ENSafrica competition focus

by the anti-trust/competition department

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The fast-changing landscape of competition law in Africa

At the turn of the century, only a handful of Africa's 54 nation states had operational competition legislation and enforcement. However, in line with developments in the rest of the world, many African countries have since enacted competition legislation and established working competition authorities. Very few African countries seem to have no immediate plans to introduce national competition regulations or roll out competition regulation through regional bodies.

Now, at least half of all African states boast national competition laws. However, in some countries, regulations that were tabled and approved (in some instances more than 10 years ago), are yet to be enforced. In other instances, competition legislation has only recently been introduced, but the regulations are actively enforced by enthusiastic regulators.

In addition to national competition regulators, Africa features a number regional bodies that have competition regulations. The most prominent of these regulators is the 19 member Common Market for Eastern and Southern Africa ("**COMESA**") Competition Commission ("**CCC**") that has been operational since 2013. Others include the East African Community ("**EAC**") that has recently commenced operations (limited to industry inquiries); the Economic Community of Central African States ("**CEMAC**"); the West African Economic and Monetary Union ("**UEMOA**"); and the Economic Community of Western African States ("**ECOWAS**").

It is fair to state that policymakers in Africa appreciate the wide-ranging benefits that competition policy and law can potentially deliver to developing economies plagued by concentrated markets and high barriers to entry, and that competition law enactment and enforcement is increasingly a feature of the economic development framework on the African continent.

One of the major impediments to competition enforcement in Africa remains access to resources. Many competition authorities in Africa are non-operational and others are under resourced, particularly when compared to the competition authorities in more developed countries. Notwithstanding the lack of resources, competition regulators are making an impact in Africa.

Diverging from the mainstream competition policy objectives of production, allocation and dynamic efficiencies, many African governments have embraced an approach to competition policy that includes broader public interest policy goals as part of the competition policy framework. These public interest objectives are not uniform for all countries. In South Africa, given its history and the state of economic development, the preservation of employment opportunities and the economic empowerment of individuals disadvantaged by the Apartheid regime, are, inter alia, key public interest objectives. Employment is an important public interest objective for many African countries, while others also include the preservation of national ownership among their public interest considerations. "Public interest" in Africa is not a uniform concept, and varies from jurisdiction to jurisdiction. COMESA's public interest considerations comprise assessment of effective competition, consumer interests, costs and barriers to entry (which are more akin to pure "competition" considerations).

African competition authorities have created a framework for increased cooperation with each other and with competition authorities outside the continent. Through regional competition regimes and bi- and multilateral arrangements, the foundations have been established for cross-border initiation of cartel investigations, market studies and coordination of remedies. It is clear that competition policy in Africa is set to become more international, impacting regulators, businesses, and consumers.

Competition policy and law in Africa is dynamic. Some of the major changes on the continent are:

- **Angola's** National Assembly has approved its first Competition Act (the "**Angola Competition Act"**) which creates the Competition Regulatory Authority of Angola (the "CRAA"). The CRAA is not yet operational. The Angola Competition Act regulates mergers and acquisitions and behavioural issues. Only transactions that exceed the thresholds of market share, invoicing and turnover shall be subject to prior notification. However, these thresholds have not been published as yet. Mergers can only be implemented after final clearance is obtained from the CRAA. Failure to obtain final clearance is punishable by up to 5% of the undertaking's turnover in the previous year. The Angola Competition Act also prohibits anti-competitive vertical and horizontal agreements, and abuses of dominance. It includes the concept of the "abuse of economic dependence", which occurs when an undertaking imposes unfair terms or breaks a commercial relationship unjustifiably, when its trading partner has no equivalent power or alternative means. Infringements may attract a penalty up to a maximum of 10% of the turnover of the undertakings concerned.
- The **Botswana** Competition Authority has been successfully enforcing the Botswana Competition Act following the promulgation of the Competition Act in 2009, and the Competition Regulations in 2011. The legislature has, however, recently approved a number of amendments in the Competition Act of 2018 (the "**New Competition Act**"). The New Competition Act introduces the imposition of criminal sanctions to any officer or director who contravenes the horizontal prohibitions or resale price maintenance prohibitions. The penalty for contravention of the horizontal prohibitions is a fine of BWP100 000 or to a term of imprisonment not exceeding five years. The penalty for contravention of the resale

price maintenance prohibition is a fine not exceeding BWP50 000. Under the new competition regime, failure to notify a merger will attract penalties of a fine not exceeding 10% of the greater of either (a) the consideration or (b) the combined turnover of the merging parties to the transaction. Another change in policy is that the New Competition Act provides for the Minister of Investment, Trade and industry to submit comments in writing in instances where the merger gives rise to public interest concerns. At this stage, the categories of public interest have not been provided.

