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Common Market for Eastern and Southern Africa

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REVISED PRACTICE NOTE REGARDING THE COMMISSION'S INTERPRETATION OF THE TERM *"OPERATE"* UNDER THE COMESA COMPETITION REGULATIONS AND THE APPLICATION OF RULE 4 OF THE RULES ON THE DETERMINATION OF MERGER NOTIFICATION THRESHOLDS AND METHOD OF CALCULATION

The COMESA Competition Commission (the "**CCC**"), having received several queries from merging parties, their legal representatives and other stakeholders in relation to the application of certain merger control provisions, hereby issues this revised Practice Note to guide the interpretation of the term "*operate*" under the COMESA Competition Regulations, 2004 (the "**Regulations**") and the COMESA Competition Rules, 2004 (the "**Rules**") and the application of Rule 4 of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation (the "**Rules on the Determination of Merger Notification Thresholds**").

i) Interpretation of the Term *"Operate"*

Article 23 of the Regulations establishes the jurisdiction of the CCC to assess mergers having a regional dimension. Under the aforementioned Article, the term "*operate*" is central to its application. Article 23 is invoked when "...*both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more Member States*...".

Whilst the Regulations have not defined the term '*operate*', paragraph 3.9 of the COMESA Merger Assessment Guidelines, 2014 (the "**Merger Guidelines**") states that, for purposes of Article 23 (3)(a) of the Regulations, an undertaking is considered to operate in a Member State if its operations in that Member State are substantial enough for a merger to have an appreciable effect on trade between Member States and restrict competition in the Common Market. Further, the Merger Guidelines state that "*…an undertaking operates in a Member State if its annual turnover or value of assets in that Member State exceeds US$ 5 million…"*.

It should be noted that at the time the Merger Guidelines became applicable, the prescribed merger notification thresholds envisaged under Article 23(3)(b) of the Regulations, were set at US$ 0. This effectively meant that all merger transactions satisfying the regional dimension requirement of Article 23(3)(a) of the Regulations were required to be notified to the CCC, irrespective of the magnitude of the merging parties' operations in the Common Market. In line with the Regulations' objectives, the CCC sought to only capture those mergers likely to affect trade between Member States and restrict competition in the Common Market. As a result, the Merger Guidelines attached a quantitative definition to the term *'operate'*, to mean the turnover or value of asset in a Member State to be at least US$ 5 million.

All stakeholders are hereby informed that following the enactment of the Rules on the Determination of Merger Notification Thresholds in 2015, the definition of the term *'operate'* under paragraph 3.9 of the Merger Guidelines is no longer applicable. For the purpose of determining whether or not a merger is notifiable to the Commission or whether or not an undertaking operates in the Common Market, the extent and magnitude of the turnover derived by or value of assets of the undertaking in a Member State is immaterial (i.e., even if turnover or value of asset is below $5 million) in so far as the notification thresholds are met". The CCC, therefore, will no longer apply the quantitative criteria set out under Paragraph 3.9 of the Merger Guidelines in determining the operation of undertakings in Member States. Hence, for purposes of merger notification in line with Article 23 of the Regulations, all stakeholders should refer to Rule 4 of the Rules on the Determination of Merger Notification Thresholds which stipulates that:

"Any merger where both the acquiring firm and target firm, or either the acquiring or the target firm, operate in two or more Member States, shall be notifiable if:

a) the combined annual turnover or combined value of assets, whichever is higher in the Common Market of all parties to a merger equals to or exceeds US$50 million; and
b) 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 US$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."

ii) Application of Rule 4 of the Rules on the Determination of Merger Notification Thresholds

Rule 4 is cumulative and must be satisfied in its entirety for a merger to be notified to the CCC. Accordingly, the CCC shall apply Rule 4 as follows:

Firstly, Regional Dimension must be satisfied. This is contained in the *chapeau* of Rule 4 which requires the merging parties to operate in at least two COMESA Member States.

Further, it gives the following alternative scenarios under which merging parties can operate in Member States namely:

a) Both the acquiring firm and target firm, each can operate in at least two Member States;
b) The acquiring firm can operate in at least two Member States, while the target firm can operate only in one Member State; **Or**
c) The target firm can operate in at least two Member States, while the acquiring firm can operate only in one Member State.

Hence, the CCC shall consider the Regional Dimension to be met where at least one of the parties to the merger operates in at least two COMESA Member States. Therefore, in instances where there are only two parties to the transaction, that is, one acquiring firm and one target firm, whereby one of the parties does not operate in at least one of the Member States; this transaction will not be notifiable.

Regional Dimension will therefore be met once any of the above scenarios is satisfied and if they are, the next step is to confirm whether Rule 4(a) is satisfied. Rule 4(a) must be satisfied by confirming that ***either*** the combined annual turnover ***or*** combined value of assets in the Common Market of all the parties to the merger is at least **USD 50 million**. The CCC will choose the higher value between the combined turnover and the combined value of asset, and verify whether it meets the thresholds.

As an illustration, party A intends to acquire party B. Party A derives turnover of USD 40 million and holds an asset value of USD 25 million in the Common Market. Party B derives turnover of USD 20 million and holds an asset value of USD 30 million in the Common Market. For purposes of considering Rule 4(a), it is noted that the parties' combined annual turnover in the Common Market (USD 60 million) is higher than their combined asset value (USD 55 million). The annual combined turnover will therefore be considered for purposes of confirming whether Rule 4(a) is satisfied, in which case, the Commission shall proceed to consider Rule 4(b).

To satisfy Rule 4(b), it should be demonstrated that the annual turnover or the value of asset, *whichever is higher*, of each of at least two of the parties to the merger in the Common Market is at least **USD 10 million**. The application of either annual turnover or value of asset under Rule 4(b) shall be adopted independent of the measure used under Rule 4(a). The CCC will choose the higher value between the annual turnover and the annual value of asset for each party in the Common Market, and verify whether it meets the thresholds.

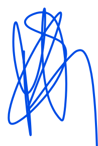
In the example provided, regard shall be had to each party's turnover or value of asset, whichever is higher, in the Common Market. Therefore, for party A, turnover will be the relevant measure against which the threshold will be applied as its turnover is higher than

its value of asset, whilst Party B's value of asset will be considered as it is higher than its turnover.

The final step in applying Rule 4 is to confirm if the 2/3 exemption rule applies. It is important to note that the 2/3 exemption rule is flexible to allow considering either asset values or turnover independent to that used in 4(a) and 4(b). It follows therefore that as long as each party to the transaction achieves 2/3 of its aggregate turnover or value of assets in one and the same Member State, the merger transaction does not fall within the jurisdiction of the CCC but under the scope of any national competition law where the notification requirements are met. For purposes of emphasis, as long as either the aggregate value of assets or aggregate turnover of each of the parties to the transaction is achieved in one and the same Member State, the exemption is triggered regardless of the measure used in 4(a) and 4(b).

This Practice Note also addresses the interpretation of Rule 4(a) and 4(b) of the Rules on the Determination of Merger Notification Thresholds. The CCC wishes to clarify that the Rules on the Determination of Merger Notification Thresholds have not made any reference to a target firm or acquiring firm with regard to the **USD 50 million** and **USD 10 million** thresholds. The Rules have referred only to "parties". Therefore, it is possible that the thresholds may be met by only the acquiring firm(s) or the target firm(s) in particular where there is more than one acquirer and/or targets to the transaction.

This Practice Note replaces Practice Note 1 of 2021 which was issued on 13 February 2021 and suspended on 8 August 2022



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