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Mergers and Acquisitions and the Incorporation of the Public Interest in Africa's Regional Competition Laws: A Case Study of COMESA

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Abstract

Public interest issues have the potential to play a significant role in the evaluation of mergers and acquisitions in Africa's regional competition laws. A case in point is the Common Market for Eastern and Southern Africa (COMESA): its regional competition authorities have jurisdiction to evaluate transactions within the Common Market. To that end, COMESA's regional competition law enumerates specific public interest factors regarding mergers and acquisitions. Further, COMESA's regional competition law permits the consideration of additional factors under the rubric of public interest, without specifying what these factors are. On this basis, COMESA's regional competition authorities have gradually created precedents on incorporating public interest considerations. This illustrates the point that purist positions towards competition law do not serve Africa's socio-economic development goals. Therefore, the challenge facing COMESA's regional competition authorities is the application of the public interest in a manner that remains faithful to the economic doctrine that underpins competition law.

Keywords

Acquisitions, COMESA, competition law, mergers, public interest, regional integration

INTRODUCTION

Mergers occur when previously independent undertakings combine to form a single entity, while acquisitions occur when one undertaking gains control over the assets or stock of another.[1] It is immaterial whether one is faced

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1 E ElHauge and D Geradin *Global Competition Law and Economics* (2nd ed, 2011, Hart Publishing) at 801. Art 1 of the COMESA Competition Regulations of 2014 defines the term "undertaking" to include "any person, public or private, involved in the production

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with a merger or an acquisition: the competition law concerned remains the same, namely that previously independent undertakings have now combined into a single entity or are now under a common ownership.[2] It is common for competition laws to include public interest clauses in some form in the evaluation of mergers and acquisitions;[3] this is because mergers and acquisitions tend to have not only economic but also political implications.[4] Such public interest clauses can take various forms; for instance, through the use of explicit instructions that the public interest be considered in merger evaluations with reference to specified factors, through the exemption of certain mergers and acquisitions from assessment by the competition authorities, or by vesting political institutions with the power to override the merger decisions of the competition authorities.[5]

Therefore, to appreciate the role of the public interest in the regulation of mergers and acquisitions within the context of regional economic integration in the Common Market for Eastern and Southern Africa (COMESA), one must first clarify what the "public interest" concept means and thereafter consider how it is incorporated in the evaluation of mergers and acquisitions in COMESA. To that end, this article focuses on the incorporation of, or attempts to incorporate, the public interest in merger regulation by the COMESA competition authorities (the Competition Commission and the Committee for Initial Determination). This article also analyses mergers and acquisitions case law as decided by these two regional competition authorities where the public interest was explicitly invoked and applied with regard to mergers and acquisitions with a COMESA regional dimension. This article utilizes COMESA competition law to put forward the premise that African countries, from the standpoint of their regional economic communities, can and should make provision for the public interest in their mergers and acquisitions review frameworks. I take the position that competition law purists (who oppose the use of public interest in competition law analyses) do not serve African countries' economic development aspirations.[6] The challenge then is twofold: how to clearly define the public interest and how to incorporate it in a manner that remains faithful to the economic doctrines that underpin competition law principles.

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of, or the trade in, goods, or the provision of services". In this article, "transaction" shall be used as a collective term to refer to both mergers and acquisitions.

2 ElHauge and Geradin, *Global Competition Law*, above at note 1 at 805.

3 D Reader "Accommodating public interest considerations in domestic merger control: Empirical insights" (Centre for Competition Policy working paper, 18 February 2016) at 21.

4 Id at 1–2.

5 Id at 8–9.

6 EM Fox "Equality, discrimination, and competition law: Lessons from and for South Africa and Indonesia" (2000) 41 *Harvard International Law Journal* 579 at 593.

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THE MEANING OF "PUBLIC INTEREST" IN COMPETITION LAW ANALYSES

The connection between the public interest and competition law is not a new phenomenon. In his 1776 treatise *The Wealth of Nations*, Adam Smith, a Scottish economist and philosopher, posited that free markets were in the public interest.[7] He postulated the "invisible hand" theory in which, if participants in a market have the freedom to engage in economic enterprise for their own self-interest, they invariably promote the public interest, without setting out to do so.[8] One can also make the argument that the oldest antitrust statute in modern competition law, the Sherman Act of 1890, was principally motivated by public interest considerations.[9] The Sherman Act was aimed at "protecting 19th century economic and political liberalism", which was obvious from Senator Sherman's comments that the statute would be "a bill of rights, a charter of liberty" to safeguard "the industrial liberty of the citizens" of the United States.[10] To consider the place of the public interest in competition law, and specifically in the evaluation of mergers and acquisitions, one must first examine how the concept is incorporated as an objective in modern competition law.

Generally, the objectives of competition law can be classified into two areas: the "core economic" goals and the so-called "public interest" goals (also referred to as "populist" goals).[11] The "core economic" objectives of competition law are concerned with promoting economic efficiency (with economists distinguishing allocative efficiency, productive efficiency and dynamic efficiency),[12] maintaining open markets (thereby protecting the competition process itself and preventing monopolistic practices)[13] and promoting innovation,[14] as well as the promotion of

7 A Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (1/1, 1776, Strahan Publishers), chap 2, para 26; E Butler *The Condensed Wealth of Nations and the Incredibly Condensed Theory of Moral Sentiments* (2011, Adam Smith Research Trust) at 4.

8 Smith *An Inquiry*, above at note 7, chap 2, para 28.

9 Sherman Act of 1890 15 USC.

10 P Sutherland and K Kemp *Competition Law of South Africa* (2019, LexisNexis), para 2(4), citing 21 Congressional Record 2457 (1890). In his minority judgment in *United States v Trans-Missouri Freight Association* [1897] 166 US 290 at 355–56, J White confirmed that "[t]he remedy intended to be accomplished by the act of congress was to shield against the danger of contract of combination by a few against the interest of the many and to the detriment of freedom".

11 OECD "The objectives of competition law and the optimal design of a competition agency" (2003) 5/1 *Organisation for Economic Co-operation and Development Journal of Competition Law and Policy* 1 at 2–4. The OECD also recognizes a third class of objectives, namely the so-called "grey-zone" objectives, such as curbing the concentration of market power.

12 RH Bork *The Antitrust Paradox: A Policy at War with Itself* (1993, The Free Press) at 427.

13 C Kaysen and DT Turner *Antitrust Policy: An Economic and Legal Analysis* (1959, Harvard University Press) at 14–16.

14 See J Schumpeter *Capitalism, Socialism and Democracy* (3rd ed, 1942, Harper & Brothers) at

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consumer welfare[15] by way of quality products, better product choices and lower prices.[16] Conventional competition law wisdom generally supports "core economic" objectives.[17]

On the other hand, the "public interest" objectives include promoting employment, small and medium enterprises, and social welfare, protecting specific sectors in the economy, protecting national ownership and ensuring the economic participation of previously excluded persons.[18] These objectives vary across jurisdictions because of the different social, political and economic considerations that are at play.[19] At its root, the term "public interest" refers to the general welfare of a populace considered as deserving recognition and

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83–84, where Schumpeter (an Austrian economist) describes innovation (dynamic competition) as "the perennial gale of creative destruction" which "incessantly revolutionises the economic structures from within, incessantly destroying the old one, and incessantly creating a new one". According to Schumpeter, competition is concerned with "the new commodity, the new technology, the new source of supply, the new type of organisation … competition which commands a decisive costs or quality advantage and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives".

