

## February 2017

Competition law is growing in Africa. According to a recent World Bank report<sup>1</sup>, in 15 years the number of jurisdictions in Africa with competition law has almost trebled. A number of African countries have introduced or proposed new or updated legislation, and some jurisdictions have introduced guidelines and other policies to facilitate the operation of the legislation.

Growth in competition regulation is happening not only at a national level, but also at a regional level. The Common Market for Eastern and Southern Africa ("COMESA")<sup>2</sup> brought its competition legislation into operation in January 2013, but this is not the only regional body on the continent. There are other regional authorities including the Central African Economic and Monetary Community ("CEMAC")<sup>3</sup> and the West African Economic and Monetary Union ("WAEMU")<sup>4</sup>. The East African Community (EAC) is also in existence and has expressed the intention to begin enforcing its competition legislation soon. The EAC Member States are Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda. Almost all of these countries are also members of COMESA, and it is unclear how the EAC and COMESA intend to dovetail their operations.

Awareness of competition legislation is growing across the continent as regulators turn their attention from a narrow focus on merger control to a wider focus on enforcement. We shall look at a few of the recent developments in this regard in various African jurisdictions.

## South Africa

Enforcement activities have long been a focus of the South African competition authorities, and South Africa is still most active in this regard. According to the World Bank Group Report, 50% of the horizontal agreement cases that were completed by nine authorities in 2013 – 2014 were investigated by the South African Competition Commission ("SACC"). The SACC continues to focus on cartel conduct, having recently referred a number of complaints to the Competition Tribunal for adjudication. It has also pursued a number of abuse of dominance cases over the years.

## Catch-up by other African countries

Other African authorities seem to be keen to follow suit in prosecuting enforcement cases rather than focusing only on merger control. According to the World Bank Group Report, to this end the annual budgets of African competition authorities have increased. Although in some countries the

increase is off a low base, the average annual budget increase was about 39% between 2009 and 2014.

Kenya is one example of this trend, where the Competition Authority of Kenya ("CAK") is increasing its manpower and in doing so has become active in enforcement and compliance. The CAK stated in late 2015 that it had increased its focus on restrictive trade practices enforcement, especially in the financial sector, advertising and cement; and that it expected increased cartel enforcement in the coming year. In addition to efforts to detect and prosecute competition contraventions, the CAK has also launched a Special Compliance Process ("SCP") as a "soft" enforcement tool for trade associations in the financial and agricultural sectors. The aim of the SCP is to ensure that trade associations are in compliance with the competition laws, and to assist them in identifying and rectifying past conduct in their sectors.

Other African countries are also devoting greater effort to their enforcement activities. To that end, a number of countries have issued enforcement guidelines. Zambia and Namibia have both taken this step, for example, and in 2016 Namibia issued its first fine for a cartel offence.

### **Cooperation between authorities**

There is also a noticeable degree of cooperation between regulators. The African Competition Forum ("ACF") plays an important role in this respect – many competition regulators are active members of the ACF, through which they share information and assist in capacity building, while increasing awareness around the benefits of implementing competition laws. The ACF was launched in March 2011 as an informal network. Since then it has grown substantially and, as at November 2016, its members included 30 national competition agencies and four regional agencies.

Another indicator of cooperation amongst regulators is the conclusion of Memoranda of Understanding (MoUs) between them. A number of these MoUs were signed in 2016. In mid-2016 representatives from the competition authorities of Botswana, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, and Zambia, all being member states of the Southern African Development Community, signed a MoU to cooperate on competition matters. The SACC was very active in signing a number of MoUs with various authorities. The COMESA Competition Commission ("CCC") has also been very active this past year on the advocacy front, having signed MoUs with numerous countries, enabling the agencies to conduct joint investigations and enforcement activities. The CCC has also issued a notice calling on parties to notify them of any agreements (both historic and forward-looking) that may be anti-competitive, in order to have these agreements exempted under Article 20 of the COMESA Competition Regulations. This follows the Zambian legislation, which has a similar provision in their legislation. Notably, the Zambian Competition and Consumer Protection Commission

("CCPC") is enforcing this provision more and more actively, and companies are being called upon to voluntarily disclose their agreements to the CCPC.

