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Agenda Item 3c. Enhancing international cooperation in the investigation of cross-border competition cases: Tools and procedures

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Enhancing International Cooperation in the Investigation of Cross-Border Cases: Tools and Procedures – *The experience of COMESA*

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Introduction

- The COMESA regional integration agenda: the transformation of isolated national markets into a single larger regional market for Eastern and Southern African countries for the long term economic development of its Member States
- Cooperation among Member States is an important precondition for the sustainability of the integration process
- The need for Member States to cooperate is explicitly recognised in the COMESA Treaty and the COMESA Competition Regulations

The Need for Cooperation under the COMESA Competition Regulations

Preamble to the COMESA Competition Regulations:

THE NEED for Member States to give effect to the principles of a Regional Competition Regulations and Rules and to use moderation and self-restraint in the interest of co-operation in the field of anti-competitive business practices;

THE DESIRABILITY of setting standards for procedures by which the regional competition agency can act as a forum for exchange of views, consultations and conciliation on matters related to anti-competitive practices affecting COMESA regional and international trade;

CONSIDERING thereof that Member States should co-operate at regional level in the implementation of their respective national legislation in order to eliminate the harmful effects of anti-competitive practices;

CONSIDERING also that closer co-operation between COMESA Member States in the form of notification, exchange of information, co-ordination of actions, consultation among Member States should be encouraged

Investigation of Cross-Border Cases

- COMESA Competition Regulations apply where there is a cross border impact
- The impact of cross-border trade is implicit prerequisite in light of the wording of Article 3(2) of the Regulations: “...**apply to conduct covered by Parts 3 (restrictive business practices), 4 (mergers), and 5 (consumer protection) which have an appreciable effect on trade between Member States and restrict competition in the Common Market**”

Article 3(3) provide that the Commission shall enjoy **primary jurisdiction** over an industry or a sector of an industry which is subject to the jurisdiction of a separate regulatory entity...”

“... does not apply to conduct expressly exempted by national legislation”

Cooperation with Member States in the Application of the Regulations

- Article 7 of the Regulations mandates the Commission to:
 - help Member States promote national competition laws and institutions with the objective of harmonization of those national laws with the regional Regulations to achieve uniformity of interpretation and application of competition law and policy within the Common Market;
 - cooperate with competition authorities in Member States;
 - cooperate and assist Member States in the implementation of its decisions; and
 - provide support to Member States in promoting and protecting consumer welfare

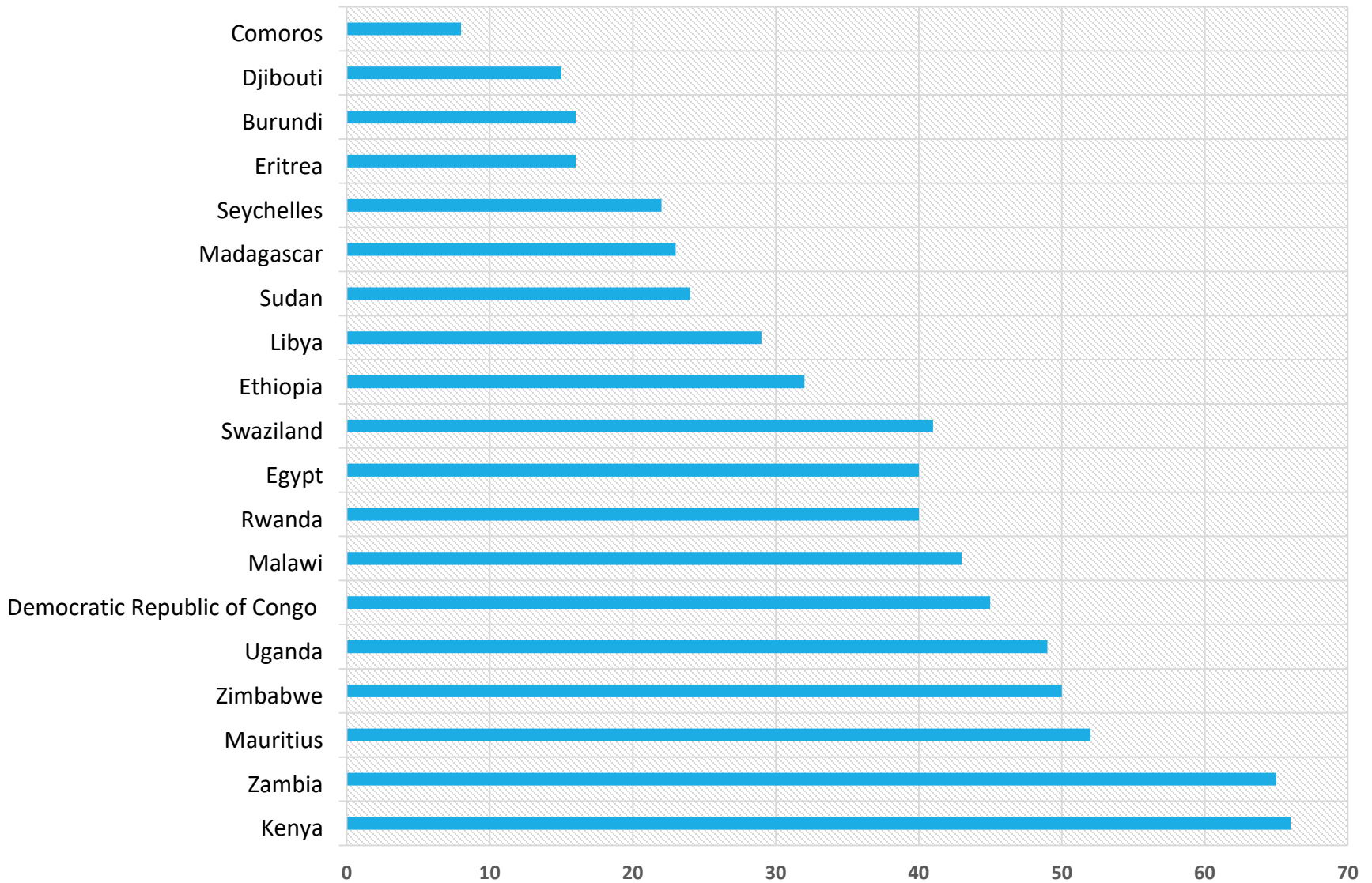
Cooperation in the Investigation of Cross-Border Mergers

