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THE VALUE OF KNOWING

REGIONAL COMPETITION ENFORCEMENT

COMESA and EAC perspectives

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COMESA COMPETITION COMMISSION (CCC)

Key features

The CCC was formulated in 2004, but only started active enforcement from 14 January 2013.

Member States

Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, eSwatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia and Zimbabwe.

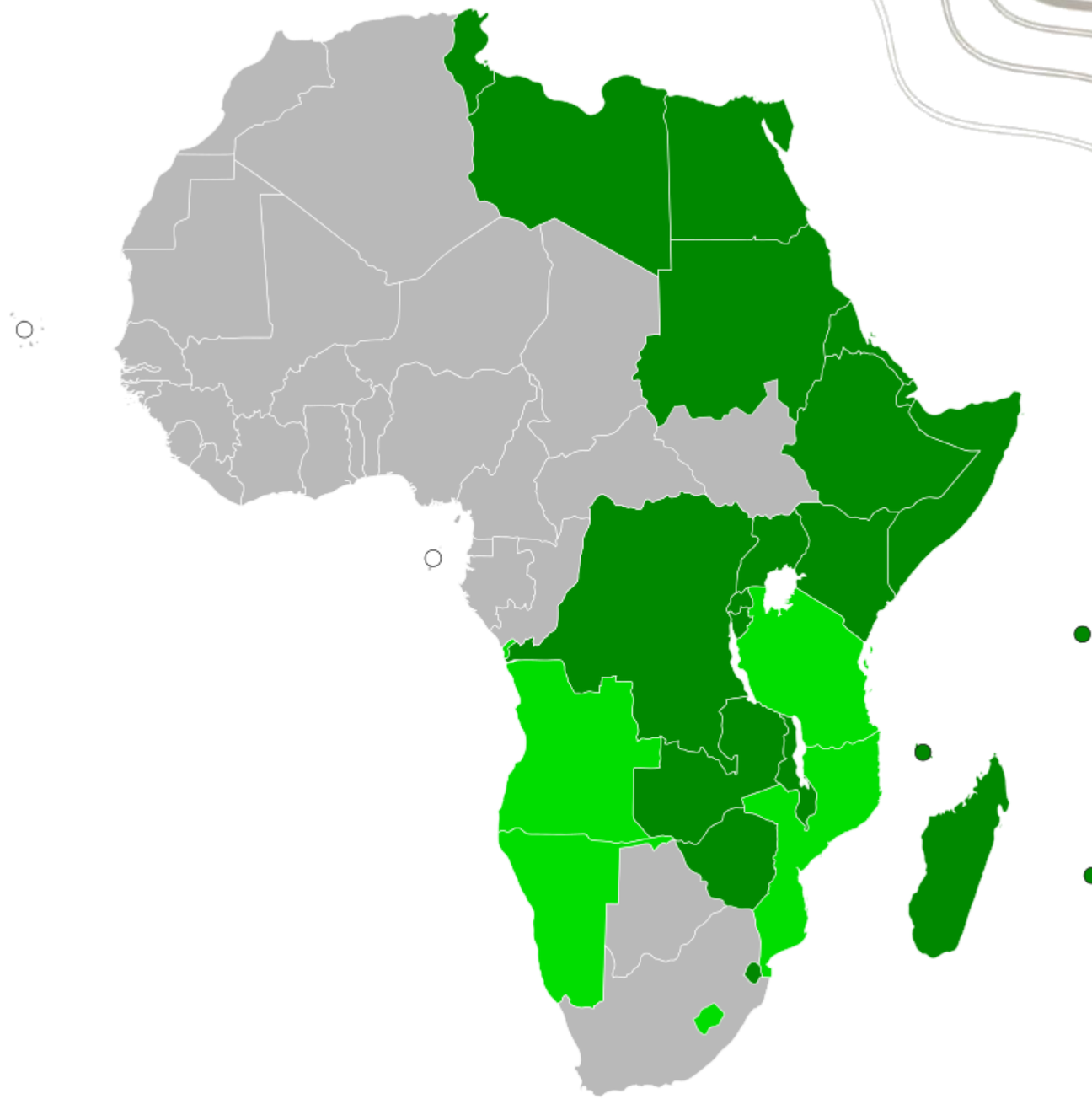
Some Member States have active domestic competition regulators, or are at various stages of implementing or drafting competition legislation.

Jurisdiction

CCC has jurisdiction on "*all economic activities whether conducted by private or public persons, within or having an effect within, the Common Market*".

Scope

Mergers and Acquisitions, Anti-Competitive Business Practices and Conduct and Consumer Protection



Source: Wikipedia

CCC: MERGER REGULATION

Merger Control in COMESA

- For a transaction to be notifiable to the CCC it must meet 2 tests, namely:
  - ✓ the test of a merger as defined in the COMESA Competition Regulations, 2004 (the **COMESA Regulations**) – essentially it must result in the direct or indirect change of control of a business in COMESA. For example, the purchase of 60% of the shares of a Kenyan company is a merger.
  - ✓ the merger notification thresholds prescribed by the CCC.

Merger Notification Thresholds – part I

- **Regional dimension test**
  - At least one of the merging parties must operate in at least 2 COMESA member states. For example:
    - ✓ the acquiring firm can operate in two Member States, whilst the target operates in one Member State only.