15 Bork *The Antitrust Paradox*, above at note 12 at 93, 427; UNCTAD "The benefit of competition policy for consumers" *United Nations Conference on Trade and Development* (2014) 1; H Hovenkamp "Implementing antitrust welfare goals" (2013) 81/5 *Fordham Law Review* 2471; ME Stucke "Should competition policy promote happiness?" (2013) 81/5 *Fordham Law Review* 2579; RH Lande "A traditional and textualist analysis of the goals of antitrust: Efficiency, preventing theft from consumers and consumer choice" (2013) 81/5 *Fordham Law Review* 2349; D Zimmer "Consumer welfare, economic freedom and the moral quality of competition law" in J Drexl, W Kerber and R Podszun (eds) *Competition Policy and the Economic Approach: Foundations and Limitations* (2011, Edward Edgar Publishing) 50 at 72; N Motta *Competition Policy: Theory and Practice* (2004, Cambridge University Press) at 18.

16 OECD "Report on convergence of competition policies" (1994) 18/1 *Organisation for Economic Co-operation and Development Journal of Competition Law and Policy* 167 at 173.

17 Ibid; W Adams and JW Brock "Antitrust and efficiency: A comment" (1987) 62/5 *New York University Law Review* 116.

18 OECD "The objectives of competition law", above at note 11 at 2–4; T Kaira "The role of SMMEs in the formal and informal economy in Zambia: The challenges involved in promoting them and including them in competition regulation" in D Lewis (ed) *Building New Competition Regimes* (2013, Edward Elgar Publishing) 139 at 142–43; T Hartzenburg "Competition policy and enterprise development: The role of public interest objectives in South Africa's competition policy" in L Cook, R Fabella and C Lee (eds) *Competitive Advantage and Competition Policy in Developing Countries* (2007, Edward Elgar Publishing) 10 at 14; D Audretsch "Small firms, innovation and competition" in M Neumann and J Weigand (eds) *The International Handbook of Competition* (2004, Edward Elgar Publishing) 79 at 88; Kaysen and Turner *Antitrust Policy*, above at note 13 at 7; B Orbach and G Campbell-Rebling "The antitrust curse of bigness" (2012) 85 *Southern California Law Review* 605.

19 L Parret "Shouldn't we know what we are promoting? Yes, we should! A plea for solid and comprehensive debate about the objectives of EU competition law and policy" (2010) 6/2 *European Competition Journal* 339 at 341.

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protection.[20] The term means something in which the public as a whole has a stake, which then justifies government intervention.

However, there is no unanimity when it comes to pursuing the public interest in competition law, either in general or in the evaluation of mergers and acquisitions in particular. This is primarily because there is no precise or generally accepted definition of what the public interest is in the context of competition law, except that the term covers those objectives or interests that do not fall under the "core economic" category.[21] Furthermore, public interest clauses also tend to be influenced by social, cultural and political context, thus making room for considerable variations in terms of the interpretation and application of competition law principles.[22]

Therefore the way that the public interest must be incorporated in competition law analyses with regard to specific business practices, such as mergers and acquisitions, has proved to be a contentious issue. Those in support of the public interest in competition law analyses, especially from the developing world, have offered cogent reasons for their position. For example, in South Africa the point has been made that the country's political and socio-economic history compels the inclusion of the public interest, not only as a general objective of its competition law[23] but also as an important consideration in the evaluation of mergers and acquisitions[24] as well as in exemption applications.[25] Further, the argument has been made that there is no reason

20 BA Barner *Black's Law Dictionary* (10th edition, 2014, Thomson Reuters), 'public interest'.

21 Reader "Accommodating public interest considerations", above at note 3 at 6.

22 Id at 28.

23 In its Preamble, the South African Competition Act 89 of 1998 (as amended) speaks of the racial discrimination which led to the exclusion of the majority black citizens from participation in the economy by all South Africans. In sec 2, the Act enumerates its objectives, which include the promotion of employment and the advancement of the social and economic welfare of all South Africans, and increasing the ownership stakes in the economy by historically disadvantaged individuals.

24 In sec 16 of the Competition Act, the competition authorities must consider the effect of a transaction on a specific industry, on employment, on the competitiveness of small business enterprises owned or controlled by historically disadvantaged persons, and the ability of domestic industries to compete internationally. In Nasionale Pers Ltd & Education Investment Corporation Ltd [1999–2000] CPLR 89 (CT) the competition authorities considered the fact that education was important in addressing the legacy of apartheid and approved the merger subject to conditions directed at building capacity in public education; in Unilever plc & Others v Competition Commission & Others 55/LM/Sep01 the competition authorities were concerned with the job losses that would result from the merger; in South African Breweries (Pty) Ltd & Diageo South Africa (Pty) Ltd LM/187/Oct18 the competition authorities considered the impact the merger would have on job creation in the future; in Simba (Pty) Ltd & Pioneer Food Group Ltd LM108/Sept19 the competition authorities imposed conditions providing for employee share ownership; in Tiger Brands Ltd & Others / Lamgeberg [2006] 1 CPLR 370 (CT) the competition authorities imposed conditions pertaining to the re-skilling of employees and the establishment of a training fund for the benefit of persons affected by the merger.

25 Section 10 of the South African Competition Act envisages the granting of exemptions

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why competition laws in the developing world should not take due consideration of the previously excluded sections of a society to incorporate distributive goals or non-economic goals, as South Africa's Competition Act 89 of 1998 does.[26] Under South African competition law, the public interest may lead to the prohibition (rejection) of a merger which is not anti-competitive, but it could also save a merger that would otherwise have been prohibited on the basis of a pure competition criteria.[27] However, caution must be exercised in that consideration of the public interest must be merger-specific,[28] lest competition law is turned into an unchecked vehicle of distribution.[29]

Those who oppose the public interest in competition law analyses have been particularly forceful in maintaining the position that competition law should not be concerned with public interest objectives, but should concern itself with fulfilling "core competition" goals; that is, only economic doctrine must be considered.[30] Bork, a proponent of the Chicago School, in defence of using economic doctrine as the sole test in competition law analyses, argued that "the *whole* task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare" (emphasis added).[31] Competition law purists have also made the point that the inclusion of the public interest will negatively affect the attainment of economic efficiency and consumer welfare[32] and, furthermore, that the public

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with regard to anti-competitive practices where such practice contributes to improving exports, advancing the competitiveness of small to medium enterprises or those owned (or controlled) by historically excluded individuals, and preventing the deterioration of an industry or ensuring economic stability.

26 Fox "Equality, discrimination, and competition law", above at note 6 at 593; AL Chua "Markets, democracy and ethnicity: Toward a new paradigm for law and development" (1998) 108 *Yale Law Journal* 1 at 69, 105–07; AL Chua "The paradox of free market democracy: Rethinking development policy" (2000) 41/2 *Harvard International Law Journal* 289; EM Fox "Economic concentration, efficiencies and competition: Social goals and political choices" 1977 (47) *Antitrust Law Journal* 798 at 885; EM Fox "The kaleidoscope of antitrust and its significance in the world economy: Respecting the differences" in BE Hawk (ed) *International Antitrust Law and Policy: Fordham Corporate Law 2001* (2001, Juris Publishing) 597 at 599; LB Schwartz "'Justice' and other non-economic goals of antitrust" (1979) 127 *University of Pennsylvania Law Review* 1076 at 1078; EM Fox "The modernization of antitrust: A new equilibrium" (1981) 66/6 *Cornell Law Review* 1140 at 1142; H Hovenkamp "Distributive justice and the antitrust goals" (1982) 52 *George Washington Law Review* 1 at 21.

27 For example, Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd 66/LM/Oct01; Telkom SA Ltd & Business Connexion Group Ltd 51/LM/Jun06, para 297.

28 See Wal-Mart Inc & Massmart Holdings Ltd [2011] 1CPLR 145 (CT).

29 For example, Anglo American Holdings Ltd and Kumba Resources Ltd / Industrial Development Corporation (intervening) [2003] 46/LM/Jun02 ZACT 45, para 156.

30 For example, *National Society of Professional Engineers v United States* [1978] 435 US 679, 692.

31 See Bork *The Antitrust Paradox,* above at note 12 at 91, where Bork also argues that "antitrust … has nothing to say about the ways prosperity is distributed".

