Competition Law

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- So that's what you call the intervention test in merger proceedings
- A focus on digital markets in COMESA

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So that's what you call the intervention test in merger proceedings

The judgment handed down in *Lewis Stores Proprietary Ltd v Pepkor Holdings Ltd and Others* (CCT316/25) [2026] ZACC 4 on 30 January 2026 marks the first occasion on which the Constitutional Court has directly considered and articulated the test for third-party intervention in the merger control context. By setting aside the decision of the Competition Appeal Court (CAC), the Constitutional Court confirmed that intervention depends on whether a party has a material interest in the proceedings or is reasonably capable of assisting the Competition Tribunal (Tribunal) in its statutory inquiry.

In one fell swoop, the Constitutional Court undid what many had welcomed from the CAC's

decision – a need to balance expedition in merger control with the benefits of intervention in the appropriate circumstances.

Over and above offering clarity on merger procedure, the decision also delineates the respective institutional roles of the Tribunal, the CAC and the Constitutional Court in merger adjudication.

Factual background

The dispute arose from Pepkor's proposed acquisition of Shoprite's OK Furniture and House & Home divisions. Lewis Stores, a national competitor to the merger parties in the low-to-middle income furniture retail segment, sought leave to intervene before the Tribunal, contending that the merger would materially reshape competitive dynamics within the furniture retail industry. It also contended that it possessed *"exclusive"* industry-specific evidence and *"unique insights"* capable of assisting the Tribunal's section 12A assessment in terms of the Competition Act 89 of 1998 (Competition Act), which the Competition Commission (Commission) initially had either not obtained or properly analysed. The Tribunal granted Lewis Stores limited rights to participate in the merger proceedings.

How the CAC framed intervention

On appeal to the CAC, that court effectively enjoined the Tribunal to consider the risk that competitors may seek intervention for cynical reasons by conflating *"material"* and *"commercial"* interests. It concluded that the Tribunal therefore ought to explore other ways to get valuable input (for example through calling the erstwhile intervenor to be a witness, or supply information) short of the procedural friction inherent in full intervention.

The CAC therefore appeared less concerned about a threshold test for intervention but rather suggested that the Tribunal should use its inquisitorial powers and "*judicial discretion*" to ensure expeditious merger hearings (in circumstances where a competitor may be advancing its own commercial interest in subverting a merger taking place in its market). In this regard, it found that Lewis had not demonstrated sufficiently specific or unique knowledge capable of providing material assistance to the Tribunal through intervention, despite basing its case for intervention on that very proposition.

In this context, the CAC found that the Tribunal's participation order was overly broad in granting extensive procedural rights and access to confidential information in a manner that risked replicating the Commission's investigative role and delaying merger proceedings.

On this basis, the CAC overturned the Tribunal's decision and dismissed the intervention application entirely, effectively excluding Lewis Stores from the merger hearing *(Pepkor Holdings Ltd v Lewis Stores (Pty) Ltd* (2025) ZACAC 6).

Lewis Stores then appealed to the Constitutional Court, placing the CAC's intervention standard and appellate approach squarely in the ring.

The Constitutional Court's rejection of the CAC's intervention standard

Peering through its public interest lens, the Constitutional Court positioned this appeal as raising a point of law of general public importance regarding the scope of intervention. Applying an incorrect legal test could infringe the constitutional right of access to courts by excluding a party from the only forum empowered to determine merger-specific competitive harm. In doing so, the Constitutional Court highlighted the constitutional aspects of merger participation and positioned the dispute as one concerning lawful access to specialised adjudication, rather than merely procedural case management.

The fundamental takeaway here, however, is that the test for intervention was clarified: an applicant must merely demonstrate a material interest in the proceedings or a reasonable prospect of assisting the Tribunal in the performance of its statutory merger analysis.

In reaffirming this test, the Constitutional Court focused on whether an applicant for intervention should demonstrate that it possesses any unique or exclusive information, and expressly rejected that proposal as a departure from the settled position that finds no support in the Competition Act or Tribunal Rules. Overreliance on the Tribunal's inquisitorial powers to obtain evidence independently would render intervention virtually impossible and undermine the participatory framework contemplated by the Competition Act.

