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A Practitioner's Critique: the One-Stop Shop Regime of the COMESA Competition Commission

by

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A. GLOSSARY

Unless the context requires otherwise or unless otherwise defined in this paper, words and expressions used in this paper shall have the meanings set out below:

Term	Definition
"**Board**"	means the 'supreme policy body' of the CCC established in terms of article 12 of the COMESA Regulations;
"**Botswana Act**"	Competition Act, 17 of 2009;
"**CCC**"	means the COMESA Competition Commission established in terms of article 6 of the COMESA Regulations;
"**COMESA**"	means the Common Market for Eastern and Southern Africa;
"**COMESA Regulations**"	means COMESA Competition Regulations, 2004 made in terms of article 55(3) of the COMESA Treaty;
"**COMESA Rules**"	means the COMESA Competition Rules, 2004 made in terms of article 8(7) read with article 39 of the COMESA Regulations;
"**COMESA Threshold Rules**"	means Rules on the Determination of Merger Notification Thresholds, 2015 made pursuant to article 23(4) read with article 39 of the COMESA Regulations;
"**COMESA Treaty**"	means the Treaty Establishing the Common Market for Eastern and Southern Africa, 1994;
"**Council**"	means the Council of Ministers established in terms of article 7(1)(b) read with article 9 of the COMESA Treaty;
"**Dutch Constitution**"	means the Constitution of the Kingdom of the Netherlands 2008;
"**EU**"	means the European Union founded on 1 November 1993 together with its successors in title;
"**EU Treaty**"	means the Treaty Establishing the European Community published in the Official Journal of the European Communities (2002/C 325/01);
"**Kenyan Act**"	means Competition Act No. 12 of 2010;
"**Kenyan Authority**"	means the NCA of Kenya established in terms of section 7 of the Kenyan Act;
"**Kenyan Constitution**"	means the Constitution of Kenya, 2010;
"**Latest EU Merger Regulation**"	means the Council Regulation (EC) No 139/2004;
"**Merger Guidelines**"	means COMESA Merger Assessment Guidelines, dated 31 October 2014;

"**MoUs**"	means memoranda of understanding and "MoU" means any one of them;
"**NCAs**"	means national competition authorities and "NCA" means any one of them;
"**Original EU Merger Regulation**"	means the Council Regulation (EEC) No 4064/89;
"**Referral Notice**"	means the Commission Notice on Case Referral in respect of Concentrations, 2005/C 56/02; and
" **Vienna Convention**"	means the Vienna Convention on the Law of Treaties, No. 18233, concluded at Vienna on 23 May 1969.

B. ABSTRACT

The ‘Competition Commission’ for the ‘Common Market for Eastern and Southern Africa’ has been established as the competition law enforcer of the ‘Common Market for Eastern and Southern Africa’, an international region of 21 African member states. The ‘Competition Commission’ is a regional body said to enjoy international legal personality. This regional body considers itself to be a ‘one-stop shop’ within the ‘Common Market for Eastern and Southern Africa’ and hence seeks to exercise its jurisdiction to the exclusion of that of ‘national competition authorities’ within the ‘Common Market for Eastern and Southern Africa’. However, in practice this ‘one-stop shop’ persona has not been accepted by all member states of the ‘Common Market for Eastern and Southern Africa’ – leading to jurisdictional confusion, legal uncertainty and enforcement fragmentation. This paper is a consideration of whether the ‘Competition Commission’ has the requisite consent from member states of the ‘Common Market for Eastern and Southern Africa’ to operate as a ‘one-stop shop’, and, if so, the paper considers what obstacles stand in the way of the effective application of the said ‘one-stop shop’ jurisdiction within the ‘Common Market for Eastern and Southern Africa’.

1. CHAPTER 1: RESEARCH OVERVIEW

1.1 Background

The Common Market for Eastern and Southern Africa ("**COMESA**") is an international region[1] made up of 21 African member states.[2] COMESA was established in December 1994 pursuant to the 'Treaty Establishing the Common Market for Eastern and Southern Africa' ("**COMESA Treaty**").[3]

Through various policies and programmes - COMESA seeks, *inter alia*, "*to promote joint development in all fields of economic activity and the joint adoption of macro-economic policies*"[4] and "*to co-operate in the creation of an enabling environment for foreign, cross border and domestic investment*".[5]

In pursuance of its objectives, the COMESA Treaty prohibits, *inter alia*, any practice which negates the objective of free and liberalised trade.[6] To the latter end, regulations governing competition within COMESA ("**COMESA Regulations**") were made in December 2004 in terms of article 55(3) of the COMESA Treaty.[7] The COMESA Competition Commission ("**CCC**") was established to enforce the COMESA Regulations and was vested with international legal personality for this purpose.[8]

The COMESA Regulations – regulates broadly three types of conduct: (i) anti-competitive business practices,[9] (ii) merger control,[10] and (iii) consumer protection.[11] In the main, the issue considered in this paper stems from the CCC's merger control powers.

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[1] COMESA enjoys international legal personality in terms of article 186(1) of the COMESA Treaty.

[2] Until July 2018, there were 19 member states: Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. The Republic of Tunisia and the Federal Republic of Somalia were admitted as COMESA member states at the 20th Summit of the COMESA Heads of State and Government held on 18 - 19 July 2018 in Lusaka, Zambia, after having fulfilled the terms and conditions of accession to the COMESA Treaty.

[3] The Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA Treaty) was signed on 5 November 1993 but only entered into force on 8 December 1994.

[4] Article 3(b) of the COMESA Treaty.

[5] Article 3(c) of the COMESA Treaty.

[6] Article 55(1) of the COMESA Treaty.

[7] Article 55(3) empowers the Council of Ministers of COMESA (established by Article 7 of the COMESA Treaty) to make regulations to regulate competition within member states.

[8] Article 6 of the COMESA Regulations established the CCC and vested upon it international legal personality.

[9] Under Part 3.

[10] Under Part 4.

[11] Under Part 5.

Although drafted in 2004, the COMESA Regulations only entered into force in November 2012 upon their publication in the Official Gazette of COMESA.[12] Quite swiftly after that, the CCC opened its doors with an announcement on 14 January 2013 that, as of that date, the CCC would start accepting merger notifications.[13]

Right off the bat, the CCC highlighted its unique and advantageous feature (over that of national competition law enforcement) as that of being a 'one-stop shop' in the following words: *"[o]ne of the notable benefits of the regional competition law regime is that it introduces a 'one stop shop' for cross border transactions thereby easing the cost of doing business in COMESA as such transactions no longer need to be notified in two or more jurisdictions*"[14] (my emphasis).

In addition to easing the costs associated with multiple filing requirements (as noted by the CCC), other benefits of a 'one-stop shop' include legal certainty in that parties can self-assess a deal and determine which body has jurisdiction over it; and where it is the regional body with jurisdiction then there tend to be significant savings in the form of time and resources typically associated with managing multiple merger notifications and the need to comply with multiple (and fairly, divergent) legal regimes.[15]

Therefore, at a cursory glance – a 'one-stop shop' regime (in relation to mergers in particular) is most laudable and a much needed development at a time when the continent may be at its best investor-confidence level to date as evidenced by the so called 'Africa Rising'[16] phenomenon and the growing ambitions by African states to increase intra-African trade.[17] In addition, the last decade has seen a growing number of the introduction of national merger control regimes not only within Africa[18] but globally (as noted at the EU

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[12] Volume 17#12 dated 20 November 2012 read with article 12(1) of the COMESA Treaty.

[13] The official website of the COMESA Competition Commission (CCC): http://www.comesacompetition.org/?page_id=375 (accessed on 25 July 2018).

[14] The official website of the CCC: http://www.comesacompetition.org/?page_id=375 (accessed on 25 July 2018).

[15] Wagener, Marianne and Upfold, Candice, "*Regional competition regimes: A comparative study of the COMESA Competition Commission and the European Competition Commission*", published as a draft online (accessed on September 2013).

[16] Wadongo, Evans, *"Africa rising? Let's be Afro-realistic"*, published in The Guardian on 7 November 2014; Fabricius, Peter, *"Africa Rising or Africa Uprising?"*, published in the Mail & Guardian 11 November 2015; Akwagyiram, Alexis, *"Africa rising - but who benefits?"* published by BBC News on 18 June 2013; Conference *"Africa Rising: Building to the Future"*, an International Monetary Fund conference held on 29-30 May 2014 in Mozambique.

[17] As at the time of writing, more than 50 African states had signed the African Continental Free Trade Area agreement, which is aimed at facilitating a single market for goods and services on the continent (see for example, "*Continent's free trade deal a game-changer for Africa*", 3 July 2018 published on IOL website: https://www.iol.co.za/capetimes/news/continents-free-trade-deal-a-game-changer-for-africa-15795779 (accessed on 26 July 2018).

[18] A few examples are given: Botswana (Competition Act, 17 of 2009 together with the Competition Regulations, 2011 – entered into force in October 2011), Mozambique (Law No. 10/2013 dated 11 April 2013 has been in effect since 10 July 2013, followed by the adoption of Decree 37/2014 of 1 August 2014 establishing the competition authority of Mozambique – however, such authority has yet to become operational), Kenya (Competition Act No. 12 of 2010 entered into force on 1 August 2011), Madagascar (Competition Law Act 2005-020 of 17 October 2005 and its implementing decree, No. 2008-771 of 28 July 2008, entered into force in 2008), Malawi (Competition and Fair Trading Act, 43 of 1998, and the Competition

discussion under Chapter 3 below). An increase in cross-border transactions coupled with an increase in jurisdictions with merger control regimes necessarily implies an increase in the number of merger filings that parties must make and an increase in the costs associated with such multiple filings.

Perhaps the best (if not, the only) example of how effective a 'one-stop shop' regime can be, is the European Union ("**EU**") where the relevant EU competition authority is said to enjoy exclusive jurisdiction over a merger having an EU 'community dimension' (with national competition authorities ("**NCAs**") within the EU precluded from reviewing that merger).[19]

As with the EU's 'community dimension' requirement, the COMESA Regulations also provide for a 'regional dimension' test which must be met before the CCC may exercise jurisdiction over a particular transaction. Notionally, therefore, there should be no conflict between the jurisdiction enjoyed by NCAs, on the one hand, (as these only enforce domestic competition laws); and the jurisdiction of a regional body like the CCC (who, as summarized by the CCC, has extra-territorial jurisdiction across multiple states).[20]

However, in practice – many transactions on the African continent lead merging parties to an intersection where the jurisdiction of NCAs within COMESA comes into direct conflict with that of the CCC.

- At first issue is the fact that a number of member states of COMESA ("**Dissenting NCAs**") have steadfastly disagreed that the CCC is a 'one-stop shop'. Accordingly, the Dissenting NCAs have required merging parties to notify domestically, a merger that is also notifiable to the CCC.[21] As at the time of writing, Egypt, Ethiopia, Kenya, Zimbabwe and Zambia were understood to have expressed dissent at one stage or another after the CCC became operational.[22]

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and Fair Trading Regulations (G.N. 20/2006), entered into force in 2006), Mauritius (Competition Act, 2007 was passed on 20 December 2007 – however, it entered into force in piecemeal with initial parts entering into force in October 2008 and the balance, which included the establishment of the relevant competition authority, entered into force in November 2009), Rwanda (Competition Act, 36 of 2012 of 21 September 2012 – however, the law establishing the competition authority has only recently been enacted), Zambia (Competition and Consumer Protection Act, 24 of 2010 entered into force on 16 August 2010). In some countries, there are new competition law bills that are pending (such as in Uganda and Nigeria).

[19] Article 21 of the Council Regulation (EC) No 139/2004.

[20] Official website of the CCC: http://www.comesacompetition.org/?page_id=375 (accessed on 25 July 2018).

[21] No official publication was ever made as to which NCAs agreed with the CCC and which disagreed with it with regards the 'one-stop shop' regime. However, over time, certain NCAs made their positions known (either through public oral statements, or requests for national filings or guidelines/notices posted on the NCAs' websites).

[22] Wagener, Marianne and Upfold, Candice, "*Regional competition regimes: A comparative study of the COMESA Competition Commission and the European Competition Commission*", published as a draft online (accessed on September 2013); Irvine, Heather "*Merger filings in Africa remain costly and cumbersome*", 18 October 2016.

- Initially, no minimum thresholds were prescribed as required by the COMESA Regulations before a transaction became notifiable to the CCC[23] – such that all transactions that met the 'regional dimension' test under the COMESA Regulations became notifiable to the CCC. Although thresholds have since been prescribed,[24] this has not in any way averted the jurisdictional tension between COMESA NCAs and the CCC.

- Seemingly in an effort to increase buy-in on the 'one-stop shop' approach, the CCC is said to have undertaken "*…an audit of domestication deficits at the national level*" with a view to develop "*…guidelines based on best practices to enhance domestication*".[25] Furthermore, the CCC has concluded "Co-operation Framework Agreements" with some of the Dissenting NCAs – however, these neither address the 'one-stop shop' issue nor confirm that the CCC is a 'one-stop shop'. More critically, the status of the bilateral agreements in law is unclear.

Half a decade since the CCC became operational, its self-declaration as a 'one-stop shop' has created complete legal uncertainty on the question of which competition regulators has jurisdiction over cross-border transactions within COMESA. As will be shown in later chapters of this paper, the abovementioned tension constantly requires parties to any cross-border transaction within COMESA to make a very difficult call: (i) notify their transaction to the CCC and the COMESA NCA of each affected COMESA member state that also has a national merger control regime in place ("**Option 1**"); or (ii) notify the CCC and only the Dissenting NCAs ("**Option 2**"); or (iii) only notify the CCC on the strength of the CCC's understanding of its regime as a 'one-stop shop'. No choice is without risk (legal or financial).[26]

- **Option 1 (catch-all approach)**: this option requires parties to pay filing fees to each notified COMESA NCA and to the CCC – and thus increases (instead of easing) transaction costs. Nevertheless, it, on the face of it, appears to be the safest route legally. However, it could result in opposing decisions that can render a transaction defunct – e.g. if one COMESA NCA unconditionally approves the implementation of a transaction within its jurisdiction (e.g. in State A), but the CCC either prohibits it altogether within COMESA or approves it subject to conditions

[23] Thresholds were set at 'nil' in terms of Rules on the Determination of Merger Notification Threshold, 2012.

[24] Rules on the Determination of Merger Notification Thresholds (COMESA Threshold Rules) published on 25 March 2015.

[25] 2015 Annual Report of COMESA (paragraph 6.3.2, page 59).

[26] During the early days following the CCC's commencement of its operations – another option was to not notify the CCC at all but to only notify NCAs. However, as it became apparent that the CCC intended to actively enforce the COMESA Regulations notwithstanding the jurisdictional turf-war with certain NCAs – not notifying the CCC was no longer a viable option.

that impact its implementation in State A. This would create a conflict of decisions without an effective legal recourse.

- **Option 2 (CCC and Dissenting NCAs only)**: although the transaction costs associated with this option may, notionally, be lower than pursuing Option 1 – it gives rise to the same risk of a conflict of decisions. The lack of uniformity in approach (in relation to non-dissenting and Dissenting NCAs) is also not desirable legally because it leads to enforcement fragmentation. One expects that all COMESA NCAs must be notified where a transaction meets their local notification requirements, or none must be notified because of the application of a true 'one-stop shop' regime by the CCC.

- **Option 3 (true 'one-stop shop')**: this may be the most cost-effective route (as it would require the payment of only one filing fee to the CCC) and it should avoid any conflict of decisions. However, the biggest risk of this option is Dissenting NCAs directly calling on merging parties to notify their transaction in terms of local merger control requirements (notwithstanding a pending notification to or decision by the CCC in relation to the same transaction). In practice, it has become clear that merging parties cannot rely on a notification to the CCC as an enforceable legal ground for refusing to notify any COMESA NCA. Therefore, where a COMESA NCA has called on merging parties to make a local filing (notwithstanding a notification to the CCC) – merging parties have abided that call as a pragmatic means of avoiding being blocked from implementing their transaction in the jurisdiction of the calling NCA. This is because the weight of an approval by the CCC is completely ineffective against a complete prohibition of a COMESA NCA – as the latter is able, through local laws and courts, to prevent parties from operating as a merged entity within their jurisdiction. Hence – the conflict of decisions is not avoided by following this option.

Most jurisdictions with merger control regimes – include some or other penalty for failing to notify transactions that meet local requirements for compulsory notifications. If a notification to or decision of the CCC is not a lawful defence or legal ground for not notifying a COMESA NCA – then merging parties face the risk of being penalized by the non-notified COMESA NCA(s), which is a far more serious repercussion than bearing the administrative, legal and financial burden associated with making multiple notifications within COMESA.

