

COMPETITION LAW AFRICA

YEAR IN REVIEW 2020



MERGERS

- Many mergers were approved subject to **extensive public interest conditions** relating to employment (for instance, in South Africa, moratoriums on retrenchments for 5 years have been imposed), investment and the effect on an industry or region).
- **Creating inclusivity and enhancing participation** was also a focus (e.g. the PepsiCo / Pioneer merger was the first major transaction in which the promotion of a greater spread of ownership of firms by workers and historically disadvantaged persons was a central issue).
- Authorities began grappling with **complex mergers in the digital space** such as the Google / Fitbit merger in South Africa, where Google agreed to several stringent conditions (for 10 years), including continued access by third parties to Fitbit's data, and access to the Android Operating System for all competing manufacturers of wrist-worn wearable devices.
- **Fines for prior implementation** were imposed in Kenya and Zimbabwe.

CONDUCT

- **Botswana** – the authority referred an abuse of dominance complaint against Gaborone Container Terminal (GABCON) for refusing to provide private haulage services.
- The **COMESA Competition Commission** (CCC) found that an agreement between Shoprite Supermarkets and GS1 Kenya did not amount to an anti-competitive practice.
- **Kenya** - the authority launched investigations into the abuse of buyer power in the retail sector, focusing on 25 large retailers.
- **Namibia** - the Namibian Supreme Court set aside a dawn raid on the basis that only an inspector can apply for the power to search and seize.
- The **South African Constitutional Court's** decision in the Pickfords case means that the **prescription provisions** in the Competition Act no longer prevent the competition authority from investigating and prosecuting cartel conduct that stopped three years before its investigation started - if the Competition Tribunal is willing to condone non-compliance.
- The **South African Competition Appeal Court's** (CAC) finding that an industrial supplier, Babelegi, had charged excessive prices for dust masks at the outbreak of the Covid-19 pandemic is the **first-ever finding of excessive pricing against a firm by the CAC**. The judgment could mean that small firms, that may not otherwise have been regarded as dominant, may be found to have market power due to their ability to unilaterally raise prices to unreasonable levels during a disaster.

MARKET INQUIRIES AND ADVOCACY

- In South Africa:
 - The **first impact** study, focusing on the forestry sector, was also published.
 - The competition authority released its paper on "**Competition in the Digital Economy**" and announced several proposed strategic actions to ensure a more competitive digital economy.
 - Final **buyer power and automotive guidelines** were published. Schools entered into agreements with the authority to ensure that school uniforms were affordable, and several banks committed to reform their conveyancing practices to allow for transformation in the industry. Shoprite and Pick n Pay also agreed they would **no longer enforce exclusivity clauses** contained in lease agreements against small and medium enterprises (SMEs) and specialist stores.
- **Kenya** – the authority announced that it intends carrying out a sector study into the regulated and unregulated digital credit markets.
- **Malawi** - the Competition and Fair Trading Commission (CFTC) launched a new project financed by the European Union to enhance the CFTC's case management system.
- **Nigeria** - the Fair Competition and Consumer Protection Commission and Economic and Financial Crimes Commission entered into an MOU with the United States Federal Trade Commission.

LEGISLATION AND NEW AUTHORITIES

- Authorities began fully operating in **Angola and Nigeria**.
- The **Mozambican authority** is expected to become fully operational at the end of January 2021, and the authority's mandate was expanded in Botswana.
- **Revised thresholds** were published in Zimbabwe.
- **CEMAC Regulations** were published introducing a filing fee, as well as merger filing forms.
- **Revised / new guidelines** were issued by the authorities in Kenya, Mauritius and Nigeria.
- New proposed legislation was published in **Eswatini and Namibia**.
- A leniency policy was launched in **Egypt**.
- An online case management system was implemented in Kenya.
- Nigeria – **new merger regulations** (including new filing fees) and merger filing forms were published.
- Tanzania – **sanctions were limited** to a fine not exceeding 10% of the person / firm's annual turnover sourced from the Mainland of Tanzania.
- The COMESA Competition Commission **suspended Phase 1 and Phase 2 review periods** for merger assessments.
- The East African Legislative Assembly held its First Reading of the **EAC Competition (Amendment) Bill, 2020**.

