ASSESSING THE MERGER CONTROL PROVISIONS OF THE COMESA COMPETITION REGULATIONS OF 2004: TIME FOR AN OVERHAUL?[1]

1. Introduction

The COMESA Competition Regulations (the 'Regulations') came into existence in December 2004 and was enforced beginning January 2013 with the establishment of the COMESA Competition Commission (the 'CCC'). Over the last nine years, the CCC have published various Guidelines and Rules in support of the Regulations, to provide clarity and certainty to selected areas of enforcement, as is common practice by competition authorities. Astonishingly, however, the primary legislation has remained unchanged. While certain basic principles of competition enforcement have stood strong in the face of time, there is no dispute that markets have obviously changed since 2004 and the emergence of technologies and creation of digital ecosystems over the last decade has led to revised thinking and approaches to competition assessment framework. This paper canvasses and assesses potential areas of the Regulations which may be in dire need of an overhaul. The paper focuses on Part IV of the Regulations which deals with merger control. Part IV was the first part of the Regulations to be enforced by the CCC and the one-stop merger control regime which has since been established represents a success story of regional competition enforcement in COMESA.

The paper focusses on two procedural aspects of merger notification, which have direct impact on the effective review of mergers. Firstly, the appropriateness of the merger notification thresholds in relation to digital mergers. Despite the obvious presence of digital giants in most of the Member States, no digital merger feature among the 300+ transactions which have been notified to the CCC since inception. This begs the question of whether there is a legal enforcement gap in terms of the current merger rules. The paper finds that the turnover and asset value thresholds remain fit for purpose, but the lack of enforcement by the CCC in the field of digital mergers can be addressed by increased enforcement powers to support its catch-all provision under the Regulations, and an 'obligation to inform' on the large digital companies engaging in acquisitions which may affect COMESA.

The second focus area is the experience of the CCC with the non-suspensory regime. The paper finds that the current system contributes to an inefficient allocation of already limited resources towards investigating procedural breaches with limited beneficial enforcement impact. Having regard to the trend prevailing in other jurisdictions, the paper advocates for a shift to the suspensory regime which would allow the CCC to focus on breaches that have more significant impact on competition, including for instance exchanges of commercially sensitive information during the merger review period that would affect the ability of the target to operate independently in an event the transaction is abandoned or rejected by the CCC.

The paper is structured as follows. Section 1 introduced the research question and the objectives of the paper. Section 2 sets out the context of the enactment of competition law in

[1] **Submitted and Accepted as Thesis for Completion of the Masters in Global Competition and Consumer Protection**

COMESA and the current merger control provisions under the Regulations applicable to the two areas of interest. Section 3 critically explores the appropriateness of the COMESA merger notification thresholds for digital mergers, starting with the literature review on the perceived need for merger regimes to capture digital mergers and amendments proposed by selected competition authorities. Section 4 reviews the motivations for non-suspensory and suspensory regimes and the experiences of selected competition authorities, against which a critical assessment of the COMESA regime will be made to determine its effectiveness. Finally, Section 5 concludes and provides recommendations for amendments to the COMESA merger control regime.

2. The Goal of Merger Control under the COMESA Competition Regulations

The Treaty establishing the Common Market for Eastern and Southern Africa (the 'Treaty') marked the desire by Member States to further the process of market integration in the region towards the goal of achieving sustainable growth and development for all Member States. The Treaty recognized the threat that anti-competitive practices could have on the integration agenda and cognizant of the growth of cross-border business activities which could increase the likelihood of anti-competitive conduct spilling beyond national borders, and the limited powers of national competition authorities against this phenomenon, leading to the promulgation of the Regulations.

The Regulations aims to promote and encourage competition by preventing anti-competitive conduct that deter the efficient operation of markets, and thus enhance the welfare of consumers in the Common Market. The Regulations established a mandatory merger notification system, requiring parties to transactions which meet the prescribed thresholds to notify the Commission of such transactions, within a prescribed period of time. The thresholds include (i) a regional dimension test, whereby either or both the acquirer and the target must operate in at least two or more Member States, and (ii) a quantitative proxy to identify transactions capable of appreciable harm linked to the magnitude of the parties' operations (turnover and assets) in the Common Market. The merger notification thresholds are prescribed under Rule 4 of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation, 2015 (the 'Merger Notification Thresholds Rules') which provides that:

> ***Any merger, where both the acquiring firm and the target firm, or either the acquiring firm 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 or exceeds COM$ 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 COM$ 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.***

Notwithstanding the above thresholds, it is noteworthy that the founders of the Regulations were mindful that quantitative thresholds may not always capture all potential harmful mergers, and thus incorporated a 'catch-all' provision in the Regulations whereby the Commission may require parties to a non-notifiable merger to notify it of that merger if it appears to the Commission that the merger is likely to substantially prevent or lessen competition or is likely to be contrary to the public interest[2]. However, despite this seemingly powerful provision, a review of the mergers published on the CCC's website[3] confirms that the CCC has yet to review a digital merger as at end June 2022.

Article 24(1) provides that a party to a notifiable merger, i.e. which meets the prescribed thresholds, shall notify the Commission in writing of the proposed merger as soon as it is practicable by in no event later than 30 days of the parties' decision to merger. The Regulations do not define the term 'decision to merge', however guidance can be found in the COMESA Merger Assessment Guidelines, 2014 (the 'Guidelines') which provides that

> ***[…]a decision to merge must either be (i) 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 (ii) the announcement of a public bid in the case of publicly traded securities***.

