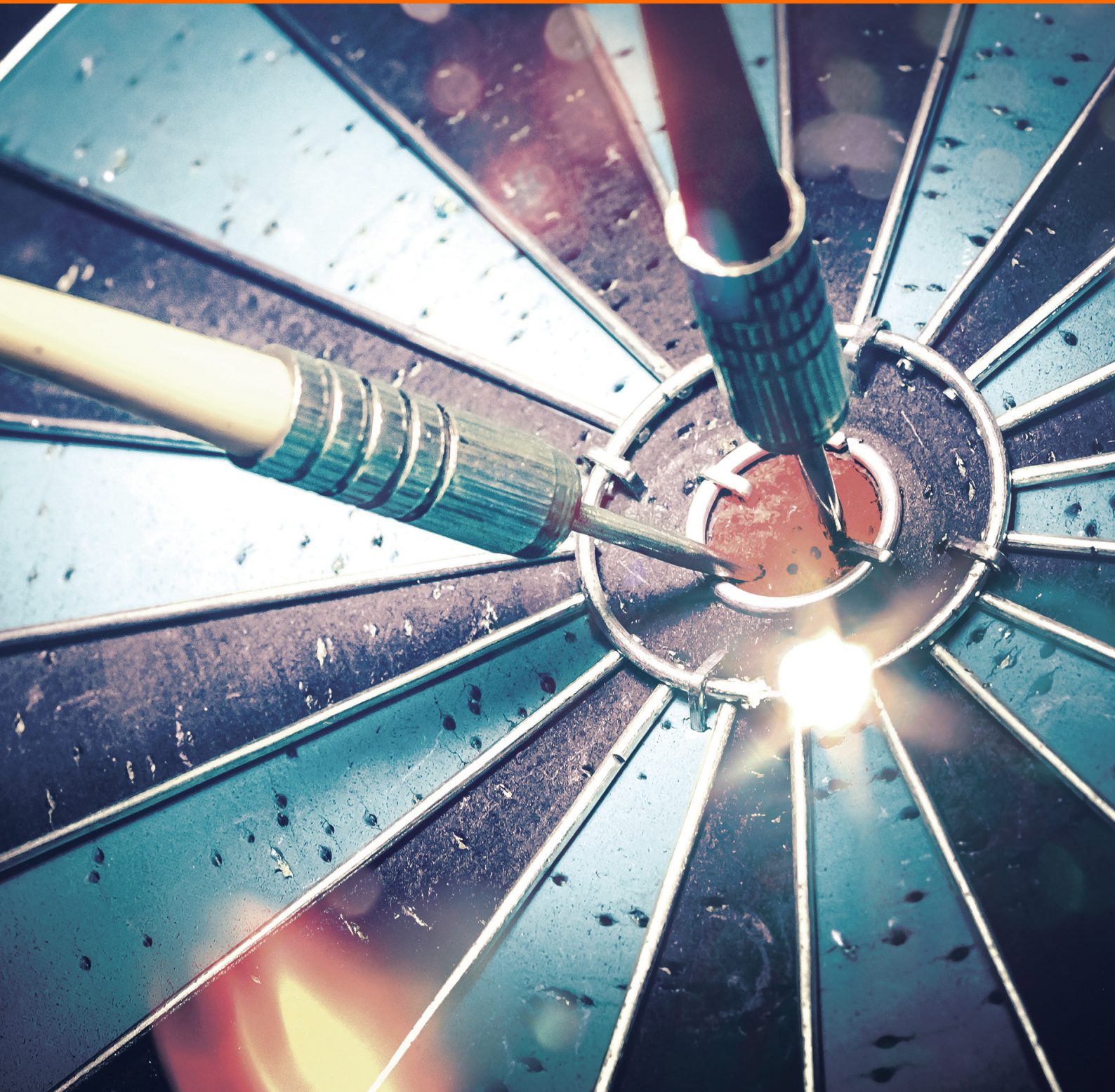




COMPETITION LAW ANNUAL REVIEW 2018/2019



WEBBER WENTZEL

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SOUTH AFRICA 2018 THE YEAR THAT WAS

2018 GENERAL OVERVIEW

2018 was an important year for competition law in Africa. Competition law spread across the continent with new legislation coming into effect, new authorities established and enforcement expanding at both a domestic and regional level.