32 H Hovenkamp "Post-Chicago antitrust: A review and critique" (2001) *Columbia Business*

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interest may potentially result in the unpredictable application of competition law and that other state instruments, instead of competition law, are more suitable to promote the public interest.[33] Another hurdle that confronts the incorporation of the public interest is that of institutional capabilities. In some jurisdictions it is the competition authorities themselves who are tasked with incorporating the public interest in competition law; in some, the task is given to sector regulators; and in others, this responsibility belongs to political institutions, not the competition authorities.[34] It is for these reasons that jurisdictions that explicitly employ the public interest in competition law analyses only do so in narrowly defined circumstances.[35]

It bears mentioning that an effective competition law and enforcement framework does in fact achieve the public interest, for example in the form of poverty alleviation (through the lowering of prices and greater product choice) and economic growth.[36] In these circumstances, the public interest is not being used to achieve a certain end, but rather is the result of an effective competition policy and law framework; it is a result of a free market, which is generally accepted.[37] It is when the public interest is explicitly or tacitly invoked as a tool, as a means to an end, that there is disagreement.

A BRIEF OVERVIEW OF THE COMPETITION LAW OF COMESA

The competition law of COMESA is principally governed by the COMESA Competition Regulations of 2004, as amended (the Competition Regulations or the Regulations).[38] In keeping with conventional competition law

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Law Review 257 at 269; WD Reekie "The Competition Act, 1998: An economic perspective" (1999) 67/2 *South African Journal of Economics* 258 at 259, 286.

33 Id at 259; Competition & Markets Authority "Public interest regimes in the European Union: Differences and similarities in approach" (Final Report of the EU Merger Working Group, 10 March 2016) at 5.

34 Reader "Accommodating public interest considerations", above at note 3 at 28.

35 OECD "Competition law and responsible business conduct" (paper presented at the Global Forum on Responsible Business Conduct, 18 June 2015) at 19.

36 J Davies and A Thiemann "Competition law and policy: Drivers of economic growth and development" (2015) 4 *Organisation for Economic Co-operation and Development Journal of Competition Law and Policy* 1 at 9.

37 Ibid.

38 COMESA is one of Africa's regional trade blocs. It is also one of the building blocks of the African Continental Free Trade Area (AfCFTA), established by the Agreement Establishing the African Continental Free Trade Area of 2018, which came into force on 1 January 2021. In the Treaty Establishing the Common Market for Eastern and Southern Africa (the COMESA Treaty), signed on 5 November 1993 and which came into force on 8 December 1994, art 55 affirms the importance of competition policy and law and makes provision for the enactment of regional competition laws. Pursuant to art 55, specific regional legal instruments pertaining to competition law have been adopted, namely: the COMESA Competition Regulations of 2004, the principal competition law instrument in COMESA; the COMESA Competition Rules of 2004, which provide for

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principles, these Competition Regulations prohibit anti-competitive business practices (both vertical and horizontal practices, as well as abuse of dominance),[39] provide a framework for the evaluation of mergers and acquisitions,[40] and make provision for consumer protection.[41] The Regulations also create institutional mechanisms tasked with enforcing regional competition law: the COMESA Competition Commission (the Competition Commission or simply the Commission), whose primary function is to apply the Regulations with regard to the trade between COMESA member states and to promote competition within the Common Market through, inter alia, monitoring and investigating anti-competitive undertakings and mediating disputes between member states concerning anti-competitive practices;[42] and the COMESA Board of Commissioners (the Board of Commissioners), which serves as the supreme decision-making body and, inter alia, has appellate and review jurisdiction of the Competition Commission's decisions.[43] From the Board of Commissioners are assigned three Commissioners who serve as full-time members of the Board and form the Committee for Initial Determinations (CID) with regard to alleged anti-competitive practices and mergers and acquisitions.[44] The Competition Regulations apply to all economic activities conducted by public or private persons with a regional dimension, that is, where the said economic activities are carried out within or have an effect within the COMESA Common Market.[45] The economic

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the procedural aspects of COMESA's competition law; the Rules on COMESA Revenue Sharing of Merger Filing Fees of 2012, the objective of which is to devise an equitable method of sharing revenue generated by merger and acquisitions filings with a COMESA dimension; the COMESA Rules on the Determination of Merger Notification Thresholds and Method of Calculation of 2012, which prescribe the threshold and method of the calculation of the turnover or the value of the assets of parties to mergers and acquisitions; the COMESA Merger Assessment Guidelines of 2014, which embody the Common Market's merger control regime; the COMESA Competition Commission (Appeals Board Procedure) Rules of 2017; the COMESA Guidelines on Market Definition of 2019, which establish a framework within which the Competition Regulations are applied by the COMESA Competition Commission and provide guidelines for a systematic tool in identifying the competitive constraints that undertakings in the region face; the COMESA Guidelines on Restrictive Business Practices of 2019, which aim to provide general guidance on the implementation of the COMESA Competition Regulations' provisions on restrictive business practices; and the COMESA Guidelines on Abuse of Dominance of 2019, which aim to provide general guidance on the abuse of dominance provisions in the COMESA Competition Regulations.

39 Competition Regulations, arts 16–22.

40 Id, arts 23–26.

41 Id, arts 27–39.

42 Id, arts 6–11.

43 Id, arts 12–15.

44 Id, art 13(4).

45 Id, art 3(1). However, arts 4(1)–4(2) enumerate specific exclusions to which the Competition Regulations do not apply, namely labour-law collective bargaining arrangements, the activities of trade unions, and the activities of professional associations.

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activities, such as mergers and acquisitions, must have a substantial and "appreciable" effect on the trade between COMESA member states and must restrain competition in the Common Market.[46]

THE COMESA MERGERS AND ACQUISITIONS REVIEW FRAMEWORK

Compared to other business practices governed by the Competition Regulations, the Competition Commission has to date evaluated a considerable number of mergers and acquisitions, and this number continues to grow.[47] These transactions cover a wide spectrum of sectors, such as mining, pharmaceuticals, banking and financial services, agriculture, information technology and telecommunications, insurance, energy and construction.[48] All COMESA member states have had undertakings operating in their territories which have notified mergers and acquisitions to the Commission.[49]

Mergers and acquisitions are governed by the COMESA Competition Regulations, the COMESA Merger Assessment Guidelines of 2014 (the Merger Assessment Guidelines), the COMESA Guidelines on Market Definition of 2019 (the Market Definition Guidelines) and the COMESA Rules on the Determination of Merger Notification Thresholds and Method of Calculation of 2012 (the Merger Thresholds Rules).[50] In terms of these legal instruments, mergers and acquisitions are not prohibited. Rather, these instruments create a regulatory or evaluation framework in terms of which transactions that fulfil a certain threshold must be notified to the Competition Commission and the CID for evaluation before they are approved and implemented. These legal instruments define the terms "merger" and "acquisition" and lay out the necessary jurisdiction requirements, the notification procedures, the conducting of merger proceedings and the evaluation of these transactions.[51]

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Further, although the Competition Regulations do not derogate from the protection and enjoyment of intellectual property rights such as patents, industrial designs, trademarks and copyrights, the Regulations prohibit the use of intellectual property rights in a manner that has anti-competitive effects.

46 Id, art 3(1). Also relevant are the COMESA Competition Rules of 2004 (as amended), which deal with the procedural aspects of the work of the COMESA competition authorities, such as the initiation of complaints and the procedure and paperwork that must be filed before the competition authorities, inter alia.

47 See "Mergers Handled by the COMESA Competition Commission, 2013 – March 2021", available at: <https://www.comesacompetition.org/?cat=56> (last accessed 12 March 2021).

48 Ibid.

49 See "Merger Transactions by Member State, 2013 – June 2016", available at: <http://www.comesacompetition.org/wp-content/uploads/2016/06/Merger-transactions-by-member-state.pdf> (last accessed 10 December 2020).

