



COMPETITION LAW ANNUAL REVIEW

2019/2020

WEBBER WENTZEL

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SOUTH AFRICA KEY DEVELOPMENTS - 2019

1. The Competition Amendment Act 2018 (Amendment Act)

- In July, many of the proposed amendments to the Competition Act came into effect. These amendments will have a substantial effect on mergers, market inquiries and the ability of government to intervene in competition matters. The partial commencement of the Amendment Act, which primarily seeks to address the high levels of economic concentration and the skewed ownership profile of the South African economy, is one of the most significant developments in this area of law in the last 20 years.
- Significantly, the amendments provide for the imposition of administrative penalties for all contraventions, including first time contraventions, of the Act.
- Some contentious provisions of the Amendment Act have not yet come into effect e.g. the obligation to notify foreign acquisitions for separate assessment to determine if these mergers may adversely affect the country's national security interest.
- Innovative draft Buyer Power and Price Discrimination regulations and guidelines have been published for public comment.

2. Mergers

- Merger conditions are becoming more expansive with the aim of addressing broader socio-economic and industrial policy issues.
 - In the Clover / Milco merger, the merged entity agreed to contribute ZAR10 million towards the relocation and training costs of effected employees.
 - In the Mondi transaction, the Mondi Group was required to invest in programmes aimed at providing support to small businesses within the group and developing communities where the group conducts its business activities.
 - In the Boundary Terraces / Bravo Group merger, Bravo Group was required to establish a development fund worth approximately ZAR7.35 million to assist affected employees, as well as their immediate family members in terms of reskilling, small business development and/or a bursary allocation for an immediate family member or affected employee.
 - In the SAB / Diageo merger, SAB was required to provide refrigerator space to its competitors, and in the CIVH / Vumatel merger, the merged entity agreed to provide free uncapped fibre services to public and private schools that its networks bypass.
- The Commission is also imposing longer moratoriums on merger specific retrenchments (e.g. a 5-year moratorium was imposed in the IDC / Celrose merger), or has in some instances, restricted merger specific retrenchments completely.

Conditional approvals related to employment, the impact of the merger on historically disadvantaged individuals, the maintenance of local production, SME development and BEE ownership levels



348 mergers were notified



Public interest conditions were imposed in 45 mergers



4 mergers were prohibited

3. Prohibited practices

- Fines were issued on firms in a number of industries including furniture removal, construction, football, industrial cleaning, power cables and wire, while complaint referrals were initiated against fleet management, network maintenance and shipping companies.
- The Constitutional Court dismissed an appeal by the Commission in the Media24 predatory pricing matter.
- The Competition Appeal Court (CAC) upheld the ZAR20 million penalty imposed on Computicket for abusing its dominance through exclusive agreements. The CAC also dismissed collusion claims against two pest control companies, as well market allocation allegations against Ster Kinekor and Nu Metro - both cases were dismissed on the basis that there was no evidence of collusion.
- The Tribunal issued a ZAR16 million penalty on Uniplate for abusing its dominance by strictly enforcing exclusive supply agreements, but dismissed separate collusion cases against two asphalt producers and two Robben Island ferry boat operators. The Tribunal also dismissed the long-running case against Natal Portland Cement (NPC) after finding that NPC was not part of a market-sharing cartel in the cement industry.

4. Market Inquiries & Advocacy

- The Commission issued long-awaited final recommendations in three market inquiries:
 - The Health Market Inquiry Report sets out findings in relation to facilities, practitioners and funders, as well as a package of recommendations;
 - The Grocery Retail Market Inquiry's findings focused on exclusive leases, fair trading practices and spaza shops; and
 - The Data Services Market Inquiry report sets out findings pertaining to data pricing, limitations in the availability of spectrum and access to facilities and fixed line data services.
- The Tribunal confirmed settlement agreements between the Commission and several firms involved in the manufacture of school uniforms in terms of which, the firms committed to contract school uniform suppliers through a transparent and competitive bidding process.
- After months of engagement with stakeholders, the Commission announced that it no longer intends to implement an Automotive Code of Conduct, but that it intends to rather convert the proposed code into a guideline.
- The Commission concluded MOUs to facilitate collaborative efforts with the Botswana Competition Authority, and the Zimbabwe Competition and Tariffs Commission respectively. The Commission also concluded an MOU with ICASA to effectively coordinate the exercise of concurrent powers.

5. Leadership changes

Mondo Mazwai was appointed as the new Tribunal Chairperson, after Norman Manoim's second term of office ended on 31 July. Tamara Paremoer was appointed as the Divisional Manager of Mergers & Acquisitions. James Hodge, the former Managing Partner of Genesis Analytics, was appointed as the Commission's Chief Economist.



