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COMPETITION LAW **ALERT**

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Competition Law developments in Africa: Part 3

This is the third and final 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), and Part 2 considered key changes in Mozambique, Tanzania, South Africa and Uganda (accessible here). This alert covers further developments in Angola, Kenya, Nigeria, and Zimbabwe.

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Merger fees now payable in Angola

At this stage, it seems that the ARC only accepts payments of the filing fee from local firms.

As of February 2021, certain fees are now due for services rendered by the Autoridade Reguladora da Concorrência (the ARC), as approved by Ministry of Finance's Executive Decree No. 32/21 (the Decree). Notably, an "*assessment of concentration*" fee is payable as part of the services. Thereafter, filing fees are payable and calculated in relation to turnover values, based on the thresholds for mandatory merger notification.

Merger thresholds

A merger is notifiable if any one, of the following, is satisfied:

- the merger will result in the acquisition, creation or reinforcement of a market share of 50% or more in the local market or a substantial part of it;
- the merger will result in the acquisition, creation or reinforcement of a market share of between 30% to 50% in the local market or a substantial part of it, and if at least two of the undertakings concerned individually achieved turnover in Angola of more than Angolan Kwanza (AOA) 450 million (approx. USD 680,000) in the preceding financial year;
- if the combined turnover in Angola of all undertakings participating in the merger exceeded AOA 3.5 billion (approx. USD 53 million) in the preceding financial year.

Combined annual turnover (AOA)	Merger filing fee (AOA)
>450 million (approx. USD 680,000)	2,418,944.15 (approx. USD 3,700)
>3.5 billion (approx. USD 53 million)	3,627,916.96 (approx. USD 5,500)

At this stage, it seems that the ARC only accepts payments of the filing fee from local firms. It remains uncertain what the position is if the financial thresholds are not met, but the 50% or more market share threshold is. Presumably, in that instance, no filing fee is payable.

Njeri Wagacha and Simone Nel

Competition and COVID-19 – steps to economic recovery in Kenya

The Guidelines provide for the exemption of certain sectors from restrictions that have been placed on certain horizontal and vertical practices found in sections 21 and 22 of the Act.

Consistent with global trends, the Competition Authority of Kenya (CAK) has recognised that the post-pandemic economic recovery project may require the short-term relaxation of restrictions imposed by competition law. This comes off the back of certain countries adopting similar relaxations aimed at stimulating economic growth during the course of the pandemic. The intention to expand such deregulation into the post-pandemic economy represents an interesting development in Kenyan competition law.

In accordance with the above policy decisions, the CAK has published the Post COVID-19 Economic Recovery Block Exemption Guidelines (Guidelines) under section 30(2) of the Competition Act 12 of 2010 (Act). The Guidelines provide for the exemption of certain sectors from restrictions that have been placed on certain horizontal and vertical practices found in sections 21 and 22 of the Act. The Guidelines aim to relax certain regulatory restrictions placed on economic activity in an effort to stimulate the Kenyan economy. In fulfilling this goal, the CAK has identified economic 'priority sectors' to be exempted from specific competition law restrictions. In classifying the sectors, the CAK looked at each sectors' contribution to the economy, the ability of the sectors to 'self-correct' in the short term and the extent of the pandemic's impact on the sector. In light thereof, the Guidelines remain subject to amendment pending the publication of the final version.

The Guidelines outline various principles to be applied when assessing whether to grant exemptions or not. These criteria, which take the form of a self-assessment, are rigorous and are aimed at striking a balance between the intention to stimulate economic growth while maintaining the general structural regulation and goals of competition law. The following requirements and criteria therefore apply:

- the measures taken must be temporary with defined timelines and a defined scope of collaboration;
- the measures must be appropriate and necessary to avoid a shortage of supply or to ensure security of supply, this may be relevant for example in the healthcare industry during the pandemic;
- the measures must be in the public interest (with the example of employment being provided);
- the measures should address concerns related to the COVID-19 disease; and
- collaboration on prices is nevertheless prohibited and price competition should be maintained at all times irrespective of the level of information exchange and collaboration.

Competition and COVID-19 – steps to economic recovery in Kenya

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Exemption extends to collaborations involving the acquisition and improvement of medical research, laboratories and equipment.

