4 Conclusions and Recommendations

4.1 Procedural Merger Regulation

The focus of transacting parties will invariably be on the compliance steps they need to take and the duration of time before they can proceed with their transaction. From an international business context, the parties may be required to notify their transaction in several jurisdictions where notification thresholds are triggered. One of the most vital requirements in this regard is information. Competition authorities need to ensure that they make publicly available their up-to-date statutes, guidelines as well as publishing detailed decisions. Having all this information available makes navigating the regulatory landscape easier for transacting parties. It also ensures that there is transparency and that decisions of the competition authority are predictable. Having easily accessible and comprehensive information as well curbs discretionary decision making on the part of the regulator and ensures that arbitrary decisions are not taken.

Many of the ESA jurisdictions unfortunately fail to adequately publish information. This is more so in respect of decisions. Most published decisions do not provide information on the analytical approach of the authority. The authorities should therefore make a concerted effort to ensure that up-to-date and detailed information is made publicly available, having regard to the confidentiality of the parties involved where publication of decisions is involved.

Some of the statutes and guidelines also give a feeling of incompleteness in drafting, which should not be the case given the fact that the ICN and OECD have provided recommendations and guidelines on practically every important aspect of merger regulation which can be suitably adapted to fit the ESA context. The ICN and OECD as well continue to regularly review and update their recommendations and guidelines, most of which are drafted with the intention of making them easily adapted to the developing jurisdiction context. The recommendations provided in the UNCTAD peer reviews of competition laws similarly serve as useful guides in fixing gaps in legislation. There are as well extensive publications and commentaries on merger regulations for the developed jurisdictions such as the US and the EU from which some guidance can be drawn. South Africa has already shown willingness to rely on the US and the EU in its

own decision making. There are in addition avenues for consultation within the ICN, OECD as well as the recently constituted African Competition Network.[1286]

Based on the review of the procedural approach of the ESA jurisdictions, some concrete recommendations (in the form of filling statutory or information gaps) as well as proposals can be made.

4.1.1 Classification of mergers

The review revealed that Malawi, Tanzania and Seychelles do not clarify what level of control constitutes a controlling interest. Zimbabwe on its part opted for a very wide approach by defining controlling interest to include any control. The ability to exercise material influence, which is the standard adopted in Botswana, Kenya, Mauritius and Zambia, or better yet the ability to exercise decisive influence may in this case be appropriate options in determining a change of control threshold to filter out non-probative transactions.

4.1.2 Notification thresholds

Of the ESA jurisdictions, Malawi is the only one that lacks a notification threshold. A notification threshold would be important even though Malawi operates a voluntary notification system. The notification threshold may be used to determine relevant merger situations as is the case in the UK, thus preventing unnecessary voluntary notifications. Having in mind that anti-competitive mergers are still subject to sanctions in Malawi, parties would still seek the authority's clearance before proceeding with their transactions. Not having a notification threshold simply means that parties unsure of the status of their transactions, even those who would fall below a would-be threshold, would still voluntarily file a notification. This would lead to more unnecessary work for the authority.

The notification threshold could also be used to trigger a mandatory requirement for the provision of certain important information by the merging parties which may then prompt the authority to investigate further or clear the transaction.

1286 See Africa Competition Forum <http://www.africancompetitionforum.org/> accessed 10 September 2019.

4.1.3 Notification system

For the ESA context, a suitable notification system should be simple, effective, implementable and enforceable. It should take into account the fact that a vast majority of mergers are non-problematic. Therefore, the already restrained resources of the authority should not be spent assessing such cases. The simplicity of the system would also mean that it can easily be implemented. It should also be predictable, hence contributing to legal certainty and make compliance by merging parties straightforward, thus enhancing the ease of doing business.

In this regard, a hybrid notification system consisting of voluntary notification but with certain mandatory information requirements would be optimal at the national level. Given the concentrated nature of the markets the investigative function of the authority, which is a core function in a voluntary system, may not be too expensive. The central role played by public interest factors in most of the ESA jurisdictions means that the investigative function may in some cases require the expenditure of resources to investigate transactions which from a competition perspective may not be problematic, but which nonetheless raise public interest concerns. Financial penalties for failure to notify problematic cases should also be set at a level that provides sufficient incentive to notify such cases.