Levied a total of
**ZAR333
Million**
in penalties, largely from
settlement agreements



Handled
142
Cartel cases

SOUTH AFRICA 2020 - WHAT TO EXPECT

1. The Amendment Act

- In 2020, it is expected that all of the extensive amendments to the Competition Act will be enacted into law. There is likely to be an increase in the number of complaints relating to buyer power and price discrimination in particular, once these provisions are enacted. Both provisions seek to support fair participation in the economy by small and medium enterprises and firms controlled by historically disadvantaged persons.
- It is anticipated that regulations pertaining to a number of the new amendments will also be finalised e.g. conduct between competitors, excessive pricing and exemptions.
- As a further consequence of the Amendment Act coming into effect, it is also expected that extensive conditions, particularly in relation to public interest / socio-economic concerns will continue to play an essential role in merger assessments. These concerns primarily relate to employment, the promotion of a greater spread of ownership, the ability of small and medium businesses to effectively participate within a market, advancing industrial policy objectives and stimulating the economy
- In terms of its power to conduct impact studies post-merger approval, it can also be expected that the Commission will begin to publish reports assessing the implementation of submissions made by merger parties and detailing the impact of past merger decisions.

2. Important decisions expected in 2020

- There may be some movement on forex matter involving 21 banks. An appeal against the Tribunal's decision relating to exceptions raised by a number of banks was heard in December 2019 at the CAC and the Constitutional Court's ruling in the same matter, focusing on access to the Commission's record, is expected in 2020.
- The CAC's judgment in the Uniplate appeal will hopefully shed further light on the use of exclusive agreements by dominant firms.
- The Tribunal's decisions in matters pertaining to Computicket / Shoprite (abuse of dominance allegations) and Unilever (collusion allegations) are expected to be finalised.
- The authorities may also begin to concentrate on the enforcement of criminal sanctions specifically ensuring that appropriate processes are in place to begin proper enforcement.

3. Market Inquires & advocacy

- The final report on the Public Passenger Transport Inquiry is expected on 31 March 2020.
- Following the extensive final recommendations in the Data, Healthcare and Grocery Retail market inquiries - the extent of implementation of the recommendations will be closely monitored. While some firms involved may challenge the recommendations, the Commission is likely to be involved in advocating for new legislation and regulations to advance implementation.
- Smaller, more targeted market inquiries may also be initiated over the course of 2020 given the Commission's expanded mandate in terms of the Amendment Act.
- Given the Commission's advocacy initiatives in the automotive and school uniform industries throughout 2019, it will be interesting to see if the Commission adopts similar collaborative engagement initiatives in other priority sectors in 2020.



REST OF AFRICA KEY DEVELOPMENTS - 2019

1. New competition authorities

- The Federal Competition and Consumer Protection Commission (FCCPC) in Nigeria and the Competition Council in Morocco both became operational.
- In May, ECOWAS launched its regional competition authority.
- Representatives from the EAC member states validated the draft EAC Competition Authority's Outreach and Advocacy Strategy (2019/20 - 2024/25) - the draft was finalised and submitted for approval. In 2018, it was reported that the EAC's Competition Authority had begun undertaking sector studies to inform the competitiveness of the region.

2. New legislation / amendments to existing legislation

- New competition law legislation came into effect in Angola and Nigeria.
- Consolidated CEMAC Regulations were published in terms of which the thresholds for notification were amended.
- The COMESA Competition Commission (CCC) published market definition, restrictive business practices and abuse of dominance guidelines.
- Nigeria - new merger thresholds were published and the FCCPC released guidelines specifically applicable to foreign-to-foreign mergers.
- Botswana - amendments to existing legislation (widening the mandate of the Competition Authority of Botswana to include enforcement of the Consumer Protection Act) came into effect and new Competition Regulations were published.
- Kenya - amendments to existing legislation (principally relating to buyer power, new merger thresholds and filing fees) came into effect.

3. Mergers

A number of conditions relating to employment and localisation were imposed, while a number of firms were fined for prior implementation.

- Botswana - the Edcon merger was approved subject to the condition that the merged entity ensure that the business of Edcon is maintained in Botswana, while a merger involving shares in a petrol station was approved on condition that the shareholding is allocated as 51% for citizens and 49% for non-citizens.
- The Egyptian Competition Authority requested that merger parties apply for merger approval in the Uber / Careem transaction, despite the current post-merger notification regime in Egypt.
- The Competition Authority of Kenya (CAK) approved the acquisition of National Bank of Kenya Ltd by KCB Group PLC subject to the condition that 90% of the merged entity's employees will be retained for a period of 18 months from the date of the closing of the merger. The CAK also imposed a financial penalty of KES 1.5 million (approximately ZAR 202,000) on Interconsumer Products Ltd for acquiring Belsize Industries Ltd and implementing the transaction without regulatory approval.