Without a clear legal answer to this jurisdictional tension - there will always be the ancillary risk that COMESA NCAs (the compositions of which are constantly changing) can change

tack at any point in time: e.g. those who at one stage accept the CCC as a 'one-stop shop' may change their position at any point in time without any legal recourse for merging parties.

As recently as 10 July 2018,[27] it was reported that parties notified a cross-border transaction to the CCC and secured an approval of the CCC. The parties proceeded to implement their transaction including in Ethiopia where the target firm also had operations. After implementing the transaction, the Ethiopian competition authority inquired from the merging parties why they had not notified their transaction to the Ethiopian competition authority. It is understood that the parties are seeking to rely on the notification to and approval of the CCC as a 'defence' for not having notified their transaction in Ethiopia. However, it remains to be seen as to whether this 'defence' will have legal standing in Ethiopia as the matter is still pending.

On 18 July 2018, Tunisia and Somalia joined COMESA to take its membership from 19 to 21 states. Upon receiving notice of these states' accession to the COMESA Treaty, the first question in the minds of competition law practitioners was: will they or will they not accept the CCC as a 'one-stop shop'? The law-firm of the drafter[28] has put this question directly to the CCC. The CCC's response was that Tunisia and Somalia have not made their position clear on whether or not they will accept the CCC as a 'one-stop shop'. Until those states make their position known on the 'one-stop shop' issue – there will continue to be legal uncertainty as to whether parties to cross-border transactions affecting Tunisia or Somalia should only notify the CCC, or whether they will need to also notify the NCAs of Tunisia and Somalia. As such, what should be a welcomed development has simply increased the number of COMESA member states in respect of which there is jurisdictional uncertainty. That parties to cross-border transactions within COMESA have no legal certainty on a critical question like which competition regulator(s) has jurisdiction over their transactions within COMESA – amounts to legal absurdity especially when coupled with the fact that, it is merging parties (not competition regulators) who may be penalized for 'making the wrong call'.

The inability of merging parties to treat the CCC's declaration of itself as a 'one-stop shop' as a 'legal defence' (as highlighted by Option 3 above in particular) is at the heart of this paper. It begs the question: what is the legal basis for the CCC's interpretation of its jurisdiction as a 'one-stop shop'? This paper considers relevant principles of international law to determine the jurisdiction of the CCC as vested upon the CCC by the COMESA

[27] Discussed at a meeting of the 'Competition Law Committee'. The Law Society of the Northern Provinces has a sub-committee called the 'Competition Law Committee' made up of competition law practitioners under the umbrella of that Law Society.

[28] Bowman Gilfillan Inc.

Regulations (read with the COMESA Treaty) vis-à-vis the jurisdiction of NCAs within COMESA. There should only be two possible outcomes: either the CCC is a 'one-stop shop' (and thus has jurisdictional authority that excludes that of COMESA NCAs in prescribed instances) or the CCC and COMESA NCAs enjoy concurrent jurisdiction (and thus the CCC's jurisdiction applies in parallel with that of COMESA NCAs).

The body of material considered in this paper suggests that the position is far from clear. If the legal uncertainty is created by the lack of clarity in the legislation founding the CCC – then wholesale changes to that legislation are required in order to provide a lasting, predictable and more certain legal position. However, if the founding legislation is clear and the uncertainty is created at the level of COMESA NCAs or their member states for having failed to domesticate the COMESA Treaty/COMESA Regulations – then urgent intervention is required at the level of COMESA member states to ensure compliance with their international obligations under the COMESA Treaty.

1.2 Problem Statement

It has become clear that there is a problem with the CCC's ambition of being a 'one-stop shop'. Put simply, not all NCAs within COMESA accept the CCC as a 'one-stop shop'. This notwithstanding any benefit that could flow from such a regime within Africa and regardless of whether such acceptance would bring the COMESA member states in closer conformity to the objectives of the COMESA Treaty. This problem has given rise to a jurisdictional turf-war and has left parties to cross-border transactions with no easy answers or legal recourse.

The purpose of this paper is to consider (i) whether in terms of the COMESA Treaty read with the COMESA Regulations, the CCC is intended to be a 'one-stop shop' in relation to competition law enforcement in COMESA with a particular focus on merger control; and (ii) if so, whether, COMESA member states have given the CCC the requisite consent under international law to have exclusive jurisdiction in COMESA over mergers falling within the scope of the COMESA Regulations and their national competition laws.

In addressing, the problem statement – this paper will focus specifically on whether the jurisdictional turf-war arises because of any of the following:

a) **interpretation** – as a result of some ambiguity in the COMESA Treaty read with the COMESA Regulations as to the jurisdiction of the CCC (vis-à-vis) that of NCAs in COMESA; or

b) **domestication** – where the COMESA Treaty/COMESA Regulations establish the CCC as a 'one-stop shop' but not all COMESA member states have domesticated the COMESA Treaty/COMESA Regulations in order to give effect to the CCC's 'one-stop shop' regime.

1.3 Research Methodology

Findings in this paper are based principally on the experience of the drafter from their application and interpretation of the literature referenced herein. To a material extent, the professional experience of the drafter has informed the scope and approach to this paper.[29]

In addressing the problem statement, the paper will consider matters listed below.

Chapter 2: The Foundation of the CCC

a) General principles of international law – with a main focus on the interplay between consent expressed through ratification of a treaty and principles of monism versus dualism.

b) COMESA - a cursory consideration of the objectives of COMESA under the COMESA Treaty.

c) The CCC - an overview of the CCC, its governing laws and the background to its alleged 'one-stop shop' jurisdiction.

Chapter 3: The EU Contrast

a) The EU 'one-stop shop' – a look at how the EU has approached the 'one-stop shop' concept and its effectiveness within the EU.

b) EU and CCC thresholds analysis - to highlight how thresholds prescribed for notifiable mergers are a contributing factor in the effectiveness of a 'one-stop shop' regime.

Chapter 4: Case Study

The Kenyan lesson – using Kenya (one of the Dissenting NCAs) to illustrate the practical problems currently faced by merging parties in this jurisdictional turf-war.

[29] As at the time of drafting, the author had had approximately 12 years' experience as a competition law practitioner.

Conclusion and Recommendations

In closing, the paper sums up the body of sources considered including proposing solutions to the problem statement.

2. CHAPTER 2: THE FOUNDATION OF THE COMESA COMPETITION COMMISSION (CCC)

For purposes of this paper, it is assumed that the creation of COMESA together with its ancillary bodies (specifically the CCC) and its regulations (in particular the COMESA Regulations) - was in accordance with the general principles of international law. However, in order to properly assess the jurisdiction of the CCC as a 'one-stop shop' – it is relevant to outline the general principles of international law with a particular focus on the inter-play between agreements concluded between sovereign states at an international level and the application of those agreements within those states' domestic jurisdictions. The chapter then examines the purpose of the CCC as outlined in the COMESA Regulations and the CCC's proclaimed reasons for considering its jurisdiction as applying on a 'one-stop shop' basis in order to determine the correctness of the CCC's stated position when regard is had to the COMESA member states' intention regarding the CCC's jurisdiction as expressed in the COMESA Treaty and COMESA Regulations.

2.1 General Principles of International Law

The Vienna Convention on the Law of Treaties ("**Vienna Convention"**)[30] is a multi-lateral treaty widely accepted as a codification of customary international law and the progressive development of international law.[31]

The Vienna Convention defines a treaty as follows: "*an international agreement concluded between [s]tates in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*"[32]

Treaties are binding upon states in accordance with the principle of *pacta sunt servanda*, which is widely considered the foundation stone of international law. This principle provides that "*[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.*"[33]

The Vienna Convention also recognises certain actors as having full powers to represent their state for purposes of adopting or authenticating the text of a treaty or for the purpose

[30] No. 18233, concluded at Vienna on 23 May 1969.

[31] Page 406, Dugard, John, *International Law: A South African Perspective*, 3rd Edition.

[32] Article 2(1)(a).

[33] Article 26 of the Vienna Convention.

of expressing the consent of a state to be bound by a treaty.[34] These include heads of state, heads of government and foreign ministers.[35]

Generally, a treaty enters into force in such manner and upon such date as it may provide or as the negotiating states may agree.[36] However, the fact that a treaty has become binding on all of its members does not mean that it became law within each member state when it entered into force.[37] An additional consideration needs to be undertaken as to whether such an international agreement has been incorporated/transformed into the national laws of its members so as to bind those states and its citizens - which is expressed in this paper as 'domestication'.

There are two schools of thought regarding domestication: monists and dualists. Although on paper their distinction appears clear – in practice, the differences are limited with states tending to favour more of a dualistic approach. To determine whether a state is a monist or dualist – one has to have regard to local laws.[38]

Broadly, with a pure monist, international law trumps domestic law (meaning domestic law – especially where it conflicts with international law – does not apply).[39] An example is the Constitution of the Kingdom of the Netherlands 2008 ("**Dutch Constitution**") - where the Dutch Constitution itself or domestic laws applicable in the Netherlands can be set aside by provisions of international agreements in the event of a conflict.[40] Such an assessment is based on two main provisions in the Dutch Constitution: (i) article 93, which states that "*[p]rovisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published*"; and (ii) article 94, which states that "*[s]tatutory regulations in force within the [Netherlands] shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.*" However, there is a view that, even as a monist state, it is only provisions of an international agreement that are universally binding (directly effective) that can set aside the domestic laws of the Netherlands in the event of a conflict.[41] Therefore, in practice it appears that

[34] Article 7 of the Vienna Convention.

[35] Article 7(2) of the Vienna Convention.

[36] Article 24(1) of the Vienna Convention.

[37] *Ibid*, Dugard, J – see chapter 4 from page 47.

[38] *Ibid*, Dugard, J.

[39] Van der Schyff, Gerhard and Meuwese, Anne, "*Dutch Constitutional Law in a Globalizing World*", Utrecht Law Review, 2010 – the article also provides that the doctrine of the 'automatic' domestic effect of international law was laid down by the Dutch Supreme Court (*Hoge Raad*) in 1919 in *Grenstraktaat Aken*, HR 3 March 1919, *NJ* 1919, 317.

[40] Article 93 read with article 94 of the Dutch Constitution.

[41] ACA-Europe Seminar, "*Soft law, legal standards and sources of law: Hierarchy of norms in Dutch legislation*", 18 December 2013.

even in the Netherlands, the direct application of an international agreement may be limited to provisions that are directly effective or 'self-executing' (see further discussion below).

Other requirements of monism have been expressed in the following form: treaties that a state has ratified are automatically part of municipal law and are binding in that domain;[42] municipal law must be consistent with international law;[43] and international law forms part of national law through 'automatic application' (i.e. there is no need for express adoption by the legislature or by the local courts of the international law in question) – unless there is some clear provision of national law, such as a statute or judicial decision, which precludes the use of the international law rule by the national court.[44]

One scholar interestingly describes monism through a range of extremities (from ambivalent monism, moderate monism to extreme monism).[45] The latter is described as those states the Constitutions of which expressly provide that certain treaties are directly applicable in those states and that in such cases the treaties in question are deemed superior to all laws, including Constitutional norms. Moderate monists are those states the Constitutions of which provide for direct application of certain treaties, which may only have a higher status than later legislation but not superior to those states' Constitutions. The ambivalent monists are those states whose practice classifies certain treaties to be 'self-executing' and therefore directly applicable to national laws – however these have the same status as municipal laws and statutes with the latest in time prevailing.[46]

A dualist, in turn, requires that an international agreement be given effect to domestically by taking some prescribed step domestically to bring a nation's laws in line with that agreement to the extent that those laws do not already comply.[47] In other words, in a dualist state, an international agreement does not become part of that state's national law until and unless it is incorporated into that national law through some step independent from ratification/conclusion of said agreement. Thus, if an international agreement has not been specifically incorporated into national laws – then it cannot be a source of rights and obligations nationally.[48]

[42] Maina, Joseph Ndirangu, "*Do articles 2 (5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a monist state?"* 2013, paragraph 2, page 7.

[43] *Ibid*.

[44] *Ibid*.

[45] Adede, O, *"Domestication of International Obligations (an Abstract)"* (Paper submitted during technical seminar held by The Constitution of Kenya Review Commission), pages 171-173.

[46] Adede, O, *"Domestication of International Obligations (an Abstract)"* (Paper submitted during technical seminar held by The Constitution of Kenya Review Commission), pages 171-173.

[47] Paragraph 91, *Hugh Glenister v President of the Republic of South Africa and ors*, ILDC 1712 (ZA 2011)

[48] *Ibid*, paragraph 92 which also quotes *Baker v Canada (Minister of Citizenship and Immigration)* [1992] 2 S.C.R 817 at paragraphs 69 & 79, *Ashby v Minister of Immigration* [1981] 1 NZLR 222 at 222 and *Kavanagh v Governor of Mountjoy* Prison [2002] 3 I.R 97 at 129.

The above principles entail that, although an international agreement binds states as between themselves at an international level – such an agreement does not, without more, create rights and obligations in the domestic legal space.[49]

Nevertheless, there appears to be an exception to the 'act of transformation' requirement – being 'self-executive' provisions of an international agreement. However, little is known about the meaning of 'self-executing' and the nature of provisions intended to fall within the sphere of self-executing. Some have suggested that a provision will only be self-executing if its language so indicates, and the prevailing national law provides for its application domestically.[50] This concept will not form part of the considerations in this paper.

Some have noted that treaty practice is a complicated process which cannot be understood fully, merely by determining whether a country is dualist or monist.[51] Therefore, notwithstanding the formal legal distinction between monism and dualism – in reality, state practice (often expressed through judicial process) has been to avoid the question of monism v dualism altogether but to rather rely in the main on legal interpretation in order to make a call as to the role of a particular international agreement in their national legal system.[52]

In order to facilitate a discussion on the application of the relevant jurisdictional provisions of the CCC within COMESA and in each COMESA member state – it is useful to first outline the history of COMESA and the foundational legal instrument of the CCC. The paper then compares the relevant jurisdictional provisions of the CCC with that of the EU. The EU is relevant because it is the only international/regional competition authority that the drafter has found to operate as a 'one-stop shop'. The paper rounds off with a case study using Kenya as an example in order to engage more meaningfully with the issue of the domestication of the COMESA Treaty and COMESA Regulations.

2.2 COMESA

For purposes of this paper, it is assumed that (i) the COMESA Treaty was concluded in accordance with the general principles outlined in the Vienna Convention – and hence is a

[49] *Ibid*, paragraph 96.

[50] De Wet, Erika: "*South Africa*", Chapter 24 published in "*International Law and Domestic Systems: Incorporation, Transformation, and Persuasion*", edited by Dinah Shelton, page 577, paragraph 2.2.

[51] *Ibid*, De Wet, E; Mbugwa, K, *Dualist or Monist: Intricacies of Treaty Practice in Kenya*, a research project submitted in partial fulfillment of the Degree of Master of Arts in International Studies, October, 2013 - Institute of Diplomacy and International Studies at University of Nairobi;

[52] *Ibid*, De Wet, Erika; Mbugwa, K, Mbugwa, K, Maina, JN.

treaty as defined by the Vienna Convention; and (ii) the COMESA Treaty duly entered into force in respect of all of the COMESA member states.[53] At an international level, therefore, all of the COMESA member states are duly bound by the COMESA Treaty and hence are required to perform the COMESA Treaty in good faith (as required by the principle of *pacta sunt servanda*).

For completeness, below is a high-level background of COMESA.

COMESA is the successor of the Preferential Trade Area for Eastern and Southern African States.[54] Under the preamble of the COMESA Treaty, it is stated that on 30 and 31 January 1992 a decision was taken to transform the Preferential Trade Area for Eastern and Southern African States into COMESA. Although signed on 5 November 1993 – the COMESA Treaty only entered into force on 8 December 1994 when it was ratified.[55]

When concluding the COMESA Treaty, its members are said to have done so with due regard to "*the principles of international law governing relations between sovereign states, and the principles of liberty, fundamental freedoms and the rule of law*" (my emphasis).[56]

One of the objectives of COMESA is "*to co-operate in the creation of an enabling environment for foreign, cross border and domestic investment…*"[57] COMESA has stated that its goal is "*to see firms outgrow their national markets and operate on a more efficient, transnational scale throughout the region.*"[58]

The COMESA Treaty provides that it shall enter into force "*when signed by or on behalf of the 'High Contracting Parties' and ratified by at least eleven signatory States*".[59] Although not defined in the COMESA Treaty – 'High Contracting Parties' appear to be the member states of COMESA listed under article 1(2) of the COMESA Treaty (being the initial 19 listed below). For any other state (not listed under article 1(2)), the COMESA Treaty shall enter into force in relation to an acceding state on the date its instrument of accession shall be deposited with the 'Secretary-General'.[60]

[53] It was unclear as at the time of drafting whether the 2 new members (Tunisia and Somalia) had already deposited their instruments of accession with the Secretary-General. For purposes of this paper, it is assumed that they had and hence the COMESA Treaty is fully binding on them.

