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AFRICA COMPETITION LAW ANNUAL REVIEW 2021/22

2021 was an important year for competition law across the continent. Key focus areas of the South African competition authorities were primarily public interest and digital markets. In the rest of Africa, competition authorities strengthened their merger control regimes and continued to implement competition law steadfastly across many sectors. The following is a short summary of some important developments in 2021 as well as our forecast of how these developments will impact firms in 2022.



MERGERS

Some of the developments included in this publication were sourced using the Betweenity App (betweenity.co.za)

Public interest is the new normal

▼ 2021 DEVELOPMENTS

Botswana

Several mergers were approved subject to public interest conditions relating to employment (e.g. that there will be no merger specific retrenchments) and citizenship empowerment.

South Africa

- **Extensive public interest conditions** were imposed in many mergers. The South African Competition Commission (SACC) frequently raised concerns regarding the potential dilution of B-BBEE/historically disadvantaged persons (HDP) ownership structures as a result of merger transactions.
- **For the first time in 20 years a merger was prohibited on public interest grounds alone.** In June 2021, the SACC prohibited ECP Africa's proposed acquisition of Burger King (South Africa) and the Grand Foods Meat Plant from Grand Parade Investments. Although the transaction was ultimately approved by the Competition Tribunal, the SACC's ground-breaking decision will have long-lasting consequences for future M&A transactions in South Africa.

▼ 2022 EXPECTATIONS

Many jurisdictions in Africa will continue to focus on public interest considerations, particularly the effect of a proposed merger on employment, as well as small and medium firms in the market.

Potential investors must understand the varying "on-the-ground" dynamics in different jurisdictions and be prepared to potentially contribute to national policy priorities such as job creation and infrastructure development.

Merger parties must adopt a more proactive approach in providing detailed public interest and transaction-related information to the authorities. In South Africa, amendments to the merger filing forms will likely be finalised in 2022 – following this, firms will have to provide extensive information about the effect of the merger on all public interest considerations, as well as more detailed information on their proposed transactions.

Concentration and prohibitions

▼ 2021 DEVELOPMENTS

Botswana

The Botswana Competition and Consumer Authority (BCCA) prohibited a merger in the retail rental space on concerns that the merger would lead to the removal of a competitor and result in one of the merger parties enhancing its dominance.

South Africa

- In some markets (e.g. retail pharmacies), conditions were imposed requiring merger parties to **notify all future acquisitions** (including those not requiring mandatory notification), after the SACC raised concentration concerns.
- Mergers in SA were **prohibited in the building, agriculture, and sodium cyanide sectors.**

▼ 2022 EXPECTATIONS

South Africa

In late 2021, the SACC released its report titled **"Measuring Concentration and Participation in the South African Economy: Levels and Trends"** (Concentration Report). One of the findings of the Concentration Report was that **mergers are affecting government-licensed industries** such as gambling, healthcare and agricultural processing.

We anticipate that these mergers, as well as those taking place in industries that the SACC has identified as highly concentrated (e.g. agro-processing, healthcare, communications, financial services etc.), will be closely examined in 2022.



MERGERS

Digital markets

▼ 2021 DEVELOPMENTS

South Africa

The SACC published proposed amendments to its draft Small Merger Guidelines. If certain criteria are met, **merger parties operating in digital markets** may be required to inform the SACC of all small mergers (i.e. those mergers that do not meet the prescribed merger thresholds).

▼ 2022 EXPECTATIONS

South Africa

Although the amendments to the Small Merger Guidelines have not yet been finalised, we anticipate that there will be some form of regulation which will **expand the scope of potentially-notifiable mergers in digital markets**.

Competition law and the Constitution

▼ 2021 DEVELOPMENTS

South Africa

The Mediclinic Constitutional Court decision emphasised that **competition law must be interpreted and applied with regard to the Constitution**. The Constitutional Court prohibited the merger between Mediclinic SA and Matlosana Medical Health Services and held that the Competition Appeal Court had failed to promote the object of Section 27 of the Constitution (the right of access to healthcare).

▼ 2022 EXPECTATIONS

South Africa

As constitutional and competition law become more infused, **many complicated constitutional challenges will arise**. Some will have substance and merit, and others will be opportunistic. The Constitutional Court's judgment in the Mediclinic case makes it clear that merger filings can no longer be limited only to competition issues. **Filings must provide comprehensive details on all public interest aspects** that may be impacted by a proposed merger.

