

Vincent Angwenyi

# Merger Regulation in Eastern and Southern Africa

The Need for Effective Implementation



**Nomos**

**MIPLC**

Munich  
**Intellectual  
Property**  
Law Center

Augsburg  
München  
Washington DC



## **MIPLC Studies**

Edited by

Prof. Dr. Christoph Ann, LL.M. (Duke Univ.)  
TUM School of Management

Prof. Robert Brauneis  
The George Washington University Law School

Prof. Dr. Josef Drexler, LL.M. (Berkeley)  
Max Planck Institute for Innovation and Competition

Prof. Dr. Michael Kort  
University of Augsburg

Prof. Dr. Thomas M.J. Möllers  
University of Augsburg

Prof. Dr. Dres. h.c. Joseph Straus  
Max Planck Institute for Innovation and Competition

Volume 40

Vincent Angwenyi

# Merger Regulation in Eastern and Southern Africa

The Need for Effective Implementation



**Nomos**

**MIPLC**

Munich  
**Intellectual  
Property**  
Law Center

Augsburg  
München  
Washington DC

This publication was supported by the Max Planck Society.



MAX-PLANCK-GESELLSCHAFT

**The Deutsche Nationalbibliothek** lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: München, Ludwig-Maximilians-Univ., Diss., 2021

ISBN 978-3-8487-8311-3 (Print)  
978-3-7489-2701-3 (ePDF)

**British Library Cataloguing-in-Publication Data**

A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-8311-3 (Print)  
978-3-7489-2701-3 (ePDF)

**Library of Congress Cataloging-in-Publication Data**

Angwenyi, Vincent

Merger Regulation in Eastern and Southern Africa

The Need for Effective Implementation

Vincent Angwenyi

368 pp.

Includes bibliographic references.

ISBN 978-3-8487-8311-3 (Print)  
978-3-7489-2701-3 (ePDF)

1st Edition 2021

© The Author

Published by

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

[www.nomos.de](http://www.nomos.de)

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-8487-8311-3 (Print)  
ISBN 978-3-7489-2701-3 (ePDF)

DOI <https://doi.org/10.5771/9783748927013>



This work is licensed under the Creative Commons Attribution 4.0 International License.



Onlineversion  
Nomos eLibrary

## Acknowledgements

This book is based on a thesis that was submitted to obtain a doctorate degree in law at the Ludwig-Maximilians-Universität München. A number of legal updates have since been made to this book. The publication of this book was financed in part by the Max Planck Society.

I would like to first and foremost extend my sincere gratitude to Prof. Dr. Josef Drexel for not only giving me the opportunity to pursue this project, but for also trusting in my ability to deliver on it. Despite his packed schedule, he remained available to give detailed guidance and support throughout my doctoral studies. I would also like to specially thank Dr. Mor Bakhoun whose wise words and encouragement gave me the motivation to pursue my doctoral studies. His friendship, mentorship and supervision truly made this journey a fulfilling one.

My doctoral studies would not have been possible without the generous financial assistance from, as well as the world-class academic facilities provided by the Max Planck Society, for which I remain deeply grateful. Through the various poster sessions and PhD conferences organized by the Max Planck Society I was able to present my research to a wider scientific community both within and beyond the Society. The academic ecosystem fostered by the Max Planck Society was not only invaluable in helping me to improve and add on to the quality of my research, but also instrumental in allowing me to explore various perspectives that added value to my dissertation. The academic community at the Max Planck Society continues to play a critical role in my professional development even beyond my doctoral studies.

I am also deeply indebted to the Munich Intellectual Property Law Center (MIPLC) for availing a very conducive environment for me to carry out my research. It was an honour to have had the chance to work as a tutor and to give back to the MIPLC family whose support was a crucial cornerstone in my doctoral journey. I cherish the professional and personal friendships that I forged at the Max Planck Society and the MIPLC.

Last but far from least I would like to sincerely thank my family for the unending encouragement, especially at those times when I was unsure whether I would see through this journey.



# Table of Contents

Abbreviations	13
1 Introduction	15
1.1 Sub-Saharan Africa Competition Policy in Perspective	15
1.2 Policy Objectives of Merger Regulation	19
1.3 Research Objectives and Questions	21
1.4 Structure of the Thesis and Methodology	23
2 Competition Policy in Eastern and Southern Africa	24
2.1 Introduction	24
2.2 The National Context	24
2.2.1 Kenya	24
2.2.2 Zambia	27
2.2.3 Zimbabwe	30
2.2.4 Tanzania	32
2.2.5 Mauritius	34
2.2.6 Malawi	36
2.2.7 Botswana	38
2.2.8 Seychelles	40
2.2.9 Namibia	42
2.2.10 Summary	45
2.3 The Regional Context	46
2.3.1 Introduction	46
2.3.2 The Regional Economic Communities	48
2.3.2.1 COMESA	48
2.3.2.2 EAC	53
2.3.2.3 SADC	58
2.3.2.4 The overlaps challenge	60
2.3.3 The EAC-COMESA-SADC Tripartite	61
2.3.3.1 Background	61
2.3.3.2 The Tripartite FTA Agreement	63
2.3.4 The Continental Free Trade Area	72
2.3.5 Summary	74



