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COMPETITION **ALERT**

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Competition law in Africa – merger control and trade update

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Competition law in Africa – merger control and trade update

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Amidst the devastating COVID-19 pandemic, there have been some interesting competition law developments in Africa during 2020 thus far. This article focuses on the recent merger control and trade developments, which are not COVID-19 specific (see article on COVID-19 updates here) in Nigeria, Kenya, Common Market for Eastern and Southern Africa (COMESA), and the African Continental Free Trade Area (AfCFTA).

Nigeria

Since the Federal Competition and Consumer Protection Commission (FCCPC) came into operation in Nigeria, certain questions regarding the process of filing mergers before the authority remain. In March 2020, the FCCPC published draft Merger Review Regulations 2020 (G002-2020) (Regulations) and revised draft Merger Review Guidelines 2020 (R001 -2020) (Guidelines). The Regulations and Guidelines purport to provide clarity and guidance on the FCCPC merger notification process. The Regulations include, for example: pre-notification consultations (in person or digitally) to clarify matters regarding thresholds, calculation of turnover or form requirements; substantive merger assessment, addressing the definition of the relevant market, countervailing buyer power, and the failing firm argument; as well as structural/behavioural remedies.

One question that remains however, is how foreign mergers will be incorporated under the Nigerian regime, particularly in light of the 2019 Guidelines on Simplified Process for Foreign-to-Foreign Mergers with Nigerian Component (Foreign Guidelines) (see a previous publication discussing the Foreign Guidelines here) which are still in force at this time.

While the Guidelines state that merger provisions of the Federal Competition and Consumer Protection Act (FCCPA) also apply to "*foreign companies (though not registered in Nigeria) who produce goods and services sold into Nigeria*", neither the Regulations nor the Guidelines clarify the position on extra-territoriality of the Nigerian merger control regime insofar as they, on the one hand, (i) refer to but do not specify what the 'local component' of a foreign merger is; (ii) posit that only Nigerian acquisitions would be notifiable; and (iii) mention that foreign acquirers require Nigerian subsidiaries, while, on the other hand, suggesting that property acquisitions (regardless of location) by Nigerian entities would fall within the FCCPC's purview. The Foreign Guidelines do not provide clarity on this front and the interrelation between these documents is not yet clear (e.g. it remains to be seen if the (finalised) Guidelines will replace, distinguish and/or amalgamate the Foreign Guidelines).

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The Appellants' argued that the application of the contested conditions would render the merger untenable, particularly in a market with a dominant market leader.

Thus, based on the standalone combined leg of the financial thresholds for mandatory merger notification in Nigeria, there remains uncertainty as to whether a merger could be triggered by a transaction involving a Nigerian or international acquirer and a target with no presence and/or operation in Nigeria.

A further concern raised by the Guidelines is its extensive list of considerations that constitute material influence and in turn 'control' for merger review purposes. Although this allows for a more comprehensive determination of a change in control; the list, which includes (inter alia) the ability to block any special resolution or any pre-emption rights in relation to the sale of shares or assets, broadens the scope of merger control by its inclusion of various minority/non-controlling interests which may become notifiable to the FCCPC.

The Guidelines and Regulations are still in draft form (as at the time of this publication), and it is hoped that these uncertainties will be clarified in the final version so as to provide useful direction in the notification of mergers.

Kenya

On 4 May 2020, the Kenyan Competition Tribunal (Tribunal) delivered its first decision pursuant to considering the Telkom Kenya Ltd and Another v Competition Authority Kenya CT/005/2020 merger review application. The appellants in the matter, being the merging parties (Telkom Kenya Ltd (Telkom) and Airtel Networks Kenya Ltd (Airtel) (collectively, the Appellants)), challenged seven out of eight of the conditions imposed by the Kenyan Competition Authority (CAK) in its 2019 conditional approval of the merger. In terms of the transaction, Airtel sought to acquire the mobile operations, enterprise and carrier services business of Telkom. The Appellants' argued that the application of the contested conditions would render the merger untenable, particularly in a market with a dominant market leader.