However, given the regulatory certainty that merging parties seek before completing a transaction, the most probable result is that most transacting parties would at the very least seek negative clearance. In this regard, an asset and turnover based threshold may be set which triggers mandatory pre-merger consultation with the authority rather than pre-merger notification. The information provided in the pre-merger consultation would then lead to either a negative clearance or to a full assessment.

For transactions that do not meet this threshold, the option for pre-merger consultation as well as negative clearance would still be available without the need for the authority to expend resources on a detailed investigation. This system should also cater for those exceptional circumstances where transactions that do not meet the consultation threshold would still be investigated. This is especially the case where for instance public interest factors such as the risk of job losses come into play.

At the regional level, mandatory pre-merger notification for transactions meeting the notification threshold should be retained. The size of the regional market means would make it challenging for the regional regulator to investigate transactions.

4.1.4 Review

The notification threshold in such a hybrid system would serve not only to trigger the mandatory information requirement and pre-merger consultation but also to ensure that there is a sufficient nexus of a transaction to the ESA jurisdiction in question. The threshold should also be focused towards assets and turnover arising within the jurisdiction rather than worldwide turnover. This is to ensure that only transactions that have a significant, direct and immediate economic effect within the jurisdiction are reviewed.

The fact that the hybrid system would result in fewer transactions being reviewed means that more resources can be focused on the problematic cases. This may lead to a lower review timeline.

4.2 Substantive Merger Regulation

The recommended standard when it comes to substantive competition law assessment in merger regulation is the SLC test. The ICN and the OECD note the flexibility with which the SLC test can be used to address competition law issues, easily responding to a case-by-case approach where the most relevant factors to a reviewed transaction take centre stage. The dominance test is widely viewed as being focused on structural issues, where market shares and concentration levels are the most relevant to the analysis of any transaction. It is in this regard viewed as being rigid and unable to be easily adapted to cases requiring a consideration of factors that are not structural. However, as seen in the EU and Germany, the dominance standard can still evolve to adapt to the evolving needs of merger review. This adaptation however was identified as having its limits. The dominance standard has been criticised for being unable to address what is regarded as the dominance gap, i.e. cases that would give rise to non-collusive oligopolies.

The reviewed ESA jurisdictions, except for Tanzania, already subscribe to the SLC test. They are therefore already part of the global convergence towards the SLC standard, which, as noted by the OECD is already widely adopted and preferred among jurisdictions. The question therefore is whether the SLC test is suitable for the ESA jurisdictions. The ESA markets are still concentrated. The reviewed decisions reveal that structural considerations such as market share and concentration still play a central role in merger assessment. From this perspective, the more structured

dominance test would aptly cater for their merger regulatory needs. This however does not mean that the jurisdictions need to revert to a dominance test. The flexibility and adaptability of the SLC test means that it is still able to address a structural merger analysis. The SLC test is in fact flexible enough to subsume the dominance test.

In the same vein, there is no urgent need for Tanzania to change to the SLC standard given its concentrated market. Tanzania in this regard appears to already fulfil its regulatory mandate using the dominance test. Looking at the EU and Germany, Tanzania may also opt to evolve and expand within the dominance standard. The EU and Germany have indeed acknowledged that their procedures did not change with the adoption of the SIEC standard. If Tanzania does opt to change its standard, a statutory change to the SLC test would as well not prove to be a challenge.

The main challenge for most of the ESA jurisdictions is the inclusion of public interest in the substantive merger review. Public interest is arguably an acceptable divergence when it comes to the ESA jurisdictions. The socio-economic context in which some of the competition laws are adapted may require the kind of intervening public interest circumstances espoused in the majority of the ESA statutes. Taking South Africa for instance the need to protect historically disadvantaged members of society and to ensure that they have equal opportunity to actively participate in the economy is vital in ensuring inclusivity. Public interest factors such as protection of employment, ensuring equal participation of small businesses, ensuring the global competitiveness of local industries which are the main public interest factors espoused may therefore be highly justifiable from developing jurisdictions point of view.

The challenge lies in ensuring that the inclusion of public interest does not compromise legal certainty. South Africa recognised this challenge and limited its public interest intervention to a fixed number of factors. This is however not the case for the other ESA jurisdictions. Their public interest analysis in most cases incorporates an open-ended list of factors. The regulatory uncertainty is amplified by the fact that a lot of discretion is left in the hands of the regulator to determine what factors to take into consideration.

