WERKSMANS
ATTORNEYS

COMPETITION

African competition law developments in 2018 and the outlook for 2019

6 February 2019 *10 min read*

Africa is sometimes described as the "last frontier" of competition law. This observation arises because many African countries have only recently adopted modern competition laws (South Africa only did so in 1999) and some key countries (like Nigeria and Uganda) have not yet done so. However, African competition law is developing rapidly and needs to be closely and regularly monitored because the consequences of a competition contravention are serious and include severe financial penalties for the firm, potential damages claims, reputational damage and even criminal sanctions for involved directors and managers (10 years jail and/or R500 000 fine in South Africa).

Competition law is now definitely on the policy agenda of African Governments and the following trends are increasingly important:

- the increasing importance of regional (as opposed to national) authorities;
- a shift in focus away from merger control towards enforcement and conduct cases (cartels, restrictive practices and abuse of dominance);
- increasing cooperation between African competition regulators;
- increasing cooperation between competition and other regulators in the same country;
- new competition laws being passed by legislatures (for example in Nigeria, Ghana, Angola, Botswana);
- competition laws being reviewed and amended (for example in South Africa);
- new competition laws being drafted (for example in Uganda and South Sudan).

With regard to regional authorities, the COMESA Competition Commission (based in Lilongwe, Malawi) has made its mark. COMESA has 21 member states (Burundi, Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Swaziland, Tunisia, Uganda, Zambia, and Zimbabwe) and since the Commission became operational in 2013, it has decided over 100 merger cases (most approved unconditionally). No cartel cases have been decided yet (a maximum USD 750 000 penalty may be imposed) and a leniency policy has not yet been issued (a draft has been prepared). Similarly, no dominance cases have yet been decided (a maximum USD 500 000 penalty may be imposed) and competition contraventions are not criminalised. However, the Commission has recently initiated its first non-merger cases, namely a 2017 investigation into the media/marketing rights for African football involving the Confederation of African Football (CAF) and Lagadere Sports and a 2018 complaint by the Egyptian competition authority against FIFA for its refusal to allow Egyptian State Television to broadcast FIFA games. The Commission is also becoming more active in its regional advocacy and conducted a training session for Ugandan officials in 2018.

In March 2018, the East African Competition Authority (based in Arusha, Tanzania) became operational. It covers Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda and has jurisdiction over competition, consumer welfare, state subsidies and public procurement. Interestingly, its focus appears not to be on mergers (even though it has jurisdiction over mergers) but on investigating firms and trade associations engaged in malpractices and the exploitation of consumers through price fixing. The Authority is also undertaking sector studies on the competitiveness of the regional economy. No cases have been decided yet, but challenges include its overlap with the existing Tanzanian and Kenyan national regulators as well as with the COMESA Commission. Burundi has passed a competition law, but its authority has not been approved. Rwanda still lacks a competition law and authority, but Uganda and South Sudan have draft competition bills pending.

In July 2018, the ECOWAS Regional Competition Authority was established (based in Bijilo, Gambia) and covers Benin, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo, and Burkina Faso. CEMAC (the Economic and Monetary Community of Central Africa) has a regional competition regime (but no formal authority and a focus on mergers) for Gabon, Cameroon, the Central African Republic, Chad, the Republic of the Congo and Equatorial Guinea. The West African Economic and Monetary Union (WAEMU or its French equivalent UEMOA) adopted competition legislation, which became operative from 1 January 2003 (notification of mergers is not compulsory) and covers Côte d'Ivoire, Benin, Burkina Faso, Guinea-Bissau, Mali, Niger, Senegal and Togo. Discussions have started to establish a Southern African Development Community (SADC) regional competition framework by 2020 (SADC members are Botswana, Lesotho, Madagascar, Mauritius, Mozambique, Namibia, SA, Swaziland, Tanzania, Zambia, Zimbabwe, Malawi, Seychelles, Angola and the Democratic Republic of the Congo).

There is an increasing recognition that cooperation between regulators leads to better enforcement. The African Competition Forum is a network of African national and multinational competition authorities and focuses mainly on advocacy and cooperation. The use of Memoranda of Understandings between regulators (MOUs) is increasingly common. The COMESA Commission has done so with the competition regulators of certain COMESA member states. The SADC competition regulators signed a MOU in 2016. The South African Commission has signed MOUs with South African regulators (like the Broad Based Black Economic Empowerment Commission, the Council for Medical Schemes, Gaming Boards, the South African Bureau of Standards, the Port Regulator and the National Liquor Authority) as well as other competition regulators (like Mauritius, the BRICS countries, Namibia, the European Commission and Kenya). In 2018, the Malawi competition authority signed a MOU with the Malawian Anti-Corruption Bureau, the Kenyan authority signed a MOU with the Kenyan Public Procurement Regulatory Authority and the Swazi authority signed a MOU with the Swazi energy regulator.