The Regulations empower the Commission to impose a penalty of not more than ten percent of either of both of the merging parties' annual turnover in the Common Market if the parties fail to give notice of the merger as required under Article 24(1)[4]. In determining an appropriate penalty, the Commission is guided to consider a number of factors including, *inter alia*, the gravity of the contravention, and whether any loss or damage suffered as a result of the contravention.

Once a merger is notified to the Commission for its review of whether it is likely to lead to a substantial lessening of competition, the parties can proceed to implement the transaction. Such a regime is known as a non-suspensory regime, which can be contrasted with suspensory regime where the parties are prohibited from implementing the transaction until a decision is issued by the competition authority. The Commission is required to examine a merger as soon as the notification is received and must make a decision on the notification within 120 days after receiving the notification. The Guidelines introduced a two-phase review period, seemingly to provide an expedited review of harmless transactions. Under Phase 1 review, if the Commission is satisfied that no significant competition concerns are likely to arise from the transaction, a decision was to be issued within 45 days from the notification of the merger. Where additional assessment was required or significant competition concerns were more likely to occur than not, a Phase 2 review would commence and continue until the end of the 120-day period (subject to any extension under Article 25(2) of the Regulations). However, on

[2] *Regulations* Article 23(6).

[3] 'Merger Cases and Compliance' *COMESA Competition Commission* (Web Page, 2022) <https://www.comesacompetition.org/merger-cases/>.

[4] *Regulations* Article 24(5).

6 February 2020, the Commission issued a press release[5] announcing the suspension of the two-phase review, implementation of Phase 1 and Phase 2 review periods for merger assessment, citing the time period required for engagements and consultations with affected Member States as the basis for the suspension.

3. Are the COMESA Merger Notification Thresholds Appropriate for Digital Mergers?

3.1 Literature Review

In recent years, certain competition authorities have amended their merger notifications thresholds in an attempt to bring digital mergers under their purview, in view of a perceived legal enforcement gap in relation to acquisitions of targets with zero or low turnover/ assets but nonetheless have a significant competitive market potential. There is a fear on missing out on review of digital mergers, in part caused by the huge number of mergers undertaken by the five digital giants (Amazon, Apple, Facebook, Google, and Microsoft), most have which fell under the radar of competition authorities. According to the LEAR report, between 2008 and 2018, Google, Facebook and Amazon collectively made 299 acquisitions, mostly targeting young start-ups. Start-ups can pose a competitive threat to the future market position of incumbents, and it is believed that acquisitions in the digital sphere is motivated by '***the incentive for incumbents to carry out pre-emptive buyouts, that is buyouts of entrants with the goal of reducing potential future competition***'[6], thereby cementing their dominance in the market and making entry exceptionally difficult. In addition, the growing economic significance of data has also raised concern of mergers resulting in accumulation of data by incumbents, making it more difficult to challenge their market power. In view of these theories of harm, competition authorities have sought to ensure that their rules are fit for capturing digital mergers. The challenge that presents itself is that merger notification thresholds are mostly turnover- or asset-based, whereas start-ups typically offer their services for free in the early stage of their existence to attract customers and thus generate network externalities. They typically would not generate sufficient turnover to trigger the turnover-based thresholds of most jurisdictions.

This section reviews the proposals put forward in selected competition authorities in Europe. Germany and Austria were selected as they were among the first agencies to propose the addition of a transaction-value based threshold in 2017 and thus there is some scope for reviewing their experience so far with these new thresholds. The EC was chosen in view of the close similarities between the Regulations and the relevant competition provisions under the Treaty for the Functioning of the European Union (TFEU).

[5] 'Notice: Suspension Of Phase 1 And 2 Review Period For Merger Assessment' *CCC* (Web Page, 6 February 2020) <https://www.comesacompetition.org/notice-suspension-of-phase-1-and-2-review-period-for-merger-assessment/>.

[6] LEAR, 'Ex-post Assessment of Merger Control Decisions in Digital Markets' (9 May 2019), 8. https://www.learlab.com/wp-content/uploads/2019/06/CMA_past_digital_mergers_GOV.UK_version-1.pdf.

The rationale for the transaction-value based threshold is that the competitive market potential of the target will typically be reflected in the transaction value, notwithstanding current profits/losses, such that where the purchase price is disproportionately higher than the turnover of the target, it can be an '***indication of innovative business ideas with great competitive market potential***'[7]. In both Germany and Austria, the transaction-value based threshold is supported by a local nexus test, whereby the target should have substantial domestic activities in the country. In their revised guidance on the new thresholds, it is explained that for the German authority, there will be no finding of significance where the target generated a turnover below €17.5m in Germany and the turnover is deemed to adequately reflects market position and competitive potential[8]. In Austria, domestic activity is construed where the turnover of the domestic target company is at least €1m, again provided that this turnover adequately reflects the market position and the competitive potential of the target company. Austria further incorporates a market share indicator as evidence of significant domestic activity based on its jurisprudence, being '**a share of >10% on a competitive relevant segment in Austria**'[9].

Whilst initially considered as a potential solution by the EC, the transaction-value based threshold was ultimately discarded by the EC, noting that

> ***(…) the overall body of evidence suggests that the absence of complementary jurisdictional thresholds – particularly based on the value of the transaction – has not in itself significantly contributed to impairing the effectiveness of the EU Merger Regulation's jurisdictional thresholds.***[10]

The EC considered that its turnover thresholds coupled with referral mechanisms generally work well, and instead proposed a shift with respect to the referral mechanism under Article 22 of the EU Merger Regulation 139/2004 (the 'EUMR'), whereby Member States would be encouraged to refer mergers that fall below national merger thresholds and which (i) affect trade between Member States and (ii) threaten to significantly affect competition within the territory of the Member State or States making the request[11]. However, whilst no amendments have been brought to the thresholds, the introduction of the Digital Markets Act (DMA) imposes specific regulatory obligations on "gatekeepers," being the major digital undertakings providing core platform services which act as important gateways for businesses to reach end users and who has a significant impact in the internal market and an entrenched and durable

---

[7] Bundeskartellamt and Bundes Wettbewerbs Behorde, 'Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)' (July 2018), 3. https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2.

