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COMPETITION ALERT

IN THIS ISSUE

Competition Law in Africa: COVID-19 update

Since the COVID-19 pandemic was first diagnosed, it has jolted the world and brought the global economy to its knees. In response, competition authorities throughout Africa have adapted in order to fulfil merger control and prohibited practice mandates, by for example, amending legislation and implementing new provisions or laws. This article focuses on modifications made specifically in response to the COVID-19 crisis and does not propose to be an exhaustive list of the manner in which all competition authorities currently function. These developments, recorded at the time of print, may be subject to further changes as the crisis unfolds.

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COMPETITION AUTHORITY	MERGER CONTROL	PROHIBITED PRACTICE
AFRICAN JURISDICTIONS		
Botswana		
Botswanan Competition and Consumer Authority (CCA)	On 2 April 2020, the CCA initially closed its doors to operations in response to the country's nationwide lockdown, but it has since resumed operations, and mergers can now be filed.	<p>The CCA advised Botswanans to be cautious of businesses taking advantage of the pandemic and stated that it would support consumers through "investigation, prohibition and control of unfair business practices." This was apparently premised on an increase in complaints regarding alleged price hikes for essential products, such as basic food products and healthcare and hygiene products.</p> <p>On 25 April and 6 May 2020, the CCA published a detailed market survey in which it identified the prices of certain basic and essential items, prices relative to areas, and names of relevant retailers. The CCA stated that it sampled prices of the essential items to help consumers make informed purchasing choices.</p> <p>On 18 May 2020, the Botswanan Minister of Trade and Investment announced a restriction on the importation of cloth face masks, the contravention of which results in a potential fine of BWP 5,000 or imprisonment for a term that does not exceed six months, or both. The only exception to this restriction is the import of masks by small, medium and micro citizen enterprises who have an import permit to do so.</p> <p>On 19 May 2020, the Chief Executive Officer (CEO) of the CCA stated that during the COVID-19 pandemic, focus was shifted to restrictive business practice and consumer protection. Further, deceitful trade practices including unreasonable price increases and low quality of goods and services is being observed. The CEO cautioned that the maximum five-year imprisonment penalty could be imposed on those found guilty of contravening Botswanan price regulations.</p>
EGYPT		
Egyptian Competition Authority (ECA)	The ECA is accepting submissions of merger notifications electronically, although the authority stated that it would be scaling down its operations during this time.	<p>In response to competitor cooperation which serves to combat the pandemic, the ECA has introduced an initiative in which it provides free advice regarding the extent to which cooperation or coordination attempts are likely to face the repercussions of being anticompetitive.</p> <p>The ECA confirmed that any information provided in a request for advice would be protected by strict confidentiality obligations.</p> <p>Although the scope for exemption for coordinated and cooperative conduct between competitors may increase during the pandemic, the ECA emphasised that it would still be taking action against non-exempted exploitative practices.</p> <p>On 16 April 2020, the Egyptian Prime Minister issued an order to enforce price caps, recommended by the ECA, in an attempt to curb excessive pricing. The cap limits the price of items such as gloves, masks, and a litre of hand sanitiser, the maximum price being LE100. Contravention may result in a fine of LE 100,000 or imprisonment for two to five years.</p> <p>The authority warned that it would be monitoring compliance with competition laws closely, and adopting a different approach for market definition and the assessment of dominance, to ensure that firms do not take advantage of the pandemic to the detriment of consumers.</p>

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ESWATINI		
Eswatini Competition Commission (ECC)	On 27 March and 23 April 2020, the ECC announced the adjournment of all ongoing investigations before the ECC for the national lockdown period, until the Government of Eswatini makes a declaration on the end of the lockdown. The ECC is accepting new merger notifications and investigating restrictive practice complaints (both of which can be submitted electronically).	
KENYA		
Competition Authority of Kenya (CAK)	An e-filing portal for merger filings exists on the CAK's website.	<p>The CAK has actively monitored prohibited practices throughout the lockdown period. For example, on 13 March 2020, the CAK published a cautionary note regarding manufacturers and retailers who contemplate collusive price increases and/or hoarding products with the intention to increase prices. The authority emphasized that such conduct is prohibited and may attract a penalty of up to 10% of the turnover of the offending firm.</p> <p>On 20 March 2020, the CAK announced that ongoing investigations into price increases and product hoarding had revealed that some major distributors and manufacturers had entered into exclusive distribution agreements. The products subject to these agreements were certain essentials, including maize flour, wheat flour, edible oils, rice, sanitisers and toilet paper. The CAK emphasised that the issue with these exclusivity arrangements is that they allegedly interfere with prices in relation to essential goods.</p> <p>The CAK ordered the affected manufacturers and distributors to remove exclusive distribution clauses in their agreements by a specified period and to desist from entering into such agreements in future. The CAK further ordered that distributors who also operate in the downstream retail market must provide these essential goods to other retailers on non-discriminatory terms.</p>
MALAWI		
Malawian Competition and Fair Trading Commission (MCFTC)	Not applicable.	<p>The MCFTC concluded an investigation in late March 2020 which revealed that 11 pharmacies in Lilongwe and Blantyre were allegedly hiking their prices by margins, ranging between 100% - 400%, in contravention of the Competition and Fair Trading Act (CFTA). The MCFTC found that the companies were excessively pricing hand sanitisers, facemasks and gloves as a result of the COVID-19 outbreak.</p> <p>The MCFTC has further warned the general public that some companies were exploiting the pandemic by promoting certain products as a cure for the virus. The MCFTC assured the public that no cure had yet been approved by the health authorities, and that it would impose stiff sanctions on businesses found to be contravening the CFTA by deceiving consumers.</p> <p>The MCFTC also noted that some independent schools were leveraging the pandemic and sharing information regarding school fees for online learning programmes. The MCFTC emphasised that exchanging commercial information between competitors related to pricing intentions constitutes collusion and would not be tolerated, and cautioned that schools found to be colluding or engaging in prohibited unfair trading, would be fined.</p>

