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**AFRICA GUIDE –  
COMPETITION**









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# Introduction - Competition law in Africa

## COMPETITION LAW DEVELOPMENTS IN AFRICA DURING THE PAST YEAR

Competition law continues to be an evolving area on the continent. During the past year developments have included the promulgation of new competition laws, amendments to competition legislation, the establishment (and coming into effect) of new competition authorities, the issuing of merger thresholds and other guidelines, and developments in policy. Cross-country information-sharing has been flourishing, e.g. through multi-lateral institutions, regional groups, inter-agency-cooperation or the publication and sharing of papers and academic dissertations. Increasingly, literature on Africa's unique economic challenges is being published. Competition practitioners are constantly challenged to grow in appreciation for the complex, multi-variable and inter-dependent features of the economies on which they advise. It demands continuous learning and engagement with stakeholders operating from different vantage points.

Some of the most important competition law developments over the past year are noted below.

- **Angola** - In January 2019, the Competition Regulatory Authority of Angola became operational with the appointment of the board of directors of the Authority. It commenced merger review and approved various mergers, including those in the market for financial services and oil. In December 2019, the Regulations on Merger Notification Forms were published, as were merger notification forms. The merger notification process is expected to become more formalised during the year to come.
- **Botswana** - Further to the publication of Statutory Instruments 154 and 156 on 2 December 2019, the Botswana Competition Act No. 4 of 2018 and the Competition Regulations, 2019 have come into effect, repealing the Competition Act No. 17 of 2009 and Competition Regulations, 2011. This introduced a new era in Botswana's competition law regime, as the new regulator, the Competition and Consumer Authority, has the power to impose strict sanctions on companies and individuals who contravene the Act. Criminal sanctions for cartel conduct and fines for pre-implementation or failure to notify a merger have been introduced.
- **Economic and Monetary Union of Central Africa (CEMAC)** - During the past year, Regulation No. B/19-UEAC-639-CM-33 of 7 April 2019 have come into effect, repealing Regulation No. 12-05 UEAC 639 U-CM-SE of 27 June 2005. The new Regulations make provision for the establishment of the Community Competition Commission within the CEMAC Commission, which is a technical body providing recommendations to the CEMAC Commission. Strict penalties for non-compliance with the Regulations have been introduced. Over the past year, a number of mergers were reviewed and approved by the CEMAC Commission.
- **Cameroon** - The Cameroonian Competition Commission continues to enforce the Competition Law by pursuing firms for failing to notify transactions, including parties to foreign-to-foreign mergers.
- **Common Market for Eastern and Southern Africa (COMESA)** - The COMESA Competition Commission published Guidelines on Restrictive Trade Practices, Abuse of a Dominant Position and Market Definition. It intensified its focus on restrictive trade practices and opened a number of Article 20 and 22 investigations. Practices that raised concerns included resale price maintenance, territorial restrictions, overly broad restraint provisions and tying. It launched cartel investigations into the pharmaceutical and construction sectors,



with further investigations anticipated as part of a 'phase two' process in the banking, telecommunications, dairy, beverages and water sectors. The Commission closely collaborates with Member States' ministries and competition authorities to gather information on firms suspected to be involved in prohibited conduct.

- **East African Community (EAC)** - Although the East African Competition Authority is not fully operational, it has finalised its market inquiry into the regional retail sector and is developing instruments to address the challenges identified. Priorities for the 2019/ 2020 fiscal year included staff recruitment, the amendment of the EAC Competition Amendment Bill and the development of Merger Guidelines. A bid by President Felix Tshisekedi of the Democratic Republic of the Congo to the EAC Chairman, President Paul Kagame of Rwanda, for the DRC to join the EAC, will be debated in early 2020.
- **Economic Community of West African States (ECOWAS)** - The Commission of ECOWAS launched the ECOWAS Regional Competition Authority in Banjul, The Gambia, on 31 May 2019. The Authority was inaugurated last year and engaged in an expert forum on market structure in November 2019. The long-awaited currency conversion in ECOWAS from Francs CFA to Eco has been approved and is set to be adopted on 1 July 2020.
- **Egypt** - The Egypt Competition Authority remains an active competition regulator and has, in the past year, prosecuted various companies and individuals for anti-competitive conduct, including Apple, Delivery Hero (in the food delivery market) and the Confederation for African Football. It also settled with various merging parties for failing to notify mergers (as part of a post-implementation notification regime). The Uber/ Careem merger has been approved subject to conditions, following a request by the Authority for the parties to subject themselves to a voluntary merger review process.
- **Ethiopia** - During the past year, Ethiopia's parliament approved a draft law that will enable competition in the telecommunications industry through the establishment of an independent communications regulator, accountable to the prime minister.
- **Kenya** - In 2019, the Competition Amendment Act, 2019 was assented to and the Competition (General) Rules, 2019 have been gazetted. According to the Competition Authority of Kenya, the General Rules (and therefore the new merger thresholds) are in effect. Guidelines on Search & Seizures, Fines & Settlements, and Buyer Power were published. The Kenya Retail Trade Code of Practice, which was issued by the Ministry of Industry, Trade and Cooperatives in 2018, came into effect, and applies to all suppliers of products and services to downstream players in the sector. The Competition Authority of Kenya's e-filing system is operational and merger notifications, exemption applications, various categories of complaints and additional submissions are now being submitted electronically.
- **Malawi** - The new board of Commissioners of the Competition and Fair Trading Commission has been reconstituted after three directors' positions had been vacant for most of 2019. The new board underwent induction training in December 2019 and was briefed by various government institutions.
- **Mauritius** - The Competition Commission of Mauritius has appointed an international consultant to review the Competition Act, the Rules of Procedures and the guidelines with a view to have the legislation amended, to enable a more efficient enforcement process mindful of the challenges of a small economy. The intention was for the consultant to submit the proposals to the Commission by the end of 2019, for further consideration. Amendments to the Act are not foreseen in the near future.

With respect to prohibited practices, the Commission recommended the imposition of a fine of MUR 76 million (USD 2.07 million) on Mauritius Chemical and Fertilizers Industry and United Investments, for cartel conduct. Visa and Mastercard were found to have abused their dominance by the setting of the interchange fee excessively high at 1% and the Commission ordered Visa and Mastercard to reduce their fees to 0.5%.





- **Morocco** - The Morocco Competition Council and the European Union are in the process of establishing a partnership to study the potential harmonisation of Moroccan and EU economic and competition laws. Among others, the partnership will provide for the coupling of the Council with an EU national competition body, and the joint organisation of a symposium on the impact of the digital revolution in the field of trade on the economy and competition law in Morocco and Europe.
- **Namibia** - A significant shift in merger policy was seen during the past year with the conditional approval of the China National Uranium Corporation/ Rossing Uranium merger. It was the first time in Namibia that a merger was approved subject to an array of public interest conditions, and signifies the Namibian Competition Commission's inclination to take steps to protect the public interest in the context of international mergers. The Commission also issued preliminary findings against Computicket Namibia for the abuse of a dominant position, and entered into settlement agreements with Santam and Hollard for price-fixing in the short-term insurance market.

Recently, the Commission rejected an application for exemption by the Namibian Petroleum Corporation for an arrangement in terms of which all fuel wholesalers in the country would be required to purchase 50% of their fuel stock requirements from Namcor, pursuant to an application by Namcor to Government for a 50% import mandate. It was found that the import mandate would reduce competition, that it was not indispensable for the attainment of the objectives for which exemption was sought, and not in line with established international best practice.

- **Nigeria** - Further to the promulgation of the Nigerian Federal Competition and Consumer Protection Act in January 2019, the Federal Competition and Consumer

Protection Commission (FCCPC) was launched on 1 April 2019. It commenced with merger review in May 2019 pursuant to the publication of a Joint Advisory by the FCCPC and the Nigerian Securities and Exchange Commission on merger notifications. Statutory merger thresholds were published, as well as a simplified merger notification form (including filing fees) applicable to foreign-to-foreign transactions.

- **South Africa** - Various provisions of the South African Competition Amendment Act 18 of 2018 have come into effect, as well as the amended Competition Commission Rule 15 dealing with access to the Commission's records. Public comment on the draft price discrimination and buyer power regulations has been provided to the Ministry of Trade, Industry & Competition. Public comment on the draft price discrimination and buyer power guidelines has been made to the Commission. During the past year, the Commission concluded three market inquiries on the healthcare, retail inquiry and data sectors, respectively.

The Commission prosecuted two firms for the abuse of a dominant position, namely the Computicket and Uniplate (Computicket lost its appeal before the Competition Appeal Court). The Commission prohibited mergers in the healthcare, steel drums and forestry sectors.

- **Tanzania** - The Fair Competition (Amendment) Bill, 2015 is pending parliamentary review, and the Fair Competition Rules, 2018 have come into effect for all matters that have been filed with the Commission after 27 July 2018. The Fair Competition Commission also issued a merger filing fee form to ensure the correct calculation of merger filing fees. The Commission found against JT International Holdings and JTI Leaf Services for entering



into a Tobacco Supply Agreement with Alliance One Tobacco Tanzania, which had the effect of lessening potential competition in the tobacco buying market in certain regions. In a similar but different matter, the Tanzanian Government ordered the Commission to withdraw its cases against tobacco buyers, as the fines in these matters totalled more than KES 11 billion (USD 108 million), causing buyers to stop procuring crop, which led to an oversupply and economic crisis.

The Commission entered into a settlement agreement with Total Tanzania Ltd, GAPCO Company Ltd and two individuals for refusing to supply petroleum products to customers. The Tanzania Bankers Association published a Code of Conduct to encourage adherence to best practices and ethical standards in the banking industry in Tanzania.

- **Zambia** - The Zambian Competition and Consumer Protection Commission issued a supplementary merger information request to be completed together with Form 1 for all transactions notified at the Commission. It also published guidelines on Abuse of Dominance, the Calculation of Merger filing fees and the Administration of Fines. From 1 September 2019, Zambia has been running an amnesty program for firms wishing to disclose their involvement in restrictive business practices (including, but not limited to, cartel conduct) without having to pay a fine.
- **Zanzibar** - This year, the Zanzibari Fair Competition Commission commenced operations, including its first merger review.
- **Zimbabwe** - Following a year of unconditional merger approvals, the Competition and Tariffs Commission has recently imposed conditions in the SSCG Africa Holding and Selby Enterprises merger. The Zimbabwean Parliament requested the Ministry of Industry and Commerce to provide a comprehensive

explanation as to the wave of price increases. A report by the Competition and Tariff Commission identified monopolies as the source of price distortions, particularly in the sugar, poultry and dairy sectors. Businesses that are still using the US Dollar as legal tender (as opposed to the Zimbabwean Dollar, pursuant to Statutory Instrument 142 of 2019 of the Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019) have also been identified as contributors to high prices. The Zimbabwean President said in its State of the Nation address that stricter penalties will be imposed on monopolies and cartels spurring persisting price increases. The Competition Amendment Bill is before Parliament, but its promulgation is not expected soon.





# Our Competition Law Practice

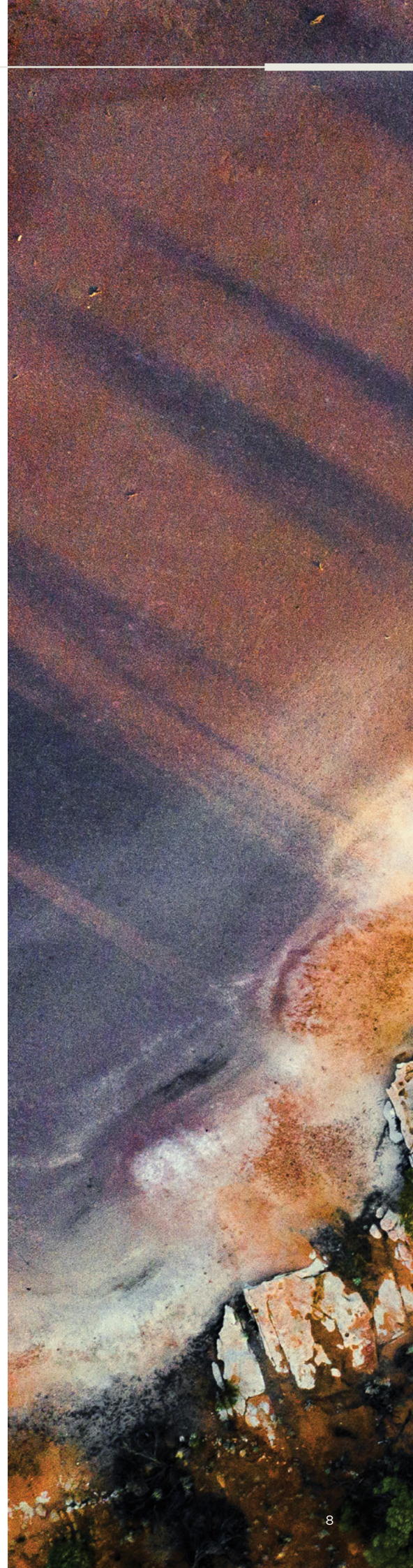
Competition law presents various challenges for companies doing business on the continent. Bowmans helps clients overcome legal complexity and unlock opportunity in Africa.

Our Competition Practice is at the forefront of developments in African competition law. We have 14 partners in our Competition Practice and we are involved in many of the most high-profile matters on the continent. We monitor competition law developments in various jurisdictions; participate in special committees on competition law; actively comment on draft legislation, guidelines and amendments; and regularly contribute to local and international competition law publications.

We provide a full range of competition and anti-trust law services including in relation to: merger control, cartels and markets, abuse of dominance and other restrictive practices, and trade issues such as the implications of commercial and exclusivity agreements, joint ventures and strategic alliances. We also provide competition law compliance training and conduct competition law audits. We have significant depth of experience in, and knowledge of, most sectors.

Our clients include local and international businesses operating in Africa as well as multi-national operations investing in Africa.

We have consistently been included in the *GCR 100*, a ranking of the world's top 100 competition law firms. In South Africa, we have been ranked in band 1 by *Chambers* and in tier 1 by the *Legal 500* for the past five years (2015–2019).











# Botswana



**BOOKBINDER BUSINESS LAW**

Jeffrey Bookbinder

### 1. What is the relevant competition legislation and who are the enforcers?

The relevant competition legislation is the Competition Act, [Cap 46:09] (the Act) together with the Competition Regulations, 2011 (the Regulations), being the regulations promulgated in terms of the Act. The Act established the Competition Authority (the Authority). The Act is enforced by the Authority, the Botswana Competition Commission (the Commission), which is the governing body of the Authority, and the High Court of Botswana.

### 2. Are there any proposed amendments or new regulations expected to come into force?

The Competition Act, 2018 (the Competition Act Amendment) was passed by Parliament on 14 December 2017. The object of the Competition Act Amendment is to repeal and re-enact the Act with amendments. Highlights from the Competition Act Amendment include, *inter alia*, the establishment of the Competition and Consumer Board which shall be the governing body of the Authority, the criminalisation of cartel conduct such that if directors and officers are found to have contravened section 25 (the Prohibition of Horizontal Agreements) of the Act they would be liable to a fine not exceeding BWP 100 000, or a prison term not exceeding five years, or both. The Competition Act Amendment is still on notice and is thus not yet in force.

### 3. Is the law actively enforced?

The Act is actively enforced by the Authority, both in respect of mergers and in relation to prohibited practices. Since the commencement of the Act in October 2011, the Authority has dealt with over 462 cases. The majority of these cases are mergers but there has been a substantial number of abuse of dominance cases and cases of restrictive business practices. The Authority recently instituted proceedings against four wholesalers alleging the occurrence of resale price maintenance. Resale price maintenance is an offence in terms of section 26 (1)(b) of the Act and thus led to an investigation in the 2017/ 2018 financial year. The Authority's intervention has now allowed general dealers that subscribe with the wholesalers'

membership group to decide prices for their products during mid-month and end of month promotions, unlike in the past.

Furthermore, the Authority recently initiated an enquiry following an anonymous tip-off that soccer teams in the local football league could not play their games at the national stadium because of an advertisement agreement between the Botswana National Sports Commission (BNSC) and a local mobile phone services provider. The tip-off indicated that advertisement agreement was couched in such a way that competitors of the mobile phone services provider could not carry out their activities at the national stadium. This agreement prohibited teams in the local football league from playing at the national stadium as the local football league was sponsored by a competitor of the mobile phone services provider. The Authority engaged BNSC and the mobile services provider. The Authority's intervention has led to teams in the local football league able to play their matches at the national stadium.

Another example is that in the 2017/ 2018 financial year, the Authority undertook an enquiry after receiving a complaint that Botswana Power Corporation (BPC) through its outsourcing division closed out potential market entrants in the tender for electrical contractors and electrical consultants. The findings were that indeed BPC was closing out potential entrants. The Authority's intervention led to the identification and removal of two constraints for the procurement of electrical services. Prior to the Authority's intervention, the BPC electrical services market was the preserve of incumbent firms and other firms were not able to enter the market.

### 4. What are the current priorities or focus areas of the competition authorities?

The focus areas of the Authority over the past year have been:

- merger control;
- cartel enforcement; and
- acting as an advisory body to the Government of Botswana in respect of statutory monopolies and how best to align them with the Act.





## 5. What kind of transaction constitutes a notifiable merger?

It is required to notify the Authority of a transaction if it (i) constitutes a merger (as defined in the Act); and (ii) meets the relevant thresholds prescribed for mandatory notification. For the purposes of the Act, a merger occurs when one or more enterprises directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another. There is no closed list of how 'control' may be achieved. Control may be achieved in any manner, including:

- the purchase or lease of shares, an interest, or assets of the other enterprise in question; or
- the amalgamation or other combination with that enterprise.

Broadly, a person controls another firm if that person, *inter alia*:

- beneficially owns more than one-half of the issued share capital of the firm;
- is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;
- is able to appoint or veto the appointment of a majority of the directors of the firm;
- is a holding company, and the firm is a subsidiary of that company as contemplated in the Companies Act;
- has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust, in the case of an enterprise being a trust;
- owns the majority of the members' interests or controls directly or has the right to control the majority of members' votes in the close corporation, in the case of the enterprise being a close corporation; or
- has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the bullet points above.

## 6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?

A merger is notifiable if it meets the following thresholds:

- the turnover in Botswana of the enterprise or enterprises being taken over exceeds BWP 10 million;
- the assets in Botswana of the enterprise or enterprises being taken over have a value exceeding BWP 10 million; or
- the enterprises concerned would, following implementation of the merger, supply or acquire 20% of a particular description of goods or services in Botswana. In relation to this requirement, the Authority has confirmed that even where an acquiring firm has no presence in Botswana but acquires control of a target firm with a market share of 20% or more in a relevant market, the merger thresholds will be triggered as, on a strict reading of the legislation, the merged enterprise will have a market share of 20% or more. Put differently, there is no need for an accretion in market share in order for the notification obligation to be triggered.

## 7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?

Parties to a notifiable merger may not implement the merger (i) before obtaining the requisite approval; or (ii) prior to the period for the Authority's review having elapsed without the Authority having made a determination in relation to the merger. Where the Authority forms a reasonable suspicion that a merger is being, or has been, implemented in contravention of the Act, the Authority may give direction in writing to the enterprise(s) concerned to the effect that, *inter alia*, implementation of the merger be suspended pending the Authority's investigation.

There are no express punitive provisions in respect of failure to pre-notify the Authority but where the Authority determines that a

merger has been implemented in contravention of the Act, it may give further direction to the enterprise(s):

- not to complete or implement the merger;
- to sell or otherwise dispose of any assets or shares or other interest acquired in the merger;
- to terminate any agreements to which the merger was subject; or
- to take such further measures as may be necessary to restore the conditions of competition existing prior to the merger.

Should the Authority determine there has been a failure to comply with a direction given where the Authority had determined that a merger had been implemented in contravention of the Act, it may give notice to the enterprise(s) concerned of its intentions and consider any representations. It may thereafter apply to the High Court for an order requiring the enterprise(s) to make good the default.

#### **8. What filing fees are required?**

The filing fee is 0.01% of the merging enterprises' combined turnover or assets in Botswana, whichever is higher.

#### **9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

The Act applies to 'all economic activity within, or having an effect within, Botswana'. Accordingly, foreign-to-foreign mergers are notifiable if the merger involves economic activity within or having an effect within Botswana and the prescribed thresholds are met.

#### **10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

Although the Act does not specifically provide for pre-notification meetings, in Botswana they are both permitted and normal practice.

#### **11. To what extent are non-competition factors relevant to the assessment of a merger?**

The Act specifically provides for public interest considerations to be taken into account. As part of the assessment that the Authority is required to make in terms of the Act, the Authority may take into account any factor it considers relevant to the broader public interest, including:

- the effect that a merger will have on a particular industrial sector or region;
- employment;
- the production or distribution of goods or the provision of services;
- exports;
- citizen empowerment; and
- the ability of national industries to compete in international markets.

The Authority has taken into consideration non-competition factors such as public interest, employment and citizen empowerment in the assessment of mergers. For example, in a decision by the Authority in late 2012, the Authority approved a proposed merger on condition that the merged entity would not retrench any Botswana-based employees for a period of three years from the date of the merger. In other mergers notified since then, employment-related conditions have been imposed.

#### **12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

The Authority may contact the customers and competitors whose details are provided by the filing entity and, where applicable, those already known by the Authority. The submissions are sourced for the Authority's investigative purposes only and do not detract from the Authority's independent assessment of the merger.





**13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

Any person, including employees, may make voluntary submissions to the Authority even though the Authority does not contact employees or their representatives for submissions.

**14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

In terms of the Act, the Authority may, if it considers it appropriate, determine that one or more hearings should be held in relation to a proposed merger. In such cases, the Authority is required to give reasonable notice in writing. The parties are then required to submit to the Authority, within 30 days of receipt of the notice, any representations that they may wish to make in relation to the proposed action. While the Act does not include a definition of days, based on the calculation of time periods under the Interpretation Act, any reference to days must be interpreted to mean calendar days.

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

Mergers are investigated by the Authority and referred to the Commission for adjudication. All determinations made and directions given by the Commission are subject to appeal to the High Court of Botswana.

**16. Does the legislation apply to joint ventures?**

The legislation does not specifically refer to joint ventures. Joint ventures that are classified as mergers fall to be notified to the Authority if they meet the thresholds for mandatory notification.

**17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

The Act regulates prohibited practices and specifically prohibits certain horizontal restrictive practices (unlawful competition between competitors). The Act stipulates that an enterprise shall not enter into a horizontal agreement with another enterprise to the extent that such agreement involves certain practices, such as:

- price-fixing (either direct or indirect);
- dividing markets (by allocating customers, suppliers, territories or specific types of goods or services);
- bid-rigging (except where the person requesting the bids or tenders is informed of the terms of the agreement before the time that the bids or tenders are made);
- restraints on production or sale, including restraint by quota;
- a concerted practice; or
- a collective denial of access, of an enterprise, to which is an arrangement or association crucial to competition.

Other horizontal agreements may be prohibited by the Authority if, following its investigation, such agreement is found to have the object or effect of preventing or substantially lessening competition in a market for any goods or services in Botswana. The Authority may carry out an investigation to determine whether the prohibition should be applied if it is satisfied that the parties to the agreement, in the case of a horizontal agreement, together supply or acquire 10% or more of the goods or services in any market in Botswana. The Authority may prohibit any horizontal agreement which (i) limits or controls production, market outlets or access, technical development or investment; (ii) applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive advantage; and (iii) makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The Authority has investigated cartel activity amongst suppliers of government food rations, medical aid schemes and local panelbeating companies.

**18. What are the authorities’ powers of investigation in relation to cartel conduct and other prohibited practices?**

The Act confers broad investigative powers on the Authority. Notably, the Act empowers the Authority to subpoena any person considered by the Authority to be relevant to the investigation. Part VII of the Act stipulates the investigative powers of the Authority in respect of prohibited horizontal and vertical agreements. Section 35 to section 37 of the Act empowers the Authority, either on its own initiative or upon receipt of information or a complaint from any person, to start an investigation into any practice that it reasonably suspects constitutes a contravention of the prohibited horizontal or vertical agreements provisions of the Act, or amounts to an abuse of a dominant position in the market.

Written notice of the investigation must be served as soon as practicable on every enterprise that is suspected to be a party to the practice, indicating the nature of the investigation and inviting the enterprise to make representations in that regard if they so wish. Where the Authority considers that it would materially prejudice the initial stages of the investigation to give such notice, it may defer from giving notice until its powers of search and entry are exercised.

The Authority has broad powers of search and seizure, including the power:

- to enter and search any premises during normal business hours by a duly appointed and authorised inspector in possession of a warrant authorising such entry and search of the premises; and
- to enter and search any premises other than a private dwelling by a duly appointed and authorised inspector not in possession of a warrant authorising the search if the owner, or any person in control of the premises, consents to the entry and search of the premises.

Notwithstanding these broad powers of investigation, the Authority is not empowered to demand the production or disclosure of information or documents which would be subject to legal professional privilege in a court of law. However, the Authority is empowered to demand and be provided with the names and addresses of an undertaking’s clients where required. Further, the Act empowers the Authority to conduct dawn raids with or without a warrant. Recently the Authority conducted four dawn raids in the medical aid and motor vehicle industries as well as food supply for government tenders.

An investigation in terms of the Act may only continue for a period of 12 months, after which the Authority must either refer the matter to the Commission for prosecution or issue a certificate of non-referral to the complainant.

However, the 12-month investigation period may be extended by agreement between the Authority and the complainant.

**19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

In terms of the Act, financial penalties for prohibited restrictive conduct may only be applied where the Commission has satisfied itself that the breach of the prohibition was committed intentionally or negligently. In such cases, the amount of a penalty imposed shall not exceed 10% of the turnover of the enterprise during the breach of the prohibition up to a maximum of three years. In fixing the amount of a particular fine, the Commission may have regard to specific factors including the gravity of the infringement and the recurrence or duration of the infringement.

An action for damages or other sum of money by any person or firm may be made only in respect of:

- price-fixing (either direct or indirect);
- dividing markets (by allocating customers, suppliers, territories or specific types of goods or services);



- bid-rigging (except where the person requesting the bids or tenders is informed of the terms of the agreement before the time that the bids or tenders are made);
- restraints on production or sale, including restraint by quota;
- a concerted practice; or
- 'a collective denial of access, of an enterprise, to which is an arrangement or association crucial to competition', subject to the conduct having been established by a determination of the Commission or, following an appeal against the determination, by a judgment of the High Court of Botswana.

The Authority has a leniency policy in place. An application for leniency may be made either orally or in writing at the premises of the Authority. Initial contact can be made by telephone to secure a place in the marker queue, provided the Authority is provided with the name of the applicant and a description of the cartel conduct including the market.

Upon such application, the Authority shall respond in writing, within three days after the application was made, acknowledging receipt of such application for leniency, specifying the way the application has been received by the Authority. In the event of a dispute as to whether an application for leniency was made, the acknowledgement letter of the Authority shall be conclusive evidence of such application.

The enterprise making a leniency application should immediately provide the Competition Authority with all the evidence relating to the suspected breach available to it at the time of application for leniency.

The leniency policy may be accessed at: <http://www.competitionauthority.co.bw/sites/default/files/LIENIENCY%20POLICY-2.pdf>.

Whilst there are no criminal sanctions expressly provided in the Act for engaging in cartel conduct, the Act provides for criminal sanctions, primarily for individuals who are found to have interfered in an investigation.

## **20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

The Act provides that any agreement, other than a restrictive agreement specifically prohibited by the Act, may be exempt from application of the Act if it can be reasonably expected that there will be benefits for the public that offset the anti-competitive effects, such as:

- the maintenance of lower prices, higher quality or greater choice for consumers;
- the promotion or maintenance of the efficient production, distribution or provision of goods and services;
- the promotion of technical or economic progress in the production, distribution or provision of goods and services;
- the maintenance or promotion of exports from Botswana or employment in Botswana;
- the strategic or national interest of Botswana in relation to a particular economic activity being advanced;
- the provision of social benefits which outweigh the effects on competition;
- the agreement occurring within the context of a citizen empowerment initiative of Government; or
- the agreement in any other way enhancing the effectiveness of the Government's programmes for the development of the economy of Botswana, including the programmes of industrial development and privatisation; provided that the prevention or lessening of competition is proportionate to the benefits for the public and does not allow the enterprise concerned to eliminate competition completely.

The Authority may grant an exemption where the agreements are unlikely to lead to a substantial lessening of competition, or where one or more of the circumstances specified in the last four bullet points above exist or are reasonably expected to exist, in relation to those agreements.



With regard to exemptions from provisions of the Act dealing with merger control, the Minister of Investment, Trade and Industry may, by regulation, specify categories of mergers exempt from the application of the Act by reference to the commercial or industrial sector involved, the nature of the activities in which the enterprises are engaged, or some aspect of the general public interest.

### **21. Is minimum resale price maintenance prohibited?**

Subject to certain exemptions, the Act prohibits any agreement involving resale price maintenance. However, a supplier may recommend a resale price provided that (i) the supplier makes it clear that the price is simply recommended and is not binding; and that (ii) the product labelling makes it clear that the price is recommended.

### **22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

An exclusive agreement may be prohibited by the Authority if, following an investigation by the Authority, such agreement is found to have the object or effect of preventing or substantially lessening competition in a market for any goods or services in Botswana. The factors to be considered are, *inter alia*, whether the agreement in issue limits or controls production, market outlets or access, technical development or investment.

### **23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

The Act prohibits the abuse of a dominant position. For the purposes of the Act, a dominant position refers to a situation in which one or more enterprises possess such economic strength in a market so as to allow the enterprise to adjust prices or output without effective constraint from competitors or potential competitors.

The Authority will consider a dominant position to exist in the supply of goods or services if (i) 25% of those goods or services are supplied by one enterprise, or are acquired by one enterprise; or (ii) 50% of those goods or services are supplied by three or fewer enterprises, or are acquired by three or fewer enterprises.

The Act provides that, in determining whether an abuse of a dominant position has occurred, the Authority may have regard to whether the agreement or conduct in question:

- maintains or promotes exports from Botswana or employment in Botswana;
- advances the strategic or national interest of Botswana in relation to a particular economic activity;
- provides social benefits which outweigh the effects on competition;
- occurs within the context of a citizen empowerment initiative of Government, or otherwise enhances the competitiveness of small- and medium-sized enterprises; or
- in any other way enhances the effectiveness of the Government's programmes for the development of the economy of Botswana, including the programmes of industrial development and privatisation.

### **24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

By October 2013, 33% of the cases investigated by the Authority were cases of abuse of dominance which included predatory pricing, refusal to deal and exclusive agreements.

A complaint of predatory pricing in the UHT long-life milk market was lodged by Delta Dairies (Pty) Limited against a chain store supermarket. Following investigations, it was found that the supermarket chain store was not a dominant player as alleged and its market share in the UHT long-life milk market was only 2% (significantly below the 25% dominance threshold).

Further, in 2014, a decision was taken by the Authority to order a merged enterprise (Jack's Gym) to divest, in order to reduce its market concentration. The merger assessment showed that



there were substantive competition concerns that would arise in the market as the merger resulted in the merged entity acquiring a dominant position (as seen from pre-merger market share estimates).

**25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

There are no punitive sanctions imposed by the Act for the abuse of a dominant position. The Act is aimed at remedying, mitigating or preventing the detrimental effects that may result, have resulted or will result from the adverse effect on, or absence of, competition. In pursuing these aims, the Competition Commission (the Commission) may issue a direction to an enterprise requiring it to:

- terminate or amend an agreement;
- cease or amend a practice or course of conduct, including conduct in relation to prices;
- observe specified conditions in relation to the continuation of an agreement or conduct;
- supply goods or services, or grant access to facilities, either generally or to named parties;
- separate itself from or divest itself of any enterprise or assets; or
- provide the Commission with specified information on a continuing basis.

**26. Are there Rules in relation to price discrimination?**

Yes. While the Act does not contain express provisions in respect of price discrimination, the Authority relies on the prohibition in the Act against any agreement which envisages the application of dissimilar conditions in equivalent transactions with other trading parties, to control price discrimination which places entities at a competitive disadvantage.

**27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

Yes. The Authority publishes merger notices and merger decisions on its website, which can be accessed at [www.competitionauthority.co.bw](http://www.competitionauthority.co.bw).

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# Burundi



**RUBEYA & CO-ADVOCATES**

Willy Rubeya





### **1. What is the relevant competition legislation and who are the enforcers?**

The relevant competition legislation is Law No. 1/ 06 of 25 March 2010 (the Act). No ministerial orders have been issued to assist with the application of the Act at this stage.

In accordance with the Act, a Competition Commission shall be established (the Commission) as the independent regulator to enforce it. The Commission can conduct investigations initiated by the Ministry of Trade, interested parties or on its own initiative. The Commission will be required to hand over a matter to the Attorney General where criminal sanctions are to be applied to a party being investigated or having already been investigated. The Commission has not yet been established. However, it is referred to in Article 12 of the Act.

### **2. Are there any proposed amendments or new regulations expected to come into force?**

There are no proposed amendments or new regulations as at the time of writing and the Act is still in force.

### **3. Is the law actively enforced?**

The Act is not actively enforced at this stage because the Commission has not yet been established.

### **4. What are the current priorities or focus areas of the competition authorities?**

The Commission has not yet been established.

### **5. What kind of transaction constitutes a notifiable merger?**

Concentrations are subject to merger control and must be notified to the Commission. A concentration is deemed to arise where:

- two or more undertakings unite through merger or acquisition or any other form of horizontal, vertical or heterogeneous takeover (based on Article 46 of the Act);
- there is a transfer of ownership or use of all or part of the property, rights or obligations of a

company (based on Article 47, paragraph one of the Act); or

- the transaction has the effect or purpose of allowing a company or a group of companies to directly or indirectly exercise a dominant influence in the relevant market.

Where the Commission finds that the concentration will materially reduce competition, it can make an order for the concentration to be prohibited or for the undertakings concerned to dispose of assets or shares in order to alleviate the damage to competition. The Commission may authorise concentrations that have the effect of materially reducing competition if they result in efficiency gains for the national economy that outweigh the detrimental effect to competition in the relevant market. However, the gain must not have been achievable without the concentration taking place (based on Article 48 of the Act).

### **6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?**

The thresholds for mandatory notification are to be prescribed by the Ministry of Trade upon recommendation by the Commission. It is provided that proposed concentrations, where the individual and combined turnover of the undertakings concerned exceed the threshold prescribed by the Ministry of Trade, must be notified to the Commission. Such proposed concentrations cannot be implemented for a period of three months commencing on the date of notification to the Commission. Proposed concentrations where the individual and combined turnover of the undertakings concerned are below the thresholds prescribed by the Ministry of Trade must be notified to the Commission within 15 days of their completion (based on Article 49 of the Act).