In reaching its conclusion, the Constitutional Court traced the test through prior CAC jurisprudence, including *Northam Platinum Holdings Limited v Impala Platinum Holdings Limited* [2022] ZACAC 10; [2022] 2 CPLR 25 (CAC) and *Africa Data Centres SA Development (Pty) Ltd v Digital Titan (Pty) Ltd* [2022] ZACAC 6; [2022] 2 CPLR 21 (CAC). These cases determined that the existence of a material interest in the matter or the ability to offer material assistance to the Tribunal is sufficient to permit intervention.

Accordingly, the Constitutional Court rejected the CAC's heightened standard and restored the orthodox assistance-based test.

The CAC's impermissible interference with the Tribunal's discretion

As has become usual in Constitutional Court decisions in the sphere of competition law, the court further held that the CAC had impermissibly interfered with the Tribunal's exercise of discretion in granting participatory rights. As the specialist adjudicative body responsible for determining whether mergers substantially prevent or lessen competition, the Tribunal enjoys a true discretionary authority in regulating participation. Appellate intrusion in the absence of legal misdirection disrupts the institutional hierarchy of South Africa's competition regime.

This aspect of the judgment is central in the Constitutional Court's reasoning and confirms the Tribunal's primacy in shaping the evidentiary record, while confining the CAC's role to correcting genuine legal error rather than re-deciding participation on the merits.

Conclusion

While the Constitutional Court cannot be faulted for affirming the importance of intervention as part of a rigorous, adversarial process that can serve (and has in the past worked) to elucidate complex issues to be fully ventilated and resolved, the court's failure to wrestle with the CAC's admonishment that the Tribunal should equally consider the need for expedition in merger control and be alive to possible ulterior motives for intervention may be disappointing to those who saw the CAC as having introduced the possibility of a more calibrated process in contested mergers.

Read together, the CAC and Constitutional Court judgments illustrate a tension between two models of merger control:

- the CAC's focus on procedural efficiency, prioritising expedition and limiting competitor participation; and
- the Constitutional Court's focus on the application of the recognised test for intervention which emphasises evidentiary completeness and access to the courts, as well as the Tribunal's discretion within the competition law regime.

One upshot of the Constitutional Court's approach is that it still appears open to the Tribunal to allow intervention to supplement and bolster the Commission's investigation, which critics might assert could lead to less rigorous investigations and a deference to third-party prosecution of mergers. In this regard, the intervention process, while adding fuel to the crucible of contested merger hearings, will still favour delay over expedition.

Ultimately, if one wishes to intervene in merger proceedings, this judgment clarifies the standard that would need to be met to do so.

Chris Charter, Andries le Grange, Marcel Bothma and Evangelia Goulas

A focus on digital markets in COMESA

The Common Market for Eastern and Southern Africa (COMESA) Competition and Consumer Commission (CCCC) adopted the COMESA Competition and Consumer Protection Regulations, 2025 and the COMESA Competition and Consumer Protection Rules, 2025 (New Dispensation) in December 2025.

The New Dispensation has significantly strengthened the CCCC's enforcement powers and introduced a new and focused approach to digital markets in COMESA. In this regard, digital markets are expressly mentioned in the context of merger regulation and dealing with prohibited practices, in particular, abuse of dominance. The New Dispensation introduces merger thresholds applicable to mergers in digital markets, and these differ from the thresholds applicable to non-digital market thresholds. This rightfully or wrongfully signals a recognition that digital markets require special merger regulation unlike other markets, presumably because they are innovative and fast evolving markets with the potential to escape much needed competition regulation.

This recognition is not new. In South Africa, the Competition Commission (SA Commission) set out its approach to digital markets in its revised Competition in the Digital Economy paper published in 2021, which examined the competitive risks associated with digital platforms.

This analysis subsequently informed the SA Commission's final Small Merger Guidelines, which highlighted the risk to competition and innovation posed by the growing number of acquisitions of digital firms.

