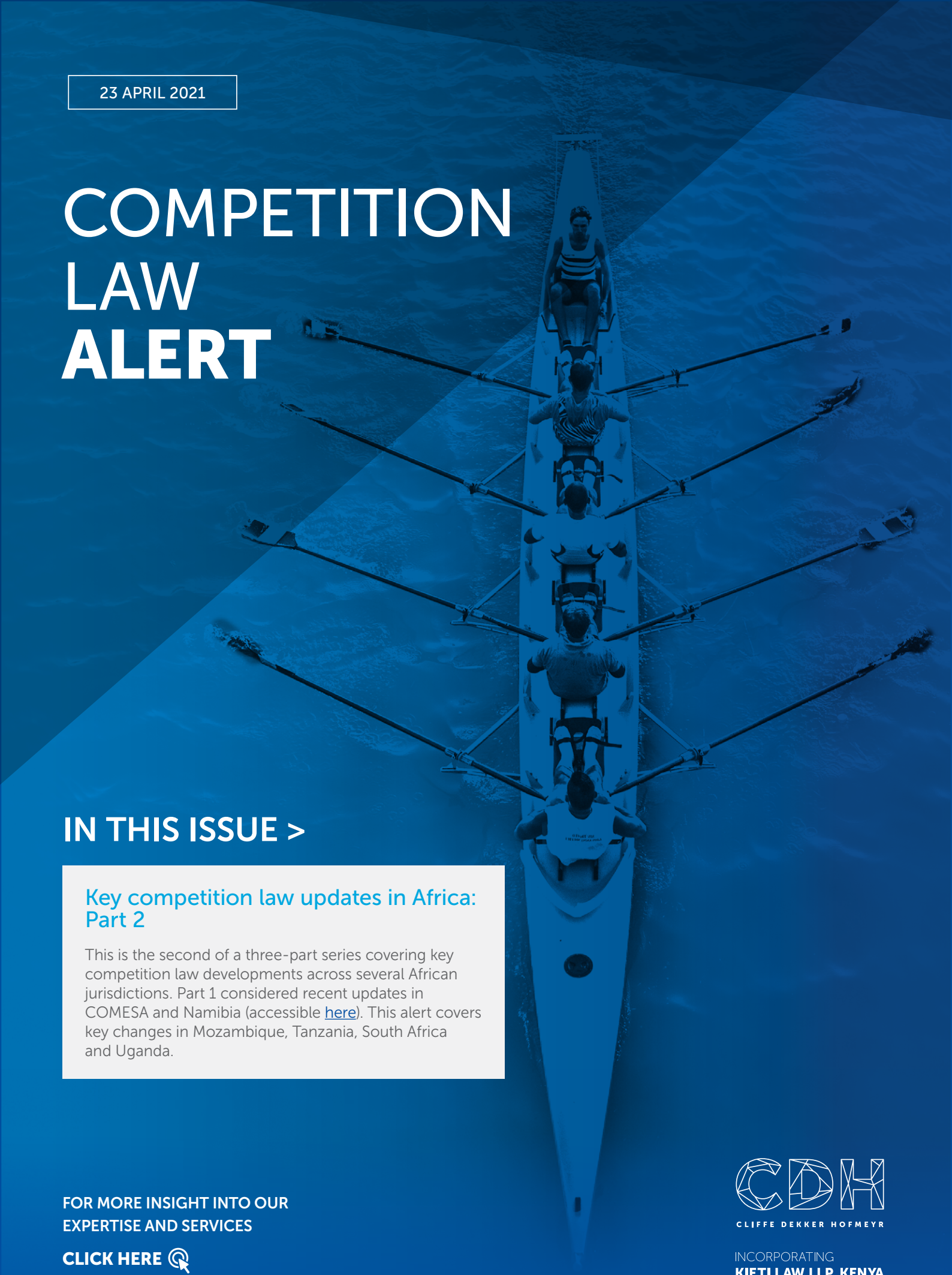
23 APRIL 2021

COMPETITION LAW **ALERT**



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Key competition law updates in Africa: Part 2

This is the second of a three-part series covering key competition law developments across several African jurisdictions. Part 1 considered recent updates in COMESA and Namibia (accessible here). This alert covers key changes in Mozambique, Tanzania, South Africa and Uganda.

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Key competition law updates in Africa: Part 2

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Mozambique watchdog becomes operational

Indications are that the Competition Regulatory Authority of Mozambique (ARC) is now practically operational. This comes after some seven years since the relevant law creating the ARC came into force.

Merger thresholds in Mozambique

Importantly, from a deal-making perspective, transactions in Mozambique may now be subject to mandatory merger notification, if one of the following thresholds are met:

(a) Combined turnover of all the undertakings concerned in Mozambique in the preceding year is equal to or exceeds 900 million meticais;

(b) The transaction results in the acquisition, creation or reinforcement of a share of or above 50% of the national market of a given good or service; or

(c) The transaction results in the acquisition, creation or reinforcement of a share of or above 30% of the national market of a given good or service, if each of at least two of the undertakings concerned achieved in the preceding year, a turnover of at least 100 million meticais in Mozambique.

Merger fees and process in Mozambique

Notification to the ARC must be made within seven working days from the conclusion of the agreement or acquisition project. Prior implementation is prohibited and a failure to notify the ARC of a notifiable transaction may incur a penalty. There is still some uncertainty in respect of the quantum of the applicable penalties, which will hopefully be resolved soon.

The filing fee, when submitting a merger notification in Mozambique, is based on 5% of the locally generated turnover, for the previous financial year, of the parties to the merger.