### **7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

The Act establishes a tiered structure whereby the ability to pre-implement a concentration is contingent upon the threshold being exceeded. Concentrations categorised as falling below the threshold may be implemented prior to their

notification to the Commission provided that the Commission is notified within the prescribed period after completion of the concentration. Concentrations categorised as exceeding the thresholds shall not be implemented prior to notification and approval by the Commission. There are no penalties for pre-implementation but the Commission has the right to cancel the merger.

#### **8. What filing fees are required?**

Not applicable.

#### **9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

Not applicable.

#### **10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

Pre-notification contacts with the competition authorities are not dealt in the legislation.

#### **11. To what extent are non-competition factors relevant to the assessment of a merger?**

The Commission will consider applications based on circumstances relevant to the merger, but since the Commission is not yet operational there are no examples at this stage.

#### **12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

Not applicable.

#### **13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

In terms of the current position, only the Ministry of Trade can make submissions. When the Commission becomes operational, the Ministry of Trade, any business entity, or any interested party will be allowed to make submissions.

#### **14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

Not applicable.

#### **15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

Article 16 of the Act provides for the possibility of review. The Commission will consider applications for review of its decisions where circumstances have changed. Decisions, which will need to be motivated and made publicly available, will be capable of being appealed. Such an appeal will have no suspensive effect.

#### **16. Does the legislation apply to joint ventures?**

The merger control aspects of the Act apply to joint ventures where there is an acquisition of control by one or more undertakings.

#### **17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

Restrictive agreements and practices are regulated by Article 37 of the Act, which prohibits concerted practices, agreements and alliances, express or implied, between undertakings which have as their object or may have as the effect of their conduct, the prevention, restriction or distortion of competition in a market and, in particular, those which:

- limit access to the market;
- interfere with price setting through market forces, by artificially increasing or decreasing prices;
- distort the market, distribution channels and sources of supply;
- limit or control production, markets, investment or technical development;
- distort or fix conditions to a tender without informing the tenderer; or
- amount to a refusal to sell.



**18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?**

The Ministry of Trade has, and in future the Commission will have, the power to investigate cartel conduct and other prohibited practices.

**19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

The Commission may impose a wide range of sanctions penalising cartel conduct and other forms of restrictive agreements and practices. The Commission may, either at the request of an interested party or of its own accord:

- issue a prohibitory injunction stopping the anti-competitive practice;
- make an order for damages; and
- order penalty payments for the period during which the offending undertaking was in default.

Moreover, where the anti-competitive practice adversely affects the economy or relevant sector, the Commission may take measures to impose interim injunctive relief. Where the offending undertaking does not comply with the prohibitory injunction, the Commission can impose a financial penalty of up to 50% of the profits or 20% of the national turnover achieved in the financial year in which the practices were implemented. The fines are proportionate to the seriousness of the charges and the scale of the damage to the economy. The fines may be doubled in the event that the offence is repeated.

The undertaking must pay the penalty within a period of 60 days, commencing on the date of notification of such penalty. Where there is a delay in paying the penalty, the undertaking is liable for further payment whereby a daily amount is imposed, equivalent to a hundredth of the original penalty. Upon the non-payment of a penalty, the Commission may order the temporary closure of the undertaking. Where the undertaking produces a variety of products, the closure affects the products subject to the anti-competitive practice(s).

An undertaking that suffers losses or damages as a result of anti-competitive practices may apply to

the Commission for an order for damages if it can establish a causal link between the anti-competitive practices and any damage suffered by it.

The Act does not provide for criminal sanctions to be imposed for the contravention of provisions relating to restrictive agreements and practices. Criminal sanctions are applicable only to offences incidental to an investigation or proceedings, as set out in Article 73 of the Act.

**20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

Concentrations can be allowed if previously notified to the Commission, or where the parties to the concentration can show that the concentration has brought about, or will bring about, net gains to economic efficiency by reducing the price of goods or services, or where there is a significant improvement in the quality or the efficiency gains in the production or distribution of this commodity.

**21. What powers of investigation does the legislation confer on the competition authorities to investigate cartels, if any?**

Offences provided for by the Act are within the competence of the officers of the Judicial Police, sworn officers of the Ministry of Trade, customs agents and sworn agents of the Commission. The investigators are empowered to subpoena documents relevant to the investigation.

Further, the investigators may be granted search orders allowing them to access the undertaking's premises, vehicles, as well as the private dwellings of the individuals concerned. The search orders permit the investigators to seize documents and products relevant to the investigation, even if such documents and products are confidential. To facilitate this, undertakings are under a duty to ensure that all documents relevant to their activities are kept safe for a minimum of 10 years.

The officials involved are bound by a duty of professional secrecy. Once the investigators have completed an official report, they divest themselves of their involvement in the procedure and the enquiry is continued by the Commission.



**22. Is minimum resale price maintenance prohibited?**

In terms of Article 31 of the Act, minimum resale price maintenance is prohibited, save in the case of books, newspapers or any other publications or where the sale of a particular product is specifically regulated.

**23. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

The Act prohibits concerted practices, agreements or partnerships, whether express or implied, which have the object or effect of restricting or distorting free competition within the national market or a substantial part thereof.

**24. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

The Act prohibits the abuse of a dominant position on the national market or a substantial part thereof. In particular, abuse of dominance may involve:

- preventing the establishment of a competing undertaking;
- requiring or inducing a supplier not to deal with a competing undertaking;
- the termination of an established commercial relationship on the grounds that a business partner refuses to submit to unjustified commercial conditions;
- limiting production, the market or technical development to the prejudice of consumers;
- refusal to sell;
- discriminatory sales conditions; or
- sales tying.

However, if the undertaking can establish that the practices concerned are aimed at or result in an increase in the quality of goods or services, or the improvement in production or the reduction of costs, in addition to an improvement in the technical, technological or economic processes, the practices mentioned above will be deemed

to fall outside the scope of the abuse of dominance. The practices must not result in any anti-competitive effect going beyond what is strictly required to achieve the gains. Furthermore, the practices must not eliminate all forms of competition in a substantial part of the particular sector.

**25. Are there examples of the authorities pursuing firms for abusing a dominant position?**

Not applicable.

**26. Does the legislation impose penalties on firms for the abuse of a dominant position?**

The Commission may impose the same sanctions for the abuse of dominance as those which may be imposed for restrictive agreements and practices. See question 7.

**27. Are there Rules in relation to price discrimination?**

Yes, the law provides Rules in relation to price discrimination. The Act, in Articles 59 and 60, provides for upper and lower ceiling prices to be set.

**28. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

Not applicable.

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# CEMAC



**BESONG & CO.**

Bayee A. Besong

## 1. What is the relevant competition legislation and who are the enforcers?

The Economic and Monetary Community of Central Africa (CEMAC, Community or Common Market) was established in 1994 and consists of six member states, namely Cameroon, Republic of Congo, Central Africa Republic, Equatorial Guinea, Chad and Gabon. CEMAC became operational pursuant to the ratification of the Treaty of N'Djaména of 1994 by the member states in 1999. The primary competition legislation is Regulation No. 06/ 19-UEAC-639-CM-33 of 7 April 2019 (Regulations). The 2019 Regulations replaced Regulation No. 1/ 99 UEAC-CM-639 of 25 June 1999, Regulation No. 4/ 99-UEAC-CM-639 of 18 August 1999 and Regulation No. 12-05 UEAC 639 U-CM-SE of 25 June 2005. The Regulations are enforced by the CEMAC Commission (Commission), relying on recommendations by the Community Competition Commission (CCC), a technical competition body to be established within the Commission. As of this writing, the CCC is not fully established and functional.

The CCC and the Commission conduct their operations in French. All submissions to the authorities must therefore be in French.

## 2. Are there any proposed amendments or new regulations expected to come into force?

The Regulations make provision for the issuing of procedural regulations on issues like the content of a merger notification, the management of deadlines, access to the CCC's records and filing fees payable. We expect that such regulations will be issued in the near future.

## 3. Is the law actively enforced?

Yes. After years of political crises in the region, the Commission has started to actively enforce the competition laws and is in the process of implementing reforms.

## 4. What are the current priorities or focus areas of the competition authorities?

The current priority for the CCC is merger review.

## 5. What kind of transaction constitutes a notifiable merger?

A notifiable merger takes place:

- When two or more formerly independent enterprises merge;
- Where one or more undertakings acquire, directly or indirectly, by way of equity, contract or any other means, the 'control' (see definition below) of all or parts of one or more enterprises;
- Where a joint venture is established which constitutes in a sustainable way an autonomous entity;

and where such a merger has a 'Community dimension' (see below).

A merger is not effected (i) when financial institutions or insurance companies, whose normal business includes the transaction and trading of securities on their own behalf or on behalf of others, temporarily hold equity interests they have acquired in a company for resale; or (ii) where the control is exercised on a provisional basis by an enterprise mandated by a public authority under the laws of a member state in the course of a bankruptcy or insolvency proceeding.

For the purposes of merger review, 'control' derives from rights, contracts or other means, which confers, individually or jointly, and having regard to circumstances of fact or law, the possibility of the exertion of a decisive influence over the activity of a business, and in particular:

- Property rights or enjoyment of all or part of the property of an enterprise;
- Rights or contracts that relate to the composition, deliberations or decisions of the governance bodies of a company.





## **6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?**

In terms of the Regulation, a merger is notifiable to the CCC if it has a Community dimension.

A merger has a Community dimension when:

- the companies involved in the operation together achieve a turnover in the Common Market of more than 10 billion Francs CFA excluding tax, or together hold more than 30% of the market; and
- a merger is likely to have an effect in at least two of the CEMAC member states.

Mergers with a Community dimension fall within the exclusive competence of the Commission under the supervision of the Community Court of Justice (Court). However, the Commission will inform the member states' authorities of the notification.

Where a merger occurs in a member state which does not have a national competition law and/ or a national competition authority, the Commission must review that merger.

## **7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

A merger may only be implemented after the approval of the merger by the President of the Commission. The CCC is tasked with the investigation of a merger and will provide the Commission with a recommendation. While a joint merger notification must be submitted, the legal obligation to notify the CCC of a merger rests with the acquiring party.

The fine for the pre-implementation or the non-notification of a merger may not exceed either (i) 10% of worldwide sales of all the parties to the merger, or (ii) 20% of the sales of these parties in the Common Market, during the last financial year (excluding taxes). The same fine will apply to non-compliance with merger conditions, implementation of a prohibited merger, or the disrespecting of injunctions imposed pursuant to a finding of incompatibility with the Regulations. In addition, the Commission may impose a daily penalty of

between 1 million Francs CFA and 20 million Francs CFA for each day of non-compliance with prescriptions set out in its decision.

## **8. What filing fees are required?**

The filing fees for merger notifications have not yet been published.

## **9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

Yes. The Regulation applies to all mergers having a Community dimension, irrespective of the location of the head office of the undertakings concerned, so long as they are likely to have a substantial impact on competition in the Community.

## **10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

The Regulations do not make provision for pre-notification contacts. However, pre-notification meetings are normal in practice.

## **11. To what extent are non-competition factors relevant to the assessment of a merger?**

If the Commission established that a merger has resulted, or is likely to result, in a substantial lessening of competition within any market, including the creation of a dominant position in the market, it must consider whether or not the merger (i) may result in any technological gain that may offset the harm to competition; and/ or (ii) whether the transaction can be justified on public interest grounds, e.g. employment (a closed list of public interest factors is not provided). However, the member states that have been notified of the merger may also request the Commission to take measures to ensure the protection of legitimate interests related to the following:

- Public security and national defence;
- Public health and the protection of the environment;
- Security of supply; or
- Prudential regulation.

**12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

In assessing whether a merger is likely to substantially lessen competition, the Commission will conduct an investigation and will consider all available evidence, including from market participants.

**13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

On the basis that employment constitutes a potential public interest ground that could be taken into account when evaluating a merger, presumably the CCC may engage with employees, employee representatives or trade unions as part of a merger investigation. More guidance in this regard may be published in future.

**14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

To our knowledge, to date, the Commission has not yet conditionally approved or prohibited a merger. The decision-makers of the CEMAC Commission meet about four times a year to make decisions. It is advisable that the parties (or their legal representatives) remain in regular contact with the Commission to discuss the status of the investigation and potential issues. Before a decision is finalised, the draft report is circulated to the member states for their input. Any concerns that are identified by the member states must be addressed by the merging parties. The President of the Commission will issue a final decision in accordance with procedural regulations (still to be published).

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

Any party who is dissatisfied with a decision of the Commission may appeal to the Court, which is the ultimate Court hearing competition-related appeals. While appeals are not automatically suspensive, the President of the Court may order a stay of the execution of a decision that may lead to adverse consequences.

**16. Does the legislation apply to joint ventures?**

Yes. In terms of Article 58, a notifiable merger is effected, among others, through the establishment of a joint venture, which constitutes, in a sustainable way, an autonomous entity.

**17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

Agreements, conventions, decisions and any concerted action or coalition having the object or effect of preventing, restricting or distorting competition in the Common Market are prohibited and automatically void. Examples include:

- the limitation of market access or the limitation of the free exercise of competition by other firms;
- price-fixing by the artificial favouring of price increases or decreases;
- the limitation or control of production, marketing, technical development, investment or technical progress;
- the allocation of markets or sources of supply;
- collective refusals of purchase and supply; or
- collusive tendering.



However, under the following circumstances, the above agreements will not be prohibited:

- Where the parties to an agreement can show that the agreement has the effect of ensuring economic progress, including the creation or maintenance of jobs; that consumers will share in the profit to be derived from the agreement; that the agreement will not lead to a substantial elimination of competition; and that the practices will only impose restrictions on competition to the extent that are necessary to achieve progress.
- Where the Commission, following a recommendation by the CCC, has exempted the particular agreement on the basis of a reduction in the cost price of a product or service to the benefit of consumers; the streamlining of an organisation, or the structure of production and distribution; the promotion of research and innovation; the improvement in the quality of products, in particular by the promotion and application of quality-related standards; and an improvement in the competitiveness of CEMAC companies, especially in the international market.

#### **18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?**

Two types of investigations can be conducted by the CCC: simple surveys and in-depth surveys: In terms of simple surveys, information is requested from firms on a voluntary basis. In-depth investigations include search and seizure operations (so-called dawn raids), which are reserved for serious cases of harm to competition and where the possibility exists that evidence may be destroyed.

Search and seizure operations must be carried out by the Executive Director after having informed the President of the Commission, and under the judicial control of the particular member state in which the search takes place. Documents may be seized in any form, including digital form. Minutes of all interviews and documents seized must be taken and shared with the company concerned.

#### **19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

The fine for cartel conduct or the abuse of a dominant position may not exceed either (i) 10% of worldwide sales of all the parties to the merger, or (ii) 20% of the sales of these parties in the Common Market, during the last financial year (excluding taxes), or a more appropriate financial year. Repeat offences will attract a fine of twice the calculated amount. Factors that will be considered in the establishment of a fine will include the turnover relevant to the infringement, the sector concerned, proportionality, the damage done to the CEMAC economy, the company's cooperation in the investigation and the absence of any dispute on its part. In addition to penalties, the CCC may also recommend injunctions against an undertaking to cease the prohibited practice, and the Commission can impose penalties for non-compliance with the injunctions.

#### **20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

The Regulations make provision for an application for exemption from the Regulations in instances where an otherwise anti-competitive agreement will result in:

- a reduction in the cost price of a product or service to the benefit of consumers
- the streamlining of an organisation, or the structure of production and distribution
- the promotion of research and innovation
- the improvement in the quality of products, in particular by the promotion and application of quality-related standards; and
- an improvement in the competitiveness of CEMAC companies, especially in the international market.



**21. Is minimum resale price maintenance prohibited?**

The Regulations do not contain a section dealing specifically with restrictive vertical practices or minimum resale price maintenance. However, the ambit of Article 30 dealing with anti-competitive agreements is sufficiently wide to include a prohibition of minimum resale price maintenance, as Article 30 prohibits, among others (i) the limitation of the free exercise of competition by other firms; (ii) price-fixing by the artificial favouring of price increases or decreases; or (iii) a limitation on marketing. To the extent that Article 30 applies to minimum resale price maintenance, the defence/ exemption provisions contained in Article 32 would also be available to the parties to the agreement. For these provisions, refer to question 17.

**22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

Exclusive agreements will be considered under Article 30 of the Regulations, or alternatively, if a party to the exclusive agreement is dominant, under Article 33 of the Regulations. In terms of Article 30 (i.e. if none of the parties to the agreement are dominant), the agreement will be unlawful if it is found to have the object or effect of preventing, restricting or distorting competition in the Common Market, unless it can be shown that the agreement will ensure economic progress, including the creation or maintenance of jobs; that consumers will share in the profit to be derived from the agreement; that the agreement will not lead to a substantial elimination of competition; and that the exclusivity will only impose restrictions on competition to the extent that they are necessary to achieve progress.

If reviewed under Article 33 (the dominance provision), the exclusive agreement will be prohibited if the object or effect of the agreement is to prevent, restrict or distort competition in the

Common Market. Article 33 contains ‘named’ acts constituting abusive exploitation by a dominant firm, such as the acts below, which may be relevant in the context of exclusive agreements:

- the limitation of research and innovation, production, marketing and technical development, to the detriment of consumers (Article 33(b));
- the refusal of sales of products or services (Article 33(e)); and
- the prevention of access by another undertaking to an upstream, downstream or related market (Article 33(f)).

On plain reading of Article 33, no defence exists for a dominant firm engaging in the ‘named’ acts of abusive exploitation like the above. Arguably therefore, an exclusive agreement between parties will be prohibited per se in instances where one of the parties to the agreement is dominant and they have engaged in one of the named acts of abusive exploitation.

**23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

Yes, the abuse of dominance or collective dominance is prohibited in terms of Article 33 of the Regulations if the object or effect of the conduct is to prevent, restrict or distort competition in the Common Market. A company or group of companies will be dominant if they are likely to avoid competing with other players in the market.

Named acts of abusive exploitation are provided in the Regulations and include:

- The direct or indirect imposition of unfair purchase or sale prices, or unfair trading conditions;
- The limitation of research and innovation, production, markets or technical development to the detriment of consumers;
- The imposition of unequal conditions on



trading partners for the provision of the same services, placing trading partners at a competitive disadvantage;

- Making the conclusion of contracts subject to the acceptance by the trading partners of additional products and services which, by their nature or according to commercial practice, are not related to the subject-matter of those contracts;
- The refusal to sell products or services;
- The prevention of access by another undertaking to an upstream, downstream or related market;
- The breaking of established commercial relations solely on the grounds that the trading partner refuses to submit to unjustified commercial conditions;
- The imposition of restrictions on the resale or export of the products supplied, the place of delivery or the form or volume of the products; or
- The offering of sales prices at an abnormally high or abnormally low level in relation to the cost of production, processing and marketing, of which the object or effect is to eliminate from a market, or to prevent access to, a business or one of its products.

As indicated above, on plain reading of Article 33, no defence exists for a dominant firm engaging in the 'named' examples of abusive exploitation like the above.

**24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

We are not aware of any investigations having been done into abuse of dominance to date.

**25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

Yes. Refer to question 19.

**26. Are there Rules in relation to price discrimination?**

Yes. Article 33(c) of the Regulations prohibits the imposition of unequal conditions on trading partners for the provision of the same services, placing trading partners at a competitive disadvantage.

**27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

While the merging parties obtain copies of the Commission's decision, the Commission does not publish decisions.



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# COMESA



## **BOWMANS**

Tamara Dini | Sivuyise Lutshiti





### **1. What is the relevant competition legislation and who are the enforcers?**

The Common Market for Eastern and Southern Africa (COMESA) is a regional organisation whose mission is to promote economic integration through trade and investment in Eastern and Southern Africa (the Common Market).

COMESA comprises 21 member states: Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, eSwatini, Somalia, Tunisia, Uganda, Zambia and Zimbabwe.

As at the time of writing, five of the COMESA member states (namely the Democratic Republic of Congo, Djibouti, Eritrea, Libya, Somalia and Uganda) have no domestic competition law regimes in place.

The COMESA competition law regime became operative on 14 January 2013. The relevant competition legislation comprises the COMESA Competition Regulations (the Regulations) and the COMESA Competition Rules, 2004 (as amended), which were amended in March 2015. The enforcer of the legislation is the COMESA Competition Commission (the Commission), which is established under Article 6 of the Regulations and is based in Lilongwe, Malawi.

The Commission is responsible for, *inter alia*, merger control and the enforcement of the prohibitions against anti-competitive business practices.

By virtue of the COMESA Treaty, the Regulations are binding on all COMESA member states.

### **2. Are there any proposed amendments or new regulations expected to come into force?**

As at the time of writing, there are no proposed amendments or new regulations expected to come into force.

### **3. Is the law actively enforced?**

The law is actively enforced. Numerous mergers have been reported to the Commission since it was established in January 2013, with 37 mergers

having been notified to the Commission in 2019 alone. Mergers notified have largely been approved unconditionally, but some of them have been approved subject to conditions.

The Commission has dealt with a number of requests for authorisation under Article 20 of the Regulations (Requests for Authorisation), whereby an undertaking, or group of undertakings, may apply to the Commission for authorisation to enter or to give effect to a contract, arrangement or understanding which is anti-competitive. The Commission may grant its authorisation if public benefits outweigh the anti-competitive effects of the contract, arrangement or understanding in question. As at the time of writing, the Requests for Authorisation that have been granted have largely related to distribution agreements.

The Commission has also initiated investigations into alleged prohibited practices under Article 19 of the Regulations. As at the time of writing, however, there is no record of concluded enforcement action in relation to investigations of prohibited practices under Article 19 of the Regulations. The Commission published a notice in March 2017 notifying the public that it had commenced an investigation into the commercialisation of media and marketing rights for African football tournaments agreements entered into, among others, by the Confédération Africaine de Football (CAF) and Lagardère Sports SAS, a sport marketing agency and member of the Lagardère Group, based France. This first investigation by the Commission in respect of potentially anti-competitive conduct is ongoing. The Commission is also investigating a complaint in relation to allegations of potential anti-competitive conduct by Shoprite Holdings Limited and GS1 Kenya Limited (GS1 Kenya). The complainant alleges that suppliers who wish to merchandise their products in Shoprite supermarkets in Uganda must obtain their barcodes from GS1 Kenya. This investigation is also ongoing.

### **4. What are the current priorities or focus areas of the competition authorities?**

Since it became operational, the Commission's priority has been dealing with approval applications (in particular, merger notifications) as well as Requests for Authorisation. As discussed above, more recently the Commission has also commenced investigations into alleged prohibited practices.

## 5. What kind of transaction constitutes a notifiable merger?

A 'merger' is defined in the Regulations as the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person, whether that controlling interest is achieved as a result of:

- the purchase or lease of the shares or assets;
- the amalgamation or combination with a competitor, supplier, customer or other person; or
- any means other than those specified in the first two bullet points.

A merger where either the acquiring firm, or the target firm, or both, operate in two or more COMESA member states (i.e. a merger with a 'regional dimension') and where certain thresholds of combined annual turnover or assets are exceeded, constitutes a notifiable merger and must in the ordinary course be notified to the Commission. The requirement that firms operate in two or more member states is met where the firms concerned have a presence or generate turnover in the Common Market.

The thresholds for notifiable mergers are<sup>1</sup>:

- the combined annual turnover or value of assets (whichever is higher) of the merging parties in the Common Market equals or exceeds USD 50 million; and
- each of at least two of the merging parties has annual turnover or assets in the Common Market of USD 10 million or more.

In circumstances where each of the merging parties generates two-thirds or more of their annual turnover in one and the same member state, a COMESA filing will not be required. Instead, national notification obligations will apply.

In terms of the Regulations, where a member state attains knowledge of a merger notification submitted to the Commission, the member state

may request the Commission to refer the merger for consideration under the member state's national competition law if the member state is satisfied that the merger, if carried out, is likely to disproportionately reduce competition to a material extent in the member state concerned or in any part of the member state (Article 24(7) of the Regulations).

The Commission must then decide whether to deal with the merger itself or to refer the merger (in whole or in part) to the competent authority of the member state concerned, with a view to that member state's national competition law being applied (Article 24(8) of the Regulations).

A benefit to business is that a single COMESA filing may replace multiple filings under national legislation. However, there are a few jurisdictions in Eastern and Southern Africa that are not members of COMESA, including the largest and most diversified economy in Africa, South Africa. This means, for example, that a Belgian entity acquiring control of a South African entity with subsidiaries in eSwatini and Malawi may need to obtain approval from the South African competition authorities (if the thresholds for mandatory notification in South Africa are met) and from the Commission (as eSwatini and Malawi are COMESA member states).

## 6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?

As noted above, in order for a merger to be notifiable to the Commission:

- either the acquiring firm, or the target firm, or both, must operate in two or more COMESA member states;
- the combined turnover or assets (whichever is higher) of the merging parties in the Common Market must be USD 50 million or more; and
- each of the merging parties must have turnover or assets in the Common Market of at least USD 10 million.

<sup>1</sup> See amendment to the COMESA Competition Rules on the Determination of Merger Notification Thresholds and Method of Calculation, 2015.



Further, where each of the merging parties generates two-thirds or more of their annual COMESA turnover in one and the same member state, or where two-thirds of each of the merging parties' assets held in COMESA are held in one and the same member state, the parties need not file with COMESA. In such instances, national notification obligations apply instead.

**7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

A party to a notifiable merger must notify the Commission of the proposed merger within 30 days of the parties' decision to merge (the Guidelines indicate that 'days' refers to calendar days). The Guidelines provide that the Commission considers that a decision is evidenced by (i) the conclusion of a legally-binding agreement to carry out the merger (which may be subject to conditions precedent); or (ii) the announcement of a public bid in the case of publicly traded securities.

The Regulations do not state that a merger may not be implemented prior to clearance. The Commission has confirmed that parties to a notifiable merger, who have filed, may implement a merger prior to approval being granted, although they run the risk of their merger having to be unbundled at a later stage if, for example, the Commission were to prohibit the merger. Implementation of a merger in contravention of the Regulations will result in the merger having no legal effect, in which case rights or obligations imposed on the merging parties by any agreement will not be legally enforceable in the Common Market.

In addition, the Commission may impose a penalty of up to 10% of either or both of the merging parties' annual turnover in the Common Market, as reflected in the accounts of any party concerned for the preceding financial year, for failure to notify a merger.

**8. What filing fees are payable?**

Currently, filing fees payable are 0.1% of the merging parties' combined annual turnover or combined assets (whichever is higher) in the Common Market, subject to a cap of USD 200 000.

**9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

The Regulations apply to 'all economic activities... within or having an effect within' the Common Market. Foreign-to-foreign mergers are notifiable if they have a regional dimension and if the thresholds are met. See question five.

**10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

The Commission has permitted and encouraged pre-notification contacts where necessary. In the ordinary course, pre-notification contacts are not required but can be helpful to clarify and agree with the Commission on the approach that will be taken in a particular merger filing and the specific information that the Commission will require.

**11. To what extent are non-competition factors relevant to the assessment of a merger?**

The Regulations provide that when called upon to consider a merger, 'the Commission shall initially determine whether or not the merger is likely to substantially prevent or lessen competition' (by assessing a range of competition and market-related factors), and if it appears that the merger is likely to substantially prevent or lessen competition, the Commission must then determine:

- whether any technological, efficiency or other pro-competitive gain will be greater than and offset the anti-competitive effects; and
- whether the merger can be justified on substantial public interest grounds.

In determining the latter, the Commission is required to take into account all matters that it considers relevant in the circumstances and to have regard to the desirability of:

- maintaining and promoting effective competition between persons producing or distributing commodities and services in the region;
- promoting the interests of consumers, purchasers, and other users in the region, with regard to the prices, quality and variety of such commodities and services;



- promoting through competition, the reduction of costs and the development of new commodities; and
- facilitating the entry of new competitors into existing markets.

The Regulations further provide that a merger shall be contrary to the public interest if the Commission is satisfied that the merger:

- has lessened substantially, or is likely to lessen substantially, the degree of competition in the Common Market or any part thereof; or
- has resulted in, or is likely to result in, or strengthen, a position of dominance which is or will be contrary to the public interest.

**12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

The Commission may conduct an enquiry for the purposes of determining whether or not to approve a merger (Article 26(5) and 26(6) of the Regulations). Before embarking on an enquiry, the Commission shall take all reasonable steps to notify all the relevant member states. The notice shall, in relation to the enquiry: (i) include the nature of the proposed enquiry; and (ii) call upon any interested persons who wish to submit written representations to the Commission in relation to the subject matter of the enquiry. In addition, the merger notification forms for a notification to the Commission require the contact details of the parties' competitors and customers. The Commission typically contacts competitors and customers either directly or through national regulators.

**13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

Employees are not typically contacted as part of the merger review process. However, the Commission will take into account concerns in respect of the impact that a merger will have on employment, where a COMESA Member State raises such concerns. A number of transactions have been approved by the Commission subject

to conditions aimed at mitigating the negative impact of a transaction on employment. Please also see the response to question 12.

**14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

Article 26 of the Regulations provides as follows: 'Before making an order under this Article, the Commission shall ensure that every person affected thereby is informed of the general content of the order it proposes to make and is given an adequate opportunity to make representations in the matter.'

Where the Commission has concerns about a particular merger, it will inform the merging parties before a decision is made to prohibit the merger or impose conditions. As at the time of writing, the Commission has not prohibited any mergers outright but it has approved a number of mergers subject to conditions.

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

Any person aggrieved by a decision by the Commission may appeal to the Board of Commissioners. The Board may hear appeals from, or review any decision by the Commission that may, in terms of the Regulations, be referred to it and may make any ruling or order necessary or incidental to the performance of its functions in terms of the Regulations. Decisions of the Board of Commissioners may be appealed to the COMESA Court of Justice based in Khartoum, Sudan.

**16. Does the legislation apply to joint ventures?**

The Regulations do not specifically refer to joint ventures. Joint ventures that are classified as mergers fall to be notified to the Commission if they constitute a merger as defined and have a regional dimension. The Guidelines provide that for a joint venture to be a merger, it must be a full-function joint venture and must perform all the functions of an autonomous economic entity.



**17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

Yes. The Regulations prohibit the following practices where undertakings are ‘engaged in the market in rival or potentially rival activities’:

- agreements fixing prices, which agreements hinder or prevent the sale or supply or purchase of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services;
- collusive tendering and bid-rigging;
- market or customer allocation agreements;
- allocation by quota as to sales and production;
- collective action to enforce agreements;
- concerted refusals to supply goods or services to a potential purchaser, or to purchase goods or services from a potential supplier; or
- collective denials of access to an arrangement or association which is crucial to competition.

As at the time of writing, there are no examples of cartel cases as the Commission has not yet proceeded against any firms for engaging in cartel conduct.

**18. What are the authorities’ powers of investigation in relation to cartel conduct and other prohibited practices?**

In conducting its investigations, the Commission may, in accordance with the Regulations and in keeping with the principles of natural justice, order any person to appear before it to give evidence, require the discovery or production of any document or part thereof, and take any other reasonable action which may be necessary to further the investigation.

In terms of the application of the Regulations and domestic competition law of the member states, it is stipulated that the Regulations have

primary jurisdiction over an industry or a sector of an industry which is subject to the jurisdiction of a separate regulatory entity, regardless of whether domestic or regional. The only further exemptions are those made by national legislation.

**19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

In terms of Rule 79, the maximum monetary penalty for each contravention of Article 19 is 750 000 units which is equivalent to USD 750 000. The Regulations do not provide for a leniency policy and do not specify criminal sanctions for cartel conduct. However, the Commission has prepared a Draft Corporate Leniency Policy document which has been circulated for comment.

**20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

The Commission may, upon application by or on behalf of an undertaking, grant an authorisation to the undertaking to enter into and/ or give effect to contracts, arrangements or understandings even if they are anti-competitive, if the Commission determines there are public benefits outweighing the anti-competitive detriment of the contract, arrangement or understanding.

While the authorisation remains in force, no party to the contract, arrangement or understanding will be in breach of the applicable Articles of the Regulations by entering into or giving effect to the contract, arrangement or undertaking. The authorisation may be granted to cover those who subsequently become parties to the contract, arrangement or understanding. The undertaking concerned, or any other person with a substantial financial interest affected by a decision of the Commission in this regard, may appeal that decision to the Board of Commissioners in the manner set out in the Regulations and the Rules.

The Commission published a number of its decisions granting such Requests for Authorisation.

**21. Is minimum resale price maintenance prohibited?**

The Regulations do not state that minimum resale price maintenance is prohibited.

**22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

An exclusive agreement between undertakings (like any other agreement between undertakings) shall be prohibited if it may affect trade between member states and has as its object or effect the prevention, restriction or distortion of competition within the Common Market. This is only applicable if an agreement is, or is intended to be, implemented within the Common Market.

**23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

Abuse of dominance is prohibited by the Regulations. An undertaking is considered dominant in a market if by itself or together with an interconnected company, it occupies such a position of economic strength that would enable it to operate in the market without effective constraints from its competitors or potential competitors. A dominant position refers to the ability to unilaterally influence price or output in the Common Market or any part of it.

Any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market in so far as it may affect trade between member states, if it:

- restricts, or is likely to restrict, the entry of any undertaking into a market;
- prevents or deters, or is likely to prevent or deter, any undertaking from engaging in competition in a market;

- eliminates or removes, or is likely to eliminate or remove, any undertaking from a market;
- directly or indirectly imposes unfair purchase or selling prices or other restrictive practices;
- limits the production of goods or services for a market to the prejudice of consumers;
- as a party to an agreement, makes the conclusion of such agreement subject to acceptance by another party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the agreement; or
- engages in any business activity that results in the exploitation of its customers or suppliers, so as to frustrate the benefits expected from the establishment of the Common Market.

**24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

There are no examples at this stage.

**25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

With regard to penalties for contravention of the provisions against abuse of dominance, Rule 79 provides that the maximum monetary penalty for each contravention is 500 000 units. Currently 500 000 units is equivalent to USD 500 000.

**26. Are there Rules in relation to price discrimination?**

The Regulations do not specifically prohibit price discrimination.

**27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

Yes. The Commission’s website is [www.comesacompetition.org](http://www.comesacompetition.org).





# Ethiopia



**AMAN ASSEFA & ASSOCIATES**

Aman Assefa

### 1. What is the relevant competition legislation and who are the enforcers?

The relevant competition legislation is the Trade Competition and Consumers Protection Proclamation (No. 813/ 2013) (the Proclamation). The Proclamation established the Trade Competition and Consumers Protection Authority (the Authority) and the Federal Trade Competition and Consumers Protection Appellate Tribunal (the Tribunal). The Proclamation is enforced by the Authority, consisting of the adjudicative bench exercising the judicial powers of the Authority; the Tribunal, which decides appeals against decisions of the Authority; and the Federal Supreme Court.

