Jackson, Etti & Edu

COMESA COMPETITION CONTROL IN 2019: SOME PRACTICAL CONSIDERATIONS

African Trade & Investment Edition

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*All views are personal

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1. Introduction

It probably goes without saying that the rules of fair play are integral to establishing a successful regional market and a sure way of creating an enabling environment for trade to be "free", "dynamic" and "certain". Market monopoly and protectionism are essentially cancerous to regional economic integration as they resurrect trade barriers time and time again, making it difficult for upcoming indigenous cross-border enterprises to conquer new territories against their bullish global counterparts. This is the role of an anti-trust or competition regime; minimum standards for free and effective competition whilst discouraging anti-competitive behaviour.

Though seemingly obvious, this invaluable piece of the puzzle is surprisingly a developing concept in international trade law such that to date, there are only two (2) Regional Economic Communities ("RECs") in the world that enforce competition law; the European Union ("EU") and the Common Market for Eastern and Southern Africa ("Comesa"). Anti-trust law at regional level is a very tricky dance, hence the six (6) year run of the Comesa Competition Commission has been challenging. This is a brief review of the Commission's progress in anti-trust, consumer protection and Mergers & Acquisitions ("M&A") cases from a practical viewpoint. I shall provide a summarised transactional overview of the Common Market between 2013 and 2018, as well as a review of the extra-territorial application of the law in case studies covering anti-competitive practices and consumer protection law. There is also a discussion on the importance of M&A control, to empowerment. My goal is to highlight a few important practical points for any investment attorney seeking the most cost-effective legal route to safeguard his or her client's business transactions within the Common Market.

2. Background

What is "Comesa"? Comesa is an African REC formed in 1994, that facilitates trade relations between mostly Southern and East African countries except for a few.[1] It accounts for a significant portion of intra-African trade and business cooperation in about twelve (12) sectors. All business is managed by various integrated institutions and agencies such as the African Leather and Leather Products Institute (Addis Ababa, Ethiopia), the Comesa Court of

[1] The current member states are Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, the Seychelles, Somalia, Sudan, Swaziland, Tunisia, Uganda, Zambia and Zimbabwe. Egypt, Burundi, the DRC and Tunisia are the only ones outside of this geographical location.

Justice (Khartoum, Sudan), the Comesa Competition Commission (Lilongwe, Malawi), the Comesa Trade and Development Bank (formerly and popularly known as the PTA Bank - Ebene, Mauritius) and the Comesa Clearing House (Harare, Zimbabwe).[2]

The Comesa Competition Commission was established and made fully binding on Member States in 2004, but only fully operationalised in 2013. This means that cross-border businesses operating within this sub-region must conform to the rules of fair play as enshrined in the founding Treaty.[3] Business transactions such as mergers and acquisitions, joint ventures as well as advertising are under scrutiny in a bid to regulate anti-competitive practice in the market. "Anti-competitive" practice is defined by the regulations as follows;

> *"a conduct which appreciably restrains competition between the Member States and is not otherwise exempt by law or authorised in a manner required by the Regulations"*[4]

The Comesa Competition Regulations (the "Regulations") are the substantive rules meant to foster healthy business competition by preventing restrictive business practices (in both public and private entities) as well as safeguarding the interests of consumers in the Common Market.[5] The regulatory framework covers four (4) aspects; Merger Control Regulation, Consumer Welfare, Abuse of dominance and Anti-competititive Practices.

The enforcement bodies are the Comesa Competition Commission (the "Commission") and the Board of Commissioners (the "Board").[6] The Commission's mandate includes investigation, legal advice, policy formulation, monitoring and adjudication of all competition matters within Comesa. The Board is primarily responsible for hearing appeals against decisions of the Commission.[7]

[2] For the full list please consult https://www.comesa.int/comesa-institutions/
[3] Article 55, Comesa Treaty
[4] Article 1, Regulations
[5] Article 3 and established by the Board in terms of Article 39, Regulations. Regulations are supported by the Competition Rules, 2004 (revised 2015) for procedure.
[6] Article 6, Regulations
[7] Article 15, Regulations

Comesa jurisdiction is automatically triggered once a business transaction crosses into the border of another Member State, subject to regulations of course.[8] Case studies discussed herein shall show how the Commission operates with extraterritorial jurisdiction in liaison with domestic regulators.