50 Merger Assessment Guidelines, sec 3(9).

51 Competition Regulations, arts 23–26.

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Mergers and acquisitions occur when there is "direct or indirect acquisition or establishment of a controlling interest … in the whole or part of the business of a competitor, supplier, customer or other person".[52] Such a "controlling interest" can be achieved in several ways, including the purchase or lease of shares or assets, or the combination of previously independent undertakings.[53] When used in connection with an undertaking, a "controlling interest" allows the holder of that interest to exercise control, directly or indirectly, over the activities of assets of an undertaking.[54] When used in connection with an asset, a "controlling interest" enables the holder to exercise control, directly or indirectly, over the asset.[55]

Mergers and acquisitions can be horizontal, vertical or conglomerate. Although the Competition Regulations do not explicitly use these terms, the manner in which mergers and acquisitions are defined is indicative of the fact that the Regulations uphold this nomenclature of mergers and acquisitions.[56] A horizontal transaction is one that occurs between competitors, that is, where the undertakings offer the same, interchangeable or substitutable products or services.[57] A vertical transaction is one that occurs between undertakings that are at different stages of the production process, that is, the undertakings produce separate services or components along the same supply chain.[58] A conglomerate transaction is one that occurs between undertakings which offer unrelated products or services, that is, there is no apparent economic relationship between the parties as they are in neither a horizontal nor a vertical relationship.[59]

Regardless of whether one is faced with a horizontal or a vertical transaction, there are competition concerns raised, albeit of a different nature. With horizontal transactions, post-merger or post-acquisition, the undertakings are no longer competitors, which means that competition is eliminated from the market and the market share of the merged undertaking (or the undertaking that acquires the stock or shares of another) increases, as does

52 Id, art 23(1); Merger Assessment Guidelines, sec 2.

53 Competition Regulations, arts 23(1)(a)–(c).

54 Id, art 23(2)(a).

55 Id, art 23(2)(b).

56 Id, art 23 stipulates that that a merger is "the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a *competitor, supplier, customer*, or *other person*". I submit that the term "competitor" denotes the existence of a horizontal relationship between the parties to the merger or acquisition, while the terms "supplier" and "customer" denote a vertical relationship between the parties, and "other person" may be taken to denote a conglomerate relationship. The term "person" is defined by id, art 1 to mean either a natural person or a juristic person. The Merger Assessment Guidelines, secs 8(11)–8(90), refer to the terms horizontal, vertical and conglomerate mergers.

57 Ibid.

58 Ibid.

59 Ibid.

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market concentration.[60] Vertical transactions, post-merger or post-acquisition, mean a combination of, for instance, a manufacturer and its distributor, or a supplier and its customers.[61] With a conglomerate transaction, despite the absence of an economic relationship, competition concerns on both a horizontal and vertical level may nevertheless arise.[62]

The evaluation of mergers and acquisitions in the COMESA Common Market proceeds on the understanding that the majority of these transactions are not harmful to competition and that in fact they often result in pro-competitive gains which benefit the consumer, such as reduced costs as well as new and improved products (or services).[63] However, at the same time, there is an acknowledgement that some mergers and acquisitions may substantially impede competition in the Common Market and may result in price increases, reduced output, diminished variety or reduced innovation, all of which negatively impact consumer welfare.[64] Such mergers therefore have the effect of substantially preventing or lessening competition (referred to as an SPLC effect). When evaluating notified transactions, the Commission and the CID are primarily concerned with whether the transaction would or is likely to have an SPLC effect or would be contrary to the public interest.[65] A transaction

60 Ibid; PN Ndlovu *Competition Law in South Africa* (2018, Wolters Kluwer) at 255–56. Horizontal mergers raise so-called "coordinated effects", namely that the remaining undertakings in the market in which the merged entity operates can carry out anti-competitive practices by coordinating their behaviour. A merged undertaking may also enhance unilateral market power, the so-called "unilateral effects", whereby the merged entity can unilaterally carry out anti-competitive conduct independent of any collusion with its competitors. The unilateral effects occur because of the enhanced or even created market power of the merged entity. Therefore, these effects can either be in the form of increased market share for the merged entity (and the consequential absence of constraints from the merged entity's competitors) or in the form of acquisition of market power in an oligopolistic market, even though the merged entity does not acquire a dominant position.

61 Merger Assessment Guidelines, secs 8(11)–8(90); PN Ndlovu *Competition* Law, above at note 60 at 251–54.

62 ElHauge and Geradin *Global Competition Law* above at note 1 at 802. For instance, the result of the merger may be that one of the undertakings enters into the market of another, which may eliminate potential competition. Alternatively, the merged entity may engage in vertical anti-competitive behaviour.

63 Merger Assessment Guidelines, sec 7(2).

64 Id, sec 7(3).

65 See Eurasian Natural Resources Corporation / Eurasian Resource Group BV CC/MER/9014/2013, para 3; ImproChem Proprietary Limited / Clariant Southern Africa's Water Treatment Business CCC/MER/9/32/2014, para 2; Khumo Bathong Strategic Investments Proprietary Limited & Star Focus Proprietary Limited / Chlor-Alkali Holdings Proprietary Limited CCC/MER/6/20/2014, para 2; Kenya Towers Limited, Malawi Towers Limited and Uganda Towers Limited / Eaton Towers Limited CCC/MER/03/04/2015, para 2; Holtzbrink Publishing Group / Springer Science / Business Media GP Acquisition SCA CCC/MER03/05/2015, para 2; Steinhoff International Holdings Limited / Pepkor Holdings Proprietary Limited CCC/MER03/02/2015, para 2; Ethos Private Equity Fund IV / Nampak Corrugated &

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that does not raise concerns in this regard will be approved.[66] Therefore, in applying the merger control rules of the Common Market, the COMESA competition authorities are principally concerned with identifying those mergers which have an SPLC effect and with imposing conditions, where appropriate, while at the same time not standing in the way of those transactions which are pro-competitive.[67]

Furthermore, in keeping with the overarching objective of economic integration, both the Competition Regulations and the Merger Assessment Guidelines are aimed at addressing mergers and acquisitions that negatively affect the trade between member states and restrict competition in the COMESA Common Market.[68] To that end, mergers and acquisitions that satisfy specific requirements (the "jurisdictional test") are to be notified to the Competition Commission for evaluation before they are implemented. The purpose of notification is to allow the Competition Commission and the CID the opportunity to regulate those transactions that are likely to result in an SPLC effect in the Common Market. The importance of the notification obligation can be described as the "centrepiece" of COMESA's mergers and acquisitions regulatory framework, in that a transaction that is implemented without complying with the notification requirements will have no legal effect and will not give rise to any rights or obligations upon the parties.[69]

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Nampak Tissue Products Limited CCC/MER/03/01/2015, para 2; Traxys Africa Proprietary Limited / Metmar Limited CCC/MER/06/08/2015, para 2; Exor SPA / PartnerRe Ltd 2016/03/07/02, para 2; Yara Nederlands BV / Greenbelt Fertiliser Limited Zambia and Greenbelt Fertiliser Malawi 2016/03/07/03JB, para 2.

66 For example, Eurasian Natural Resources Corporation, above at note 65, paras 10–11; Old Mutual Alternatives Investments Holdings Proprietary Limited / African Fund Managers (Mauritius) / African Infrastructure Investment Fund 2 General Partner Proprietary Limited CCC/MER/07/11/2015, paras 2, 9.