The case represents the first invocation of the Tribunal's review powers against a decision of the CAK. The main considerations and outcomes of the case are discussed below.

Key conditions and outcomes

The Kenyan Competition Act allows the Tribunal to confirm, modify or reverse any order issued by the CAK in whole or in part. In this matter, the Tribunal considered whether the challenged conditions were discriminatory against the Appellants. The first condition imposed by the CAK was that the merged entity shall not sell or transfer operating and frequency spectrum licenses for the duration of the licences. The second condition was that upon expiry of the operating licences, the allocated spectrum will revert back to the Government of Kenya. The Tribunal found that the first and second conditions altered the provisos under which the licenses were issued by the Communications Authority of Kenya and did not favour this amalgamation of duties. As such, the Tribunal amended these conditions to read that the Communications Authority of Kenya would monitor these licenses and related transactions.

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In summary, the Tribunal amended six of the seven contested conditions in an attempt to better conceptualise the intention of the CAK.

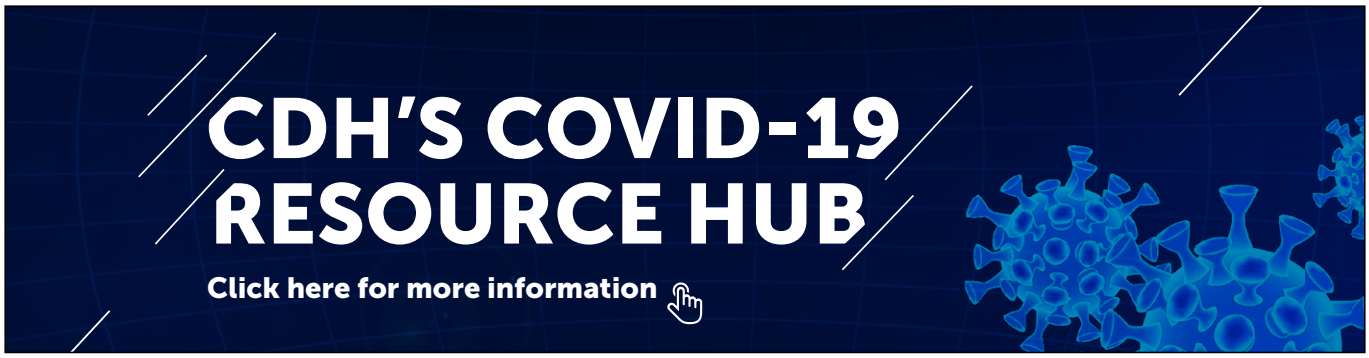
The third condition was that the merged entity was restricted from entering into any form of sale agreement within the next five years unless the failing firm argument is indicated. This condition was found to be too broad, and was amended to: the merged entity shall not sell more than 40% of its shares to a competitor for the duration of five years, and that the entity is at liberty to enter into commercial agreements necessary for the running of its business. Despite being watered down by the Tribunal, the third condition remains peculiar as it imposes a general forward-looking restriction as opposed to requiring the merged entity to liaise with/ notify the CAK of any future sale of its shares (thereby allowing that CAK to retain direct oversight of this market).

As a consequence of Telkom's advantageous position regarding its ability to access government fibre optic, the fifth and sixth conditions attempted to restrict the merged entity's ability to negotiate with the Government of Kenya for this access on preferential terms.

The Tribunal acknowledged the CAK's concerns regarding this preferential relationship but nonetheless held that the merged entity is still at liberty to negotiate with the Government of Kenya on open market terms.

The seventh condition related to employment and proposed that a percentage of employees in Telkom had to be retained for two years, which the Tribunal kept unchanged on the basis that such moratoria are not unusual (often ranging between one to three years), and served the public interest. Finally, the eighth condition, which required the Appellants to submit annual reports to the CAK indefinitely, was amended and limited to a two-year period, as an indefinite period was considered unreasonable.