The Guidelines apply to the following affected industries, and such industries accordingly receive exemptions from prohibitions on certain vertical and horizontal practices found in sections 21 and 22 of the Act. The exemptions are however limited, as highlighted below:

Sector	Guidelines
Manufacturing	Exemption is narrowly defined and broken down into sub-sectors, which include the manufacture and distribution of furniture, stationary, beverages, uniforms, ventilators, and medical equipment for public institutions including government hospitals and schools, and whose joint market shares does not exceed 15% of the relevant market. Collaboration between pharmaceutical manufacturers is permitted yet limited to the production and distribution of COVID-19 vaccines and COVID-19 related products. Non-pharmaceutical manufacturing and distribution firms are exempt only in relation to the production of COVID-19 related equipment.
Private Healthcare	Parties are permitted to lobby financial institutions (through their industry associations) for favourable credit terms, including interest payable. Stakeholders in the industry may further collectively lobby insurance companies in relation to credit periods in which insurance companies should honour claims. Regarding the supply of medication and equipment, parties may coordinate in relation to the procurement of COVID-19 consumables and pharmaceuticals.
Aviation, Travel and Hospitality	Parties are allowed to collaborate in relation to the planning of schedules and the marketing of airline operators, provided that effective competition is guaranteed. Travel agents may also collaborate in relation to the acquisition of customers and the filling of vans and airlines. Coordination in relation to transportation or shipping of procured consumables, such as masks, hand sanitizers, water sanitation, disinfectants and anti-viral products, is permitted.
Health Research Services	Exemption extends to collaborations involving the acquisition and improvement of medical research, laboratories and equipment. It is aimed at permitting collaboration in the attainment of joint intellectual property rights in COVID-19 related inventions as well as collaboration in the licensing and distribution of the COVID-19 vaccines with aim of ensuring its efficient distribution. More specifically, however, the exemptions now allow for 'Most Favoured Nation (MFN)' clauses in distribution agreements to ensure that the Kenyan population are granted priority in the distribution of vaccines.
Horticulture, Farming and Export	Exemptions permit collaboration by horticultural farmers dealing in fruits, vegetables and flowers meant for export. The exemption is limited to joint marketing in export markets, joint consolidation and inland freighting as well as the permissibility to lobby shippers collaboratively to obtain favourable shipping terms.

Njeri Wagacha and Jonathan Sive

Developments in Nigeria's merger regime under new competition regulations, operationality of authorities

Prior to the promulgation of the Regulations, there was a lack of clarity regarding the notification requirements of foreign-to-foreign mergers.

Developments

Merger regulation in Nigeria has undergone recent and significant reform. The Federal Competition and Consumer Protection Act (the Act) was signed into law in January 2019, and aims to regulate merger control, cartel conduct, restrictive vertical practice and abuse of dominance. While certain aspects of competition law had been regulated by the Consumer Protection Act (Cap C25, 1992), Nigeria did not have a dedicated competition regime prior to the new Act's promulgation.

Following the passing of the Act into law, on 23 November 2020, the Nigerian Federal Competition and Consumer Protection Act Merger Review Regulations were published (the Regulations). The Regulations aim to provide the substantive and procedural requirements for the implementation of the Act's framework. Most recently, on 4 March 2021, the Federal Competition and Consumer Protection Commission (Commission) and the Competition and Consumer Protection Tribunal (Tribunal) were inaugurated by the Minister of Industry, Trade and Investment.

Merger regulation and thresholds

The Act defines a merger as when one or more 'undertakings' directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking. A merger can be defined as small or large, depending on turnover and asset values of the firms involved in the transaction. Only large mergers require notification. The Regulations instruct the newly formed Commission to consider the acquisition of shareholding or voting rights above 25% as a likely merger based on a rebuttable presumption of conferring the ability to materially influence policy.

Notification must occur where a combined turnover equals/exceeds 1 billion Naira. Notification is also required if the target firm's turnover exceeds or equals 500 million Naira regardless of the size of the acquiring firm. It is further noted that foreign merging parties will be required to appoint local legal representation to notify the merger to the Commission.

Prior to the promulgation of the Regulations, there was a lack of clarity regarding the notification requirements of foreign-to-foreign mergers. The Regulations now specifically grants jurisdiction to consider mergers that occur *"purely as a result of a transaction involving undertakings wholly domiciled outside Nigeria"* if the merger has a *"local component"*. This in turn requires the foreign enterprise to have a 'local nexus', such as subsidiaries in Nigeria, or for the foreign enterprise to meet the turnover requirements to be classified as a large merger (i.e. combined annual turnover of the acquiring undertaking and target undertaking in, into or from Nigeria equals or exceeds 1 billion. Naira or the annual turnover of the target undertaking in the preceding year equals or exceeds 500 million Naira) (Regulation 22).

Public interest considerations

In terms of section 94(4) of the Act, the following factors are taken into account when assessing public interest:

- a particular industrial sector or region;
- employment;
- the ability of national industries to compete in international markets; and
- the ability of small and medium scale enterprises to become competitive.

Developments in Nigeria's merger regime under new competition regulations, operationality of authorities*...continued*

It remains to be seen whether a cap will be introduced to limit the fees payable for a merger filing.

The legislation (at sections 94(1)(b)(ii) and 94(3)(b)) provides that the Commission shall determine whether a merger that appears likely to prevent or lessen competition can or cannot be justified on public interest grounds. Accordingly, the Commission may confirm a merger on the basis of public interest considerations even where the merger is likely to lessen competition.

