may be expected to have on international business.

## 2. COMPETITION IN COMESA

COMESA is a supranational organisation of nineteen member states.<sup>1</sup> In 2004, the COMESA Competition Regulations and Competition Rules were adopted to prohibit anti-competitive practices within the region, to establish a merger control regime for cross-border cases and to address other competition law and consumer protection matters.

Although the competition regime was adopted nearly a decade ago, the implementing legislation required for its enforcement was only adopted towards the end of 2012. Two competition bodies have been established for these purposes:

- The CCC is responsible for investigating anti-competitive practices and reviewing merger control filings.
- The Board of Commissioners is intended to make rulings, impose remedies and hear appeals against decisions of the CCC.

Currently, only a minority of the COMESA Member States have operational national competition laws. The opening for business should therefore introduce a degree of active enforcement in countries where none previously existed. The framework envisages that the CCC will have primary jurisdiction over all matters with a regional dimension. However, a number of Member States have already sought to challenge whether COMESA can oust national jurisdiction in cases where the national permitting legislation is not yet in place<sup>2</sup>. The fact that some Member States do not recognise the jurisdiction of the CCC is likely to pose a challenge to the enforcement of the new regime.

## 3. ANTITRUST

The CCC has jurisdiction to take enforcement action against anti-competitive practices and behaviour with a cross-border or regional dimension. COMESA’s antitrust provisions are similar to those in effect in a number of jurisdictions around the world, including the European Union:

<sup>1</sup> Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

<sup>2</sup> The COMESA Treaty provides that all parties to it are bound by all the regulations made under it including the Competition Regulations. However, there is doubt as to whether the Competition Regulations have been domesticated by all Member States as is required under the Competition Regulations.

- **Restrictive Business Practices:** agreements and practices which have as their object or effect the prevention, restriction or distortion of competition within COMESA are generally prohibited and declared void. However, such practices may be exempted where they fulfil certain conditions such as promoting technical or economic progress while allowing consumers a fair share of the resulting benefit.
- **Prohibited Practices:** it is an offence to engage in hardcore competition practices such as price fixing agreements, market sharing, collusive tendering and bid rigging.
- **Abuse of dominant position:** an undertaking will be considered to hold a dominant position where it is able to operate without effective constraints from its competitors or potential competitors. An abuse of such position may consist of various exploitative and exclusionary practices, including: foreclosing market entry; imposing unfair prices; and limiting production.
- **Authorisations:** undertakings may apply to the CCC for authorisation of potentially anti-competitive activities on the basis that the public benefits outweigh the anti-competitive detriment. Authorisations may be granted in respect of restrictive business practices, abuses of dominant position and prohibited practices.

The CCC is empowered to order parties to cease infringing activities, impose fines and take such other action as is necessary to address the illegal conduct. Maximum penalties that may be imposed vary from US\$300,000 to US\$750,000 depending on the infringement (with the highest penalties reserved for prohibited practices). Any penalties imposed will be subject to a cap of 10% of annual turnover in the Common Market.

#### 4. MERGER CONTROL

The merger control framework establishes a supranational regime for transactions that have a “regional dimension”. The key points on the regime are as follows:

- **Filing thresholds:** a transaction will have a “regional dimension” where a party acquires a controlling interest in another party and either (or both) operate in two or more COMESA Member States. The CCC interprets the word “operate” to mean that a firm derives turnover from two or more Member States. It is not necessary to be directly domiciled in a Member State for these purposes; the test may be satisfied through exports, imports, representative offices or establishment of subsidiaries in a COMESA Member State. Although the Regulations provide for assets and turnover based thresholds, these have both been set to zero meaning that currently all transactions with a regional dimension are notifiable. The CCC also has jurisdiction to require notification of mergers that do not fulfil the thresholds, but nonetheless appear likely to have a significant impact on competition or to be contrary to the public interest. It remains to be seen whether the CCC will seek to enforce the merger filing requirements against all potentially notifiable transactions, whether it will take a more pragmatic approach (as adopted by a number of regulators around the world) of only seeking to enforce the rules against transactions with “local effects”, or whether it will at least set a minimum jurisdictional threshold.



- **Scope of Application:** notification is required of the “direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part” of a business where at least one of the parties operates in two or more Member States. This means that a filing will be required where the acquirer operates in two or more Member States but the target has no operations in the Common Market. Notifications will also be required when a foreign business operating outside of the Common Market seeks to acquire or merge with a business operating in two or more Member States.
- **Filing fees:** a filing fee is payable based on the lower of: (i) US\$500,000 or (ii) 0.5% of the parties’ combined turnover or combined assets (whichever is highest) in the COMESA region.
- **Process:** merger filings are mandatory and must be made within 30 days of a decision to merge. Failure to notify may result in penalties of up to 10% of turnover in the COMESA region. The CCC has 120 days to conduct its investigation, which may be extended where required. Although currently unclear, it appears that parties may be able to close their transactions once notified without having to wait for clearance. However, this may expose parties to a risk that the CCC subsequently finds the transaction to be anti-competitive and imposes remedies.
- **Evidence:** the published merger forms require detailed information to be provided on the transaction, including market shares for the parties and their competitors in all markets in which they sell products or services within the COMESA region (even in the absence of competitive overlaps).
- **Substantive test:** the CCC will assess “whether or not the merger is likely to substantially prevent or lessen competition”. The CCC should also take into account whether the pro-competitive aspects of the transaction outweigh any detrimental effects. The CCC may also take public interest considerations into account, which may add an additional layer of uncertainty to the outcome of the merger review process.
- **One-stop shop?** Although the legislative framework suggests that the CCC should operate as a one-stop shop for merger control in the region where the requisite effect on inter-state trade exists, a number of Member States have sought to challenge this position. In addition, the framework permits Member States to request the CCC to refer back part of, or the entire, transaction to the national competition authority where it may have a disproportionate impact on competition in their jurisdiction.