[8] Bundeskartellamt and Bundes Wettbewerbs Behorde, 'Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)' (January 2022), 82. https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionswertschwelle.pdf;jsessionid=391DEF030843BE27E53966517522761D.1_cid362?__blob=publicationFile&v=2.

[9] *Ibid*, 83.

[10] EC Staff Working Document, 'Evaluation of procedural and jurisdictional aspects of EU merger control' (26 March 2021), 134. https://ec.europa.eu/competition/consultations/2021_merger_control/SWD_findings_of_evaluation.pdf.

[11] EC, 'Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases 2021/C 113/01' (31 March 2021), [6], [9] and [13]. https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf.

position. Importantly, under the DMA, all gatekeepers are required to inform the EC of all of their intended acquisitions, prior to their implementation, of other undertakings providing core platform services or any other services provided within the digital sector or other services that enable the collection of data. Further, the DMA provides a minimum amount of information that should be provided by the gatekeepers in this process to ensure the usefulness of the information.

3.2 What Lessons can be learnt for COMESA?

The literature is unequivocal about the limitations of relying solely on turnover and asset-based thresholds in evaluating the potential competitive impact of mergers in the digital sphere, and thus in evaluating the potential need for notification and review. It is further observed that despite a seemingly powerful catch-all provision available under the Regulations which apply to transactions not meeting the thresholds, a review of the mergers published on the CCC's website[12] confirms that the CCC has yet to review a digital merger as at end June 2022. In fact, it is noted that the catch-all provision has only been invoked once[13]. It therefore appears that the CCC is either extremely cautious in making use of this powerful tool – a recognition that indeed with great powers comes great responsibility – or it is somehow challenged in its implementation.

In view of the foregoing, in the first instance, we consider whether the prescribed thresholds could be replaced or supplemented to suit the digital world. Whilst the rationale for a transaction-value based threshold is sound as it would indeed reflect the potential competitive impact of the services, technology or human capital being acquired, however, it does not speak to the local nexus of the transaction which is key in ensuring that competition authorities do not overextend their mandate by reviewing transactions which are not capable of producing significant effects on markets within their territories. Transaction values are rarely broken down according to jurisdictions where the target operates or is expected to operate. Therefore, the use of transaction-value based thresholds in the alternative where domestic turnover thresholds are not met would cast a wider than necessary net, as it would not be representative of the merging parties' activity, whether current or potential, within the jurisdiction.

To address this, it has become necessary to supplement the transaction-value threshold with other criteria to capture the magnitude of operations of the target in the relevant jurisdiction. In Germany, this goes back to a turnover test to the extent that turnover is a relevant indicator, whereas Austria would rely on market share estimates, which creates additional complications where the target is not yet operational in their markets. Further, relying on market shares as a measure for notification would be taking a step backwards and contrary to internationally

[12] CCC 'Merger Cases and Compliance' <https://www.comesacompetition.org/merger-cases/>.
[13] CCC/MER/6/22/2019 Augusta Acquisition B.V/Careem [CCC]. https://www.comesacompetition.org/wp-content/uploads/2020/02/Uber-decision.pdf.

recognised best practices[14]. It has been recognised that notification regimes which are based on market shares "*injects costs and burdens into transactions, as well as considerable uncertainty and the possibility of substantial delays. As a result, the ICN Recommended Practices and other international best practice documents on merger review, such as the OECD Recommendation on merger review, do not support the use of market shares in notification thresholds. Many jurisdictions have moved away from them in the recent past*".[15] Even in traditional sectors, there is need to look beyond the market shares, which albeit an important element, may understate the effects of competition if considered independently from other market conditions[16]. Further, digital mergers bring additional issues in terms of which measure would be used to calculate market shares, for instance number of (active) users, number of downloads of an application, or even number of interactions made over a platform, which can cause further confusion on the notifiability of a transaction, thus bringing more legal uncertainty for businesses and competition authorities alike.

A review of the type of cases notified to the German competition authority on the application of the new threshold appears to support the above identified challenges and suggest that the tool has not led to any significant advantage in identifying potentially harmful digital mergers. Of the 60 cases dealt under the value-based threshold, 29 required no notification, most frequently due to lack of domestic connection[17]. Of the remaining 31 cases, clearances were granted in 19 cases, and in 10 cases the notification was withdrawn as not required. And even more concerning, out of the 60 cases, only 4 cases involved the technology sector[18]. Thus, the evidence so far points towards the conclusion that the supplementary thresholds may lead to an increased administrative burden on the competition authority and the parties from the higher number of mandatory notifications, without a corresponding enforcement benefit in relation to mergers which were intended to be captured by the implementation of the additional thresholds. For a relatively small authority such as the CCC, the increased burden may result in limited resources left to implement the other equally important parts of the Regulations.

We consider next the effectiveness of the catch-all provision allowing for an otherwise non-notifiable transaction to be notified and reviewed by the competition authority. For the provision to be invoked, the CCC must demonstrate that there is a possibility or likelihood that the transaction will lead to significant competition concerns. This in turn requires access to

---

[14] ICN Merger Working Group Notification & Procedures Subgroup, International Competition Network, '*Setting Notification Thresholds for Review'*, 8. https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_SettingMergerNotificationThresholds.pdf.