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MAURITIUS		
Mauritian Competition Commission (MCC)	<p>The MCC is open and is accepting submissions of merger notifications electronically.</p>	<p>On 9 April 2020, the MCC announced that it would not tolerate conduct by dominant suppliers which seek to exploit the crisis and consumers. Although the MCC recognised that some businesses may need to collaborate during the pandemic, it emphasised that anticompetitive agreements against the public interest will be dealt with "the full might of the law".</p> <p>The MCC further confirmed that suppliers setting maximum prices for their products in order to limit unjustified price increases at retail level is allowed.</p> <p>Complaints from the public and queries regarding ongoing investigations were encouraged to be sent through electronic channels.</p> <p>During the pandemic, the Mauritian authorities have found multiple traders contravening business, competition and consumer protection laws through high pricing or trading without registration. Price controls on products have long been a part of Mauritian law in terms of the Consumer Protection (Price and Supplies Control) Act 12 of 1998 (MCPA). Legal supplements to the MCPA have been published from March to May 2020 to include additional essential goods (such as gloves and hand sanitiser).</p>
NAMIBIA		
Namibian Competition Commission (NCC)	<p>On 6 May 2020, the NCC announced that it would partially resume its normal operations from 11 May 2020, encouraging stakeholders to contact the NCC using electronic modes of communication so as to minimise physical contact.</p> <p>The NCC urged the public to access merger filing forms (as well as complaint forms, exemption applications and all other competition regulation-related forms) on the NCC website.</p> <p>However, physical documentation for merger filing (as well as complaints and exemption applications) will now also be accepted at the NCC offices, subject to measures put in place to minimise possible exposure to COVID-19.</p>	<p>On 24 March 2020, the NCC confirmed it had received complaints regarding price hiking on certain healthcare and essential items. The NCC therefore undertook a market analysis on product prices for immune boosters, hand sanitisers, N95 and 3ply face masks, and found significant price increases being implemented in each category.</p> <p>The NCC issued a cautionary notice to retailers and suppliers against exploiting consumers through prohibited practices, such as excessive pricing and price-fixing. The NCC further set up a dedicated team as part of its Enforcement, Exemptions & Cartels Division to prioritise complaints on essential healthcare and hygiene products during the pandemic.</p> <p>On 18 May 2020, the NCC emphasised that complaints regarding essential products would be given priority. It was also noted that price gouging remedies would have to be incorporated under the Namibian Competition Act (where legally permissible), since the NCC does not have direct consumer protection powers. To enable more effective price exploitation redress, the NCC is attempting to have price regulations published which complement its current powers under the Namibian Competition Act.</p>