### 2. Are there any proposed amendments or new regulations expected to come into force?

Yes, there is. A new draft is already prepared. It is expected to bring change more in the administration and implementation of the law. The substantive part will see little changes.

### 3. Is the law actively enforced?

The Proclamation is actively enforced, both in respect of mergers and prohibited practices.

### 4. What are the current priorities or focus areas of the competition authorities?

The focus areas of the Authority are merger control, prohibited practices and consumer protection. The Authority also has visible advocacy works.

### 5. What kind of transaction constitutes a notifiable merger?

A transaction is notifiable if it (i) constitutes a merger (as defined in Article 9(3) of the Proclamation); and (ii) meets the prescribed thresholds for mandatory notification. In terms of Article 9(3), a merger occurs:

- when two or more business organisations, previously having independent existence, amalgamate, or when such business organisations pool the whole or part of their resources for the purpose of carrying on a certain commercial activity; or

- by directly or indirectly acquiring shares, securities or assets of a business organisation, or taking control of the management of the business of another person by a person or group of persons through purchase or any other means.

There is no closed list of what an ‘acquisition of control’ constitutes for purposes of defining a merger. In terms of the Authority’s Merger Directive issued in 2016 (the Merger Directive), a controlling interest can be established in many ways, including:

- the acquisition by a business organisation or a person of a stake in excess of 50% in another business organisation or business;
- having the ability to determine the majority of the votes that may be cast at a general meeting;
- having the ability to appoint or veto the appointment of a majority of the board of directors of the organisation; or
- having the ability to influence the strategic commercial policy of a business organisation.

### 6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?

A merger is notifiable if:

- in the case of an amalgamation, the combined assets, turnover or registered capital (whichever combination is higher) of both the acquiring and the target company is ETB 30 million or higher; or
- in the case of an acquisition, the assets, turnover or registered capital (whichever is higher) of the target company is ETB 30 million or higher.

In terms of the Merger Directive, mergers can be categorised as either small, intermediate or large. Small mergers are transactions where the above values (assets, turnover or registered capital) are less than ETB 30 million; intermediate mergers are transactions where the above values are between ETB 30 million and ETB 300 million; and large mergers are transactions where the values are above ETB 300 million. Small mergers are not notifiable to the Authority.



### **7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

No merger agreement or arrangement may come into effect before merger approval has been obtained. Pre-implementation or failure to notify a transaction will expose the parties to administrative penalties of between 5% and 10% of annual turnover. The direct or indirect participation of a person other than a business person in the offence will expose such a person to penalties of between ETB 10 000 and ETB 100 000.

### **8. What filing fees are required?**

No filing fees have been published to date.

### **9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

The Proclamation applies to any commercial activity or transaction having an effect within Ethiopia. Therefore, based on plain reading of the Proclamation, foreign-to-foreign mergers are notifiable to the Authority as long as deemed to have impact in Ethiopia. It is not as yet clear what type of ‘impact’ is required to trigger the application of the law. From the few cases so far entertained, it appears to be the stance of the Authority to require notification and clearance if either one or both of the foreign based parties to a merger have a local presence. This position may change in future.

### **10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

Pre-notification contacts with the Authority are not dealt with in the Proclamation or Merger Directive. In spite of the absence of formal rules in the law however, the Authority routinely accepts and entertains questions from the parties to a proposed merger.

### **11. To what extent are non-competition factors relevant to the assessment of a merger?**

The Proclamation does not contain any express reference to non-competition factors to be considered for purposes of a merger assessment.

Article 10(2) of the Proclamation states that the effect of the merger on ‘trade competition’ must be considered. However, paragraph 20 of the Merger Directive provides that a ‘merger assessment shall be conducted from trade competition, public interest and market perspectives’. In this regard, the following public interest factors must be considered by the Authority:

- Whether or not the gains in public interest will outweigh the anti-competitive effect of a merger;
- Whether or not the merger will significantly contribute to accelerated economic development, the transfer of technical knowledge, the production and distribution of products, or the provision of services;
- Whether or not the merger will contribute significantly to the rescuing of a failing business;
- Whether or not the merger will enable small and micro businesses to become competitive; or
- Whether the merger will result in other technological, capacity or competitiveness gains.

### **12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

Article 10(3)(b) of the Proclamation provides that, during the course of the Authority’s investigation of a merger, the Authority may ‘invite, by a notice published on a newspaper having wide circulation, any business person who is likely to be affected by the said merger, to submit his written objections, if any’. In reality, this is not effectively sought and neither are the views of the market influential.

### **13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

The Directive under Paragraph 21.1 stipulates that pursuant to the Authority’s issuance of a notice of objection, any entity objecting the merger may lodge its objection. Hence, anyone including employees can lodge their objections. As such, nothing under the law or practice precludes employees from making submissions pursuant to the call for objection by the Authority or otherwise.



Also, while nothing in the Directive or Proclamation is provided regarding as to who the Authority reaches out during its investigations, the Authority, if it finds it useful for its investigation, may reach to any individual or party including, employees.

**14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

Neither the Proclamation nor the Directive provide for a detailed procedure in this case. However, the Authority as a matter of its internal custom gives the opportunity to the parties to present their cases before it intends to prohibit merger or impose conditions.

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

A party dissatisfied with the Authority’s decision may appeal to the Tribunal within 30 days from the date of the decision. A final appeal against a decision of the Tribunal can be made to the Federal Supreme Court on a point of law.

**16. Does the legislation apply to joint ventures?**

The Proclamation does not specifically refer to joint ventures. However, paragraph 7.1 of the Merger Directive refers to a joint venture as a ‘type of merger’. Joint ventures that are classified as mergers fall to be notified to the Authority if they meet the thresholds for mandatory notification.

**17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

Yes. Article 7 of the Proclamation prohibits an agreement between or concerted practice by business persons or a decision by an association of business persons in a horizontal relationship if:

- it has the effect of preventing or significantly lessening competition, unless a party to the agreement, concerted practice or decision can prove that any technological, efficiency or other pro-competitive gain resulting from the agreement outweighs that effect; or

- it involves directly or indirectly, fixing a purchase or selling price or any other trading condition, collusive tendering, or dividing markets by allocating customers, suppliers, territories or specific types of products or services.

In the past, the Authority filed cartel charges against players in the pharmaceutical market (December 2017), the rebar, corrugated sheet, steel tube and pipe markets (January 2018), and the veterinary medicine market (March 2018).

**18. What are the authorities’ powers of investigation in relation to cartel conduct and other prohibited practices?**

The Authority has the power to conduct investigations where there is sufficient grounds to suspect, based on its own information or information given to it by any person, that an offence has been committed.

The Authority may also conduct dawn raids with or without police assistance. A search and seizure order requested by investigating officers of the Authority shall be granted by an adjudicative bench of the Authority in accordance with the provisions of the Criminal Procedure Code. Upon the granting of the order, an investigating officer is empowered to enter business premises where the relevant products are stored, or stop a vehicle loaded with the relevant products; take samples of products necessary for the investigation, examine and take copies of records and documents kept in any form; and seize products.

The powers of the adjudicative benches of the Authority and the Tribunal include the power to order any person to furnish information and submit documents that may be required; order the attachment, seizure and sale of products; and summon any witness to appear and testify.

**19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

Business persons who violate Article 7 dealing with anti-competitive agreements, concerted practices and decisions, shall face penalties of 10% of total annual turnover. Cartel conduct constitutes a criminal offence.



The Proclamation makes provision for corporate leniency in terms of Article 42(6), which states that the Authority may exempt a person, who participated in the commissioning of horizontal or vertical conduct, from prosecution, if he/ she gives adequate information on the offence and on the role of the major participants that may not be otherwise obtained.

**20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

In terms of Article 4 of the Proclamation, the Council of Ministers may specify by regulation certain trade activities facilitating economic development and exempt those from the application of the Proclamation. The Proclamation does not make provision for business persons to apply for exemption from the provisions of the Proclamation.

**21. Is minimum resale price maintenance prohibited?**

Yes. Article 7(2)(b) of the Proclamation prohibits agreements between businesses if such agreements involve the establishment of a minimum resale price. This is an absolute prohibition for which the law allows no justification.

**22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

Exclusive agreements may be considered under the provisions dealing with prohibited vertical agreements and/or abuse of a dominant position, respectively. Under the former, an exclusive agreement will be unlawful if it has the effect of significantly lessening or preventing competition, unless a party to the agreement can prove that the technological, efficiency or other pro-competitive gain associated with the agreement outweighs its anti-competitive effect.

When reviewed under the abuse of dominance provisions, an exclusive agreement will be deemed to be abusive if any party to the agreement is dominant and involved in: (i) the limitation of

production, or the hoarding, diverting, prevention or withholding of products from being sold in the regular channels of trade (Article 5(2)(a) of the Proclamation); (ii) imposition of unfair selling or purchase prices; (iii) making the supply of particular goods or services dependent on the acceptance of competitive or non-competitive goods or services or imposing restrictions on the distribution or manufacture of competing goods or services or making the supply dependent on the purchase of other goods or services having no connection with the goods or services sought by the customer; (iv) discrimination between customers on the basis of price and other conditions in the supply and purchase of products and services without justifiable economic reason (Article 5(2)(f) of the Proclamation); or (v) the imposition of restrictions as to where or to whom or in what conditions or quantities or at what prices the products or services shall be resold or exported, without justifiable economic reason (Article 5(2)(h) of the Proclamation).

**23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

As indicated above, the Proclamation prohibits the abuse of a dominant position. Articles 5 and 6 of the Proclamation deal with the abuse of market dominance and provides, in Article 5(1), *inter alia* that 'no business person, either by himself or acting together with others, may carry on commercial activity by openly or dubiously abusing the dominant position he has in the market.'

To date, the Council of Ministers has not yet issued regulations setting out the market share threshold indicating dominance. In terms of Article 6, a business person, either by himself or acting together with others in a relevant market, will be deemed to have a dominant position if it has the actual capacity to control prices or other conditions of commercial negotiations, or to eliminate or utterly restrain competition in the relevant market. In terms of Article 6(2), a dominant position in a market may be assessed by

taking into account the business person's share in the market, or his capacity to set barriers against the entry of others into the market, or other factors as may be appropriate, or a combination of these factors.

Acts deemed to constitute an abuse of market dominance include the following:

- limiting production, hoarding or diverting, preventing or withholding products from being sold in the regular channels of trade;
- doing directly or indirectly such harmful acts, aimed at a competitor, as selling at a price below cost of production, causing the escalation of the costs of a competitor or pre-empting inputs or distribution channels;
- directly or indirectly imposing unfair selling or purchase price;
- refusing, contrary to the clearly prevalent trade practice, to deal with others on terms the dominant business person customarily or possibly could employ as though the terms are not economically feasible to him;
- without justifiable economic reasons, denying access by a competitor or a potential competitor to an essential facility controlled by the dominant business person;
- without justifiable economic reasons, discriminating between customers in prices and other conditions in the supply and purchase of products and services;
- without justifiable economic reasons, making the supply of particular products or services dependent on the acceptance of competitive or non-competitive products or services, or imposing restrictions on the distribution or the manufacture of competing products or services, or making the supply dependent on the purchase of other products or services having no connection with the products or services sought by the customer; or
- without justifiable economic reasons and in connection with the supply of products and services, imposing such restrictions as to where or to whom or in what conditions or quantities or at what prices the products or services shall be resold or exported.

In the context of the above, the following are considered to be justifiable economic reasons:

- maintenance of quality and safety of products;
- levelling prices or benefits offered by a competitor;
- achieving efficiency and competitiveness; and
- other similar reasons specified by regulation.

**24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

Though difficult to confirm, it is highly probable that there may be some businesses that are under the radar of the Authority.

**25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

Article 42(2) of the Proclamation provides that business persons who violate the provisions of Article 5 (dealing with the abuse of market dominance) shall be punished with a fine of between 5% and 10% of their annual turnover.

**26. Are there Rules in relation to price discrimination?**

Yes. In terms of Article 5(2)(f) of the Proclamation, discrimination between customers on the basis of price and other conditions in the supply and purchase of products and services constitutes an abuse of dominance and is prohibited.

**27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

No.

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# Ghana



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## 1. What is the relevant competition legislation and who are the enforcers?

In the context of a general anti-trust or competition regulation, there is no general anti-trust or competition law in Ghana. A draft bill, the Competition and Fair Trade Practices Bill (the Competition Bill), has been in existence since 2004. There is no indication as to when the Competition Bill will become law.

Currently, the legislation which is of a general character and makes express reference to ‘competition’ in Ghana is the Protection Against Unfair Competition Act, 2000 (Act 589) (the Unfair Competition Act). However, the Unfair Competition Act does not apply in the same way as anti-trust or competition legislation in other jurisdictions in the context of mergers and/ or acquisitions. It is a general mechanism for the protection of business goodwill and

reputation, proprietary information, whether or not it is registered, and the prevention of acts that cause or are likely to cause confusion with respect to another person’s enterprise.

The Unfair Competition Act does not create any regulatory body or administrative process for the purpose of enforcement. Rather, it provides that an aggrieved person may seek common law remedies in a competent Court. The Court may award injunctive or other equitable remedies, compensatory damages, or any other remedy that it deems fit.

In addition, note that, although there is no general anti-trust or competition legislation, various sectoral laws and regulators are responsible for the promotion of fair competition and, in certain sectors, merger control as well. The most notable of these are:

SECTOR	LAW	REGULATOR
Banking	Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930)	Bank of Ghana
Mining	Minerals and Mining Act, 2006 (Act 703) (Mining Act)	Minerals Commission
Energy	Energy Commission Act, 1997 (Act 541)	Energy Commission
Aviation	Ghana Civil Aviation Act, 2004 (Act 678)	Ghana Civil Aviation Authority
Telecommunication	Electronic Communications Act, 2008 (Act 775) (ECA)	National Communication Authority
Pensions	National Pensions Act, 2008 (Act 766)	National Pensions Regulatory Authority
Insurance	Insurance Act, 2006 (Act 724) (Insurance Act)	National Insurance Commission
Public utilities: electricity and water	Public Utilities Regulatory Commission Act, 1997 (Act 538)	Public Utilities and Regulatory Commission
Petroleum, Oil and Gas	Petroleum (Exploration and Production) Act, 2016 (Act 919)  Petroleum Commission Act, 2011 (Act 821)	Petroleum Commission



Merger control provisions in relation to public companies are contained in the Securities Industry Act, 2016 (Act 929) (the SEC Law) and the SEC Rules (Takeover and Mergers Code), with the Securities and Exchange Commission being mandated to review, approve and regulate takeovers, mergers and acquisitions of public companies.

Ghana is also a member of the Economic Community of West African States (ECOWAS). The ECOWAS Competition Authority is responsible for regulating mergers and acquisitions with a regional dimension and aims to function in a similar way to COMESA. The ECOWAS Supplementary Act on Competition Rules, 2008 (the ECOWAS Competition Rules) prohibits anti-competitive business conduct which prevents, restricts or distorts competition within the common market of ECOWAS. Prohibited acts include agreements, decisions and concerted practices which, for instance, fix prices or trading conditions, limit or control production, share markets, customers and sources of supply. Please note there are no publicly recorded decisions relating to Ghana where the ECOWAS Competition Rules have been applied.

## **2. Are there any proposed amendments or new regulations expected to come into force?**

Currently, there are no proposed amendments or new regulations in respect of anti-trust applicable to mergers, takeovers and acquisitions. As noted in question one, there is no indication as to when the Competition Bill will become law.

## **3. Is the law actively enforced?**

The industry-sector regulators are reasonably active. However, logistical constraints and more pressing priorities may, at times, reduce their effectiveness and efficiency.

## **4. What are the current priorities or focus areas of the competition authorities?**

Entities seeking to merge have the responsibility to comply with Ghanaian law, which includes the Unfair Competition Act. Under the Unfair Competition Act, any act or practice in the course of industrial or commercial activity which is contrary to honest practices, is anti-competitive or constitutes unfair competition. Note that an act or practice includes an omission. However, 'honest practices' is not defined. The Unfair Competition Act focuses on the following specific areas:

- any conduct or activity which causes confusion with respect to a person's business, products or services. The confusion may be in connection with a trademark, a trade name, or something which identifies a business;
- any conduct or activity which damages the goodwill or reputation of a person's business, products or services;
- any conduct or activity which misleads or is likely to mislead the public in respect of a person's business, products or services. This may arise from the advertisement or promotion of goods or services in connection with, for instance, the manufacturing process of a product, the quality of a product or service, or the geographical origin of a product or service;
- any conduct or activity which discredits a person's business, products or services. This may arise from making a false or unjustifiable allegation during the advertisement or promotion of goods or services;
- the acquisition, disclosure or use of secret information without the consent of the rightful owner and in a manner contrary to honest business practices. The acquisition, disclosure or use of secret information may result from conduct or activity such as industrial or commercial espionage, breach of contract or breach of confidence; and
- any conduct or activity which results in the breach of a law of Ghana, an international obligation or a regional obligation to which a person is subject, in a manner contrary to honest business practices. The international obligations include World Trade Organisation protocols and agreements such as those on anti-dumping issues and subsidies.



It is unclear from the Unfair Competition Act whether the processes or steps to implement mergers or to embark on acquisitions qualify as act or practice for which the Unfair Competition Act becomes applicable to regulate such processes or steps. In practice, mergers and acquisitions have been done without express reference to compliance with the Unfair Competition Act.

As a general policy consideration in terms of the sectorial regulators, the priority of the sectoral regulators is premised on the national interest, primarily the growth and development of the economy. By way of example, under the Mining Act share transactions are tightly regulated in the national interest. The Mining Act further provides that no mineral right or interest shall be transferred, assigned or dealt with in any other manner without the prior approval, in writing, of the sector minister. The minister is empowered to restrict a person from becoming the controller of a mining company if it will be prejudicial to the national interest.

### 5. What kind of transaction constitutes a notifiable merger?

‘Merger’ is defined in the Companies Act, 992, 2019 (Companies Act) as: ‘merger includes merger by:

- absorption by which the undertaking, property and liabilities of one or more companies, including the company in respect of which a scheme is proposed, are to be transferred to another existing company; or
- formation of a new company by which the undertaking, property and liabilities of two or more companies, including the company in respect of which the scheme is proposed, are to be transferred to a new company and the consideration envisaged for the transfer is shares in the transferee company receivable by a member of the transferor company with or without any cash payment to that member.’

In order to give effect to a merger under the Companies Act, there is a requirement for the following documents to be delivered to the

Registrar of Companies for registration and issuance of a certificate of merger to the company:

- the approved merger proposal;
- a certificate signed by the directors of each transferor company stating that the merger has been approved in accordance with the Companies Act and the constitution of the company, if any;
- a copy of the notice reserving the name of the company, if any, where the transferee company is a new company or the merger proposal provides for a change of the name of the transferee company;
- a certificate signed by the directors, or proposed directors of the transferee company stating that, where the proportion of the claims of creditors of the transferee company in relation to the value of the assets of the company is greater than the proportion of the claims of creditors of a transferor company in relation to the value of the assets of that transferor company, no creditor shall be prejudiced by that fact;
- a document in the prescribed form signed by each of the persons named in the merger proposal as a director or secretary of the transferee company consenting to act as a director or secretary of the company, as the case may be; and
- a report regarding the fairness of the merger and issued by an insolvency practitioner appointed by each company unless dispensed with in accordance with the Companies Act.

The merger proposal must set out the terms of the scheme and provide, among others:

- the names of the transferor and transferee companies;
- the number of shares to be allotted;
- amount of any cash payment; and
- the date the merger is intended to take effect.

Additionally, the sector-specific laws referred to earlier require notification and approval of certain mergers. Examples of notifiable transactions under the various sectoral legislation are set out



below. Under the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930), the following transactions require notification to and approval by the Bank of Ghana:

- a change in the control of a bank or its holding company;
- a sale, disposal or transfer of the whole or a part of the business of a bank;
- the amalgamation or merger of a bank with any other bank or institution; and
- the reconstruction of a bank.

Note that the Bank of Ghana may not approve a share acquisition or merger if the transferee may exercise influence to the detriment of the bank and ultimately to its consumers. Under the Insurance Act, a scheme of transfer or amalgamation of an insurance business must first be notified to the National Insurance Commission (NIC) and approval obtained prior to implementation. Under the ECA, if a transfer of shares in a licensee company results in a change of control or may cause that company to breach licence terms relating to its ownership structure, then the National Communications Authority (NCA) must first approve the transfer. If no change in control or no breach results from the transfer, merely notifying the NCA of the transaction will be sufficient. In the mining sector, there cannot be a merger without the prior written consent of the Minister of Mines.

See question 6 for a brief discussion of what constitutes a merger in terms of the SEC Rules.

#### **6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market shares)?**

Generally, there are no thresholds when it comes to the notification of mergers. The relevant sectoral regulator may, however, need to be notified of a merger prior to its implementation (as discussed in question five). By way of example:

- In the banking and insurance sectors, a merger requires the approval of the Bank of Ghana or the NIC, respectively.
- The SEC Rules (Takeover and Mergers Code) governs mergers, substantial acquisitions, takeovers and schemes of arrangement.

With respect to listed companies, acquisitions of 30% or more of the shares of a publicly listed company (or its holding company) trigger a mandatory takeover offer and require the approval of the SEC.

#### **7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

Generally, the pre-implementation of mergers requiring approval is prohibited. The consequences for non-compliance include the annulment of mergers, prohibition of the exercise of voting rights, and prohibition of the payment of dividends and bonus shares or rights issues.

#### **8. What filing fees are required?**

Generally, filing fees are paid for each regulatory or sectoral filing required. However, for the most part, these are nominal. Note that there are no fees payable in respect of an application for the prior approval of the Bank of Ghana in respect of mergers or takeovers in banks and financial institutions. Where the stated capital increases as a result of a merger, a stamp duty is paid on the increase in the stated capital of the merged company.

#### **9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

There are no specific laws and regulations that apply in Ghana to foreign-to-foreign mergers. However, it is not inconceivable that a foreign-to-foreign merger might trigger the merger control provisions of the sectoral legislation discussed above. There are no specific examples of this, however.

#### **10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

Formal or informal guidance may be sought from the relevant sectoral regulatory bodies prior to notification. Pre-notification filings, dialogues or meetings are not expected, but the regulatory bodies would not be adverse to these or to providing guidance where required.

**11. To what extent are non-competition factors relevant to the assessment of a merger?**

Regulators have the discretion to consider non-competition factors in a merger review process. Such factors include promotion of the national interest, impact on employment, promoting competitiveness of national firms in international markets, equitable distribution of ownership or wealth and promotion of ‘national champions’.

Note that, under the Labour Act, 2003 (Act 651):

- Where a merger is likely to result in redundancies, the employer is required to notify the chief labour officer in advance of the intended redundancy and also furnish the relevant trade union with information on the redundancy.
- The employer must also consult the trade union on measures to be taken to avert or minimise any termination, as well as the effects of termination on the employees.
- The quantum of redundancy payments and their terms and conditions must be negotiated between the employer and the employees or the trade union.
- In respect of the quantum of redundancy payments and the terms and conditions of redundancy payments, an aggrieved employee may submit a petition to the National Labour Commission for redress.

**12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

A sectoral regulator has wide discretion in the merger review process and may well contact third parties during this process.

**13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

Sectoral regulators consider employee issues as key, and will generally require that an adequate plan has been put in place to address any

employment issues, including retrenchments (see the response to question 11). Approval may be granted conditionally subject to compliance with certain employment-related obligations.

**14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

In practice, where a sectoral regulator intends to prohibit a merger, it will meet with the parties and relevant stakeholders for purposes of taking submissions as to why the merger should not be prohibited.

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

Generally, where parties are dissatisfied or aggrieved with the decision of a regulator, they may seek redress before the courts. Under the Insurance Act, for example, where a party is dissatisfied with a decision of the NIC, it may appeal to the High Court.

**16. Does the legislation apply to joint ventures?**

Local legislation does not apply to joint ventures. However, the ECOWAS Competition Rules, subject to its implementation coming into force, could be applicable depending on the circumstances. Note that to the extent a joint venture violates the ECOWAS Competition Rules, this may constitute a breach of the Unfair Competition Act, and thus will be deemed anti-competitive conduct in terms of the Act and the applicable sanctions will apply.

**17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

Although the Unfair Competition Act does not expressly prohibit cartel conduct, it generally prohibits an act or practice which is contrary to honest business practices. With regard to the sectoral legislation, there are no specific prohibitions on cartel conduct and there are no examples of regulators pursuing firms for cartel



conduct. However, as discussed under question 18, regulators are generally vested with powers to prohibit and investigate any conduct including those that may be anti-competitive in nature which will extend to cartel conduct.

By way of example, under the ECA, a licence issued to a network operator must include a condition that the licence is subject to the licensee not engaging in anti-competitive conduct. Additionally, the NCA is authorised to prevent and sanction anti-competitive behaviour.

Further, the ECOWAS Competition Rules, which are regional obligations, specifically prohibit cartel conduct within the Common Market of ECOWAS.

**18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?**

As noted, the sectoral regulators are generally vested with powers to investigate and prevent prohibited practices, which may include cartel conduct. The regulators are mandated to request relevant information and, in appropriate cases, may embark on inspections in cases of suspected non-compliance. Regulators may also seek the assistance of the Court to intervene further, where appropriate, and to subpoena relevant documents and witnesses.

**19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

The Unfair Competition Act generally does not provide for penalties or criminal sanctions for unfair or anti-competitive conduct. However, since breach of law is part of conduct prohibited under the Unfair Competition Act, a defaulting entity may be liable for any consequential criminal sanction applicable for breach of a relevant law. An aggrieved person generally may seek civil remedies in Court.

In terms of certain sectoral legislation: any act tending to amount to anti-competitive conduct may result in actions being taken by the regulator, including the revocation of the licence of the guilty party (e.g. in the telecommunications sector) and withdrawal of advantages or state support.

There are no criminal sanctions for anti-competitive conduct in terms of the Unfair Competition Act. There is also no leniency policy in place.

**20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

Generally, where anti-competitive conduct is prohibited, there are no stated exemptions.

**21. Is minimum resale price maintenance prohibited?**

Minimum resale price maintenance is not expressly prohibited under any law. However, minimum resale price maintenance will be prohibited under the Unfair Competition Act if it is shown to be contrary to honest business practices. Also note that sectoral regulators are generally given powers to make regulations providing guidelines and Rules on tariffs. For example, the NCA has the power to establish regulation regimes, which may include the setting, review and approval of prices where it detects anti-competitive pricing or acts of unfair competition.

**22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

Exclusive agreements are not expressly prohibited. Exclusive agreements may, however, be anti-competitive to the extent that they are shown to result in uncompetitive pricing, poor quality goods, or services or generally contrary to honest business practices.

**23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

Although both the sectoral legislation and the Unfair Competition Act have no specific or express prohibitions against abuse of a dominant position, the ECOWAS Competition Rules specifically prohibit the abuse of a dominant position acquired



through the possession of a substantial share of the market which enables the control of prices. Furthermore, if a practice is shown to be contrary to honest business practices, it will contravene the Unfair Competition Act.

**24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

There are no examples of authorities pursuing firms for abusing dominant positions.

**25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

No. An aggrieved party may seek civil remedies in Court.

**26. Are there Rules in relation to price discrimination?**

There are typically no specific Rules on price discrimination in the sectoral legislation and in the Unfair Competition Act. However, any allegation of price discrimination could be potentially assessed in terms of whether the conduct is contrary to honest business practices.

With regard to the sectoral legislation, the ECA provides some limited examples of a provision on price discrimination. Under the ECA for example, operators are enjoined not to discriminate among similarly situated users. Specifically, calls to rural areas shall not be priced higher as a result of a special interconnection agreement. Under the ECOWAS Competition Rules, the ECOWAS Competition Authority has the power to injunct discriminatory pricing practices.

**27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

The publication of decisions may vary among regulators and these may or may not be published. Where there has been a judicial review or appeal of a decision by a Court, it becomes a matter of public record and thus accessible to the public at the registry of the courts. The Judicial Service of Ghana has a website where it publishes some selected Court decisions which might include competition-related decisions. The judiciary's website is [www.judicial.gov.gh](http://www.judicial.gov.gh).

We are also aware that, in recent times, there are websites owned and managed by private entities where court decisions may be found.

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# Kenya



## **BOWMANS**

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## 1. What is the relevant competition legislation and who are the enforcers?

The relevant legislation is the Competition Act, No. 12 of 2010 (the Act) which came into force on 1 August 2011. The Act repealed the Restrictive Trade Practices, Monopolies and Price Control Act (Chapter 504 of the Laws of Kenya).

The Act establishes the Competition Authority of Kenya (the Authority or the CAK) whose principal functions include applying, promoting and enforcing compliance with the Act. The Act also establishes the Competition Tribunal (the Tribunal) which hears appeals from decisions of the Authority.

## 2. Are there any proposed amendments or new regulations expected to come into force?

### The Competition Amendment Bill, 2019

The Competition Amendment Bill, 2019 is currently being deliberated in Parliament. The purpose of the Bill is to give more clarity on buyer power and the abuse of buyer power. The salient features of this bill include:

#### Definition of buyer power

Buyer power is defined as the influence exerted by an undertaking or group of undertakings in the position of purchaser of a product or service to:

- obtain from a supplier more favourable terms; or
- impose a long term opportunity cost including harm or withheld benefit, which if carried out, would be significantly disproportionate to any resulting long-term cost to the undertaking or group of undertakings.

In determining any complaint in relation to abuse of buyer power, the Authority shall take into account all relevant circumstances including the:

- nature and determination of contracts between the concerned undertakings;
- payment requested for access to infrastructure; and
- price paid to suppliers.

Any person who abuses his or her buyer power commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding KES 10 million.

### Conduct amounting to abuse of buyer power

This includes:

- delays in payment of suppliers without justifiable reason;
- unilateral termination or threats of termination of a commercial relationship;
- refusal to receive or return any goods without justifiable reason;
- transfer of costs or risks to suppliers of goods; and
- demand for preferential terms unfavourable to supplies etc.

### Powers of the Authority

The Bill provides for the following powers of the Authority in relation to abuse of buyer power:

- monitor the activities of the sector/ undertaking where incidences or likelihood of incidences of abuse of buyer power;
- require industries and sectors, in which instances of buyer power are likely to occur, to develop a binding code of practice; and
- publish the code of practice to be developed in consultation with relevant stakeholders.

### Professional associations

The Bill provides for any professional association whose rules contain a restriction that has the effect of preventing, distorting or lessening competition and which fails to apply for an exemption or which, having applied for an exemption, fails to comply with the Authority's decision rejecting its application.

### The Draft Guidelines on Relevant Market Definition

In May 2019, the Authority invited comments from the public on the draft Market Definition Guidelines. To our knowledge, these guidelines are still in draft form.



The purpose of the Guidelines on Relevant Market Definition (Guidelines) is to provide guidance as to how the Authority applies the concept of relevant market(s) in its enforcement of the Act.

#### **The Consumer Protection Guidelines**

These rules are still undergoing the approval process before they can be enacted into law. These Rules shall govern the actions of the Authority in the exercise of the functions conferred under the Act, in particular, procedures for: conducting of investigations into restrictive trade practices, consumer infringements; determination of exemptions; handling of mergers; settlement of restrictive trade practices and consumer infringements; and determination of penalties and remedies.

#### **Reconsolidation of forms**

The Authority has also reconsolidated its prescribed forms for ease of reference. The following forms are now readily available on the Authority's website:

- Exemption form in respect of intellectual property Rules;
- Exemption form in respect of professional Rules;
- Exemption form for certain restrictive practices;
- Confidentiality claim form;
- Merger notification form (as described above);
- Merger withdrawal forms;
- Consumer complaint form;
- Special compliance process declaration form for trade associations; and
- Self-evaluation reporting template for special compliance process for trade associations.

#### **3. Is the law actively enforced?**

Yes. Although the Authority started out with a primary focus on merger control, it now appears keen to become more active in the enforcement of restrictive trade practices including the abuse of dominance and unwarranted concentrations of economic power as well as consumer protection.

#### **4. What are the current priorities or focus areas of the competition authorities?**

The Authority, pursuant to its mandate of consumer protection as outlined in Part VI of the Act, has intensified consumer awareness campaigns, which are focused on matters of consumer welfare.

In its Strategic Plan for the period from 2017/ 2018 to 2020/ 2021, the Authority has indicated that its focus will be on:

- Enforcement of competition and regulation of mergers by enhancing market surveillance, transparency, accountability and predictability of enforcement, compliance and merger issues and increasing prevention and deterrence of anti-competitive practices;
- Consumer protection by increasing deterrence of unfair and misleading market practices, empowering consumers to exercise choice through consumer awareness and promoting creation and strengthening of consumer bodies;
- Research and advocacy through enhanced monitoring and evaluation, institutional risk management practices and Internal and External Knowledge Management;
- Visibility and corporate image, namely to enhance its corporate visibility and to strengthen media relations; and
- Organisational sustainability by broadening revenue streams, optimising use of resources and improving productivity and efficiency.

#### **5. What kind of transaction constitutes a notifiable merger?**

Section 2 of the Act defines a merger as 'an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover'.

Section 41(1) of the Act states that a merger occurs when one or more undertakings, directly or indirectly, acquires or establishes direct or indirect



control over the whole or part of the business of another undertaking. Section 41(2) states that a merger, as defined in section 41(1), may be achieved in any manner including:

- the purchase or lease of shares, acquisition of an interest or purchase of assets of the other undertaking in question;
- the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;
- the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;
- acquiring by whatever means the controlling interests in a foreign undertaking that has a controlling interest in a subsidiary in Kenya;
- in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;
- vertical integration;
- exchange of shares between or among undertakings which results in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or
- amalgamation, takeover or any other combination with the other undertaking.

**6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?**

Under the Act, whether or not merging parties are supplying similar goods or services, a notification to the CAK is required where a change in control occurs and the definition of a merger in the Act is met.

The CAK to set thresholds for any proposed merger to be excluded from the provisions of Part 4 of the Competition Act (Part 4 of the Competition Act contains the provisions that deal with Mergers and Merger control). The CAK has yet to set and publish such thresholds.

Until such thresholds are published, merging parties can apply for exclusion pursuant to the Guidelines for Exclusion of Mergers (the Exclusion

Guidelines) published by the CAK. The Exclusion Guidelines are not binding as they have not been passed into law. They are, however, indicative of the CAK’s internal policy on how it exercises its discretion to exclude mergers from the provisions of the Act.