After ongoing stakeholder engagement throughout 2018, the President of South Africa has assented to the Competition Amendment Act 18 of 2018 (Amendment Act). A copy of the Amendment Act is available [here](#). This historic development marks the beginning of a new era of competition law, which is more public interest focused than ever before. Our e-alerts setting out the key changes introduced by the Amendment Act are available [here](#) and [here](#).

The Amendment Act primarily seeks to address the high levels of economic concentration and the skewed ownership profile of the South African economy. Once the Amendment Act becomes effective, new and complex competition law issues will emerge.

MERGERS

OVER THE 2017/18 FINANCIAL YEAR TWO KEY MERGER-RELATED DECISIONS:

- In the *SABC/ Multichoice* case, the extent of the Commission's powers was challenged. The parties contended that the Commission was limited to a 'desktop study' of the case and could not investigate any further or interview witnesses. However, the Constitutional Court confirmed that the Commission may investigate transactions to determine whether they constitute or give rise to a notifiable merger.
- In the *Murray & Roberts/ Aton* case, the Competition Appeal Court (CAC) delivered a significant judgment on shareholder voting rights. In particular, the CAC ruled that an acquirer, in a hostile merger context where merger approval by the competition authority remains outstanding, is not prohibited from acquiring and voting shares in a target company, provided there is no acquisition of control.

[Click here](#) for our Merger Control Quick Facts.

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OVER THE 2017/18 FINANCIAL YEAR, THE COMMISSION:

Handled

146

cartel
investigations

Concluded

29

settlement
agreements

Conducted

37

dawn raids

Imposed (collectively) over

ZAR354

million
in administrative
penalties

Prohibited practice investigations involved banks, football agents, poultry equipment manufacturers, book publishers, school uniform suppliers, airlines, and liquid petroleum gas companies.

Prohibited practice investigations involved banks, football agents, poultry equipment manufacturers, book publishers, school uniform suppliers, airlines, and liquid petroleum gas companies. Some of these investigations are in the process of being finalised, while others have resulted in settlement agreements, or are in the process of being prosecuted before the Competition Tribunal.

The CAC's predatory pricing ruling in the Media24 matter was appealed to the Constitutional Court. Some of the Tribunal's notable decisions related to, among other things, the ambit of joint ventures and single economic entities, the concept of characterisation, instances in which parties are considered to be competitors, and market division.

THREE KEY DECISIONS:

- In the *Dawn/ Sangio* case, the CAC provided guidance on the test to be applied when assessing whether restraint of trade clauses will expose companies to a prohibited practice contravention. This significant judgment examined whether a non-compete clause in a shareholders' agreement contravened the Competition Act. The CAC highlighted the importance of assessing agreements between parties in a horizontal relationship in their totality, in order to determine whether they exhibit the 'character' of prohibited cartel conduct.
- In the *Competition Commission/ Computicket* case, the Tribunal found that Computicket had abused its dominance and ordered the company to pay an administrative penalty of ZAR20 million. The Commission led evidence that Computicket required or induced its customers not to deal with its competitors. The Tribunal held that exclusionary effects were evident with sufficient robustness during the relevant period.
- In the *Competition Commission/ Wilmar Continental and Others* case, the High Court set aside a search warrant which authorised dawn raids to be conducted at the premises of five edible oils manufacturers. The Court held that the Commission had failed to make out a case for the issuance of a search warrant in terms of the Competition Act.

[Click here](#) for our Dawn Raid Guidelines.

We recently developed the Webber Wentzel Alert which provides a co-ordinated legal emergency response at the click of a button.

[Click here](#) for more information.