As at mid-June of this year, the CCC has received two merger notifications. The CCC announced in March 2013 that it had received its first notification under the new merger control regime in respect of the acquisition by Funai Electric Company of Philips Electronics’ Lifestyle Entertainment business. The second notification, relating to the proposed acquisition by Cipla India of Cipla Medpro, was announced in May 2013.

## 5. CONSUMER PROTECTION

Consumers in the Common Market may seek redress from the CCC for any consumer protection violations. The CCC may investigate and prohibit such matters as:

- False or misleading representations in advertising and selling;
- Unconscionable conduct in consumer and business transactions;
- Product safety and information standards and unsafe goods;
- Supply of unsuitable goods; and
- Supply of defective goods causing injury and loss.

## 6. LOOKING TO THE FUTURE

The CCC recently published draft guidelines on the Competition Regulations and Competition Rules in a bid to provide some clarity on their interpretation and application and invited stakeholders' comments on the same. Comments in respect of the uncertainties outlined above were submitted for the CCC's consideration and it is hoped that the situation will become clearer as the CCC's decisional practice continues to evolve and further guidance is published.

## Coulson Harney

Coulson Harney is one of the largest corporate law firms in Kenya. Since it was founded in 2008 the Firm has moved quickly up the rankings of the international legal directories such as Chambers Global, Legal 500, PLC, World Trademark Review and International Financial Law Review. Coulson Harney has eight partners and approximately thirty lawyers with qualifications and work experience in Kenya, the United Kingdom and Australia. Coulson Harney lawyers work on Kenyan domestic matters and transactions, and on international and cross-border advisory mandates for a wide range of clients. The firm is part of the Bowman Gilfillan Africa Group (BGAG), a network of leading African commercial law practices. The association provides Coulson Harney with seamless access to BGAG's knowledge pool and to its world-class legal, IT and office management resources. Bowman Gilfillan Africa Group has a presence in Capetown and Johannesburg, South Africa, Dar es Salaam, Tanzania and Kampala, Uganda.



### **RICHARD HARNEY**

Richard Harney is an experienced lawyer who qualified in the UK (1985) and worked as an English Solicitor at Clifford Chance LLP and Baker & McKenzie LLP for seven years. He then spent 14 years in Kenya with Kaplan & Stratton, one of Kenya's leading firms.

Richard's practice areas include company and commercial law, privatisation, banking, finance, capital markets, acquisitions, public offerings, take-overs, joint ventures, investments, corporate restructuring and general commercial contracts. Richard has numerous citations as one of the leading lawyers in Kenya from Chambers Global Guide to the Worlds' Leading Lawyers (equal first place in 2001-2012), Legal 500 and IFLR. He has recently been recognised as a Leader in his field by Chambers Global 2013 and as a Leading Lawyer by IFLR 1000.

Richard is a member of the Law Society of England & Wales, the International Bar Association and the Law Society of Kenya.



### **JOYCE KARANJA-NG'ANG'A**

Joyce Karanja- Ng'ang'a qualified as a Kenyan Advocate in 2005. She joined Coulson Harney as a Senior Associate in 2008. Joyce was made a Partner of the firm in 2009.

Joyce's work at Coulson Harney primarily encompasses company, corporate and commercial work. She has experience in project management and finance work and in privatisations, acquisitions, take-overs, joint ventures, corporate re-organisations, competition law, extensive due diligence experiences as well as securities work and conveyancing. Joyce has been recognised as Up and Coming in the Corporate and Commercial category by Chambers and Partners, as a rising star by IFLR 1000, and as one of the 'Top 40 Women under 40' by the Kenya Business Daily. She has been published in the Essentials of Merger Review 2011 & 2012 editions (The American Bar Association) and the Nature of Law magazine.

Joyce is a member of the Law Society of Kenya and the International Bar Association.

## Slaughter and May

Slaughter and May is a leading international law firm recognised throughout the business community for its commercial awareness and commitment to its clients.

The Slaughter and May Competition Group is one of the world's leading competition and regulatory practices. Established in 1970, it has an outstanding reputation advising on competition and regulatory law. The Group has consistently been ranked as an elite practice by the legal directories, with individual partners singled out as leaders in their field.

The Group comprises about 50 lawyers based in London, Brussels and China who are all specialists in competition and sectoral regulation. The lawyers function across the offices as an integrated team. In addition, the Group has developed close working relationships with the competition practices of leading international firms in other major jurisdictions so that, in combination, the firms can provide a full international service that is unique in its quality, depth and scope.



### **MICHAEL ROWE**

Michael Rowe has been a partner at Slaughter and May since 2001, having joined the firm as a trainee in 1992. Michael is head of the firm's Competition Litigation team.

Michael has significant experience of EU and UK merger cases, including a number of high profile second phase inquiries and cases cleared at first phase subject to commitments. His experience spans a diverse range of business sectors including fast-moving consumer goods, defence, business insurance, financial services, mining and natural resources, oil and gas, life sciences, IT and building materials. His contentious experience includes advising on multi-jurisdictional claims for damages and other relief and encompasses proceedings before the Competition Appeal Tribunal.



### **PAUL WALTER**

Paul joined the firm as a trainee in 2002, becoming a special advisor to the Competition group in 2012.

Paul has extensive experience of representing clients before the European Commission, the OFT and the UK Competition Commission, having been involved in a considerable number of merger cases before the UK and EU competition authorities. He has also been involved in several cartel and other behavioural cases, including on appeal to the General Court in Luxembourg.



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