[54] In terms of article 188 of the COMESA Treaty, the Preferential Trade Area ceased to exist upon the entry into force of the COMESA Treaty, being 8 December 1994.

[55] Article 194(1) of the COMESA Treaty (also see http://www.comesa.int/overview-of-comesa/)

[56] Preamble of the COMESA Treaty, last paragraph.

[57] Article 3(c) of the COMESA Treaty.

[58] Paragraph 106 of the 2012 Annual Report of COMESA.

[59] Article 194(1) of the COMESA Treaty.

[60] Article 194(4) read with article 195 of the COMESA Treaty. The Secretary-General is appointed in terms of article 17 of the COMESA Treaty.

Until 2018, COMESA had been made up of 19 member states: Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Very recently, on 19 July 2018,[61] Tunisia and Somalia joined COMESA to bring its total membership to 21. It is said that their application to join had been pending since 2016.[62]

Article 7 of the COMESA Treaty establishes various organs to execute designated functions under the COMESA Treaty. Two key organs are:

a) The 'Authority' – being the supreme policy organ of COMESA responsible for the general policy and direction of the performance of executive functions. Directions of the Authority taken in terms of the COMESA Treaty are binding on COMESA member states and all other organs of COMESA.[63]

b) The Council of Ministers ("**Council**") – composed of designated Ministers. It is empowered to make regulations, which, once made, are binding on all COMESA member states.[64] In order to enter into force – regulations must be published in the Official Gazette of COMESA and enter into force on the date of publication or such later date as may be specified in the regulations in question.[65]

In as much as the principles of domestication (summarised above) require something more than mere ratification in order for an international agreement such as the COMESA Treaty to have application within each signatory member state – the position taken in this paper is that regulations duly enacted in terms of the COMESA Treaty do not automatically apply within COMESA member states. Due regard must be had to the national laws of the COMESA member states to ascertain the status of the COMESA Regulations vis-à-vis each state (which positions may vary depending on whether a state leans towards the monist v dualist side). This point is expanded upon under the discussion on the CCC and the case study dealt with in Chapter 4.

[61] At the 20th Summit of the COMESA Heads of State and Government held on 18th and 19th July 2018 in Lusaka, Zambia, after having fulfilled the terms and conditions of accession to the COMESA Treaty (See 'CCC Notice No.2 of 2018').

[62] https://africanantitrust.com/category/somalia/ (accessed on 27 July 2018).

[63] There is one exception – being that such directions will not be binding on the Court of Justice (established by article 7 of the COMESA Treaty) in the exercise of its jurisdiction.

[64] Article 10(1) read with article 9(3) and article 10(2) of the COMESA Treaty.

[65] Article 12(1) of the COMESA Treaty.

Competition enforcement is specifically provided for in the COMESA Treaty and for this very purpose the COMESA Regulations were made.[66] COMESA has indicated that the COMESA Regulations must be applied by the CCC with COMESA's ambition of single market integration in mind.[67]

The COMESA Treaty does not regulate the interplay between national competition laws and the COMESA Regulations at all. However, it does contain a definition for 'consensus' as "*general agreement, characterised by the absence of objection to issues secured by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments*"[68] (my emphasis). 'Co-operation' is also defined as "*the undertaking by [m]ember [s]tates in common, jointly or in concert of activities undertaken in furtherance of the objectives of [COMESA] as provided under [the COMESA] Treaty or under any contract or agreement thereunder or in relation to the objectives of [COMESA]*".[69]

As at the date of writing, all the COMESA member states had national competition laws except for five: Democratic Republic of the Congo, Djibouti, Eritrea, Libya and Uganda.[70]

2.3 COMESA Competition Commission (CCC)

General Overview

The CCC started operating on 14 January 2013.[71] It was established as an international legal personality in terms of article 6 of the COMESA Regulations. Through the COMESA Regulations, the CCC has been granted the 'legal capacity' in the territory of each COMESA member state to perform its function under the COMESA Treaty.[72]

At the time of writing, the CCC was based in Lilongwe, Malawi.

The body of law regulating the activities of the CCC is: (i) the COMESA Treaty, (ii) the COMESA Regulations, and (ii) the rules made in terms of article 39 of the COMESA Regulations dated December 2004 ("**COMESA Rules**"). The CCC has also issued a number of guidelines – reflecting its non-binding approach to particular matters. Of

[66] Article 55(1) read with article 55(3) of the COMESA Treaty.
[67] Paragraph 106 of the 2012 Annual Report of COMESA.
[68] Article 2 of the COMESA Treaty.
[69] Article 2 of the COMESA Treaty.
[70] Dini and Pickering, "*Resolving concerns with the COMESA Competition Law Regime*", The Antitrust Source, February 2016, 1.
[71] Official website of CCC: http://www.comesacompetition.org/?page_id=375 (accessed on 25 July 2018).
[72] Article 6(a) of the COMESA Regulations.

relevance to this paper are the 'COMESA Merger Assessment Guidelines of 2014' ("**Merger Guidelines**").[73]

The COMESA Regulations are enforced by two main bodies:[74]

a) **Commission** – this is the investigative arm of the CCC. The investigation of mergers is not expressly listed under the general functions of the Commission in the COMESA Regulations.[75] However, mergers implicitly fall within the investigative functions of the Commission because later provisions in the COMESA Regulations require that notification of mergers must be made to the Commission and be assessed by the Commission.[76]

b) **Board of Commissioners ("Board")** – this is the 'supreme policy body' of the CCC[77] and has, *inter alia*, an adjudicative function in relation to anti-competitive business practices[78] and an appellate function in respect of any decision of the Commission referred to it (including merger decisions).[79]

In accordance with article 12(1) of the COMESA Treaty, the COMESA Regulations were published in the Official Gazette of COMESA[80] and entered into force on 20 November 2012.

Pursuant to article 55 of the COMESA Treaty, the purpose of the COMESA Regulations is "*to promote and encourage competition by <u>preventing</u> restrictive business practices and other restrictions that <u>deter the efficient operation of markets</u>, thereby enhancing the welfare of the consumers in [COMESA], and to protect consumers against offensive conduct by market actors*"[81] (my emphasis).

The COMESA Regulations apply[82] to "*<u>all</u> economic activities whether conducted by private or public persons <u>within, or having an effect within, [COMESA]</u>, except for those activities*

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[73] COMESA Merger Assessment Guidelines, dated 31 October 2014.

[74] There is also a COMESA Court of Justice which receives appeals against decisions of the Board of Commissioners.

[75] Article 7 of the COMESA Regulations lists the functions of the CCC and only includes investigations of 'anti-competitive practices' within COMESA but not of mergers. The former practices are distinct from mergers and fall under a separate section (Part 3 of the COMESA Regulations).

[76] Article 24 read with articles 25 -26 of the COMESA Regulations.

[77] Article 12 of the COMESA Regulations.

[78] *Ibid* footnote 75 on the distinction between these practices and mergers.

[79] Article 15 read with article 26(13) of the COMESA Regulations.

[80] Volume 17#12 dated 20 November 2012 read with article 12(1) of the COMESA Treaty.

[81] Article 2 of the COMESA Regulations.

[82] Article 3(1) of the COMESA Regulations.

as set forth under Article 4…"[83] (my emphasis). Critically, the COMESA Regulations (in terms of article 3(1)) apply to, *inter alia*, mergers which have "*an appreciable effect on trade between [m]ember [s]tates and which restrict competition in [COMESA]*" (my emphasis). The scope of application outlined at article 3(1) of the COMESA Regulations is referred to in the rest of the paper as the 'COMESA Scope'.

Merger control within COMESA is specifically regulated under Part 4 of the COMESA Regulations, from article 23 to 26. There are essentially three requirements for a transaction to trigger a notification obligation in terms of the COMESA Regulations: (i) the transaction must be a 'merger' as defined by article 23(1) of the COMESA Regulations, (ii) the merger must have a regional dimension as defined by article 23(3)(a) of the COMESA Regulations; and (iii) the parties to the merger must meet the minimum thresholds prescribed in terms of article 23(3)(b) read with article 23(4) of the COMESA the Regulations.

(i) **Merger**: means "*the direct or indirect acquisition or establishment of a controlling interest*[84] *by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person, whether that controlling interest is achieved as a result of (a) the purchase or lease of the shares or assets; (b) the amalgamation or combination with a competitor, supplier, customer or other person; or (c) by means other than those specified in the first two bullet points*".[85] Although Chapter 3 touches again on the meaning of a 'merger' – this paper is founded on a generic meaning of 'merger' as expanded on under Chapter 3.

(ii) **Regional dimension test**: this requires that both or either party to the merger should operate in two (or more) COMESA member states.[86]

(iii) **Minimum thresholds**: between January 2013 and March 2015 – these were set at nil,[87] in effect meaning only one requirement (the regional dimension test) needed to be met in order for a merger to be notifiable to the CCC. However, from March 2015 – actual thresholds were set with reference to minimum turnover or asset values of merging parties.[88]

[83] The exclusions relate to collective bargaining arrangements relating to employment terms, trade union activities and activities of professional bodies designed to develop professional standards (article 4 of the COMESA Regulations).

[84] 'Controlling interest', in relation to any undertaking, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking (article 23(2)(a) of the COMESA Regulations). In relation to any asset, 'controlling interest' means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset (article 23(2)(b) of the COMESA Regulations).

[85] Article 23(1) of the COMESA Regulations.

[86] Article 23(3)(a) of the COMESA Regulations.

[87] Thresholds were set at 'nil' in terms of Rules on the Determination of Merger Notification Threshold, 2012.

[88] Rules on the Determination of Merger Notification Thresholds (COMESA Threshold Rules) published on 25 March 2015.

There is notably a fundamental conflict between, on the one hand, the application standard set for the COMESA Regulations in terms of the COMESA Scope and, on the other hand, the specific merger control requirements set under the main merger control provisions of the COMESA Regulations (in particular, article 23). This conflict was particularly acute and problematic between January 2013 and March 2015 when nil thresholds applied for COMESA.

The first requirement of the COMESA Scope is that the COMESA Regulations only apply to activities that have an "*appreciable effect on trade between [COMESA] [m]ember [s]tates*". However, during the 'nil thresholds' era for mergers, only the regional dimension test could be relied on to determine whether a merger needed to be notified to the CCC. However, "*appreciable effect on trade*" implies a materiality threshold which is arguably much higher than the regional dimension test because the regional dimension test only requires both or either of the parties to a merger to be active in at least two COMESA member states (out of 19 and now 21) – i.e. impacting a minimum of approximately 10% of COMESA. There was some relief from March 2015 when minimum thresholds were prescribed for COMESA but (as explained in more detail under Chapter 3 below) these thresholds are arguably still too low, leading to more mergers being notifiable to the CCC than should perhaps be the case for a regional body.

The second requirement of the COMESA Scope prescribes that the COMESA Regulations only apply to 'anti-competitive' conduct – i.e. in the case of mergers, only those mergers that "*<u>restrict competition</u> in [COMESA]*". This requirement suggests that the CCC is not authorized to assess any merger in terms of the COMESA Regulations where such merger does not restrict competition within COMESA. In contrast, conventional merger control regimes empower competition regulators to assess any mergers within or having an effect within the regulated national/regional territory provided that the operations of merging parties meet a minimum size (typically identified in terms of financial[89] or market share thresholds).[90]

Understandably, the CCC considered it impractical to limit its jurisdiction to only those mergers that restrict competition as such an approach would completely deprive the CCC of even the opportunity to verify whether such mergers may be pro- or anti-competition within COMESA. As such, the CCC applies principally the main merger control provision

[89] For example, the gross turnover or total assets of the merging parties in a given territory.

[90] For example, EU competition law (see Chapter 3 of this paper), the South African Competition Act, 89 of 1998 and much of the national competition laws of the COMESA member states.

(article 23) of the COMESA Regulations as opposed to the COMESA Scope in that it requires notification of all mergers that i) meet the regional dimension test (discussed in more detail below); and (ii) if the parties to the mergers meet the thresholds prescribed in terms of the COMESA Regulations.[91]

Jurisdiction

The jurisdiction of the CCC within COMESA is outlined in article 3(2) of the COMESA Regulations which provides as follows: *"[t]hese COMESA Regulations shall have primary jurisdiction over an industry or a sector of an industry which is subject to the jurisdiction of a separate regulatory entity (whether domestic or regional) if the latter regulates conduct covered by Part… 4 [mergers] of these [COMESA] Regulations. This Article does not apply to conduct expressly exempted by national legislation*" (my emphasis).

Typically, the CCC reads article 3(2) with article 24(7) of the COMESA Regulations – to justify why it considers that the COMESA Regulations created it to be a 'one-stop shop' (especially for mergers). Article 24(7) provides that: *"[a] [m]ember [s]tate having attained knowledge of a merger notification submitted to the Commission may request the Commission to refer the merger for consideration under the [m]ember [s]tate's national competition law if the [m]ember [s]tate is satisfied that the merger, if carried out, is likely to disproportionately reduce competition to a material extent in the [m]ember [s]tate or any part of the [m]ember [s]tate*" (my emphasis). Article 24(8) of the COMESA Regulations sets out the mechanism for considering a merger referral request in terms of article 24(7) – giving the CCC the discretion to elect to deal with the case itself or refer (any part of it) to the requesting NCA to be assessed in terms of that NCA's national competition law.[92]

In fairness to the CCC, the expression 'primary jurisdiction' implies that there is an element of inequality or hierarchy between the jurisdiction of the CCC and that of other competition regulators (whether domestic or regional) – with the former having more prominence or higher ranking than the latter. In contrast, the South African Competition Act[93] creates equivalence in the jurisdiction between the South African competition authorities and sector regulators. For example, it provides that, "*[i]n so far as [the] Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority which*

[91] In terms of article 23(4) of the COMESA Regulations.

[92] Article 24(8) requires the CCC to inform the requesting NCA of its written decision within 21 days of the request. The COMESA Regulations do not define 'days' – however, in practice, it has become apparent that the CCC interprets 'days' to mean calendar days (for example, a definition of 'day' is included in the Merger Guidelines). The CCC (through Merger Guidelines) has included a further requirement – which is that the NCAs must make their referral requests within 14 days after receiving information from the CCC on the merger in question (see paragraph 5.24 of the Merger Guidelines at page 22 read with paragraph 5.5(b) of the Merger Guidelines at page 18).

[93] Act 89 of 1998, as amended.

authority has jurisdiction in respect of conduct regulated in terms of…[the] Act, [the] Act must be construed as establishing concurrent jurisdiction in respect of that conduct" (my emphasis).[94] Thus concurrency entails that no authority's jurisdiction is ousted by the other.[95]

A closer consideration of the wording of article 3(2) of the COMESA Regulations begs the question whether the expression 'primary jurisdiction' is sufficient to preclude NCAs within COMESA from reviewing mergers that meet both the notifiability requirements of the COMESA Regulations and of the domestic competitions laws of individual COMESA member states. In other words, did the drafters of the COMESA Regulations intend for the CCC to enjoy primary jurisdiction over mergers that meet the notifiability requirements of the COMESA Regulations without ousting the local jurisdiction of NCAs within COMESA in respect of the same transactions (i.e. create an element of concurrency between the jurisdiction of the CCC and that of COMESA NCAs); or does article 3(2) of the COMESA Regulations essentially preclude NCAs within COMESA from reviewing all mergers that meet the notifiability requirements of the COMESA Regulations (i.e. establish the CCC as a 'one-stop shop') regardless of whether they also meet the notifiability requirements of the domestic competition laws of NCAs?

It is apparent that neither article 3(2) nor article 24(7) of the COMESA Regulations expressly preclude NCAs within COMESA from reviewing mergers that meet the notifiability requirements of the COMESA Regulations. Article 24(7) simply provides for a referral mechanism after a merger has been notified to the CCC and is pending assessment by the CCC. It does not preclude COMESA NCAs from invoking their domestic merger control regimes – e.g. by-passing the CCC and directly calling on parties to make a local notification in a cross-border transaction that meets the notifiability requirements of their domestic competition law (where such transaction is already under the purview of the CCC). In practice, Ethiopia and Zimbabwe are examples of jurisdictions where the relevant NCAs have called on parties to notify them directly of cross-border transactions that were also notified to the CCC.[96]

In the Merger Guidelines (which are understood to be non-binding and having no force of law) – the CCC highlights the regional dimension test as "*reflecting the supra-national*

[94] Section 3(1A)(a) of Act 89 of 1998, as amended.