[15] *Ibid*, 4 – 5.

[16] Australia Competition and Consumer Commission, 'Ex post review of ACCC merger decisions', February 2022, 2. https://www.accc.gov.au/system/files/Ex%20post%20review%20of%20merger%20decisions.pdf

[17] Barth Christoph, 'No "killer acquisitions" in sight (yet)… recent experience with the German merger control transaction value threshold', *Linklaters* (28 January 2021) <https://techinsights.linklaters.com/post/102gpm8/no-killer-acquisitions-in-sight-yet-recent-experience-with-the-german-merger>. See also Maria Dreher et al, 'Revised guidance on the Austrian and German transaction value threshold', *Freshfields Bruckhaus Deringer* (Web Page, 28 February 2022) <https://transactions.freshfields.com/post/102hjsi/revised-guidance-on-the-austrian-and-german-transaction-value-threshold>.

[18] *Ibid*.

information about the parties' operations and market position in the Common Market, which is often not easily accessible from public sources. The CCC has no powers to compel the submission of information to pursue a merger under Article 23(6) – such powers come in at the stage of investigations which apply to Part 3 of the Regulations dealing with restrictive business practices. Further, while the Regulations clearly identify the non-notification of a notifiable merger as a breach of the law, there are no sanctions or consequences for failing to comply with the Commission's requirement to notify a non-notifiable merger.

There is thus considerable merit in the proposal under the EU DMA for an obligation on companies of a certain size operating in the field of digital platforms to inform the authority of their merger activity. In the first instance, this obligation could be limited to mergers involving acquiring parties which meet the prescribed turnover or asset values in the Common Market to ensure on the one hand, some degree of local nexus whilst, on the other hand, managing the administrative burden on the authority. To assist the authority in determining which transaction requires a substantive review, the Regulations should stipulate the core information which should be provided by the parties, including their COMESA-wide annual turnover, activities in the Common Market including number of active users, subscribers, type of data collection and processing, a summary of the merger, including its nature and rationale, and a list of the Member States concerned by the merger. A requirement to inform to would ease the administrative burden of a requirement to notify, whilst offering sufficient flexibility to allow the competition authority to monitor merger activity which may require its subsequent intervention. Failure to comply with the obligation to inform, as well as failure to comply with the obligation to notify if the CCC so determine should be clearly spelt out as breaches of the law for which the parties can be fined.

4. How Effective is the COMESA Non-Suspensory Merger Regime?

4.1 Literature Review: Non-Suspensory vs Suspensory Regimes

The second part of the paper reviews the effectiveness of the non-suspensory regime as operated by the CCC. Globally, many competition authorities operate suspensory regimes[19]. Under the European framework, on which the Regulations are closely modelled, Article 4 of the EU Merger Regulation prescribes the notification of concentrations prior to their implementation, while Article 7 imposes a standstill obligation prior to notification and clearance. Within COMESA, a similar preference for suspensory regime can be found. Among

[19] Kyriakos Fountoukakos, Adelaide Luke and Josh Butler, 'Why Should Merger Regime Considerations Be Placed at The Forefront of Transactions in The Mining Sector?'. *Herbert Smith Freehills Legal Briefings*, (31 October 2016) <https://www.herbertsmithfreehills.com/latest-thinking/why-should-merger-regime-considerations-be-placed-at-the-forefront-of-transactions>.

those Member States with merger control[20], the Democratic Republic of Congo[21], Kenya[22], Zambia[23], Ethiopia[24], Eswatini[25], Burundi[26], Seychelles[27], Rwanda[28], Sudan[29], and Madagascar[30] and Zimbabwe[31] prohibit closing before approval is granted.

The popularity of suspensory regimes is that it gives the competition authority the ability to assess the pre-merger and foreseeable post-merger situation without potential irreversible alteration of market structures during the review period arising from the implementation of the transaction. In addition to remedying anticompetitive concerns ex-ante, a suspensory regime also '***avoids the potentially difficult untangling of assets and business relationships, or irreversible insights into sensitive competitor information***'[32], or loss of key staff or management for the target which will impact the ability of the target to operate as a standalone competing business. The merging parties must continue to operate as independent players on the market pending the issuance of a decision. Whilst some degree of information exchange is expected as part of due diligence in the merger discussions, parties are however prohibited from engaging in the exchange of competitively sensitive information or agreeing on future pricing strategy, customer allocation or other elements of competition, to prevent coordinated effects in the long-run in the event the merger is abandoned or rejected[33]. In the matter of

---

[20] Of the 21 Member States, Comoros, Djibouti, Eritrea, Libya, Somalia and Uganda do not have merger control/ notification regimes.

[21] 'The Democratic Republic Of Congo's New Pricing Freedom And Competition Act' referring to Organic Law no. 18/020 on Pricing Freedom and Competition, *Herbert Smith Freehills* (28 August 2018) <https://www.herbertsmithfreehills.com/latest-thinking/the-democratic-republic-of-congo%E2%80%99s-new-pricing-freedom-and-competition-act#:~:text=The%20Competition%20Act%20proclaims%20that,freely%2C%20like%20under%20previous%20laws>.

[22] *Kenya Competition Act No. 12 of 2010*, Article 42. https://www.cak.go.ke/sites/default/files/Competition_Act_No._2012_of_2010.pdf.

[23] *Zambia Competition and Consumer Protection Act, 2010*, Article 26(4). https://www.ccpc.org.zm/legalframework.

[24] *Ethiopia Proclamation No. 813/2013 on Trade Competition and Consumers Protection*, Article 9(2). https://www.tralac.org/images/docs/6961/ethiopia-proclomation-on-trade-competition-and-consumer-protection-2013.pdf.