However, section 94(1)(c) of the Act appears to open the door for the rejection of a merger that does not offend competition on the basis of public interest considerations as a standalone ground for determining whether a merger can be justified or not.

Fees payable

The merger filing fee is calculated on a sliding scale as a percentage of either the combined annual turnover of the merger parties in, into or from Nigeria or as a percentage of the transaction consideration, whichever is the higher:

Threshold - based on combined turn-over of merging parties	Fee payable – based on transac-tion consideration		Fee payable – based on combined annual turnover of merging parties
First five hundred million Naira	0.3%	OR	0.3%
Next five hundred million Naira	0.225%		0.225%
Any sum thereafter	0.15%		0.75%

The filing fees payable may be disproportionate to the impact that the merger may actually have in Nigeria, particularly in foreign-to-foreign transactions where a Nigerian business is a small part of the overall transaction value. It remains to be seen whether a cap will be introduced to limit the fees payable for a merger filing.

Chris Charter and Jonathan Sive

Zimbabwe publishes draft guidelines on horizontal agreements

Commercialisation agreements will be considered pro-competitive if it fosters entry and growth of a market.

The Competition and Tariff Commission (CTC) has recently published Guidelines on Horizontal Agreements 2021 (Guidelines) which provide general guidance on the implementation of the Zimbabwean Competition Act, Chapter 14:28 (Zimbabwean Competition Act) as it relates to horizontal agreements. Although not yet in force, and pending the approval of the Board of Commissioners, broadly, the Guidelines seek to clarify the CTC's approach in assessing horizontal agreements which by object or effect restrict competition. The CTC noted the "*need for transparency and predictability*" as the basis for publishing the Guidelines.

The Guidelines highlights certain key considerations and developments, which are briefly discussed below.

Competition concerns	Guidelines
Horizontal Agreements	Engagement in a horizontal agreement will not constitute an unfair business practice where such an agreement involves companies belonging to the same group of companies.
Restrictive Practices	Two sets of criteria: • *Per se* prohibited agreements (agreements between competitors to fix prices, restrict output, rig bids or allocate markets by allocating customers, suppliers, territories, or lines of commerce) are considered *prima facie* illegal without inquiring into the claimed business purposes, rationale, pro-competitive advantages, or overall competitive effects. The offender(s) will not be given the opportunity to raise any efficiency, pro-competitive or technological gains as a defence to the alleged anticompetitive agreement. • Rule of reason (agreements that do not restrict competition by object) consists of a broad range of agreements undertaken by competitors that may be efficiency-enhancing which may include information exchanges of various types and may have economic benefits when they result *inter alia* in cost savings, sharing of risk, investment in new products or technologies. The CTC will analyse agreements for potential or actual anti-competitive effects if it falls under the rule of reason type of agreements by conducting an assessment various factors including *inter alia* the structure of the relevant market(s), market shares and concentration, the level and extent of entry, public interest and efficiency benefits.
Information Sharing	Any data exchange or statistical reporting that includes current prices, or information that identifies data from individual competitors, can raise competition concerns if it encourages more uniform prices than otherwise would exist absent the exchange. The exchange of firms' individualised intentions regarding quantities, sales, market, territories, prices and components of prices including rebates, discounts, and credit terms, pricing formulas, mark-ups and margins is likely to lead to collusive outcomes. The sharing of historical data other than price is less likely to raise competition concerns.

Zimbabwe publishes draft guidelines on horizontal agreements*...continued*

The CTC noted the *"need for transparency and predictability"* as the basis for publishing the Guidelines.

Competition concerns	Guidelines
Product Agreements	Agreements wherein two or more parties agree to jointly produce products are considered capable of giving rise to significant benefits for consumers and markets. The CTC will consider the extent to which an agreement combines the production assets of the parties thereby limiting their ability to compete.
Joint Commercialisation Agreements	Considered to be less likely to create competition concerns where the agreement makes it possible for undertakings to enter a market they could not have entered individually. Commercialisation agreements will be considered pro-competitive if it fosters entry and growth of a market.
Joint Purchasing Agreements	Has the ability to create buyer power which can result in pro-competitive or anti-competitive outcomes and are less likely to raise competition concerns where the undertakings involved do not have market power.
Research and Development Agreements	Considered to be beneficial to both the market and consumers as it may result in innovation but may also raise competition concerns as they may create market-dominating technologies and may involve restrictive agreements concerning the use of the result of the research. Such agreements are considered less anticompetitive if all parties have full access to the final results.
'Safe Harbour' Provision	Section 9 of the Zimbabwean Competition Act, known as the 'Safe Harbour' provision stipulates that, there are circumstances in which the Commission, absent extra ordinary circumstances, may not challenge an agreement under the Act. It is however clarified that this provision is not applicable to agreements that constitute unfair business practices.
Damages	Any person who is affected by an anti-competitive agreement has the right to recover damages by proceedings in a court from every person responsible for the agreement.

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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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