- The Competition Authority of **Kenya** (the "**CAK**") has invited interested stakeholders to comment on new draft rules and guidelines, including Merger Threshold Rules; Abuse of Buyer Power Rules; Consolidated Guidelines on the Substantive Assessment of Mergers; Block Exemption Guidelines; Search and Seizure Guidelines; and Consumer Protection Guidelines. Presently, all mergers in Kenya, irrespective of their value, require mandatory notification to the CAK. This is set to change with the introduction of new merger thresholds. Merger notification will not be required where the parties to the merger have a combined annual turnover and/or gross asset value in Kenya, whichever is the higher, of below KSH500-million. Merger transactions between undertakings that have a combined annual turnover or gross asset value in Kenya of between KSH500-million and KSH1-billion may be considered for exclusion. This means that the undertakings will still need to notify the CAK of their merger. The CAK will then decide, within 14 days, whether to approve the merger or call for a full investigation.
- In **South Africa**, the Competition Draft Amendment Bill (the "**SA Amendment Bill**") was published on 1 December 2017 and is expected to come into effect during the course of 2018. The primary objective of the Amendment Bill is to address structural challenges that are seen by The Minister of Economic Development (the "**EDD Minister**") to constrain the South African Economy. The SA Amendment Bill provides that the public interest test is equal to the competition test in relation to mergers. The SA Amendment Bill also attempts to address concerns that have arisen in relation to cross-directorships and cross-shareholdings in all mergers. Parties will now be required to disclose merger activity for the past three years in order for the authorities to assess creeping concentration concerns within markets. The Amendment Bill also seeks to allow the Minister to also appeal the Competition Tribunal decisions to the Competition Appeal Court, and, in certain circumstance, gain access to confidential information.
- Swaziland is currently seeking to repeal the existing Competition Act, 2007 and adopt a new competition act, currently in the form of the Competition Bill, 2018 (the "**Swazi Competition Bill**"). Once passed, the Swazi Competition Bill will fundamentally change the current Swazi competition regime by, among other factors:
  - altering the structure of the current Swazi competition framework by introducing a Competition Tribunal;
  - overhauling the current merger control regime;
  - introducing new abuse of dominance;
  - giving the Swazi Commission the authority to initiate market inquiries;
  - empowering the Swazi Commission to review mergers that do not ordinary meet the relevant thresholds;
  - allowing the Competition Tribunal to impose an administrative penalty of up to 10% of a company's turnover for engaging in various conduct, including cartel activity, pre-implementing a merger and a failure to comply with merger conditions; and
  - introducing minimum mandatory penalties for any parties found to have entered into cartel activity.

Competition bites

Leniency available to ringleaders in Mauritius

The Competition Commission of Mauritius (the "CCM") has expanded its leniency programme to include cartel "initiators" or "ringleaders". Previously, enterprises that had coerced others into collusive agreements did not qualify to receive immunity or other benefits.

The CCM has had a functioning leniency programme in place since the inception of its operations in 2009. However, it found that the policy that cartel initiators do not qualify to receive immunity led to uncertainty and deterred leniency applications. The amendment to the leniency programme formalises the CCM's temporary special amnesty programme that allowed "initiator" firms to apply for partial leniency that allowed for a 50% reduction in the administrative penalty otherwise payable.

This special amnesty programme led to various successful leniency applications and related prosecutions, prompting the CCM to formalise the expansion of the leniency programme.

COMESA commences non-merger investigations

Like most fledgling competition authorities, the COMESA CCC focused its attention on merger review when it commenced its activities in 2013. The CCC has established a reputation as a keen enforcer of merger regulation and has intervened and extracted undertakings from merging parties in a number of cases where it found mergers to have anti-competitive effects. Having built capacity through its merger review activities, the CCC has now diverted resources to non-merger investigation. The CCC launched investigations into to the Confederate of African Football's ("**CAF**") decision to extend exclusive marketing of broadcasting rights and sponsorship agreements with Lagardère Sports in relation to CAF football tournaments and into Coca-Cola Africa Proprietary Limited's distribution agreements in Ethiopia and Comoros.

Exemption applications in Kenya

The Competition Authority of Kenya (the "**CAK**") in June 2018 rejected two exemption applications under sections 25 and 26 of the Kenyan Competition Act, 2010.