[25] *Eswatini Competition Act 2007*, Article 35. http://compco.co.sz/online/wp-content/uploads/2018/08/THE-COMPETITION-ACT-2007.pdf.

[26] *Burundi Act No. 1/06 of 25 March 2010* (Legal System for Competition - English Translation), Article 49.

[27] *Seychelles Fair Competition Act 2010*, Article 22(1). https://www.ftc.sc/wp-content/uploads/2019/01/FCA.pdf.

[28] *Rwanda Law Nº 36/2012 of 21/09/2012* relating to competition and consumer protection, Article 18. https://gazettes.africa/archive/rw/2012/rw-government-gazette-dated-2012-11-12-no-46.pdf.

[29] Baker McKenzie, '*An Overview of Competition and Antitrust Regulations in Africa*' (Aug 2019) 119. https://www.bakermckenzie.com/-/media/files/insight/guides/2019/overview-of-competition-and-antitrust-regulations-in-africa.pdf.

[30] ENSafrica report on Doing Business in Madagascar quoting Madagascan Competition Act No. 2005-020 of 17 October 2005 and Decree No. 2008-771 of 28 July 2008. https://www.ensafrica.com/doing-business/download?termId=36

[31] Zimbabwe Competition Act [Chapter 14:28], Article 34A(3)(b). https://www.competition.co.zw/downloads/

[32] OECD, 'Suspensory Effects of Merger Notifications and Gun Jumping'. Published for the 130th Meeting of the Competition Committee on 27-28 November 2017, paragraphs 2 and 5. https://one.oecd.org/document/DAF/COMP(2018)11/en/pdf.

[33] Holly Vedova, Keitha Clopper, and Clarke Edwards 'Avoiding antitrust pitfalls during pre-merger negotiations and due diligence'. Published by the US Federal Trade Commission Competition Bureau ("US FTC"). https://www.ftc.gov/enforcement/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-pre-merger-negotiations-and-due-diligence.

Insilco Corporation, the US FTC held that the exchange of commercially sensitive information in a merger involving two competitors '***had the potential to harm competition in the interim pre-consummation period and in the event the acquisitions were delayed, modified, or abandoned, may have led to even greater and more long-lasting harm***.'[34] Integration prior to receiving the approval of the authority, including engaging in coordinated conduct, are violations of the standstill obligation, and have led to significant fines being imposed by competition authorities. For example, the European Commission ('**EC**') fined Altice Europe NV for failing to notify its acquisition of PT Portugal SGPS SA before implementation and for failing to comply with the standstill obligation, noting that '***[T]o be able to deliver accurate decisions within tight timelines, the EU merger control system is built on clear procedural rules that companies must fully respect to ensure fair competition***.'[35]

Notwithstanding the attractiveness of the suspensory regime, the CCC is not alone in operating a non-suspensory regime, and is joined notably by Italy, Mexico, the United Kingdom, Australia, and New Zealand. However, in stark contrast to the CCC model, in these jurisdictions, the law confers upon the competition authorities power to impose merger specific interim measures to suspend ongoing integration or prevent further co-operation or implementation of the merger during the review phase, if the circumstances so warrant.

For instance, the Italian Competition Authority can issue such an interim suspension order pursuant to Article 17 of the Italian Competition Act (Law no. 287/1990). In Mexico, the COFECE can issue a "non-execution order" within ten days of receiving the merger notification. In the United Kingdom, the UK Competition and Markets Authority (CMA) operates a voluntary merger notification regime. It has the power to review mergers which meet the prescribed thresholds. Parties have no obligation to notify and can integrate ahead of receipt of merger clearance. However, once a second phase investigation is commenced by the CMA, an automatic prohibition applies under Section 81 of the Enterprise Act 2002. During the first-phase review, the CMA can also prohibit the completion of a merger by imposing a holds-separate order that will remain in force for the duration of the investigation. It is reported that the CMA imposes interim measures in almost completed mergers to prevent further integration which may jeopardise the CMA's review of the transaction[36]. A breach of the interim order is a violation of law and has been subject to significant fines. In 2019, the CMA imposed a whopping fine of £250,000 on Paypal[37] for engaging in cross-promoting of the target's business (iZettle) to potential customers in the UK which directly contradicted the CMA's interim order

---

[34] US FTC, 'Insilco Corporation; Analysis To Aid Public Comment' (September 1997), page 2. https://www.ftc.gov/sites/default/files/documents/federal_register_notices/insilco-corporation-analysis-aid-public-comment/970908insilcocorp.pdf

[35] EC Press Release '*Mergers: Commission fines Altice €125 million for breaching EU rules and controlling PT Portugal before obtaining merger approval*'. Published on 24 April 2018. https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3522.

[36] 'Record £250,000 Fine Imposed by the CMA On Paypal For Integration Activities During Merger Review Process', *Herbert Smith FreeHills* (25 August 2019) <https://www.herbertsmithfreehills.com/latest-thinking/record-%C2%A3250000-fine-imposed-by-the-cma-on-paypal-for-integration-activities-during>.

[37] CMA Notice of penalty pursuant to section 94A of the Enterprise Act 2002 in the Completed acquisition by PayPal Holdings, Inc. of iZettle AB. https://assets.publishing.service.gov.uk/media/5d89dd69e5274a15769e6ccc/PayPal_Notice_of_penalty_v3.pdf.

requiring the parties in relation to their UK activities to (i) refrain from any action which might impair the ability of merging parties to compete independently; (ii) maintain the business and brand identity of the target separate from PayPal; and accordingly (iii) the customer lists of the target was to be operated and updated separately by iZettle[38]. In the ***Electro Rent/Microlease*** merger, which was the CMA's first infringement decision for breach of an interim order, the UK Competition Appeal Tribunal in upholding the fine of £100,000, declared it appropriate '***it is of the utmost importance that interim orders be scrupulously complied with, and that a party should not itself form judgments or reach decisions that are properly for the CMA***'[39].

