Licensing Agreements under COMES Merger Control Regimes

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COMESA | Licensing Agreements under COMESA Merger Control
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Licensing agreements occupy a structurally ambiguous position in merger control. They sit between asset acquisitions and ordinary commercial contracts. Licensing agreements differ in structure and intend from M&A and joint venture transactions. Nonetheless, they may lead to change of control over a commercial activity related to the license. Where such transfer is not just provisional, it may raise competition concerns that merit merger control review. The COMESA Competition and Consumer Commission (CCCC) has not issued specific guidelines clarifying how licensing agreements should be treated in a merger control context and published decisional practice remains limited. Hence, when dealing with licensing agreements under the COMESA merger control regime, parties have limited means to assess their notification obligations. Consulting merger control regimes that have further developed the treatment of licensing agreements may therefore provide useful guidance. Given that the COMESA merger control framework is in large parts aligned with EU merger control principles, and the CCCC has consistently relied upon internationally recognized merger control concepts in interpreting the COMESA Competition Regulations, European Commission decisional practice provides the most useful analytical framework. This client brief therefore considers how European Commission precedent may inform the treatment of licensing agreements under the COMESA merger control regime.

Licensing agreements as concentrations under EU law

Control under the EU Merger Regulation may be acquired not only through shares or assets, but also through contracts, including license agreements, where they confer the possibility of exercising decisive influence on a lasting basis (Art. 3(2) EUMR; Art. 3.1 Jurisdictional Notice). The key question is whether the transaction gives rise to a lasting structural change in the market, namely through the transfer of the ability to operate a business on an autonomous basis. As clarified in the EC Consolidated Jurisdictional.

This requires that the licensed assets constitute a "business" with a market presence, to which turnover can be clearly attributed. Hence, license agreements only qualify as concentrations where the license is (i) exclusive, at least within a defined territory; (ii) granted for a sufficient duration to bring about a lasting change in market structure, and (iii) confers decisive influence, thus, allowing the licensee to operate the related business independently, including determining its commercial strategy, production, and market conduct.

The relevant license currently producing turnover is not necessarily required. In several decisions concerning licensing agreements in the pharmaceutical sector, the European Commission accepted the capacity to generate turnover in the foreseeable future is sufficiently substantiated (see e.g. Novartis/GlaxoSmithKline, Case M.7872). More broadly, while not directly applicable to merger control, the revised Technology Transfer Block Exemption Regulation (that took effect few days ago, 1 May 2026) reflects a similar forward-looking logic. It recognises that technologies with no current sales remain competitively relevant (and are treated as having a 0% market share under Article 101 TFEU). Thence, the regulation confirms that the absence of turnover does not preclude competitive significance. Although this does not modify the legal test under the EU merger control regime, it supports a more dynamic understanding of economic activity in certain sectors, like for example in the technology sector. Here licenses may amount to concentrations where they effectively transfer a business but not where they merely grant access to technology or infrastructure without transferring strategic autonomy (see e.g. Microsoft/Yahoo! Search Business, Case COMP/M.5727).

Licensing agreements and the COMESA merger control regime

The COMESA Treaty and the COMESA Competition Regulations empower the CCCC to review concentrations that have a regional dimension, defined as transactions where the parties operate in two or more COMESA Member States. A "merger" is broadly defined under Article 23 COMESA Competition Regulations to include any transaction resulting in a change of control, including through contracts or any other means. The CCCC Merger Assessment Guidelines confirm that control may be established not only through the acquisition of shares or assets, but also through contractual arrangements that confer the ability to determine or decisively influence the commercial conduct of an undertaking.

This formulation is deliberately broad and is expressly modelled on EU merger control concepts. The CCCC has acknowledged that its framework draws inspiration from European Commission practice, and the Guidelines reference EU decisional precedent as a relevant source of interpretive guidance. On the specific question of licensing agreements, the CCCC has not issued dedicated guidance. However, the breadth of the concentration definition—and the CCCC's general openness to EU-derived analysis—means that exclusive licensing arrangements satisfying the three-part EU test may in principle constitute notifiable concentrations under the COMESA regime.

On jurisdictional thresholds, the COMESA regime applies where parties operate in two or more Member States and meet the prescribed turnover or asset thresholds. For licensing transactions, turnover attribution can be complex. The CCCC has accepted that turnover from licensed activities may be attributed depending on who bears commercial risk and exercises operational control. Parties should assess this carefully before concluding a licensing arrangement falls below the COMESA thresholds.

The CCCC will consider whether the arrangement results in a lasting change of control over an autonomous economic activity within the COMESA region. Where a license is exclusive within a defined COMESA territory and confers on the licensee the ability to determine its commercial strategy independently, the CCC is likely to treat it as a notifiable concentration, irrespective of whether structured as a license rather than an asset sale.

Key takeaways

Unlike under EU merger control, the treatment of licensing agreements is not expressly regulated under the COMESA Competition Regulations. Nor has the CCCC issued specific guidance addressing the circumstances in which licensing arrangements may constitute concentrations. Nevertheless, the broad definition of a concentration under Article 23 COMESA Competition Regulations, together with the CCCC's functional approach to the concept of control, suggests that licensing agreements may fall within the scope of the COMESA merger control regime where they result in a lasting transfer of decisive influence over an autonomous business.

While the COMESA legal framework contains limited guidance specific to licensing agreements, its general principles closely resemble those developed under EU merger control. Accordingly, the European Commission's approach to exclusive licensing arrangements provides the most useful analytical framework for assessing whether a licensing transaction may constitute a notifiable concentration under the COMESA regime. In particular, the three cumulative criteria developed under EU law—exclusivity, sufficient duration to produce a lasting structural market change, and the transfer of decisive influence over an autonomous business—provide a useful starting point for the assessment.

Parties should nevertheless bear in mind that European Commission decisional practice, while persuasive, is not binding upon the CCCC. Consequently, although EU law provides valuable guidance where the COMESA framework remains relatively undeveloped, the CCCC will ultimately formulate its own position as its decisional practice evolves. Parties may therefore rely on EU merger control principles as persuasive authority when assessing licensing arrangements, while recognizing that the CCCC may adopt a different approach where warranted by the wording or objectives of the COMESA Competition Regulations.

Accordingly, parties contemplating exclusive or long-term licensing arrangements with a regional dimension should assess carefully whether the transaction may result in the transfer of control over an autonomous business and, if so, whether the applicable COMESA jurisdictional thresholds are met. Given the absence of dedicated CCCC guidance, an early assessment of the transaction by reference to both the COMESA Competition Regulations and established EU merger control principles remains the most prudent approach.

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