## **Leniency programmes**

A number of African countries have leniency policies in place, although not all of them are actively used. According to the World Bank Report, at least seven countries have a leniency program for cartel participants, but leniency applications at the time of that report had only been received in South Africa and Mauritius.

In Kenya, the CAK published the terms of two voluntary disclosure programmes applicable to trade associations in the financial, agriculture and agro-processing sectors, allowing parties to report contraventions in exchange for immunity from prosecution. The deadline for submissions to be made to the Authority was mid April 2016. The amnesty did not, however, extend to conduct which was already the subject of an ongoing investigation. Thus, since an inquiry into the cement industry was already underway, the amnesty did not apply to the cement sector.

South Africa's leniency policy has been particularly successful, having assisted in the uncovering of numerous cartels since 2008, when the policy was updated *inter alia* to allow ringleaders to seek leniency. In fact, it is frequently a follow-on process from a dawn raid as parties comb through their records and apply for leniency shortly thereafter. Going forward its popularity is likely to decrease, since the South African legislation was amended in May 2016 to allow for criminal prosecution of individuals involved in cartel conduct. The legislation provides for the SACC to recommend that whistleblowers be granted leniency from prosecution, but the final decision rests not with the SACC but with the National Prosecuting Authority, and this may cause parties who would otherwise have come forward to be more cautious.

## **Market enquiries**

South Africa has made active use of this tool, having held its first market enquiry over ten years ago, when it investigated the banking sector. The SACC did not use this tool frequently, however, as the legislation did not clearly make provision for market enquiries. Since the legislation was amended to provide explicitly for market enquiries in 2013, the SACC has launched three market enquiries (healthcare, LPG, grocery retail).

This investigative tool has not been adopted in other African jurisdictions as yet, although the COMESA Competition Commission ("CCC") has indicated that they propose to hold market enquiries.

## **Dawn raids**

The SACC has conducted a number of dawn raids across numerous industries since the commencement of the South African Competition Act, 1998. Its first search and seizure exercise, which was carried out against participants in the cement industry in the early 2000s, was not a success, since it was procedurally flawed, and the SACC's conduct was heavily criticised by the courts. The procedural irregularities in the execution of the warrant resulted in it being set aside, and the SACC had to return the documents seized during the raid. After this inauspicious start,

the SACC desisted from conducting dawn raids for a number of years, but the SACC has since carried out numerous successful raids.

At least 16 countries have search and seizure powers, but few have carried out raids, although the trend seems to be catching on outside South Africa. For example, dawn raids have been carried out recently in Zambia, Kenya, and Namibia.

### **Follow-on damages**

Another phenomenon that has started to arise is that of follow-on damages. While these are becoming quite common globally, it is probably too early to see such cases in most African jurisdictions, where prosecutions are relatively new. However, South Africa is starting to see parties launching civil damages claims and no doubt other jurisdictions will follow.

### **The need to address African competition law**

Enforcement of competition legislation is growing in Africa. As can be seen from our discussion of recent developments across the continent, enforcement tools and fines are on the increase, and the stakes for parties who contravene the legislation, both national and regional, are rising. Against this backdrop, companies operating, or considering making acquisitions, in Africa, should ensure that they are familiar, and comply with, the competition legislation of the countries or regions they operate or intend to operate in, to ensure that they do not run the risk of falling foul of that legislation and consequently bearing the brunt of enforcement action against them by the relevant competition authorities.

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1 World Bank Group Report titled "Breaking down Barriers: Unlocking Africa's Potential Through Vigorous Competition Policy: June 2016 at page 10.

<http://documents.worldbank.org/curated/en/243171467232051787/pdf/106717-REVISED-PUBLIC-WBG-ACF-Report-Printers-Version-21092016.pdf> accessed 10 December 2016 (hereafter "World Bank Group Report")

2 The Member States of COMESA are Burundi, Comoros, Djibouti, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

3 The Member States of CEMAC are Gabon, Cameroon, the Central African Republic (CAR), Chad, the Republic of the Congo and Equatorial Guinea.

4 WAEMU's Member States are Benin, Burkina Faso, Cote d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo.

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