In Australia, Section 50 of the Competition and Consumer Act prohibits mergers or acquisition that will have the effect, or be likely to have the effect, of substantially lessening competition in any market. Parties filing for merger authorisation are required to submit a written undertaking (pursuant to Section 87B of the Competition and Consumer Act 2010) not to proceed with the proposed acquisition while the ACCC is considering the application[40]. Alternatively, the Australian Competition and Consumer Commission (ACCC) may seek a court injunction to prevent a merger from proceeding until the merger review has been concluded (under section 80 of the Act). The ACCC can refer breaches of Section 87B undertakings to the Federal Court, which may result in orders to comply, fines or any other appropriate orders.

The ACCC has been active in ensuring parties remain independent until completion of the merger. In the ***Cryosite/Cell Care*** merger, Cryosite was found to have engaged in cartel conduct by ceasing to supply new customers from the date it signed the sale agreement and setting up a system to refer enquiries from potential customers to Cell Care. This effectively meant that the parties stopped competing with each other before the completion of the merger. Cryosite was ordered to pay a fine of AUD $1.05 million. In its decision, the Federal Court underlined that

> ***cartel conduct … prior to the completion of a sale can result in permanent structural change to the market. … although the Court has the power to remedy structural changes to a market resulting from an illegal acquisition by ordering divestiture, this option may not be available in cases where a permanent structural change results from cartel conduct. Accordingly, the penalty to be imposed for cartel conduct … ahead of a proposed sale or its completion needs to be sufficiently high to deter businesses who may otherwise be able to circumvent the proper application of s50 and its associated divestiture remedy or at the least render less effective or nugatory such a remedy***.[41]

[38] CMA, 'Initial Enforcement Order pursuant to section 72(2) of the Enterprise Act 2002 in Acquisition By Paypal Holdings, Inc. Of Izettle Ab' (2018) [4(c)], [5(a)], and [5(g)]. https://assets.publishing.service.gov.uk/media/5ba38861e5274a54b9d28c07/paypal_izettle_initial_enforcement_order.pdf.

[39] Judgement of the Competition Appeal Tribunal in 1285/10/12/18 Electro Rent Corporation v Competition and Markets Authority [2019] CAT 4, [206]. https://www.catribunal.org.uk/sites/default/files/2019-02/1285_Electro_Judgment_CAT_4_110219.pdf.

[40] 'Merger authorisation' *ACCC* (2022) <https://www.accc.gov.au/business/mergers/merger-authorisation>.

[41] ACCC v Cryosite Limited [2019] FCA 116, [46 – 50]. http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2019/2019fca0116.

The fines imposed by the competition authorities in non-suspensory jurisdictions, and upheld by their respective courts, illustrate the consensus on the importance of interim measures to deter premature coordination and integration of businesses in a manner which can have anti-competitive, and in some cases, irreversible effects until the merger assessment can be completed.

It is worth noting that the ICN Recommended Best Practices recognises both suspensory and non-suspensory regimes and provides guiding principles for each system. For non-suspensory regimes, parties should be permitted to notify transactions without undue delay on the basis of evidence of good faith intention to consummate the transaction. In so doing, the competition authority should give a reasonable time for the parties to notify their transaction. Italy, which operates a non-suspensory, mandatory merger notification regime like the CCC does not impose specific timelines for notification, as long as it is done prior to implementation of the transaction[42]. In Australia, where there are no standstill obligations but there exists a voluntary notification system, for informal clearance, parties are advised to approach the authority as soon as the merger is contemplated and before it is complete[43] while for merger authorisations, filing must be made prior to completion of the transaction[44]. The rationale for imposing a time limit is that it will allow the competition authority to conduct a timely review of the transaction. Once the transaction is notified, if the parties proceed to integrate their businesses prior to the clearance from the authority, they effectively assume all the risks associated with the review, including costs arising from requirement to divest whole or part of the business or other remedies that may be imposed.

In suspensory regimes, although certain jurisdictions do prescribe timeframes for notification to be made (e.g., Albania, Greece, and Slovenia), this is inconsequential to the effective assessment by the authority as the parties will not be able to implement the transaction. It is in the best interests of the parties to notify their transaction at the earliest possible so as to receive the authorisation expeditiously. In this regard, competition authorities typically provide a timeframe within which a decision is to be issued, or alternatively, within which the merger cannot be implemented (e.g., Japan, Burundi, Canada). In COMESA Member States (Zimbabwe, Rwanda) which prescribes timelines for notifying a transaction, a time period of 30 days has been commonly adopted.

4.2 What Lessons can be learnt for COMESA?

[42] ICLG 'Merger Control Laws and Regulations, Italy 2022'. https://iclg.com/practice-areas/merger-control-laws-and-regulations/italy.

[43] 'Australia Competition and Consumer Commission, 'Merger Review Process Guidelines', paragraph 27. https://consultation.accc.gov.au/mergers-and-adjudication/merger-process-guidelines/supporting_documents/merger%20review%20process%20guidelin%20MER201305320.docx

[44] 'Q&A: merger notification and clearance in Australia'. *Lexology* (17 August 2021) <https://www.lexology.com/library/detail.aspx?g=a800b29f-4b3e-4255-accb-2b6b99801b64#:~:text=In%20relation%20to%20the%20merger,the%20consent%20of%20the%20applicant>.