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NIGERIA		
Federal Competition and Consumer Protection Commission (FCCPC)	<p>The FCCPC announced that it would scale down on its operations for the period of national lockdown, in order to direct its focus on COVID-19-related complaints and issues.</p> <p>The FCCPC indicated that it would accept the electronic filing of merger notifications in cases where:</p> <ul style="list-style-type: none"> • there is a risk of the imminent failure of one of the merging parties; • there is a host jurisdiction other than Nigeria, in which the transaction is subject to time limitations, and the transaction requires notification and approval from the FCCPC to be concluded; and • any other time sensitive situations, such as ones that have regulatory approvals which may expire, and such approvals are conditional upon presenting notification to the FCCPC within a specific period. <p>In notifying such a merger to the FCCPC, a party must entitle the submission as an "Extenuating Circumstantial Notification".</p>	<p>On 1 March 2020, the FCCPC issued a cautionary notice regarding suppliers and retailers taking advantage of citizens by engaging in prohibited trade practices. The FCCPC recognised that the practice of unreasonably increasing prices on essential health and hygiene items, such as hand sanitisers or face masks, constituted "obnoxious trade practices" prohibited by the Federal Competition & Consumer Protection Act (FCCP Act).</p> <p>The FCCPC also noted the need for collaboration in certain sectors in order to combat the virus. Although it expressed understanding for the necessity of some of these arrangements, particularly in addressing public health/safety and food supply, it noted that some of these arrangements would technically contravene the FCCP Act. In an effort to support businesses that may have undertaken such collaborations, the FCCPC confirmed that it would assess bona fide arrangements in the light of the national priority to combat the virus.</p> <p>On 28 April 2020, the FCCPC published guidelines for businesses to follow. For example, approval for any collaborations between competitors to combat the virus would have to be sought from the FCCPC by way of an electronic application. The FCCPC added that it would be closely monitoring price gouging and confirmed that manufacturers setting maximum prices on goods which retailers later on-sell is not unlawful in Nigeria.</p>
RWANDA		
Ministry of Trade & Industry (MTI)	<p>Not applicable.</p>	<p>As at 20 March 2020, 24 businesses in the City of Kigali had been fined due to allegedly inflating prices in response to the COVID-19 pandemic. These fines were issued after the MTI requested that all traders comply with consumer protection and competition laws and desist from increasing prices unreasonably. Based on publicly available information, the fines issued by the MTI over various offenses amid the COVID-19 lockdown between March and April amounted to approximately RWF 10.74 million.</p>

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SOUTH AFRICA		
<p>South African Competition Commission (Commission)</p> <p>South African Competition Tribunal (Tribunal)</p>	<p>On 24 March 2020, the Commission stated that it would be placing focus on COVID-19 related matters. It therefore discouraged (but did not prohibit) the filing of mergers, except those involving firms in distress.</p> <p>The Tribunal announced that it would be taking certain measures regarding merger proceedings, namely:</p> <ul style="list-style-type: none"> • Unopposed extension applications for large mergers must be filed electronically and will be granted in chambers; • Phase 1 mergers – unopposed, and non-complex according to the Commission: <ul style="list-style-type: none"> • the panel may, if required, request additional information from the Commission or merging parties to be submitted electronically; • parties will not be required to be present for the teleconference by the panel; and • parties will be notified of the panel’s decision and Merger Clearance Certificates will be issued within the stipulated time periods • Phase 2 mergers – complex but unopposed according to the Commission: <ul style="list-style-type: none"> • parties may be required to avail themselves for a hearing via teleconference. • Phase 3 mergers – very complex and are opposed according to the Commission: <ul style="list-style-type: none"> • will not be set down during the lockdown period. <p>Communication of a change in procedures has not been received at the time of this publication.</p>	<p>In the early stages of the pandemic, several block exemptions were issued for certain industries, which allow certain engagement in concerted conduct ordinarily prohibited (see previous article detailing these exemptions here).</p> <p>The Commission has confirmed its focus on excessive pricing matters during this time. Following suit, the Tribunal noted that while priority complaint referrals from the special investigation by the Commission, if any, relating to COVID-19 will be heard by arrangement with the parties; complaint referrals already enrolled, pre-hearings and hearings relating to interlocutory proceedings, will be postponed sine die and no new matters will be set down. Urgent matters, if any, will also be set down and heard by arrangement with the parties.</p> <p>Since the dawn of the pandemic, the Commission has been inundated with excessive pricing complaints, many of which have been referred expeditiously to the Tribunal. The Tribunal issued regulations regarding the expedited process/procedure for excessive pricing hearings during the pandemic (see previous article detailing these measures here).</p> <p>The Tribunal has confirmed some 15 consent agreements (at the time of this publication) for COVID-19 excessive pricing complaints. Two separate contested hearings have also been held remotely, involving the accused firms, Babelegi Workwear and Industrial (Babelegi) and Dis-Chem Pharmacies. In its order issued today, the Tribunal found that Babelegi contravened section 8(1)(a) of the Competition Act by charging excessive prices for face masks that it sold to customers between 31 January 2020 and 5 March 2020. The Tribunal has ordered Babelegi to pay an administrative penalty of R76,040 which exceeds the excess profit/improper gains from the excessive pricing conduct.</p> <p>Despite the enforcement shift in focus to excessive pricing, competition law in respect of other prohibited practices remains applicable (see previous article here).</p>