Sustainability issues

▼ 2021 DEVELOPMENTS

South Africa

The merger involving the acquisition by Air Liquide of 16 air separation units owned by Sasol was approved, subject to a commitment by the merger parties that they will target a reduction of carbon emissions associated with the target assets by 30% within 10 years. The SA Competition Commissioner has remarked that **ignoring sustainability issues is an existential risk for competition authorities**.

▼ 2022 EXPECTATIONS

We expect that environmental, social and governance issues will feature more prominently and that mergers involving companies in sectors such as energy, agriculture, mining, fisheries, plastic, transport etc. will be carefully assessed.



MERGERS

Regional enforcement and prior implementation

▼ 2021 DEVELOPMENTS

COMESA

The COMESA Competition Commission (CCC) issued an important practice note clarifying the application of its merger notification thresholds. The CCC also issued its first fine for failure to notify a transaction to the CCC within the prescribed time period and imposed a fine on a merger party for failing to comply with a merger condition.

Mozambique

The Mozambican competition authority became fully operational in 2021 and amended its merger filing fees and merger thresholds.

Nigeria

The Federal Competition and Consumer Protection Commission also amended its filing fees and published new merger review regulations.

Zimbabwe

The Zimbabwean Competition and Tariffs Commission imposed a fine on a dairy milk processor for implementing a merger without approval.

▼ 2022 EXPECTATIONS

COMESA

We expect that regional competition authorities such as the CCC will continue to increase enforcement efforts. The CCC, under the leadership of its new Chief Executive Officer, Willard Mwemba, has indicated that it intends to ramp up its assessment of mergers (with a particular focus on mergers in the private equity space) and increase its capacity.

Rest of Africa

2022 is likely to be marked by a continued increase in the number of countries with active competition law regimes. Countries with existing competition laws will continue to enhance legislation, improve processes and increase capacity.

South Africa: In the 2020/21 financial year, of the 242 mergers notified to the SACC, 78% were approved subject to conditions.

COMESA: In 2021, the COMESA Competition Commission **granted 6 comfort letters, and approved 29 mergers unconditionally and 2 mergers with conditions.**

The CCC also issued its first ever fine for failure to notify a transaction to the CCC within the prescribed time period.



CONDUCT

2021 DEVELOPMENTS

COMESA

The CCC published a practice note on conduct of hearings; procedures for cases where undertakings have been reached; and a cautionary note on restrictive business agreements.

Botswana

The BCCA entered into a settlement agreement with Gaborone Container Terminal. The BCCA had alleged that GABCON abused its dominance through a refusal to deal and excessive pricing behaviour.

Eswatini

The Eswatini Competition Commission launched an investigation into the price increase imposed by a funeral home, known as a “Covid-19” fee, after the funeral home advertised that it would be charging an additional fee for all Covid-19 related deaths.

Mauritius

The Mauritian Competition Commission (MCC) imposed penalties on members of the Association of Private Health Plans and Administrators (APHPA). The MCC’s investigation, among other things, revealed that members of the APHPA had colluded on certain costs.

Kenya

The Competition Authority of Kenya (CAK):

- published model contracts for use by buyers and suppliers in the retail and insurance sectors, aimed at minimising abuse of buyer power
- operationalised an Informant Reward Scheme which provides a mechanism for informants to receive financial incentives in exchange for actionable information about restrictive trade practices
- fined three companies in the concrete and wooden electricity poles market for collusive tendering
- fined several market players who colluded to fix the minimum price of liquefied petroleum gas cylinders

South Africa

- Fines were imposed on several firms for various cartel activities in the outdoor advertising and tourism industries, while complaint referrals were initiated against a global spark plug supplier and firms operating in the earthmoving machinery and plant equipment space.
- In the matter involving Beefcor, the Constitutional Court had to decide whether the SACC could reinstate a withdrawn complaint. The Court held that the words “completed

proceedings” mean finalised proceedings, in that the Tribunal has disposed of the issues relating to the merits of the complaint.

- The SACC’s Concentration Report detailed the levels of concentration and participation in South Africa. The report found that in the 144 sectors of the economy that were examined, 69.5% were highly concentrated. Sectors highlighted include agriculture, retail, health care, financial services, energy, gambling, and construction.

Zambia

The Competition and Consumer Protection Commission fined Lafarge Zambia Plc and Mpande Limestone Ltd 10% of their annual turnover for engaging in price fixing and market division. Seven suppliers of fish fingerlings were also fined for engaging in cartel conduct.