- The Commission has jurisdiction on mergers where both the acquiring firm and the target firm, or either of them, have operations **in two or more Member States** and meet the prescribed thresholds
- Article 26(6) of the Regulations requires the Commission to notify all affected Member States of notified merger transactions
- Consultation on cross-border merger investigations includes:
 - Sharing of merger filing Form 12 and relevant market information, subject to confidentiality waivers from merging parties;
 - Investigations of past transactions by the merger parties in the relevant Member States
 - Collaboration on design of remedies/undertakings to address competition concerns at national and regional level

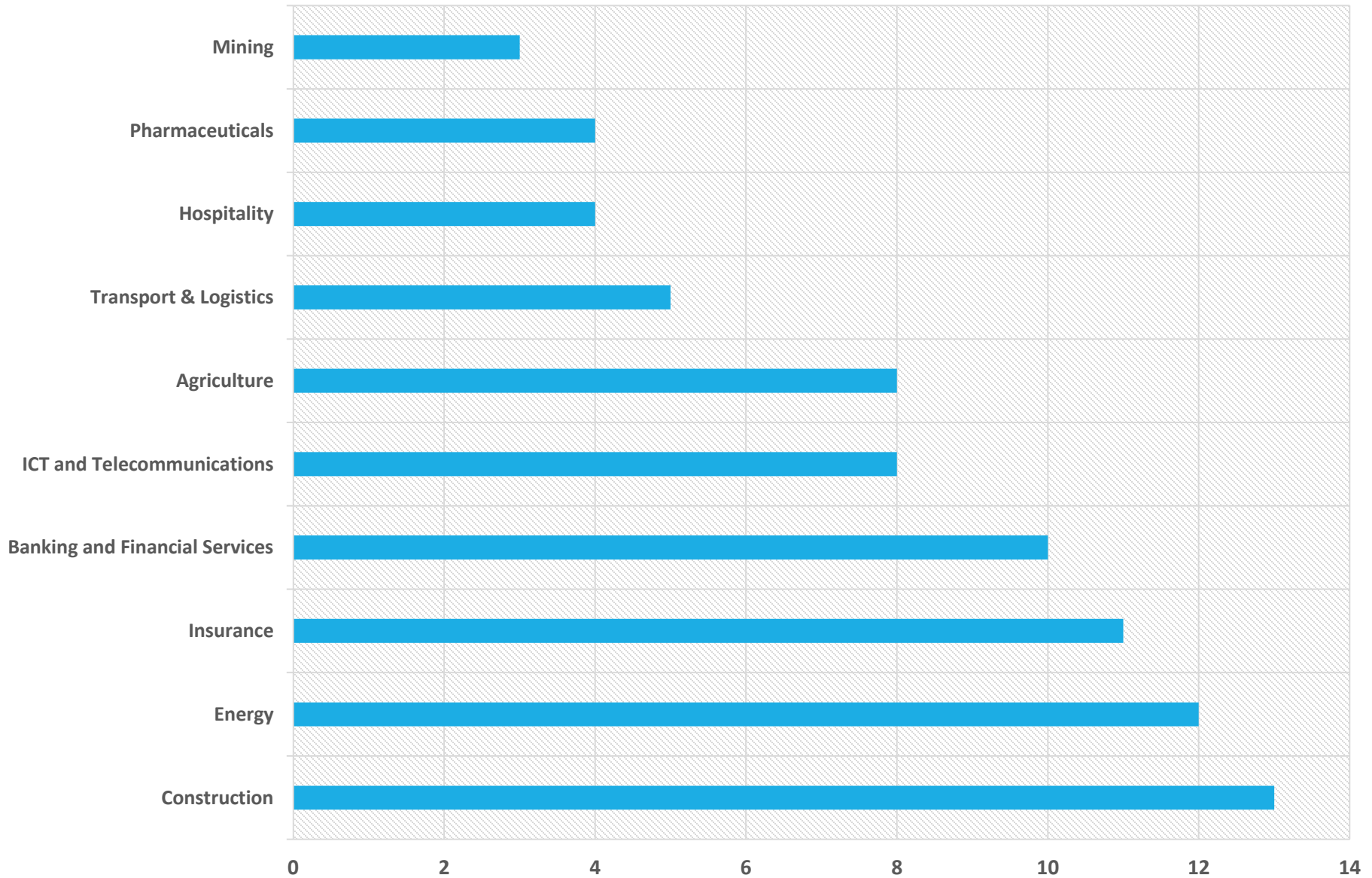
Cooperation in the Investigation of Cross-Border Mergers (cntd)