[95] *The Competition Commission of South Africa v Telkom Limited/The Competition Tribunal* (SCA case no.: 623/2008).

[96] At a meeting of the 'Competition Law Committee'. The Law Society of the Northern Provinces has a sub-committee called the 'Competition Law Committee' made up of competition law practitioners under the umbrella of that Law Society. The names of the parties are not disclosed for preservation of confidentiality.

nature of the [CCC]'s jurisdiction…to justify resorting to the jurisdiction of the [CCC] (rather than of a competent national authority)"[97] (my emphasis).

This statement of the CCC – appears to be just a different iteration of the 'one-stop shop' principle. However, the fact that the CCC has extra-territorial enforcement powers does not negate domestic powers of NCAs within COMESA. This can be demonstrated by a closer look at the regional dimension test.

The regional dimension test of COMESA is outlined at article 23(3)(a) of the COMESA Regulations – it requires "*both the acquiring firm and target firm or either the acquiring firm or target firm [to] operate in two or more [m]ember [s]tates*."

Based on the drafter's analysis of the implication of aforementioned provisions of the COMESA Regulations, it is possible for parties to a cross-border transaction to meet the requirements of domestic competition laws and the regional dimension test of COMESA. In the main, this is because there is no express provision in the COMESA Regulations ousting the jurisdiction of COMESA NCAs where the CCC has jurisdiction over a cross-border transaction. As such, it would be difficult (without more) to deprive COMESA NCAs their lawful authority to exercise jurisdiction over that transaction.

For example, a target firm can have operations in Kenya and Zambia, whilst the acquiring firm has operations in Mauritius, Uganda and Zambia. The NCAs of all of the affected jurisdictions will not be empowered to consider the impact of the transaction beyond their borders. However, the CCC will (in terms of the regional dimension test) be so empowered (leaving aside merger thresholds for the moment). If any of the national notifiability requirements are met – the relevant NCA(s) may invoke their national enforcement powers to assess the impact of that transaction within their national borders. The CCC would be assessing the transaction from what it refers to as the 'supra-national' or regional perspective whilst the NCA would be confining their assessment to their local market.

It is therefore possible (as often happens in practice) that a transaction can and does meet both the regional and national notifiability requirements.

In the 2012 Annual Report of COMESA (prior to the CCC becoming operational) – it is stated that the CCC has "*continued to engage itself in soft enforcement through effective*

[97] Paragraph 3.10, Merger Guidelines, page 11.

dialogue, holding informal consultations and co-operating with [m]ember [s]tates on several aspects of competition law enforcement".[98]

After becoming operational, it appears that the CCC has continued engaging with COMESA NCAs advocating for the effective enforcement of the COMESA Regulations. For example, in 2015 the CCC indicated that in 2016 it would increase its "*focus on advocacy in order to sensitize national governments and other stakeholders on the provisions of the COMESA Regulations and <u>the need for domestication of the [COMESA] Treaty and COMESA Regulations</u>*"[99] (my emphasis).

Part of the attraction of the CCC as a 'one-stop shop' regime is that COMESA member states have agreed to a 50-50 fee sharing arrangement in terms of which the CCC shares half of the annual revenue collected from merger filings with affected member states[100] – i.e. jurisdictions most affected by cross-border transactions notified to the CCC get the lion's share of the overall revenue generated by the CCC in any year from merger filing fees. However, in reality, merging parties have been faced with a double-whammy – where they have to notify the CCC (and pay the applicable filing fee) and they also have to notify NCAs within COMESA (and pay the applicable filing fees).

Where COMESA NCAs have ignored the notion that the CCC was established as a 'one-stop shop' by calling for direct filings – the CCC has not come to the aid of merging parties by helping them to resist the call to notify beyond the CCC. Merging parties have either had to make local notifications or risk being penalized by the COMESA NCA(s) in question for failing to make local notifications.[101]

There was clearly no consensus between COMESA member states (and their NCAs) in relation to the 'one-stop shop' issue as at the time the CCC became operational (or even at the ratification of the COMESA Treaty) - which is most unfortunate. COMESA NCAs cannot have been caught off-guard by the enforcement of the COMESA Regulations given that designated Ministers of each COMESA member state are part of the Council established in terms of the COMESA Treaty. The COMESA Regulations were duly gazetted as required by the COMESA Treaty. Therefore, it is unclear why there was no prior agreement between

[98] Paragraph 106 of the 2012 Annual Report of COMESA.
[99] Paragraph 7.2 of the 2015 Annual Report of COMESA, page 82.
[100] Rules on Revenue Sharing of Merger Filings.
[101] Refer to Chapter 4 of this paper on the Kenyan case study.

COMESA member states on this pertinent issue of jurisdiction during the drafting of the COMESA Regulations in 2004, or before they entered into force in 2012.

In 2016, seemingly, in an attempt to broker firmer 'collaboration' with NCAs in relation to competition law enforcement in COMESA, the CCC concluded bilateral memoranda of understanding ("**MoUs**") with select COMESA NCAs. The CCC reported the following to COMESA: "*[the CCC] has enhanced the effective competition enforcement at [m]ember [s]tates level by entering into bilateral Enforcement Cooperation Agreements with [m]ember [s]tates. During the year under review, the CCC signed…MoUs… with six [NCAs]…namely: Competition Authority of Kenya, The Fair-Trade Commission of Seychelles, Swaziland Competition Commission, Egyptian Competition Authority, Madagascar Competition Council, and the Competition and Consumer Protection Commission of Zambia. The MoUs seek to ensure effective cooperation in competition law enforcement between the [CCC] and [m]ember [s]tates*".[102]

In addition to concluding MoUs, the CCC held a workshop in 2016 "*on the need to domesticate the…COMESA Regulations.*"[103]

As at the date of drafting, the CCC had concluded MoUs with 8 COMESA NCAs for the following COMESA member states: Egypt, Kenya, Madagascar, Malawi, Mauritius, Seychelles, Swaziland and Zambia.

Of the NCAs that have concluded MoUs with the CCC – at least three (Egypt, Kenya and Zambia) have at some point or other indicated that they are Dissenting NCAs (as defined under Chapter 1 above). In other words, they have directly or indirectly indicated that they do not consider the CCC as a 'one-stop shop'.[104] Given the ongoing engagements between the CCC and NCAs – it may very well be that the conclusion of MoUs with the other NCAs was also motivated by some level of dissent/concern expressed by these other NCAs on the status of the CCC as a 'one-stop shop'.

The MoUs are substantially similar. Therefore, only the MoU with Kenya ("**Kenya MoU**") will be summarized as Kenya is also the member state used for a case study in this paper. Kenya is key for two reasons (i) since 2014, it has been reported by the CCC as being the

[102] Paragraph 14.3.2(a) of the 2016 Annual Report of COMESA, page 118.

[103] Paragraph 14.3.2(d)(a) of the 2016 Annual Report of COMESA, page 119.

[104] The Dissenting NCAs have been identified in terms of the researcher's experience through notified/assessed merger transactions. There is no publication (whether by the CCC or COMESA) listing Dissenting NCAs or indicating which NCA has still needs to domesticate the Regulations.

most (or one of the COMESA member states most) affected by cross-border transactions;[105] and (ii) it has steadfastly been a Dissenting NCA since the CCC became operational.

The MoUs appear to be premised on two main provisions (i) the requirement under the COMESA Regulations for the CCC to co-operate with NCAs;[106] and (ii) the merger referral requirement under the COMESA Regulations[107] which empowers NCAs to request the CCC to refer a merger notified to the CCC to NCAs where such a merger is likely "…*to <u>disproportionately reduce competition to a material extent</u> in the [m]ember [s]tate [of the affected NCA or any part of the [m]ember [s]tate*" (my emphasis).

Article 2 of the Kenya MoU sets out the purpose of the MoU as being "*to promote and facilitate co-ordination…between [p]arties in the harmonization of regional and national laws and policies of [m]ember states and lessen the possibilities or impact of difference.*"

The rest of the Kenya MoU then outlines mechanisms for collaboration which include notifying each other when they become aware that enforcement activities may affect 'important interests' of the other party (article 3), exchanging information (article 4), co-ordinating enforcement activities (article 5), consultations with each other as needed (article 7), and assisting each other with capacity building (article 8).

Perhaps of most relevance to this paper is article 6 of the Kenya MoU in terms of which the CCC and Kenya NCA agree that "*it is in their common interest to minimize any potentially adverse effects of their enforcement activities in as far as the application of the respective competition laws are concerned.*" The parties also agree to take into account the 'important interests' of the other party when making decisions as to whether or not to initiate an investigation, the scope of the investigation, and the nature of remedies sought. Where there is a divergence of views arising out of the enforcement of respective competition laws – parties undertake to address it in a 'timely and practicable manner as circumstances may permit.'

There is no mention of the exercise of the CCC's enforcement powers as a 'one-stop shop' regime. Kenya in no way concedes that it will refrain from applying its national competition law where a transaction is notifiable to the CCC. At best, Kenya agrees to co-operate with the CCC in order to minimize any divergence of approaches when investigating mergers.

[105] See 2012 – 2016 Annual Reports of COMESA – accessible on http://www.comesa.int/comesa-annual-reports/.
[106] Article 7(2)(c) of the COMESA Regulations.
[107] In terms of article 24(7) of the COMESA Regulations.

Therefore, the MoUs do not appear to alter or even dilute the position of the Dissenting NCAs with regard the CCC's role as a 'one-stop shop'.

2.4 Chapter Summary

It is apparent from the above analysis that the COMESA Treaty is silent as to the jurisdiction of the CCC within COMESA. The COMESA Regulations are, in turn, unclear regarding whether the CCC's jurisdiction is (or is intended to be apply as) a 'one-stop shop'. Although the COMESA Regulations hint at the CCC having a higher level of jurisdiction in so far as the extra-territorial application of the COMESA Regulations is concerned (i.e. through the words 'primary jurisdiction'), they go no further and, in particular, they do not expressly oust the domestic jurisdiction enjoyed by NCAs in COMESA where transactions are also notifiable to the CCC.

It is therefore worth taking a closer look at how the EU has gone about adopting a 'one-stop shop' regime. There are other regional bodies in Africa, some of which provide for supranational regulation of merger control[108] – however these are not considered in this paper – the primary reason being that the CCC has relied substantially on the EU model in shaping its regime including formulating the Merger Guidelines.[109]

Thereafter, regard is had to thresholds applicable in the EU for mergers falling within the EU jurisdiction as compared to those applicable in COMESA in order to highlight how thresholds are a contributing factor in the effectiveness of a 'one-stop shop' regime.

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[108] The East African Community (EAC) is perhaps the best example. It is a regional intergovernmental organisation consisting of five countries: Burundi, Kenya, Rwanda, South Sudan, Uganda, and Tanzania. The EAC founded was by the Treaty for Establishment of the East African Community, which was signed on 30 November 1999 and entered into force on 7 July 2000. The competition law in the EAC is the East African Community Competition Act (2006) and the Regulations (2010). The drafter understands that the relevant competition authority, the East African Community Competition Authority (EACCA), only became operational in 2018 (through contacts with Ms Lilian Mukoronia, the Deputy Registrar of the Mergers and Acquisitions at the EACCA). Although the EACCA appears to still be in the process of setting up infrastructure (in that it has not yet called for merger notifications) – it is currently understood to be undertaking a market enquiry in the retail sector. Another regional body is CEMAC (the French acronym for *Communaute Economique et Monetaire d'Afrique Centrale*), an organization established in 1994, consisting of Cameroon, Republic of Congo, Central Africa Republic, Equatorial Guinea, Chad, and Gabon. It became operational after the N'Djaména Treaty was ratified by all six member states in 1999. Regulation No. 1/99 UEAC-CM639, dated 25 June 1999, governs anti-competitive practices (including the abuse of market power) in the common market and was modified by Regulation No. 12-05 UEAC 639 U-CM-SE, dated 27 June 2005. The former provides for pre-notification of mergers and acquisitions with a community dimension but the drafter is not aware of the regulator being active. There is also ECOWAS (also known as CEDEAO, the French acronym for *Communauté économique des États de l'Afrique de l'Ouest*) is a regional group of fifteen West African countries: Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. ECOWAS was founded on 28 May 1975, with the signing of the Treaty of Lagos. The ECOWAS treaty was subsequently revised and signed in Cotonou on 24 July 1993. Competition is regulated by the Supplementary Act a/sa.1/06/08 which regulates restrictive business practices, the abuse of a dominant position, mergers and acquisitions and state aid. Also see: Matthieu, Adam, "*Main Supranational Merger Control Rules Likely to Apply to M&A Transactions in Africa*", Antitrust/Competition & Marketing Bulletin of Fasken Martineau, 15 February 2011.

[109] See the official COMESA website: http://www.comesacompetition.org/?s=european+commission.

The paper rounds off with a case study using Kenya in order to engage more meaningfully with the issue of domestication. The paper concludes with recommendations in an effort to bring the CCC closer to achieving its aspirations of being a 'one-stop shop'.

3. CHAPTER 3: THE EU CONTRAST

3.1 Application of a 'One-stop Shop' in the EU

In the EU, the word 'concentration' is used to describe what many other jurisdictions refer to as 'mergers'. In principle, however, the expressions are synonymous – referring to transactions where a firm acquires/establishes some defined change of control (acquiring firm) over the business (the target firm) of another firm (the seller). Under this section – the word 'concentration' will be used – however, in the rest of the paper, the word 'merger' is used. Similarly the word 'undertakings' must be understood to be synonymous to 'firms', or 'companies', or 'enterprises', or 'entities'.

At a high-level, the legal framework establishing a regional competition law body in the EU is similar to that relating to COMESA.

a) The main international agreement upon which the merger control regime within the EU is founded is the 'Treaty Establishing the European Community' ("**EU Treaty**").[110] The EU Treaty requires the adoption of appropriate regulations, rules or directives to give effect to, *inter alia*, the competition law principles outlined in the EU Treaty (discussed in more detail below).

b) Pursuant to the EU Treaty,[111] the Council Regulation (EEC) No 4064/89 ("**Original EU Merger Regulation**") was adopted on 21 December 1989 and entered into force on 21 September 1990. The Original EU Merger Regulation sets out rules applicable to large concentrations, the market impact of which is presumed to go beyond any single EU member state.[112]

c) The Original EU Merger Regulation was applied for approximately 15 years until it was amended through the Council Regulation (EC) No 139/2004 (**Latest EU Merger Regulation)**, which was adopted on 20 January 2004 and entered into force on 1 May 2004.

[110] Consolidated Version of the Treaty Establishing the European Community, Official Journal of the European Communities (2002/C 325/01) - the publication contains the consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community, incorporating the amendments made by the Treaty of Nice, signed on 26 February 2001.

[111] Article 83 of the Treaty Establishing the European Community (EU Treaty).

[112] Paragraph I.1, page 6, Green Paper on the Review of the Council Regulation (EEC) No 4064/89.

EU Treaty

Broadly, the EU Treaty makes provision for the regulation of concentrations in the EU under Title VI, Chapter 1, Section 1 (articles 81 – 86).

A bit more specific than the COMESA Treaty – the EU Treaty (at articles 81 and 82) identifies specific conduct that it prohibits because it is 'incompatible with the [EU]'. This includes what is generally referred to as cartel conduct (such as price fixing by rival firms) and abuse of dominance (through, for example, the imposition by a dominant firm of unfair purchase or selling prices or other unfair trading conditions).

As with the COMESA Treaty, the EU Treaty requires regulations to be adopted in order to give effect to the competition principles set out in Articles 81 and 82.[113] Critically, the EU Treaty specifically requires that such regulations must:

- take into account "*the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other*"[114] (my emphasis); and

- "*determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this article*"[115] (my emphasis).

In addition, the EU Treaty provides, at article 84, for the following pivotal situation: "*[u]ntil the entry into force of the provisions adopted in pursuance of [a]rticle 83, the authorities in [EU] [m]ember [s]tates shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the [EU] in accordance with the law of their country and with the provisions of Article 81…and of Article 82*" (my emphasis).[116] The relevant competition authority for the EU ("**EU Commission**") was nevertheless granted the power to ensure that the principles at article 81 and 82 are applied – and a high level mechanism is outlined at article 85 in terms of which, through co-operation with EU member states, the EU Commission could (upon request by an NCA or on its own initiative) investigate cases of suspected infringement of these principles (without derogating from article 84).

