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Common Market for Eastern and Southern Africa

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PRACTICE NOTE ON THE COMMISSION'S APPLICATION 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 "**Commission**"), having received several queries from merging parties and their legal representatives in relation to the application of certain merger control rules, hereby issues this practice note on its application of the term "*operate*" under the COMESA Competition Regulations, 2004 (the "**Regulations**") and the COMESA Competition Rules, 2004 (the "**Rules**") and its approach to 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) Application of the Term "Operate"

Article 23 of the Regulations establishes the jurisdiction of the Commission to assess cross-border mergers where the term "*operate*" is central to the application of Article 23 of the Regulations which, *inter alia*, applies where "*...both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more Member States...*".

The Regulations have not defined the term operate. However, paragraph 3.9 of the COMESA Merger Assessment Guidelines of 2014 (the "**Merger Guidelines**") states that an undertaking is considered to operate in a Member State for purposes of Article 23 (3)(a) of the Regulations if its operations in that Member State are substantial enough

that a merger can contribute to an appreciable effect on trade between Member States and restrict competition in COMESA. 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 Regulation, 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 Commission, irrespective of the magnitude of the merging parties' operations in the Common Market. In line with the Regulations' objectives, the Commission 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', as meaning 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, the definition of 'operate' under paragraph 3.9 of the Merger Guidelines in no longer applicable as the Rules take precedence over the Guidelines. In view of this, paragraph 3.9 of the Guidelines has been rendered ineffective with the coming into force of Rule 4 of the Rules on the Determination of Merger Notification Thresholds. Therefore, for purposes of merger notification in line with Article 23 of the Regulations, all stakeholders should be referring 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 applies to merger transactions that satisfy both the "Regional Dimension" and "Notification Thresholds" requirements under Article 23 of the Regulations. Rule 4 is cumulative and must be satisfied entirely before a merger is notified to the Commission. Rule 4 is therefore applied 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 three alternative scenarios under which merging parties can operate in Member States namely:

a) Both the acquiring firm and target firm 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.

Regional Dimension will therefore be met once any of the three 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 annual assets in the Common Market of all the parties to the merger equals to at least US$ 50 million. The option to use combined annual turnover or combined annual asset shall depend on the higher amount of the two total values.

Assuming the Regional Dimension and Rule 4(a) is satisfied, the next step is to confirm whether the merging parties satisfy Rule 4(b). To satisfy Rule 4(b), it should be demonstrated that the annual turnover or annual asset, whichever is higher, of each of at least two of the parties in the Common Market is at least US$ 10 million. **Whether to use annual turnover or annual asset depends on the higher of the two. It should also depend on the measure (turnover or asset) used in Rule 4(a).**

As an illustration, assume annual combined turnover is higher than annual combined asset under Rule 4(a). This shall mean annual combined turnover will be adopted under Rule 4(a). Therefore, proceeding to Rule 4(b) shall mean confirming whether the annual turnover of each of at least two of the parties in the Common Market is at least US$ 10 million.

The final step in applying Rule 4 is to confirm if the 2/3 exemption rule holds. Given that Rule 4 must be applied in its entirety, the 2/3 exemption rule must also be read in conjunction with the preceding limbs in establishing the thresholds i.e. Rule 4(a) and Rule 4(b). For both the collective and individual thresholds requirements under Rule 4(a) and 4(b), it is the higher value of the turnover derived or asset value held which must be considered. In this regard, the 2/3 rule is meant to apply once the higher value has been established. It would be contrary to the principles and spirit of the 2/3 rule to rely on a different financial criterion to exempt a notification than the criterion used to establish a notification requirement under first two limbs of Rule 4.

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