- Article 24(8) of the Regulations provides that where a Member State is satisfied that a merger notified to the Commission is “likely to disproportionately reduce competition to a material extent in the Member State or any part of the Member State”, the Member State can request for a referral of the merger for consideration under the Member State’s national competition law
 - Lusaka Cosmopolitan/ Delta merger referred to Competition and Consumer Protection Commission of Zambia in 2016
 - Holcim/ Lafarge merger referred to Competition Commission of Mauritius in 2015
 - Sanlam/ Masawara Investments merger referred to Zimbabwe’s Competition and Tariff Commission in 2014

Merger Transactions by Member States, 2013 - 2017



Merger Transactions by Economic Sector, 2013 to 2017



Cooperation in the Investigation of Restrictive Business Practices

- Rule 40 requires the Commission to carry out investigations on restrictive business practices in close and constant liaison with the competent authorities of the Member States
- Pursuant to Rule 43, the Commission can request officials of the competent authorities of the Member States to assist the Commission in its investigations.
 - CAF investigation: Interviews with stakeholders carried out in Member States in collaboration with NCAs
 - Eveready distribution agreements: Stakeholders questionnaires distributed in Member States through the national competition authorities
- Advisory opinions provided to Member States on their investigations into restrictive business practices
- Joint anti-cartel project with World Bank in collaboration with all Member States

Tools for Fostering Cooperation

- Bilateral agreements with National Competition Authorities provide further avenues for inter-agency information sharing and more generally in establishing a longer-term co-operation framework
- MOUs and Cooperation Framework agreements signed with Egypt, Kenya, Madagascar, Malawi, Mauritius, Seychelles, Swaziland, and Zambia, dealing with exchange of confidential information and cooperation in investigations

Tools for Fostering Cooperation

- Priority areas to promote cooperation:
 - ***Strengthening the regulatory environment*** in the Common Market by assisting MS in the drafting and review of their competition and consumer protection laws (Seychelles, Madagascar, Uganda);
 - ***Institutional capacity building*** and enforcement of competition laws in the Common Market - The Commission has facilitated numerous workshops, trainings and seminars to strengthen the capacities of competition-related agencies in the region, taking into account the important diversity among COMESA countries in terms of political situations, priorities and institutional strengths and weaknesses.

Tools for Fostering Cooperation

- An effective competition agency requires certain essential conditions including adequate financial resources, skilled staff; and the ability to advocate compliance with competition law among business and government agencies
- The CCC has invested heavily in building capacity and providing technical assistance to younger competition agencies in the region to overcome initial challenges
 - *Capacity building provided to Djibouti and Madagascar through secondments and study tours to experienced National Competition Authorities in the Common Market*
 - *Training provided to the Ethiopia Trade Competition and Consumer Protection Commission on merger assessment*
 - *Sensitization workshops held in Djibouti, Madagascar, Swaziland, and Zimbabwe on the benefits of competition and regional integration*
 - *Training workshops on instruments used by the Commission – Merger Assessment Guidelines, Article 16 and 18 Guidelines*

Promoting Cooperation beyond the Common Market

- Seminar with East African Community Competition Authority held in 2016 dealing with implications of overlapping country membership and divergent objectives of regional blocs on the enforcement of competition laws and cost of doing business
- Consultation with non-COMESA competition authority on theories of harm on an ongoing merger transaction
- Tendency for multinational companies to export their anti-competitive conduct; thus critical for the development of instruments allowing consultations with international competition authorities where similar conduct have been investigated and prosecuted

Way Forward

- Closer cooperation with international competition agencies critical for effective enforcement of competition laws.
- While significant achievements in the area of inter-agency cooperation have been made, obstacles to more effective cooperation both within and beyond the Common Market remain.
- Need to review instruments available to accelerate pace of implementation of cooperation agreement frameworks, in particular in relation to sharing of confidential information.

Thank you.

Any comments to:-

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