[113] Article 83(1) of the EU Treaty.

[114] Article 83(2)(b) of the EU Treaty.

[115] Article 83(2)(e) of the EU Treaty.

[116] Article 84 of the EU Treaty.

It is apparent from the above summary that the EU Treaty is more expansive and prescriptive than the COMESA Treaty in so far as competition law regulation at the 'community' level is concerned. The intentions of the EU member states is clearer in that they desired for the relationship between national competition laws and those at the EU level to be defined upfront, and pending that process – a mechanism of co-operation is built in – which clearly provides that the EU Commission (assisted by EU members) could undertake investigations in terms of article 85 of the EU Treaty. Where it does so (on its own initiative or upon request by an NCA) – it would be the EU Commission running the investigation and NCAs would be assisting and co-operating with the EU Commission during such an investigation. Article 85 goes so far as to empower the EU Commission (where it finds that an infringement has taken place) to propose appropriate measures to bring such conduct to an end.

Therefore, one can conclude that the EU Treaty was adopted by its members with the ideology of a 'one-stop shop' in mind.

Latest EU Merger Regulation

In the lead up to amending the Original EU Merger Regulation – a Green Paper was produced in 2001[117] ("**Green Paper**") reflecting on an almost decade-long application of the Original EU Merger Regulation.

The Green Paper describes the Original EU Merger Regulation as setting out "*rules applicable to large concentrations, the market impact of which is presumed to go beyond any single EU member state*"[118], and hence apply to "*all concentrations with significant cross-border effects*"[119] (my emphasis).

It then goes on to state: "*[f]or this purpose the [Original EU] Merger Regulation conferred exclusive jurisdiction on the [EU] Commission over "concentrations with a [c]ommunity dimension". This 'one-stop shop' principle serves a dual purpose. First, in the spirit of subsidiarity, it builds on the realisation that merger control at community level is justified in view of the inability of any single [m]ember [s]tate to deal comprehensively with the cross-border scale and effects of such transactions. In addition, the single 'stop'…simplifies*

[117] Green Paper on the Review of Council Regulation (EEC) No 4064/89 presented by the Commission of the European Communities on 11.12.2001, COM (2001) 745.
[118] *Ibid*, paragraph I.1, page 6.
[119] *Ibid*, paragraph I.3, page 6.

administrative procedures, thereby enabling both competition authorities and companies to minimise the costs of merger control"[120] (my emphasis).

It appears that since the Original EU Merger Regulation was adopted, membership of the EU had increased from 12 to 15 member states and, according to the Green Paper, the markets of those members were becoming increasingly integrated.[121] As at the preparation of the Green Paper – further integration was anticipated through the then anticipated introduction of the Euro and because of the trend towards internationalisation or globalisation.[122] Since publication of the Green Paper, EU membership has risen to 28[123] – with one member (the United Kingdom) having announced its intention to exit the EU on March 2019.[124]

As has been the case throughout Africa, the Green Paper also noted the increasing introduction of merger control regimes worldwide – which in turn would lead to an "*increase in the costs associated with multiple filing requirements.*"[125] Many EU member states had also introduced merger control rules – and despite the move towards harmonisation with the Original EU Merger Regulation, various degrees of discrepancy were said to persist.[126]

A need for revising the Original EU Merger Regulation was therefore identified "*so that the [EU] Commission and each [NCA], individually and together, can utilise their resources in the optimal way for protecting competition in the [EU], while at the same time reducing any unnecessary burden on industry, in terms of compliance costs and increasing legal certainty….*"(my emphasis). Medium-sized companies were identified as being most vulnerable because their limited size meant they fell below the thresholds of the Original EU Merger Regulation but still remained subject to the burden of multiple national filings.[127]

The Green Paper goes on to, *inter alia*, describe the 'one-stop shop' principle as outlined in the Original EU Merger Regulation. In essence, the Original EU Merger Regulation gave

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[120] *Ibid*, paragraph I.4, page 6.

[121] *Ibid*, paragraph I.5, page 6.

[122] *Ibid*, paragraph I.6, page 7.

[123] Current EU members are: Austria (1995), Belgium (1958), Bulgaria (2007), Croatia (2013), Cyprus (2004), Czech Republic (2004), Denmark (1973), Estonia (2004), Finland (1995), France (1958), Germany (1958), Greece (1981), Hungary (2004), Ireland (1973), Italy (1958), Latvia (2004), Lithuania (2004), Luxembourg (1958), Malta (2004), Netherlands (1958), Poland (2004), Portugal (1986), Romania (2007), Slovakia (2004), Slovenia (2004), Spain (1986), Sweden (1995), United Kingdom (1973) - leaving on 29 March 2019 after its citizens voted in favour of exiting the EU on June 2016) – official website of the EU: https://europa.eu/european-union/about-eu/countries/member-countries_en (accessed on 4 August 2018).

[124] See official website of the EU: https://europa.eu/european-union/about-eu/countries/member-countries/unitedkingdom_en#brexit (accessed on 4 August 2018)

[125] *Ibid*, Green Paper, paragraph I.7, page 7.

[126] *Ibid*, paragraph I.8, page 7.

[127] *Ibid*, paragraph I.9, page 7.

the EU Commission sole competence to deal with concentrations with a 'community dimension'. They presume that such concentrations have a market impact going beyond the national borders of any one [EU] member state.[128]

There is a founding principle behind the manner in which cases between the EU Commission and each NCA are allocated called the 'notion of subsidiarity'. This principle requires that "*action should be taken at the most appropriate level of jurisdiction.*"[129]

The EU experience has confirmed that the EU Commission is "*better placed to deal with concentrations where merging parties are active on markets that are wider than national*" (my emphasis). It is recognized that EU member states may be able to handle issues that relate to their own territory – however, the reason why the EU Commission is considered better placed to deal with extra-territorial transactions is because they are better able to address "*the totality of…concerns throughout the [EU].*" This approach is also seen as being more efficient as it militates against "*parallel treatment of the same issues in a number of [m]ember [s]tates*" (my emphasis).[130]

There are, conversely, circumstances which NCAs are better placed to deal with. This is in relation to those transactions that produce their effects within a particular member state – the effective regulation of these does not require access to the broader powers of the EU Commission.[131]

The adoption of the Latest EU Merger Regulation was in essence a recasting of EU competition legislation "*designed to meet the challenges of a more integrated market and the future enlargement of the [EU].*"[132]

Critically, the Latest EU Merger Regulation emphasise that they "*should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one [m]ember [s]tate. Such concentrations should, as a general rule, be reviewed exclusively at [c]ommunity level, in application of a 'one-stop shop' system, and in compliance with the principle of subsidiarity. Concentrations not covered by the [Latest EU Merger Regulation] come, in principle, within the jurisdiction of the [m]ember [s]tates*" (my emphasis).[133]

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[128] *Ibid*, paragraph II.15, page 8.
[129] *Ibid*, paragraph II.16, page 8.
[130] *Ibid*, paragraph II.16, page 8.
[131] *Ibid*, paragraph II.16, page 8.
[132] Recital 6 of the Council Regulation (EC) No 139/2004 (Latest EU Merger Regulation).
[133] Recital 8 Latest EU Merger Regulation.

The Latest EU Merger Regulation requires its scope to be "*limited by quantitative thresholds*" in order to cover concentrations which have a 'community dimension'. A concentration with a community dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds prescribed thresholds provided the undertakings in question have "*substantial operations*" in the community.[134] The actual thresholds and their substantiality is discussed at paragraph 3.2 below.

Provision is then made for the referral of concentrations from the EU Commission to NCAs and from NCAs to the EU Commission. The Latest EU Merger Regulation requires that rules governing such referrals should operate as an "*effective corrective mechanism*" in light of the principle of subsidiarity. The purpose of the referral rules is to protect the competition interests of the member states in an adequate manner and take due account of "*legal certainty and the 'one-stop shop' principle.*"[135]

The Latest EU Merger Regulation identifies the deficiencies of multiple notification of the same transaction as increasing legal uncertainty, effort and cost of undertakings and the possibility of conflicting assessments. Multiple notification is possible with concentrations which fall below the community dimension but which meet notification requirements of national regimes. Accordingly, the Latest EU Merger Regulation encourages further development of referral to the EU Commission by NCAs in order to avoid multiple notifications "*to the greatest extent possible*".[136]

'**One-stop shop**' – the EU Commission is granted the "*sole jurisdiction*" to apply the Latest EU Merger Regulation, subject only to review by the Court of Justice.[137] The Latest EU Merger Regulation expressly prohibits member states from applying their national legislation on competition to any concentration that has a community dimension.[138] Member states are nonetheless permitted to take appropriate measures to protect legitimate national interests in a manner that is compatible with the general principles of EU law.[139] The powers of NCAs is limited to cases where, failing intervention by the EU Commission, effective competition is likely to be significantly impeded within the territory of their member states,

[134] Recital 9-10 Latest EU Merger Regulation.
[135] Recital 11 Latest EU Merger Regulation.
[136] Recital 12-13 Latest EU Merger Regulation.
[137] Recital 18 Latest EU Merger Regulation, specifically regulated at article 21 of the Latest EU Merger Regulation.
[138] *Ibid*, article 21(3) of the Latest EU Merger Regulation.
[139] *Ibid*, article 21(4) of the Latest EU Merger Regulation.

and where the competition interests of those member states cannot be sufficiently protected by the Latest EU Merger Regulation [140]

Pursuant to the case referral system provided for in the Latest EU Merger Regulation, the EU Commission issued the 'Commission Notice on Case Referral in respect of concentrations' ("**Referral Notice**").[141]

In its introduction, the Referral Notice highlights the workings of the EU 'one-stop shop' regime by stating: "*[c]oncentrations with a '[c]ommunity dimension'…fall within the exclusive jurisdiction of the Commission; [m]ember [s]tates are precluded from applying national competition law to such concentrations by virtue of…the [Latest EU] Merger Regulation. Concentrations falling below the thresholds remain within the competence of the [m]ember [s]tates; the [EU] Commission has no jurisdiction to deal with them under the [Latest EU] Merger Regulation.*" [142]

Although the Original EU Merger Regulation made provision for case referrals between the EU Commission and NCAs – a number of developments that necessitated the amendment of the Original EU Merger Regulation through the adoption of the Latest EU Merger Regulation, also necessitated the refinement of the case referral system. Key developments include the fact that merger control laws had been introduced in almost all EU member states and there had been an increase in a number of transactions not meeting the community dimension necessitating filings in multiple member states (and some of these were thought to affect competition beyond the territories of individual member states).[143]

Therefore, the Referral Notice was designed to facilitate the re-attribution of cases between the EU Commission and member states, consistent with the principle of subsidiarity (i.e. to ensure that the appropriate authority/authorities undertakes a particular merger investigation). Critically, it remained the intention to preserve the basic features of the Original EU Merger Regulation – in particular, the 'one-stop shop' principle for mergers with a cross-border impact.[144]

Accordingly, the Referral Notice highlights the importance of avoiding fragmentation of cases through the use of case referrals.[145]

[140] *Ibid*, read with Recital 18 of the Latest EU Merger Regulation.
[141] 2005/C 56/02.
[142] Paragraph 2, Commission Notice on Case Referral in respect of concentrations' (2005/C 56/02) (Referral Notice).
[143] Paragraph 4, Referral Notice.
[144] Paragraph 5, Referral Notice.
[145] Paragraph 12, Referral Notice.

For the sake of legal certainty – a referral is to only be made when there is a compelling reason for departing from 'original jurisdiction'.[146] Broadly, the Referral Notice outlines mechanisms for (i) referral of cases by the EU Commission to EU member states (pre and post – notification stages); and (ii) referral of cases from EU member states to the EU (post-notification stage).

Summary: 'One-stop Shop' under the EU

It is patent that the EU, through the legal framework summarised above, set about creating a competition authority in the form of the EU Commission embodying the single market aspirations of the EU Treaty. The relationship between various national legislations within the EU and their impact on the role of the EU Commission was a founding consideration which led to the harmonisation efforts captured by the Original EU Merger Regulation, as refined through the Latest EU Merger Regulation. These efforts are expressed through two principles: (i) creating the EU Commission as a 'one-stop shop'; and (ii) incorporating a self-correcting mechanism through referrals based on the principle of subsidiarity.

Put simply: the EU Commission and NCAs of EU member states do not have concurrent jurisdiction. Rather the Latest EU Merger Regulation establishes a clear division of competence, with the EU Commission functioning as a 'one-stop shop' to the exclusion of NCAs where a transaction has a community dimension.

The EU considers the 'one-stop shop' as being beneficial to competition authorities and businesses alike: the handling of a merger by a single competition authority within the EU normally increases administrative efficiency, avoiding duplication and fragmentation of enforcement effort as well as potentially incoherent treatment (regarding investigation, assessment, and possible remedies) by multiple authorities. Other benefits to businesses specifically include reduced costs and burdens from multiple filing obligations, and critically, the elimination of the risk of conflicting decisions resulting from the concurrent assessment of the same transaction by a number of competition authorities under diverse legal regimes.

It should be stressed that 'single competition authority' relates specifically to that of the EU. Therefore, a filing to the EU Commission of mergers with a community dimension does not negate the need to submit notifications to competition authorities with jurisdiction outside of the EU. For example, for cross-border transactions affecting non-EU jurisdictions such as Australia, Canada, China, the United States or other African jurisdictions like Botswana,

[146] Paragraph 13, Referral Notice.

Namibia, or South Africa – an assessment still needs to be undertaken by the merging parties as to the notifiability of their transaction to NCAs in these non-EU states. Therefore, the advantages described in respect of a 'one-stop shop' in the EU does not ameliorate the burden of other filings in non-EU states.

Accordingly, the 'one-stop shop' principle as applied in the EU specifically avoids jurisdictional friction between the EU Commission and NCAs within the EU (including the consequent inefficiencies).

3.2 Thresholds in the context of a 'One-stop Shop' Regime

Overview

As noted at the EU law discussion above, thresholds can be an effective way of limiting the scope of a competition authorities' jurisdiction, or 'pitching' such authority's jurisdiction at the level contemplated by the underlying legislation.[147] Set at the appropriate level, thresholds can be an effective way of ensuring that the correct transactions fall within the purview of the intended/appropriate competition authority.

A 'no-threshold' merger regime typically means that all transactions that constitute mergers under particular merger control regimes would be notifiable to the relevant competition authority. This would be particularly onerous for merger control regimes that are suspensory: i.e. regimes prohibiting the implementation of mergers within their jurisdiction without the approval of those mergers by the relevant competition authority.

In order to 'get-going', legislatures will either set thresholds at nil (which is as good as not having any thresholds) – this was the case with the CCC; but more often than not, thresholds are set too low such that even 'mom-and-pop' transactions are caught.[148] However, setting merger thresholds is not a perfect science. Thresholds must always bear in mind the intention of the underlying legislation and adapt to the ever changing economic climate.

Thresholds play a pivotal role in the practical implementation of a 'one-stop shop' principle. For example, if the thresholds prescribed for a 'one-stop shop' are set at a level that overlaps with thresholds applicable to authorities whose jurisdiction is meant to be subsidiary to the regime intended to be a 'one-stop shop' – this can have the practical effect

[147] Recital 9-10 of the Latest EU Merger Regulation.

[148] For example, Namibia and South Africa have increased their thresholds to reduce this risk.

of frustrating the 'one-stop shop' principle. This outcome is illustrated in the ensuing discussion.

EU

To reiterate, the intention behind setting thresholds under the competition law regime of the EU was to cover mergers which have a community dimension. A merger would then be deemed to have a community dimension if the undertakings to it exceed the prescribed thresholds.

In terms of article 1(2) of the Latest EU Merger Regulation – a merger (described therein as 'concentration'), has community dimension where (a) the combined aggregate worldwide turnover of all undertakings concerned is more than EUR5000 million; and (b) the aggregate community-wide turnover of each of a least two of the undertakings concerned is more than EUR250 million – unless each of the undertakings concerned achieves more than two-thirds of their aggregate community-wide turnover within one and the same member state.

These are significant figures. In rand-terms, the combined aggregate worldwide turnover amounts to ZAR76 900 000 000; whilst the individual aggregate community-wide turnover is ZAR3 845 000 000.[149]

The Latest EU Merger Regulation includes an exception to the abovementioned which is also to be regarded as a community dimension applicable to undertakings that do not meet the levels outlined above.[150] 'Community dimension' in this context is in essence a four-layered test: (i) an aggregate worldwide turnover of all undertakings of more than EUR2500 million, (ii) the combined aggregate turnover of all undertakings in each of at least three EU member states of more than EUR100 million; (iii) in each of at least three member states included for the purpose sub (ii), the aggregate turnover of each of at least two undertakings is more than EUR25 million; and (iv) the aggregate community-wide turnover of each of at least two of the undertakings is more than EUR100 million – unless each of the undertakings concerned achieves more than two-thirds of its aggregate community-wide turnover within one and the same member state.