67 Merger Assessment Guidelines, sec 7(4). Examples of conditional approvals include: Banque Populaire du Rwanda / Atlas Mara 2016/06/JB/01, para 12; Metal Fabricators of Zambia plc / Reunert Limited 2016/11/LV/01, paras 8–14; Blue Nile Cigarette Company / British American Tobacco Middle East DMCC 2016/09/JB/05, paras 11–14; Rosewild Trade and Invest Proprietary Limited / Chlor-Alkali Holding Proprietary Limited 2016/09/JB/03, paras 11–12; Greenfield Joint Venture Between Orange SA / MTN Group Limited CC/MER/09/33/2018, paras 12–17; Augusta Acquisition BV / Careem Inc CCC/MER/6/22/2019, paras 10–11.

68 Competition Regulations arts 23–26 are devoted to mergers and acquisitions. In turn, the Merger Assessment Guidelines are wholly dedicated to the evaluation of mergers and acquisitions.

69 Competition Regulations, art 24(2); notification must be made within 30 days after the merging parties' decision to merge. The Merger Assessment Guidelines sec 4(1) makes provision for pre-merger notification consultation with the Competition Commission to establish whether the transaction in question is indeed a merger, whether it must be notified and the calculation of annual turnover, value of assets, market shares and other matters. In id, secs 4(2)–4(9), the guidelines permit merging parties to request "comfort letters" from the Commission stating that the transaction in question is not a notifiable merger because it would not have an appreciable effect on trade between

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In addition, failing to notify a transaction within the stipulated timeline may result in a penalty being imposed on the parties to the transaction by the Competition Commission.[70]

While COMESA competition law is clear that notifiable transactions implemented contrary to the COMESA mergers and acquisitions regulatory framework will have no legal effect and that no rights or obligations pertaining to the transaction can be legally enforced in the Common Market, parties are not prohibited from implementing notifiable mergers prior to giving notification or before the Competition Commission has evaluated the merger.[71] But the difficulty with such a course of action is that if the Commission reviews the transaction and concludes that it is unlawful, the parties may be ordered to dissolve the transaction or to take the necessary steps to bring it into line with COMESA's competition law,[72] which is likely to have financial implications.

The jurisdictional elements

For mergers and acquisitions to be governed by COMESA competition law, they must fulfil specified criteria, collectively referred to as the "jurisdictional test". This test is constituted of three requirements, namely that the transaction is a "merger" as defined by the Competition Regulations, with a "regional dimension" that satisfies specific financial "thresholds". If these requirements are satisfied, the "jurisdictional test" confers jurisdiction upon the COMESA competition authorities to evaluate the transaction.

What constitutes a "merger"?

As already indicated, "merger" must be taken to mean "the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person".[73] This "controlling interest" can be acquired either through the purchase or lease of the shares or assets of a competitor, supplier, customer or other person; the amalgamation or combination with a competitor, supplier, customer or other person; or through any other means.[74] The Merger Assessment Guidelines acknowledge that "controlling interest" can take place in various forms.[75]

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member states or restrict competition in the Common Market. Such requests must be supported by information and documents to enable the Commission to evaluate the request.

70 Competition Regulations, arts 24(4)–24(6). Such a penalty may not exceed 10% of either or both merging parties' annual turnover in the Common Market for the preceding financial year.

71 Merger Assessment Guidelines, secs 5(31)–5(33).

72 Ibid; Dairy Distributors SAE / Greenland Group for Food Industries SAE CCC/MER/5/19/2019, paras 9–11; Competition Regulations, art 23(6).

73 Competition Regulations, art 23(1); Merger Assessment Guidelines, sec 2.

74 Competition Regulations, art 23(1)(a)–(c).

75 Merger Assessment Guidelines, secs 2(4)–2(10).

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The "regional dimension" requirement

The "regional dimension" requires that both the acquiring and target undertakings or either the acquiring undertaking or the target undertaking must operate in at least two member states.[76] An acquiring undertaking is one that as a result of a transaction would directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.[77] A target undertaking is one that as a result of a merger would have the whole or part of its business directly or indirectly controlled by an acquiring undertaking.[78]

An undertaking is deemed to be "operating" in a member state if its annual turnover or value of assets in that member state exceeds a specific monetary threshold.[79] Furthermore, where the target undertaking does not operate in any member state in the Common Market, a merger between the undertakings does not have a sufficient regional dimension or effect on trade between member states or restriction on competition in the Common Market to establish a territorial nexus at the supranational level and is therefore not a notifiable merger.[80] This means that the merger will not be evaluated by the regional competition agency; rather, it falls under the consideration of the individual relevant domestic (national) competition authorities of the relevant member states.[81] Furthermore, the stipulation that both the acquiring and target undertakings must operate in two or more member states must be considered, with the requirement that such operations are "substantial enough

76 Competition Regulations, art 23(3)(a); Merger Assessment Guidelines, secs 3(1)–3(13). For example, in ImproChem Proprietary Limited, above at note 65, para 3, the parties to the transactions operated in 12 member states; in Telkom SA SOC Limited / Business Connexion Group Limited CCC/MER/9/25/2014, para 3, the parties to the transaction operated in 11 member states; in Platform Specialty Products Corp / Arysta LifeScience Limited CCC/MER/11/41/2015, para 3, the parties to the transaction operated in nine member states; in Coca-Cola Beverages Africa Limited / Coca-Cola Sabco Proprietary Limited CCC/MER/03/03/2015, para 3, the parties to the transaction operated in seven member states; in Finance Bank Zambia plc / Atlas Mara Limited 2016/03/24/02/BR, para 3, the parties to the transaction operated in four member states; in Sadolin Group of Companies / Kansai Plascon East Africa Proprietary Limited 2017/09/13/03/RR, para 4, the parties to the transaction operated in ten member states; in Fairfax Africa Holdings Corporation / Consolidated Infrastructure Group Limited CCC/MER/07/25/2018, para 7, the parties to the transaction operated in nine member states; in Outotec Oyj / The Minerals Business of Mesto Oyj CCC/MER/09/37/2019, para 5, the parties to the transaction operated in 12 member states; in Kantar Group / Bain Capital Investors LLC CCC/MER/3/6/2020, para 4, the parties to the transaction operated in nine member states.

77 Merger Assessment Guidelines, secs 2(4)–2(10).

78 Ibid.

79 Id, secs 3(9)–3(10); for example Lake Oil Group Limited / Petronas Sudan Limited 2016/03/08/06/JB, paras 4–7; DSV A/S / Uti Worldwide Inc 2016/03/07/07/01/JB, paras 3–6.

80 Merger Assessment Guidelines, sec 3(10).

81 See Exor SPA, above at note 65, paras 3–4, 6.

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that a merger involving it can contribute to an appreciable effect on trade" between members and restriction on competition in the Common Market.[82] In some circumstances, the transaction may have a disproportionately negative impact on a specific member state, and to remedy this, specific conditions relating to that member state may be imposed by the COMESA competition authorities.[83] Alternatively, the part of the transaction that disproportionately reduces competition in a particular member state may be referred to that member state for evaluation.[84]

The "threshold" requirement

The "threshold requirement" is concerned with the monetary values of the undertakings that are party to the transaction. The transaction must exceed a specified threshold, calculated with reference to the combined annual turnover or value of assets of the parties to the transaction in the COMESA region, either in general or in relation to specific industries; if the turnover or the value of assets are at or above this threshold, the regional merger control rules will apply with regard to transactions with a regional dimension.[85] If more than two thirds of the annual turnover or value of assets in the Common Market for each of the merging parties is achieved within a single member state, then such a merger does not have an appreciable effect on the trade between member states.[86] It follows that such a merger will be notified to the domestic competition authority of the relevant member state.

Both the regional dimension and the threshold requirement make a merger "notifiable". That is, if a merger is one in which either or both of the acquiring and target undertakings operate in at least two member states and the combined annual turnover or assets exceed the threshold, then before it is

82 Merger Assessment Guidelines, sec 3(9); Oasis SA and Mobile Cash RDC / Orange Middle East and Africa 2016/06/JB/02, paras 3–4.