3.2.4.1.2	Procedure for Notification	141
3.2.4.2	The United States	142
3.2.4.3	South Africa	144
3.2.4.4	The United Kingdom	147
3.2.4.5	Eastern and Southern Africa	149
3.2.4.5.1	Pre-Notification Guidance	149
3.2.4.5.2	COMESA Case Referral System	150
3.2.4.5.3	Procedure for Notification	150
3.2.4.5.4	Confidential Information	153
3.2.4.5.5	Final Determination	154
3.2.5	Market Definition	155
3.2.5.1	Role of Market Definition in Merger Control	155
3.2.5.2	The Concept of Substitutability	158
3.2.5.3	Determining substitutability: The Hypothetical Monopolist Test	163
3.2.5.4	Challenges to market definition	166
3.2.5.5	The ESA Perspective	168
3.2.6	The Substantive Test	169
3.2.6.1	The United States	171
3.2.6.2	The European Union	177
3.2.6.3	South Africa	188
3.2.6.4	The Competition Tests from the Eastern and Southern Africa Perspective	192
3.2.6.4.1	Substantial Lessening of Competition	192
3.2.6.4.1.1	Analytical approach	194
3.2.6.4.1.2	Case Studies	196
3.2.6.4.2	Creation or Strengthening of a dominant position	205
3.2.6.4.2.1	Analytical approach in Tanzania	205
3.2.6.4.2.2	Case Studies	206
3.2.6.4.3	Hybrid test	208
3.2.6.4.3.1	Analytical approach	208
3.2.6.4.3.2	Case Studies	208
3.2.6.4.4	Observations from the case studies	217
3.2.7	Efficiencies	219
3.2.7.1	Economic efficiency, consumer welfare and total welfare	219
3.2.7.2	Efficiency Defence in Merger Regulation	225
3.2.7.3	Efficiencies in the ESA Context	231

## Table of Contents

3.2.8	The Public Interest Assessment	232
3.2.8.1	South Africa	232
3.2.8.1.1	Employment	235
3.2.8.1.2	Competitiveness of small businesses	238
3.2.8.1.3	Impact on particular industrial sector or region	239
3.2.8.1.4	International competitiveness of national industries	240
3.2.8.1.5	National Security	243
3.2.8.2	The ESA Jurisdictions	244
3.2.8.2.1	Public Interest in the Laws	244
3.2.8.2.2	Implications of the public interest considerations	247
3.2.8.2.3	Public Interest in merger cases	248
3.2.9	Remedies and Enforcement	251
3.2.9.1	Negotiated Solutions	251
3.2.9.2	Structural Remedies	254
3.2.9.3	Behavioural Remedies	256
3.2.9.4	The ESA Remedies Approach	257
3.2.9.5	Enforcement	259
3.2.10	The optimal merger review process for ESA	263
3.2.10.1	Introduction	263
3.2.10.2	Defining Mergers	265
3.2.10.3	Options for notification	266
3.2.10.4	Notification and review	269
3.2.10.4.1	Nexus with the jurisdiction	269
3.2.10.4.2	Notification threshold	270
3.2.10.4.3	Review	272
3.2.10.5	The gap in the dominance test	274
3.2.10.6	The ESA Perspective on the Competition Test	278
3.2.10.7	Public interest considerations	278
3.2.10.8	Choice of remedies	283
3.2.10.9	Conclusion	285
3.2.10.9.1	The procedural approach	285
3.2.10.9.2	The substantive approach	287
3.3	Extraterritoriality	289
3.3.1	Introduction	289
3.3.2	The Merger Regulation Context	291

3.3.3	Experience in the EU, the US, South Africa and Eastern and Southern Africa	293
3.3.3.1	The United States	293
3.3.3.2	The European Union	295
3.3.3.3	South Africa	299
3.3.3.4	Experience in the ESA Jurisdictions	301
3.4	Comity and Cooperation	302
3.4.1	European Union and United States	302
3.4.2	South Africa	307
3.4.3	Eastern and Southern Africa	307
3.4.4	Conclusion	310
3.5	Institutional design	311
3.5.1	Introduction	311
3.5.2	Institutional Structure	312
3.5.3	Institutional Independence	317
3.5.3.1	Appointments	317
3.5.3.2	Funding	318
3.5.3.3	Autonomy	320
3.5.4	Other factors	321
3.5.5	Conclusion	322
4	Conclusions and Recommendations	324
4.1	Procedural Merger Regulation	324
4.1.1	Classification of mergers	325
4.1.2	Notification thresholds	325
4.1.3	Notification system	326
4.1.4	Review	327
4.2	Substantive Merger Regulation	327
4.3	Extraterritoriality and Comity	329
4.4	Institutional Design	330
4.5	Conclusion	331
	Annex	335
	Bibliography	339



## Abbreviations

ABA	American Bar Association
ACF	African Competition Forum
AFDB	African Development Bank
CFI	Court of First Instance
COMESA	Common Market for Eastern and Southern Africa
DOJ	Department of Justice
ESA	Eastern and Southern Africa
EU	European Union
FDI	Foreign Direct Investment
FTAIA	Foreign Trade Antitrust Amendment Act
FTC	Federal Trade Commission
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GWB	Gesetz gegen Wettbewerbsbeschränkungen
HHI	Herfindahl-Hirschman Index
IBA	International Bar Association
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee
ICT	Information and Communications Technology
IGE	Intergovernmental Group of Experts on Competition Law and Policy
ILC	International law commission
ITO	International Trade Organisation
MNC	Multinational Corporation
OECD	Organisation for Economic Co-operation and Development
REC	Regional Economic Community
SA	South Africa
SIEC	Significant Impediment to Effective Competition
SLC	Substantial Lessening of Competition
SSA	Sub-Saharan Africa

## *Abbreviations*

TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
USD	United States Dollar
WGTC	Working Group on the Interaction between Trade and Competition Policy
WTO	World Trade Organisation