3. Transactional review

3.1. Current Foreign Direct Investment (FDI) trends[9]

Comesa FDI Income v Africa:	FDI inflows increased by 3.6% from US$ 18.6 billion in 2016 to US$ 19.3 billion in 2017 and accounted for approximately 46% of Africa's FDI inflows in 2017;[10]
Comesa FDI dominating countries:	Egypt 44.4% and Ethiopia 18.6%; Petroleum (64.6%), Services (11.4%) and Manufacturing (10.4%) sectors dominated in Egypt. Real estate, Manufacturing, and Construction dominated in Ethiopia at 92%.
Comesa FDI dominating sectors:	Overall, Manufacturing, Oil and gas, Real estate, Construction and Financial services are the most lucrative sectors in the Common Market.
Comesa greenfields v Africa	The Common Market accounted for 33% of all greenfield projects in Africa. Total number of greenfield projects were 219 and shared as follows; Egypt (24%), Kenya (23.7%), Ethiopia (11%) and others 41.3%

Fig 1 (Comesa, 2018)

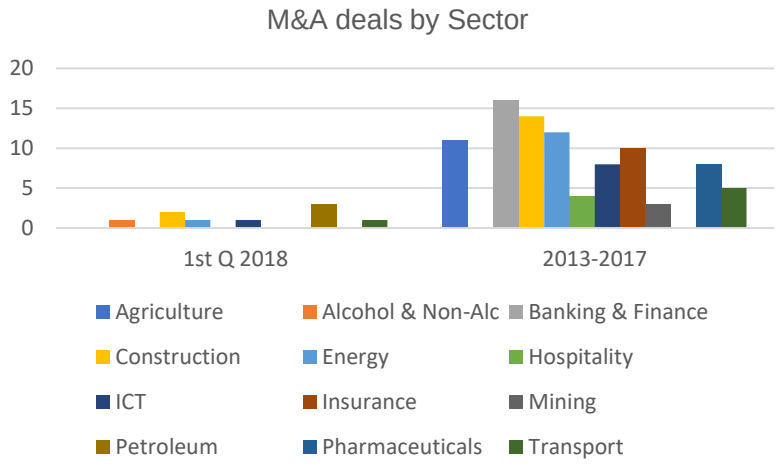
3.2. Sector performance

Comesa recognises the following sectors*; Agriculture; Alcohol & Non-alcoholic Beverages (FMCG); Banking & Finance; Construction (Real estate & Infrastructure); Energy (Power); Hospitality; ICT & Communications; Insurance; Mining; Petroleum (Oil & Gas); Pharmaceuticals and Transport logistics;*

The target sectors for investment are currently Manufacturing, Petroleum (Oil & Gas), Construction (Real Estate & Infrastructure) and Banking & Finance. As shown below, the dominant sectors in M&A transactions within the first quarter of 2018 were Petroleum,

[8] Article 16 (1) Regulations
[9] Comesa Investments Trends 2018 Report
[10] Overall Africa FDI inflows declined by 21.4% from 53.2% in 2016 to about 41.8% in 2017, owing to global trends.

Construction and ICT, whilst Banking & Finance, Construction and Energy (power), were leading between 2013 and 2017.[11]



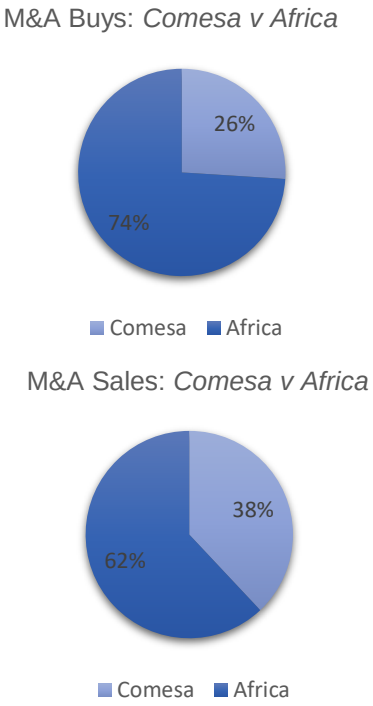


Fig 2 – profile of merger transactions by sector;

