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COMPETITION LAW **ALERT**

IN THIS **ISSUE**

Key competition law updates in Africa: Part 1

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Namibia publishes competition policy document

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Key competition law updates in Africa: Part 1

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COMESA Competition Commission

The COMESA Competition Commission (Commission) is a regional competition authority equipped to enforce cross-border mergers between 21 African Member States and promote competition through investigating anti-competitive practices that have an appreciable effect on trade between Member States and restricts competition in the common market.

Change of Guard at the Commission

The tenure of office of the Director and Chief Executive Officer of the Commission, Dr George Lipimile came to an end on 31 January 2021. Dr Lipimile was appointed in February 2011 and served in this capacity for ten years, during which he played an important role in establishing and shaping the Commission as the first regional competition authority in Africa. Dr Willard Mwemba has been appointed as the Acting Director and Chief Executive Officer of the Commission since 1 February 2021. Dr. Mwemba will be featured on our very own Njeri Wagacha's podcast @Njeritalks next month.

Rules trumps Guidelines and clears up meaning of *"operate"*

A transaction is notifiable to the Commission if it falls within the meaning of a merger and if it meets both the regional dimension threshold and the notification threshold. The Commission has published three source documents to assist merging parties to determine whether a transaction is notifiable. These include the (i) Competition Regulations (Regulations); (ii) Merger Assessment Guidelines (Guidelines) and (iii) the Rules on the Determination of Merger Notification Thresholds (Rules).

In December 2004, Article 23(3) of the Regulations set out the regional dimension threshold and the notification threshold. The Commission will have jurisdiction where *"(a) both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more Member States and (b) the threshold of combined annual turnover or assets is exceeded"*. Under the first threshold, the merger inquiry turns on the term *"operate"* and no guidance was offered as to what this term meant.

In October 2014, paragraph 3.9 of the Guidelines states that an undertaking is considered to *"operate"* in a Member State if its operations are substantial enough that a merger can contribute to an appreciable effect on trade between Member States.

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Key competition law updates in Africa: Part 1...*continued*

To date, the Commission has engaged in rather soft enforcement action with a request for firms to seek authorisation.

Furthermore, the Guidelines introduced a quantitative yardstick to the term *"operate"* in that *"an undertaking operates in a Member State if its annual turnover or value of assets in that Member State exceeds US$5 million."*

In March 2015, rule 4 of the Rules provides that –

> *"any merger where both the acquiring firm and target firm, or either the acquiring or the target firm, operate in two or more Member States, shall be notifiable if: the combined annual turnover or combined value of assets, whichever is higher in the Common Market of all parties to a merger equals to or exceeds US$50 million; and the annual turnover or value of assets, whichever is higher, in the Common Market of each of at least two of the parties to a merger equals or exceeds US$10 million, unless each of the parties to a merger achieves at least two-thirds of its aggregate turnover or assets in the Common Market within one and the same Member State."*

The Guidelines and the Rules caused much confusion to merging parties and their advisors as the term *"operate"* in a Member State were contradictory in both documents. The Commission received requests from stakeholders for clarity on the correct interpretation. In February 2021, the Commission issued a welcomed practice note which clearly states that the definition of *"operate"* under the Guidelines in no longer applicable and the Rules take precedence over the Guidelines. As economies and markets across the globe rebuild following the wake of the COVID-19 pandemic, it is envisaged that M&A activity will also be on the rise. The Commission's practice note is a welcome improvement and will provide much needed clarity to the merger notification regime across the Common Market.

A word of caution on restrictive business practices

Since 2013, the Commission has been inviting firms operating in the Common Market to seek authorisation for any existing or proposed agreements between firms, decisions by associations of firms and concerted practices which may adversely affect trade between Member States or have the objective of preventing, restricting or distorting competition in the Common Market.

The Commission is concerned that some firms operating in the Common Market, have been engaging in, and continue to engage in agreements that include territorial restrictions or contain clauses that may divide markets by allocating customers, suppliers, territories or specific types of goods and services. In particular, the Commission has indicated that it has in its possession anecdotal evidence of certain sectors with participants who have continued to engage in these restrictive business practices.

To date, the Commission has engaged in rather soft enforcement action with a request for firms to seek authorisation. However, in February 2021, the Commission has issued a cautionary warning to firms operating in the Common Market and to the general public, that it shall take a harder stance on enforcement through screening, detection, investigation and punishment of offenders. In terms of rule 45 of the Rules] if firms are found in contravention of the Regulations, the Commission has the power to impose a penalty of up to 10% of annual turnover units of account in the Common Market.

Njeri Wagacha, Albert Aukema and Naasha Loopoo

Namibia publishes competition policy document

The NCP outlines the principles, aims and objectives that will guide Namibia's competition policy framework over the next ten years.

On 8 December 2020, the Namibian Ministry of Industrialisation and Trade published its first national competition policy document, "*Growth at home National Competition Policy, 2020 – 2025*" (NCP). Although the NCP was only published in December 2020, it was adopted and approved by Cabinet in August 2020.