83 For example, Lusaka Cosmopolitan Investments Limited / Delta International Mauritius Limited 2016/11/LV/08, para 8.

84 Merger Assessment Guidelines, sec 5(27)(a); in Gulf Africa Petroleum Corporation / Total Outre Mer SA MER/07/17/2016, paras 7–11, the transaction, which raised competition issues in Kenya, was approved subject to conditions to be implemented in the Kenyan market regarding third parties.

85 Competition Regulations, art 23(4); Merger Assessment Guidelines, secs 3(14)–3(26). Rule 4 of the COMESA Rules on the Determination of Merger Notification Thresholds stipulates that for a merger to be notifiable, the combined annual turnover or combined assets, whichever is higher, in the Common Market for all parties to a merger must equal or exceed COM$ 50 million; and the annual turnover or value of assets, whichever is higher, in the Common Market of at least two of the parties to the merger must equal or exceed COM$ 10 million, unless each of the parties to the merger achieves at least two thirds of its aggregate turnover or assets in the Common Market within a single member state. COM$ is the COMESA currency used by the COMESA Competition Commission regarding the thresholds for mergers and acquisitions notified to the Commission; in terms of Rule 4, COM$ 1 is equivalent to USD 1.

86 Merger Assessment Guidelines, sec 3(11).

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implemented, the parties to the transaction must notify the Competition Commission.[87]

INCORPORATING THE PUBLIC INTEREST IN THE COMESA MERGERS AND ACQUISITIONS FRAMEWORK

Under COMESA competition law, the public interest is not limited to the assessment of mergers and acquisitions; it is also an important factor in the evaluation of authorization requests (or exemption requests) for anti-competitive practices.[88] Authorizations are granted by the Competition Commission upon application by or on behalf of undertakings to partake in conduct that is anti-competitive, provided such conduct brings with it public benefits which outweigh the anti-competitive effect.[89] These authorizations, which are granted for a specified period of time, permit an undertaking to engage in a prohibited practice and guarantee that such an undertaking will not face prosecution by the competition authorities for the duration of the exemption.[90] Further, the activities of professional associations are excluded from the application of the Competition Regulations where these activities are directed at developing or enforcing professional standards reasonably necessary for safeguarding the public interest.[91]

When it comes to mergers and acquisitions in COMESA, the public interest factors are a double-edged sword. On the one hand, the public interest can "save" a notifiable transaction, that is, the public interest can be the basis upon which to approve a transaction that would otherwise have been prohibited based on its anti-competitive effects.[92] On the other hand, the public interest can also potentially block notifiable transactions on the basis that such a transaction is "contrary to the public interest", necessitating the imposing of conditions in order to deal with the concerns.[93]

The COMESA mergers and acquisitions regulatory framework explicitly incorporates the public interest in three distinct, albeit related, circumstances: to justify an otherwise anti-competitive transaction;[94] in the remedies that the competition authorities can issue where a transaction has been found to be

87 Competition Regulations, art 23(5)(a); Exor SPA, above at note 65, paras 3–7.

88 Competition Regulations, art 20. In domestic jurisdictions, such as South Africa, authorizations are referred to exemptions which under the Competition Act 89, sec 10(3), are granted for a specified period and under specific terms if such exemptions are directed at achieving particular objectives, including those contributing towards the competitiveness and efficiency gains that promote employment of industrial expansion, and the participation or entry into a market by small and medium enterprises or firms controlled or owned by historically disadvantaged persons.

89 Competition Regulations, art 20(1).

90 Id, art 20(1)(a).

91 Id, art 4(c).

92 Id, art 26(1)(b).

93 Id, arts 26(3)–26(4).

94 Id, art 26(1)(b).

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contrary to the public interest;[95] and to induce the notification of an otherwise non-notifiable transaction.[96]

The public interest in approving otherwise anti-competitive notifiable mergers and acquisitions

The approval of otherwise anti-competitive transactions on the basis of the public interest can be regarded as a "positive" statement of the public interest in merger evaluation. When incorporated this way, the public interest is used to "save" or justify a transaction which, while having an SPLC effect, can nonetheless be approved. Where the public interest is used in this manner, it means that the transaction in question is one that is notifiable.[97] Such a transaction must then be evaluated by the Competition Commission and the CID.[98]

In terms of the Competition Regulations and the Merger Assessment Guidelines, the consideration of the public interest follows upon the evaluation of the competitive effects of the transaction. Thus, under the COMESA mergers and acquisitions review framework, the analysis of mergers and acquisitions involves two distinct components, namely the analysis of the competitive effects of a transaction and the consideration of public interest issues.[99] The first stage requires the evaluation of the competitive effects of the transaction to establish whether or not it has an SPLC effect.[100] This process necessitates that the relevant market first be identified in both its geographical and product (or services) aspects.[101] In employing the SPLC test, the Commission must consider the actual and potential level of import competition in the market; the ease of entry into the market (including both tariff and regulatory barriers); the level, trends of concentration and history of collusion within the relevant market; the degree of countervailing power in the market; the likelihood that the acquisition would result in the merged parties possessing market power; the dynamic characteristics of the market (including growth, innovation and product differentiation); the

95 Id, art 26(7).

96 Id, art 23(6).

97 Id, art 23(5)(a).

98 Id, art 26(1)(b).

99 See Total Outre Mer SA / Shell Marketing Egypt and Shell Compressed Natural Gas Egypt Company CCC/MER/7009/2013, paras 3(1)–4(1).

100 Competition Regulations, art 26(1); Merger Assessment Guidelines, sec 6(1).

101 Id, secs 8(3)–8(10). For example, Total Egypt LLC / Chevron Egypt SAE CCC/MER/1012/2013, para 8; Old Mutual (Africa) Holdings Proprietary Limited / Oceanic Company Limited CCC/MER/007/2013, para 8; Cannon Assurance Limited / Metropolitan International Holdings Proprietary Limited CCC/MER/9/30/2014, para 7; Torre Industrial Holdings Limited / Control Instruments Group Limited CCC/MER/5/15/2014, para 9; International Lease Finance Corporation / AerCap Ireland Limited CCC/MER/101/2014, para 2; Telkom SA SOC Limited, above at note 76, para 7; Coca-Cola Beverages Africa Limited above at note 76, para 8; Traxys Africa Proprietary Limited, above at note 65, para 7; Yara Nederlands BV, above at note 65, para 7; Tsebo Holdings Proprietary Limited / Wendel SE 2017/03/JB/06, para 7.

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nature and extent of vertical integration in the market; whether the business or part of the business of a party to the merger has failed or is likely to fail; and whether the merger will result in the removal of efficient competition.[102] Where necessary, the Commission can carry out an inquiry to ascertain any competition concerns.[103]

The competition assessment of notified transactions also relies on the theories of harm and efficiencies in order to decide if the transaction under investigation is more likely to have an SPLC effect.[104] To determine whether this is likely, there must be a comparison of the competitive situation considering the merger against the competitive situation without the merger (the counterfactual scenario).[105] The type of transaction (horizontal, vertical or conglomerate) will also influence the evaluation process.[106]

A range of types of transaction will be approved: those that pass the competitive effects analysis (for example a transaction that does not raise significant competition concerns in the Common Market or will not have a substantial effect on the market structure of the Common Market);[107] those that promote competition, that result in economic efficiency and that enhance consumer welfare in the Common Market;[108] those that do not negatively affect intra-COMESA trade;[109] those that are not likely to have an SPLC effect and are therefore not likely to be contrary to the public interest;[110] and those that do not result in customer and service foreclosure (when an undertaking, or undertakings in coordination, cause harm to upstream competitors which then raises downstream rivals' costs).[111]

102 Competition Regulations, arts 26(2)(a)–(h).

103 Id, art 26(5).

104 Merger Assessment Guidelines, secs 7(6)–7(8).

105 Id, sec 7(9).

106 Id, sec 8(1). This process involves examining the impact of the merger on entry and expansion, the assessment of efficiencies, countervailing buyer power and the removal of a "maverick undertaking", inter alia.