The public interest intervening circumstances should be well defined and limited to ensure that there is regulatory certainty and to take away the substantial amount of discretionary power granted to the regulator, which may easily be abused. In addition to the closed list of public interest factors, the competition authorities should publish guidelines where transacting parties and the public at large are clearly informed of the analytical

approach when it comes to considering the specific public interest factors. The South Africa public interest guidelines are highly instructive in this regard.

4.3 Extraterritoriality and Comity

Effective exertion of extraterritorial jurisdiction in merger regulation depends largely on economic influence. This is especially the case where such economic influence can get the merging parties to willingly cooperate with the enforcing jurisdiction, as evidenced by the willing cooperation of the parties to the *Institut Merieux* merger with the US regulators. The business interests of the parties within the enforcing jurisdiction should be significant enough to incentivize the willingness of the merging parties to cooperate. The ESA jurisdictions, at least individually, do not have the necessary economic influence to exert extraterritorial pressure especially where large multinationals are involved, as evidenced by the *Toyota Tshusho* merger.

An effective solution in this regard would be to leverage on the regional regulator, in this case the COMESA Competition Commission. The Common Market for Eastern and Southern Africa is without a doubt a relatively significant economic area, which continues to attract substantial FDI and M&A activity. Whereas the loss of one country´s market within COMESA may be relatively inconsequential to the broader commercial interests of a multinational, the probability of being locked out of the whole Common Market may be sufficient incentive for cooperation with the regional regulator. This is keeping in mind that most multinationals will have a regional strategy rather than focusing on a specific country. A focused effort by the Member States to empower the regional regulator would in this regard enable the regional regulator to effectively protect the economic interests of the Member States.

Where the parties to a transaction that is settled abroad do not willingly cooperate with the competition authority, cooperation with the jurisdiction where the transaction is being effected becomes indispensable. A strict enforcement strategy would not be effective in a foreign jurisdiction without deference by or cooperation with the foreign regulator in the interests of comity. Therefore cooperation, either informally or formally through the conclusion of cooperation agreements, becomes very important and should no doubt become an important part of the regulatory strategy of

the ESA jurisdictions. This is especially important given the increasingly international focus of merger regulation.

4.4 Institutional Design

Proper implementation of merger regulation laws hinges on an effective institutional design. Two important factors in the optimal designing of an institution are the structure, in terms of the decision-making bodies, and how independently the institution can carry out its mandate.

An optimal structure is one that is as integrated as possible, avoiding overlapping functions and ensuring that the decision-making rests to the greatest extent within the specifically constituted decision-making bodies. Integrated decision-making also eliminates the possibility of contradictory decisions and minimises the extent to which external influence can compromise the integrity of the institution.

Except for Namibia, the reviewed ESA jurisdictions have in this regard adopted highly integrated institutional structures, with functions either wholly carried out by a single authority or commission, or with a tribunal that serves a review function or a decision-making role in certain cases, with access to courts of law being available in practically all cases. Integrated structures have indeed been recommended for developing jurisdictions, where the courts may not necessarily be specialised in dealing with competition law issues. The recommendation for Namibia in this case would be to remove the review function from the Minister and have it given to either a specially constituted tribunal or a specialised section of the courts of law.

The only question is whether the ESA jurisdictions have sufficient capacity and expertise to properly implement the law. Notwithstanding the absence of specific data to verify this, the challenge of capacity constraints always arises for developing jurisdictions. Continued capacity building is therefore a ubiquitous recommendation when it comes to developing country institutions.

One of the forums in which such cooperation as well as capacity building can be carried out is within the African Competition Forum. Its mission is:

> to promote the adoption of competition principles in the implementation of national and regional economic policies of African countries, in order to alleviate poverty and enhance inclusive economic growth, development and consumer welfare by fostering competition in mar-

kets, and thereby increasing investment, productivity, innovation and entrepreneurship.[1287]

It has a membership of 33 out of the 54 African states. COMESA is also a member of the ACF. The fact that even countries that have not implemented competition laws are members indicates the goodwill that the ACF has generated. One of the key areas ACF is looking to focus on is technical assistance in drafting and revising competition policy.[1288]

In respect of institutional independence, sources of funding and the appointment of officials stand out as points of concern for the ESA jurisdictions. Many the reviewed ESA jurisdictions need to make restrictions on sources of funding that are likely to compromise the integrity of the competition authority. Donations and grants from parties that would prospectively be under review is one such restriction. In terms of appointment, a system such as parliamentary vetting which ensures checks and balances should be adopted, rather than having a Minister holding such appointment powers. This would ensure that there are no biased appointments or appointment of officials who can easily be influenced.