The NCP outlines the principles, aims and objectives that will guide Namibia's competition policy framework over the next ten years. The policy is designed to ensure economic growth and development and promote or maintain the level of competition in markets, including by addressing governmental measures that directly affect the behaviour of enterprises and the structure of industry and markets.

Despite the absence of a National Competition Policy, the Namibian Government enacted the Competition Act 2 in 2003, and the Namibian competition authority has to date been implementing the legislation. However, the government has determined that the presence of national legislation is inadequate to deal with the increasing complexity of the market as well as ensuring that markets work to achieve efficiency and equity goals, in the Namibian context, and therefore that a policy is required to direct these goals.

Companies with Namibian operations should take note of the precise objectives of the policy which will influence changes in legislation and enforcement.

The policy sets out both economic efficiency and public interest objectives of the NCP. The economic efficiency objectives of the NCP include:

- provision of guiding principles in the effective review of policies, legislation and government programmes;
- addressing regulatory and infrastructural challenges for effective implementation and enforcement of competition law and policy;
- promotion of institutional coherence for cooperation with sectoral regulators to minimise jurisdictional gridlocks;
- protection of Micro, Small and Medium enterprises from policies and legislation that are anti-competitive; and
- creation of awareness and targeted advocacy initiatives to build and sustain a culture of competition.

The public interest objectives, in addition to overlapping with some of the economic efficiency goals, include:

- safeguarding investment and employment;
- promotion of interest and market opportunities for small firms;
- promotion of ownership spread in relation to historically disadvantaged persons;
- enhancement of energy and safety efficiency; and
- protection of natural resource management.

Namibia publishes competition policy document...*continued*

The NCP will be reviewed by an external entity every five years, and a review report will be submitted to the Ministry of Industrialisation and Trade for discussion with the National Competition Commission.

To achieving these objectives, the NCP sets out a number of guiding principles, including:

- **limitation of anti-competitive conduct:** addressing in particular abuse of dominance and collusive conduct, and requiring firms which own the rights to dominant infrastructure or intellectual property grant third party competitors access.
- **Developmental merger control:** through balancing the anti-competitive effects of a merger with any pro-competitive or public interest effects which may result from a merger.
- **Adoption of a cross-border investment and transactions framework:** to review and modify current rules that may affect complex cross-border acquisitions.
- **Oversight and surveillance on pricing provisions:** addressing in particular legislation to restrain monopolistic pricing behaviour.
- **Market investigations:** when features of a market may give rise to anti-competitive effects.
- **Fostering competitive neutrality between government and private business:** to establish a level playing field between the government and private sector within a market.
- **Reformation of regulations and policies that may restrict competition:** through impact assessments of new policies, regulation and law, and the introduction of voluntary compliance policies in the private sector.
- **Alignment of state support measures with competition:** including by examining the impact of state support measures on competition conditions.
- **Coordination of competition policy with development policies:** such as the national policies on Consumer Protection and Micro, Small and Medium Enterprises.
- **Harmonisation of competition, industrial and trade policies:** through monitoring by the competition authority to ensure that benefits accrued from trade agreements are passed onto domestic customers and primary producers.
- **Adoption and prompting of voluntary or mandatory sectoral codes of conduct:** to regulate the conduct of participants within a certain market, in relation to competitors and customers.
- **Defining the of scope of jurisdiction of competition and economic regulators:** to mitigate any overlapping jurisdiction or potential interference.
- **Incorporation of multilateral, bilateral and regional trade agreements:** to ensure the cooperation of regional and international firms with competition policy.

The NCP will be reviewed by an external entity every five years, and a review report will be submitted to the Ministry of Industrialisation and Trade for discussion with the National Competition Commission.

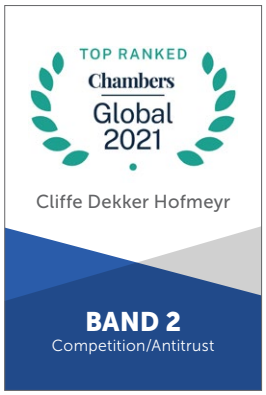
Namibia publishes competition policy document...*continued*

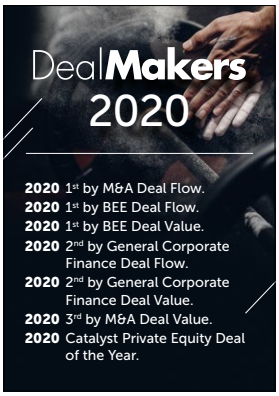
The Bill is an indication of how the rubber will hit the road in the implementation of the NCP.

The adoption of the NCP has prompted proposed amendments to the Namibian competition law. The content of the Namibian Competition Draft Bill was covered in a separate article by CDH titled "*Proposed Namibian Competition Bill set to introduce sweeping amendments*".

The Bill is an indication of how the rubber will hit the road in the implementation of the NCP. As was the case with the amendments to the South African Competition Act (embracing many of the same objectives reflected in the NCP), it is likely we will see some shifts in focus, particularly toward public interest considerations, when the Namibian competition authority carries out its mandate.

Lara Granville and Mmakgabo Makgabo





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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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