Figs 3 & 4 – M&A deals bought & sold - 2016 & 2017 (Comesa, 2018);

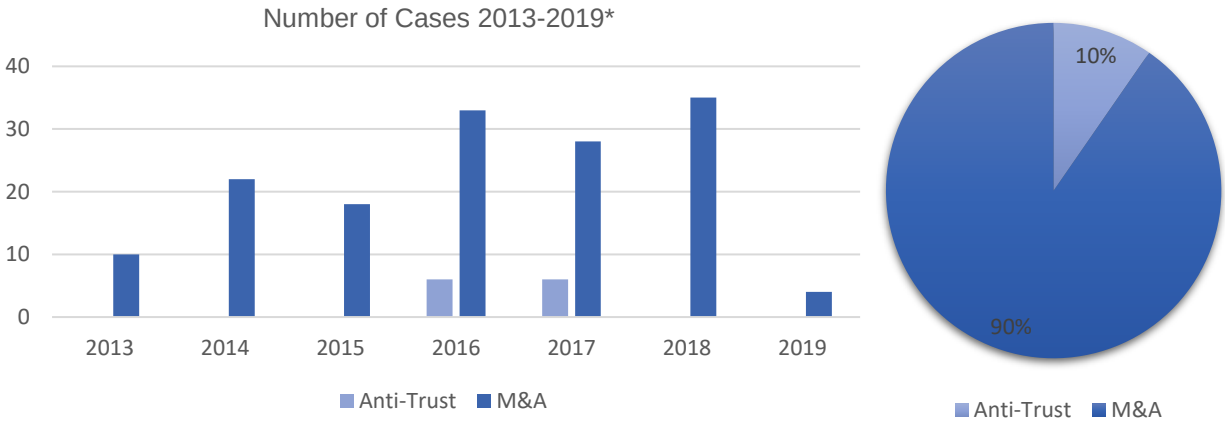
3.3. Value realised per transaction;

It is important to note that Comesa does not disclose business secrets and other important corporate information during the publication of any of its decisions.12 Transaction specific corporate information therefore does not form part of the public record and hence there is no verifiable intelligence on the value of cases at transaction level. Comesa is renowned for its detailed market intelligence, however, it only captures general statistics on industry performance, economic outlook per State, overall FDI inflow etc. This is broadly outlined in the "FDI profile", above. The downside of current statistics is that they do not disclose indigenous or African firms' performance against their multinational counterparts.

[11] Comesa 2018 report, above
[12] Rule 73, Competition Rules

4. Brief case review (2014 – 2019)

4.1. Case statistics



Figs 5 & 6 – Anti-trust v M&A cases (Comesa, April 2019)

*List includes all cases received, the bulk of which have been determined. The Court of Justice is yet to receive any appeals from the Board of Commissioners on any competition matter.

4.2. M&A

Mergers are regulated under Comesa so as to prevent monopoly and abuse of dominance strategies, for instance where companies merge simply to eliminate competition in the market. Notwithstanding, Comesa encourages M&A transactions because greenfield investments have been on the decline in the market, hence M&A has been used as a form of both foreign direct investment and domestic investment.[13]

Comesa Competition Commission has handled almost two hundred (200) mergers since inception, granting most unconditionally, some conditionally and declining or withdrawing a few.[14]Three important trends worth noting in 2018/19 M&A include the following;

a. Petroleum (Oil & Gas), Construction (Real estate & Infrastructure) and ICT, are target sectors;
b. Multinational corporations dominate the investment space against indigenous firms;
c. Conditions in acceptance generally focus on regulating injustices

[13] GK Lipimile (2013), *'Operationalisation of the Comesa competition regulations'*, Chatham House Annual Competition Policy. Lipimile is the Comesa Competition Commison, CEO.
[14] Comesa Archives; https://www.comesacompetition.org/?cat=56

A good example is the conditional acceptance of the 100% acquisition of the entire stake of Engen (South Africa) in EIHL (Engen International Holdings) by Vivo Energy (the Netherlands) of 5th July 2018.[15] Vivo, the acquirer is a Dutch company specialising in retail of petroleum brands in Kenya, Madagascar, Uganda and Zambia. Engen is a well-known South African petroleum retail company that owns the target, EIHL 100%. EIHL is a holding company based in Mauritius that operates retail and wholesale petroleum product distribution in the DRC, Kenya, Malawi, Rwanda, Zambia and Zimbabwe.

