

COMPETITION

# The COMESA Competition Commission's increasing emphasis on competition enforcement and conduct cases

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## The COMESA Competition Commission

1. The Common Market for Eastern and Southern Africa ([COMESA](#)) covers 21 countries namely Burundi, the Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Swaziland, Seychelles, Somalia, Tunisia, Uganda, Zambia and Zimbabwe. The COMESA Competition Commission ("**CCC**") has been operating since January 2013 and is one of the most important and active African regional competition authorities.

2. On 25 February 2021, the CCC issued a cautionary notice on restrictive business agreements which stated that–

- 2.1 some undertakings operating in the COMESA Common Market had been and continue to engage in agreements that include restrictive territorial clauses and market allocation which contributed to forming barriers to trade in the Common Market;
- 2.2 the CCC had in its possession "anecdotal evidence" of certain sectors which have continued to engage in such conduct;
- 2.3 the CCC had engaged in "soft enforcement for a reasonable period, by engaging undertakings and requesting them to notify such agreements in accordance with Article 20 of the Regulations and through numerous awareness programs";
- 2.4 the CCC considered that it had given "ample time to undertakings operating in the Common Market to sanitise their agreements pursuant to Article 20 of the Regulations" and that the CCC had accordingly decided to "focus more on hard enforcement through screening, detection, investigation and punishment of offenders";
- 2.5 the CCC would work closely with the national competition authorities in COMESA member states to ensure that offenders are detected, investigated and punished.

## Article 16 of the COMESA Competition Regulations

3. Like many new competition authorities, the CCC's workload was initially taken up mostly by merger cases. However since 2016, it has increasingly focussed on prohibited restrictive business practices which are defined in Article 16 of the COMESA Competition Regulations ("**Regulations**") as "agreements between undertakings, decisions by associations of undertakings and concerted practices which –

- 3.1 may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the Common Market"; and
- 3.2 are, or are intended to be, implemented within the Common Market.

4. Article 16 provides that such prohibited agreements and decisions are void. Article 20 of the Regulations provides that it is an "offence" for "undertakings engaged in the market in rival or potentially rival activities" (ie actual or potential competitors) to engage in –

- 4.1 agreements fixing prices which "hinder or prevent the sale or supply or purchase of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons, or limit or restrict the terms and conditions of sale or

supply or purchase between persons engaged in the sale of purchased goods or services”;

- 4.2 collusive tendering and bid-rigging;
- 4.3 market or customer allocation agreements;
- 4.4 allocation by quota as to sales and production;
- 4.5 collective action to enforce arrangements;
- 4.6 concerted refusals to supply goods or services to a potential purchaser, or to purchase goods or services from a potential supplier;
- 4.7 collective denials of access to an arrangement or association which is crucial to competition.

5. A fine of up to 10% of annual turnover in the Common Market may be imposed by the CCC for contraventions of Articles 16 or 19.

## Article 20 of the Regulations

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6. Article 20 of the Regulations allows an undertaking to apply voluntarily to the CCC for an authorisation “to enter and/or give effect to contracts, arrangements or understandings even if they are anti-competitive, if the CCC determines that there are public benefits outweighing the anti-competitive detriment of the contract, arrangement or understanding”. From 2016 to 2020, 12 such applications were made to the CCC of which 11 were successful (six were authorised subject to undertakings given by the parties). The applications generally dealt with distribution and supply agreements and one dealt with the inclusion of Air France into an existing joint venture between KLM and Kenyan Airways (this was unconditionally authorised by the CCC).

7. Article 21 of the Regulations allows any person to request an investigation by the CCC where there is “reason to believe that activity by an undertaking located in a Member State has the effect, or is likely to have the effect, of restricting competition in the Common Market”. The first such investigation by the CCC commenced in November 2019 following a complaint to the CCC about an agreement between Shoprite Uganda and GS1 Kenya which requires that suppliers of products to Shoprite supermarkets in Uganda, must obtain their barcodes from GS1 Kenya. The CCC however decided in July 2020 that Shoprite’s conduct did not have the effect of preventing, restricting, or distorting competition in the Common Market and was unlikely to lead to the abuse of a dominant position.

## Article 22 of the Regulations

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8. Article 22 of the Regulations allows the CCC to launch an investigation on its own initiative if it has “reason to believe that business conduct by an undertaking restrains competition in the Common Market”. From 2016 to 2020, only four such investigations were launched of which 3 have been finalised. The CCC has not yet finalised its investigation into agreements between the Confédération Africaine de Football (CAF) and Lagardère Sports S.A.S for the exclusive commercialisation of marketing and media rights of CAF’s football championships. No competition concerns were found in two of the investigations relating to Parmalat’s distribution agreements and an exclusive dealing agreement between Eveready East Africa and Clorox Sub Saharan Africa. The third investigation related to Coca Cola Beverage’s distribution agreements and was resolved on the basis of undertakings given to the CCC including the implementation of a competition law compliance program.

9. Following the issue of its 25 February 2021 cautionary notice –

- 9.1 in June 2021 the CCC commenced an investigation into potential violations of Articles 16 and 19 of the Regulations by beer manufacturing companies operating in the Common Market, namely AB InBev, Castel, Diageo and Heineken. The focus of the investigation appears to be market allocation arrangements between the companies and territorial restrictions in their distribution agreements with third party independent distributors;
- 9.2 in September 2021 the CCC imposed its first ever fine for the late notification of a merger. The Regulations require notification within thirty days after the “decision to merge” (being the signature date of the merger agreement). The merger involving Helios Towers Limited, Madagascar Towers S.A and Malawi Towers Limited was notified on 2 July 2021 instead of by 22 April 2021 as required by the Regulations. A fine of USD 102 101 (being 0.05% of the parties combined turnover in the COMESA Common Market in the 2020 financial year) was imposed.

10. The CCC is accordingly taking action to enforce the Regulations as indicated in its 25 February 2021 cautionary notice. It is noteworthy that the investigation of beer manufacturing companies is the first investigation by the CCC under article 19 dealing with cartel conduct. The CCC does not have a cartel leniency policy (although a draft has been prepared) and contraventions of the Regulations are not criminalised.

11. It is highly likely that the CCC (and other African regional and national regulators) will continue to focus and cooperate on combatting anti-competitive practices (including cartels and the abuse of dominance). The Treaty creating the African Continental Free Trade Area expressly provides that member states will enter into negotiations on competition policy as part of Phase II of the Treaty's implementation (which is planned to be completed by 31 December 2021). The Treaty has been signed by 54, and ratified by 40, African countries. This indicates strong political will by African Governments to implement a Treaty of which African competition policy forms a key part.

12. These developments will increase the risk for business of competition law contraventions and, due to their serious consequences (including fines and, in some cases, criminal sanctions), business should adopt a "prevention is better than cure" approach including competition law training and compliance programs for senior executives and staff. Due diligence investigations of potential targets in M&A transactions must cover African competition law compliance and appropriate protections for the buyer must be included in the transaction documents.

The Memorandum of Understanding between the Competition Commission of South Africa and the National Agricultural Marketing Council – [find out more](#).

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