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South Africa invites public comments

Draft regulations on non-binding advisory opinions in South Africa

The public were invited to comment on the proposed draft Regulations dealing with non-binding advisory opinions (NBAOs). In South Africa, the Competition Commission (Commission) is mandated to issue NBAOs in terms of the Competition Act 89 of 1998 (Act). NBAOs aim to assist businesses to comply with the Act by providing non-binding guidance.

In terms of the draft Regulations:

- NBAOs must be requested from the Commission in writing and must include the:
  - names of the requesting party (suggestive that anonymous requests may not be entertained);
  - markets in which the requesting party operates;
  - reasons why a NBAO is sought from the Commission;
  - nature of the legal advice sought; and
  - relevant facts, information and supporting documents and the reason(s) why a NBAO is sought.
- The proposed fee for procuring a NBAO is R20,000 for medium enterprises; and R50,000 for other market participants. This is markedly higher than the predecessor fee of R2,500. The draft regulations do however also propose exempting certain entities from paying a fee, including national or provincial departments, non-profit organisations, micro-enterprises and small enterprises, amongst others.
- NBAOs would not fetter any future discretion of the Commission in exercising its statutory duties.
- The Commission will be empowered to review, revise or withdraw its NBAO if the NBAO is likely to undermine the objectives of the Act.
- Upon receipt of a request for a NBAO, the Commission may, in its discretion decide to: (i) issue a NBAO, (ii) decline to issue a NBAO and refund the filing fee if it appears that issuing a NBAO is likely to undermine the objectives of the Act; or (iii) determine that the issues in the NBAO are better dealt with by way of an investigation or any other appropriate process in terms of the Act.

Proposed amendments to South African merger filing, exemption and confidentiality forms

Public comment is simultaneously being sought on proposed amendments to certain forms rules and regulations dealing with: revised forms for exemption applications and merger filings and the regimes for access to confidential information submitted to the Commission, and the Minister of Trade, Industry and Competition's (Minister) participation in merger proceedings.

A relevant proposal addresses the matter of resolving disputes regarding confidentiality claims and third party access to confidential information submitted to the Commission. This will require, before the Commission makes a determination in respect of whether information submitted to it is confidential, that the Commission issue a Notice of Intention to Make a Determination to a

Key competition law updates in Africa: Part 2*...continued*

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claimant and respondent. The claimant and respondent will then be allowed five business days to make representations to the Commission. Within five business days after the Commission makes its determination, an aggrieved person may refer the Commission's decision to the South African Competition Tribunal.

The proposed amendments also deal with the participation by the Minister in merger proceedings, proposing that if the Minister decides to participate in any merger before the Commission, the Minister must file a form, Minister's Notice of Intention to Participate, within 10 days after receiving a copy of the Merger Notice from the Commission. The Minister may file a concise statement of the public interest grounds on which the Minister relies in respect of a particular merger, and a statement of the Minister's preferred decision (if any).

Importantly, reinforcing the focus of the South African competition authorities on the public interest effects of mergers, the amended merger forms will require parties to provide additional and significantly more detailed information on the effect of proposed mergers on each of the public interest considerations in the Act. This will effectively trigger, for each statutory public interest ground affected, specific new topics which must be canvassed by the merger parties in the merger notification. Practically, this will require merger parties to provide considerably more detail than is currently required for a complete merger filing, relating to, for example, the merger's impact on:

- local production/manufacturing/ supply chains;
- significant social upliftment projects;
- local resources;
- regional sustainability;
- public policy goals;
- barriers for small and medium businesses (SME)/firms controlled or owned by historically disadvantaged persons (HDP);
- SME/HDP suppliers; and
- HDP shareholders, employee share schemes etc.

The proposed suite of amendments also includes changes to the forms for applications for exemptions, with a significant increase in the supporting information to accompany such applications.

There have been diverse reactions to the proposed amendments, with some welcoming the increased guidance in respect of relevant issues to be canvassed in merger notifications and exemption applications, whilst others have raised concerns that the preparation of these documents will become increasingly onerous and increase the costs of doing business.

Key competition law updates in Africa: Part 2*...continued*

Uganda has been suspended as a Common Market for Eastern and Southern Africa (COMESA) Member State.

Tanzania aims to impose maximum penalty for prior implementation of a merger

Assessing merger obligations when doing business in Tanzania should be front of mind. For example, the Fair Competition Commission (FCC) in Tanzania, in January 2021, issued provisional findings in which it stated its intention to impose a penalty of 10% of combined annual turnover (being some TZS 326 510 252), against five local firms for allegedly implementing a merger without prior notification to and approval from the FCC. The alleged contravention dealt with the transactional steps taken in anticipation of the transformation of the Simba Sports Club (SSC) from a sports club to a company. The FCC alleges a change of control occurred within SSC, constituting a merger for purposes of the Fair Competition Act, 2003, and that the financial thresholds for mandatory notification were met based on the asset value of SSC. The final outcome of the matter remains to be seen as the FCC's findings are only provisional and the respondents still have an opportunity to appeal the final findings, but this signals a stark warning to those doing business in Tanzania, to consider merger obligations which may arise.

Uganda suspended from COMESA for alleged arrear payments

Uganda has been suspended as a Common Market for Eastern and Southern Africa (COMESA) Member State. It has been reported that Uganda has allegedly been in arrears in respect of its financial commitment fees for more than two years. COMESA has placed the nation in the "*sanction bracket*", meaning that the Member-State loses all privileges flowing from COMESA membership including key free trading benefits, amongst others. It remains to be seen whether this suspension of Uganda will impact competition law enforcement in any direct, appreciable way. While Uganda has certain sector-specific competition regulation in the banking, energy, pharmaceutical and insurance sectors, for example, it does not currently have an operational national merger control regime.

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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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