The Exclusion Guidelines provide, *inter alia*, that the following types of transactions may be considered for exclusion from the provisions of the Act:

General	Combined turnover of the merging parties is between KES 100 million and KES 1 billion.
Healthcare sector	Combined turnover of the merging parties is between KES 50 million and KES 500 million.
Carbon-based mineral sector (firms engaged in upstream production and supply of oil, natural gas or coal)	If value of the reserves, rights and associated exploration or production assets (including equipment, machinery, fixtures, etc.) to be held as a result of the merger is below KES 4 billion.
Carbon-based mineral exploration and prospecting (but not production of oil, natural gas and/ or coal)	Undertakings under this sector (which is defined as the Excluded Sector under the definitions in the Exclusion Guidelines) may also apply for exclusion.

A written application in the prescribed form must be made to the Authority requesting exclusion.

**7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

The Act expressly prohibits the implementation of a merger prior to receipt of approval from the Authority and, where the approval is conditional, implementation of the merger is subject to the stated conditions. Any merger which is implemented in the absence of an authorising order from the Authority is of no legal effect.



Payment of the full purchase price is deemed as implementation whereas payment of a maximum amount of 20% of the agreed purchase price is not deemed to constitute implementation.

Any person who implements a merger in contravention of the Act commits an offence and is liable on conviction to imprisonment for a period not exceeding five years, or to a fine not exceeding KES 10 million, or both.

In addition to the above sanctions, the Authority may impose a penalty of an amount not exceeding 10% of the gross annual turnover in Kenya (during the preceding year) of the undertaking or undertakings in question.

**8. What filing fees are required?**

The Authority introduced merger filing fees with effect from 1 August 2014, requiring merging parties to provide evidence of payment of the filing fees as part of the merger notification in order for an application to be deemed complete. The fees payable are as follows:

COMBINED TURNOVER OF THE MERGING PARTIES	FILING FEE PAYABLE
Exclusion application	No filing fee payable (exclusion filing is still required)
KES 500 million to KES 1 billion (healthcare sector)	KES 500 000
KES 1 billion to KES 50 billion	KES 1 million
Above KES 50 billion	KES 2 million

**9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

The Act requires that any mergers which take place outside Kenya and which result in the change of control of a business, part of a business, or an asset of a business in Kenya in any manner, must be notified.

In addition, section 6 of the Act makes provision for extraterritorial application of the Act and, *inter alia*, provides that the Act shall apply to conduct outside Kenya by:

- a citizen of Kenya or a person ordinarily resident in Kenya;
- a body corporate incorporated in Kenya or carrying on business within Kenya;
- any person in relation to the supply or acquisition of goods or services by that person into or within Kenya; or
- any person in relation to the acquisition of shares or other assets outside Kenya resulting in the change of control of a business, part of a business or an asset of a business, in Kenya.

**10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

The Act is silent on pre-notification meetings. However, in practice, the Authority is willing to have pre-notification meetings upon request from the merging parties. Pre-notification meetings with the Authority are advisable, particularly in respect of complicated, high profile or time-sensitive matters.

**11. To what extent are non-competition factors relevant to the assessment of a merger?**

Section 46(2) of the Act allows the Authority, in making its determination in relation to a proposed merger, to take account of any criteria which it considers relevant to the circumstances involved in the proposed merger. As such, the Authority has the discretion to take non-competition factors into account. The factors stipulated in the Act, which may be considered by the Authority include:

- the extent to which the proposed merger would be likely to result in a benefit to the public, which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking which is not a party to the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
- the extent to which the proposed merger would be likely to affect a particular industrial sector or region;

- the extent to which the proposed merger would be likely to affect employment;
- the extent to which the proposed merger would be likely to affect the ability of small undertakings to gain access to any market; and
- any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.

The Merger Guidelines also highlight public interest factors as key to making a determination in relation to a proposed merger. The relevant public interest factors include job losses and efficiencies, impact of the merger on small and medium-size enterprises and the impact of foreign direct investment. The Merger Guidelines provide that the Authority will conduct a public interest assessment regardless of the outcome of the competition assessment.

**12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

The Act does not contain a specific provision empowering the Authority to contact customers and competitors of the merging parties as part of the merger review process. The Act, however, allows any person including a person not involved as a party in the proposed merger to voluntarily submit to an investigator or the Authority any document, affidavit, statement or other relevant information in respect of a proposed merger.

The Market Definition Guidelines provide that, where appropriate with regard to the product and geographic market, the Authority will contact the main customers and competitors of the parties in its enquiries. The purpose of the contact is for the Authority to gather views on the boundaries of the markets as well as the factual information that the Authority may require to reach a conclusion on the scope of the market.

With regard to the extent to which submissions by customers and competitors are considered, the Market Definition Guidelines provide that

submissions by customers and competitors will be used for purposes of market definition only where they are sufficiently backed by factual evidence.

**13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

As mentioned above, the Act stipulates that any person, including a person not involved as a party in the proposed merger, may voluntarily submit to the Authority any document, affidavit, statement or other relevant information in respect of a proposed merger.

The Act does not specify that employees of the merging entities may make submissions to the Authority but, as indicated above, they would be entitled to do so.

**14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

The Act does not require, but does generally empower, the Authority to give the merging parties an opportunity to make representations before issuing its decision to approve or prohibit a merger. Under the Act, where the Authority decides to prohibit or conditionally approve a proposed merger, it must issue written reasons for its determination to the merging parties. The Authority's decision can be challenged through an application for review in the Tribunal, as discussed further in question 15 below.

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

The Act makes provision for parties dissatisfied with the Authority's decision on a merger to appeal to the Tribunal, which is established under section 71 of the Act. Section 48 of the Act provides that no later than 30 days after notice is given by the Authority in the *Kenya Gazette* of its determination on a proposed merger, a party to the merger may apply to the Tribunal for the Authority's decision to be reviewed. The Tribunal has its own Rules of procedure and timing. Within



30 days after receiving the application to review the Authority's decision, the Tribunal is required to issue a notice of the application in the *Kenya Gazette* and invite interested parties to make submissions to the Tribunal in regard to the matter being reviewed.

Within four months of the date on which an application for review is made, the Tribunal is required to make a determination either:

- overturning the decision of the Authority;
- amending the decision of the Authority by ordering restrictions or including conditions;
- confirming the decision of the Authority; or
- referring the matter back to the Authority for reconsideration on specified terms.

Section 73 of the Act provides that the persons who are entitled to appeal to the Tribunal include any person who, by an order made under section 46 of the Act (being the Authority's determination of the merger), is enjoined from proceeding with a proposed merger or authorised to proceed with a proposed merger, subject to conditions prescribed by the order.

If a party is aggrieved by the decision of the Tribunal, a further right of appeal lies to the High Court of Kenya, which must be made within 30 days of the notice of the Tribunal's decision being filed on that party. The decision of the High Court is final.

It is important to note, however, that in cases where competition law claims originate in the High Court (as judicial review writs or constitutional petitions), decisions of the High Court can be appealed at the Court of Appeal. Decisions of the Court of Appeal can be appealed at the Supreme Court, which is final.

#### **16. Does the legislation apply to joint ventures?**

The Act applies to joint ventures only insofar as a joint venture constitutes a notifiable merger as defined under the Act. The Merger Guidelines also provide some further guidance on the extent to which joint ventures are notifiable mergers, which includes that the joint venture would need to be a full-function joint venture.

#### **17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

Under the Act, the Authority is empowered to regulate cartel conduct, including any agreements or concerted practices which have the object or effect of preventing, distorting or lessening competition in any goods or services in Kenya.

The following definitions in the Act in this respect are worth noting:

- 'agreement' when used in relation to a restricted practice includes a contract, arrangement or understanding, whether legally enforceable or not; and
- 'concerted practice' means co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces independent action, but which does not amount to an agreement.

The Act specifically prohibits certain horizontal restrictive practices (unlawful conduct between competitors) as well as certain vertical restrictive practices (unlawful conduct between an undertaking and its supplier or customer, or both).

The Act also prohibits direct or indirect price fixing; dividing markets by allocating customers, suppliers, areas or specific types of goods or services; distorting, restricting or preventing competition and collusive tendering.

Parties to any agreement may apply to the Authority for an exemption from the application of the provisions of the Act which prohibit restrictive trade practices.

The Authority may grant an exemption if it is satisfied that there are exceptional and compelling reasons of public policy as to why the agreement, decision, concerted practice or category of the same, ought to be excluded from the application of the Act. The Authority may grant the exemption for a specified period and subject to certain terms.



The Authority is also empowered to grant block exemptions for any category of decisions, practices or agreements between firms. This power is to be exercised subject to the approval of the CS, by notice in the *Kenya Gazette*.

By way of examples of the CAK's actions on cartels, in 2016, the CAK conducted its first dawn raid at the offices of fertiliser producers Mea Limited and Yara East Africa, both of which are members of the Fertiliser Association of Kenya (FAK), on the allegation of price collusion between the two fertiliser companies.

### **18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?**

The Authority is empowered to investigate restrictive and prohibited trade practices, which include cartel conduct, either on its own initiative, or on receipt of information from any person or government agency.

In conducting its investigations, the Authority may, by notice in writing to the person being investigated:

- require the person (or director or other competent officer in the case of a body corporate) to provide information relating to the investigation within the time and in the manner specified in the notice;
- require the person to appear before the Authority to give evidence or produce any documents;
- require the person to produce certain documents to the Authority or to a person specified in the notice to act on the Authority's behalf; and
- request the person in possession of certain records to give copies of the records to the Authority.

The Authority also has search and seizure powers under the Act, the enforcement of which can be carried out with the assistance of police officers and other law enforcement agencies.

### **19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

Any person who contravenes the provisions prohibiting cartel conduct is liable on conviction to imprisonment for a period not exceeding five years or a fine not exceeding KES 10 million, or both. Further, under section 36 (d), the Authority may impose a financial penalty of up to 10% of the immediately preceding the year's gross annual turnover in Kenya of the undertaking(s) in question.

The Authority is empowered by the Act to operate a leniency programme and to this end, in 2017, the Authority issued the Leniency Program Guidelines, which operationalise section 89A of the Act. Under the leniency programme, any firm that voluntarily discloses the existence of any agreement or practice which is prohibited by the Act and co-operates with the Authority in its investigations may be granted leniency by the Authority and spared from all or part of any fines that would otherwise apply to it under the Act.

Further details of the leniency programme are set out in the Leniency Program Guidelines.

### **20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

Section 25 of the Act provides that any undertaking or association of undertakings may apply to the Authority to be exempted from the provisions of the Act with respect to restrictive agreements, practices and decisions. These provisions may be in respect of:

- any agreement or category of agreements;
- any decision or category of decisions; or
- any concerted practice or category of concerted practices.

Once an application for exemption is made, the Authority is required to publish notice of the application in the *Kenya Gazette*. The notice should indicate the nature of the exemption sought by the applicant and call upon interested persons to submit



to the Authority, within 30 days of the publication of the notice, any written representations which they may wish to make in regard to the application.

The Act also empowers the Authority to issue block exemptions for any category of decisions, practices or agreements between firms, subject to the approval of the CS, by notice in the *Kenya Gazette*.

In addition to the exemptions provided for above, the Act also makes provision for exemptions with respect to intellectual property rights and professional Rules.

### **21. Is minimum resale price maintenance prohibited?**

Section 21(1) of the Act provides that agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings, which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of the Act.

Section 21(3)(d) expressly prohibits any agreement, decision or concerted practice which, *inter alia*, involves a practice of minimum resale price maintenance.

However, section 21(4) of the Act provides that the prohibition on maintenance of minimum resale prices stated above shall not prevent a supplier or producer of goods or services from recommending a resale price to a re-seller of the goods or a provider of the service, provided that:

- it is expressly stipulated by the supplier or producer to the re-seller or provider that the recommended price is not binding; and
- if any product, or any document or thing relating to any product or service, bears a price affixed or applied by the supplier or producer, the words 'recommended price' appear next to the price so affixed or applied.

### **22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

Exclusive agreements are unlawful to the extent that they have the object or effect of preventing, distorting or lessening competition in trade in any goods or services in Kenya, or a part of Kenya, unless they are exempted in accordance with the Act.

The prohibition is general and the Act does not expressly stipulate the factors to be taken into account in determining whether the exclusive agreement has the object or effect of preventing, distorting or lessening competition in the Kenyan market. However, the Act particularly prohibits any agreement which, among other things, limits or controls production, market outlets or access, technical development or investment. As exclusive agreements may have the effect of limiting or controlling production, market outlets or access, they would, on the face of it, likely be deemed to be unlawful unless exempted.

The Authority may grant an exemption if it is satisfied there are exceptional and compelling reasons of public policy as to why the agreement ought to be excluded from the prohibitions contained in the Act on restrictive trade practices.

In making a determination on an exemption, the Authority will take into account the extent to which the agreement contributes to, or results in, or is likely to contribute to or result in:

- maintaining or promoting exports;
- improving, or preventing decline in the production or distribution of goods or the provision of services;
- promoting technical or economic progress or stability in any industry; and
- obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices.

### **23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

The Act prohibits the abuse of a dominant position, the Act defines a dominant undertaking as an undertaking that produces, supplies, distributes or otherwise controls not less than half of the total goods or services produced, supplied or distributed in Kenya or any substantial part thereof.

Firms that, although not dominant, control between 40% and 50% of the market share (unless they can show that they do not have market power) or control less than 40% of the market share but have market power are also considered to be dominant. For these purposes, market power is defined as the power of a firm to control prices, exclude competition or behave (to an appreciable extent) independently of its competitors, customers or suppliers.

Conduct that amounts to abuse of a dominant position includes:

- directly or indirectly imposing unfair prices or trading conditions;
- limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices;
- applying dissimilar conditions to equivalent transactions with other trading parties;
- making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts; and
- the abuse of intellectual property rights.

### **24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

It is in the public domain that the Authority has conducted investigations on firms operating in the cement sector, telecommunications sector and pay TV sub-sector, pursuant to complaints filed against the firms for, *inter alia*, abuse of dominance.

### **25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

Yes. Currently, any person who abuses their dominant position is liable on conviction to imprisonment for a period not exceeding five years, or a fine not exceeding KES 10 million, or both. The Authority is also empowered to impose a financial penalty of up to 10% of the immediately preceding year's gross annual turnover in Kenya of the undertaking in question.

### **26. Are there Rules in relation to price discrimination?**

As at the time of writing, there are no Rules expressly relating to price discrimination. However, the Act does prohibit agreements, decisions or concerted practices which apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

### **27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

The Authority is required to publish its decisions in the *Kenya Gazette*, although this is limited to the final decision of the Authority. The Authority also publishes a summary of the decisions it has made during the relevant year, in its annual report. The Authority is not required to, nor does it, publish its detailed reasoned decisions. However, it has indicated that it may consider doing so in the future in order to create competition law jurisprudence.

The Authority's website is [www.cak.go.ke](http://www.cak.go.ke).



# Malawi



## PFI PARTNERSHIPS

Elton Jangale



## 1. What is the relevant competition legislation and who are the enforcers?

The relevant legislation is the Competition and Fair-Trading Act [No. 43 of 1998 of the Laws of Malawi] (the Competition Act), which is complemented by the draft Competition and Fair-Trading Regulations (G.N. 20/ 2006) (the Regulations). The core objective of the Competition Act is to promote competition in Malawi. The Competition Act is enforced by the Competition and Fair-Trading Commission (the Commission), which is established under the Act. The Commission comprises a Board of Commissioners (the Board) and a Secretariat. The Board has the ultimate mandate for competition regulation in Malawi.

The Competition Act promotes competition in Malawi using three main strands, i.e. by regulating anticompetitive trade practices; prohibiting abuse of dominant positions; and controlling mergers and takeovers. Anticompetitive trade practices in Malawi, or in any substantial part of it, which are likely to result in the prevention, restriction or distortion of competition to an appreciable extent, such as cartels, collusive tendering and bid-rigging, market allocation, predation, excessive pricing, price fixing and resale price maintenance, are prohibited under the Competition Act but unevenly regulated by the Commission. The Commission has investigated and decided on resale price maintenance conduct but is yet to bust a hardcore cartel conduct or prosecute blatant bid-rigging conduct. The Commission has investigated on abuses of dominant position in various instances, including indirectly when regulating mergers. To date, no merger, which was consummated before notifying the Commission, has been fined, blocked or ordered to unwind. However, several mergers have been authorised by the Commission with conditions, mostly structural remedies but few behavioural remedies.

The role of the Commission is to ensure market players are not engaged in anti-competitive conduct and any other business practices that have or would likely have negative effects on competition. The mandate of the Commission covers any activity that has commercial value. The Commission uses a two-pronged approach

to discharge its mandate. On the one hand is the preventive approach, which seeks to assist market players to voluntarily comply with the provisions of the Act; and, on the other hand, is the enforcement approach which seeks to assist market players correct any offending conduct. There are sanctions prescribed for any infringement of the provisions of the Act. Nonetheless, the Commission may exercise discretion and issue reformatory orders. Any action taken by the Commission under the enforcement approach is based on thorough investigations which involve soliciting information from the market and getting information from the parties under investigations and other stakeholders. The results of the investigations are submitted to the Board in a report that is based on legal and economic analyses of the evidence gathered. The report forms the basis for deliberations and determination by the Board.

The Companies Act [Cap. 46:03 of Laws of Malawi] (the Companies Act) provides for the procedure and manner through which mergers involving a company or companies that are listed on the Malawi Stock Exchange (MSE) or unlisted companies but with more than ten shareholders. By regulating the procedure and manner through which mergers are conducted, the Companies Act seeks to protect the interests of shareholders of the company whose shares are targeted for acquisition. This is pertinent considering that consumers can constitute shareholders of listed companies.

In terms of the Companies Act, the Commission has been designated as the Panel on Takeovers and Mergers, which is required to regulate takeover bids, mergers and acquisitions and other transactions that have or may have, directly or indirectly, an effect on the ownership or control of companies. This provision requires the Commission to assess all offers for takeover, acquisition or exchange share ownership on the MSE to ensure that there is fair and equal treatment of all shareholders in a target company and to ensure that shareholders are not denied an opportunity to make an informed decision on the merits of an offer. Similarly, this provision would be applicable to any offer for acquisition involving at least 30% shareholding in any listed company or any company with more than 10 shareholders.



## **2. Are there any proposed amendments or new regulations expected to come into force?**

Since 2014, there has been talk within the Commission and the Government of Malawi to reform the Competition Act and the Regulations. To date, nothing substantial has materialised.

## **3. Is the law actively enforced?**

The Act is actively enforced by the Commission in two respects: competition enforcement and consumer protection. The Competition Act seeks to promote competition by prohibiting anticompetitive conduct and protecting consumer welfare. The Commission has been very active in advocating awareness in competition compliance and promoting protection of consumer rights. Nonetheless, it is becoming evident over the years that the Commission unevenly investigates and prosecutes different anticompetitive conduct. In most cases, the Commission has reacted to complaints lodged by consumers and competitors.

## **4. What are the current priorities or focus areas of the competition authorities?**

It is not obvious to ascertain the current priorities or focus areas of the Commission. There has been less activity in competition enforcement by the Commission from the last quarter of 2018 up to end of 2019. In fact, there are many decisions, both in merger notification applications and anticompetitive investigations or prosecutions, which have remained outstanding since 2018.

In our view, it is most likely that the operations of the Commission were affected by changes in its human resource capacities both at the level of the Board Commissioners and at the level of the Secretariat. From the last quarter of 2018 to a larger part of the first half of 2019, the Commission did not have Board Commissioners due to expiry of terms of the former Board Commissioners. New Board Commissioners were only appointed towards the end of the first half of 2019. However, the appointment of the new Board Commissioners almost coincided with the expiry of the contractual terms of the three most senior executive members of the Secretariat. This is most likely to have affected the operations of the Commission in the second half of 2019.

Notwithstanding our assessment of 2019, it is most likely that the Commission will in 2020 continue with its approach which focuses on encouraging voluntary compliance with national and regional competition laws, as opposed to taking an interrogative or prosecutorial approach.

## **5. What kind of transaction constitutes a notifiable merger?**

The Competition Act does not create a mandatory merger notification regime. Any transaction that is likely to result in substantial lessening of competition in a market in Malawi is required to be notified to the Commission for approval. The Commission takes the view that all mergers are notifiable.

Merger notifications can be notified to the Commission before or after closure of a merger transaction or consummation of the merger. The Commission accepts notifications at any time. If notified after consummated, it is advisable that the notification be made without delay. Parties that notify the transaction after the merger has already been consummated risk being required to unmake the transaction in the event that the merger is found to be anti-competitive. A notification of a merger can be made by any of the parties or by a person designated by the parties.

To notify a merger transaction, parties need to complete and submit an application form, which is obtainable from the offices or website of the Commission. The application for merger authorisation must be accompanied by the latest audited financial accounts and a payment of notification fees. In addition to the forms, parties are required to submit any relevant documents that can help the Commission to access the likely impact of the transaction on competition. The documents may include reports of market studies conducted by the parties or other authorities in the industry.

In the Supreme Court of Malawi in the civil appeal case, *Competition & Fair-Trading Commission v Airtel Malawi Ltd and Bharti Airtel Ltd* [MSCA Civil Appeal No. 23 of 2014] delivered on 26 November 2018, which has overturned the High Court of Malawi case of *The State and the Competition and Fair-Trading Commission*, [Miscellaneous Case No. 1 of 2013 (application for judicial review)], the Supreme Court has held that

a decision by the Commission ordering merging or merged parties to notify their merger remains valid until challenged by way of appeal in the High Court of Malawi before expiry of 15 days of the decision of the Commission. The Court went on to state that a decision by the Commission was not open for judicial review.

The Supreme Court decision has fortified the Commission's view which it considers any merger between two or more independent enterprises, or takeover of one or more such enterprise, to be susceptible to notification for authorisation by the Commission. The Commission has indicated that the assessment of whether the merger results in a substantial lessening of competition is an assessment to be conducted by the Commission after parties have notified the merger and this is not an assessment that should be conducted by the parties themselves in order to determine whether to notify or not.

For the purposes of the Act, 'merger' means the acquisition of a controlling interest in:

- any trade involved in the production or distribution of any goods or services;
- an asset which is, or may be utilised in connection with, the production or distribution of any commodity, where the person who acquires the controlling interest already has a controlling interest in any undertaking involved in the production or distribution of the same goods or services; or
- the acquisition of a controlling interest in any trade whose business consists wholly or substantially in (i) supplying goods or services to the person who acquires the controlling interest; or (ii) distributing goods or services produced by the person who acquires the controlling interest.

This is a non-exhaustive list of how control may be achieved. Broadly, a 'controlling interest', in relation to (i) any undertaking, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking; and (ii) any asset, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset.

On 4 September 2015, the Commission concluded a memorandum of understanding with the COMESA Competition Commission, to ensure co-operation between the two authorities. It includes agreements relating to:

- notification of either party's enforcement activities which may affect important interests of the other party;
- exchange of information regarding anti-competitive business practices which either party believes is relevant to, or may warrant, enforcement activity by the other party;
- co-operation in investigations whereby both parties will render assistance to one another in their investigations; and
- advancing technical assistance and capacity building programmes through integrated strategies.

On 29 March 2016, a new strategic plan for the Commission was launched. The current Strategic Plan (2015–2020) has as its aspired strategic outcome that the Commission will have created a highly competitive and fair-trading environment in Malawi for consumer welfare and business prosperity by the end of 2020.

## **6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?**

There are no minimum thresholds for merger notifications. Basically, all mergers are notifiable.

In assessing any merger, the Commission will consider whether the transaction will (i) result in elimination of a competitor from the market; (ii) lead to a new company created after the merger to increase its market power which can be abused; (iii) lead to crowding out of competitors from assessing inputs or distribution channels; or (iv) create an environment that would likely force other competitors to engage in anti-competitive business practices.

Additionally, the Commission assesses the benefits that the merger will create. A decision whether or not to authorise a merger is based on an assessment of whether the benefits of the merger outweigh its anti-competitive effects.



### **7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

As the merger notification regime is not mandatory, there is no prohibition on the pre-implementation of a merger. It is, however, an offence to effect a merger that is likely to result in a substantial lessening of competition in the market without the approval of the Commission. If the parties decide to seek authorisation for the merger or takeover, it is advisable that the parties await clearance before consummating the merger.

There is no statutory penalty specifically or expressly attributable to contravention of merger notification statutory requirements. There is, however, a general provision in the Act which states that any person guilty of an offence for which no specific penalty is provided (e.g. as is the case in respect of mergers) shall be liable for a fine of MWK 500 000 or an amount equivalent to the financial gain generated by the offence, if such amount is greater, or to imprisonment for five years. In the event of a conviction for contravening the merger notification statutory provisions, it is most likely that courts would order fines instead of custodial sentences; and any order of custodial sentence would be as a last resort as a result of failure to pay a fine.

Further, any merger or takeover, which is held to result in substantial lessening of competition in the Malawi market, shall not have any legal effect; and no rights or obligations imposed on the participating parties by any agreement in respect of the merger or takeover shall be legally enforceable.

### **8. What filing fees are required?**

The filing fee payable for a merger is 0.05% of the combined turnover or total assets, whichever is the higher, of the enterprises proposing to effect the merger or takeover. For negative clearance the fee is MWK 700 000.

### **9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

Yes, it is necessary to obtain approval for foreign-to-foreign mergers which are likely to have effects that result in substantial lessening of competition in the Malawi market.

### **10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

Although the Act does not require pre-notification meetings, the Commission encourages parties to have a pre-notification meeting with the Commission to discuss how the transaction may be notified and get clarification on the information that needs to be submitted.

### **11. To what extent are non-competition factors relevant to the assessment of a merger?**

Non-competition factors considered by the Commission in evaluating a merger relates mostly to public interest consideration issues which include the extent to which a merger is likely to result in (i) increase in employment; (ii) acceleration in the rate of economic development; (iii) special attributes of a particular (industrial) sector or region; or (iv) the ability of small businesses or the informal sector or the socially disadvantaged and persons with disabilities to become competitive, i.e. impact in expanding the base of entrepreneurship and human development.

For example, in terms of special attributes of a particular industrial sector, in the assessment of a recent merger between National Bank of Malawi (NBM) and IndeBank, the Commission found that, while the transaction would result in a reduction in the number of banks in Malawi and that the market share of NBM as the acquirer would increase further after the merger, the benefits of the transaction outweighed its negative effects. The Commission reached a conclusion that the transaction saved IndeBank from statutory closure which would have resulted in loss of savings by IndeBank customers and negatively affected the banking industry. However, to mitigate the negative effects that the transaction would likely create, the Commission required NBM to commit to undertakings which included a requirement that the bank would not abuse its increased market share.



## **12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process?**

The Commission contacts customers and competitors if they are considered to be affected by the merger. Through public notices posted on the Commission's website and through publications in major newspapers of Malawi, the Commission invites customers and competitors to public hearings on mergers matters. It is not unusual for the Commission to give rights of audience to customers or competitors without the merging parties being furnished beforehand the submissions to be made. The Commission tends to rely on submissions made by customers or competitors in arriving at its decision.

## **13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

Suppliers, government ministries, departments and agencies or any other interested stakeholders may be contacted by the Commission to make submissions. If the Commission embarks on a public enquiry, a wide consultation process with stakeholders is followed. Employees are able to make submissions; however, in practice the Commission deals with trade unions, not usually with individual employees. Submissions on behalf of employees are important to the merger assessment process. The Commission is empowered to require any participant in the market within which a merger or takeover is proposed to grant the Commission access to records relating to patterns of ownership and percentages of sales accounted for by enterprises in the relevant sector.

## **14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

There is no formal process to make representations before a decision is issued (such as a public hearing). Nonetheless, all hearings by the Commission, including relating to mergers, are required to take place in public. The recent trend has been for concerned third parties, such

as competitors, customers or consumers, to make prior requests in writing to the Commission to make representations at the hearings.

Once the merging parties have made their initial submissions, the Commission is required under the Act to come back to the parties with a decision within 45 days. However, the Commission may ask for additional information regarding the merger, the parties or their businesses. If the Commission asks for the additional information, the 45 days start running from the date the Commission receives the requested information. The Commission then makes its order to approve or reject the application, or it may approve the application on condition that certain steps be taken to reduce negative effects of the merger or takeover on competition. In practice, the 45 day limit is not complied with even in circumstances in which the Commission has all the required information.

## **15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

In the Supreme Court of Malawi in the civil appeal case, *Competition & Fair-Trading Commission v Airtel Malawi Ltd and Bharti Airtel Ltd* [MSCA Civil Appeal No. 23 of 2014], it has been affirmed that a decision of the Commission ought to, pursuant to section 48 of the Competition and Fair-Trading Act, be appealed to a judge in chambers in the High Court of Malawi (Commercial Division) within 15 days of the date of the finding or decision of the Commission being made. The main distinction being that an appeal to a judge is usually brought to challenge the outcome of a case, whereas, a judicial review before a judge analyses the way in which a public body, e.g. the Commission, reached its decision in order to decide whether that decision was lawful or not. It was therefore inappropriate to commence judicial review proceedings where a decision by the Commission had been appealed against pursuant to section 48.

Extension of the 15-day period was considered by a judge in the High Court of Malawi in the context of an application for authorisation of an exclusivity agreement which was determined under section 44 of the Act. In commercial case number 2 of 2014 (Commercial Division), *Airtel Malawi Ltd versus The Competition and Fair-Trading Commission*, the Court held that it did not have the power to grant



an extension to the 15-day period. Although this case did not deal with a merger specifically, it is likely to be applicable in merger cases.

**16. Does the legislation apply to joint ventures?**

The legislation applies to full-function joint ventures.

**17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

Yes, the Act regulates prohibited practices and specifically prohibits certain horizontal restrictive practices (i.e. unlawful conduct between competitors). Any category of agreements, decisions or concerted practices likely to result in the prevention, restriction or distortion of competition to an appreciable extent in Malawi or in any substantial part of Malawi, is prohibited. Section 33(3) of the Act enumerates examples of business practices which have or would likely have negative effects on competition and are, therefore, prohibited. These include: cartels, such as price fixing or market allocation agreements among competing firms; bid rigging; resale price maintenance; predation; abuse or misuse of market power; and exclusive arrangements or agreements.

The Commission takes proactive action to identify market players that are potentially involved in cartel conspiracy or markets which may be affected by cartelisation. Cartel detection tools used by the Commission involve analyses of observable economic data and firm behaviour, systematic monitoring of media as well as tracking firms and individuals to detect behaviour which is inconsistent with a healthy competitive process.

In October 2014, the Commission determined that the Insurance Association of Malawi (IAM) engaged in a cartel and ordered IAM to cease and desist from the practice; and make a public withdrawal of any recommended premium rates that might be in force. The Commission launched investigations following the information it came across which alleged that IAM engaged in setting of premium rates and recommending the same to its members contrary to sections 32(1) and 34(1) of the Act. Also, the Commission ordered

Independent Schools Association of Malawi (the ISAM) to cease and desist from engaging in anti-competitive business practices. This followed investigations that confirmed that ISAM had been engaging in prohibited price fixing by setting fees in order to reduce competition among members. Apart from setting the fees, the Association was also involved in developing a code of conduct aimed at regulating the conduct of members with regard to where to open schools, who to admit as students and who to recruit as teachers. The Commission has also issued similar orders against Minibus Owners Association of Malawi and Travel Agents Association of Malawi.

**18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?**

The Act confers powers of investigation on the Commission, including the power to (i) summon and examine witnesses; and (ii) call for and examine documents. The Commission requires an order in a form of a search warrant granted by a responsible Court of Malawi in order to carry out a search. The Commission does not have powers to carry out an arrest.

The functions of the Commission include carrying out, on its own initiative or at the request of any person, investigations in relation to the conduct of business so as to determine whether any enterprise is carrying on anti-competitive trade practices or unfair trading practices and the extent of such practices, if any and to do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under the Act.

The Act empowers an investigating officer who is in possession of a warrant to search and inspect all things upon the premises of the suspected enterprise. The Commission is empowered to obtain all information it considers appropriate, and for such purposes it is empowered, *inter alia*, to hear any interested party and to hold public meetings.

**19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

There is no specific penalty for cartel conduct. However, it is an offence to engage in any form of cartel conduct as set out under section 33(3) of the Act. A person who is guilty of an offence under the Act for which no specific penalty is provided, is liable for a fine of MWK 500 000 or an amount equivalent to the financial gain generated by the offence, if such amount is greater, and to imprisonment for five years.

Further, any person who suffers injury, loss or harm as a result of any agreement, arrangement, undertaking, act or omission which is prohibited by the Act may recover damages by way of civil proceedings in the High Court of Malawi from the person responsible for any such agreement, arrangement, undertaking, act or omission. There is no leniency policy in place.

**20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

There is no provision in the Act providing for a mechanism to apply for exemption from certain parts of the legislation.

However, the Act permits the Commission to authorise any act, agreement or understanding which is not prohibited outright by the Act (i.e. an act, agreement or understanding which is not necessarily illegal unless abused) if that act, agreement, or understanding is consistent with the objectives of the Act and the Commission considers that, on balance, the advantages to Malawi outweigh the disadvantages.

The Commission is prohibited from authorising acts, agreements or understandings of a kind described as cartel conduct and abuse of dominance under sections 33(3) and 41(1) respectively. An example of an application for authorisation is the case of Chibuku Products Ltd (CPL) in which an application by CPL was made to the Commission in terms of section 44 of the Act, for authorisation to distribute CPL's products through appointed exclusive distributors. Although the Commission determined that the proposed

distribution arrangement had the likely effect of restricting competition in the distribution of CPL's products, the Commission authorised the arrangement subject to certain amendments of restrictive clauses in the distribution agreement. The arrangement had positive elements which outweighed the anti-competitive effects. In particular, it ensured the availability of CPL's products in remote areas at reasonable prices.

**21. Is minimum resale price maintenance prohibited?**

The Act does not distinguish between minimum and maximum resale price maintenance. Resale price maintenance is prohibited if it limits access to markets or otherwise unduly restrains competition or has, or is likely to have, an adverse effect on trade or the economy in general. In a recent competition matter against a beverages manufacturing and bottling company, Castel Malawi Limited (Castel), the Commission made no distinction between minimum and maximum resale price maintenance and went on to order Castel to cease and desist from recommending prices which were tantamount to resale price maintenance.

In terms of the Regulations, an enterprise may apply to the Commission for authorisation to engage in resale price maintenance if it is of the view that the conduct will not (i) limit access to markets; (ii) unduly restrain competition; or (iii) have an adverse effect on trade or the economy in general.

**22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

Exclusive dealing arrangements, insofar as they make the supply of goods or services dependent on the acceptance of restrictions on the distribution, manufacture or provision of competing or other goods or services, are prohibited if they limit access to markets or otherwise unduly restrain competition or have, or are likely to have, an adverse effect on trade or the economy in general.

