Ancillary Restraints under the COMESA merger control regime

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The "ancillary restraints" doctrine, originally developed by the European Commission, serves to validate restraints that are objectively necessary to implement a legitimate transaction. It is relevant to restrictions that are directly related to, and necessary for, the implementation of a concentration. The treatment of ancillary restraints in merger control varies significantly across competition law regimes. While some jurisdictions have adopted dedicated frameworks setting out the conditions under which transaction-related restrictions may be considered permissible, others address such restrictions as part of the broader substantive assessment of a concentration. The COMESA Competition and Consumer Commission (CCCC) has historically not recognised a standalone ancillary restraints doctrine. However, the recently adopted COMESA Competition Regulations 2025 expressly recognise ancillary restrictions as a factor that may be considered in merger assessment.

Pursuant to the 2025 Regulations, the CCCC will assess whether a merger is likely to substantially lessen competition in the Common Market. In conducting their assessment, the CCCC may take into account a range of factors, including "the extent of ancillary restrictions, including non-compete and non-solicitation restrictions". This is the first express reference to ancillary restraints within the COMESA merger control framework. However, the 2025 Regulations do not establish a dedicated ancillary restraints regime, nor do they provide specific safe harbours or detailed criteria for assessing transaction-related restrictions. Rather, ancillary restraints form part of the CCCC's broader substantive assessment of whether a transaction is likely to substantially lessen competition. In assessing such restrictions, the CCCC primarily evaluates them based on two criteria:

- *Necessity* — the restraint is directly related to and objectively necessary for the implementation of the transaction. Hence, the CCCC will consider whether without the restraint, the transaction could not be completed or its primary benefits would be significantly undermined. Non-compete and non-solicitation clauses in M&A transactions are expressly identified as forms of ancillary restrictions that should be assessed through this lens.

- *Proportionality* — the scope, duration, and geographic reach of the restraint must be proportionate to the legitimate objectives pursued. Under this criterion the CCCC assesses whether the restriction is suitable to reach the intended objective, is the least invasive measure available to reach the intended objective, and proportionate in the narrower sense; thus, does not go beyond what is reasonably required to safeguard the parties' investments or other objectives pursued with the restraint.

The 2025 Regulations mark an important development by expressly recognising ancillary restrictions, including non-compete and non-solicitation obligations, as a relevant factor in merger assessment. However, the regime stops short of establishing a dedicated ancillary restraints doctrine or providing detailed guidance on the circumstances under which such restrictions will be considered permissible. Accordingly, ancillary restraints remain subject to a case-by-case assessment within the broader substantial lessening of competition analysis, with particular emphasis on their connection to the transaction and the proportionality of their scope and duration.

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