107 For example, Old Mutual (Africa) Holdings Proprietary Limited / Oceanic Company Limited, above at note 101, paras 7–9.

108 CFR Inversiones SPA / Adcock Ingram Holdings Limited CCC/MER/1223/2013, paras 7–8.

109 For example, Sanlam Emerging Markets Proprietary Limited / Masawara Investments Mauritius Limited CCC/MER/07/09/2015, para 7; Old Mutual Alternatives Investments Holdings Proprietary Limited / African Fund Managers (Mauritius), above at note 66, paras 7–8; DSV A/S, above at note 79, paras 10–11; China National Tire & Rubber Co. Ltd / Pirelli & CSpA 2016/03/07/04/JB, para 11; Oasis SA, above at note 82, paras 10–12; Maersk Olie og Gas A/S / Total SA 2018/01/JB/01, paras 9–10; Banque Malgache de l'Ocean Indien / Banque Centrale Populaire CCC/MER/1/1/2019, paras 7–9.

110 See Total Outre Mer SA, above at note 99, para 4(1); Sadolin Group of Companies, above at note 76, paras 10–11; PPC International Holdings Proprietary Limited / CIMERWA Limited CCC/MER/8002/2013, paras 4(1)–4(2).

111 For example, FedEX Corporation / Supaswift (Swaziland) (Proprietary) Limited, Supaswift Zambia Limited and Supaswift Limited (Malawi) CCC/MER/1121/2013, para 7; Coca-Cola Beverages Africa Limited above at note 76, para 9; Holtzbrink Publishing Group, above at note 65, para 7; Steinhoff International Holdings Limited, above at note 65, para 8; Ethos

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If the SPLC inquiry indicates that the transaction is likely to have an adverse effect, the Commission and the CID must then consider if there are any technological or other pro-competitive gains that may result from the merger which outweigh and offset its negative impact.[112] Such technological or pro-competitive gains must be such that they would not be likely to arise but for the merger.[113] Thereafter, the competition authorities shall consider whether to approve the anti-competitive transaction on "substantial public interest grounds".[114]

The public interest is also stated negatively. Mergers and acquisitions are regarded as being contrary to the public interest if the competition authorities' analysis shows that the transaction will have an SPLC effect in the Common Market or a part thereof,[115] that is, if it has substantially lessened or is likely to substantially lessen the levels of competition in the Market or has resulted in or is likely to result in or strengthen a position of dominance.[116] Conversely, a transaction that does not result in the merged entity acquiring a dominant position in the relevant market post-transaction due to the parties' diminutive market shares will be approved.[117] The Commission will also look favourably on transactions that do not alter the market structure post-merger.[118]

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Private Equity Fund IV, above at note 65, para 7; Yara Nederlands BV, above at note 65, para 9; MyBucks SA / Opportunity International Group 2016/06/JB/03, para 10; Copperbelt Energy Corporation plc / Zambian Transmission LLP 2018/03/JB/07, para 9.

112 Competition Regulations, art 26(1)(a).

113 Ibid.

114 Id, art 26(1)(b).

115 Id, art 26(3)(a). The CID regularly approves mergers on the basis that they are "not likely to substantially prevent or lessen competition and will not be contrary to the public interest". For example, Eurasian Natural Resources Corporation, above at note 65, para 8, a mining and transportation merger; Total Egypt LLC, above at note 101, paras 7–9, a petroleum sector merger; Roots Group Arabia / Ideal Standard MENA CCC/MER/1017/2013, para 7, a construction sector merger; Old Mutual (Africa) Holdings Proprietary Limited / Provident Life Assurance Company Limited CCC/MER/9015/2013, paras 7–8, an insurance sector merger.

116 Competition Regulations, arts 26(3)(a)–(b). China National Tire & Rubber Co. Ltd, above at note 109, paras 9–10, notes that a dominant position is not illegal, but the abuse thereof is. With this particular transaction, the Commission indicated it would result in a market share of 45% in Egypt and that if this dominant position were abused, Egypt's competition law would apply, and / or the Competition Regulations' provisions if such abuse affected two or more COMESA member states. See also Traxys Africa Proprietary Limited, above at note 65, paras 8–9; Exor SPA, above at note 65, para 13; Finance Bank Zambia plc, above at note 76, paras 7–8.

117 See EQT Services (UK) Limited / Kuoni Travel Holding Limited 2016/06/JB/04, para 12; MyBucks SA, above at note 111, para 9; Total Outre Mer SA, above at note 99, para 4; Finance Bank Zambia plc, above at note 76, paras 7–8; PPC International Holdings Proprietary Limited, above at note 110, paras 4(1)–4(2).

118 For example, I & M Holdings / CDC Group plc 2016/06/JB/05, para 11; Dow Chemical Company / EI Pont de Nemours Company 2016/09/JB/01, paras 8–9; ARM Cement

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In deciding whether or not a merger will be contrary to the public interest, the Competition Commission shall consider all relevant matters in the given circumstances,[119] as well as specific factors, namely the need to maintain and promote effective competition in the production or distribution of goods and services in the Common Market;[120] the promotion of the interests of consumers in the Common Market in relation to prices, quality and variety for goods and services;[121] the promotion through competition of reduced costs; the promotion of innovation; and the entrance of new competitors into existing markets.[122] These are regarded as the public interest factors under COMESA's mergers and acquisitions framework. However, I argue that in fact these factors are not public interest factors as ordinarily understood. Rather, they are "core economic" factors, not "populist" goals, as they deal with the "core economic" goals of promoting competition, consumer welfare (regarding price, variety and quality of goods and services) and innovation.[123] Thus it can be argued that what the Competition Regulations classify as the public interest is not actually in that category, in terms of the traditional classification of the objectives of competition law. There is nothing wrong with this per se: an effective competition law is indeed in the public interest, as it results in a free market. Further, this approach is commendable because it eschews the approach of incorporating factors that may turn the merger evaluation into a process that veers away from its economic roots. But it does raise the possibility that the process of evaluating mergers and acquisitions may be unpredictable and include the consideration of ill-suited aspects.

Furthermore, when deciding whether a merger can be justified on substantial public interest grounds, the Competition Commission is given a great deal of discretion in that it "shall take into account all matters that it considers relevant in the circumstances", other than the factors explicitly stated in the Competition Regulations,[124] which may include other public interest factors. For example, the Commission can take into account the employment concerns of member states when evaluating mergers and can approve a transaction subject to conditions on the parties to safeguard employment and guard against job losses that may be the consequence of the

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Limited / CDC Group plc 2016/09/JB/02, paras 7–8; Syngenta AG / China National Agrochemical Corporation 2016/09/JB/10, paras 7–9; Total SA / Liquefied Natural Gas Business of Engie SA 2018/03/JB/08, paras 8–10; Ontario Inc / AGT Food and Ingredients Inc CCC/MER/01/03/2019, paras 10–11; Finnish Fund for Industrial Cooperation Ltd / Green Resources AS CCC/MER/04/10/2019, paras 8–9; BC European Capital X and BC Partners Fund XI / Società Finanziaria Macchine Automatiche SpA CCC/MER/8/20/2020, paras 10–12.