In terms of the Regulations, an enterprise may apply to the Commission for authorisation to enter



into an exclusive dealing arrangement of this nature if it is of the view that the conduct will not (i) limit access to markets; (ii) unduly restrain competition; or (iii) have, or be likely to have, an adverse effect on trade or the economy in general.

**23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

The Act prohibits abuse or misuse of a dominant position. The Act addresses the abuse or misuse of market power, providing that any person who has a dominant position of market power shall not use that power for the purpose of (i) eliminating or damaging a competitor in that market or any other market; (ii) preventing the entry of a person into that market or any other market; or (iii) deterring or preventing a person from engaging in competitive conduct in that market or any other market.

The Act and Regulations do not provide a threshold or definition of dominance, however the Commission's website records that 'an enterprise would be deemed to be dominant when it possesses such significant market power to adjust prices or outputs or trading terms without effective constraint from competitors or potential competitors'.

The Act also prohibits predatory behaviour towards competitors including the use of cost pricing to damage, hinder or eliminate competition, if the behaviour limits access to markets or otherwise unduly restrains competition, or has, or is likely to have, adverse effects on trade or the economy in general.

**24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

In 2018, the Commission did not find any abuse or misuse of dominant position in a merger approval matter relating to the acquisition by Central Poultry (2000) Ltd (Central Poultry) of some substantial business assets of Crown Agro Industries Ltd. Allegations of abuse of dominant

position were levelled against Central Poultry by some small-scale poultry farmers. The merger was approved subject to some conditions which targeted at preventing any abuse by Central Poultry in the future.

In 2017, the Commission dismissed allegations of abuse of dominance against CP Feeds Limited, an associated or affiliated company of Central Poultry. Specifically, it was alleged that CP Feeds were selling chickens at a price which undercut small scale poultry producers. This followed investigations which the Commission conducted which showed that CP Feeds was vertically integrated such that their production costs for chickens were much lower than that of small-scale poultry producers. This allowed the company to sell at much lower prices. There was no evidence to prove that CP Feeds was abusing its market power. The Commission held that the small-scale producers were demanding protection from legitimate competition from companies enjoying economies of scale and scope.

In 2013, the Commission investigated and dismissed a case in which Fasa Products Ltd (Fasa) was accused of engaging in anti-competitive business practices. It was alleged that Fasa had appointed exclusive distributors for soya pieces and was refusing to allow other wholesalers to purchase the product directly from the factory shop.

The Commission has also referred a matter to the Reserve Bank of Malawi, as a financial services sector regulator, to come up with appropriate regulations to level the playing field for credit referencing businesses, after it found that the conduct by members of the Banking Association Malawi created an anti-competitive business environment in credit referencing.

**25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

There is no specific penalty for abuse of dominance, however, it is an offence for any person that has a dominant position of market power to misuse that power. Also, the Commission does not have powers to impose fines directly. The Commission requires the aid of the applicable courts of Malawi to get the fines imposed.



A person guilty of an offence under the Act for which no specific penalty is provided may be liable for a fine of MWK 500 000 00 or an amount equivalent to the financial gain generated by the offence, if such amount is greater, and to imprisonment for five years.

Further, any person who suffers injury, loss or harm as a result of any agreement, arrangement, undertaking, act or omission which is prohibited by the Act may recover damages by way of civil proceedings in the High Court from the person responsible for any such agreement, arrangement, undertaking, act or omission.

## **26. Are there Rules in relation to price discrimination?**

The Act requires enterprises to refrain from engaging in discriminatory pricing and discrimination in terms and conditions, in the supply or purchase of goods or services, including by means of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises, if the act or behaviour limits access to markets or otherwise unduly restrains competition, or has or is likely to have an adverse effect on trade or the economy in general.

This prohibition does not only apply to dominant firms, but to any category of agreements, decisions and concerted practices which is likely to result in the prevention, restriction or distortion of competition to an appreciable extent in Malawi or in any substantial part of it.

## **27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

The Act requires the Commission to publish its decisions in the *Government Gazette*, which is an official document that is accessible to the public. In practice, the Commission rarely publishes its decision in the *Gazette*. Some decisions by the

Commission are available in summary form on the Commission's website [www.cftc.mw](http://www.cftc.mw) under 'Media/ Press Release'. However, not all decisions appear to be published.

Among those recently published are short summaries of the mergers considered for authorisation by the Commission, such as:

- The Commission ordered Castel Group Malawi Ltd to pay a fine of MWK 35.416 million for supplying the market with products likely to cause harm to consumers;
- The Commission ordered Castel Group Malawi Ltd to pay a fine of MWK 0.5 million for supplying the market with products containing foreign objects likely to cause harm to consumers;
- The Commission ordered Peoples Trading Centre to pay a fine of MWK 0.5 million for engaging in misleading conduct with regard to pricing of chickens;
- The Commission authorised the acquisition of Crown Poultry Ltd by Central Poultry Ltd, subject to Central Poultry reviewing its distribution arrangements for live chickens;
- Acquisition of SABMiller plc by Anheuser-Busch InBev SA/ NV (AB InBev); and
- Acquisition of shareholding in Charter Insurance Company by Liberty Holdings Ltd and Liberty Nominees (Proprietary) Ltd.



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# Mauritius



**FIRMWISE/ BOWMANS**

Shianee Calcuttea

### 1. What is the relevant competition legislation and who are the enforcers?

The Competition Act, 25 of 2007 (Act) regulates competition in Mauritius and came into effect between October 2008 and December 2009. The Act is enforced by the Competition Commission (Commission), a body corporate whose powers are, *inter alia*, to determine whether a restrictive business practice has taken place, to conduct hearings, to determine penalties or remedies where the Act has been contravened, to review mergers, and to co-operate with international competition authorities.

### 2. Are there any proposed amendments or new regulations expected to come into force?

The Commission has appointed an international consultant to review the Act, the Competition Commission Rules of Procedure 2009 and the guidelines with a view to having the legislation amended, so as to enable a more efficient enforcement process that is sensitive to the challenges associated with a small economy. While the intention was for the proposals to be submitted to the Commission by the end of 2019, it is not clear what the current status is. Amendments to the Act are not foreseen in the near future.

### 3. Is the law actively enforced?

Yes. In the last year under review (2017/ 2018), the Commission was actively involved in the conducting of inquiries, investigations and market studies, merger reviews (especially on behalf of the COMESA Competition Commission (CCC)), and the administering of an amnesty programme for enterprises engaged in resale price maintenance in Mauritius. The latter attracted 102 applications across a number of product markets.

### 4. What are the current priorities or focus areas of the competition authorities?

The Commission is currently committed to the dual objective of enforcing the Act rigorously while improving its enforcement efficacy over the long-term. Currently, all sectors of the economy are targeted for enforcement. In the current

financial year, the Commission expects to complete 24 enquiries, five to six investigations, 24 merger investigations on behalf of the CCC, conduct one market study and advise Government where required. It also intends to further promote its corporate leniency policy.

### 5. What kind of transaction constitutes a notifiable merger?

Under the Act, there is currently no obligation on entities to notify the Commission of a 'merger situation' (please see question 6 below). A 'merger situation' occurs when two or more enterprises, of which one operates in Mauritius, either by itself or through a company being incorporated in Mauritius, are brought under common ownership or control. In terms of the Act, 'common control' means:

- enterprises of interconnected bodies corporate;
- enterprises carried on by two or more bodies corporate of which one person has, or groups of persons have, control; or
- two distinct enterprises, one carried on by a body corporate and the other carried on by a person having control over that body corporate.

In terms of the Act, any person may be treated as bringing an enterprise under his control where such person: (i) is able to control or materially influence the policy of an enterprise without having a controlling interest in such enterprise, (ii) is able to control or materially influence the policy of an enterprise, and subsequently acquires a controlling interest in the same enterprise, and (iii) is already able to influence the policy of an enterprise and becomes able to control that policy.

According to the Competition Commission Guidelines on Mergers (Merger Guidelines), the test for control is whether material influence is capable of being exercised rather than the actual exercise of such influence. The existence of control will be determined based on a case-by-case analysis of the entire relationship between the merging parties. In terms of the Merger



Guidelines, the Commission considers that a controlling interest is generally deemed to exist where a person:

- owns at least 30% or more of the voting rights;
- controls the composition of the board;
- is in a position to exercise, or control the exercise of, more than one-half of the maximum number of votes that can be exercised at a meeting of the company; or
- holds 30% or more of the issued shares of the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital.

#### **6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?**

In terms of the Act, a merger shall be subject to review by the Commission where:

- all the parties to the merger, supply or acquire products and services of any description, and will, following the merger, together supply or acquire 30% or more of all those products or services on the market; or
- one of the parties to the merger alone supplies or acquires, prior to the merger, 30% or more of products or services of any description on the market; and
- the Commission has reasonable grounds to believe that the creation of the merger situation has resulted in, or is likely to result in, a substantial lessening of competition within any market for products and services.

Although there is no requirement of merger notification, the Commission encourages merging parties to notify the Commission before they merge to obtain guidance. Should the Commission become aware of a merger after it has been implemented, it may open an investigation into the merger. If it is established that the merger will lead to a substantial lessening of competition in a market, the Commission may order a remedy, which may include a divestiture or 'demerger'.

#### **7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

Notification of a merger at the Commission is voluntary and no sanctions apply for a failure to notify or prior implementation of a merger. However, mergers that are likely to substantially lessen competition may be investigated by the Commission and may be subject to a remedy under the Act. Remedies can include conditions placed on a merger, or guidance provided to the parties by the Commission. Where enterprises intend to merge, they may approach the Commission for guidance as to whether the proposed merger is likely to substantially lessen competition in a market.

#### **8. What filing fees are required?**

No filing fees are payable for merger notifications.

#### **9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

As stated above, a merger situation occurs when two or more enterprises, of which one enterprise operates in Mauritius, either by itself or through a company incorporated in Mauritius, are brought under common ownership or control. Based on this definition, foreign-to-foreign mergers do not appear to be notifiable, but guidance may be sought from the Commission.

#### **10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

Any party to a merger may, and is encouraged to, apply to the Commission for guidance as to whether a proposed merger is likely to substantially lessen competition in a market.

#### **11. To what extent are non-competition factors relevant to the assessment of a merger?**

If the Commission established that a merger has resulted, or is likely to result, in a substantial lessening of competition within any market, it must consider whether public benefits are present that will offset the harm to competition.

Public benefits are defined as (i) gains in the safety of products and services, (ii) the efficiency with which products are produced, supplied or distributed, or with which services are supplied or made available, (iii) the development and use of new and improved products and services, and in the means of production and distribution, or (iv) the promotion of technological and economic progress. It must also be shown that the above benefits have been, or are likely to be, shared by consumers and business in general.

**12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

In assessing whether a merger is likely to substantially lessen competition, the Commission will consider all available, relevant and verifiable evidence that can be reasonably obtained, including from market participants.

**13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

It is unclear whether employees are contacted as part of a merger investigation. Public interest benefits are narrowly defined in the Act and the effect of a merger on employment is not included in the definition. There is also no indication of employment-related conditions having been imposed by the Commission to date. However, the Commission often investigates mergers on behalf of the CCC, and could, in accordance with the provisions of the COMESA Regulations, 2004, expand its inquiry to include other public interest factors for consideration, including employment.

**14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

The Commission typically publishes a Statement of Issues after an investigation has been completed, allowing the merging parties to propose undertakings or otherwise engage with the Commission to remedy identified concerns. See for example the 2012 mergers involving Swan Insurance Co Ltd and Anglo Mauritius Society Ltd. The parties to the merger may also request the Commission to convene a hearing to make representations. In terms of formulating and publishing procedural rules, the Commission shall have regard to, among others, the principles of natural justice and the need for fairness between parties.

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

Any party who is dissatisfied with an order or direction of the Commission may appeal to the Supreme Court of Mauritius against the order or direction in accordance with the rules of the Chief Justice.

**16. Does the legislation apply to joint ventures?**

Yes. The legislation applies to any person, firm, partnership, corporation, company, association or other juridical person, engaged in commercial activities for gain or reward and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them.

**17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

Yes, the Act specifically prohibits cartel conduct, which deals with the fixing of selling or purchase prices of products and services, the sharing of markets or sources of supply of the products and services, the restriction of the supply or acquisition of products and services, and bid rigging.





Recently, the Commission has recommended the imposition of a fine of MUR 76.4 million (USD 2.08 million) on Mauritius Chemical & Fertilizers Industry Ltd and United Investments Ltd, which are the two main suppliers of fertilisers in Mauritius, for operating a cartel. In a different matter in the beer industry, following a leniency application by Phoenix Beverages Ltd (PBL) in relation to a cartel with Stag Beverage Ltd, the latter was ordered to pay a fine of approximately MUR 20 million (USD 545 000). PBL obtained a 75% discount as leniency applicant and was fined approximately MUR 6.5 million (USD 180 000).

#### **18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?**

The Executive Director may, for the purposes of any investigation under the Act, do the following:

- order any person to attend, at a specified time and place, for the purpose of being examined orally in relation to any matter;
- require any person to produce any book, document, record or article, or to provide information in a written statement, in relation to any matter relevant to the investigation. Such requests must be made in writing and signed by the Executive Director;
- order any person to furnish a statement on oath or affirmation setting out all information which may be required under the written notice;
- enter and search the premises of any person and take possession of documents or copies of them, including information stored on a computer, disk, cassette, microfilm, or preserved by any mechanical or electronic device, with a warrant signed by a Magistrate; or
- require any person to provide an explanation of any such documents, or to state where they may be found.

#### **19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

The Commission may, in relation to cartel conduct or minimum resale price maintenance, issue a direction and/ or impose a financial penalty on the enterprise, which shall not exceed 10% of the turnover of the enterprise in Mauritius during the period of the breach up to maximum period of five years. However, in order for the Commission to impose a financial penalty, the breach must have been committed intentionally or negligently. Directions by the Commission may include directions to terminate or amend the agreement, or to remedy, mitigate or prevent the adverse effects identified by the Commission.

The Commission has a Corporate Leniency Policy (CLP) in place, which is set out in the Competition Commission Guidelines on Collusive Agreements (CCM3). In terms of the CLP, among others, the Commission will grant an enterprise the benefit of total immunity from financial penalties for a given infringement where the enterprise is the first to provide the Commission with evidence of the cartel before an investigation has commenced, provided that the Commission does not already have sufficient information to establish the existence of the alleged cartel activity. Immunity will also be subject to the enterprise:

- providing the Commission with all the information, documents and evidence available to it regarding the cartel activity;
- fully co-operating throughout the investigation and until the conclusion of any action by the Commission as a result of the investigation; and
- refraining from further participation in the cartel from the time of disclosure of the cartel (unless instructed otherwise).

The Act does not provide for criminal sanctions for cartel conduct.

**20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

There is no provision in the Act allowing parties to a restrictive business practice to apply for exemption from the legislation. However, petroleum products and liquid petroleum gas are excluded from the application of the Act; and so too, the following agreements or practices:

- any practice of employers or any agreement by which employers are parties insofar as it relates to the remuneration, terms or conditions or employment of employees;
- any agreement insofar as it contains provisions relating to the use, licence or assignment of rights under or existing by virtue of laws relating to copyright, industrial design, patents, trademarks or service marks; and
- any practice or agreement approved or required under an international agreement to which Mauritius is a party.

**21. Is minimum resale price maintenance prohibited?**

Yes, an agreement involving minimum resale price maintenance is prohibited and void, unless the minimum resale price is recommended only, not binding, and the words ‘recommended price’ appear next to the resale price.

**22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

An exclusive agreement can only be reviewed under the monopoly provisions of the Act. This means that an exclusive agreement will only be reviewable if at least one of the parties to

the agreement are in a ‘monopoly situation’. A monopoly situation exists in relation to the supply of products or services where:

- 30% or more of those products or services are supplied, or acquired in the market, by one enterprise; or
- 70% or more of those products or services are supplied, or acquired in the market, by three or fewer enterprises.

Exclusive conduct will be prohibited if it has the object or effect of preventing, restricting or distorting competition, or constitutes exploitation of a monopoly situation. Exclusive agreements are therefore not unlawful in themselves, but only if they are likely to lead to anti-competitive foreclosure to the detriment of consumers. Refer to the Guidelines on Monopoly Situations and Non-Collusive Agreements (Monopoly Guidelines) issued by the Commission for additional factors that the Commission will consider.

**23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

As indicated above, a monopoly situation exists in relation to the supply of products or services of any description where:

- 30% or more of those products or services are supplied, or acquired in the market, by one enterprise; or
- 70% or more of those products or services are supplied, or acquired in the market, by three or fewer enterprises.



Conduct by a firm having a monopoly situation will be prohibited if it has the object or effect of preventing, restricting or distorting competition, or constitutes exploitation of the monopoly situation. When reviewing a monopoly situation, the Commission shall take into account:

- the extent to which an enterprise enjoys, or a group of enterprises enjoy, such a position of dominance in the market so as to make it possible for that enterprise or those enterprises to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors;
- the availability of substitutable products or services to consumers in the short term;
- the availability of nearby competitors to whom consumers could turn in the short term; and
- evidence of actions or behaviour by an enterprise that is, or a group of enterprises that are, party to the monopoly situation where such actions or behaviours have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are likely to be detrimental to the interests of consumers.

If the Commission finds that the specific conduct has led to anti-competitive effects in the market, it will assess whether any of the following public interest factors relevant to the conduct outweigh the anti-competitive effects:

- gains in the safety of products and services;
- the efficiency with which products are produced, supplied or distributed, or with which services are supplied or made available;
- the development and use of new and improved products and services, and in the means of production and distribution; or
- the promotion of technological and economic progress. It must also be shown that the above benefits have been, or are likely to be, shared by consumers and business in general.

Refer to the Monopoly Guidelines issued by the Commission for more information.

#### **24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

The Commission has carried out several investigations into abuse of dominance in the past. A recent example is the Commission's finding that Visa and MasterCard have abused their dominance in the market by the setting of interchange fees excessively high at 1%. It was found that the interchange fee can constitute up to 79% of the cost to be incurred by banks for supplying merchants with facilities for accepting card payments. It was found that, at 1%, the interchange fee was restricting competition among banks and financial institutions by preventing some of them, especially smaller institutions, from providing merchants with card acceptance facilities at lower prices. The Commission ordered Visa and MasterCard to limit their interchange fee for debit and credit card transactions to 0.5%.

Refer to the Commission's annual reports for further examples of investigations into abuse of a dominant position.

#### **25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

Where it has been found that an enterprise abused its monopoly situation by engaging in a prohibited practice in terms of section 46 of the Act, and that no public interest factors outweighed the anti-competitive effects of the conduct, the Commission may give the enterprise direction as it considers necessary, reasonable and practicable to:

- remedy, mitigate or prevent the adverse effects on competition that the Commission has identified; or
- remedy, mitigate or prevent any detrimental effects on users and consumers in so far as they have resulted from, or are likely to result from, the adverse effects on, or the absence of, competition.



Such direction may include, but is not limited to, a requirement that the enterprise shall:

- terminate or amend an agreement;
- cease or amend a practice or course of conduct, including conduct in relation to prices;
- supply products or services, or grant access to facilities;
- separate or divest itself of any enterprise or assets; or
- provide the Commission with specified information on a continuing basis.

Any person who fails without reasonable excuse to comply with a requirement imposed by the Commission shall commit an offence and shall, on conviction, be liable to a fine of up to MUR 500 000 (USD 13 500) and to imprisonment for a term of up to two years.

#### **26. Are there Rules in relation to price discrimination?**

The Act does not specifically deal with price discrimination; however, the Monopoly Guidelines briefly refer to this conduct. Price discrimination is not in itself anti-competitive and the Commission will not investigate it as an abuse, unless it forms part of a strategy that indeed constitutes an abuse, e.g. predatory pricing or excessive pricing. Refer to the Monopoly Guidelines for more information.

#### **27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

Yes, the Commission publishes its decisions on its website, <https://competitioncommission.mu/>.

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# Mozambique



## **HENRIQUES, ROCHA & ASSOCIADOS**

Fabrcia Almeida Henriques

## **MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS**

Pedro Gouveia e Melo



### 1. What is the relevant competition legislation and who are the enforcers?

Competition Law is regulated in Mozambique primarily by 10/ 2013 of 11 April 2013 (the Competition Law), and the Competition Law Regulation, approved by Decree 97/ 2014 of 31 December 2014 (the Regulation).

Ministerial Diploma 79/ 2014 of 5 June 2014 establishes the fees applicable, in particular, to merger control notifications and requests for exemption of restrictive agreements.

The administrative authority with exclusive jurisdiction to enforce the Competition Law is the Autoridade Reguladora da Concorrência (the Authority), an independent entity endowed with administrative and financial autonomy and broad supervisory, regulatory, investigatory and sanctioning powers. The Statute of the Authority was approved by Decree 37/ 2014 of 1 August 2014 (the Statute of the Authority).

### 2. Are there any proposed amendments or new regulations expected to come into force?

The Competition Law contemplates that a number of implementing regulations are to be approved (e.g. setting out the applicable forms to submit merger notifications and establishing a leniency programme), but no drafts or proposals are publicly available.

### 3. Is the law actively enforced?

The Authority is not yet operational. As such, the law is not actively enforced.

### 4. What are the current priorities or focus areas of the competition authorities?

Not applicable.

### 5. What kind of transaction constitutes a notifiable merger?

The Competition Law applies to transactions that (i) are considered to be ‘concentrations between undertakings’, and (ii) meet the jurisdictional thresholds.

The following operations are deemed to constitute a concentration between undertakings:

- a merger between two or more independent undertakings;
- the acquisition of control, by one or more undertakings, over other undertaking(s) or part(s) of other undertakings; and
- the creation of a joint venture performing, on a lasting basis, all the functions of an autonomous economic entity (i.e. a fully functioning joint venture).

The concept of an undertaking encompasses all entities conducting economic activity through the offer of goods or services in the market, regardless of their legal status.

The following exceptions do not constitute a concentration in the meaning of the Competition Law:

- the temporary or transitional acquisition of control over an undertaking;
- the acquisition of shareholdings or assets by an insolvency administrator within insolvency legal proceedings;
- the acquisition of a shareholding merely as a guarantee;
- the temporary acquisition by financial institutions or insurance companies of shareholdings in companies active outside the financial sector, insofar as the securities are acquired with a view to their resale, if the acquirer does not exercise the corresponding voting rights with a view to determine the competitive behaviour of the target (or only exercises them with a view to prepare the sale), and if the disposal of the controlling interest occurs within one year; and
- two or more concentrations between the same undertakings in a period of five years that individually do not meet the jurisdictional thresholds. However, if the concentration resulting from the conclusion of the last agreement meets the jurisdictional thresholds, it should be notified to the Authority before closing.



## **6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?**

Notification is mandatory whenever the concentration meets at least one of the following thresholds:

- The combined turnover of all the undertakings concerned in Mozambique in the preceding year is equal to or exceeds MZN 900 million.
- 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 in a substantial part thereof.
- 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, or in a substantial part thereof, as long as each of at least two of the undertakings concerned achieved in the preceding year a turnover of at least MZN 100 million in Mozambique.

The Competition Law provides that, even when the concentration does not meet the jurisdictional thresholds, the Authority may nevertheless, within six months of it becoming public knowledge, open *ex officio* an investigation and request the notification of the concentration, in case it is deemed to appreciably impede, distort or restrict competition and does not qualify for a public interest exemption. Parties involved in a non-reportable transaction may voluntarily submit a filing to the Authority, which may well be advisable if there is any chance that the Authority will intervene *ex officio*.

## **7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

A concentration meeting the jurisdictional thresholds is subject to mandatory notification to the Authority within seven working days from the conclusion of the agreement or acquisition project, and cannot be implemented before a non-opposition decision is (expressly or tacitly) adopted by the Authority.

Failure to file a notice of concentration within the statutory deadline subject to mandatory notification exposes the merging parties to serious negative consequences. In particular:

- the breach of the notification deadline makes the undertakings concerned liable to fines of up to 1% of the previous year's turnover for each of the participating undertakings; and
- the validity of any legal instrument related to the transaction is dependent upon the express or tacit clearance by the Authority.

In cases where the Authority opens an *ex officio* investigation of the concentration, the statutory decision deadlines do not apply.

The early implementation of a concentration subject to mandatory filing without express or tacit clearance from the Authority, or in breach of a decision prohibiting one concentration, makes the undertakings concerned liable to fines of up to 5% of the previous year's turnover for each of the participating undertakings.

## **8. What filing fees are required?**

Pursuant to Ministerial Decree 79/ 2014, of 5 June 2014, the effectiveness of the notification is dependent on the payment of the filing fee by the notifying parties, which is equal to 5% of the turnover of the previous year.

As the value of the filing fee is significantly higher than the maximum fine for untimely notification (1% of turnover), and equal to the maximum fine applicable for implementation before clearance and prohibited anti-competitive practices (5% of turnover), it is hoped that this value is a typing error that will be rectified before the Authority begins operation.

## **9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

Foreign-to-foreign mergers are caught by the Competition Law to the extent that they have, or may have, effects in the territory of Mozambique. Therefore, foreign-to-foreign mergers may be subject to mandatory filing whenever both parties or the target alone achieve, directly or indirectly, sales in Mozambique (despite the fact that neither of the undertakings concerned is established in the country), and the jurisdictional thresholds are met.

**10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

The Competition Law Regulation provides for confidential and informal pre-notification contacts. As the Authority is not yet operational, there is no indication of whether pre-notification meetings will become standard practice.

**11. To what extent are non-competition factors relevant to the assessment of a merger?**

In its substantive analysis, the Authority is bound to take into account public interest reasons which may justify any impediments or restrictions to competition resulting from the notified concentration. In particular, the Authority's public interest assessment should consider the effect of the transaction on:

- a specific sector or region;
- employment;
- the capacity of small enterprises, or enterprises controlled by historically disfavoured persons, to become competitive; and
- the capability of national industry to compete internationally.

**12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

Following publication of a notice of the notification by the Authority in two national newspapers (which should be made within five days of filing), any interested third party may submit comments on the transaction within the deadline established by the Authority, which cannot be less than 15 working days.

Competitors should also be heard when the Authority takes into account non-competition public interest reasons (see question 11).

In addition, prior to the adoption of a final decision in the procedure, the Authority must hold a hearing involving the notifying parties, as well as any third parties that have already intervened in the procedure and expressed an adverse opinion on the merger. The hearing suspends the time periods for the adoption of a decision by the Authority.

**13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

While there is no specific reference in the Competition Law to employees, the Authority can request information from any relevant undertaking or individual. It may also be argued that employees can be considered 'interested third parties' and be allowed to intervene in the procedure (see question 12 above).

**14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

As mentioned in question 12, prior to the adoption of a final decision in the procedure, the Authority must hold a hearing involving the notifying parties, as well as any interested third parties that have already intervened in the procedure and expressed an adverse opinion on the merger. If no such third parties have come forward and if the decision is an unconditional clearance, the Authority can waive the requirement for a hearing.

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

All of the Authority's decisions on merger control, either clearing or prohibiting a merger, are subject to judicial review.

The Statute of the Authority determines that the Authority's decisions may be appealed in Court, namely to the Judicial Court of the City of Maputo, in the case of procedures leading to the application of fines and other sanctions, and to the Administrative Court, with regard to merger control procedures and requests for exemptions relating to restrictive agreements.

**16. Does the legislation apply to joint ventures?**

Yes. The creation of, or the acquisition of control over, a jointly controlled undertaking constitutes a concentration whenever the joint undertaking fulfils the functions of an independent economic entity on a lasting basis (i.e. a fully functioning joint venture).



Where the creation of the joint venture has the object or effect of co-ordinating the competitive behaviour of undertakings that remain independent, such co-ordination is assessed under Articles 15 to 18 of the Competition Law.

**17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

The Competition Law specifically prohibits, *inter alia*, agreements and concerted practices between competing undertakings resulting in the adoption of uniform or concerted commercial conduct, in fixing directly or indirectly prices or other business conditions, limiting production or distribution of products and services, and partitioning markets or supply sources.

As mentioned above, the Competition Law prohibitions have not yet been enforced.

**18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?**

In the enforcement of its sanctioning and supervisory powers, the Authority is able to interview any relevant persons, request documents, conduct searches and seizures in the premises of the undertakings concerned and, when necessary, proceed to the sealing of business premises. Searches and seizures at business premises must be conducted with a warrant of the competent judiciary authority. The Authority may request the assistance of the police force when necessary.

**19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

Parties involved in prohibited anti-competitive practices (including cartels, other horizontal and vertical agreements, the abuse of a dominant position and the abuse of economic dependence) are liable for fines of up to 5% of their consolidated turnover.

The following ancillary sanctions may also be applied: (i) publication of the sanction in the official journal and/ or in a national or local newspaper; (ii) the interdiction of the infringing company from participation in public tenders for a period of five years; and (iii) the breakup of the company, transfer of shareholder control, sale of assets, partial termination of a business entity, and any other act necessary for the elimination of the harmful effects to competition.

No criminal sanctions are contemplated in the Competition Law.

The Competition Law contemplates the establishment of a leniency programme by way of a regulation published by the Authority, but no draft has yet been made public.

**20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

The Competition Law establishes an administrative procedure for the issuance by the Authority of an exemption to the prohibitions in the Competition Law. The request for exemption should be submitted by one or more of the undertakings that are party to an agreement, according to a form to be approved by the Authority.

The conditions for exemption are as follows:

(i) The agreement should pursue one of the following objectives:

- contributing to improving the production or distribution of goods and services;
- reducing prices to consumers;
- accelerating economic development;
- incentivising the technological development of Mozambican companies;
- enabling a better allocation of resources;
- promoting national goods or services;
- promoting exports;
- promoting the competitiveness of small- and medium-sized national companies;
- contributing to the consolidation of national companies; and
- promoting the protection of intellectual property.



(ii) The agreement must not eliminate competition or contain restrictions that are not indispensable to the attainment of the relevant objectives above.

Professional associations recognised by the Government may also request exemption for their internal Rules that have the effect of appreciably restricting competition. The exemption is granted when the Rules in question are essential to maintain the professional standards or the specificities of the profession.

### **21. Is minimum resale price maintenance prohibited?**

One of the prohibited vertical restraints expressly listed in the Competition Law is the imposition on distributors of resale prices, discounts, payment conditions, profit margins or any other commercial conditions in their dealings with third parties.

### **22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

Agreements with exclusivity provisions are not expressly prohibited by the Competition Law, but one of the examples of prohibited vertical conduct is the imposition of minimum or maximum quantities on distributors in their purchases of contractual products. This prohibition, given its broad wording, is also likely to cover obligations to purchase all or a certain percentage of the buyer's requirements of such products. Such restrictions may benefit from exemption if all the legal criteria are met.

### **23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

The Competition Law prohibits the abusive exploitation, by one or more undertakings, of a dominant position in the national market or in a substantial part thereof, having as its object or its effect the impediment, distortion or restriction of competition.

The Regulation establishes a rebuttable presumption of dominance for an undertaking, or collectively for two or more undertakings, whose market share equals or exceeds 50%.

The Competition Law sets out an extensive but non-exhaustive list of behaviours considered abusive, such as:

- refusing to provide a product or service or to grant access to essential infrastructure without cause;
- terminating a commercial relationship without justification;
- forcing or inducing a supplier or consumer not to deal with a competitor;
- selling below cost without justification;
- importing goods below their cost in the exporting country;
- price discrimination;
- tying;
- excessive pricing; and
- any other conduct listed in Articles 17 and 18 of the Competition Law as prohibited horizontal or vertical agreements.

The Competition Law also prohibits the abusive exploitation, by one or more undertakings, of the state of economic dependence of any supplier or client which does not have an equivalent alternative. Abusive conduct may take the form of any of the vertical agreements and practices prohibited by the Competition Law.

### **24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

As the Authority is not yet operational, the Competition Law prohibitions are not currently enforced.

### **25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

Parties involved in the abuse of a dominant position and the abuse of economic dependence are liable for fines of up to 5% of their consolidated turnover, as well as to the ancillary sanctions referred to in question 19.

### **26. Are there Rules in relation to price discrimination?**

Price discrimination is listed as a prohibited practice in the context of vertical agreements, the abuse of a dominant position and the abuse of economic dependence of a supplier or client.



Price discrimination is considered an abuse of a dominant position where it:

- is likely to prevent, distort or restrain free competition;
- relates to equivalent transactions of goods and services of the same type and quality; and
- refers to sale prices, discounts, payment conditions, granted credit or other services rendered that relate to the supply of goods and services.

**27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

Decisions of the Authority will be published in the official journal of Mozambique (*Boletim da República*). In addition, the Statute of the Authority provides that decided cases are published on the Authority's website, but this is not yet operational.

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# Namibia



**KOEP & PARTNERS**

Meyer van den Berg



### **1. What is the relevant competition legislation and who are the enforcers?**

In Namibia, competition law is regulated by the Competition Act 2 of 2003 (the Competition Act) and the rules (the Rules) passed in terms of this Act. The Competition Act and the Rules are enforced by the Namibian Competition Commission (The Commission).

The High Court of Namibia has jurisdiction to hear and determine any matter arising from proceedings instituted under the Competition Act.

### **2. Are there any proposed amendments or new regulations expected to come into force?**

No amendments have been enacted to date.

### **3. Is the law actively enforced?**

Competition law in Namibia is actively enforced in respect of merger control. Because of the current relatively low merger thresholds, a large number of transactions fall to be notified. In terms of the Competition Act, the Commission is required to make a determination on a proposed merger within 30 days after receipt of the merger notification. However, the Competition Act provides that this period may be extended by a further 30 days if the Commission requests additional information or if a conference is convened. The periods referred to above can be extended due to the complexity of the issues or if the Commission deems it appropriate to do so, by a period not exceeding 60 days. In this regard, the Commission issues a notice in writing to the undertakings involved extending the period.

Any reference to days in the Competition Act and the Rules means business days.

The law relating to restrictive business practices has not been as actively enforced as merger control at this stage, but there has been an increase in enforcement activity in this area. Some alleged restrictive practices have been investigated and in most instances, settlements have been reached with the alleged offenders before action was instituted through the Namibian courts. Unfortunately, the general public has not been made aware of these investigations. The

Commission has conducted market enquiries in the automobile industry, the retail sector, the cement and the poultry industries in partnership with the African Competition Forum, among others.

### **4. What are the current priorities or focus areas of the competition authorities?**

The Commission places a strong emphasis on the promotion of local content and employment retention.

### **5. What kind of transaction constitutes a notifiable merger?**

The Competition Act provides that a merger occurs 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. In terms of the Competition Act, a merger may be achieved in any manner including through the purchase of shares, an interest, or assets of the other undertaking in question; or amalgamation or other combination with the other undertaking.

The Competition Act does not make express provision for the exclusion of certain transactions from the merger definition (e.g. where a restructuring occurs within the same economic entity). However, the Commission has indicated that it does not regard internal restructurings as requiring notification. A cautious approach is nevertheless advisable.

