

Mr. Miek Van der Wee  
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International Relations Unit  
Directorate General Competition  
European Commission  
B-1049 Brussels

Friday 7 June 2013

**RE: AmCham EU's concerns on COMESA's merger control system**

Dear Mr. Van der Wee,

Further to our fruitful discussion on 19 February 2013, please find below a note listing the main concerns of the American Chamber of Commerce to the EU (AmCham EU) on the new merger control system established by the Common Market for Eastern and Southern Africa's (COMESA) Competition Commission.

The concerns below are of the utmost importance for AmCham EU. COMESA's merger control regime has already created significant confusion, uncertainty and costs to our companies involved in multi-national mergers. Among the concerns you will find in the note below, four of them should be urgently addressed:

- Only one party needs to operate in at least two or more COMESA Member States to trigger a filing obligation;
- Excessive filing fees;
- No filing thresholds; and
- Potential parallel jurisdiction over mergers between COMESA and national authorities.

We are aware of certain significant steps that DG Competition has already taken following our meeting. We understand that these have led to meaningful results in opening up a discussion on key issues related to the COMESA merger control regime. The importance of DG COMP's engagement on this issue cannot be overstated and we are very much encouraged by the resolve and interest that we know you are taking in this matter to promote sound international standards on merger control as agreed by the

International Competition Network (ICN)<sup>1</sup> as well as the OECD. It is clear that the COMESA merger regime departs very significantly from such standards. These issues relating to the COMESA merger regime are very significant, not only will these affect global transactions adversely where competition in the COMESA Member States may be affected, but more importantly, transactions that have no meaningful links with the COMESA Member States may also be subject to unreasonable filing obligations.

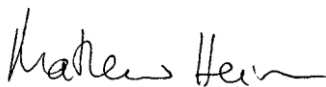
Importantly, the COMESA merger control regime should ensure:

- Reasonable local nexus/effects test for filing requirements;
- Refraining from standstill requirements;
- Reasonable review periods;
- Avoidance of excessive filing fees; and
- Reasonable substantive review standards.

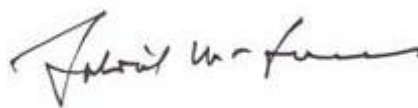
We would like to assure you of AmCham EU's determined support in promoting sound competition policy across the global antitrust community, in particular with respect to:

- Enforcement of antitrust laws based on sound analytical frameworks and consumer welfare;
- Procedural fairness; and
- Avoiding extraterritorial impact of local enforcement actions.

We hope that our observations on COMESA's new merger control system will prove useful. Should you require any further information, please do not hesitate to contact Pierre Bouygues at AmCham EU ([pierre.bouygues@amchameu.eu](mailto:pierre.bouygues@amchameu.eu); +32 (0)2 289 10 32).



Mathew Heim



Gabriel McGann

Co-Chairs of the AmCham EU's Competition Policy Committee

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<sup>1</sup> <http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx>

## Note on COMESA's Competition Law

### Introduction

1. From 14 January 2013, COMESA's Competition Commission (CCC) began to enforce COMESA's competition rules and accept merger control filings for the 19 African Member States within the COMESA region<sup>2</sup>.
2. Since then, industry and legal practitioners have raised concerns as to how COMESA's competition regulations (regulations) will apply in practice, particularly the merger control regime. For example: *Is the new regime a one-stop-shop for mergers in the COMESA region? When can a notifiable deal close and what are the risks of early closing?*
3. Until all of these concerns, as well as others that will surely arise, are answered, AmCham EU believes that the Regulation will lead to uncertainty and complexity for companies that are active in the regions covered by COMESA.

### Concerns relating to the application of COMESA's merger control regime

*The COMESA merger regime extends jurisdiction to transactions that have no link with COMESA Member States*

4. The COMESA notification requirements *do not specify any turnover threshold or deal-value threshold* required for making a notification with the CCC mandatory. The CCC has exercised its power in accordance with Article 23(3)(b) of the Regulations to set turnover/asset thresholds at \$0 for notifiable transactions, so that all merger transactions (irrespective of size or turnover) must be notified to the CCC, provided both acquiring firm and target, or either of them, operate in two or more Member States.
5. This implies that a transaction would be notifiable even if the target has no activity in the COMESA region and the purchaser operated a small shop in two different COMESA states. AmCham EU is concerned that a large number of transactions will thus potentially be caught, thereby placing a heavy regulatory burden both on the merging parties and on the CCC's resources.
6. The CCC has jurisdiction (subject to a possible 'referral back' request by a COMESA national competition authority) over transactions involving the direct/indirect acquisition of a controlling interest by one or more persons of whole/part of a business, provided at least one party operates in two or more COMESA Member States.