119 Competition Regulations, art 26(4).

120 Id, art 26(4)(a).

121 Id, art 26(4)(b).

122 Id, art 26(4)(c).

123 See the section "The meaning of 'public interest' in competition law analyses" above.

124 Competition Regulations, art 2(4).

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transaction.[125] The promotion of foreign investment into the Common Market has been regarded as a public interest factor,[126] as has the possibility that a transaction will lead to the closure of operations in a member state, a public interest issue necessitating the conditional approval of the transaction.[127] It is in the public interest that mergers and acquisitions contribute towards the realization of the single market objective laid out in the COMESA Treaty, and transactions that contribute towards this objective and are not inimical to it will be approved.[128] Conversely, transactions that are

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125 In the three cases DSV A/S, above at note 79, para 12, DFCU Limited & Zambia National Commercial Bank / Arise BV 2017/06/JB/05, para 10, and Delta Corporation Limited / Traditional Beer Businesses of Anheuser-Busch InBev SA/NV in Zambia CCC/MER/10/27/2017, paras 9–10, with consideration of Zambia's policy of industrialization and its job creation strategy to safeguard the public interest such as job losses in all mergers, the CID approved the transaction on condition that the parties entered with local contractors for a period of one year from the date of the approval of the transaction in order to maintain the existing legal obligations. Secondly, the parties to the transaction were to ensure that no existing jobs at the operational level were lost in Zambia because of the merger for a period of one year after the approval of the transaction, unless such job losses occurred in strict adherence to Zambia's labour laws. In BIH Brasseries Internationales Holdings Limited / Carlsberg Malawi Limited 2017/04/11/01/RR, paras 9–15, the CID imposed conditions on the merging parties that for a period of 24 months there would be no retrenchments owing to the merger, and that the merging parties would continue to build capacity of the current employees in key operations of the company. In Vivo Energy Holding BV / Engen International Holdings (Mauritius) Limited 2018/07/01, para 13, the CID was concerned with the non-compete clause with regard to employees. In Marinvest Srl, Ignazio Messina & CSpA / RORO Italia Srl CCC/MER/11/41/2019, para 11, the CID approved the transaction subject to the condition that the parties would not implement merger-specific retrenchments for a period of two years post-transaction.

126 See PPC International Holdings Proprietary Limited / CIMERWA CCC/MER/8002/2013, para 3(3).

127 For example, Akzo Nobel Coatings International BV / Mauvilac Industries Limited CCC/MER/43/12/2019, paras 12–15.

128 For example, Eurasian Natural Corporation, above at note 65, para 10; CFR Inversiones SPA, above at note 108, para 9; FedEX Corporation, above at note 111, para 8; CMC Holdings Limited / Al Futtaim Auto & Machinery Company LCC CCC/MER/204/2013, paras 6–8; Kone Kenya Limited / Marryat & Scott (Kenya) Ltd CCC/MER/103/2014, para 7; Africell Holding SAL / Orange Uganda Limited CCC/MER/6/19/2014, paras 9–10; Holcim Limited / Larfage SA CCC/MER/6/20/2014, paras 8–11; Cannon Assurance Limited, above at note 101, para 8; ImproChem Proprietary Limited, above at note 65, para 7; Platform Specialty Products Corp, above at note 76, para 8; Kenya Towers Limited, above at note 65, para 8; Holtzbrink Publishing Group, above at note 65, para 8; Steinhoff International Holdings Limited, above at note 65, para 9; Ethos Private Equity Fund IV, above at note 65, para 8; Finance Bank Zambia plc, above at note 76, paras 2 and 7; Barclays Bank Egypt SAE / Attijariwafa Bank SA 2017/09/LV/01, paras 9–10; Building Supply Group / Steinhoff Doors & Building Materials Limited 2018/01/JB/06, para 8; Total SA / Eren Renewable Energy SA 2018/01/JB/02, paras 9–10; Vivo Energy Investments BV / Kuku East Africa Holdings Limited CCC/MER/06/23/201907/27/2019, paras 9–10; Platin2025 GmbH / Robert Bosch Packaging Technology GmbH CCC/MER/08/30/2019, paras 9–10; Tana Protein Foods

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contrary to the single market objective, for example, those which divide or partition the Common Market, are regarded as being contrary to the public interest.[129] Therefore, a transaction which has the effect of partitioning the Common Market will either be prohibited or approved subject to the imposition of conditions aimed at ensuring the free movement of commodities across borders.[130] Conversely, mergers and acquisitions that promote integration in the Common Market will be approved.[131]

The public interest and remedies

If the evaluation of a transaction reveals that it is contrary to the public interest, there are several courses of action that the Commission may take: it may declare the transaction to be unlawful;[132] it may prohibit the transaction;[133] it may order the dissolution or termination of any organization or association, whether corporate or unincorporated, that is a party to the transaction;[134] or it may approve the transaction but impose restrictions on parties to the merger.[135] The Commission may also make any such order that is necessary to prohibit the transaction or alleviate its impact.[136]

The public interest and non-notifiable mergers and acquisitions

Since the COMESA competition authorities only have jurisdiction to evaluate transactions with a regional dimension that fulfil specified thresholds,[137] transactions that do not meet these criteria are therefore regarded as non-

contd
Ltd / African Protein Holdings Limited CCC/MER/11/26/2020, paras 10–11; Adwia Company SAE / Zanzibar Pharma Limited CCC/MER/08/18/2020, paras 10–12; International Lease Finance, above at note 101, para 7.

129 For example, Africell Holding SAL above at note 128, para 10; Robert Bosch GmbH / Hytec Holdings (Pty) Ltd CCC/MER/8/29/2014, para 10.

130 In BIH Brasseries Internationales Holding Limited, above at note 125, paras 9–15, in which beer products produced in Malawi were not exported to neighbouring member states and conversely beer products produced in neighbouring member states were not exported into Malawi. Thus, these products were not subject to free movement across borders in the Common Market. To address this, the CID took the view that the transaction could be authorized only if the parties undertook to allow free movement of their products across borders in the Common Market. In Eaton Towers Holdings Limited / ATC Heston BV CCC/MER/06/24/2019, paras 10–12, the CID concluded that the transaction was likely to have an SPLC effect in the relevant market in Uganda, that it would restrict trade between member states and would thus be incompatible with the COMESA Treaty objectives. Thus the CID imposed several conditions and a monitoring of compliance with them.

131 International Lease Finance / AerCap Limited CCC/MER/101/2014 para 7.

132 Competition Regulations, art 26(7)(a).

133 Id, art 26(7)(b).

134 Id, art 26(7)(c).

135 Id, art 26(7)(d).

136 Id, art 26(7)(e).

137 Id, art 23(5)(a).

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notifiable.[138] This means that parties to such a transaction are under no legal obligation to notify the Competition Commission prior to implementing the transaction. However, parties to a transaction may be required to notify the transaction if the Commission is of the view that the transaction is likely to have an SPLC effect or is likely to be contrary to the public interest,[139] which, as already indicated, pertains to the maintenance of competition, the promotion of consumer welfare and the promotion of innovation in the Common Market.[140]

CONCLUDING OBSERVATIONS AND REMARKS

The foregoing discussion has shown that the public interest is firmly entrenched in the competition laws of Africa's regional trade blocs. Perhaps important is the fact that there is no single definition of the concept of public interest because it is influenced by social and political factors, which may vary across the legal systems of the world. This article has shown that there are compelling reasons for the inclusion of the public interest in the application of competition law in developing countries. For example, there might be a need to use competition law as a tool to ensure that citizens who were previously discriminated against and excluded from participating in the economy are now given an opportunity to take part; this can be done through competition law incorporating the public interest, as the example of South Africa's competition law has shown. The foregoing discussion has shown that COMESA's merger regulations have not eschewed the use of economic doctrine in analysing transactions. What is unique about COMESA's mergers control regime is that the factors under the public interest are actually "core economic" factors, but there is also the possibility that the COMESA regional competition authorities can consider "populist" objectives, such as employment objectives, as part of the public interest inquiry. Where the regional competition authorities do this, and consider public interest issues not explicitly enumerated in COMESA regional competition law, they have done so after embarking on a competition analysis of the transaction. In all these circumstances, the incorporation of the public interest is always preceded by core competition analyses.

CONFLICTS OF INTEREST

None

138 Id, art 23(5)(b).

139 Id, art 23(6).

140 Id, arts 26(4)(a)–(c).

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