The CCC's enforcement record in relation to merger-related breaches is relatively modest. As of June 2022, the CCC has only imposed fines in two instances, the first being for failure to comply with an order in a conditional merger clearance, and the second, of more relevance to this paper, for failure to notify within the prescribed 30-days period. In a non-suspensory regime, the latter breach is akin to procedural gun jumping. On 23 March 2021, Helios Towers Malawi Limited ('HM') and Bharti Airtel Malawi Holdings B.V. ('BA') signed a share sale agreement ("SSA"), for the acquisition by HM of 100% of BA's shares (representing100% of the issued share capital) in Malawi Tower Limited. On the same day, a second SSA was entered into by Helios Towers Madagascar Limited ('Helios Madagascar') and Airtel Madagascar ('AM') for the acquisition by Helios Madagascar of 100% of AM's shares (representing 100% of the issued share capital) in Madagascar Towers S.A. The target businesses consist of passive infrastructure assets (towers) provided in Malawi and Madagascar respectively.

The transactions were notified to the CCC on 2 July 2021, following the CCC's intervention regarding the non-notification of the transactions. The decision to merge had been established on 23 March 2021, being the date the SSAs were signed. Thus, the application of Article 24(1) meant that the parties were required to notify the transactions by 22 April 2021. The CCC's Committee for Initial Determination ('CID') held that the parties' late notification of the transaction was a contravention of the Regulations and a fine of USD 102,101.765 (corresponding to 0.05% of the parties' combined turnover in the Common Market) was imposed on the parties. In its determination of the fine, the CID observed that while a maximum penalty of 10% is provided for under the Regulations, it is not applicable in the current scenario given the nature of the contravention. Importantly, the CID held that the breach is not likely to have resulted in any loss or damage on the market.

The scant CID decision does not provide insight into the reasons advanced by the parties for the failure to notify. The relatively low percentage of the fine suggest that the CID did not consider that there was a deliberate attempt by the parties to evade the law. Absent a reasoned decision, one could speculate that the parties may have been challenged in their ability to notify the transactions[45]. Of interest, it is noted that two SSAs were signed, but the decision treat both transactions as a single interconnected transaction – this could suggest uncertainty over the notifiability of the individual transactions (which would not have met the regional dimension test). The statement by the CID that the breach did not have an impact on the market raises the question of whether competition authorities should devote already limited resources to the prosecution of procedural matters which may have little impact on the state of competition in markets, which is the primary goal of competition laws. In its decision, the CID acknowledged that the primary objective of administrative penalties is deterrence against future violations by undertakings that have contravened the Regulations and as a general deterrent to other firms that may be contemplating engaging in similar breaches. It is undisputable that contraventions of the law must be investigated and sanctioned, in order for an authority to be taken seriously. However, it must also be recognised that in some instances, breaches may occur as a genuine

[45] A separate decision was issued on 23 September 2021 where the CID approved the transaction, noting the absence of competition concerns.

mistake from the parties, particularly where there may be uncertainties in relation to whether a triggering event has occurred.

Having regard to the experience of other jurisdictions, we consider whether there may be other more effective means of ensuring the CCC is able to promptly review and intervene on notifiable mergers. Two options present themselves: enhancing the current non-suspensory regime; or a complete overhaul towards a suspensory regime.

The current provisions of the Regulations are not sufficient to promote effective enforcement action that focuses on breaches with significant potential harm on the market. Specifically, the Regulations should empower the CCC to intervene during its assessment phase to suspend completion of the merger when its investigation reveals likely concerns in the post-merger market structure, as well as the power to sanction parties who fail to comply with such interim orders. To provide certainty to the parties as to whether they can proceed with the implementation of their transactions, such interim orders should be issued within a specified timeline. Further, the Regulations should make it clear that until such time that the merger is completed, or the lifting of an interim order, the parties to the transaction are required to behave independently on the market, and that failure to do so shall constitute collusive conduct which can be sanctioned under the provisions of Article 16 of the Regulations.
Further, where notification is required within a specified period following a triggering event, such period should accord the parties a reasonable period of time to submit the filing, commensurate with the information requirements to be satisfied. It is debatable whether the timeframe of 30 days provided for the notification of a regional merger constitute a reasonable period. Whilst a similar time period can be observed for countries that have adopted timeframes linked a triggering event, the information required for purposes of notification is typically limited to national markets. It is unconceivable that the same timeframe would be sufficient for parties to collate and process information for markets across 21 Member States, more so considering the significant substantive information required provided under the Form 12 Notice of Merger.

The second option would be a revolution of the COMESA regime. A suspensory regime is the system which most competition jurisdictions have opted for, including newer regimes (e.g. Saudi Arabia, Peru). Where amendments to merger control regimes are being seen, the trend has been for changes towards a suspensory regime (e.g. Costa Rica[46]) and none vice versa. This can be explained by the fact that notwithstanding the success that competition authorities in non-suspensory regimes have enjoyed, there are considerable challenges in the implementation of the interim orders. The experience of Australia is on point. In the ***Virtus/Adora*** merger involving two leading providers of IVF services, the ACCC sought an injunction to halt Virtus acquiring Adora fertility clinics. The merger would have seen an increase in Virtus' already significant market share and would have eliminated a rigorous competitor. The parties informed the ACCC of their proposal to complete the transaction notwithstanding the fact that

