Debevoise & Plimpton

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Number of African Merger Control Regimes Growing — and so Is Enforcement

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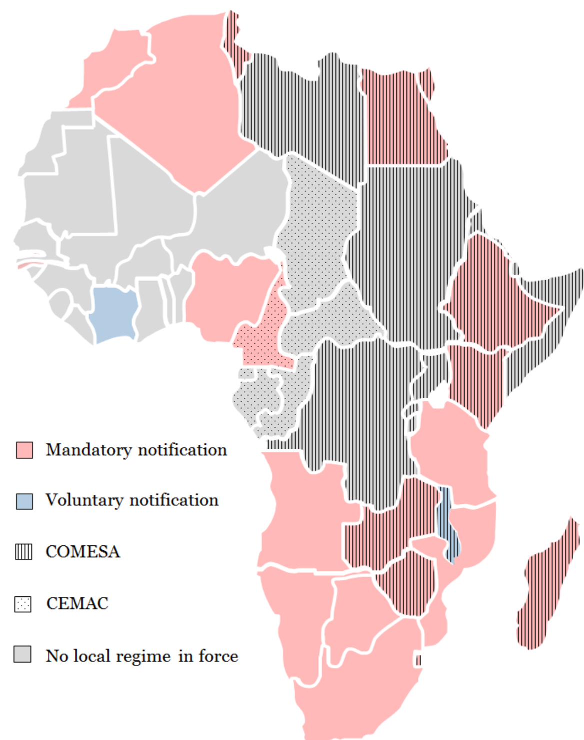
The number of merger control regimes worldwide has increased rapidly in recent years, including across Africa. Since 2010, the number of African countries with merger control regimes has almost doubled to more than 20. If one includes those jurisdictions that do not have their own national regime but are part of one of the five regional bodies with some form of merger oversight (e.g. COMESA, CEMAC), the total number has more than tripled to over 30 countries. In addition to new regimes, several jurisdictions with existing laws have recently revised theirs, often introducing significant amendments.

However, the thresholds, as well as the notification and review requirements, differ significantly across jurisdictions. Notification thresholds can be either extremely low or based on the parties' global size, resulting in international deals where the parties may have minimal local activities or without domestic competitive effects being caught regardless. Once a transaction is notified, the review period can take significantly longer than the basic statutory time frame, for example in jurisdictions where information requests "stop the clock", as newly formed authorities typically take longer to review complex transaction structures or markets. Finally, notification fees can be substantial in some jurisdictions, particularly if calculated as a percentage of the global turnover or assets of the parties or where a separate filing is required for each local subsidiary. On occasion the fee can exceed the local turnover of the target business.



In principle, regional authorities such as COMESA act as a "one-stop-shop" and should consequently simplify the merger control process for multi-jurisdictional transactions, but this is not always the case. For example, in the EU the merging parties are able to apply to reallocate jurisdiction to the European Commission if a deal triggers multiple national filings or has clear regional effects (with associated benefits such as reduced administrative burden and greater legal certainty), but that is not currently possible with COMESA. Additionally, there are also certain COMESA member states that do not unreservedly accept COMESA jurisdiction and still require a separate parallel notification if their jurisdictional thresholds are met, such as Egypt. COMESA is understood to be working on both of these points.

While many African merger authorities are young and consequently inexperienced, active enforcement has been increasing notably. This is, in part, supported by the number of regional networks and links the regulators have established with one another, furthering transparency across jurisdictions. This is an important consideration for multi-jurisdictional deals.

We have described in the following the most recent country-specific developments, which concern Kenya, Nigeria and Egypt. Other countries that have either adopted a new regime, or revised and strengthened their existing merger control regime in the last couple of years, are Angola, Botswana, Madagascar, Morocco and South Africa.

KENYA

Kenya's revised merger control regime came into force in January 2020. One welcome improvement is that Kenya now cedes jurisdiction where the COMESA thresholds are met. Kenya only retains jurisdiction in case of a COMESA notification where two-thirds or more of the parties' turnover or value of assets is generated or located in Kenya.

In addition, Kenya's target-specific thresholds have increased from KES 100m to KES 500m (approximately US$5m), where the parties' combined turnover or value of assets in Kenya is equal to or above KES 1bn (approximately US$9.9m). A filing will also be triggered if the acquirer's turnover or value of assets in Kenya exceeds KES 10bn (approximately US$99m) and the parties are in the same market or related vertically. Additional thresholds for specific public interest sectors exist.

The other welcome change is the introduction of specific categories of exempt transaction, including where the deal happens entirely outside of Kenya and there is no local nexus. Taken together, these changes are largely an improvement over the old regime which was easily triggered. How they will work in practice remains to be seen.

NIGERIA

As part of a wider competition law overhaul in February 2019, Nigeria also revised its merger control regime. However, the new merger control thresholds are extremely low and will likely be triggered by a large number of transactions where parties have either Nigerian sales or local operations.

The Nigerian Federal Competition and Consumer Commission now requires a filing where (i) the combined turnover of the parties "in, into or from" Nigeria is at least NGN 1 billion (approximately US$2.8m) or (ii) if the turnover of the target "in, into or from" Nigeria is at least NGN 500 million (approximately US$1.4m). While a fast-track procedure for foreign-to-foreign transactions has been introduced alongside the new regime—previously foreign-to-foreign mergers where excluded from any notification requirement—it is not yet clear how this will work in practice.

EGYPT

Similarly, the Egyptian Competition Authority published new guidelines which introduced an updated notification form and reversed the previous position of a filing exemption for foreign-to-foreign transactions, including where the target had no presence in Egypt. While the Egyptian regime is currently still a post-closing regime, the authority is considering moving to a suspensory regime instead. As an example of the new and more interventionist approach, the Egyptian authority imposed interim measures on Uber in October 2019 ordering it not to complete its acquisition of regional competitor Careem *before* it granted its approval and to file for *pre*-approval despite the current non-suspensory regime. That deal was then approved late in December 2019, subject to certain behavioural commitments.

In summary, the dynamic way in which African merger control is continuing to develop adds complexity, both to the analysis of whether a transaction triggers filing requirements, as well as the coordination of filings across different jurisdictions. As a result, it is important to bear in mind relevant merger control requirements when doing business in African countries, as these can impact the timing and cost of a transaction, in particular for deals with cross-border aspects.

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Please do not hesitate to contact us with any questions.

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