In summary, the Tribunal amended six of the seven contested conditions in an attempt to better conceptualise the intention of the CAK. Notably, while modified, none of the contested conditions were set aside entirely. The



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The African Continental Free Trade Area purports to achieve accelerated economic growth through greater competition and access to new markets, even in struggling African countries.

Tribunal decision appears to support the principle that in assessing specialised markets which are regulated by various bodies, the competition authority should not overreach into the regulatory function of another body, such as the Communications Authority of Kenya, in particular where that is a specialist body. This matter highlights the possibility of, as well as the merits in, an application for review of the CAK ruling(s).

COMESA

There has been considerable activity from the COMESA Competition Commission (CCC). On 10 May 2020, the CCC found that more than twelve trade agreements, which had previously been operational in the Common Market for many years, were anti-competitive. The CCC based its findings on the fact that the now banned agreements were a potential bar to competition, thereby safeguarding dominance by monopoly undertakings. The increased vigilance of such agreements is due to the CCC viewing them as having the highest potential for partitioning the Common Market. Among the arrangements struck down were various distribution agreements which affected alcoholic and non-alcoholic beverages and fast-moving consumer goods. Another banned agreement was between Confederation Africaine de Football (CAF) and Lagardere Sports S.A.S (LS), in terms or which CAF had granted the exclusive right to commercialize its broadcasting and marketing rights to LS in the Common Market for an extended period of over twenty years. The CCC also utilised its consumer protection powers, by intervening and ordering Ethiopian Airlines to compensate passengers who lost their space on flights as a result of overbooking.

The CCC had a total of 16 merger transactions under assessment for the first quarter of 2020. The sectors affected in these transactions included among others: energy, insurance, banking and finance, alcoholic/non-alcohol beverages, retail and pharmaceutical. The majority of these transactions had an impact in Kenya, followed by Rwanda, Mauritius and Uganda. Thus, merger activity in the region continues, despite the COVID-19 pandemic.

AfCFTA

The African Continental Free Trade Area (AfCFTA) purports to achieve accelerated economic growth through greater competition and access to new markets, even in struggling African countries. One of the objectives identified in the preamble of the AfCFTA Agreement (Agreement) is to *"create an expanded and secure market for the goods and services of State Parties through adequate infrastructure and the reduction or progressive elimination of tariffs and elimination of non-tariff barriers to trade and investment"*. The AfCFTA, adopted on 21 March 2018 and signed by 54 African states including South Africa, was due to become fully operational with an intended progressive lifting of

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The African Union estimates that the lifting of tariffs will lead to a 60% increase in the level of intra-African trade by 2022.

trade tariffs on 1 July 2020. However, the newly elected AfCFTA Secretary General, Wamkele Mene (Mene), has subsequently noted that the anticipated operation of the AfCFTA has been delayed due the public health crisis caused by the COVID-19 pandemic.

Despite this postponement, Mene indicated that this delay has not detracted from the intention to fully implement the Agreement. Measures to ensure that intra-Africa trade remains flexible and flowing, particularly as economies emerge from the COVID-19 pandemic and begin to function at full capacity, should be encouraged.

Since being adopted, significant measures to integrate the continent have been taken under AfCFTA, for example: in Senegal which launched an interregional bus service with The Gambia; and Rwanda announcing the elimination of visas for all African nationals. COVID-19 has arguably emphasised the need to boost African trade. Secretary General Mene, reiterated in a statement from his appointment that the "*[AfCFTA] offers Africa an opportunity to confront the significant trade and economic development challenges of our time including: market fragmentation; smallness of national economies; over reliance on the export of primary commodities; narrow export base, caused by shallow manufacturing capacity; lack of export specialisation; under-developed industrial regional value chains; and high regulatory and tariff barriers to intra-Africa trade amongst others*".

The tariff measures intended to be adopted by the AfCFTA are aimed at encouraging the manufacturing and industrial sector in an attempt to bolster African economies against exchange rate volatility and external factors such as fluctuating commodity prices. The African Union estimates that the lifting of tariffs will lead to a 60% increase in the level of intra-African trade by 2022. Currently, intra-African trade is very low despite high annual economic output from Africa.

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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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