[46] 'Global Merger Control Update 2020' *Jones Day* (Web Page, February 2020) <https://www.jonesday.com/en/insights/2020/02/global-merger-control-update-2020>

the ACCC's review was still ongoing. In its press release, the ACCC stressed that "[s]***ituations like this demonstrate why [the ACCC] believe Australia needs a formal merger regime, under which companies cannot complete transactions which raise potential competition issues before they allow adequate time for ACCC approval***"[47]. The ACCC has been advocating for a shift to a suspensory regime, publicly acknowledging its outlier status in relation to the rest of the world. The plea by former ACCC Chair, Rod Sims, at the 2021 Law Council of Australia's Competition and Consumer Workshop speaks volume to the difficulties of enforcing interim measures:

> ***Australia's current merger laws are failing to adequately protect competition, however, and so need to be changed… The Australian approach to merger control is out of step with most merger regimes internationally, under which mergers are required to be notified as part of a formal assessment regime and must obtain clearance before they can proceed***.[48]

5 Conclusion and Proposed Recommendations

The CCC has had a commendable enforcement record since its establishment in 2013. Nonetheless it is quite clear that the Regulations of 2004 does require major surgery if the CCC wishes to be seen as a credible and effective regulator. The review of legislative instruments is an important feature to the effectiveness of any legal system, to ensure that they are fit for purpose in the advent of political, social, economic and technological developments in markets which can affect the intended goals of these instruments. Unsurprisingly, there will be aspects of the law which are unclear or unpractical, and which reform can only be meaningfully undertaken after the regulator has had sufficient time to implement and experience the challenges in practice. Considering its enactment 17 years ago, and its enforcement 9 years ago, a review of the Regulations in today's world is thus reasonable, and possibly overdue.

The Regulations established a mandatory non-suspensory merger notification regime. Turnover and asset thresholds were adopted in 2015, with the aim to exclude transactions which are not capable of having an appreciable impact on trade or competition within COMESA, in line with the objective of the Regulations. This was important to protect the attractiveness of COMESA as market for investment, as well as to preserve and prioritise the resources of the CCC towards intervention on potentially harmful conduct and thus corresponding positive enforcement impact. The features of digital markets, including self-preferencing/ market tipping, network effects, etc, and the growing market power of the digital giants have incentivised various jurisdictions to introduce additional thresholds to address the huge number of digital mergers which have escaped review. To date, the success of these new thresholds has been limited. The paper found that the existing thresholds remain fit for purposes, in light of the existence of a catch-all provision under the Regulations. However, the

[47] ACCC Media Release (13 October 2021), 'ACCC seeks urgent injunction to halt Virtus acquiring Adora fertility clinics'. https://www.accc.gov.au/media-release/accc-seeks-urgent-injunction-to-halt-virtus-acquiring-adora-fertility-clinics

[48] Rod Sims, 'Protecting and promoting competition in Australia'. Speech delivered at the Law Council of Australia Competition and Consumer Workshop 2021 on 27 August 2021. https://www.accc.gov.au/speech/protecting-and-promoting-competition-in-australia

experience of the CCC suggests that the enforcement of the latter has been problematic, and suggests that amendments should therefore be geared towards providing supplementary powers to the CCC to ensure the authority can make effective use of this powerful tool. Specifically with respect to digital mergers, the paper recommends that the CCC adopts an 'obligation to inform' which would apply where the acquirer meets the existing thresholds, and the target operates or is intended to operate in the Common Market. This obligation should set out the minimum information to be provided to the CCC to allow the latter to make an informed decision as to whether there is need for further review, without unduly frustrating investment incentives.

Finally, the paper found that the non-suspensory regime has not promoted an efficient use of ex-ante merger control powers, in particular considering the complete lack of powers by the CCC to intervene during the merger review process to remedy any concerns that ongoing or further integration of the businesses have on the market. By contrast, the other jurisdictions operating similar non-suspensory regimes have deemed interim enforcement measures as a necessary corollary to the operation of the non-suspensory regime[49]. Though amendments can be made to improve the effectiveness of the non-suspensory regime, the paper advocates for a complete shift of the system, prohibiting parties from integrating their businesses before receiving approval from the CCC. This system will ensure the CCC can review the potential impact of the transaction without any alteration to market dynamics caused by ongoing integration which may prejudice the CCC's assessment. It also promotes a reallocation of resources away from the monitoring and prosecution of mostly procedural matters with a dubious impact on pro-competitive outcomes.

However, such a revolution of the system will require further adjustments to the Regulations. The CCC would be encouraged to conduct its assessments swiftly, particularly in non-contentious transactions. Delays in merger implementation will impose additional costs on the parties to the transaction; there is therefore need to ensure the system remain effective and efficient, to ensure its acceptance among stakeholders. In particular, there will be need for a simplified approach for fast tracking transactions which are highly unlikely to raise competition concerns. It is therefore recommended that the CCC should reintroduce the Phase 1 and Phase 2 timelines. Further, at the moment, parties to any transaction must complete the same merger notification form, irrespective of whether there are any overlap in any markets. It is recommended that for transactions with no overlaps at industry and Member State level, a simpler merger notification form be adopted, requiring less information on market shares and customer details for instance, which would be less onerous on the parties.

The above proposed amendments have the potential to meaningfully enhance the quality and impact of enforcement action by the CCC. These amendments will bring the CCC in line with

[49] Chris Boyd, 'Gun-jumping in voluntary merger regimes: The risks keeping global transactions in suspense', *Kluwer Competition Law Blog* (Blog Post, 24 October 2019) <http://competitionlawblog.kluwercompetitionlaw.com/2019/10/24/gun-jumping-in-voluntary-merger-regimes-the-risks-keeping-global-transactions-in-suspense/>.

the tried and tested best practices embraced by competition authorities worldwide since the promulgation of the Regulations in 2004.