While it is accepted that the New Dispensation makes way for a more intentional focus on mergers in digital markets, there has been a notable shift towards more active scrutiny of prohibited practices in Africa, with authorities devoting greater attention to how contractual and structural arrangements limit market access, rather than focusing solely on merger activity. The New Dispensation's focus on abuse of dominance in digital markets also forms part of a broader evolution in the CCCC's prohibited practices enforcement toolkit. While merger control has historically been the most visible aspect of COMESA's work, recent years have seen an increase in prohibited practice investigations, including cases involving restrictive agreements and unilateral conduct affecting cross-border trade. With specific regard to abuse of dominance, the New Dispensation focuses on digital platforms, data-driven market power, network effects and the role of firms operating as gateways between businesses and consumers.

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Meta investigation

In February 2026, the CCCC initiated its first abuse of dominance investigation under the New Dispensation, into alleged abuse of dominance conduct by Meta Platforms Inc (Meta), relating to changes implemented to the WhatsApp Business Solution terms in the Common Market (COMESA investigation). The investigation concerns the 2025 amendments introduced to the WhatsApp Business Solution terms by Meta. The complaint alleges that these amendments restrict third party artificial intelligence (AI) providers from accessing WhatsApp, a crucial gateway for the AI service providers to their customers. The CCCC alleges that these changes were made unilaterally and may signal that Meta abused its dominant position. The focus of the COMESA investigation is therefore not on consumer use of WhatsApp but rather, access to a business facing interface that allows automated and large scale interaction with customers. The CCCC is further considering whether WhatsApp functions as an important route to market for business users, and whether restricting access may exclude competing AI service providers from related markets. The CCCC has stressed that the investigation is at a preliminary stage and that no findings have been made against Meta yet.

This investigation is therefore best understood not as an isolated development, but as part of a wider move towards more assertive and sustained prohibited-practice enforcement by the CCCC, now supported by expanded powers and the New Dispensation's focus on modern markets.

Further, the COMESA investigation was initiated against a backdrop of parallel and related investigations by competition authorities in the European Union (EU) into closely connected conduct affecting Meta and its WhatsApp Business messaging platform.

European proceedings

In December 2025, the Italian Competition Authority (AGCM) adopted interim measures in an abuse of dominance investigation concerning restrictions imposed on third-party AI chatbot providers' access to WhatsApp Business communication tools operated by Meta. The AGCM considered that changes to WhatsApp's business-facing terms appeared to exclude competing AI chatbot providers, while continuing to allow Meta's own AI services to operate. Pending the outcome of its investigation, the AGCM ordered the immediate suspension of the contested terms on the basis that they risked causing serious and irreparable harm to competition.

Similarly, the European Commission has launched a formal investigation under Article 102 of the Treaty on the Functioning of the European Union (TFEU) into related access restrictions involving Meta's WhatsApp messaging platform across the European economic area (excluding Italy). The European Commission is examining whether restrictions on third-party AI providers' access to WhatsApp Business communication tools may prevent competing services from reaching customers, while favouring Meta's own AI offerings. In February 2026, The European Commission issued a statement of objections to Meta, setting out its preliminary view that the contested WhatsApp Business terms breach Article 102 TFEU. The European Commission has also signalled its intention to consider interim measures to preserve competitors' access to WhatsApp while the investigation is ongoing.

Conclusion

The COMESA, Italian and EU proceedings reflect parallel enforcement in relation to closely connected conduct, and point to a common concern regarding how control over access to key digital platforms may affect competition in adjacent and emerging markets, particularly where those platforms play an important role in connecting businesses with customers.

For businesses active in digital or data-driven sectors in the Common Market, the COMESA investigation offers an early indication of the practical application of the New Dispensation and that controlling access to key platforms must align with competition law principles. Firms operating across COMESA member states, particularly those whose business models involve control over access to platforms, or depend on access or the integration of AI-enabled services, should take note of the CCCC's willingness to deploy its expanded enforcement toolkit and should consider reviewing their contractual arrangements and platform access policies against the standards introduced by the New Dispensation. Although the investigation remains at a preliminary stage and no findings have been made, the road ahead is clear: digital markets in the Common Market will be subject to increasingly rigorous competition oversight.

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