MARKET INQUIRIES & ADVOCACY

Healthcare Inquiry - During 2018, substantial provisional recommendations were made as part of the private Healthcare Inquiry. The provisional recommendations are intended to address a number of features that harm competition within the market and cover a broad range of categories i.e. medical schemes, hospitals and practitioners. The final report is expected to be finalised in 2019, following further stakeholder engagement.

Other Market Inquiries - Public hearings took place in the public transport, retail and data services market inquiries.

Advocacy - As collaborative efforts increase amongst competition authorities across Africa, the Commission entered into MoUs with eSwatini, and the Seychelles. The Commission was also elected chair of the continental competition body, the African Competition Forum.

REST OF AFRICA 2018 THE YEAR THAT WAS

NEW LEGISLATION AND AUTHORITIES:

- Angola – finalised its competition legislation and regulations and its competition authority is now fully operational.
- Botswana – published proposed amendments to its competition legislation which are awaiting enactment.
- Democratic Republic of Congo – a new Competition Act has come into force.
- Zimbabwe – a comprehensive competition policy was finalised.
- Morocco – a merger control regime became operational, following the long-awaited appointment of the Competition Council.
- COMESA – Tunisia and Somalia officially became members.
- The East African Community Competition Authority commenced operations.
- The ECOWAS Competition Authority's headquarters were established.

MERGERS

At the regional level, the COMESA Competition Commission conditionally approved three mergers and unconditionally approved 28 mergers.

Access our COMESA Quick Facts [here](#) for a summary of all you need to know about submitting a merger to the COMESA Competition Commission.

Domestically, numerous mergers were conditionally approved with employment conditions imposed in many jurisdictions (eg Botswana, Kenya, Malawi and Namibia), as well as other commitments to continue supply to existing customers and local procurement.

Fines for prior implementation were imposed in Kenya and Zambia, and mergers were prohibited in Namibia (involving mobile networks) and Zimbabwe (in the agricultural sector).

The Egyptian Competition Authority began pursuing a more active role in requesting companies to notify mergers, although its current merger control regime allows for post-merger notification (this position is expected to change soon following the passing of a new law).

Draft merger thresholds were released in Kenya which provide separate thresholds for full mergers, exclusions and those mergers that are exempt from notification, and indicate that the Competition Authority of Kenya will soon begin to recognise the COMESA Competition Commission's jurisdiction (currently a notification is required to be made to both the CAK and CCC if the relevant merger requirements are met).

In Zambia, changes were made to the manner in which merger filing fees are calculated – the fee is now based on a percentage of whichever party's turnover/assets is higher.

PROHIBITED PRACTICES

Regionally, the COMESA Competition Commission launched an investigation into FIFA's refusal to allow Egypt's State TV broadcaster to air the 2018 FIFA World Cup matches.

At the domestic level, we also saw:

- Investigations into the school uniform industry launched in Egypt, Kenya and Zambia, and textbook suppliers investigated in Malawi (akin to the investigations launched in South Africa).
- The Botswana Competition Authority reject an exemption application for a buying group from Choppies Supermarket.
- A buyer power department formed by the Competition Authority of Kenya.
- A dawn raid set aside and a corporate leniency policy launched in Namibia.
- The Egyptian Competition Authority fine sports broadcaster beIN Sports and refer 70 clay brick factories to public prosecution.
- The Zambian Consumer and Competition Commission impose fines on four chicken hatcheries.
- 21 local steel bar producers charged with price-fixing in Ethiopia.

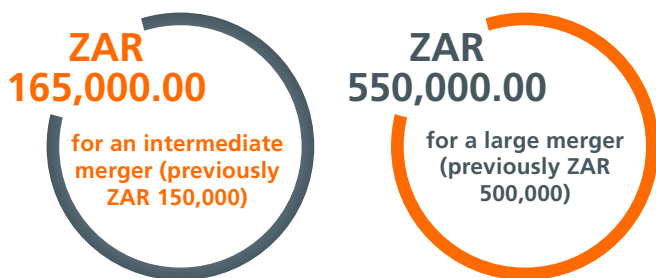
SOUTH AFRICA 2019 THE YEAR AHEAD

2019 GENERAL OVERVIEW

The comprehensive changes proposed by the Competition Amendment Act 2018 will result in compliance policies requiring an update. Boards and employees will also most likely require compliance training to ensure that the practical implications of the amendments are properly understood.