The 'two-third' proviso in either definition of community dimension – is to cater for transactions involving undertakings with significant worldwide and EU turnover but which turnover is substantially generated from the same member state. A transaction falling within

[149] Based on a EUR: ZAR exchange rate of 1: 15.38 as at 27072018.
[150] Article 1(3) of the Latest EU Merger Regulation.

the ‘unless’ portion, falls below the community dimension test and must accordingly be assessed by affected NCAs (as the better placed/more appropriate authority).[151]

COMESA

Article 23(3) of the COMESA Regulations defines the scope of application of the COMESA merger control regime. It provides that merger control provisions apply where:

a) both the acquiring firm and target firm or either the acquiring or target firm operate in two or more COMESA member states (article 23(3)(a)); and

b) the threshold of combined annual turnover or assets provided for are exceeded (article 23(3)(b)) (my emphasis).

The first requirement is commonly referred to as the ‘regional dimension’ test, whilst the second requirement relates to quantitative thresholds. This is somewhat more nuanced than the EU regime in respect of which ‘community dimension’ refers to a merger that exceeds prescribed quantitative thresholds.

The COMESA Regulations intended that quantitative thresholds would be prescribed in terms of article 23(4) of the COMESA Regulations such that transactions could be classified in terms of article 23(5) as either being ‘notifiable’ or ‘non-notifiable’ mergers – with notifiable mergers being transactions having a regional dimension and in respect of which the parties exceed thresholds prescribed in terms of article 23(4); whilst non-notifiable mergers relates to transactions in respect of which the parties either do not meet the regional dimension test or have a value at or below prescribed thresholds.[152]

However, when the CCC became operational on 14 January 2013 the distinction required by article 23(5) between ‘notifiable’ and ‘non-notifiable’ mergers was superfluous because merger thresholds were set at nil.[153] This in essence meant that, contrary to article 23(3) of the COMESA Regulations, a merger only needed to meet the regional dimension test in order for it to be notifiable to the CCC. To get around this ‘lower standard’ - competition practitioners motivated for a purposive and holistic interpretation of the COMESA Regulations in an effort to exclude transactions that could not have been intended to fall within the COMESA Scope: i.e. those that did not “*have an appreciable effect on trade*

[151] Further guidance is given on the calculation of merger thresholds at article 5 of the Latest EU Merger Regulation.
[152] Article 23(5) read with articles 23(3) and 23(4) of the COMESA Regulations.
[153] Rules on the Determination of Merger Notification Threshold, 2012.

between [C]OMESA [m]ember [s]tates" and that did not "*restrict competition in [COMESA]*" as required by article 3(1) of the COMESA Regulations. This was in an effort to avoid *de minimis* transactions falling within the purview of the CCC, and was effectively a holistic (but qualitative) approach to the reading of the COMESA Regulations which required the import and consideration of the COMESA Scope (i.e. article 3 of the COMESA Regulations) in relation to each cross-border transaction that met the regional dimension test.

There was additional complexity (during the 'nil threshold' era) posed by the regional dimension test set by article 23(3)(a) of the COMESA Regulations: it is met if both parties to a transaction are in at least two COMESA member states, or if either of them is in at least two COMESA member states. The latter creates a material deficiency in that it does not require the target firm (i.e. the company being acquired, and over which a change of control happens) to be present/operate in any COMESA member state in order for a transaction to have a regional dimension.

This is a major lacuna in the COMESA Regulations and is in fact contrary to the COMESA Scope set at article 3(1) of the COMESA Regulations – being that the COMESA Regulations only apply to transactions that have "*an appreciable effect on trade between [COMESA] [m]ember [s]tates*" and which restrict competition in COMESA. The problem with not requiring the target's presence in COMESA is that if a target firm has no operations at all in any COMESA member state – then no merger is consummated in any COMESA member state because the acquiring firm is not effecting any change of control in any COMESA member state. Therefore, requiring a filing purely on the strength of the acquiring firm's presence in COMESA means that filings have to be made to the CCC even though there is in fact no merger taking place in COMESA. In other words, it makes no sense that the COMESA Regulations should apply because those transactions cannot have "*an appreciable effect on trade between [COMESA] [m]ember [s]tates*" let alone impact competition in COMESA in any way (be it positively or negatively).

Therefore, the regional dimension test as currently set in article 23(3)(a) does not meet the standard of application set by the COMESA Scope in article 3(1) of the COMESA Regulations.

Recognising the deficiencies in the regional dimension test and the 'nil thresholds' – the CCC, by way of the Merger Guidelines sought to cure these deficiencies through either creative interpretation or through the inclusion of qualifiers.

In practice, the CCC started to apply a form of materiality threshold expressed in the following way: *"[the CCC] considers that an undertaking only 'operates' in a [COMESA] [m]ember [s]tate for purposes of Article 23(3)(a) of the COMESA Regulations if its operations in that [m]ember [s]tate are substantial enough that a merger involving it can contribute to an appreciable effect on trade between [m]ember [s]tates and restriction on competition in [COMESA]. For these purposes, the [CCC] considers that an undertaking 'operates' in a [m]ember [s]tate if its annual turnover or value of assets in that [m]ember [s]tate exceeds US $5 million*" (my emphasis).[154]

The CCC also took on board the concerns raised regarding the absence (in the regional dimension test) of a requirement that the target firm must have some presence in COMESA before the CCC can exercise jurisdiction over a given transaction. Through the Merger Guidelines, it stated that "*where no target undertaking operates in any [m]ember [s]tate in COMESA, a merger between them does not have sufficient regional dimension or effect on trade between [m]ember [s]tates or restriction on competition in COMESA to establish a territorial nexus at the supra-national level, and is therefore not a 'notifiable merger*'" (my emphasis).[155]

In addition, the CCC developed an *ad hoc* practice of issuing 'comfort letters' – where parties could motivate through written submissions to the CCC, why a particular transaction should not fall within the jurisdiction of the CCC. The Merger Guidelines endorse comfort letters and provide guidance on when it may be ripe to resort to them.[156]

On 26 March 2015, new 'Rules on the Determination of Merger Notification Thresholds' ("**COMESA Threshold Rules**") were introduced repealing the 2012 Rules (that set nil thresholds).

Rule 4 of the COMESA Threshold Rules provides that a transaction that meets the regional dimension test shall be notifiable to the CCC if (i) the combined annual turnover or combined value of assets, whichever is higher, in COMESA of all parties to a merger equals or exceeds COM$50 million; and (ii) the annual turnover or value of assets, whichever is higher, in COMESA of each of at least two of the parties to a merger equals or exceeds COM$10 million, unless each of the parties to a merger achieves at least two-thirds of its aggregate turnover or assets in COMESA within one and the same COMESA member state.

[154] Paragraph 3.9 of the Merger Guidelines.
[155] Paragraph 3.10 of the Merger Guidelines.
[156] Section 4, from page 15, Merger Guidelines.

'COM$' stands for 'COMESA Dollar' which in turn denominates the American Dollar (USD).[157]

It is noteworthy that the COMESA Threshold Rules, as with the EU, also have a 'two-third' proviso – therefore, a transaction that triggers the 'unless' portion, falls below the thresholds and must accordingly be assessed by only affected NCAs and not the CCC.

The requirement that each of at least two of the parties must meet a minimum threshold (COM$10 million) – assists in ensuring that, notwithstanding the gap in the regional dimension test, the target firm is in at least one COMESA member state. However, this requirement (although a much needed improvement for reasons outlined above) may be *ultra vires*.

The key instrument regulating merger control in COMESA is the COMESA Regulations (which were passed in conformity with article 55(3) of the COMESA Treaty). Therefore every other instrument – will be subordinate to the COMESA Regulations and must comply with the essential requirements in the COMESA Regulations. In this regard, article 23(4) of the COMESA Regulations provides the framework for setting merger thresholds.

Article 23(4)(a) of the COMESA Regulations specifically provides that "*the Board shall, subject to approval by Council, prescribe a threshold of combined annual turnover or assets in the region, either in general or in relation to specific industries, at or above which this [a]rticle will apply with regard to mergers with a regional dimension*" (my emphasis). When setting the scope for the application of the merger control provisions, article 23(3)(b) of the COMESA Regulations described the 'quantitative threshold' that must be met as "*the threshold of combined annual turnover or assets…*" (my emphasis). Neither article 23(3)(b) nor article 23(4)(a) – include a further requirement relating to merging parties' individual turnover or asset values in COMESA.

Therefore, the inclusion in the COMESA Threshold Rules of a further leg which must be met before a transaction is notifiable may be going a step farther than what was contemplated in article 23(4)(a) and article 23(3)(b) of the COMESA Regulations. In other words – there is inconsistency between, on the one hand, the scope of merger thresholds set in the main legal instrument (i.e. the COMESA Regulations) and, on the other hand, the actual thresholds prescribed in the rules issued pursuant to the main legal instrument (i.e. COMESA Threshold Rules). Such an inconsistency may invalidate the COMESA Threshold

[157] Rule 2 read with rule 5(3) of the Rules on the Determination of Merger Notification Thresholds, 2015.

Rules in so far as they exceed the merger threshold scope prescribed by the COMESA Regulations.

In Botswana – a similar inconsistency in respect of merger thresholds was identified by the NCA for Botswana in 2012. Merger control is regulated in Botswana through the Competition Act, 17 of 2009 ("**Botswana Act**") and the Competition Regulations, (Statutory Instrument No. 84 of 2011) – both of which entered into force on 14 October 2011. Broadly, section 54 of the Botswana Act provides that thresholds for a merger that falls within the Botswana Act must relate to the turnover or assets in Botswana of only the enterprise being taken over (i.e. the target firm).[158] However, the Competition Regulations, which were published pursuant to the Botswana Act,[159] set thresholds based on the "combined" turnover or assets of the "merging enterprises" in Botswana (my emphasis).[160] The level of threshold was set at P10 000 000 (or 10 million Pula). In January 2012, the drafter sought guidance from the Botswana NCA on whether a merger involving clients of the drafter[161] fell within the scope of the Botswana merger control regime in circumstances where the enterprise being taken over had turnover significantly below P10 000 000 through imports into Botswana only (i.e. no local operations) and had no assets in Botswana. However, the acquiring firm alone had turnover or assets in Botswana that exceeded P10 000 000. This meant that the merger fell outside of the scope of the Botswana Act if one only had regard to the value of the Botswana turnover or assets of the enterprise being taken over in Botswana (as per section 54 of the Botswana Act). However, the merger fell within the Competition Regulations given that the combined turnover or assets of the merging enterprises (because of the acquiring firm) exceeded P10 000 000.

Ultimately, the Botswana NCA determined that the Competition Regulations were *ultra vires* for having prescribed thresholds based on the combined turnover or assets of the merging enterprises in Botswana as opposed to turnover or assets of only the enterprise being taken over as required by the Botswana Act. The Botswana NCA relied on the Botswana Act to exclude the merger from the purview of the Botswana Act (and hence the jurisdiction of the Botswana NCA). To date – it is accepted that the turnover or asset value of only the enterprise being taken over in Botswana is relevant for purposes of determining whether a merger has sufficient jurisdictional nexus to Botswana.

[158] There is also an alternative threshold based on market shares in Botswana (section 54(c) of the Botswana Act).

[159] In terms of section 80 of the Botswana Act.

[160] Section 20 of the Competition Regulations, Statutory Instrument No. 84 of 2011.

[161] An acquisition by Bytes Technology Group South Africa (Pty) Ltd of 100% of the issued share capital of Unisys Africa (Pty) Ltd.

In contrast to COMESA, the community dimension test applicable in the EU is prescribed in the Latest EU Merger Regulation itself. Like the COMESA Threshold Rules, it also contemplates a two-legged test of combined values, on the one hand, and individual values, on the other hand. It is understood that with a two-legged test (due to the conjunction 'and') – both legs must be met in order for a transaction to be notifiable under the regime in question. However, if either leg is not met then the transaction would be deemed to fall below the prescribed thresholds.

Under the COMESA Regulations (article 23(3)(b) read with article 24) – a merger falls within the purview of the CCC when parties to it meet or exceed only the combined merger threshold (set at USD50 million by the COMESA Threshold Rules). In other words, if one party had no operations in any COMESA state and the other had at least USD50 million in turnover or asset value – when combined, those parties would meet the combined USD50 million threshold. Under the COMESA Regulations, no further requirement is included relating to merging parties' individual turnover/asset values in COMESA. However, the COMESA Threshold Rules have included this further requirement (set at USD10 million by the COMESA Threshold Rules). Thus under the COMESA Regulations, there is only a 'one-legged' threshold – and it is aligned to the regional dimension test set in the COMESA Regulations which is drafted so as to not require both parties to have some presence in COMESA (including the target firm) as already explained above.

In terms of international best practice, the COMESA Threshold Rules are a welcomed development as they embody the COMESA Scope (as provided at article 3(1)) far better than the regional dimension test or the quantitative thresholds contemplated for a notifiable merger under the COMESA Regulations. However, legally it may not be competent for the COMESA Threshold Rules to deviate from the COMESA Regulations (through an inclusion of a further leg in the quantitative thresholds of setting a minimum threshold for each merging party in COMESA). Rather, the COMESA Regulations may require a direct amendment that recasts the regional dimension test and sets quantitative thresholds that are more consistent with the COMESA Scope by ensuring that only mergers that have an "*appreciable effect on trade between [COMESA] [m]ember [s]tates*" fall within the jurisdiction of the CCC.

From a materiality perspective, it is notable that the thresholds prescribed by the COMESA Threshold Rules are substantially lower than the EU thresholds. At some level, it is understandable that they should be lower than the values prescribed for the EU given that Africa comprises largely emerging economies whereas the EU is made up of arguably more developed economies.

Perhaps a more fitting comparison to COMESA may be a fairly developed country on the continent. South Africa is not a member of COMESA. However, under the preamble of the COMESA Treaty – South Africa is invited to join COMESA upon fulfilment of conditions outlined in the COMESA Treaty. Therefore, there is always the chance (even if only notional at this stage) of South Africa electing to join COMESA.

In South African rands (ZAR),[162] the COMESA combined annual turnover/asset value is equivalent to ZAR659 000 000; whilst the individual turnover is equivalent to ZAR131 800 000.

South Africa has, in turn, two classes of notifiable mergers: an intermediate merger and a large merger.[163] For an intermediate merger: (i) the merging parties (i.e. both the acquiring firm and transferred firm) must have combined annual turnover in, into or from South Africa or assets in South Africa (whichever is higher) of ZAR600 million; and the transferred firm must have annual turnover in, into or from South Africa or assets in South Africa (whichever is higher) of ZAR100 million. For a merger to be large: (i) merging parties must have combined annual turnover in, into or from South Africa or assets in South Africa (whichever is higher) of ZAR6.6 billion; and the transferred firm must have annual turnover in, into or from South Africa or assets in South Africa (whichever is higher) of ZAR190 million.[164] Small mergers may be implemented without the approval of the relevant competition authority in South Africa.[165]

Therefore, if South Africa were to ever join COMESA – there will inevitably be a jurisdictional clash because its threshold levels overlap substantially with those set for COMESA. The two-thirds proviso included in the COMESA Threshold Rules – will not always apply because it will not catch transactions where the parties to it derive turnover or own assets that are enough to meet national thresholds but the parties' aggregate turnover or assets in COMESA falls short of the two-third proviso.

The above analysis highlights why a properly applied 'one-stop shop' principle alongside properly set thresholds would be much more effective in avoiding a jurisdictional conflict between a regional body and NCAs.

[162] At the USD: ZAR exchange of 1: 13.18 as at 27072018.

[163] Section 11 of Competition Act, 89 of 1998 (as amended) read with the Government General Notice 216 of 2009.

[164] Section 11 of Competition Act, 89 of 1998 (as amended) read with the Government General Notice 216 of 2009.

[165] Section 13 of Competition Act, 89 of 1998 (as amended).

3.3 Chapter Summary

The body of legal instruments for COMESA interpreted together and individually does not have the effect of casting the jurisdiction of the CCC as a 'one-stop' shop. In other words, even the thresholds prescribed for the CCC within COMESA does not exclude the jurisdiction of NCAs within COMESA. Instead, the relevant COMESA instruments contain deficiencies going beyond the jurisdictional question by, in the main, failing to limit the jurisdiction of the CCC to only those mergers, *inter alia*, having an appreciable effect on trade between COMESA member states as required by the COMESA Scope.