The transaction involves Vivo acquiring 100% of EIHL, whilst Engen acquires 13% of Vivo. The Commission noted that certain aspects of the acquisition, would impede fair trade. There are overlapping activities in Kenya which would lead to competition concerns in the downstream retail of petroleum products such as petrol, diesel and lubricants in certain places. The Committee Responsible for Initial Determination (the "CID") approved the acquisition based on conditions which include the following;

- Retention of all employees of the target company;
- Honouring all existing contracts especially with SMEs;
- Selling off all the assets of one of the retail stations within thirty-six (36) months from the date of the notice of determination.

4.3. Anti-competitive practices and consumer protection

Statistics have shown that the Commission has only investigated and decided upon very few anti-trust and consumer protection matters. One of the most important cases that shows the impact of competition regulation on cross-border businesses in the Common Market is the case concerning the *Allegations of Misleading Adverts by Fastjet Airlines Limited (the "Fastjet case")*. It is an important case because it covers both anti-trust and consumer protection.

Fastjet is a predominantly British owned pan-African low-cost carrier that only operates in Africa. It is listed on the London Stock Exchange and is the brainchild of former Easyjet and Go (British Airways) founders. Fastjet operates in East, West and Southern Africa under the

[15] Decision of the Thirty-Sixth Committee responsible for Initial Determination on the application for authorisation of the merger involving Vivo Energy Holding BV and Engen International Holdings (Mauritius) Limited 5 July 2018

brand names, "Fastjet" and "Fly540", with offices in Dar-es-Salaam, Tanzania; Harare, Zimbabwe and Johannesburg, South Africa. Southern African operations are predominantly African owned.

The brief background of the matter is that allegations of "misleading advertising" were levelled against Fastjet's Tanzanian office ("Fastjet Tanzania") for its marketing in Kenya.[16] It is Fastjet's general marketing policy that it advertises its tickets excluding tax and related government charges. The Competition Commission made its initial investigations on the 23rd May 2016, and determined that Fastjet's advertising in Kenya, Tanzania, Uganda, Zambia, and Zimbabwe ("Fastjet Group") was in violation of Comesa Competition Regulations.

The CID relied on Article 27(g) of the Regulations which provides as follows;

> *"A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services make a false or misleading representation with respect to the price of goods or services"*

Fastjet Kenya complied with the said regulations by ceasing the advertising model in consultation with the Kenyan Civil Aviation Authority. The standing position is that Comesa issued a formal warning to all Member States where Fastjet operates effective from 12th July 2016, to abstain from continued use of this advertising model.[17] This means that formal communication reached both the competition commissions and civil aviation regulators of all the Member States for enforcement, not only where the Fastjet Group operates. Fastjet escaped a fine, however, it is under close scrutiny by authorities within the Common Market and its competitors would relish an opportunity to raise the alarm should any further violations occur.

[16] Decision of the Twenty Third Meeting of the Committee Responsible for Initial Determination Regarding the Allegations of Misleading Adverts by Fastjet Airlines Limited Staff Paper No. 2016/06/JB/08
[17] In terms of Article 24 (6), Regulations, the Commission takes the "behaviour" of the parties into consideration

There seems to be sufficient authority within the regional and global airline industry at large to support the CID's strictness, if one considers similar sanctions against Rynair in 2005 and British Airways in 2014. In 2011, South African Airways ("SAA") and ticket agent Destination Southern Africa were fined US$75,000 for 'deceptive price' advertising by the U.S. Department of Transportation ("DOT"). SAA, unlike Fastjet was actually confusing its customers because when consumers clicked on a link next to the fare listed on the homepage, they were taken to a second page where they could select a specific vacation package. Only after selecting, were they taken to a third page where they could see the taxes, fees and the requirement for double occupancy. This violated the DOT policy which requires internet fare listings to disclose separate taxes and fees through a prominent link next to the fare stating that government taxes and fees are extra, and that the link must take the viewer directly to information where the type and amount of taxes and fees are displayed.[18]