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<sup>2</sup> Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

7. However, AmCham EU notes that the Regulations remain silent on the interpretation to be given to the term 'operate', so it is unclear whether a merger control filing requirement would be triggered if either the acquirer or target had limited sales in two or more COMESA states through sales from overseas without a physical, corporate presence.
8. In addition, AmCham EU is concerned that the Regulations do not provide for exemptions, specific treatment or a simplified procedure for certain transactions *e.g.* between two entities of the same corporate group which would not result in an actual change of control.

*There is a significant risk for parallel merger reviews by COMESA and Member States' authorities*

9. The Regulations are stated to have only 'primary jurisdiction'. AmCham EU finds unclear whether national competition authorities will retain parallel jurisdiction over transactions with a regional dimension (over and above the right to request a referral) or whether parties filing a transaction before the CCC would benefit from a one stop-shop principle (thus avoiding the need to file simultaneously at national level). This lack of clarity brings legal risk and potentially significant additional administrative burdens for companies doing transactions if the law or practice evolves in such a way that they have to file with COMESA and at national level. While only eight of COMESA Member States currently have active national merger control, this number is likely to grow, further increasing the risk and uncertainty.
10. It is therefore possible that (unlike the EU) a merger must be notified at both COMESA level and national level (in Member States that have an active merger control regime).<sup>3</sup>
11. The CCC considers that it operates a 'one-stop shop'. However, it is understood that some COMESA states (such as Kenya and Zambia) are seeking to clarify the extent of CCC's jurisdiction and the interaction between COMESA's competition rules and national competition rules and that, meanwhile, they are advising parties to continue to apply national rules and to notify the relevant national authorities even where the Regulations apply.

*Although unclear at this time, the COMESA regime may provide for a mandatory standstill period with excessively long review periods*

12. There is no express prohibition against implementation after a transaction is notified either in the Regulations or in the CCC's merger filing form. However, the Regulations and the CCC merger filing form provide that the CCC may decide to impose on a party to a transaction a fine not exceeding 10% of the aggregate turnover of the party in the COMESA region in the previous financial year if it fails to notify a merger before its implementation. In addition, a failure to notify would result in the transaction being void in the COMESA region. Thus there is an uncertainty regarding the scope of the mandatory standstill period and the voidable nature of the transactions.

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<sup>3</sup> At present, eight member states have a merger control regime with an operational competition authority accepting filings, namely Burundi, Egypt, Kenya, Malawi, Mauritius, Swaziland, Zambia and Zimbabwe.

13. Clarification is expected to be provided in the COMESA Merger Assessment Guidelines 2013 (referred to in the filing form but not yet public). Although any party aggrieved by the orders of the CCC may appeal to the Board of Commissioners, the procedure and timing of the appeal is not explained in the Regulations.
14. The CCC review period is excessive with current rules suggesting a decision be taken within 120 days further to the notification. However, extension of this period can be sought from the Board of Commissioners and, given that there appears to be no consequence attached to the lack of decision at the end of the review period, concern has arisen within AmCham EU that this could create uncertainty for parties should the CCC fail to meet the 120 day timeframe.

#### *High filing fees*

15. The CCC will consider the higher of 0.5% of either the combined assets or turnover in the COMESA region as the filing fees for notification. The filing fee would not exceed \$500,000. This means that purchasers with substantial sales or operations in the COMESA common market will face high fees even when acquiring targets with only minor activities in the region.
16. The maximum fee is also almost twice as high as the next most expensive regime, the US. AmCham EU fears that given the absence of turnover thresholds, a large number of transactions may be caught by COMESA's regime and the very high filing fee would add a significant transaction cost for merger filings.

#### *Who and When to notify*

17. Each party to a transaction should notify the CCC as soon as it is practicable but in no event later than 30 days of the parties 'decision to merge'. It is unclear what could be construed by the CCC as a 'decision to merge'. Clearly, a filing deadline triggered by a Memorandum of Understanding (MOU) or any other non-binding documents would raise significant concerns. Where filing deadlines are used by competition authorities, such deadlines should only be capable of being triggered by binding transactional documents.

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*AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe.*

*AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled €1.9 trillion in 2012 and directly supports more than 4.2 million jobs in Europe.*

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