The overarching law (i.e. COMESA Treaty) is silent on the intended scope of the jurisdiction of the CCC. The underlying competition law (i.e. the COMESA Regulations and ancillary rules/guidelines) are ambiguous in that they only vest the CCC with primary jurisdiction and do not expressly provide for the relationship between the jurisdiction of the CCC and NCAs within COMESA. The relevant provisions of the COMESA Regulations could lead to insignificant transactions being notifiable to the CCC even where such transactions do not affect trade between COMESA member states (at all or to an appreciable effect). However, the COMESA Threshold Rules and Merger Guidelines provide some substantiality requirement in that they require that the target should have operations in at least one COMESA member state, and exclude transactions from the jurisdiction of the CCC where parties to them substantially derive turnover or own assets in only one COMESA member state. However, the COMESA Threshold Rules (in particular) may be *ultra vires* by having as a minimum requirement, the target's presence in at least one COMESA member state as this is not required by the COMESA Regulations, which notably define the framework for the prescription of merger thresholds applicable within COMESA.

Nevertheless, the next chapter considers the question of domestication and presupposes that there is some legal basis for considering or treating the CCC as a 'one-stop shop' regime.

4. CHAPTER 4: CASE STUDY – THE KENYAN LESSON

4.1 Domestication Debacle

As noted under Chapter 2 of this paper – the COMESA Treaty is silent on the issue of the jurisdiction of the CCC within COMESA. Instead, the CCC's jurisdiction is outlined in the COMESA Regulations and effected through ancillary instruments published pursuant to the COMESA Regulations such as the COMESA Threshold Rules.

Unlike in the EU, there is no express provision in the COMESA Regulations (or any of its subordinate instruments) – which ousts the jurisdiction of other NCAs within COMESA in favour of the CCC in relation to mergers that have a regional dimension and where parties to them meet thresholds prescribed for COMESA. Therefore, it is questionable whether the founding legislation of the CCC indeed intended for the CCC to be a 'one-stop shop'. If it did not, then the question of domestication becomes irrelevant (because with or without domestication of the COMESA Treaty, the CCC is not created as a 'one-stop shop').

The CCC (in its reports to COMESA member states) appears to hold the view that properly considered, the COMESA Regulations have established it as a 'one-stop shop' regime. The nub of the issue in so far as the CCC is concerned is one of domestication, as is apparent from the abovementioned reported engagements between the CCC and NCAs.[166]

The critical question at this juncture is: if the problem of the jurisdictional turf-war stems from a failure by certain COMESA member states to domesticate the COMESA Regulations – then as at the time of their entry into force (on the date of their publication in the Official Gazette of COMESA), can they have empowered the CCC to enforce the COMESA Regulations in so far as the COMESA member states that have yet to domesticate the COMESA Regulations were concerned? Put differently, if domestication will remove the 'one-stop shop' objections – then as things currently stand, it is unclear whether the CCC has the requisite consent under international law to be exercising extra-territorial jurisdiction in respect of transactions affecting those states that are yet to domesticate the COMESA Regulations.

Even if one considers that the domestication referred to by the CCC is that of the COMESA Treaty (as opposed to the COMESA Regulations) – the COMESA Treaty says nothing more about competition law enforcement than that regulations must be made to regulate

[166] 2015 Annual Report of COMESA (paragraph 6.3.2, page 59 and page 82).

competition within the COMESA member states.[167] Therefore, regard must also be had to the COMESA Regulations in considering the issue of domestication.

4.2 Kenyan Competition Law Regime

Overview

Kenya is a COMESA member state. Since the CCC became operational, Kenya has been noted as being one of the COMESA member states most affected by cross-border transactions in COMESA.

- In 2014, Kenya received the third highest revenue (USD766 204) shared by CCC[168] with affected COMESA member states from the aggregate revenue collected by CCC from filing fees that year (USD10.6 million). It was topped by Zambia (in second place having received a cut of USD827 086) and Egypt (in first place with a cut of USD945 665).[169]

- In 2015, Kenya was the member state most affected by COMESA transactions followed by Zambia, Uganda, Mauritius and Rwanda. Out of an aggregate of more than USD3.9 million received by the CCC from filing fees – Kenya received USD466 173.[170]

- In 2016, Kenya yet again topped the COMESA charts – receiving USD1 755 497 out of a total of USD9 431 138 collected by the CCC in 2016. Zambia, Egypt and Zimbabwe were close in tow receiving respectively USD1 464 769, USD1 437 001, and USD1 055 992.[171]

The above shows that a significant number of cross-border transactions notified to the CCC relate to parties with operations in Kenya.

Kenya is particularly key for this paper because it has to date never regarded the CCC as a 'one-stop shop'.

[167] The only provision that may be relevant is article 55(1) wherein it is stated that COMESA member states agree that any practice which negates the objective of free and liberalized trade shall be prohibited, and further that COMESA member states agree to prohibit any agreement between undertakings or concerted practice which has its object or effect the prevention, restriction or distortion of competition within COMESA.

[168] The CCC keeps 50% of the aggregate collected and shares 50% with affected member states (see Rules on Revenue Sharing of Merger Filings).

[169] Table 34, entitled: "*Merger Revenue Sharing among Member States*", page 103 of the COMESA 2014 Annual Report.

[170] Table 321 entitled: "*Revenue Accruing to Member States for the year 2015*", page 80 of the COMESA 2015 Annual Report.

[171] Table 28, entitled: "Revenue Sharing of Notification Fees with Member States in 2016", page 117 of the COMESA 2016 Annual Report.

Kenyan Merger Control Regime

The merger control regime of Kenya is contained in the 'Competition Act No. 12 of 2010' ("**Kenyan Act**").[172] It entered into force on 1 August 2011.

The NCA of Kenya is called the 'Competition Authority of Kenya' ("**Kenyan Authority**").[173]

This paper is premised on the assumption that the Kenyan Act[174] and the COMESA Regulations[175] intended to attribute substantially the same meaning to a 'merger' (and to the extent that there is some divergence, such divergence is not relevant to the problem under consideration).

The Kenyan Act requires parties to a proposed merger in Kenya to notify the Kenyan Authority of their proposed merger in writing or in the prescribed manner.[176] Therefore, the Kenyan Act does not distinguish between 'notifiable' and 'non-notifiable' mergers. This is quite a departure from international best practice which generally provides that a transaction must be notified to a competition authority where (i) it constitutes a merger as defined by a particular legislation, and (ii) it meets thresholds (typically financial) prescribed under that legislation.[177]

Section 42 of the Kenyan Act empowers the Kenyan Authority, by notice in the *Kenya Gazette*, to set the threshold for a merger to be excluded from the merger control provisions of the Kenyan Act.

As at the time of drafting, there were no merger thresholds applicable in Kenya. The general approach in Kenya has, therefore, been that any transaction that constitutes a merger in terms of the Kenyan Act is notifiable to the Kenyan Authority (i.e. regardless of the size of

[172] Under Part IV of the the Competition Act No. 12 of 2010 (Kenyan Act).

[173] Established in terms of section 7 of the Kenyan Act.

[174] Section 41(1) of the Kenyan Act considers that a "*merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.*" Section 41(2) in turn provides that "*[a] merger contemplated in subsection (1) may be achieved in any manner, including (a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;…(h) amalgamation, takeover or any other combination with the other undertaking.*"

[175] Article 23(1) of the COMESA Regulations defines a merger as "*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, whether that controlling interest is achieved as a result of (a) the purchase or lease of the shares or assets; (a) the amalgamation or combination with a competitor, supplier, customer or other person; or (a) any means other than those specified in the first two bullet points.*"

[176] Section 43(1) of the Kenyan Act.

[177] The average competition law has this two-pronged requirement (examples in Africa include Botswana, Namibia, Nigeria, South Africa, Tanzania, Zambia, Zimbabwe).

the transaction, or size of the parties' operations in Kenya) unless the Kenyan Authority grants an exclusion as per below.

Thus far the Kenyan Authority has only published 'Merger Exclusion Guidelines'[178] which came into effect on 1 August 2013. The Merger Exclusion Guidelines are not legally binding but are intended to create some level of transparency and predictability in the nature of mergers considered by the Kenyan Authority as suitable for exclusion from the provisions of the Kenyan Act. In essence, the intention appears to be to exclude 'small mergers' where the Kenyan turnover of the merging parties falls below a certain level.[179]

Broadly, mergers that may be considered by the Kenyan Authority for exclusion include:[180]

a) mergers where the combined turnover of the merging parties is below KES1 billion (equivalent to ZAR130 000 000),[181] and the turnover of the target undertaking is below KES100 million (equivalent to ZAR13 000 000);

b) in the healthcare sector, where the combined turnover of the merging parties is between KES50 million (equivalent to ZAR6 500 000) and KES500 million ((equivalent to ZAR65 000 000);

c) in the carbon-based mineral sector, if the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger is below KES4 billion (equivalent to ZAR520 000 000);

d) undertakings under the excluded sector, being the carbon based mineral exploration and prospecting.

Any party seeking to exclude their transaction from the realm of the Kenyan Act – must file an "exclusion application" with the Kenyan Authority.

The Merger Exclusion Guidelines state that the Kenyan Authority will not consider any merger for exclusion where the parties' values exceed those summarised above or as otherwise provided for in the Merger Exclusion Guidelines.[182]

[178] Exclusion of Proposed Mergers from Provisions of Part IV of the Competition Act, No. 12 of 2010, effective from 1 August 2013 (Merger Exclusion Guidelines).

[179] It is understood that in 2013, the Kenyan Authority published draft thresholds for merger notification but they were never finalized.

[180] Section 5 of the Merger Exclusion Guidelines.

[181] KES values converted to ZAR using the KES: ZAR exchange rate of 1: 0.13 as at 28072018.

[182] Section 4 of the Merger Exclusion Guidelines.

Therefore, a merger in Kenya triggers some form of regulatory approval process: be it, the short-form exclusion process (if granted by the Kenyan Authority), or the longer-form full merger review process.

Kenya v COMESA

Kenya, as with COMESA, requires the payment of a filing fee for a merger notification.

In Kenya, the fees are either KES500 000, KES1 million or KES2 million (equivalent to ZAR65 000, ZAR130 000 to ZAR260 000)[183] – depending on the transaction size.[184]

In COMESA – the filing fee is calculated as a percentage of the combined turnover/asset value of the merging parties (therefore it ranges per transaction depending on the size of the parties). It sits at 0.1% of the merging parties' combined annual turnover or combined asset value (whichever is higher) in COMESA, provided that the fee shall not exceed USD200 000 (equivalent to ZAR2 636 000).[185]

The Kenyan merger control regime is suspensory in that parties to a proposed merger in Kenya may not implement it in Kenya unless the Kenyan Authority has approved it.[186] The COMESA merger control regime is, however, not suspensory.

The COMESA Regulations rather prescribe a time within which a merger must be notified to the CCC: "*[a] party to a notifiable merger shall notify the [CCC] in writing of the proposed merger as soon as it is practicable but in no event later than 30 days of the parties' decision to merge'.*"[187] Therefore, under COMESA – parties may implement their merger without first securing the CCC's approval. However, they would be doing so risking having to 'unscramble the egg' in the event that the CCC decides to prohibit the merger. The other complexity is that – given the referral mechanism provided for in the COMESA Regulations, it may be prudent to treat COMESA as a suspensory regime in the event that an NCA (with a suspensory regime) requests that a case (or parts of it) be referred by the CCC to that NCA for assessment under that NCA's national legislation.

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[183] KES values converted to ZAR using the KES: ZAR exchange rate of 1: 0.13 as at 28072018.

[184] (i) KES500,000 (for a transaction in the healthcare sector where the combined turnover of the merging parties is between KES500 million and KES1 billion); (ii) KES 1 million (where the combined turnover of the merging parties is between KES1 billion and KES50 billion); and (iii) KES2 million (where the combined turnover of the merging parties is above KES50 billion).

[185] Rule 55, COMESA Competition Rules (2014).

[186] Section 42(2) of the Kenyan Act.

[187] Article 24(1) of the COMESA Regulations.

There are penalties outlined in the Kenyan Act for implementing a merger in Kenya without the approval of the Kenyan Authority. These include: (i) the transactions having no legal effect in Kenya; (ii) the parties to the transaction being deemed to have committed an offence for which they would be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding KES10 million (equivalent to ZAR1 300 000),[188] or both; and (iii) the Kenyan Authority having the power to impose a financial penalty in an amount not exceeding 10% of the preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question.[189]

In COMESA – a transaction not notified within the stipulated time will have no legal effect in COMESA.[190] An administrative penalty may also be imposed for a failure to notify the CCC – which penalty may not exceed 10% of either or both of the merging parties' annual turnover in COMESA as reflected in the accounts of any party concerned for the preceding financial year.

4.3 Domestication in Kenya

Kenya is a signatory to the COMESA Treaty. However, since the CCC became operational, the Kenyan Authority has consistently rejected the notion that the CCC's jurisdiction ousts the Kenyan Authority's jurisdiction. In practice, therefore it has been as though the CCC and the Kenyan Authority enjoy concurrent jurisdiction over mergers meeting notification requirements under both the COMESA Regulations and the Kenyan Act. Parties to such mergers have accordingly been required to notify both authorities of the same transactions, pay each authority filing fees due to them under their governing legislation, and face the possibility of all manner of conflicting outcomes (from investigation processes, timelines to divergent decisions).

The biggest winner in this situation has been the Kenyan Authority because it benefits from its share of the revenue collected by the CCC from filing fees relating to transactions affecting Kenya, and it receives filings fees for the same transactions notified directly to it. It also has a direct say on the outcome of transactions which say is completely independent of whatever outcome may flow from the CCC's process. The merging parties bear the biggest brunt of this situation not only because it has led to the increase in transactional costs but it requires walking a delicate balance of having to comply with two different merger control regimes having an effect in the exact same country.

[188] KES values converted to ZAR using the KES: ZAR exchange rate of 1: 0.13 as at 28072018.

[189] Sections 42(3), 42(5) and 42(6) of the Kenyan Act.

[190] Article 24(1) of the COMESA Regulations.

On the strength of reports made by the CCC to COMESA[191] – one assumes in this section that the basis of the Kenyan Authority's disagreement is the failure by its jurisdiction to domesticate the COMESA Regulations (as opposed to an interpretation dispute relating to whether the CCC was indeed established by COMESA Regulations as a 'one-stop shop'). Therefore, regard is had below on Kenya's position on the incorporation/transformation of international agreements into its national laws.

The supreme law in Kenya appears to be 'The Constitution of Kenya, 2010' ("**Kenyan Constitution**") because section 2(1) of the Kenyan Constitution expressly provides that "*[the Kenyan Constitution] is the supreme law of [Kenya] and binds all persons and all [s]tate organs at both levels of government.*"[192]

The Kenyan Constitution expressly provides for the relationship between international agreements to which Kenya is a party and the national laws of Kenya.

In terms of section 2(5) of the Kenyan Constitution, *"[t]he general rules of international law shall form part of the law of Kenya*" and, critically, section 2(6) prescribes that "*[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under [the Kenyan] Constitution*" (my emphasis).

At first blush, the implications of section 2(6) of the Kenyan Constitution, in particular, appear self-evident: an international agreement duly ratified by Kenya automatically forms part of the national laws of Kenya – akin to a monist state. On a simple reading of this section – one expects that the COMESA Treaty automatically became part of the Kenyan law upon its ratification by Kenya.

Although it appears that a number of scholars have similarly expressed the view that Kenya is, through this section 2(6), now a monist state[193] - others have cast aspersions on the proposition that section 2(6) of the Kenyan Constitution has the effect of automatically incorporating into Kenyan law any and all international agreements duly ratified by Kenya.

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[191] See for example, paragraph 7.2 of the COMESA 2015 Annual Report, page 82; paragraph 14.3.2(a) of the 2016 COMESA Annual Report, page 119.