CCC: MERGER REGULATION

Notification Thresholds – part II

- **Financial threshold test – which are cumulative:**
  - A combined annual turnover or value of assets (whichever is higher) in the Common Market of at least USD 50 million; **and**
  - Annual turnover or assets (whichever is higher) in the Common Market of each merger party is at least USD 10 million; **unless**
  - each of the parties achieves at least $^{2}/_{3}$ of its aggregate turnover or assets (whichever is higher) in one and the same Member State (in which case a national filing will be required not a COMESA one).
- If a CCC merger filing is required, the parties must notify CCC within 30 days of the merging parties' decisions to merge (usually the date of the merger agreement).
- COMESA is non-suspensory i.e. parties are permitted to implement the merger pending the CCC's determination on the merger notification.
- CCC can either:
  - ✓ approve the merger conditionally or unconditionally; or
  - ✓ reject the merger.

CCC: MERGER REGULATION

Filing Fees

- The merger filing fee is 0.1% of the merging parties' combined annual turnover or value of assets (whichever is higher) in the Common Market, up to a maximum of USD 200,000.

Penalty for Failure to Notify

- If parties fail to notify a merger to the CCC, they may face financial penalties of up to 10% of either or both of the merging parties' annual turnover in COMESA in the immediately preceding financial year.
- Further, the merger shall not have any legal effect within COMESA.

CCC: MERGER REGULATION

Other Notable Issues

- **Kenya – Competition (General) Rules 2019**
  - These Rules came into effect in December 2019 – very helpfully provide that mergers notifiable to COMESA no longer need to be notified in Kenya.
  - Prior to this, if both the Kenya and COMESA merger notification requirements were met, it was necessary to make double notifications to both the CCC and the Competition Authority of Kenya – which was cumbersome and increased transaction costs.
  - However, it is possible for a national competition authority to request the CCC to refer a merger to the national authority, where such a merger may disproportionately affect competition in that Member State's jurisdiction as compared to others.

CCC: ANTI-COMPETITIVE BUSINESS PRACTICES

Anti-Competitive Business Practices

- These are practices that would as their **object or effect** cause the prevention, restriction or distortion of competition. Examples of these include *agreements or practices* that amount to:
  - price fixing;
  - collusive tendering;
  - market or customer allocation;
  - abuse of dominance.
- CCC has power to investigate potential infringements, issue public notices in the Member States, engage with potential offenders and take views from 3rd parties.

Applicable Penalties

- If found guilty, the CCC may order the involved parties to:
  - cease the offending conduct immediately;
  - pay a fine as determined by CCC of up to 10% of their annual turnover in the Common Market; and/or
  - take any other remedial action needed by CCC.
- There is the possibility of consequent civil action against such a guilty party by affected consumers across the various Member States. Always important for any settlements not to include any admission of liability.

Authorisation by CCC

- One may apply for authorization by the CCC (exemption), and will be required to prove that the public benefits of the conduct outweigh the anti-competitive detriment.

CCC: CONSUMER PROTECTION

Consumer Protection

- The CCC's mandate also includes the enforcement of consumer protection standards – in the supply of goods or provision of services within the Common Market.
- Examples of this include:
  - ✓ false or misleading information - price, quality, history, place of origin;
  - ✓ product safety standards - compliance with prescribed safety standards;
  - ✓ unsafe goods or other unconscionable conduct.
- CCC has power to investigate potential infringements, issue public notices in the Member States, engage with potential offenders and take views from 3rd parties.
- CCC may order various remedial actions if a breach is identified, including ordering:
  - ✓ payment of compensation to affected persons;
  - ✓ a ban or recall of dangerous goods;
  - ✓ the repair or replacement of defective goods.

EAST AFRICAN COMMUNITY COMPETITION COMMISSION (EACCC)

- The EACCC was formed following the commencement of the East Africa Competition Act in 2014 and is based in Arusha, Tanzania.
- Intended to be a "one-stop shop" for competition matters with a regional effect amongst East African Community Member States.
- The scope is: merger regulation, restrictive business practices, abuse of dominance and consumer welfare.
- The EACCC is not yet operational, but this is ongoing, with various commissioners being sworn in and procedural regulations under development.

EAST AFRICAN COMMUNITY COMPETITION COMMISSION (EACCC)

- The EAC Member States are at various stages of competition law enforcement i.e:
  - Kenya and Tanzania - have very active competition regulators i.e. CAK and FCC;
  - Rwanda – has a competition law and regulator established but it is not yet fully operational;
  - Uganda, South Sudan and Burundi– are at various early stages of developing their competition law regimes.

CONCLUSION

- Concurrent jurisdiction is a key concern arising from regional competition regulation.
- Kenya is a member of both COMESA and EAC, essentially 3 levels of potential regulation on:
  - ✓ *mergers*: Kenya and COMESA double merger notification issue resolved through the 2019 Rules, but EACCC and KE merger regulation may be an issue.
  - ✓ *anti-competitive conduct and consumer protection*: Kenya, COMESA and EAC overlapping jurisdiction.
- MOUs, Rules or Regulations between these regulators may cure these issues.
- Players active in these markets need to be aware of the potential overlapping regulation and enforcement actions.

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THANK YOU