In the first instance, WOW Beverages, a Kenyan beverage importing company, sought to enter into exclusive distributorship agreements with seven international suppliers and filed an exemption application with the CAK. These contracts would allow WOW Beverages to import and exclusively distribute 214 premium wine and spirit brands in Kenya. As justification for this exemption application, WOW Beverages argued that the agreements would, inter alia, protect local consumers from defective products and guarantee accountability when such products enter the Kenyan market, and ensure that compromised or adulterated products do not enter the market. The CAK rejected these arguments and concluded that "parallel imports, through legal channels, are likely to bring more benefits to Kenyan customers." The CAK also noted that imported products are subject to controls by other Kenyan government authorities and, accordingly, that the safety of any imported products will be ensured. The exemption application was denied on these grounds.

In the second instance, the CAK rejected an exemption application by the Institute of Certified Public Secretaries of Kenya

(“**ICPSK**”), which sought to issue governance audit guidelines (including guidelines on fees). ICPSK submitted that these fee guidelines would ensure that governance auditors, as a new professional offering in Kenya, will focus on growing business rather than competing on pricing. Moreover, ICPSK submitted that fee guidelines would eliminate illegal practitioners from the sector, provide a fair play ground for all practitioners, and prevent undercutting, which may result in the lowering of standards. The CAK, in rejecting this application, made it clear that there was no evidence that the fixing of prices will maintain or improve professional standards. Notably, the CAK stated explicitly that, “price fixing by professional associations extinguish[es] competition with no plausible public benefits.”

Recently, two airlines have filed an exemption application with CAK, which would allow them to discuss, among others, revenue sharing and price setting, in respect of a joint venture. The CAK is still considering this application.

East African Community Competition Authority commences operations

The EAC, founded in 1967, is a regional intergovernmental organisation comprising Burundi, Kenya, Rwanda, Tanzania, South Sudan and Uganda, with Somalia poised to join soon. Only two of the EAC’s members (Kenya and Tanzania) have operational competition authorities.

The East African Community’s Competition Authority (the “**EACCA**”) became operational in the first quarter of 2018. Its activities are currently limited to market enquiries. The EACCA has announced that it is initiating its first market inquiry, but it has not yet made public the industries that will be investigated. The EACCA has publicly stated that one its priorities is to “liberalise the financial sector and undertake further reforms so as to allow entry into the sector of more banks and other financial institutions”.

Steel cartel investigation in Ethiopia

Earlier this year, the Ethiopian Trade Competition and Consumer Protection Authority (“**TCCPA**”) referred 21 rebar, corrugated sheet, steel tube and pipe producers, as well as rebar importers, for prosecution on price fixing charges. If found guilty, the respondents could incur an administrative penalty of up to 10% of their annual turnover. Cartel conduct in Ethiopia carries criminal liability and transgressors could face imprisonment for a period up to five years.

This is the first documented prohibited practice matter that has commenced in Ethiopia and likely marks the beginning of a period of active enforcement. In light of the relative infancy of competition law in Ethiopia. Given the corresponding lack of case law, this case will be precedent setting.

The TCCPA’s investigation follows similar investigations into steel cartels globally and on the African continent.

USD25 000 penalty in Liberia for egg price hike

The Liberian Act to Enact the Competition Law of Liberia to Provide for an Efficient Free Market System (the “**Liberian Competition Act**”) has been in force for less than a year, but the Liberian Ministry of Commerce and Industry (“**MOCI**”) has already used the legislation to send a message to the business community that there are repercussions for non-compliance with the Liberian Competition Act. The MOCI imposed a USD25 000 penalty on the Fouani Brothers Corporation (“**FBC**”) for unilaterally hiking the price of eggs in Liberia, after finding that FBC had “deliberately, blatantly and wilfully” contravened the Liberian Competition Act. The MOCI indicated that such a fine is indicative of the fact that it will not allow businesses to bring “unnecessary hardship” to the people of Liberia, and should serve as a warning to other businesses. The Fouani Brothers Corporation was given 72 hours to pay the fine.

The Liberian Competition Act makes provision for monetary penalties up to USD100 000.

South African Competition Commission named agency of the year in Asia-Pacific, Middle East and Africa

The South African Competition Commission (the “**SACC**”) was recently pronounced “Agency of the Year

in Asia-Pacific, Middle East & Africa” for 2017 at Global Competition Review’s (“**GCR’s**”) 8th Annual GCR Awards ceremony. In presenting the award to the SACC, GCR noted that it was selected being “the best-established antitrust agency in Africa, with a track record of cracking down on cartels big and small, and its involvement in some of the world’s biggest deals”. It is clear that the SACC is paving the way for competition regulation in Africa.

COMESA set to welcome Somalia and Tunisia to the common market

The CCC is the most established and developed regional competition authority in Africa. Presently, COMESA has 19 member states with a combined population of 490-million people. COMESA is set expand with the imminent admission of Somalia and Tunisia. The 21 member state-strong free trade area will house over 516-million people (almost half the continent’s population).

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