- The Malawi Supreme Court of Appeal has upheld a decision by the Competition and Fair Trading Commission (CFTC) which required Airtel Malawi Ltd to apply to the CFTC for authorisation of the acquisition by Barti Airtel Ltd of Zain Malawi.
- The Namibian Competition Commission (NACC) entered into a settlement agreement with PG Glass Namibia, in terms of which it has agreed to pay a fine of approximately NAD1.4 million (approximately ZAR1.4 million) for implementing a merger prior to approval.

4. Prohibited practices

- The Kenyan government created a Buyer Power Department within the CAK to address concerns regarding businesses abusing their influence over suppliers.
- The Mauritius Competition Commission (MCC) received a total of 102 applications under its Resale Price Maintenance Amnesty Programme. The MCC also found that two chemical fertiliser supply companies engaged in collusive conduct and recommended that a fine of Rs 76.4 million (approximately ZAR 32 million) be imposed.
- The NaCC confirmed its preliminary findings that Computicket Namibia abused its dominant position by imposing exclusive agreements on its clients and engaging in bundling, price discrimination and tying. The NaCC also refused an application by the Namibian Petroleum Corporation to grant an exemption for a proposed 50% import mandate for fuel.
- The Zambian Competition and Consumer Protection Commission launched a 6-month amnesty program to raise awareness and compliance - the programme provides an opportunity for persons or enterprises who are engaged in cartel practices to apply for amnesty in exchange for a waiver of fines as well as immunity from possible prosecution.

5. Market Inquiries & Advocacy

- The Eswatini Competition Commission (ECC) released a draft report in its Retail Banking Market Inquiry. Following a finding that bank charges were relatively high compared to other Common Monetary Area member countries, the ECC has recommended, among other things, that the Central Bank of Eswatini ensures that banks do not charge high fees that are not related to the costs of providing services.
- In February 2019, the Zimbabwean parliament began an inquiry into mobile data costs. The committee decided to set up the inquiry after receiving an increased number of consumer complaints related to high charges. The Competition and Tariffs Commission also announced that it will be commissioning a market inquiry into the school uniforms sector, following allegations of anticompetitive practices.
- In April 2019, the CAK released a report on its Market Inquiry into the SME Leasing Sector in Kenya. The report focused on barriers to the expansion of leasing for SMEs and made a number of substantial recommendations.

REST OF AFRICA 2020 - WHAT TO EXPECT

1. New competition authorities

- Across Africa, 2020 is likely to be marked by strengthened enforcement efforts and an increase in the number of countries with active competition law regimes.
- Several new competition authorities that have been on the brink of implementing competition law regimes may become operational e.g. Madagascar and Mozambique
- Several regional competition authorities (aside from COMESA) are likely to start finding their feet (such as the EACCA, CEMAC and ECOWAS) and it will be important to monitor their activities across their continent.

2. New legislation / amendments to existing legislation

- Competition legislation is likely to be finalised in Ghana and Uganda after numerous calls for the expedited passing of competition law in these jurisdictions.
- Egypt - substantial amendments to the existing legislation (particularly in relation to mergers) has been on the cards for some time and it is expected that pre-merger notification regime may be introduced.

3. Mergers

- Authorities are likely to continue broadening the scope of merger conditions. Whilst most public interest conditions relate to employment, there is a shift towards the imposition of other public interest conditions such as promoting localisation - particularly relating to ownership and continuing existing local procurement arrangements.
- There is also likely to be an increase in the number of fines for prior implementation of mergers- there have been fines for prior implementation in countries such as Tanzania, Namibia and Kenya over the last few years.

4. Prohibited practices

- COMESA - in late 2019, it was reported that the CCC will be launching investigations into various sectors including pharmaceuticals, construction, banking, telecommunications, dairy, beverages and water. It will be important for firms that operate in these industries across Africa to closely monitor developments in this regard. In late 2019, it was also announced that the CCC had launched an investigation against Shoprite Holdings Ltd and GS1 Kenya Ltd regarding potentially anti-competitive agreements in place between the two firms - the outcome of this investigation is expected in 2020.
- Namibia - the NaCC's investigation of Computicket for allegedly engaging in anti-competitive conduct will be finalised.
- It is anticipated that a number of complaints will be lodged against dominant firms in Kenya since the new buyer power provisions are now in effect and a Buyer Power Department has already been established within the CAK.
- More competition authorities may offer amnesty programmes, while the outcomes of existing programmes are likely to be announced.



Across Africa, 2020 is likely to be marked by strengthened enforcement efforts and an increase in the number of countries with active competition law regimes.

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