One of the most significant recent developments in African competition law is in Nigeria (Africa's largest economy). Previously, only sector specific competition regulation existed. However, the Federal Competition and Consumer Protection Bill was passed by Parliament in December 2017 and awaits signature by the President to come into force (a decision is only likely after the elections in February 2019). The Bill establishes a Commission and Tribunal and covers cartels, dominance, anticompetitive practices and mergers as well as consumer protection. Cartel conduct, the abuse of dominance and minimum resale price maintenance are prohibited. It controversially allows the President to regulate the prices of certain goods and services on the Commission's recommendation and criminalises cartels as well as other contraventions and the failure of a firm to cease an abusive practice after receipt of a desist order from the Commission. A general penalty may be imposed on body corporates of up to 10% of annual turnover. Directors of the body corporate face up to 5 years jail and/or a 50 million Naira fine. A tax of 0.5% of after tax profits will be payable by all Nigerian companies to the Commission.

Angola is one of Africa's largest economies so a significant development is that in May 2018 a new competition law was enacted, which regulates cartels, dominance and other anticompetitive conduct. In October 2018, competition law regulations were approved and the next step is for the authority to become operational.

In Botswana, a new Competition Act was passed by Parliament and approved by the President in July 2018. Cartel conduct has been criminalised and involved directors and employees face 5 years jail or 100 000 Pula fines. A fine of 50 000 Pula may be imposed for prohibited vertical agreements. The implementation of a merger without prior approval now carries a fine of up to 10% of the price or the combined turnover of merging parties (whichever is higher).

In Namibia, a corporate leniency programme was launched in 2018. This is a proven effective tool for regulators in combatting cartels and indicates the Commission's policy focus on cartel enforcement. In 2018, the Namibian Commission also referred Namib Mills to the High Court for alleged abuse of dominance in the wheat flour market pursuant to its exclusive purchase undertaking in its loan agreements with bakers (the Commission is seeking a penalty of about R49 million) and warned taxi operators not to increase their prices without approval from the Transport Board due to price fixing concerns. The Commission is also investigating the Namibian Pharmaceutical Society and more than 200 pharmacies for price fixing pursuant to a Society rule requiring a 50% mark up on the dispensing of medicines.

The Mauritian leniency programme was amended in 2018 to allow the initiators or coercers of cartels to apply for leniency and get a 50% reduction in fines. Widening the opportunities for leniency should pave the way for more leniency applications and more effective cartel enforcement. The results of the Mauritian authority's Resale Price Maintenance Amnesty Programme (from June to October 2017) were also published in 2018. One hundred and two firms applied for amnesty (including fast moving consumer goods, construction, manufacturing, IT products, electronic goods, books pharmaceuticals and cosmetics). The Commission's report on its construction market study was released and found that various markets were highly concentrated, several players were vertically integrated and construction material prices were not regulated. It remains to be seen what action (if any) will flow from such report.

The Zambian competition authority remains one of the most active in Africa and in 2018 it investigated the increase in chlorine prices (of 800% to 1000%) following a cholera outbreak, received complaints about price increases of bottled water and imposed a fine of 7% of annual turnover on four chicken hatcheries in Lusaka for fixing trading conditions and setting production quotas through a "chick order policy developed and implemented by the Poultry Association. It also issued guidelines on the abuse of dominance for public comment and a warning on single school uniform suppliers. The effectiveness of its 2017 leniency policy is still to be tested.

In 2018, the Kenyan competition authority granted a 4 year exemption for a joint venture between Kenya Airways and Precision Air to set prices, share revenues and cooperate on sales and marketing. An exemption application by the Institute of Surveyors to set minimum service fees was, however, rejected. The authority also launched a market enquiry into the financial leasing sector and an investigation into exclusive suppliers of school uniforms. The authority also requested Parliament to enact laws to compel regulators to work together.

In 2018, 70 Egyptian clay brick factories were referred for prosecution for price fixing following a fuel price increase and a USD 22 million fine was imposed on the beIN sports broadcaster and its CEO for forcing subscribers to switch from Nilesat to the Qatar Sohail satellite and subscribe to all sports bundles. The Egyptian authority also prohibited schools from requiring the purchase of school uniforms only from a specific supplier.

Other developments in 2018 included the launch by the Zimbabwean competition authority of a new National Competition Policy to review the existing law and issuing a statement on the uniform application of recommended maximum wholesale and retail prices. A new competition bill entered the parliamentary approval process in Ghana. Twenty one Ethiopian steel bar producers were charged with fixing their selling prices on the same day that a 15% devaluation of the Ethiopian currency (the Birr) was announced. In Malawi, an investigation of alleged collusion between suppliers of school textbooks to the Ministry of Education was launched.

African competition law developments in 2018 clearly indicate that African competition law enforcement will increase going forward. Competition laws will be passed, implemented and reviewed/amended. Authorities are increasingly moving away from a focus on mergers to a focus on combatting anti-competitive conduct like cartels and the abuse of dominance and this will increase the risk for business of competition contraventions. Due to the serious consequences of such contraventions, business should adopt a "prevention is better than cure" approach and consider competition law training for senior executives and staff and implementing compliance programs including a whistle blower program/hotline and "dawn raid training" (there have been over 70 raids in South Africa since 2016 and raids have also taken place in Kenya, Namibia, Botswana, Malawi and Zambia).

Pieter Steyn

Director

View Profile