COVID-19-RELATED DEVELOPMENTS IN SOUTH AFRICA

- **Exemptions** were granted in the following sectors to promote concerted conduct aimed at preventing the escalation of the national disaster: healthcare, banking, retail property and the hotel industry.
- **Consent agreements** - the Competition Commission confirmed that it had received over 1 700 Covid-19-related complaints and tip-offs since March 2020. 35 settlement agreements, with a total value of approximately ZAR 15.5 million, were confirmed by the Competition Tribunal.
- **Contested matters** – Dis-Chem was fined ZAR 1.2 million by the Competition Tribunal for charging excessive prices for surgical face masks, and although the CAC also found Babelegi guilty of excessive pricing of face masks, no fine was imposed on Babelegi.



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COMPETITION LAW AFRICA

YEAR TO COME 2021

MERGERS

- In South Africa, the competition authority will continue to focus on creating a more **inclusive economy and de-concentrating high levels of ownership**. Conditions, particularly relating to the promotion of a greater spread of ownership and the ability of SMEs and HDP firms to participate more effectively, will continue to play a major role in merger assessments.
- **Foreign investment** - Section 18(A) of the South African Competition Amendment Act, dealing with the effect of acquisitions by foreign firms on the country's national security interests, is expected to come into effect.
- In keeping with the trend of third-party interventions in merger applications (e.g. the JSE / Link Market Services and Thabong Coal / South 32 mergers) it can be expected that **intervention applications will be common** in 2021, especially when the merger could have an effect on a particular region or industry.
- **Public interest conditions** will continue to feature prominently in mergers across Africa. More conditions related to nationalism, local procurement and supply commitments, the creation of new jobs and development funds are expected. These conditions have numerous effects, ranging from the timing of the proposed transaction to the way the business of the merged entity is ultimately conducted.

CONDUCT

- In South Africa, following the ground-breaking Babelegi decision, more firms (including those that would not traditionally be regarded as dominant) may be prosecuted for abuse of dominance. Across Africa, we also anticipate a growing number of **abuse of dominance** prosecutions (e.g. once proposed amendments to the Namibian Competition Act are finalised, abuse of dominance may be per se prohibited in Namibia).
- In South Africa, Price Discrimination Guidelines are likely to be finalised. We also anticipate an **increase in buyer power** complaints.
- Authorities across Africa will continue to closely monitor **markets traditionally plagued by anti-competitive behaviour** (e.g. the Zambian authorities are probing price fixing in the cement market and the Nigerian authorities are closely monitoring the flour market).
- **Digital economy** – more investigations into the behaviour of large technology firms are expected, especially given the growing number of complaints launched worldwide.
- As the Covid-19 pandemic continues, authorities across Africa will continue to monitor the **pricing practices** of suppliers of masks, sanitisers and certain foods.

MARKET INQUIRIES, LEGISLATION AND NEW AUTHORITIES

- In South Africa, final recommendations are expected in the **public passenger transport** market inquiry. Following the publication of the first impact study report in August 2020, the authority is expected to initiate several more impact studies to assess the effect of its past decisions on particular industries.
- It is anticipated that discussions and stakeholder engagements on the second phase (dealing with competition law) of the **African Continental Free Trade Agreement** (AfCFTA) will begin. One of the aims of the AfCFTA is to create uniform competition policy across the region, and ultimately a supra-regional competition regulator.
- **East African Community** – the EAC Competition (Amendment) Bill, 2020 is likely to be finalised and the East African Community Competition Authority will commence reviewing mergers.
- **Ghana and Uganda** – after extensive advocating by stakeholders over the last few years, competition legislation may finally be enacted in these jurisdictions.
- **Mozambique** – in 2020, the Chairman and Board of the competition authority were appointed. The authority is likely to be fully operational in early 2021.
- **Namibia** – comprehensive changes introduced by the Draft Competition Bill are likely to become effective. Key amendments relate to abuse of dominance and concerted practices.
- Important amendments to existing competition legislation are expected in Egypt. In late 2020, the Egyptian Prime Ministry approved a draft law amending certain provisions of Law No. 3 of 2005 on the Protection of Competition and Prohibition of Monopolistic Practices. The draft law adds a definition of "concentration", lists transactions that are exempt from the definition, offers clearer definitions of control and material influence, and **mandates the notification of concentrations to the Egyptian Competition Authority**.

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ACROSS AFRICA, CONTACT US HERE**