Fastjet, in their defence argued that their advertising policy was clear enough as it not only explained the fare in detail below the advert but actually redirected the customer to the direct booking page with the full fare. The defendant did not appeal this decision to the Board of Commissioners. The prospects seemed minimal even at domestic level. Competition rules surrounding allegations of deceptive advertising are very strict in most jurisdictions because the rationale is not only to level the playing field in the industry but to protect unsuspecting consumers. In the Member State Zimbabwe for instance, "Misleading advertising" is a strict liability offence because it is a form of "public welfare offence" that is, an offence involving prohibitions or duties designed to protect the general public.[19]

Prosecution need not prove a mental element such as intention or negligence for determining the actual commission of the crime.[20] It is therefore not necessary to show that the service provider intended to deceive the consumer, but only that the consumer was misled or deceived by the advertisement. This means that an accused cannot rely on the same defences available where intention or negligence is a requirement.

[18] https://www.consumeraffairs.com/airline-advertising-rule-violations
[19] See Competition Act of Zimbabwe and the classical case of *S v Maceys of Salisbury Ltd* 1982 (2) ZLR 239 (S) (statute on contamination of foodstuffs) and *Zimbabwe United Freight Co Ltd* 1990 (1) ZLR 357 (S)
[20] Section 17 (1) Criminal Law (Codification & Reform) Act of Zimbabwe 9:23

It is my considered view that the Commission erred in its finding. Competition law in many jurisdictions within the Common Market, recognises genuine bargains as a legitimate marketing strategy. This is especially appropriate for a low-cost carrier, such as Fastjet that offers the so called "budget" travel packages. The adverts are not "misleading" or "false", as they are clear in prescribing the airline's bargain price as well as the provision for additional taxes which any reasonable customer ought to understand. There is absolutely no deliberate attempt to hide the complete air fare as the customer has all the necessary information to make an informed decision.

The effect of such a ruling for a low-cost carrier, is quite significant. Affordability is what a low-cost carrier sells, especially a pan-African one such as Fastjet that is trying to break into a lucrative market. Africa, which holds about 15% of the planet's population and 20% of earth's land mass, only benefits from less than 3% of the world's aviation sector.[21] Fares charged by operators in Africa are often four (4) times the cost ("seat per kilometre basis") of those charged in other regions like Europe, for instance.[22]

5. The heart of the business case

It is my view that "abuse of dominance" goes to the core of anti-competitive practice in the Common Market and is the heart of the business case for competition control.[23] A dominant position is defined by the Regulations as *"an ability to influence unilaterally, price or output in the Common Market or any part of it".* [24] This is when a company occupies such a powerful economic position that it dictates the terms of business for a certain sector in the Common Market.[25] The factors of dominance include such things as restricting entry of any business into the market, eliminating competition, imposing unfair purchase or selling prices or limiting production of goods or services for a market to the detriment of consumers.[26] Restricted

[21] According to the International Air Transport Association ("IATA"), rapid population growth in Asia and Africa is amongst the top drivers of change; "The future of the airline industry 2035", IATA (2017), 6.
[22] IATA
[23] Article 18, Regulations
[24] Article 17(c)
[25] Article 17(a), Regulations
[26] See Comesa Consumer Guide

competition violates consumer welfare as consumers cannot benefit from variety, improved quality and lower prices.[27]

Foreign owned cartels are prevalent on the African landscape and they are the primary reason why Comesa Competition control must succeed to protect both consumers and indigenous players. Prior to the operationalisation of the Comesa Competition Commission, cartels took advantage of the lack of regional oversight to abuse market power. FMCG has been an easy target and the notorious "beer wars" are an example. In East Africa, South African based company SABMiller and Kenyan based EABL, engaged in market battles until they reached "market allocation arrangements", where EABL left the Tanzanian market to SABMiller and SABMiller left the Kenyan market to EABL.[28] In 2009, the Competition Commission of Mauritius prosecuted a similar unlawful arrangement between Stag Beverages Limited (Castel subsidiary) and Phoenix Beverages, imposing a fine of about US$900,000. [29]