The trigger for notification is a change of control and, more specifically, whether a transaction falls within the ambit of section 42(3) of the Competition Act, which sets out the various ways in which control may exist.

In terms of these provisions, a person controls an undertaking if that person:

- beneficially owns more than one-half of the issued share capital of the undertaking;
- is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;

- is able to appoint, or to veto the appointment, of the majority of the directors of the undertaking;
- is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Namibian Companies Act;
- in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
- in the case of the undertaking being a close corporation, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or
- has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control as mentioned in the preceding bullet points.

The Competition Act further provides that it is the Commission that must make a determination in respect of a merger and, in doing so, will evaluate the criteria which it considers relevant to the circumstances applicable to the proposed merger, including whether there will be an effect on competition. It is not the role of the merging parties to evaluate any effect on competition and, on the basis of their evaluation, decide whether or not to notify a merger; this evaluation is the task of the Commission.

## 6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?

The thresholds take a two-step approach.

Step 1: the first step is to look at the combined value of the parties. The Competition Act does not apply where the combined value of the assets and/ or turnover of the acquirer and target equals or does not exceed the values set out below in sub-paragraphs (a) to (d):

(a) the combined annual turnover in, into or from Namibia of the acquirer and target is equal to or valued below NAD 30 million;

(b) the combined asset value in Namibia of the acquirer and target is equal to or valued below NAD 30 million;

(c) the annual turnover in, into or from Namibia of the acquirer plus the assets in Namibia of the target is equal to or valued below NAD 30 million;

(d) the annual turnover in, into or from Namibia of the target plus the assets in Namibia of the acquirer is equal to or valued below NAD 30 million.

If the combined value of (a) to (d) above all fall below NAD 30 million, then the merger is not notifiable. However, if one of the combinations exceed NAD 30 million, the next step is to look at the asset and turnover values of the target only.

Step 2: If the value of the assets and turnover of the target fall below NAD 15 million, the merger will not be notifiable (even if a combined value in (a) to (d) above exceeds NAD 30 million).

The threshold notice refers to transferred undertaking instead of target. The thresholds specifically define a transferred undertaking as the total of all the undertakings that are transferred in respect of a merger which include any undertaking, or the business or assets of the undertaking that, as a result of a transaction are transferred in any circumstances set out in section 42 of the Competition Act:

(a) would become controlled by another undertaking; and

(b) any other undertaking that is controlled by, or the direct or indirect control over the whole or part of its business is held by, an undertaking which would become controlled by another undertaking.

Further, the Commission may call upon merging parties to submit a merger notification to it within 30 days of receipt of written demand, in respect of mergers in which the value falls below the threshold amounts set out. The method of calculation of the asset or turnover value is prescribed and as a general proposition must be determined in accordance with Namibian Generally Accepted Accounting Practices or International Financial Reporting Standards.





### **7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

No party to a notifiable merger may implement the merger before:

- it has obtained the requisite approval from the Commission; or
- the Commission's review period in relation to the proposed merger has lapsed without the former having made a determination in relation to the proposed merger.

In the event that a merger has been implemented in contravention of the provisions of the Competition Act, the Commission may make application to the High Court for:

- an interdict restraining the parties involved from implementing the merger;
- an order directing any party to the merger to sell or otherwise dispose of any shares, interest or other assets it has acquired pursuant to the merger;
- declaring void any agreement or provision of an agreement to which the merger was subject; or
- the imposition of a pecuniary penalty, which the Court considers appropriate, but not exceeding 10% of the global turnover of the undertaking during its preceding financial year.

The Commission, however, recognises that mergers in multiple jurisdictions may be subject to staggered approvals in the various jurisdictions and allow carving out or ring-fencing in respect of the Namibian approval, provided that due notice be given in advance.

### **8. What filing fees are required?**

The fees for filing a merger notice are as follows:

- NAD 10 000 if the combined figure is valued below NAD 50 million;
- NAD 25 000 if the combined figure is valued at or above NAD 50 million, but less than NAD 65 million;

- NAD 50 000 if the combined figure is valued at or above NAD 65 million, but less than NAD 75 million;
- NAD 75 000 if the combined figure is valued at or above NAD 75 million, but less than NAD 100 million;
- NAD 125 000 if the combined figure is valued at or above NAD 100 million, but less than NAD 1 billion;
- NAD 250 000 if the combined figure is valued at or above NAD 1 billion, but less than NAD 3.5 billion; or
- NAD 500 000 if the figure is valued at or above NAD 3.5 billion.

For these purposes the combined figure means the greater of the:

- combined annual turnover in, into and from Namibia of the acquirer and the target;
- combined assets in Namibia of the acquirer and the target;
- annual turnover in, into and from Namibia of the acquirer plus the assets in Namibia of the target; or
- assets in Namibia of the acquirer plus the annual turnover in, into and from Namibia of the target.

When determining the combined figure, the acquirer is taken to refer to all the undertakings that are acquiring undertakings in respect of the merger. An 'acquiring undertaking' is defined as: (i) any undertaking that, as a result of a transaction in any circumstances set out in section 42 of the Competition Act, would acquire or establish direct or indirect control over the whole or part of the business of another undertaking; (ii) any other undertaking that has direct or indirect control over the whole or part of the business of an undertaking referred to in (i); and (iii) any other undertaking that is controlled by, or has direct or indirect control over the whole or part of the business which is held by, an undertaking referred to in (i) or (ii).

When determining the filing fee, it is necessary to consider the assets in Namibia and the turnover in Namibia of the entire group of companies to which the acquirer belongs.

### **9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

In terms of the Competition Act, it would be necessary for undertakings to notify and obtain approval from the Commission in the event of foreign-to-foreign mergers, if one of the parties to the merger in question engages in economic activity in Namibia or if the merger will have an effect in Namibia, in addition to meeting the statutory thresholds for mandatory notification.

The concepts of economic activity in Namibia and an effect in Namibia are unclear and no statutory definitions are available at present. Foreign precedent may be persuasive in evaluating these concepts.

### **10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

The Competition Act does not provide for pre-notification contacts or pre-notification meetings, although the Commission is willing to hold pre-notification meetings or otherwise enter into pre-notification discussions.

### **11. To what extent are non-competition factors relevant to the assessment of a merger?**

The Competition Act provides that the Commission may base its determination of a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger. These criteria may include the following, namely, the extent to which the proposed merger would be likely to:

- prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;
- result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;

- result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
- affect a particular industrial sector or region;
- affect employment;
- affect the ability of small undertakings, in particular small undertakings owned or controlled by historically disadvantaged persons, to gain access to or to be competitive in any market;
- affect the ability of national industries to compete in international markets; or
- result in likely benefits to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.

### **12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

The Competition Act empowers the Commission to refer the particulars of a proposed merger to an inspector for investigation. Any person, including a person other than the notifying parties, may submit to such inspector (or the Commission) any document, affidavit or other information in respect of the proposed merger. The practice of the Commission is to make enquiries and contact customers, competitors and even other regulators, in the case of a regulated industry.

The Commission may, if it considers it appropriate and useful, hold a conference in relation to a proposed merger. The Commission may also invite parties other than the notifying parties to make representations at such a conference.



**13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

As noted above, any person, including employees, may be invited to make submissions to the Commission or provide information of their own volition. As part of the merger notification, parties are requested to state what effect the merger will have on employment.

**14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

The Commission may, if it considers it appropriate and useful, convene conferences between parties where they can make representations before a decision is issued by the Commission.

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

In terms of the Competition Act, a party to a proposed merger may, within 30 days from the determination by the Commission, in the first instance, apply to the Minister of Trade and Industry to review such determination.

Once the internal review appeal process has been exhausted, an application for review to the High Court in terms of the principles of administrative law and procedure is also available.

**16. Does the legislation apply to joint ventures?**

The Competition Act does not specifically provide for, or even define, joint ventures but specifically includes any amalgamation or combination between undertakings and accordingly the ambit of the legislation seeks to encompass all business forms. Therefore, any joint venture which constitutes an undertaking and involves itself in a merger as defined would fall to be notified to the Commission. Depending on the circumstances, one or more undertakings seeking to form a

joint venture may be required to comply with the provisions of the Competition Act regulating mergers. Joint ventures are also subject to the provisions of the Competition Act that prohibit anti-competitive conduct.

**17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

The Competition Act prohibits restrictive practices and, in particular, contemplates and includes in its ambit agreements concluded between parties in a horizontal relationship, being undertakings trading in competition. Agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited. In particular, the Competition Act prohibits any agreement, decision or concerted practice which:

- directly or indirectly fixes purchase or selling prices or any other trading conditions;
- divides markets by allocating customers, suppliers, areas or specific types of goods or services;
- involves collusive tendering;
- involves a practice of minimum resale price maintenance;
- limits or controls production, market outlets or access, technical development or investment;
- applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject of the contracts.

In August 2016, after an investigation by the Commission, Sanlam Namibia and PPS Insurance Ltd agreed to pay NAD 15 million (approximately EUR 990 000) for allegedly dividing the market through a joint venture marketing agreement and

admitted to contravening the Competition Act. This was the first penalty paid for a contravention and the first admission of guilt in terms of section 23 of the Competition Act. The settlement followed a series of negotiations between the Commission and the respondents and was therefore a negotiated outcome rather than a matter tested on its merits. The respondents subsequently filed an application for exemption with the Commission in relation to the particular conduct, which was denied.

### **18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?**

The Commission has broad investigative powers and may, either on its own initiative or upon receipt of information or a complaint from any person, launch an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute a prohibited practice. An investigation must be instituted within three years from the date the alleged infringement has ceased. If the Commission decides that any of the prohibitions on restrictive business practices have been infringed, it must give written notice of the proposed investigation to each undertaking which may be affected by that decision. The notice must, *inter alia*, inform each undertaking that it may submit written representations to the Commission. The notice must also request the undertaking to indicate whether it requires an opportunity to make oral representations to the Commission, in which case the Commission will convene a conference.

After consideration of any written representations and of any matters raised at a conference, the Commission may institute proceedings in the Court against the undertaking or undertakings concerned for an order:

- declaring the conduct which is the subject matter of the Commission's investigation, to constitute an infringement of the prohibition on restrictive agreements, practices and decisions or abuse of dominant position;
- restraining the undertaking or undertakings from engaging in that conduct;
- directing any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;
- imposing a pecuniary penalty, which may not exceed 10% of the global turnover of the undertaking during its previous financial year; or
- granting any other appropriate relief.

The Competition Act provides the Commission with relatively wide powers of search and seizure and the taking of evidence. Inspectors (appointed by the Commission) are empowered under the Competition Act to:

- search any premises;
- search any person on the premises if there are reasonable grounds for believing that the person has personal possession of any document or article that has a bearing on the investigation;
- examine any document or article found on the premises that has a bearing on the investigation;
- request any information about any document or article found on the premises;
- take extracts from, or make copies of, any book or document found on the premises that has a bearing on the investigation;
- use any computer system on the premises to search any data contained in or available to that computer system, reproduce any record from that data and seize any output from that computer for examination and copying; and
- attach and remove from the premises for examination and safekeeping anything that has a bearing on the investigation.

An inspector may not enter upon and search any premises unless he or she obtains a warrant authorising such entry and search, unless the owner, or any other person in control of the premises consents to the entry and search of the premises, or the inspector on reasonable grounds believes that a warrant would be issued if applied for, and that the delay in obtaining a warrant would defeat the object of the entry and search.



The Commission may also receive in evidence any statement, document, information or matter that may in its opinion assist to deal effectively with an investigation conducted by it, whether or not such statement, document, information or matter would otherwise be admissible in a court of law.

**19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

The Commission may not by itself impose any penalties but has to approach the High Court of Namibia to do so. The Court may impose a pecuniary penalty for any amount which it considers appropriate but not exceeding 10% of the global turnover of the undertaking during its preceding financial year. In determining an appropriate penalty, the Court must have regard to all relevant matters concerning the contravention.

The Commission may also at any time, during or after an investigation into an alleged infringement pertaining to prohibited practices, enter into an agreement of settlement with the undertaking(s) concerned, setting out the terms to be submitted by the Commission by application to the Court for confirmation as an order of the Court. Such an agreement may include, with the consent of any person who submitted a complaint to the Commission in relation to the alleged infringement, an award of damages to the complainant, and/ or any amount proposed to be imposed as a pecuniary penalty.

A contravention or failure to comply with an interim or final order of the Court given in terms of the Competition Act constitutes an offence. Upon conviction, the perpetrator is liable to a fine not exceeding NAD 500 000, or to imprisonment for a period not exceeding 10 years, or to both. In the case of any other contravention of the Competition Act, a convicted person is liable to a fine not exceeding NAD 20 000, or to imprisonment for a period not exceeding one year, or to both.

**20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

The Competition Act allows any undertaking or association of undertakings to apply to the Commission to be exempt from the provisions relating to restrictive business practices in respect of any agreement or category of agreements, any decision or category of decisions, or any concerted practice or category of concerted practices.

The Commission may, upon such application and on such conditions as the Commission may determine, grant an exemption in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trademarks, plant varieties or any other intellectual property rights.

If a professional association's Rules contain a restriction that has the effect of preventing or substantially lessening competition in a market, the association may apply to the Commission for an exemption.

**21. Is minimum resale price maintenance prohibited?**

Yes.

**22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

Agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited unless they are exempt in accordance with the provisions of the Competition Act.



Agreements and concerted practices contemplated above include agreements concluded between parties in a horizontal relationship, being undertakings trading in competition, or parties in a vertical relationship, being an undertaking and its suppliers or customers, or both.

In particular, legislation prohibits any agreement, decision or concerted practice which:

- directly or indirectly fixes purchase or selling prices or any other trading conditions;
- divides markets by allocating customers, suppliers, areas or specific types of goods or services;
- involves collusive tendering;
- involves a practice of minimum resale price maintenance;
- limits or controls production, market outlets or access, technical development or investment;
- applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject of the contracts.

**23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

Yes. For example, in April 2016, the Commission initiated proceedings in the High Court against Namcars (Pty) Ltd, a dominant, online advertising website, for an order declaring, among others, that Namcars has abused its dominant position in contravention of section 26(1), read with section 26(2)(b) of the Competition Act. The allegation is that Namcars imposed a policy prohibiting automotive dealers who advertise with Namcars from advertising its used vehicles on competing websites. The Commission has recorded its

willingness to engage with the respondent in an endeavour to settle this matter with the object of avoiding Court proceedings.

Recently, the Commission also took action against several insurance firms for alleged abusive practices, following a practice by insurance firms to agree on the maximum charges that panel beaters should charge. The matter is ongoing, although two firms acknowledged guilt and have entered into settlement agreements with the Commission.

**24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

Yes. For example, in April 2016, the Commission initiated proceedings in the High Court against Namcars (Pty) Ltd, a dominant, online advertising website, for an order declaring, among others, that Namcars has abused its dominant position in contravention of section 26(1), read with section 26(2)(b) of the Competition Act. The allegation is that Namcars imposed a policy prohibiting automotive dealers who advertise with Namcars from advertising its used vehicles on competing websites. The Commission has recorded its willingness to engage with the respondent in an endeavour to settle this matter with the object of avoiding Court proceedings.

**25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

Following an investigation into the conduct of one or more undertakings by the Commission, the Commission may institute proceedings in Court against the undertaking or undertakings concerned for an order imposing a pecuniary penalty, among others.

The Court may impose a pecuniary penalty for any amount which the Court considers appropriate, but not exceeding 10% of the global turnover of the undertaking during its preceding financial year. In determining an appropriate penalty, the Court must have regard to all relevant matters concerning the contravention.



The Commission may at any time, during or after an investigation into an alleged infringement, enter into an agreement of settlement with the undertaking(s) concerned setting out the terms to be submitted by the Commission by application to the Court for confirmation as an order of the Court.

Such an agreement may include, with the consent of any person who submitted a complaint to the Commission in relation to the alleged infringement, an award of damages to the complainant, and/ or any amount proposed to be imposed as a pecuniary penalty.

An order imposing a pecuniary penalty has the effect of, and may be executed as if it were, a civil judgment granted by the Court in favour of the Government of Namibia.

A pecuniary penalty payable in terms of the Competition Act is paid into the State Revenue Fund.

**26. Are there Rules in relation to price discrimination?**

The Competition Act prohibits restrictive practices and the abuse of a dominant position. Such prohibited conduct may include, directly or indirectly, imposing unfair purchase or selling prices or other unfair trading conditions and applying dissimilar conditions to equivalent transactions with other trading parties.

**27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

The decisions of the Commission are published in the *Government Gazette*, which is not available without a subscription. As at the time of writing, the Commission had not published decisions on its website [www.nacc.com.na](http://www.nacc.com.na).



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# Nigeria



## **UDO UDOMA & BELO-OSAGIE**

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## 1. What is the relevant competition legislation and who are the enforcers?

The Federal Competition and Consumer Protection Act, 2018 (the Act) was enacted on 30th January 2019. The Act repealed the Consumer Protection Council Act Cap. C25, Laws of the Federation of Nigeria, 2004, and the provisions of the Investments and Securities Act, 2007 (the ISA) which dealt with merger control.<sup>1</sup> The Act was enacted to promote fair, efficient and competitive markets in Nigeria, and is applicable to all undertakings and all commercial activities within, or having effect within, Nigeria.<sup>2</sup> Subject to the provisions of the Nigerian Constitution and notwithstanding the provisions of any other law, the provisions of the Act override the provisions of any other law relating to competition and consumer protection.<sup>3</sup>

The Act also establishes the Federal Competition and Consumer Protection Commission (the Commission) which is responsible for, *inter alia*, merger control, the enforcement of the prohibitions under the Act against anti-competitive business practices and consumer protection; and the Competition and Consumer Protection Tribunal (the Tribunal), which has the power to determine matters relating to conduct prohibited by the Act. Furthermore, appeals against the decisions of the Commission may be made to the Tribunal and appeals against the decisions of the Tribunal may be made to the Court of Appeal.<sup>4</sup>

There are also certain sector-specific laws, guidelines and provisions that deal with competition-related issues, including:

- The Nigerian Communications Commission (the NCC), established under the Nigerian Communications Act, (Chapter N97) Laws of the Federation of Nigeria, 2004 (the Communications Act), regulates the Nigerian communications sector. Both the Communications Act and the Competition Practices Regulation 2007 (the NCC Regulations) address competition issues in the communications sector.

- The Point of Sale Card Acceptance Services Guidelines 2011 (CBN POS Guidelines), published by the Central Bank of Nigeria, contain provisions prohibiting card associations or card schemes from engaging in anti-competitive activities or any act that will lead to the abuse of a dominant position, monopoly or unfair competition. It further prohibits collusion between two or more card associations, card schemes or payment schemes in respect of issuing, acquiring, processing or switching of payment cards.
- Guidelines on Mobile Money Services in Nigeria, issued by the Central Bank of Nigeria in 2009, contain provisions that prohibit mobile money operators from engaging in conduct which has an anti-competitive effect in any aspect of mobile money services.
- The Operational Rules and Regulations for the Nigeria Central Switch has extensive rules for the prohibition of anti-competitive activities, including exclusivity agreements, tie-in agreements, refusals to deal, predatory fees or any other activities likely to have an adverse effect on competition in Nigeria.
- The Electric Power Sector Reform Act, 2005 enables the Nigerian Electricity Regulatory Commission to promote (where feasible) competition and private sector participation.
- The Public Procurement Act, 2007 expressly prohibits suppliers, contractors and consultants from entering or attempting to enter into any collusive agreements, whether enforceable or not, where the prices quoted in their respective tenders, proposals or quotations are or would be higher than would have been the case had there not been collusion between the persons concerned. This legislation also forbids bid-rigging, which it defines as an agreement between persons whereby offers submitted have been pre-arranged between them; or where their conduct has had the effect of directly or indirectly restricting free and open competition, distorting the competitiveness of the procurement process or an escalation or increase in costs or loss of value to the national treasury.

<sup>1</sup> Section 165(1) of the Act.

<sup>2</sup> Section 2(1) of the Act.

<sup>3</sup> Section 104 of the Act.

<sup>4</sup> Section 38(1) read with 55(1) of the Act.

- The Civil Aviation Act, 2006 grants the Nigerian Civil Aviation Authority the power to investigate and determine upon its own initiative (or upon the receipt of a complaint by any air carrier, air travel agent, consumer of air transport services or other allied aviation service provider) whether an air service provider has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or in the sale of tickets or in the provision of other allied aviation services. The Nigerian Civil Aviation Authority may also order such air service provider to desist from such practices or method of competition. The Nigerian Civil Aviation Authority has the power to carry out investigations and is authorised by the Civil Aviation Act to take all steps reasonably necessary to ensure compliance with the Civil Aviation Act and the regulations, rules and orders made pursuant to it, including the power to ground any aircraft and to seal the premises of any air transport service provider or provider of ancillary services.
- The Price Control Act, (Chapter P28) Laws of the Federation of Nigeria, 2004 (the Price Control Act) empowers the Price Control Board to fix the controlled price range for essential items, like sugar, salt, milk, flour, matches, petroleum products, motor vehicles, motorcycles and bicycles with their spare parts. Under the Price Control Act, it is an offence for any person to sell any such ‘controlled commodity’ above its approved controlled price. Hoarding of controlled commodities is also an offence and, on conviction, fines and terms of imprisonment may be imposed.

Insofar as the Act applies to an industry or a sector of an industry that is subject to the jurisdiction of another government agency whose mandate includes enforcement of competition and consumer protection laws or principles, the Act is construed as establishing concurrent jurisdiction between the Commission and the other relevant agency with the Commission having precedence over and above the relevant government agency.<sup>5</sup>

## 2. Are there any proposed amendments or new regulations expected to come into force?

It is expected that the Commission will issue rules and guidelines in relation to the process for implementing mergers. In the interim, however, the Commission and the SEC issued a joint advisory and guidance on mergers, acquisitions and other business combinations notifications on 3 May 2019 setting out the approach to be followed with respect to mergers (the Advisory). In terms of the Advisory, all notifications or filings will be reviewed under the existing Regulations, Guidelines and Fees of the Securities and Exchange Commission made pursuant to the ISA (the SEC Rules). In effect, therefore, the SEC Rules remain applicable insofar as they are consistent with the Act until different guidance is given by the Commission.

In relation to merger thresholds, the Commission issued a notice in the official *Gazette* of the Federal Republic of Nigeria (the Notice) which indicates that a merger is notifiable where the combined annual turnover in Nigeria of the parties in the year preceding the merger was more than NGN 1 billion, or where the annual turnover of the target in Nigeria in the preceding year was more than NGN 500 million.

The Notice, which is dated 10 July 2019, states that members of the public are invited to submit proposals and comments on the thresholds within 60 days of the date stated in the Notice. The 60-day timeline has now lapsed, and the Commission has started applying the thresholds stipulated in the Notice.

On 13 November 2019, the Commission published guidelines titled *Guidelines on Simplified Process for Foreign-To-Foreign Mergers with Nigerian Component* (Guidelines).

<sup>5</sup> Section 105(2) of the Act.





The Guidelines set out a new process for obtaining the approval of the Commission in respect of foreign-to-foreign mergers that have an impact in Nigeria, and prescribe a new regime in relation to the processing fees that are payable in respect of such transactions. These fees are as follows:

THRESHOLD	FEES
Combined turnover of NGN 1 billion and above	No filing fee payable (exclusion filing is still required)
Target undertaking has turnover of between NGN 500 million and NGN 1 billion	NGN 2 million

The Guidelines also introduce two key innovations which are as follows:

- The Commission will publish a non-confidential summary of the transaction for which its approval is sought. For this purpose, merging parties will be required to provide the non-confidential summary as part of the filing. It is not yet clear whether members of the public will be invited to comment on such published transactions or if it will be published prior to the Commission taking a decision.
- The Commission has introduced an expedited review process where decisions on foreign-to-foreign merger filings will be made within 15 business days. An additional fee of NGN 5 million will be payable for the expedited review.

### 3. Is the law actively enforced?

The Commission has commenced full operations and the Act is being actively enforced, particularly in relation to the Commission's merger control and consumer protection mandates.

### 4. What are the current priorities or focus areas of the competition authorities?

The Commission is currently focused on competition issues arising from mergers across all sectors and has assumed the defunct Consumer Protection Council's role in protecting the interests of consumers in the Nigerian market.

### 5. What kind of transaction constitutes a notifiable merger?

Previously, the Securities and Exchange Commission (the SEC) under the ISA and the SEC Rules regulated merger control in Nigeria. However, the Act discontinued the role of the SEC in this regard.

Under the Act, a 'merger' occurs 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.<sup>6</sup> The Act provides that a merger may be achieved through (i) the purchase or lease of shares, an interest or assets of the other undertaking in question; (ii) the amalgamation or other combination with the other undertaking in question; or (iii) a joint venture.<sup>7</sup> The Act introduces joint ventures as a means of achieving a merger but does not provide any guidance on the circumstances under which a joint venture would constitute a merger. It is expected that the Commission will issue guidelines that will provide clarity on this issue.

In terms of the Act, a transaction is required to be notified to the Commission if it (i) constitutes a merger (as defined in the Act); and (ii) meets the relevant thresholds for mandatory notification.<sup>8</sup>

With respect to thresholds, a merger is notifiable where the annual turnover in Nigeria of the parties in the year preceding the merger was more than NGN 1 billion, or where the annual turnover of the target in Nigeria in the preceding year was more than NGN 500 million. 'Turnover' is defined broadly and includes 'injections for the purpose of the business'.

<sup>6</sup> Section 92(1)(a) of the Act.

<sup>7</sup> Section 92(1)(b) of the Act.

<sup>8</sup> Section 92 read with section 93(1) of the Act.

Under the Act, the concept of control is relevant to the definition of a merger; an undertaking has control over another undertaking where the first undertaking:

- beneficially owns more than one half of the issued share capital or assets of the undertaking;
- is entitled to cast a majority of the votes that may be cast at a general meeting of the undertaking or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;
- is able to appoint or to veto the appointment of a majority of the directors of the undertaking;
- is a holding company, and the undertaking is a subsidiary of that company as contemplated under the Companies and Allied Matters Act;
- in the case of an undertaking that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
- has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraph (a) to (f).

The Act also provides that an undertaking will not be deemed to exercise control over the business of another undertaking in circumstances where (i) credit institutions or other financial institutions or insurance companies hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking, or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of those securities within one year of the date of acquisition; or (ii) control

is acquired by an office-holder according to the laws of the Federation relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings.<sup>9</sup>

#### **6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?**

The Act provides for small and large mergers and the Commission has the authority to stipulate thresholds for these mergers.<sup>10</sup>

The Commission's approval is required before implementing large mergers. The Notice categorises a transaction as a large merger if, in the financial year preceding the merger:

- the combined annual turnover of the parties in, into or from Nigeria is NGN 1 billion or more; or
- the annual turnover of the target in the preceding year is NGN 500 million or more.

Small mergers: any transaction not meeting the above thresholds is classified as a 'small merger'.

The Act provides that a party to a small merger is not required to notify the Commission of that merger and may implement without approval unless the Commission requires notification.<sup>11</sup> In this regard, the Commission may require the parties to notify it of a small merger, within six months after a small merger is implemented, if in the opinion of the Commission the small merger may substantially prevent or lessen competition.<sup>12</sup>

The Act provides that a party to a large merger shall notify the Commission of the merger and that the parties shall not implement the merger unless approved, with or without conditions, by the Commission.<sup>13</sup>

<sup>9</sup> Section 92(3) of the Act.

<sup>10</sup> Section 92(4) read with section 93(2) of the Act.

<sup>11</sup> Section 95(1) of the Act.

<sup>12</sup> Section 95(3) of the Act.

<sup>13</sup> Section 96(1) and (4) of the Act.



### **7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

Parties to a small merger may implement the merger without notification to or approval from the Commission in the ordinary course. Where the Commission requests that parties to a small merger notify the Commission of the transaction, the parties are prohibited from taking any further steps to implement the merger until the merger has been approved by the Commission.

The parties to a large merger, however, are required to obtain the approval of the Commission prior to implementing the merger. The Act expressly prohibits parties to a large merger from implementing the merger without the prior approval, with or without conditions, of the Commission.<sup>14</sup> An undertaking that does not obtain the necessary approval of the Commission commits an offence and is liable on conviction to a fine not exceeding 10% of turnover of the undertaking in the business year preceding the date of the commission of the offence or such other percentage as the court may determine, having regard to the circumstances.<sup>15</sup> Further, the Act provides that in the case of large mergers any action undertaken to implement a transaction without the approval of the Commission is void.<sup>16</sup>

The Commission is empowered to revoke a decision approving or conditionally approving a merger if (i) the decision was based on incorrect information for which a party to the merger is responsible; (ii) the approval was obtained by deceit; (iii) the parties fail to implement the merger within 12 months after the approval was granted; or (iv) an undertaking concerned has breached an obligation attached to the decision of the Commission approving the merger. In this regard, the Commission may prohibit the merger even though any relevant time period set in the Act may have lapsed.<sup>17</sup>

<sup>14</sup> Section 96(4) of the Act.

<sup>15</sup> Section 96(7) of the Act.

<sup>16</sup> Section 96(5) of the Act.

<sup>17</sup> Section 99 of the Act.

### **8. What filing fees are required?**

The Commission is empowered to make regulations relating to the charging and collection of fees.<sup>18</sup>

Until such time that the Commission prescribes filing fees, the SEC Rules in relation to filing fees apply. As such, the filing fee applicable is NGN 50 000. In addition to the filing fee, the following processing fees, computed based on the value of the consideration of the transaction, are payable:

- first NGN 500 million - 0.3%
- next NGN 500 million - 0.225%
- any sum thereafter - 0.15%

Fees are, however, payable to the Commission, not the SEC.

In relation to the filing fees for foreign-to-foreign mergers, please see question two.

### **9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

The approval of the Commission will be required if the acquisition of shares or other assets outside Nigeria will result in the change of control, whether directly or indirectly, of a business, part of a business or any asset of a business in Nigeria.

### **10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

Pre-notification contact with the Commission is permitted. As at the time of writing, the Commission's approach in regard to pre-notification meetings is not yet known.

### **11. To what extent are non-competition factors relevant to the assessment of a merger?**

The Act provides that when determining whether a merger or proposed merger can or cannot be justified on grounds of public interest, the

<sup>18</sup> Section 18(1)(h) of the Act.

Commission shall consider the effect that the proposed merger will have on (i) a particular industrial sector or region; (ii) employment; (iii) the ability of national industries to compete in international markets; and (iv) the ability of small and medium scale enterprises to become competitive.<sup>19</sup>

**12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

The Act provides that in making a determination in respect of a merger notification, the Commission may hear any person who in the Commission's opinion is able to assist in making a determination in respect of the merger notified. In doing so, the Commission may hold a public or private hearing. The extent to which submissions of customers and competitors is influential is not known, as at the time of writing.

Rule 426 of the SEC Rules provides that a party to a merger should provide a list of its major competitors in its product market and the market position or market share of these competitors. The merging parties may also be asked to identify and provide contact details for the five customers with the largest aggregate purchases in value during the last financial year of each of the merging entities for each of the identified products or services, in each of the identified geographical areas.

**13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

Please see our response above. Further, the Act provides that the Minister is entitled to make representations to the Commission with respect to any merger under its consideration on the listed public interest grounds in the Act, being (i) a particular industrial sector or region; (ii)

employment; (iii) the ability of national industries to compete in international markets; and (iv) the ability of small and medium scale enterprises to become competitive.<sup>20</sup>

The parties to a merger are also required to notify any registered trade union that represents employees of the acquiring and target undertakings, or the employees or representatives of the employees of the acquiring and target undertakings, if there are no such trade unions.<sup>20</sup>

**14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

There is no express obligation or requirement in law for the Commission to provide the merging parties with an opportunity to make representations before it issues its decision to either prohibit a merger or impose conditions.

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

A person aggrieved by a decision of the Commission may file an application for appeal or review before the Tribunal and, in respect of a decision of the Tribunal, to the Court of Appeal.

**16. Does the legislation apply to joint ventures?**

The Act provides that a merger may be achieved by way of a joint venture. The Act therefore applies to joint ventures that fall within the definition of a merger, if the thresholds are met.

<sup>19</sup> Section 94(4) of the Act.

<sup>20</sup> Section 100(1) of the Act.  
<sup>20</sup> Section 100(1) of the Act.



**17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

Under the Act, any agreement among undertakings, or a decision of an association of undertakings, that has the purpose of preventing, restricting or distorting competition is void and of no legal effect.<sup>21</sup> The Act regulates prohibited practices and, specifically, prohibited acts include (except where authorised by the Commission)<sup>22</sup> any agreement or concerted practice that purports to (i) directly or indirectly fix a purchase or selling price; (ii) dividing markets by allocating customers, suppliers, territories or specific types of goods or services; (iii) limiting or controlling production or distribution; (iv) collusive tendering; and (v) making the conclusion of an agreement subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreement.

Cartel conduct is also prohibited by various pieces of sector-specific legislation, such as the Communications Act and the Civil Aviation Act.

**18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?**

The Act confers broad investigative powers on the Commission, including the power to summon any person to furnish the Commission with any information or document, or to appear before the Commission to give evidence orally or in writing.<sup>23</sup> Failure to comply with a summons constitutes an offence and the person is liable upon conviction to imprisonment for up to three years or a fine of up to NGN 10 million (approx. USD 27 000) or both a fine and imprisonment.<sup>24</sup>

The Commission also has broad powers of search and seizure. Part VI of the Act empowers the Commission to enter and search any premise and to inspect and remove from the premises any article, document, or extract to ascertain whether

any undertaking has engaged in or is likely to engage in conduct constituting a contravention of the Act.

**19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

The Act provides general penalties for prohibited conduct as well as penalties for specific offences against competition of (i) price fixing; (ii) conspiracy; and (iii) bid rigging.

The general penalty provided in Part VIII of the Act provides that an undertaking engaging in prohibited conduct commits an offence and is liable upon conviction to a fine not exceeding 10% of its turnover in the preceding year, further each director of the body corporate, or in the case of a natural person, is liable upon conviction to imprisonment not exceeding five years, or to a fine not exceeding NGN 5 million or both the fine and imprisonment.<sup>25</sup>

With regards to price fixing, conspiracy and bid rigging, the Act provides for, upon conviction, administrative penalties of up to 10% of an undertaking's turnover in the preceding business year. It also provides for liability on the part of directors. Directors may be liable for imprisonment for up to three years or for a fine of up to NGN 10 million (approx. USD 27 000) or to both a fine and imprisonment.<sup>26</sup>

There is currently no leniency policy in place.