4.5 Conclusion

At the beginning of the study various specific questions were raised regarding merger regulation in ESA: Where do the merger regulation regimes in ESA fall within the global convergence in merger regulation? How do the substantive as well as the procedural merger regulation standards fit the context of ESA? Is there a need for redefined merger regulation systems for ESA? If so is the appropriate merger regulation regime?

From the development economics point of view, the questions raised were: Can a nexus be made between the adoption of competition law by the ESA jurisdictions and an increase in economic development? Can an increase in FDI and M&A activity be attributed to the merger regulations? Do the merger regulations enhance or facilitate the ease of doing business?

Merger regulation in ESA is in many aspects, both substantively and procedurally, already converged or increasingly converging to the developing global standards. From a substantive perspective, the majority of

1287 Info available on the Africa Competition Forum website <http://www.africancompetitionforum.org/about-us/who-we-are> accessed 25 September 2019.

1288 Ibid.

the ESA jurisdictions already apply the SLC test which is already flexible enough to meet the needs of a nascent regime, even those having highly concentrated markets like the ESA countries. This high level of concentration means that even countries like Tanzania that employ the dominance test are still able to meet their regulatory needs. Certain core divergences in the substantive approach, such as substantive public interest assessment, are arguably acceptable provided they are well defined with clearly set boundaries that ensure there is certainty in their application. Currently therefore, there is no pressing need for redefining or substantially altering the substantive approach, more so regarding the competition test applied. What is needed is to work on setting the limits of application of the public interest standard.

One aspect that is clear, especially from the procedural point of view, is a need for effective implementation. The question of redefining the merger regulatory landscape or finding a suitable regime cannot be properly addressed before the current systems are effectively implemented so that specific shortcomings can be identified. This implementation should as well include filling in or providing sufficient guidance on those aspects not properly addressed within the existing statutory framework. There is also an urgent need to ensure sufficient publication of information in respect of the statutory approach as well as the decisions made by the authorities. From the perspective of extraterritorial enforcement, a regional (rather than a national) approach which leverages on the economic importance of the regional market will be a more effective and plausible solution for the ESA countries. In this sense, ensuring that the COMESA framework is properly supported and facilitated will enable the COMESA competition commission to in turn address those extraterritorial transactions that have an adverse effect within the regional market.

Effective implementation ultimately hinges on the development of a proper competition culture as well as the goodwill to address the various challenges or shortfalls existing within the various regulatory regimes in ESA.

Implementation notwithstanding, one may still theorize on whether the procedural approach to merger regulation can be optimized. This is in respect of what can be considered an appropriate regime. A plausible approach may entail the adoption of a hybrid notification system, that is largely voluntary but with certain mandatory information requirements. This would effectively reduce the sizeable workload and expenditure of resources on non-probative merger assessments. It may also result in more streamlined and faster review of the problematic cases. This system may

however prove challenging for many competition authorities that rely financially on the filing fees. They may however contemplate introducing a 'service charge' for any substantive pre-merger consultations as well as for the granting of negative clearances.

Although available data does not enable a direct connection to be made between merger regulation on its own and economic development, one can place the role of merger regulation within a wider policy framework that should contribute to the ease of doing business, especially by ensuring that there is no regulatory uncertainty. Merger regulation should indeed strive to make it easier for investors, especially foreign direct investors, to set up or carry out their businesses. To this end, the ESA jurisdictions need to concretely address the challenges arising from their broad public interest assessment as well as the information asymmetry caused by the insufficiency of publicly accessible or available information. From a legislative drafting perspective, there should be more focused drafting of laws and provision of guidelines which will ensure there is less arbitrariness on the part of the regulator, thus improving investor certainty.

This should however be with due regard to an overarching objective of inclusive economic development where the weaker segments of society have been empowered to participate efficiently and effectively in the market.