MERGERS

NEW MERGER FILING FEES EFFECTIVE FROM 1 JANUARY 2019:



2019 – SOME KEY MERGER-RELATED DECISIONS HAVE ALREADY BEEN HANDED DOWN AND MORE ARE EXPECTED

- In the *Competition Commission/ HCI* case, the Constitutional Court confirmed that the approval of a merger is a once-off affair. The Court held that the need for notification of a merger is triggered when a firm acquires control of another and once approval for such merger is granted, no further investigation is allowed other than to confirm that assurances made and conditions placed by the Commission have indeed been met.
- The mining merger involving Sibanye-Stillwater and Lonmin is also expected to be contested at the CAC. The appeal was launched by the Association of Mineworkers and Construction Union, who allege that the Competition Tribunal failed to take into consideration its submissions on the merger, particularly in relation to employment concerns.

KEY MERGER-RELATED CHANGES INCLUDED IN THE COMPETITION AMENDMENT ACT THAT WILL BE CLOSELY FOLLOWED

Merger Assessment - The provision empowering the Commission to assess any mergers engaged in by a party for such period as may be stipulated by the Commission – these provisions are aimed at targeting concerns around creeping concentration.

Intervention in merger proceedings involving a foreign acquiring firm - The provision which empowers a Committee (appointed by the President) to intervene in a merger where the acquiring firm is foreign, and the merger may adversely affect the country's national security interests.

PROHIBITED PRACTICES

2019 WILL BE A PRECEDENT-SETTING YEAR

- The Constitutional Court's judgment in the *Competition Commission/Media24* predatory pricing case is expected to clarify the approach to this complex issue. Predatory pricing occurs if a dominant firm deliberately sells goods or service below marginal or average variable cost, so as to foreclose rivals out of the market. The dominant firm intentionally incurs losses in the short term with a view to raising prices in the long term once its rivals have exited the market. In this case, the Commission contends that Media24 committed an exclusionary act by engaging in a predatory pricing strategy to drive a rival community newspaper publication out of the market in the Welkom area.
- The Tribunal's pending decision in the *Competition Commission/Uniplate* matter is an important abuse of dominance case that involves exclusive agreements. In this case, Uniplate's exclusive agreements with suppliers of embossing machines will come under scrutiny. Few abuse of dominance matters have been successfully prosecuted in South Africa and it will be important to see if this case will contribute to much-needed precedent on this area of the law, especially given the prevalent use of exclusive agreements in general business practice.
- In the *Competition Commission/Wilmar Continental and Others* case, the Commission has applied to the Supreme Court of Appeal for leave to appeal a recent High Court judgment setting aside its dawn raid on several edible oils companies. The court held that the Commission had failed to make out a case for the issuing of a search warrant in terms of the Competition Act and it will be interesting to see if the SCA adopts a similar view.
- A ruling on the exceptions raised by a number of banks in the forex cartel case is also expected soon.

KEY CHANGES INCLUDED IN THE AMENDMENT ACT THAT WILL BE CLOSELY FOLLOWED

Administrative penalties - The Amendment Act proposes the removal of the yellow card for first time prohibited practice offences and increases the maximum administrative penalty to 25% of a firm's annual turnover for repeat offences. Regulations are expected to clarify contraventions involving horizontal and vertical prohibited practices.

Abuse of dominance - Proposed price discrimination provisions are aimed at ensuring that small and medium businesses or firms owned by historically disadvantaged persons are able to participate effectively in a market, while proposed buyer power provisions make it an offence for a firm with buyer power to unfairly exploit suppliers that are small and medium business in specific sectors of the economy. Buyers and sellers, particularly in concentrated markets, must carefully consider the impact of these provisions.

MARKET INQUIRIES & ADVOCACY

The private healthcare sector (which has been running for over five years), data services and grocery retail market inquiries are all expected to be completed in 2019, while the public passenger transport inquiry is expected to conclude in 2020.