**20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

The Act provides for an exemption for those agreements among undertakings or a decision of an association of undertakings, where the Commission has authorised the agreement or decision being entered into. In this regard, the Commission will consider whether the agreement or decision (i) contributes to the improvement

<sup>21</sup> Section 59(1) of the Act.

<sup>22</sup> Section 59(2) of the Act.

<sup>23</sup> Section 32(1) of the Act.

<sup>24</sup> Section 113(1) of the Act.

<sup>25</sup> Section 69(1) and 69(2) of the Act.

<sup>26</sup> Section 107(4), 108(3) and 109(3) of the Act.



of production or distribution of goods, services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit; (ii) imposes on the undertakings concerned only such restrictions as are indispensable to the attainment of the objectives referred to in (i) and; (iii) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the good or services concerned.

Insofar as the Act applies to an industry or a sector of an industry that is subject to the jurisdiction of another government agency whose mandate includes enforcement of competition and consumer protection Laws or principles, whenever it is alleged that a provision of the Act is contravened by an undertaking within a regulated industry, the undertaking must demonstrate that the conduct in question was ordered or required by a regulatory agency with jurisdiction. In such instances, the Commission may, subject to any agreement between the Commission and the other relevant government agency, issue a cease-and-desist order, prohibiting further violations of the Act.

### **21. Is minimum resale price maintenance prohibited?**

The Act prohibits minimum resale price maintenance and provides that agreements which establish minimum prices to be charged on the resale of goods and services are void. The Act, however, does not preclude an undertaking from notifying a dealer of, or publishing, a recommended price.

The Act further provides that an undertaking may not withhold the supply of any goods or services from a dealer on the ground that the dealer has sold the goods or services at a price below the recommended resale price, or is likely to sell them at a price below the recommended resale price.<sup>27</sup>

<sup>27</sup> Section 65(1) of the Act.

### **22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

The Act provides for restrictive agreements. Specifically, the Act provides that an undertaking shall not request another undertaking to refuse to sell or purchase any goods or services with the intention of harming certain undertakings. The Act does not specify the factors to be considered when determining the lawfulness or unlawfulness of such agreements.

Sector-specific legislation may also be applicable. For example, Regulation 13(e) of the NCC Regulations empowers the NCC to review all agreements and practices which constitute exclusive dealing agreements, in terms of which a licensee reaches and agrees with another party for the supply of products or services on an exclusive basis. The purpose of the review is to determine whether the exclusivity obligation has, or may have, the effect of substantially lessening competition in related communications markets.

Section 71(6) of the Electric Power Sector Reform Act, 2005 provides that, unless expressly granted, a licence granted by the Nigerian Electricity Regulatory Commission (the NERC) will not be exclusive. The NERC may allow a licensed activity to be exclusive for all or part of the period of the licence provided that such licence is for a specific purpose, for a geographical area or for some combination of both.

### **23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

The Act prohibits certain conduct which constitutes the abuse of a dominant position. An undertaking is considered to be in a dominant position ‘if it is able to act without



taking account of the reaction of its customers, consumers or competitors'. The Act also provides that 'a dominant position in a relevant market exists where an undertaking enjoys a position of economic strength enabling it to prevent effective competition being maintained on the relevant market and having the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers'. Provision is also made for the Commission to publish the size of market share that may constitute a dominant position in particular markets.

The Act specifically prohibits a dominant undertaking from (i) charging an excessive price to the detriment of consumers; or (ii) refusing to give a competitor access to an essential facility when it is economically feasible to do so; or (iii) engaging in an exclusionary act if the anti-competitive effect of that act outweighs its technological efficiency and other pro-competitive gains. The Act prohibits an undertaking from engaging in the following exclusionary acts, unless the undertaking can show technological, efficiency and other pro-competitive gains which outweigh the anti-competitive effect:

- requiring or inducing a supplier or customer not to deal with a competitor;
- refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
- selling goods or services on the condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
- selling goods or services below their marginal or average cost; or
- buying up a scarce supply of intermediate goods or resources required by a competitor.

An undertaking shall not be treated as abusing a dominant position if its conduct (i) contributes to the improvement of production or distribution of goods or services or the promotion of technological or economic progress; (ii) is indispensable to the attainment of the objectives referred to in (i) and; (iii) does not afford the undertaking the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

Notably, the Act also addresses the regulation of monopolies. The Act provides that where it appears to the Commission that there are grounds for believing that a 'monopoly situation' may exist in relation to the 'production or distribution of goods or services of any description, or in relation to exports of goods or services of any description from Nigeria, the Commission shall investigate a particular sector to determine the extent of the situation in relation to the market'.<sup>28</sup> The Commission is required to issue a report following its investigation and, where the Commission finds that a monopoly situation exists, the Commission is required to consider the action to be taken to remedy or prevent any adverse effects resulting from a monopoly situation as part of its investigation and may make recommendations in this regard to the Tribunal.<sup>29</sup> Based on the Commission's findings, the Tribunal may exercise any of its powers under the Act, or make any orders it considers necessary to remedy or prevent the adverse effects specified by the Commission. The Act provides examples of orders that the Tribunal may make, including: (i) declaring an agreement to be unlawful; (ii) requiring any party to such agreement to terminate the agreement, either wholly or in part as may be specified, within the time specified; (iii) requiring a person supplying goods or services to publish a list of prices, with or without such further information, as may be specified; (iv) prohibiting or restricting the acquisition by an undertaking of the whole or part of another undertaking; or (v) providing for the division of any undertaking by the sale of any part of its shares, assets or otherwise for which purpose all the activities carried on by way of business by any one undertaking or by any two or more interconnected undertakings.

Again, sector-specific legislation may also be relevant. With respect to the communications sector, a dominant position is described in Regulation 18 of the NCC Regulations as 'a position of economic strength in one or more specifically defined communications markets, such that, a licensee in that position has the ability to unilaterally restrict output, raise prices, reduce quality or otherwise act independently of competitors or consumers'. Subject to the various factors considered when determining whether a

<sup>28</sup> Section 76 of the Act.

<sup>29</sup> Section 84 of the Act.

licensee holds a dominant position, Regulation 20 of the NCC Regulations establishes a presumption of dominance where a licensee's gross revenues in a specific communications market exceeds 40% of the total gross revenue of all licensees in that market.

**24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

As at the time of writing, there are no examples of the Commission pursuing abuse of dominance cases at this stage.

In 2013, the NCC carried out a determination of dominant positions in various segments of the Nigerian communications market. This study resulted in the declaration of MTN Nigeria as the dominant operator in the mobile voice segment of the market. Subsequently, in 2014, the NCC carried out routine compliance checks on approved tariff plans of network operators. It found that MTN Nigeria was charging its subscribers on the MTN iPulse, a tariff of one kobo per second or 60 kobo per minute, which was below the Mobile Termination Rate of NGN 6.40 per minute at the time. It was found that the MTN tariff offering had not received regulatory approval and that MTN was in breach of its obligation as a dominant operator in the voice segment of the Nigerian communications market. The NCC commenced an enforcement process against MTN.

The NCC placed certain obligations on MTN, including that MTN should not offer any differential pricing in its on-net and off-net mobile voice service. MTN was directed to collapse its on-net and off-net tariff.

Also in 2014, the NCC carried out compliance checks on regulatory obligations and found that MTN had breached its obligations. MTN was invited to provide explanations, which were found to be unacceptable to the NCC. The NCC issued a final warning to MTN and directed that:

- MTN should immediately collapse the on-net and off-net tariff on its network and strictly comply with all obligations placed on MTN under the 2013 Declaration of Dominance;
- MTN should notify the NCC of compliance with the Communications Act within 10 days of receipt of the directive; and
- MTN should discontinue and withdraw all unapproved promotions, including but not limited to 'MTN 100% Daily On-net Promo', 'MTN 200% recharge bonus', 'On-net Bonus SMS Promo', and 'MTN All day WOW Promo'.

In 2016, MTN acquired certain assets of Visafone Communications Limited (Visafone) (including the licences and the 800MHZ Spectrum). We understand that the acquisition was challenged in court by a competitor on the basis that the offer for the sale of Visafone's assets was not made to all of the key telecoms players through a fair bidding process moderated by the NCC. However, the matter did not proceed to trial as the court struck it out on procedural grounds.

In June 2018, the NCC held a public enquiry on the acquisition, in which various interested stakeholders participated. However, as at the time of writing, the NCC is yet to make a decision on the matter.

**25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

The Act provides that an undertaking that abuses its dominant position in a market commits an offence and is liable on conviction to an administrative fine of up to 10% of its turnover in the preceding business year or such higher percentage as the court may determine.

Further, the Act provides that where an undertaking fails to cease an abusive practice after receiving an order from the Commission to that effect, each director commits an offence and is liable on



conviction to imprisonment for up to three years, or to a fine of up to NGN 50 million (approx. USD 138 000) or to both a fine and imprisonment.

In the communications sector, the NCC may direct that a licensee in a dominant position discontinue an activity in the communications market if the activity has, or may have, the effect of substantially lessening competition. The NCC may also implement appropriate remedies. In addition, the Regulations provide that where the activities of a licensee constitute an abuse of its dominant position, or an anti-competitive practice, the NCC may issue an order that such licensee pay compensation to persons affected by such abuse as well as publish an acknowledgement and apology for such actions. In terms of section 140 of the Communications Act, where no specific penalty is prescribed for any offence, a person found guilty of the offence is liable for a fine of up to NGN 100 000 (approx. USD 275), or to imprisonment for a period of up to one year, or to both. In the event of a subsequent conviction, persons guilty of an offence under the Communications Act may be liable for a fine of up to NGN 500 000 (approx. USD 1 300), or imprisonment for a period of up to three years, or both.

#### **26. Are there Rules in relation to price discrimination?**

The Act gives the Commission the power to prohibit the discrimination or preferences in prices of other related matters.<sup>30</sup> As such it appears that separate regulations would need to be published to deal with price discrimination.

In the communications sector, the NCC Regulations prohibit the practice of deliberately reducing the profit margin that may be achieved by a competing licensee that requires wholesale communications services from the licensee in question, by increasing the prices for the wholesale communications services required by that competing licensee or by decreasing the prices of communications services in retail markets where they compete, or both.

<sup>30</sup> Section 18(3)(f) of the Act.

The CBN POS Guidelines contain provisions to the effect that a merchant shall under no circumstances charge a different price, surcharge a cardholder or otherwise discriminate against any member of the public who chooses to pay with a card or by other electronic means. The Nigeria Inter-Bank Settlement System Operational Guidelines also provide that parties to switching services shall not abuse their dominant positions by directly or indirectly imposing unfair or discriminatory conditions and fees in the provision of their services.

#### **27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

The Act provides that in the case of a small merger the Commission shall publish a notice of any decision it makes in the *Federal Government Gazette*.<sup>31</sup> In the case of large mergers, the Act provides that the Commission shall publish its decision in at least two national newspapers.



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<sup>31</sup> Section 95(8)(a) of the Act.

# Seychelles



**APPLEBY**

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## 1. What is the relevant competition legislation and who are the enforcers?

- The relevant legislation in Seychelles is the Fair Competition Act 2009, the Fair Trading Commission Act 2009 and the Consumer Protection Act 2010 (together, the Laws).
- The Fair Trading Commission (the Commission) is established under the Fair Trading Commission Act (FTCA) as the enforcer to ensure that individuals and businesses comply with the Laws. The Commission is required under the FTCA to issue Rules and guidelines on the economic and legal analysis which shall be used for the determination of cases under the FTCA. The Commission has the following duties and powers:
  - to promote the education of consumers and businesses through advocacy and publications;
  - the promotion and maintenance of fair and effective competition;
  - to carry out on its own initiative or at the request of any person or enterprise that has an interest in a matter:
    - such investigations in relation to conduct of trade as will enable it to prevent the use of business practices in contravention of the Laws or as it may consider necessary or desirable in connection with any matters falling within the provisions of the Laws;
    - any such enquiry into the practices of any professional association to ensure that such practices are not contrary to any of the Laws;
    - any studies; and
    - publish such reports and information regarding matters affecting the interests of consumers and enterprises;
  - to keep under review commercial activities to ensure that practices that may adversely or unfairly affect the interests of consumers and businesses are prevented or terminated;
  - to take such action as it considers necessary:
    - to prevent the abuse of a dominant position by an enterprise;
    - to eliminate anti-competitive practices; and
    - to prevent or control anti-competitive mergers;
- to make available to consumers and persons engaged in business, general information with respect to their rights and obligations under the Laws;
- to assist a national body in developing and promoting the observance of standards of conduct for the purpose of ensuring good business practice;
- to receive and evaluate consumer complaints;
- to assist consumers in resolving complaints;
- to investigate whether enterprises are engaged in restrictive business practices;
- to determine and monitor the standards of services supplied by service providers to ensure compliance; and
- to perform such other functions to give effect to the FTCA.

### THE FAIR COMPETITION ACT

The Fair Competition Act (FCA) was enacted in November 2009 and came into operation on 5 April 2010 to ensure the benefits of the competition process in Seychelles are unhindered by anti-competitive activity. The objectives of the FCA are:

- to promote, maintain and encourage competition;
- to prohibit the prevention, restriction or distortion of competition and abuse of dominant positions in trade; and
- to ensure that enterprises irrespective of size, have the opportunity to participate equitably in the market place.

The FCA applies to all individuals and businesses, trade and professional associations, and the State and public bodies insofar as they are carrying on commercial activities. The FCA generally outlaws any agreements, business practices and conduct which have a damaging effect on competition in Seychelles. The FCA more indicatively prohibits arrangements between undertakings that impede competition, or are intended to do so, e.g. agreeing to fix prices, cartel agreements, or bid-rigging; the abuse by one or more undertakings of a dominant position in a market; and certain mergers and acquisitions, unless prior approval is obtained from the Commission.

## THE CONSUMER PROTECTION ACT

The Consumer Protection Act (CPA) was enacted on 29 November 2010. The CPA aims at protecting consumers' rights by imposing certain duties on producers and suppliers of goods and services in the Seychelles.

The Commission, in administering the CPA, shall promote and advance the economic welfare of consumers by:

- the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers;
- reducing any disadvantages experienced by consumers;
- promoting fair business practices;
- promoting fair contract terms;
- protecting consumers from misleading, deceptive or fraudulent conduct; and
- improving consumer awareness and information.

The CPA applies to any goods and services promoted or supplied in Seychelles in the ordinary course of the supplier's business. The FCA provides for a system of enforcement through compliance notices. As such, the Commission may:

- initiate or receive complaints concerning alleged prohibited conduct;
- investigate and evaluate complaints or alleged contraventions of the FCA;
- conduct hearings and issue notices, give orders and directions; and
- impose remedies or financial penalties.

### 2. Are there any proposed amendments or new regulations expected to come into force?

The Commission has finalised the Consolidated Fair Trading Draft Bill (Bill), which was approved by the Cabinet on 26 June 2019. It is expected that the Bill will soon be tabled before the National Assembly. The Bill seeks to address gaps in the existing pieces of legislation by building on the existing laws and harmonising the Fair Trading Act, 2009, the Consumer Protection Act, 2010, and the Fair Competition Act, 2009, so that the laws

of Seychelles are in line with international best practice and the latest developments in consumer protection and competition.

One of the new features of the Bill is the setting up of a tribunal to handle matters instead of the current system which comprises a board and an appeal tribunal. The establishment of a tribunal will serve to speed up the process allowing consumers and businesses to get redress or remedies under the law quicker.

The Bill will also align the functions and powers of FTC with international best practice and stakeholder departments and agencies in Seychelles to ensure that functions do not overlap, and to facilitate enforcement. To further adapt to the dynamic nature of competition laws, the new law seeks to facilitate mergers in Seychelles by proposing simplified definitions of the different types of mergers and includes provisions for the detection of cartels.

### 3. Is the law actively enforced?

The Laws are actively enforced by the Commission, which aims to safeguard the interests of consumers, promote competition and fair trade in Seychelles to benefit consumers, businesses and the economy.

The Fair Trading Commission follows a pattern of a twice weekly inspection schedule. The scheduled inspections as per the Commission's standard practice focuses on compliance with the following sections of the CPA:

- section 19: to ensure information is in a language Seychellois can understand.
- section 20: to ensure prices are displayed clearly to consumers.
- section 21: to ensure goods are not being sold above prices or that suppliers are not engaged in dual pricing.
- section 22: to ensure products on offer for sale are labelled properly.
- section 24: to ensure goods on offer for sale have not exceeded their expiry dates.
- section 25: to ensure suppliers of goods are providing receipts after purchase and that receipts comply with CPA requirements.



In addition to the above, the Competition Department (the Department) remains available for urgent inspections within the first 30 minutes of a request being made to the Commission (on Mahe) subject to the request fulfilling the criteria for such. The latter refers to situations compromising consumer interest; for instance, in the case of a significant number of expired goods on offer for sale in a particular outlet that the Commission is alerted to either by a staff member of the Commission or a member of the public, including a business.

In the scenario explained above, inspections are specific to the alert and/ or complaint received but this does not preclude a thorough inspection being conducted soon after.

#### **STATISTICS OF THE FTC FOR THE FIRST SEMESTER OF 2019**

For the first semester of 2019, 92 consumer complaints worth SCR 13 209 781.50 were lodged, out of which 36 were consumer goods cases and 56 consumer services cases. The most prominent complaints were from the construction sector and for electric goods. From these, 32 cases have been remedied.

Similarly, there have been 49 market investigations, 121 inspections, 50 compliance notices, and 32 compliance certificates were issued. Six cases of non-compliance were identified and fines of SCR 353 000 were imposed. Fourteen cases have been referred to the Board of Commissioners for hearing.

Moreover, six competition cases have been recorded and two cases were referred to the Board of Commissioners for hearing.

There has been a 100% success rate before the Appeal Tribunal. Nineteen cases were filed before the Board of Commissioners and 14 cases of non-compliance were referred to court.

#### **STATISTICS OF THE FTC FOR 2018**

In 2018, the FTC recorded a total of 215 consumer complaints, 46% of which were for consumer goods cases and 54% for consumer services cases, representing a total value of approximately SCR 30 million. Out of the 215 consumer complaints, 139 cases have been addressed, and nine undertakings worth SCR 291 062.21 have been accepted by the FTC.

The FTC also recorded a total of 23 competition complaints and 13 enquiries. Five undertakings were endorsed in relation to resale price maintenance. In 2018, the Board of Commissioners also cleared its first merger case with conditions in the shipyard sector. At a regional level, the FTC, as a member of the COMESA worked on 12 merger notifications. Out of these cases, two were for abuse of dominance, seven cases related to anti-competitive agreements and 14 were notifications of mergers, which consisted of two local merger notifications and 12 COMESA merger notifications.

In 2018, the Legal Department achieved a success rate of 94% for cases before the Board of Commissioners (out of 45 cases filed) and 66% for cases before the Appeal Tribunal.

#### **4. What are the current priorities or focus areas of the competition authorities?**

The Commission's objective is to promote efficiency and competitiveness among business enterprises and service providers and to improve the standards of service, quality of goods distributed and services supplied by business enterprises and service providers over which it has jurisdiction.

According to the Commission, Seychelles is facing a specific constraint in implementing the anti-dumping, safeguards and countervailing measures. Upon joining the World Trade Organisation (WTO), Seychelles has undertaken a commitment that specifically restricts the use of these measures until it has developed national legislations to regulate them. The implementation of such measures are imperative for the protection of existing local industries and, in certain cases, to avoid retardation of the establishment of industries from import surges, dumped products and subsidised imports. To address this issue there

will be a need to assess the current trade regime by identifying gaps and needs required to be bridged in order to have a functioning trade defence mechanism.

**5. What kind of transaction constitutes a notifiable merger?**

According to the FCA, a notifiable merger is one which involves an enterprise that by itself controls or, together with any other enterprise with which it intends to effect the merger, is likely to control 40% or more of a market, or such other amounts as the Minister responsible for trade may prescribe. Notifiable mergers are prohibited unless permitted by the Commission. For such a merger to take place, the Commission’s approval is required.

**6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?**

Proposed mergers whereby the entity resulting from the merger is likely to control 40% or more of the market are prohibited unless permitted by the Commission. In this regard, it is mandatory for such proposed mergers to be notified to the Commission.

The Commission may grant its permission in the following circumstances:

- the merger is likely to bring about gains in real (as distinct from pecuniary) efficiencies that are greater than, or are likely to offset, the effects of any limitations on competition that result or are likely to result from the merger; or
- one of the parties to the merger is faced with actual or imminent financial failure, and the merger represents the least anti-competitive of the known alternative uses for the assets of the failing business.

**7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

The FCA provides that where an enterprise wishes to establish a merger, it shall apply to the Commission for permission to effect the merger. The application is made through the prescribed application form which should contain the prescribed information. Where the Commission

determines after investigation that enterprises have effected a merger (as defined in the FCA) without the Commission’s permission, the Commission may by notice in writing direct the enterprises concerned so that the merger may be determined within such time specified in the direction. An enterprise seeking permission to effect a merger shall demonstrate that if the merger was not completed, it is not likely that the relevant efficiency gains would be realised by means which would limit competition to a lesser degree than the merger; or demonstrate that reasonable steps have been taken within the recent past to identify alternative purchasers for the assets of the failing business, and describe in detail the results of the search for alternative purchasers.

The FCA contains a general provision relating to the imposition of penalties. One of the powers of the Commission is to impose remedies or financial penalties on an enterprise which conducts its business in breach of the FCA. It appears this provision applies to the implementation of mergers without the Commission’s permission.

**8. What filing fees are required?**

A non-refundable fee of SCR 1 500 is payable on submission of a completed merger application form. Where the Commission accepts the merger, the parties are required to pay a fee (as set out below) based on a percentage of their combined turnover for their preceding financial year. Where the merger involves a failing firm, the Commission will use its discretion to determine the appropriate fee payable.

THRESHOLDS	COMBINED TURNOVER/ ASSET VALUE
Lower	0.1% of SCR 0 – SCR 500 000
Higher	0.5% of SCR 501 000 and above.

**9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

The FCA does not specifically cater for foreign-to-foreign mergers. However, the FCA mentions that where an enterprise wishes to effect a merger, it shall apply to the Commission for permission. This provision of the FCA does not make a distinction between Seychelles-registered entities



and foreign entities. Any practice or agreement, which is approved or required under an international agreement to which Seychelles is a party, is excluded from the provisions of the FCA.

**10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

Pre-notification contacts prior to the submission of a merger application are not required in terms of the FCA and parties may simply submit a merger application form with the requisite information.

**11. To what extent are non-competition factors relevant to the assessment of a merger?**

Under the FCA, the Commission shall assess the following before granting permission for a merger, namely:

- the structure of the market likely to be affected by the proposed merger;
- the degree of control exercised by the enterprises concerned in the market, and particularly the economic and financial power of the enterprises;
- the availability of alternatives to the services or goods supplied by the enterprises concerned in the merger;
- the likely effect of the proposed merger on consumers and the economy; and
- the actual or potential competition from other enterprises and the likelihood of detriment to competition.

**12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

In order to understand the scope of the market in relation to the proposed merger, it is regarded as necessary for the Commission to contact the customers and competitors of the merging parties. As part of the review process, customers and competitors may be interviewed by the Commission in order to understand the effect of a merger on the relevant market. The Commission

publishes a notice in the *Gazette* and in at least one daily newspaper informing the public of the application and advising that any person who has an interest in the matter may submit written objections to the grant of the authorisation within the time specified in the notice and the Commission will consider all objections received and satisfy itself that it is reasonable in the given circumstances to grant the authorisation.

**13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

The legislation does not specify whether employees may make submissions to the Commission.

However, the FCA provides that every person aggrieved by an act of an enterprise may make a complaint to the Commission against that enterprise.

**14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

Where it appears during the Commission's investigation of a merger that some concerns have arisen, or are likely to arise due to the merger, the enterprise may offer a written undertaking to the Commission to address those concerns. The written undertaking may be submitted to the Commission before or during its investigation. If the undertaking addresses all the concerns (based on the lessening of competition, for example) satisfactorily, the Commission will accept the undertaking.

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

If an enterprise is dissatisfied with an order or decision made by the Commission, it may appeal to the Tribunal. If the enterprise is dissatisfied with the decision of the Tribunal, the enterprise may appeal to the Supreme Court.



On appeal, the Supreme Court may:

- affirm, reverse, amend or alter an order or direction of the Tribunal;
- remit the matter to be further determined by the Tribunal with its opinion on the matter; or
- make such order as it deems fit.

Note that the Commission emphasises mediation as a first step in providing redress to consumers.

#### 16. Does the legislation apply to joint ventures?

The legislation does not specifically refer to joint ventures. However, the legislation applies to ‘enterprises’ which are defined as ‘any person, firm, partnership, corporation, company, association or other juridical person, engaged in commercial activities for gain or reward’. This includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them. As such, the legislation appears to apply to joint ventures. Moreover, the investigative powers of the Commission may extend to a joint venture to ensure that there is no existence of a dominant position. An example of this is the case of Zil Air (Pty) Ltd (Zil Air) and Helicopter Seychelles Ltd (Helicopter Seychelles). In July 2010, following speculation of a commercial joint venture between Zil Air and Helicopter Seychelles, the Commission made an enquiry to Zil Air regarding the nature of the venture in question.

In line with this, the Commission sought further information from Helicopter Seychelles. The Commission eventually assessed that Helicopter Seychelles held a dominant position in the helicopter services market. This assessment was supported by Helicopter Seychelles’ large market share. It was therefore advised that an application to effect the merger in question would have to be made to the Commission in accordance with section 22 of the FCA. Section 21 of the FCA provides that all mergers involving an enterprise, which by itself, or jointly with another enterprise, controls 40% or more of a market, are prohibited unless permitted by the Commission.

#### 17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?

The FCA prohibits cartel conduct in the form of agreements between enterprises, trade practices or decisions of enterprises, or undertakings or concerted practices of enterprises that have or are likely to have as their object or effect the prevention, restriction or distortion of competition when they:

- directly or indirectly fix purchase or selling prices, or determine any other trading conditions;
- limit or control production, markets, technical development or investment;
- provide for the artificial dividing up of markets or sources of supply;
- affect tenders to be submitted in response to a request for bids, for example:
  - a party agrees not to submit a bid in response to a call or request for bids or tenders; or
  - bidding parties submit, in response to a call or request, bids or tenders that are reached by agreement between or among themselves, unless the enterprises are not able to submit their bids individually;
- apply dissimilar conditions to equivalent transactions with other parties engaged in the same trade, thereby placing those other parties at a competitive disadvantage; or
- make the conclusion of an agreement subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such agreement.

An enterprise shall not conspire, combine, agree or arrange with another person to:

- limit the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supplying any service;



- prevent, limit or unduly lessen the manufacture or production of any goods to unreasonably enhance the price thereof;
- unduly lessen competition in the production, manufacture, purchase, sale, supply, rental or transportation of any goods;
- unduly lessen, limit or prevent competition in the provision of insurance on persons concerned in or property related to the production, storage, transportation or dealing in any goods or the provision of services; or
- otherwise unduly restrain or injure competition.

For example, the Fair Trading Commission through the Competition Department investigated seven cases for Retail Price Maintenance. As per the Fair Competition Act 2009, Resale Price Maintenance is prohibited. As such, businesses are prohibited from publishing, agreeing or dictating the price at which a product is to be resold. Retailers should be free to set the prices of the products they sell. The manufacturer, distributor, importer or wholesale should not influence such prices.

The Resale Price Maintenance cases usually relate to the following products:

- Sale of Cigarettes (one case)
- Sale of Bread (three cases)
- Sale of ice creams (one case)
- Alcoholic beverages (two cases)

In 2018, the FTC investigated four cases for Retail Price Maintenance, which related to the following products:

- Sale of Meat Products (one case)
- Alcoholic Beverages (three cases)

In two of the cases, a settlement was reached, whereby the relevant businesses made undertakings to desist from such activities and to inform retailers to whom they supply their goods, that they are free to set their own prices for the resale of the products. The other cases are still under investigation and/ or their respective undertakings is being finalised.

An example of the Commission's intervention in a situation of distortion of competition is the Dan Imports and Exports case. In the course of 2012, the Commission received a complaint regarding an advertisement for the sale of Sun Cool in the nation

by Dan Imports and Exports. The advertisement read 'RS.6 in all shops on Mahe and Praslin'. It was alleged that the advertisement constituted or indicated price fixing (which constitutes a prohibited practice under the FCA) in the supply of Sun Cool to retailers and consumers. The Commission found that the advertisement constituted a contravention of the FCA.

The Commission acknowledged the co-operation of Dan Imports and Exports, which had accepted its breach of the FCA and had ceased to publish the advertisement and agreed that retailers were free to sell the product at the price at which they wished to sell it. The Commission recommended that the management of Dan Imports and Exports attend a two-hour advocacy session on the FCA in order to better understand the requirements of the FCA. The advocacy session was well received by the representative of Dan Imports and Exports.

A very recent example is with regard to the retail price of Heineken Beer in Seychelles. Upon reviewing the local newspapers to ensure that adverts published by businesses are in conformity with the Consumer Protection Act (CPA) 2010 and/ or the Fair Competition Act (FCA) 2009 the Fair Trading Commission came across an advert published by ISPC Seychelles. This advert indicated the price at which Heineken Beer in 25cl bottles was to be sold. According to the FCA 2009, it is unlawful for a supplier to impose or maintain a minimum price at which its supplies are to be sold by retailers.

Following the inspections conducted, the Commission has established that the majority of retailers whose shops were inspected were obliged to charge the retail price advertised by ISPC Seychelles. This clearly shows they had engaged in resale price maintenance thus maintaining that the price of the Heineken Beer will be the same across Mahe Island.

Furthermore, during the meeting held with the representatives from ISPC Seychelles they did not dispute the fact that the Commission perceived them to be in contravention of the FCA 2009. On the contrary, they opted to an undertaking with the Commission. It was therefore concluded that ISPC Seychelles has contravened the Fair Competition Act 2009.

### **18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?**

The Commission has the ability to investigate whether enterprises are engaged in restrictive business practices. For this purpose, the Commission may:

- hold enquiries;
- administer oaths;
- summon and examine witnesses;
- compel the production of such books, records, papers and documents as it may consider necessary or proper for any proceeding, investigation or hearing held by it;
- examine any documents produced;
- require that any document submitted to the Commission be verified by affidavit;
- seize documents;
- adjourn investigations;
- make test purchases;
- inspect goods; and
- do all necessary and proper acts in the lawful exercise of its powers or the performance of its functions.

In addition, the Commission has the power to hear any person who may have information, which may assist an investigation.

Regarding seizures, if the Commission has reason to believe that the laws have been violated (whether in terms of consumer protection, fair competition or any other provisions of the FCA) and that any book, document or article relating to the offence is being kept or concealed in a building or place, the Commission shall apply to a magistrate for a search warrant to search and seize that book, document or article.

### **19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

Where the Commission determines that an enterprise has entered into an agreement that has the effect of preventing, restricting

or distorting competition (cartel conduct), the Commission may instruct the enterprise as follows, in order to remedy, mitigate or prevent the adverse effects on competition:

- terminate or amend an agreement;
- cease or amend a practice or course of conduct in relation to prices;
- supply goods or services or grant access to facilities;
- separate or divest itself of any enterprise or assets; or
- provide the Commission with specified information on a continuing basis, within such time as may be specified by the Commission. The Commission may, on a case-by-case basis, instead of giving instructions, impose a financial penalty.

Alternatively, the Commission may provide both instructions and a financial penalty. Additionally, regarding sanctions, every enterprise that fails or refuses to obey an order of the Commission made under the FCA is liable on conviction to a fine not exceeding SCR 400 000 and, in the case of a continuing offence, to a further fine of SCR 10 000 for each day or part thereof during which the offence continues. Where it is proved that an enterprise has failed to obey an order of the Commission made under the FCA, every director and officer of the enterprise is liable on conviction to a fine not exceeding SCR 100 000, or to imprisonment for a term not exceeding two years, or to both, unless that individual proves that all necessary and proper means in his or her power were taken to obey and carry out the order of the Commission.

There is no corporate leniency policy in Seychelles. However, the law is currently under review and a corporate leniency policy is being considered. However, it should be noted that the reduction of a penalty or immunity from the imposition of a financial penalty is at the discretion of the Commission, which shall weigh up the relevance and impact of the facts provided.



**20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

The FCA provides for an enterprise to apply to the Commission for authorisation to enter into or carry out an agreement or to engage in a business practice, which in its opinion, is an agreement or practice affected or prohibited under the Act. The Commission is authorised to approve the application where it is satisfied that the agreement or practice is reasonable and is likely to result in a public benefit.

The Commission may approve the exemption subject to conditions and timeframes, which it considers appropriate in the circumstances. Before approving the exemption, the Commission must:

- publish a notice in the *Gazette* informing the public of the application; and
- advise interested persons that they may submit written representations within the prescribed time period.

The Commission must consider all written objections submitted and satisfy itself that it is reasonable in the circumstances to approve the exemption. Subsequent to granting the exemption, the Commission is empowered to revoke the exemption if:

- the Commission is satisfied that the exemption was granted on the basis of false or misleading information;
- the enterprise has breached the conditions upon which the exemption was granted; or
- amend the exemption if it is satisfied that the market conditions necessitate an amendment.

The Commission is required to notify the enterprise in writing of the proposed amendment or revocation prior to implementation thereof.

Agreements or practices excluded from the FCA:

- Any practice of employers or agreement to which employers are parties insofar as it relates to the remuneration, terms or conditions of employment of employees.
- Any practice or agreement approved or required under an international agreement to which Seychelles is a party.

**21. Is minimum resale price maintenance prohibited?**

Yes. See question 17 for examples.

**22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

Subject to the FCA, any conduct on the part of an enterprise amounting to an abuse of a dominant position is prohibited. Exclusive agreements form part of the conduct, which gives rise to an abusive dominant position as defined by the FCA. For example, a dominant supplier might have a series of exclusive purchasing agreements with dealers in a particular geographical market. This might hinder other suppliers operating in and/ or wishing to enter that market.

However, such an agreement would not be unlawful if the dominant enterprise is able to objectively justify its conduct and show that it has behaved in a proportionate manner in defending its legitimate commercial interest and show the benefits arising out of that dominant position.

However, if the primary purpose of the conduct is to curb competition, it shall be prohibited by the Commission.

**23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

It should be noted that the FCA makes the distinction between a dominant position and abuse of a dominant position. An enterprise is deemed to hold a dominant position if that

enterprise occupies such a position of economic strength that enables it to operate in the market independently without effective competition from customers, competitors or potential competitors.

Conduct which amounts to an abuse of a dominant position is prohibited if it adversely or unfairly restricts trade within the jurisdiction. Conduct specifically listed as constituting an abuse of a dominant position consists of:

- restricting the entry of any enterprise into that or any other market that supplies, or is likely to supply, a substitute for the goods or services supplied in that market;
- preventing or deterring any enterprise from engaging in competitive conduct in that or any other market;
- eliminating or removing any enterprise from that or any other market;
- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions that are excessive, unreasonable, discriminatory or predatory;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of agreements subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements; or
- exclusive dealing, market restriction or tied selling.