2022 EXPECTATIONS

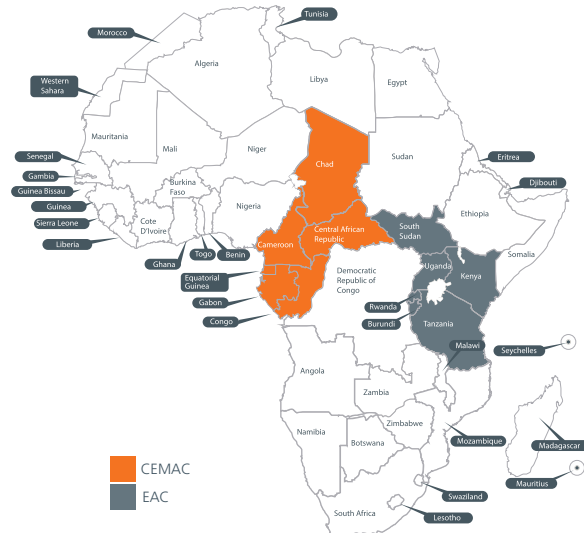
If the Covid-19 pandemic continues in 2022, we expect that competition authorities across Africa will continue to closely monitor the pricing of essential items such as food and personal protective equipment. Firms operating in these sectors should guard against excessive price increases.

Authorities across Africa will also continue to closely monitor markets traditionally plagued by anti-competitive behaviour (e.g. cement, flour, healthcare), and may also begin to probe digital markets more closely since many firms in this space are facing competition investigations globally.

COMESA

As part of increased prohibited practice enforcement efforts, the CCC is likely to continue focusing on regional distribution agreements (particularly exclusivity provisions).

CEMAC & EAC





MARKET INQUIRIES, NEW LEGISLATION & ADVOCACY

2021 DEVELOPMENTS

Egypt

The Egyptian Competition Authority filed a lawsuit against a telecommunication firm and two retailers for failure to provide data and documents for an electronic device market study.

COMESA

The CCC announced that it is conducting a **market observation exercise to look at small-scale food producers and consumers** in some of its member states (Malawi, Kenya, Zimbabwe and Uganda) to determine whether bottlenecks exist in these markets that may hinder sustainable growth.

South Africa

- The **Online Intermediation Platform Market Inquiry** (OIPMI) moved swiftly ahead in 2021. Several requests for information were issued to stakeholders and public hearings took place in late 2021.
- The SACC released its final **Public Passenger Transport Market Inquiry Report**. The report indicated that the public transport network lacks integration, has a skewed subsidy system and requires policy frameworks.
- From July 2021, the SACC's Guidelines for Competition in the South African **Automotive Aftermarket** became effective. These guidelines are aimed at providing guidance to industry players on the adoption of pro-competitive measures in the automotive aftermarket, and promoting greater participation of small businesses, as well as HDPs.

2022 EXPECTATIONS

The African Continental Free Trade Area Agreement

Trading under the AfCFTA began at the beginning of 2021. We anticipate that negotiations involving the **development of the AfCFTA's competition policy** will progress in 2022. It has been reported that member states are in the process of carrying out national consultations on the AfCFTA's competition policies.

East Africa Community

We expect that the East Africa Community Competition (Amendment) Bill will be finalised and that the East African Community Competition Authority will begin reviewing mergers soon. The Democratic Republic of Congo is also expected to be admitted to the EAC in 2022.

ECOWAS

The ECOWAS Council of Ministers has validated draft supplementary legislation on the establishment, powers and functions of the ECOWAS Regional Competition Authority (ERCA). The ERCA is

expected to start interventions in 2022 in the regional market and member states.

COMESA

The CCC has undertaken to amend its legal instruments, particularly the CCC Regulations and guidelines. This process is on-going and will be finalised in 2022.

South Africa

- The OIPMI will hold closed in-camera hearings in early 2022 and publish its provisional report by May 2022. The final report is scheduled to be published in November 2022. It is likely that the recommendations contained in the final report will have **far-reaching consequences for firms operating in digital markets**.
- Following the publication of the SACC's first Concentration Report, the **SACC may launch market inquiries and investigations** in some of the sectors that are identified as being highly concentrated such as agriculture and fintech.
- Given that the SACC has embarked on public awareness campaigns regarding its **school uniform and automotive guidelines** (both of which are not binding), these guidelines may be used as a basis to pursue investigations in 2022. Many other competition authorities across Africa have also warned against unfair / anti-competitive practices in the school uniform sector.
- Regulations may also be published pertaining to restrictive horizontal and vertical practices, exemptions and excessive pricing.

Seychelles

A new Competition Bill is expected to be passed in the Seychelles. This new legislation will repeal the current Fair Trading Commission Act, the Fair Competition Act and Consumer Protection Act.

COMESA



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