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SEYCHELLES		
Fair Trading Commission of Seychelles (FTCS)	Although the FTCS closed for a period of time due to the pandemic, it has since resumed operations.	
TANZANIA		
Fair Competition Commission (FCC)	Numerous merger notifications have been published on the FCC website since March. No further notices have yet been published by the authority regarding any amendments to the merger notification procedures.	<p>The FCC identified alleged concerns regarding certain prices and quality standards on health and hygiene essentials. The FCC confirmed that it will continue to monitor whether reasonable prices are placed on essential items such as sterilizers, masks and disinfectant hand wash during the pandemic. The FCC identified many potential causes of increased prices, such as limited factory production, restricted imports/exports and opportunistic businesses looking to hike their prices. In this regard, the FCC reminded importers, traders, manufacturers and dealers that unfair business practices, such as excessive pricing is prohibited and will be investigated where applicable.</p> <p>The FCC further stated that the Tanzanian Bureau of Standards (TBS) requires that certain quality standards be maintained, particularly regarding hand sanitisers which should have a content of at least 60% alcohol. The FCC and TBS will collaborate in ensuring that the mandate from the Ministry of Trade and Commerce to monitor the marketplace in Tanzania is fulfilled.</p>
UGANDA		
Local Council of Uganda (LCU)	Not applicable.	Certain directives directly from Ugandan President Yoweri Museveni and the LCU have identified and warned traders against hiking prices in response to the pandemic. Traders in retail and wholesale found to unreasonably hike prices during this time risk having their trade licences permanently revoked under Ugandan trade licensing laws.
ZAMBIA		
Zambian Competition and Consumer Protection Commission (ZCCPC)	Not applicable.	<p>In response to the virus, the ZCCPC has warned companies and individuals to desist from excessively pricing hygiene products in response to the increased demand for such products during the COVID-19 crisis.</p> <p>The ZCCPC also received complaints of individuals claiming to be bank agents in attempts to obtain personal banking information for fraudulent purposes. The ZCCPC warned the public to be cautious of these false online banking agents attempting to defraud unsuspecting consumers in the wake of COVID-19 and confirmed that it would be working with the Zambian police and other authorities as such fraudulent conduct is a criminal offence subject to a sanction of imprisonment.</p>

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ZIMBABWE		
Zimbabwean Competition and Fair Tariff Commission (ZCFTC)	<p>The ZCFTC announced that it would scale down its operations during the Zimbabwean lockdown period. It will prioritise all COVID-19 related transactions, the following transactions only being accepted if they are related to the pandemic:</p> <ul style="list-style-type: none"> • merger and acquisitions transactions; • trade tariff relief applications; • authorisations of conduct, arrangements or agreements; and • abuses of dominance such as exploitative practice complaints. 	<p>The ZCFTC noted that some producers and manufacturers had published “recommended price ranges” for retailers and wholesalers to utilise in trading their goods/services. The purpose of these recommended price ranges was, in the ZCFTC’s view, seemingly to “cushion” consumers from likely exploitation by unscrupulous retailers. The ZCFTC found this initiative to be a potential platform for operationalising a cartel, in contravention of the Zimbabwean Competition Act. The ZCFTC thus urged competitors to desist from recommending minimum or maximum price ranges, for risk of later investigation by the authority.</p>
REGIONAL BODIES		
COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA		
COMESA Competition Commission (CCC)	<p>Due to restriction of movements and national lockdowns in most countries as a result of the COVID-19 pandemic, the CCC noted that some parties may not be able to gather all the information required to complete the prescribed notification within 30 days of the parties’ decision to merge. During this temporary period, the CCC will consider the initial engagement with the parties as the beginning of the notification process, which shall only be considered complete once all the information is submitted. It follows therefore that, as long as the parties have engaged the CCC on the notification process, they will not be penalised for failure to submit complete information within 30 days of the parties’ decision to merge.</p>	<p>The CCC cautioned consumers in the region to be alert to opportunists aiming to defraud the public during this time, when most businesses are operating online. The regional body has launched an awareness campaign aimed at encouraging consumers to be vigilant of scams, and to report complaints of such fraud.</p>

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INFORMAL NETWORKS		
AFRICAN COMPETITION FORUM		
<p>African Competition Forum (ACF)</p> <p>(An informal network of African national and multinational competition authorities, which promotes the adoption and implementation of competition law principles in African countries).</p>	<p>Not applicable.</p>	<p>The ACF, as a regional collective, issued a statement which recognised the difficulties the COVID-19 pandemic has posed to competition authorities throughout Africa. Authorities have had to gear up to combat price gouging and excessive pricing in an effort to deter exploitative conduct by businesses. In this regard, the ACF reported that there had been engagement in different regions with manufacturers and suppliers in certain markets to help ensure unreasonable price increases did not prevail.</p>

Susan Meyer, Preanka Gounden and Charissa Barden

WEBINAR INVITATION

BUYER POWER AND PRICE DISCRIMINATION UNDER THE COMPETITION ACT, RELATED INCOME TAX INCENTIVES AND BEE CONSIDERATIONS.

DATE: Tuesday, 2 June 2020 TIME: 13h00 - 14h00

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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