6. Practical considerations for your client

6.1. The forum

Institutional structure may be summarised as follows:

Comesa Court of Justice:	Has jurisdiction over all matters within the Comesa Treaty, as a court of first instance and advisory body for the Council and Member States.[30] It has been operational since 2000 in Khartoum, Sudan. It acts as appellate court for competition matters.
Board of Commissioners:	Handles all appeals from the Competition Commission.[31] It is the supreme policy organ of the Commission.[32]
Competition Commission's CID:	The Committee for Initial Determination conducts all investigations and makes preliminary decisions on all matters brought before the Commission.[33]

[27] L Kaziboni & R Das Nair (2014), 'the beer industry in Africa: a case of carving out geographic markets?', *CCRED*, (University of Johannesburg), 1
[28] B Matsika, 'Imara Africa Securities, Investing in Africa: East Africa Breweries Limited 2011 Results & Update' 3 (Imara Africa Securities 2011), available at: *http://www.imara.co/uploads/stockbroking/africa-securities/IAS_EABL_FY_2011_Results_Update__07_Oct_2011.pdf*.
[29] Competition Commission of Mauritius, 'Commissioners endorse the recommendations of the Executive Director and direct Phoenix Beverages Ltd and Stag Beverages Ltd to pay financial penalties of MUR27 million for collusive behaviour', (2014)
[30] Article 7, Treaty
[31] Article 15, Regulations
[32] Article 12, Treaty; Section 7 & 25, Rules
[33] Article 6, Treaty; Section 24, Rules

Fig 7

6.2. The law

Anti-trust and merger cases are governed by the Comesa Competition Regulations, Competition Rules, 2004 as amended in 2015 together with guidelines for Competition and Merger Assessment. According to the Treaty, Comesa law is binding on all Member States and therefore takes precedence over domestic law in all competition matters, therefore parties cannot have recourse to domestic legislation on Comesa matters. [34] Jurisdiction is triggered once the following has been determined:

a. Cross-border application;
b. Threshold;

In M&A, the Regulations apply where both the acquiring firm and the target firm or either operates in two (2) or more Member States.[35] The jurisdictional limit therefore is that there should be some minimum level of cross-border activity.[36] Take note that a firm need not be domiciled in a jurisdiction to qualify for extra-territorial application, so long as it conducts business through; exports, imports, distribution channels and subsidiaries. [37]

In addition, once the mergers have been deemed applicable in Comesa, the regulations create a mandatory notification system detailed below. A notifiable merger must satisfy the following thresholds:

- The combined annual turnover or value of assets (whichever is higher) of the merging parties in the Common Market equals or exceeds US$50 million and;
- Each of at least two (2) of the merging parties has annual turnover or assets in the Common Market of US$10 million or more. [38]

Now, if one was to file in a Member State such as Zimbabwe for instance, then Counsel should expect the national competition authority to apply a threshold of US$1.2 million (combined annual turnover of parties). If value exceeds US$10 million, however, then the Comesa

[34]Articles 5 & 10(2), Treaty. Except where conduct is specifically exempted by national legislation.
[35] Article 23 (3) (a), Regulations
[36] Articles 3 & 16 (1)
[37] See comments by Comesa Competition CEO, George K. Lipimile, above
[38] Section 3, Merger Assessment Guidelines

monetary jurisdiction applies. Take note that the thresholds would not apply where each of the merging parties generates two thirds or more of the annual turnover in one and the same Member State.[39]

6.3. The procedure[40]

The Commission should be notified within thirty (30) days of the parties' decision to merge, failure of which attracts fines of up to 10% of either one or both merging parties' turnover in the Common Market. The law is actively enforced within the Common Market and investors within the various Member States comply.

In terms of timelines, Counsel should expect a decision within four (4) months or one hundred and twenty (120) calendar days for a complex merger (phase 2) and forty-five (45) calendar days for a phase 1.