[192] Also see section 1 of 'The Constitution of Kenya, 2010' (Kenyan Constitution) which provides that "*[a]ll sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.*"

[193] Referenced by Maina, JN, *Do articles 2 (5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a monist state?* (page 11): Mwagiru, M, *From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice*, Journal of Language, Technology & Entrepreneurship in Africa, Vol. 3 No. 1 (2011); The Kenya National Commission on Human Rights, *Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations* (2011); Herman Omiti, "*The Monist Dualist Dilemma and the Place of International Law in the Hierarchy*" (July 3, 2012). Available at SSRN: http://ssrn.com/abstract=2099043

The 'monist-detractors' have in essence argued that the matter turns on the interpretation of the Kenyan Constitution as a whole – with due regard to the fact that (i) the Kenyan Constitution has vested legislative powers on Parliament whilst executive powers lie with Government; and (ii) the Kenyan Constitution expressly provides that certain human rights treaties entered into by Kenya must be incorporated in the Kenyan law through some additional legislative process involving Parliament.[194] In sum, these detractors conclude that section 2(6) of the Kenyan Constitution does not unequivocally make Kenya a monist state with respect to treaty practice[195] – and that in reality, Kenya does not lean purely towards monism.[196]

All of the scholars considered for this paper are however in accord in their view that prior to the Kenyan Constitution – Kenya, through state practice, was largely a dualist state and that the 1963 Independence Constitution (the predecessor to the Kenyan Constitution) did not provide for the direct application of international law in the Kenyan legal system.[197]

After the Kenyan Constitution entered into force, the 'Treaty Making and Ratification Act'[198] ("**Treaty Act**") was enacted to provide the procedure for the making and ratification of treaties and other ancillary acts. It is noted that whilst the Kenyan Constitution is silent about the means of implementing section 2(6) of the Kenyan Constitution – section 3 of the Treaty Act, provides that the Treaty Act applies to treaties which are concluded by Kenya after its commencement. It does not however provide for what will happen to previously ratified treaties.[199]

An issue critical to this paper relates to the applicability of section 2(6) to international agreements ratified by Kenya prior to the Kenyan Constitution entering into force (of which the COMESA Treaty is an example). The general view appears to be that the Kenyan Constitution applies retroactively (subject to some transitional arrangements contained therein).[200] Therefore, the sum of the various views leads one to conclude that, notwithstanding section 2(6) of the Kenyan Constitution or how it has been interpreted by various scholars, the COMESA Treaty could not have automatically formed part of the

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[194] Mbugwa, K, *Dualist or Monist: Intricacies of Treaty Practice in Kenya*, pages 28, 47, 48, 57; Maina, JN, *Do articles 2 (5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a monist state?* pages 13 – 18.

[195] Mbugwa, K, *Dualist or Monist: Intricacies of Treaty Practice in Kenya*, page 28.

[196] Maina, JN, *Do articles 2 (5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a monist state?* page 19.

[197] Orago, N, *The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective*; Mwagiru, *From Dualism to Monism*, page 144; Mbugwa, K *Dualist or Monist: Intricacies of Treaty Practice in Kenya*; Maina, JN, *Do articles 2 (5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a monist state?*

[198] Act 45 of 2012.

[199] Mbugwa, K, *Dualist or Monist: Intricacies of Treaty Practice in Kenya*, page 25.

[200] *Ibid*, Mbugwa;

Kenyan national laws principally because the COMESA Treaty was ratified at a time when Kenya was understood to largely be a dualist state (through court practice). This is regardless of whether or not Kenya is intended to be a monist state through section 2(6) of the Kenyan Constitution. As such, some additional step was required to have been taken specifically incorporating the COMESA Treaty into the Kenyan legal system. Based on the position taken by the Kenyan Authority, it appears that such further step has yet to be taken and hence the COMESA Treaty is yet to be duly domesticated in Kenya.

There is a further complexity in that, although the COMESA Treaty was ratified prior to the Kenyan Constitution entering into force – the COMESA Regulations (which are alleged to have established the CCC as a 'one-stop shop') entered into force on 20 November 2012,[201] which is clearly after the Kenyan Constitution entered into force. However, the act of enacting the COMESA Regulations was done in terms of the COMESA Treaty – and is distinct from the question of domestication. Therefore, whilst the COMESA Regulations may be binding under the COMESA Treaty – this does not mean that the COMESA Regulations have application in Kenya so as to create obligations and rights binding on Kenyan citizens.

In view of the above, it appears that the question as to the place of the COMESA Regulations within the Kenyan legal system is a long way from being answered. For the sake of legal certainty – the question cannot be answered solely through engagements or consultations or even MoUs / other agreement concluded between the Kenyan Authority and the CCC. It needs to be definitively resolved by those empowered under the Kenyan Constitution to take a formal position on the issue (be it courts, through interpretation or the national legislatures/designated government organ (as is appropriate) through some official step).

4.4 Future Outlook

Prior to concluding on this section, it is worth noting that the Kenyan Authority appears to be desirous to finding a solution to this jurisdictional turf-war with the CCC.

In early 2018, the Kenyan Authority published 'Merger Threshold Rules, 2018' ("**Draft Rules**") for public comment. However, there has been no further movement on these.

The publication of the Draft Rules represents the first time since the CCC became operational that the Kenyan Authority seeks to recognise the CCC as a 'one-stop shop'.

[201] Upon being published in the Official Gazette of COMESA - Volume 17#12 dated 20 November 2012 read with article 12(1) of the COMESA Treaty.

The Draft Rules provide that their main object is to "*deepen transparency, predictability and accountability among the business community regarding the [Kenyan] Authority's merger enforcement process and thereby easing cost of doing business and deepening of the investment climate*" (my emphasis).[202] One of the ways the Draft Rules seek to achieve this objective is by "*providing clarity on the transactions notifiable at the national and regional levels.*"[203]

According to the Draft Rules – mergers will be exempt from notification under the Kenyan Act – if they meet the thresholds prescribed for a COMESA notification and two-thirds or more of the merging parties' turnover or assets (whichever is higher), relevant in COMESA is not generated or located in Kenya.

The two-thirds proviso is already built into the COMESA merger thresholds (discussed under Chapter 3 above) – which in essence removes from the jurisdiction of the CCC mergers where the parties to it generate at least two-thirds of their aggregate turnover or own at least two-thirds of their assets in one and the same COMESA member state. Therefore, if parties have made a notification to COMESA then by implication it would be because the two-thirds proviso does not apply to their transaction. If the two-third proviso does apply (and say, the relevant jurisdiction is Kenya) – then the CCC would not have required a notification, leaving it to the Kenyan Authority to exercise jurisdiction over that transaction under the Kenyan Act.

If the failure to domesticate in Kenya the COMESA Treaty/COMESA Regulations is the main obstacle to the CCC being recognized in Kenya as a 'one-stop shop' – then one wonders whether it would be sufficient under Kenyan law, for the Kenyan Authority to elevate the jurisdiction of the CCC above that of the Kenyan Authority in the manner contemplated by the Draft Rules. Asked differently, one wonders whether a more permanent solution does not lie above the level of the CCC and the Kenyan Authority (e.g. at a parliamentary level in Kenya).

Nevertheless, the Draft Rules may signal an impending end/substantial revision to the *status quo* were the Kenyan Authority and the CCC are in practice treated as enjoying '*de facto* concurrent jurisdiction' over transactions having an effect in Kenya and COMESA.

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[202] Paragraph 4 of the draft Merger Threshold Rules, 2018.

[203] *Ibid.*

4.5 Chapter Summary

Even if, hypothetically, the COMESA member states consented to the CCC exercising jurisdiction on a 'one-stop' shop basis within COMESA – not all the COMESA member states have domesticated the COMESA Treaty or COMESA Regulations. Kenya holds itself out to be an example of a state that has not yet domesticated these COMESA instruments and as such the Kenyan Authority continues to apply local merger control regimes by requiring notifications of even transactions falling within the CCC's jurisdiction. Consequently, parties in practice make dual notifications: to the Kenyan Authority and the CCC; pay two filing fees; comply with two different merger control regimes and face the potential of two divergent decisions in respect the same transaction applicable to or having an effecting within Kenya.

5. CONCLUSION AND RECOMMENDATIONS

It has been a challenge for companies doing business in Africa to navigate the merger control regimes applicable on the continent.

One the one hand, gravitation to a regional international body empowered with supreme jurisdiction that appropriately excludes the jurisdiction of the underlying NCAs in relation to, in particular, competition merger control – is not only pivotal but a necessary development in this modern day of increased globalisation and ever growing efforts to increase bilateral and multi-lateral trade between not only African states but also between African states and non-African states. This is demonstrated through the likes of BRICS[204] and the signing of the African Continental Free Trade Area agreement. On the other hand, however, such a regional body needs to be properly and clearly regulated for, above of all, the sake of legal certainty and for easing the burden of doing business in Africa.

The lessons learned from the CCC and its workings with NCAs within COMESA member states highlight the importance of properly defining the roles and relationship of the CCC and NCAs within COMESA member states. To date, that relationship has either not been properly defined (because the COMESA Regulations are unclear) or it has not been properly implemented (because of the failure of certain COMESA member states to domesticate the COMESA Regulations).

The CCC has adopted a firm position on how it views the relationship between its jurisdiction and that of COMESA NCAs. It considers itself to be a 'one-stop shop' – which should mean parties should only notify the CCC (to the exclusion of individual NCAs within COMESA) of transactions that constitute notifiable mergers in terms of the COMESA Regulations. However, certain COMESA NCAs (Dissenting NCAs) have effectively rejected the CCC as a 'one-stop shop' – resulting in parties needing to notify the CCC and individual COMESA NCAs in respect of the same transaction.

The CCC has nevertheless remained steadfast in its position and has instead sought to get Dissenting NCAs onside through various efforts, including workshops, the issuance of the Merger Guidelines and the use of non-binding arrangements such as MoUs. However, these efforts have to date been unsuccessful.

[204] 'Brics' is an acronym coined by the British economist, Jim O'Neil, to describe an association between five merging national economies: Brazil, Russia, India, China and South Africa.

The main bar identified by the CCC to the effective implementation of its 'one-stop shop' jurisdiction is the failure by certain COMESA member states to domesticate the COMESA Treaty/COMESA Regulations. This paper however concludes that even if domestication had been done by all the COMESA member states, this would not necessarily provide the requisite solution to what has been a challenging and quite costly problem (at least for businesses engaged in cross-border mergers within COMESA). This is because the COMESA Regulations actually do not expressly exclude the jurisdiction of COMESA NCAs in relation to mergers that are notifiable to the CCC under the COMESA Regulations. The COMESA Treaty itself is completely silent on the issue.

It is not competent for the CCC to cure the gaps and deficiencies of the COMESA Treaty/COMESA Regulations through subordinate instruments such as rules or guidelines. Lessons drawn from the EU make it clear that a proper assessment of the effective application of the primary legal instruments of COMESA is necessary. The intention of the COMESA member states in so far as competition law enforcement within COMESA is concerned needs to be clearly and unambiguously articulated in the primary legal instruments such as the COMESA Treaty or COMESA Regulations. The relationship between the jurisdiction of CCC and that of NCAs within COMESA should be expressly regulated to avoid enforcement fragmentation, to reduce the number of multiple notifications within COMESA, and to ease the cost of doing business within COMESA. Legal certainty also demands that the same transactions should be treated the same by the CCC and every COMESA NCA (i.e. either they trigger the jurisdiction of the CCC, or that of affected NCA but preferably not both).

Therefore, there will always be scope for a difference in the interpretation of the COMESA Regulations unless an amendment is made to the COMESA Regulations expressly establishing the CCC as a 'one-stop shop' and making provision for the allocation of work along the lines of the subsidiarity principle applied in the EU to ensure that cases are reviewed by the best placed competition authority. Such an amendment must make it impossible for NCAs (within COMESA member states) to by-pass the CCC through calling for parties to cross-border transactions in COMESA to make filings directly to COMESA NCAs.

The prospect of the COMESA membership growing over time and the potential increase in the enactment of national merger control regimes within COMESA – underscores the importance of jurisdictional clarity – without which, the administrative, legal and financial burden on merging parties to cross-border mergers within COMESA will only increase (instead of decrease) over time.

BIBLIOGRAPHY

TEXTBOOKS

1. Dugard, J, *International Law: A South African Perspective*, 3rd Edition.

INTERNATIONAL LEGAL INSTRUMENTS

1. COMESA Competition Regulations, 2004.
2. COMESA Rules, 2004.
3. Council Regulation (EEC) No 4064/89.
4. Council Regulation (EC) No 139/2004.
5. Commission Notice on Case Referral in respect of concentrations 2005/C 56/02.
6. COMESA Merger Assessment Guidelines of 2014.
7. Consolidated Version of the Treaty Establishing the European Community, Official Journal of the European Communities (2002/C 325/01).
8. Rules on the Determination of Merger Notification Threshold, 2012.
9. Rules on the Determination of Merger Notification Thresholds, 2015.
10. Rules on Revenue Sharing of Merger Filings.
11. Treaty Establishing the Common Market for Eastern and Southern Africa, 1994.
12. Vienna Convention on the Law of Treaties, No. 18233, concluded at Vienna on 23 May 1969.

LOCAL LEGAL INSTRUMENTS

1. Competition Act, 17 of 2009 – Botswana.
2. Competition Regulations, 2011 – Botswana.
3. Competition Act, 12 of 2010 – Kenya.
4. Competition Law Act 2005-020 – Madagascar.
5. Competition and Fair Trading Act, 43 of 1998 – Malawi.
6. Competition and Fair Trading Regulations (G.N. 20/2006) – Malawi.
7. Competition Act, 2007 – Mauritius.
8. Competition Act, 36 of 2012 – Rwanda.
9. Competition Act, 89 of 1998 – South Africa.
10. Competition and Consumer Protection Act, 24 of 2010 – Zambia.
11. Constitution of Kenya, 2010.
12. Decree 37/2014 – Mozambique.
13. Decree 2008-771 – Madagascar.
14. Draft Merger Threshold Rules, 2018 – Kenya.

15. The Constitution of the Kingdom of the Netherlands 2008.
16. Law No. 10/2013 – Mozambique.
17. Exclusion of Proposed Mergers from Provisions of Part IV of the Competition Act, 12 of 2010, dated 1 August 2013 – Kenya.

CASE LAW

1. *The Competition Commission of South Africa v Telkom Limited/The Competition Tribunal* (SCA case no.: 623/2008).
2. *Hugh Glenister v President of the Republic of South Africa and ors*, ILDC 1712 (ZA 2011).

ARTICLES/JOURNALS

1. ACA-Europe Seminar, "*Soft law, legal standards and sources of law: Hierarchy of norms in Dutch legislation*", 18 December 2013.
2. Adede, O, *"Domestication of International Obligations (an Abstract)"* (Paper submitted during technical seminar held by The Constitution of Kenya Review Commission).
3. Akwagyiram, A, *"Africa rising - but who benefits*?" published by BBC News on 18 June 2013.
4. Annual Reports of COMESA 2012 – 2016.
5. Conference "*Africa Rising: Building to the Future*", *an International Monetary Fund conference held on 29-30 May 2014 in Mozambique.*
6. De Wet, E: "*South Africa"*, Chapter 24 published in "*International Law and Domestic Systems: Incorporation, Transformation, and Persuasion"*, edited by Dinah Shelton.
7. Dini and Pickering, "*Resolving concerns with the COMESA Competition Law Regime*", The Antitrust Source, February 2016, 1.
8. Fabricius, P, "*Africa Rising or Africa Uprising?*", published in the Mail & Guardian 11 November 2015.
9. Green Paper on the Review of Council Regulation (EEC) No 4064/89 presented by the Commission of the European Communities on 11.12.2001, COM (2001) 745.
10. Irvine, H "*Merger filings in Africa remain costly and cumbersome*", 18 October 2016.
11. Maina, JN, "*Do articles 2 (5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a monist state?"* 2013.
12. Matthieu A, "*Main Supranational Merger Control Rules Likely to Apply to M&A Transactions in Africa*", Antitrust/Competition & Marketing Bulletin of Fasken Martineau, 15 February 2011.
13. Mbugwa, K, "*Dualist or Monist: Intricacies of Treaty Practice in Kenya*", a research project submitted in partial fulfillment of the Degree of Master of Arts in International Studies, October, 2013 - Institute of Diplomacy and International Studies at University of Nairobi.
14. Unknown author, "*Continent's free trade deal a game-changer for Africa*", 3 July 2018 published on IOL website: https://www.iol.co.za/capetimes/news/continents-free-trade-deal-a-game-changer-for-africa-15795779.
15. Van der Schyff, G and Meuwese, A, "*Dutch Constitutional Law in a Globalizing World*", Utrecht Law Review, 2010.

16. Wadongo, E, *"Africa rising? Let's be Afro-realistic",* published in The Guardian on 7 November 2014.
17. Wagener, M and Upfold, C, "*Regional competition regimes: A comparative study of the COMESA Competition Commission and the European Competition Commission*", published as a draft online (accessed on September 2013).

OFFICIAL WEBSITES

1. COMESA - http://www.comesa.int
2. COMESA Competition Commission - http://www.comesacompetition.org
3. EU - https://europa.eu/european-union