It will also be interesting to evaluate the results of the Commission's various advocacy initiatives

In the school uniform industry, the Commission has entered into an MOU with FEDSAS, a federation of school governing bodies and is expected to make an announcement regarding its interactions with stakeholders in the industry in February 2019.

A final Code of Conduct for Competition in the South African Automotive Industry is also expected to be published. The finalisation of the code has proved challenging given the far-reaching effect it is expected to have on the industry.

KEY CHANGES IN THE AMENDMENT ACT TO NOTE:

- The new market inquiry provisions proposed by the Amendment Act are aimed at improving the process and ensuring that its outcomes include measures to address concentration and the transformation of ownership.
- The Commission's findings following a market inquiry will be binding.
- The Commission will be able to order divestitures as part of its duty to remedy structural features identified as having an adverse effect on competition in a market.
- Market inquiries must be completed in 18 months.

CHANGES IN LEADERSHIP

In 2019, significant leadership changes are expected at the competition authorities. The final term of the Chairperson of the Tribunal, Norman Manoim, will come to end later this year. The Commission will also welcome James Hodge, the former Managing Partner of Genesis Analytics, as its Chief Economist.

Other changes at the Commission also include Makgale Mohlala moving to head of Mergers & Acquisitions and Lebo Mabidikane taking over as head of the Cartels Division.

REST OF AFRICA 2019 THE YEAR AHEAD

2019 GENERAL OVERVIEW

Across Africa, 2019 is likely to be marked by strengthened enforcement efforts and an increase in the number of countries with active competition law regimes.

On an almost monthly basis, competition authorities are being established and new legislation is being published. Businesses working on the continent will need to be cognisant of these developments. Being aware of potential competition law developments enables businesses to exercise vigilance and adopt proactive strategies to manage risk.

AT THE DOMESTIC LEVEL:

- Several new competition authorities may become operational in 2019 – the DRC, Comoros, Madagascar and Mozambique.
- In Nigeria, the President has assented to the Federal Competition and Consumer Protection Act 2018 – a competition authority is expected to become fully operational soon.
- Competition legislation is likely to be finalised in Ghana.
- New amendments to Egypt’s merger control regime are expected which will oblige companies to obtain the approval of the agency before completing a merger.
- In Namibia, there is likely to be some case law developments related to abuse of dominance.

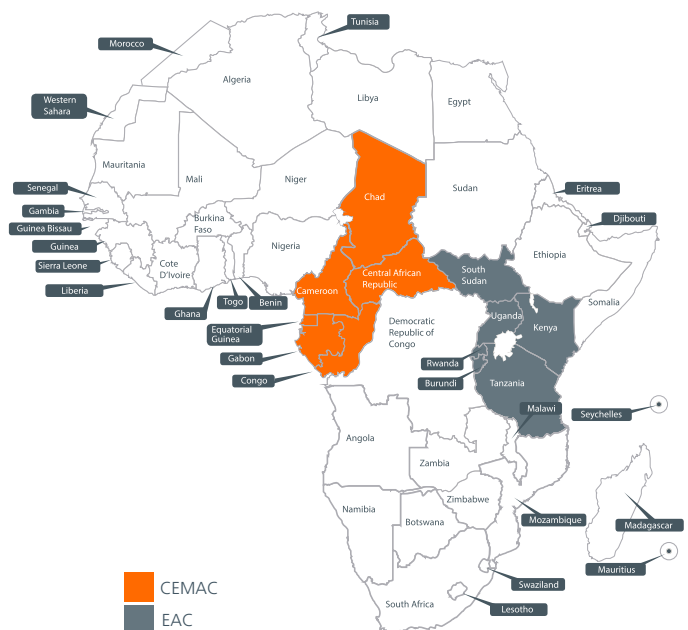
AT THE REGIONAL LEVEL:

Several regional competition authorities (aside from COMESA) are likely to start finding their feet (such as the EAC Competition Authority, CEMAC and ECOWAS) and it will be important to monitor their activities across their continent.

COMESA



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