Aggrieved parties may appeal to the Board of Commissioners in terms of the Regulations. Further appeal lies with the Comesa Court in Khartoum. The procedure is covered in the Rules of the Court. The Court's decision is final and not appealable at national level.[41] In fact, the Court's rulings take precedence over those of the national courts of Member States and Member States may quote precedents from its rulings.[42] Whilst the Court has a mandate to make rulings on any issue related to the interpretation of the Treaty, Counsel should take note that the Commission may be a faster route for issues of clarity. The Commission has a mandate for capacity building hence its doors are open for clarification of procedure.

Comesa Competition has created a "one-stop-shop", hence merger notification at the regional office eliminates multiple filing in each of the competition authorities within the Common Market. Caution, however, is advised as there are certain Member States like Kenya that are yet to regularise their operations in line with the Treaty[43], hence it is advisable to confirm with the national competition authority if a local notification is still mandatory.

[39] Section 3, above
[40] Comesa Competition Rules of 2004
[41] Article 31, Treaty
[42] Articles 29 & 30, Treaty
[43] Articles 5(2) & 10(2)

6.4. The cost

Filing fees have been reduced. They were previously set at 0.5% of parties' combined turnover or assets (whichever is higher) up to a maximum of up to US$500,000. The new fees are set at 0.1% of combined annual turnover or assets (whichever is higher) up to a maximum of up to US$200,000.[44] The only way to avoid the regional fees altogether is to attempt a national notification. Comesa Competition Rules apply to mergers that have *"an appreciable effect on trade between Member States and which restrict competition in the common market."*[45] The 2015 Guidelines clarify that where there is minimal effect on the local market, then there is no need for regional notification. [46]

Counsel must apply to the Commission within thirty (30) days of decision to merge, to be issued with a "Comfort Letter" to enable national notification and avoid the high regional filing fees. Counsel must expect the Comfort Letter within twenty-one (21) days, subject to any additional clarification or documentation. If Counsel was required to file national notification for a transaction in Egypt, Kenya and Zimbabwe for instance, then they should expect fees within the following ranges: Egypt (US$0), Kenya (min US$10,000-max US$100,000) and Zimbabwe (min US$10,000 – max US$50,000). Regional filing still appears higher.

7. Concluding remarks

The Commission has come a long way in the provision of clarity, certainty and predictability of the enforcement system. This value proposition is still an ongoing concern; clearly, however, a business case still exists for a regional competition regime. Abuse of dominance is one of the major barriers to fair trade and a big obstacle for indigenous firms. Comesa needs to step up its investigation and prosecution of cartels in the Common Market.

Comesa Competition control is doing relatively well with what it has, against its counterpart, the EU. Resources are limited, however; Members States have different levels of development and there is need for more buy-in from Member States to raise its standards to a comparable

[44] Rule 55 (5), Competition Rules (2015)
[45] Articles 16 & 18, Regulations
[46] Rule 55 (10)

one-stop-shop facility. Counsel is therefore advised to always check the extant procedural arrangement between Comesa and the respective Member States before instituting notification proceedings.

Beyond the Common Market, some of the policy challenges such as multiplicity of trade agreements are Africa-wide, hence priorities and interest will always collide. Take a hypothetical transaction that could involve Kenya, Tanzania and Zambia for instance – Kenya owes equal allegiance to the East African Community ("EAC") and Comesa, whilst Tanzania to EAC and Southern African Development Community (SADC), and Zambia to Comesa and SADC. The overlap provides a lifeline for the same regional cartels to continue carving out and controlling markets across Africa's borders because Comesa is currently the only one with an effective extraterritorial mandate. The current focus towards the Continental Free Trade Area (CFTA) is expected to be the lasting harmonisation strategy to bring sanity to the region[47] but hopefully Comesa competition can lead the continent in regional competition control. Comesa has made strides in law, procedure and resources, with an enviable efficient system. The recent digitisation of the Comesa Court has accelerated information flow and justice delivery to match global standards of "paperless" courtrooms like the EU and UN.

[47] F Ismail, "Inclusivity & the transformational potentials of the AfCFTA for African countries", (2019), *NIALS*, (University of Lagos)

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