However, the Commission will not treat the enterprise as abusing a dominant position if:

- it is shown that its behaviour was exclusively directed at improving the production or distribution of goods or promoting technical or economic progress, and consumers were allowed a fair share of the resulting benefit;
- the effect or likely effect of its behaviour in a market is the result of its superior competitive performance; or
- the enterprise enforces or seeks to enforce any right under or existing by virtue of

any copyright, patent, registered design or trademark except where the Commission is satisfied that the exercise of those rights:

- has the effect of lessening competition substantially in a market; and
- impedes the transfer and dissemination of technology.

#### **24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

Yes. For example, in 2010, the Commission received a complaint from Hunt Deltel Ltd (HDL) against Land Marine Ltd (LML) for an alleged abuse in the port sector by LML which enjoyed exclusive rights in the shore handling and stevedoring market at the Commercial Port of Victoria. HDL argued that apart from carrying out stevedoring and shore-handling activities, LML also engaged in inland transportation of cargo within Seychelles and was a direct competitor of HDL in that activity. HDL alleged that the exclusivity enjoyed by LML allowed it to distort fair competition among all enterprises providing cargo transportation services.

In particular, HDL complained that LML abused its position in the following manner:

- LML refused to allow other enterprises to perform their own loading and unloading activities, on the grounds that it had exclusivity in providing shore-handling services; and
- LML imposed severe and restrictive timeframes within which HDL had to operate at the port, unload cargo or complete its tasks. LML's conduct resulted in HDL's services to its customers being greatly constrained, resulting in a loss of clients for HDL.

After assessing HDL's complaint, the Commission found that LML held a dominant position in both the upstream and downstream markets. It concluded that LML enjoyed exclusivity in essential port services at the commercial port and that there was no competition in these markets.

The Commission then considered whether LML's conduct amounted to an abuse of dominance. The Commission found that LML had abused its dominant position by applying dissimilar conditions to equivalent transactions in favour of the downstream market. The Commission considered





the fact that the commercial port is an essential facility, without access to which market operators operating in the downstream market could not provide services to their customers. By refusing to grant competitors access, or by granting access on less favourable terms than those of its own services, LML's conduct amounted to an abuse of dominance by imposing a competitive disadvantage on its competitor.

Following its investigation and analysis, the Commission concluded that LML infringed the FCA by adopting conduct that led to abuse of its dominant position.

LML provided an undertaking to the Commission addressing these concerns, which the Commission found satisfactory.

A more recent example is the 2014 case of *FTC v Ferox Abattoir (Pty) Ltd*, in which the Board of Commissioners received a complaint from one Mr Jean against Ferox Abattoir (Pty) Ltd to the effect that the complainant was refused the supply of broiler chicks at the hatchery facility when he or she came to buy some chicks to rear, due to an outstanding bill owed by the complainant to the abattoir facility.

Both facilities – the abattoir and the hatchery – were owned and managed by the respondent.

A formal investigation was launched and it was recorded through a telephone call documented by the Commission that the complainant had been categorically refused the supply of broiler chicks by the hatchery facility.

The complainant claimed that he or she had suffered loss of revenue due to the non-realisation of two potential broiler cycles and had to cease the broiler farming business, which caused a decrease in his or her farming business earnings as a whole.

Being unable to mediate the matter further, the Commission deemed it necessary to bring a case against Ferox Abattoir (Pty) Ltd (Hatchery Facility) before the Board of Commissioners for determination.

During its investigation the Commission determined that the hatchery was an essential facility as there were no viable substitutes for the essential input being the supply of broiler chicks. The Commission argued that given that the respondent is the sole provider of broiler chicks in the country the respondent is considered the dominant service provider; hence in refusing to supply broiler chicks to the complainant (an essential input in broiler farming activities), the respondent is deemed to have abused and was still abusing its dominant position.

The respondent argued that the abattoir and the hatchery form part of one company, being Ferox Abattoir (Pty) Ltd. Hence, the debt owed by the complainant was attributable to both the hatchery and the abattoir, such that if the complainant paid his debt, the company would be willing to sell chicks to him. As such denial of services by the hatchery for debts owed at the abattoir should be maintained and if that is allowed, then the breach of section 7(3)(b) of the Fair Competition Act, 2009 should fall.

The Board of Commissioners ultimately rejected the respondent's arguments and concluded that the respondent had abused its dominant position in contravention of section 7 of the Fair Competition Act, 2009.

## **25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

The FCA empowers the Commission to provide remedies to competition issues following an investigation, and in some cases, the Commission is empowered to impose financial penalties. Where the Commission determines that any conduct has constituted an abuse it:

- shall notify the enterprise of its finding accompanied by a copy of the report;
- shall direct the enterprise to cease the abusive conduct within a specified period; and
- may require the enterprise to take such further action as in its opinion is necessary.

Where the Commission imposes a financial penalty, the financial penalty shall not exceed 10% of the turnover of the enterprise in Seychelles during the period of the breach of the prohibition, up to a maximum period of five years.

**26. Are there Rules in relation to price discrimination?**

Yes. Price discrimination may constitute an abuse of dominance. Price discrimination is regarded as abusive if after investigation by the Commission, it has been established that such conduct has harmed competition.

**27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

The Commission publishes its decisions on its website: [www.ftc.sc](http://www.ftc.sc). However, it is to be noted that not all decisions are immediately available.

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# South Africa



**BOWMANS**

Xolani Nyali | Sian Fagan

## 1. What is the relevant competition legislation and who are the enforcers?

The relevant competition legislation is the Competition Act, 89 of 1998, as amended and the regulations promulgated in terms of the Act. The Act is enforced by the Competition Commission (Commission), the Competition Tribunal (Tribunal) and the Competition Appeal Court (the CAC).

## 2. Are there any proposed amendments or new regulations expected to come into force?

The Competition Amendment Act, 1 of 2009 (the Amendment Act) was passed into law in 2009 but has not come into effect with the exception of section 6, relating to market enquiries, and certain parts of section 12 and section 13, relating to the criminalisation of cartel conduct. The latter relate to criminal liability for individuals in relation to contraventions of the Competition Act. In particular, they allow for directors and managers to be held criminally liable for causing a company to engage in, or ‘knowingly acquiesce’ to, a company’s involvement in cartels. Individuals may face personal penalties of up to ZAR 500 000 and/ or 10 years’ imprisonment. The Commission anticipates that the provisions in the Amendment Act relating to complex monopolies and concurrent jurisdiction will be implemented by 2020.

The Competition Amendment Act, 18 of 2018 was signed into law in February 2019 and certain parts dealing with merger control, abuse of dominance, administrative penalties, exemptions and market inquiries came into effect on 12 July 2019 (the 2019 Amendment Act).

The 2019 Amendment Act is aimed at addressing two key structural challenges in the South African economy, namely (i) reducing concentration and the racially skewed spread of ownership of firms in the economy; and (ii) enhancing the policy and institutional framework, and procedural mechanisms for the administration of the Act. The amendments address five priorities:

- strengthening the provisions of the Act relating to prohibited practices and mergers;
- emphasising the impact of anti-competitive conduct on small businesses and firms owned by historically disadvantaged persons;

- strengthening the provisions of the Act relating to market enquiries;
- the alignment of competition-related processes and decisions with other public policies, programmes and interests; and
- enhancing the administrative efficacy and processes of the competition regulatory authorities.

Some key amendments include:

- the introduction of additional considerations in the assessment of a merger, including the extent of common ownership and common directorship in competing firms, and recent mergers undertaken by the merging parties;
- the expansion of public interest considerations relevant for merger assessment. Relevant considerations will now include the ability of small or medium-sized enterprises (SMEs) or firms controlled or owned by historically disadvantaged persons ‘to effectively enter into, participate in or expand within the market’ and ‘the promotion of a greater spread of ownership by, for example, increasing the levels of ownership by historically disadvantaged persons and workers in firms in the market’;
- the inclusion of the allocation of market shares as a collusive activity under section 4(1)(b)(ii) of the Act;
- the inclusion of an administrative penalty of 25% of a firm’s annual turnover for a second offence and the end of ‘yellow card’ offences (no penalty for first-time contravention) in terms of which all first-time offenders are subject to a penalty on a first offence;
- the introduction of additional objectives and grounds of exemption; and
- additional powers granted to the Commission and Minister in merger proceedings and to conduct market inquiries.



The provisions of the 2019 Competition Amendment Act that are not yet in force, and which will be brought into force by proclamation at a later date are:

- those relating to national security and acquisitions by foreign acquirers in terms of which the Commission and a government committee (yet to be constituted) must be notified of an acquisition of a South African firm by a foreign acquiring firm if the merger may impact national security interests of the Republic. The Committee must decide whether the transaction may have an adverse effect on national security interests and the competition authorities may not make any decision where the merger has been prohibited on national security grounds;
- new powers of the Minister to make regulations regarding restrictive horizontal practices and restrictive vertical practices;
- time limits for the Commission to decide an application for an exemption;
- provisions relating to confidentiality and disclosure of information submitted to the competition authorities;
- new buyer power provisions; and
- new provisions relating to price discrimination by dominant firms.

In December 2018, first drafts of the Price Discrimination Regulations and the Buyer Power Regulations were published for public comment. Revised versions were then published for comment in October 2019. At the time of writing, the final Price Discrimination Regulations and Buyer Power Regulations are not yet in force, however, are expected to come into force before the end of 2019.

The relevant provisions of the 2019 Amendment Act dealing with price discrimination and buyer power are expected to come into force once the draft Price Discrimination and draft Buyer Power Regulations are finalised, giving further content to these provisions.

First drafts of the Price Discrimination Guidelines and Buyer Power Guidelines were published in October 2019 for public comment. At the time of writing, the draft Price Discrimination Guidelines and draft Buyer Power Guidelines are not yet in force, however, are expected to come into force before the end of 2019.

### **3. Is the law actively enforced?**

The law is actively enforced, both in respect of mergers and prohibited practices (including abuse of dominance).

### **4. What are the current priorities or focus areas of the competition authorities?**

The Commission's priority sectors are (i) food and agro-processing; (ii) healthcare; (iii) intermediate industrial inputs; (iv) construction and infrastructure; (v) banking and financial services; (vi) information and communication technology and (vii) energy. According to the Commission, these sectors were selected taking into account South Africa's economic policies, the volume of complaints received in the sector and market failures which the Commission has identified through past investigations and scoping exercises. Both mergers and prohibited practices in these sectors attract close scrutiny.

Another area of concern for the Commission is the private healthcare sector, in which the Commission conducted its first formal market inquiry to determine the factors that restrict competition and underlie increases in private healthcare expenditure in South Africa.

The Commission conducted the inquiry through an inquisitorial process of public hearings and the review of secondary material obtained from information requests, consultations and summons. The inquiry was led by a panel comprising industry experts, under the leadership of panel chairperson, former Chief Justice Sandile Ngcobo. The inquiry began in January 2014 and on 5 July 2018. Its provisional findings and recommendations report (the Report) was published on the Commission's website. Stakeholders subsequently requested access to the underlying data and information considered in preparing the Report, which the inquiry granted by opening an online Data Access Room on 23 July 2018.

The Commission released its Health Market Inquiry Final Findings and Recommendations Report (the Final Report) in September 2019. The Commission's findings include that the South African private healthcare market is 'characterised by high and rising costs of healthcare and medical scheme cover, and



significant over-utilisation without stakeholders having been able to demonstrate associated improvements in health outcomes'. Further, it found that the 'market is characterised by highly concentrated funders and facilities markets, disempowered and uninformed consumers, a general absence of value-based purchasing, practitioners who are subject to little regulation and failures of accountability at many levels'.

The Commission found that 'there has been inadequate stewardship of the private sector with failures that include the Department of Health not using existing legislated powers to manage the private healthcare market, failing to ensure regular reviews as required by law, and failing to hold regulators sufficiently accountable. As a consequence, the private sector is neither efficient nor competitive.' The Commission holds the view that 'a more competitive private healthcare market will translate into lower costs and prices, more value-for-money for consumers and should promote innovation in the delivery and funding of healthcare'.

Based on its findings, the Commission has made recommendations to, among other things, adopt a set of interrelated interventions designed to promote systemic change; improve the context within which facilitators, funders and practitioners operate and create a shift towards a pro-competitive environment; and review its approach to creeping mergers. The Final Report has been published on the Commission's website.

A separate market inquiry was conducted into the liquefied petroleum gas (LPG) market. LPG has been recognised as being of strategic importance as an alternative source of energy for South Africa by various government policies. For example, the National Development Plan identified that increasing the proportion of LPG in South Africa's energy mix in order to meet the country's objective of a sustainable energy supply. The LPG market inquiry started in September 2014. The inquiry has been concluded and the final report was published on 24 April 2017. Based on the findings, the Commission has made recommendations to introduce new measures to improve competition in the LPG sector to be implemented between 2017 and 2019.

A third market inquiry is being conducted in relation to the grocery retail market. The inquiry was initiated on the back of concerns surrounding the disappearance of the small and informal retail sectors in townships. Given the relationship between the decrease in informal traders and the rise of shopping centres, the inquiry seeks to address both the formal and informal sectors of the market. The inquiry has been concluded and the Commission has published its preliminary report.

A fourth market inquiry initiated by the Commission relates to the public passenger transport sector and follows numerous complaints received by the Commission relating to public transport in the country. The scope of the inquiry includes price setting mechanisms, price regulation, transport planning, allocation of subsidies, route allocation, licensing requirements etc. The Commission published its guidelines for participation in the inquiry and its call for submissions on 13 July 2017. At the time of writing, public hearings were to be conducted by the Commission in key metropolitan areas in South Africa.

The most recent inquiry announced to date is the Data Services Market Inquiry, which was initiated by the Commission at the request of the Minister of Economic Development. The Inquiry was established in the context of concerns that perceived high data costs in South Africa are constraining the full potential of a data-driven economy, with an adverse impact on users of cellphones and laptops, as well as businesses that require high volumes of data. The Inquiry commenced on 18 September 2017 and was expected to be concluded on 31 March 2019. At the time of writing, the Commission has published its provisional findings and recommendations report.

## **5. What kind of transaction constitutes a notifiable merger?**

The Commission must be notified of a transaction in the following circumstances: if the transaction: (i) constitutes a merger (as defined in the Act); (ii) meets the relevant thresholds; and (iii) constitutes economic activity within, or having an effect within, South Africa. For purposes of the Act, a 'merger' occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over



the whole or part of the business of another firm, whether such control is achieved as a result of the purchase or lease of the shares, an interest or assets of the other firm, by amalgamation or any other means. There is no closed list of how control may be achieved. Broadly, a person controls another firm if that person, *inter alia*:

- beneficially owns more than one-half of the issued share capital of the firm;
- is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;
- is able to appoint or to veto the appointment of a majority of the directors of the firm;
- is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act; or
- has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the first four bullet points above.

These examples cited in the Act are not a closed list of what constitutes control. For example, the acquisition of control over a business, or the assets of a business, pursuant to a sale of business or sale of assets agreement, is not specifically enumerated as a class of control, but will always be accepted as the acquisition of control for the purposes of the Act.

The first four bullet points above set out what are referred to as instances of ‘bright line’ or ‘legal’ control. The last bullet point provides a catch-all to the effect that a person controls a firm if that person ‘has the ability to materially influence the policy of the firm in a manner comparable to the person who, in ordinary commercial practice, can exercise an element of control’, referred to in the first four bullet points. This covers instances in which a firm, without acquiring bright line control, may acquire *de facto* control by being able to materially influence the policy of another firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of bright line or legal control.

## 6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market shares)?

In the ordinary course, only intermediate and large mergers require prior notification and approval. Intermediate mergers are those that meet the following thresholds:

- combined annual turnover in, into or from South Africa and the target firm(s) are valued at ZAR 600 million or more; or the combined assets in South Africa of the acquiring firm(s) and the target firm(s) are valued at ZAR 600 million or more; or
- the annual turnover in, into or from South Africa plus the assets in South Africa of the target firm(s) are valued at ZAR 600 million or more; or
- the annual turnover in, into or from South Africa of the target firm/ s plus the asset(s) in South Africa of the acquiring firms are valued at ZAR 600 million or more.

In addition, the annual turnover in, into or from South Africa or the asset value of the target firm(s) must be ZAR 100 million or more.

A large merger is one where one of the four calculations given above results in a figure that is equal to, or exceeds ZAR 6.6 billion and the annual turnover or asset value of the target firm(s) equals or exceeds ZAR 190 million. The turnover and assets are calculated with reference to the previous financial year of the parties.

The Act defines an acquiring firm broadly, referring to the entire group to which the acquirer forms a part, while a target (or transferring) firm is defined narrowly, referring to the actual business being acquired.

### **7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

Parties to a notifiable merger may not implement the merger before obtaining the requisite approval. Implementing a notifiable merger prior to approval being obtained or failing to notify the Commission of a merger is a contravention of the Act, and exposes the parties to administrative penalties of up to 10% of turnover, as well as potential injunctions on implementation. Penalties have been applied by the authorities for prior implementation. The level of penalties applied has varied, depending on the circumstances.

On 2 April 2019, the Commission published its final Guidelines for the Determination of Administrative Penalties for Failure to Notify a Merger and Implementation of Merger. These Guidelines set out the Commission's approach to prosecuting parties for non-notification or the pre-approval implementation of mergers.

The Commission uses a filing fee-based methodology for penalties for failure to notify mergers, unlike the turnover-based methodology for determining administrative penalties in cartel cases.

### **8. What filing fees are required?**

Filing fees payable for a large merger are ZAR 550 000. Filing fees payable for an intermediate merger are ZAR 165 000. There are no filing fees payable for small mergers.

### **9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

The Act applies to all economic activity within or having an effect within South Africa. However, insofar as the notification of mergers is concerned, the thresholds are calculated in relation to combined turnover or assets in relation to South Africa only and in practice, notification is required if a company's South African assets or South

African-derived turnover meets the thresholds. As such, the Act is applicable to foreign-to-foreign mergers only to the extent that the parties have assets in South Africa or turnover generated in, into or from South Africa. The Commission's approach is that neither party requires a presence in South Africa and that it will suffice if the target alone has turnover in South Africa so as to meet the thresholds. Arguably this goes too far and is against the legal principle that statutes do not apply extraterritorially unless specifically set out in the statute. However, since the Act came into effect in 1999, the Tribunal has considered and approved many foreign-to-foreign transactions and, as a matter of general practice, foreign-to-foreign mergers, where the target has a subsidiary or business activities in South Africa must be notified to the authorities if the relevant thresholds are met.

### **10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

The vast majority of mergers are notified without pre-notification contacts. However, the Commission permits pre-notification meetings and a practitioner's notice issued by the Commission mentions that if merging parties wish to engage in a pre-notification meeting to discuss merger filing requirements for a specific proposed merger, the relevant contact person is the manager of the Mergers and Acquisitions Division. In practice, pre-notification contacts tend to be held in relation to contentious mergers only. Meetings can also be arranged with the Commission shortly after filing, when a case team has been set up.

### **11. To what extent are non-competition factors relevant to the assessment of a merger?**

The Act provides for public interest considerations to be taken into account, in addition to the business and economic efficiency criteria which are used to assess the effect that a merger will have on competition. Specifically, the Act requires the competition authorities to consider whether an otherwise anti-competitive merger could be



approved on the basis of a substantial positive public interest impact as part of the assessment that the competition authorities are required to make in terms of the Act. The authorities must determine whether the merger can or cannot be justified on substantial public interest grounds by assessing:

- the effect that a merger will have on a particular industrial sector or region;
- employment;
- the ability of small businesses, or firms controlled by historically disadvantaged persons, to become competitive; and
- the ability of national industries to compete in international markets.

The Commission has shown concern for issues such as employment with regard to both mergers and complaints of prohibited practices. In some recent merger decisions, the Commission has been unwilling to accept merger-related job losses.

Further, the Commission has recently indicated that it requires certainty from merging parties as to whether job losses will occur as a result of a merger or not. Notwithstanding the above, in the vast majority of cases, competition arguments are the Commission's focus and the basis on which decisions are made. However, public interest considerations remain significant.

The 2019 Amendment Act makes some amendments to the wording of the public interest grounds set out above. One such amendment is the insertion of a new public interest factor, which reads: 'the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market'.

Whereas under the Act, the competition authorities are required to consider whether an otherwise anticompetitive merger could be approved on the basis of a substantial positive public interest impact, the 2019 Amendment Act arguably elevates the public interest enquiry to be on equal footing with the competition enquiry.

Lastly, the Minister of Economic Development (who previously only had rights of review), as well as the Commission, now have rights of appeal in

merger proceedings. The Minister of Economic Development's right of appeal applies in respect of public interest grounds where there has been Ministerial participation before the competition authorities or with leave from the CAC.

## **12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

The Commission case handler appointed to investigate a merger contacts the largest customers and competitors of the merging parties during the course of the Commission's review. Generally, these parties will be asked if they have any concerns with the proposed merger and, if so, the basis for these concerns. Should they wish to do so, the customers and competitors may claim confidentiality in respect of their written submissions to the Commission. Their submissions are influential, although to the extent that their concerns are not relevant to the assessment that the Commission is required to make, the Commission will generally disregard such input. The submissions will nevertheless form part of the Commission's record and remain on file.

## **13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

In terms of section 13A(2) of the Act, the parties to a merger must each provide a non-confidential version of the merger notification to any registered trade union that represents a substantial number of its employees, or the employees concerned or representatives of such employees, in the absence of a registered trade union.

The Act requires proper service on the trade unions and/ or employee representatives. Proof of service must be submitted as part of the notification, failing which the notification will not be regarded as complete. Notably, the time period for the Commission's review does not commence until service of the merger notification is complete.

Any person may voluntarily submit information to the Commission in relation to a merger. However,

trade unions and/ or employee representatives are afforded a more prominent role in the merger review process than other third parties and they are entitled by legislation to participate in merger proceedings. A trade union or employee representative, upon whom a non-confidential version of the merger filing is required to be served, may notify the Commission of its intention to participate in merger proceedings within five business days after receiving notice of the merger.

In addition to the rights of trade unions and employee representatives to intervene, any person who has a material interest in a merger may apply to intervene in Tribunal proceedings by filing a Notice of Motion. The Notice of Motion must include a concise statement of the nature of the person's interest in the proceedings. An application to intervene must be served on all parties to the proceedings and the Tribunal is required to determine whether or not the person asserting a material interest is permitted to intervene.

Although trade unions and/ or employee representatives are afforded a more significant place in the merger review process, the Government and other interested parties have intervened in certain significant merger cases. In relation to the latter, the Commission is specifically required in terms of the Act to provide the Minister of Trade & Industry with a copy of a large merger notification received by the Commission for the Minister of Economic Development to consider whether it wishes to make any representations on the public interest grounds mentioned above.

**14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

The Act does not require that the Commission grant merging parties an opportunity to make representations before a decision is issued where the authority intends to (i) prohibit a merger or impose conditions (in the case of intermediate mergers); or (ii) recommend a prohibition or conditional approval (in the case of large mergers). However, in the ordinary course, the Commission case handler appointed to investigate the merger will contact the legal representatives of the merging parties to discuss any preliminary

concerns the Commission may have identified during its investigation. In the ordinary course, the Commission would invite the merging parties' legal representatives to make submissions on the concerns it has with the proposed merger and, if appropriate, to offer any behavioural or structural remedies to address the Commission's concerns.

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

The Commission's decisions may be appealed to the Tribunal. The Tribunal's decisions, whether at first instance or in appeals from decisions of the Commission, may be taken on review or appeal to the CAC.

The Act makes it clear that the parties to a merger, intervening government bodies, trade unions and third parties (as the case may be) who have established they have a material interest in the merger have a right to appeal the decisions of the Tribunal.

The Minister of Trade & Industry may participate, in the prescribed manner, in merger proceedings before the Commission, the Tribunal or the CAC, in order to make representations on any of the public interest grounds listed in the Act. A trade union or employee representative may appeal a decision of the Tribunal to the CAC, provided that the trade union or employee representative was a participant in the Tribunal proceedings. Further, subject to the provisions of the Act and the Rules of the CAC, a person affected by a decision of the Tribunal may appeal against, or apply to the CAC to review the Tribunal's decision. This allows competitors, customers and other third parties to appeal decisions of the Tribunal.

The issue of whether or not the Commission can appeal a Tribunal decision has been raised and discussed by the courts. This was considered by the CAC for the first time in Commission/ Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd. The merger had been approved by the Tribunal conditionally. The CAC referred to section 17 of the Act, which regulates who may appeal against merger proceedings, and provides that an appeal to the CAC may be made by (i) any party to the merger; or (ii) a person who, in terms





of section 13A(2), is required to be given notice of the merger, provided the person had been a participant in the proceedings of the Tribunal. Section 13A(2) relates to the registered trade unions representing a substantial number of employees of the acquiring or target firms, or the employees concerned or a representative of the employees concerned, if there are no such registered trade unions. The CAC noted that it is clear from this wording that only two categories of persons are permitted in terms of the Act to appeal against decisions of the Tribunal in merger proceedings and that the Commission does not fall within either of these categories.

The Commission had relied on section 61(1) of the Act, read with section 37(1)(b)(i). The CAC stated that sections 61(1) and 37 of the Act should not be read as altering or derogating from the provisions of section 17 in respect of appeals against Tribunal merger decisions. It follows that the categories of persons which may appeal against Tribunal merger decisions are those limited categories specifically set out in section 17(1) and not the class of 'affected' persons referred to in section 61(1).

The parties who may participate in merger proceedings are (i) any party to the merger; (ii) the Commission; (iii) any person who was entitled to receive a notice in terms of section 13A(2) and who indicated to the Commission an intention to participate, in the prescribed manner; (iv) the Minister of Economic Development, if the minister has indicated an intention to participate; and (v) any other person whom the Tribunal has recognised as a participant. The CAC found that not all these participants may appeal against a decision of the Tribunal. Those who may appeal are specifically referred to in section 17(1) of the Act. The CAC held that the omission of the other participants is clearly indicative of the legislature's intention.

The 2019 Amendment Act provides that the Commission and the Minister of Trade & Industry now have an automatic right to appeal the decisions of the Tribunal. However, the Minister of Trade & Industry must have participated in the Commission or Tribunal's proceedings or, on application for leave to the CAC, to be entitled to appeal.

## **16. Does the legislation apply to joint ventures?**

The legislation does not specifically refer to joint ventures. Joint ventures that are classified as mergers fall to be notified to the Commission if they meet the thresholds for mandatory notification and, if they fall below the thresholds. Such agreements may in any event be notified voluntarily. The Commission has published a non-binding practitioners' note to help determine whether a joint venture should be notified. To the extent that a joint venture is not a merger, the prohibited practices provisions of the Act may nevertheless apply.

## **17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

The Act regulates prohibited practices and specifically prohibits certain horizontal restrictive practices (unlawful conduct between competitors). The Act prohibits price-fixing (either direct or indirect, and which may relate to a purchase or selling price or any other trading condition); dividing markets (by allocating market shares, customers, suppliers, territories, or specific types of goods or services); and collusive tendering.

The Commission has prosecuted firms across a wide range of industries for engaging in cartel conduct, including the construction, cement, concrete, bread, milling, glass and airline industries.

## **18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?**

Chapter 5: Part B of the Act confers broad investigative powers on the Commission, including the power to summon any person who is believed to be able to furnish information or to be in possession or control of any information, document or object that may assist the Commission in performing its functions. A person who is so summoned is required to answer each question truthfully and to the best of their ability except to the extent that answering any one

question may be self-incriminating. In the ordinary course, the Commission requires that a person who has been requested to appear before it for questioning, or who has been summoned, provide his or her responses under oath.

The Commission also has broad powers of search and seizure. Sections 46 and 47 of the Act authorise the Commission to enter premises (with or without a warrant) for the purpose of conducting a search and seizure operation. The Commission is not required to notify the person in possession or control of the premises to be searched prior to obtaining a search warrant or prior to arriving at the premises. In the ordinary course, the Commission conducts search and seizure operations on a surprise basis and has conducted dawn raids on companies in various industries, including cement, furniture removal, scrap metal, tyres, LPG, vehicle glass, particleboard, fibreboard, packaging material, cargo shipping, edible oils and margarine.

**19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

Cartel conduct is per se unlawful and a firm engaging in cartel conduct is exposed to a penalty for a first infringement. The Commission's pursuit of cartels is vigilant. Administrative penalties of up to 10% of turnover may be imposed on the firm concerned. The 2019 Amendment Act introduces a new provision in relation to administrative penalties, increasing the maximum administrative penalty to 25% of a firm's annual turnover if a firm's anti-competitive conduct is substantially a repeat by the same firm of conduct previously found to be a prohibited practice. In addition, the administrative penalty may be increased by the turnover of any firm which controls the firm that is found to have engaged in a prohibited practice and to make the controlling firm jointly and severally liable for the penalty.

Where an application is made for leniency, the CLP applicant must co-operate fully with the Commission in order to benefit from the leniency policy by providing the Commission with all information in respect of the cartel, including information about those involved. Once the Commission receives an application for leniency

it will initiate an investigation and, in conducting its investigation, may subpoena any person for questioning.

The Act provides for criminal liability of directors and other employees having management authority where they have caused the company to engage in cartel conduct or where they have knowingly acquiesced to the conduct.

**20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

Yes. In terms of section 10 of the Act, and Schedule 1 Part A of the Act, a firm may apply to the Commission for exemption from the application of Chapter 2 of the Act, which deals with prohibited practices. The circumstances in which exemptions may be granted are limited. In terms of section 10 of the Act, the Commission may grant an exemption if the agreement or practice concerned contributes to (i) the maintenance or promotion of exports; (ii) the promotion of the ability of small businesses, or firms controlled by historically disadvantaged persons, to become competitive; (iii) change in productive capacity necessary to stop decline in an industry; or (iv) the economic stability of an industry designated by the Minister of Economic Development after consulting the minister responsible for that industry. Further, any restriction imposed on the firms concerned by the agreement or practice must be required to attain the objective in question. In terms of Schedule 1 Part A of the Act, trade associations may apply to the Commission for exemption if, having regard to internationally applied norms, any restriction contained in the Rules of the associations is reasonably required to maintain professional standards or the ordinary function of the profession. Exemption applications are permitted for both agreements and conduct and may be granted conditionally or unconditionally.

The 2019 Amendment Act introduces the following new grounds for exemptions: (i) promotion of the effective entry into, participation in, or expansion within a market by small and medium businesses, or firms controlled or owned by historically disadvantaged persons; (ii) promotion of competitiveness and efficiency



gains that promote employment or industrial expansion; and (iii) the economic development, growth, transformation or stability of any industry designated by the Minister, after consulting the Minister responsible for that industry.

In addition to introducing additional objectives and grounds for exemption and thereby expanding the application of section 10, the 2019 Amendment Act seeks to expedite the exemptions process by restricting the Commission to a period of one year in which to grant or refuse the exemption, unless the applicant and the Commission agree otherwise. The 2019 Amendment Act furthermore provides for the Minister of Trade & Industry to publish regulations in relation to exemptions, which may cater for the fast-tracking of exemptions for agreements or practices in certain key sectors and industries.

#### **21. Is minimum resale price maintenance prohibited?**

Minimum resale price maintenance is per se unlawful. Section 5(2) of the Act specifically provides that the practice of minimum price maintenance is prohibited. Section 5(3) of the Act provides that despite section 5(2), a supplier or producer may recommend a minimum resale price to the re-seller of a good or service, provided that (i) the supplier or producer makes it clear to the re-seller that the recommendation is not binding; and (ii) if the product has its price stated on it, the words recommended price must appear next to the stated price.

#### **22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

Within the framework of the Act, exclusive agreements typically fall within the ambit of section 5, which applies to agreements between parties in a vertical relationship (i.e. a firm and its customers, its suppliers, or both). Section 5(1) prohibits agreements between parties in a vertical relationship if the agreement has the effect of substantially preventing or lessening competition in a relevant market, unless the parties to the

agreement can show technological, efficiency or other pro-competitive gains outweigh the anti-competitive effect. Where an exclusive agreement has an anti-competitive effect, factors typically relevant in assessing the lawfulness of the agreement include the duration of the agreement, the degree of foreclosure resulting from the agreement and the levels of concentration in the market.

In addition, where one of the parties is dominant in the relevant product market, exclusive arrangements may also fall to be investigated under the abuse of dominance provisions of the Act, particularly if the exclusive arrangement constitutes an 'exclusionary act'. An exclusionary act is defined as an act that impedes or prevents a firm entering into, or expanding within, a market.

#### **23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

The Act prohibits the abuse of a dominant position. A firm is considered to be dominant in a market if (i) it has at least 45% of that market; (ii) it has less than 35% of that market, but has market power (as defined in the Act); or (iii) it has at least 35% but less than 45% of a particular market, unless it can show that it does not have market power. 'Market power' is defined in the Act as 'the power of a firm to control prices, or to exclude competition or to behave, to an appreciable extent, independently of its competitors, customers or suppliers'.

The Act includes per se prohibitions which prevent a dominant firm from (i) charging an excessive price (as defined in the Act) to the detriment of consumers; or (ii) refusing to give a competitor access to an essential facility (as defined in the Act) when it is economically feasible to do so.

With regard to prohibitions that are not per se unlawful, a dominant firm is prohibited from engaging in any exclusionary act (as defined in the Act) if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain.

Further, the Act prohibits a firm from engaging in the following exclusionary acts, unless the firm can show technological, efficiency or other pro-competitive gains that outweigh the anti-competitive effect:

- requiring or inducing a supplier or customer to not deal with a competitor;
- refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
- selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of the contract;
- selling goods or services below their marginal or average variable cost;
- buying-up a scarce supply of intermediate goods or resources required by a competitor; and
- discriminating between purchasers in relation to equivalent transactions of goods or services of like grade and quality.

An example of an abuse of dominance case in the telecommunication sector is that following a complaint by the South African VANS Association (SAVA) against South Africa's incumbent telecommunications company, Telkom Ltd (Telkom). After investigating the complaint, the Commission found that Telkom had abused its monopoly position in the fixed line telecommunication market by excluding competing value-added network service (VANS) providers from the downstream VANS market. The Tribunal supported the Commission's finding and, in 2012, ruled that Telkom's practices of (i) refusing to supply access to essential facilities to independent VANS providers; (ii) inducing customers not to deal with them; (iii) charging customers excessive prices for access services; and (iv) discriminating in favour of its own customers by giving them a discount on distance-related charges which it did not advance to customers of the independent VANS providers, constituted an abuse of dominance, which resulted in a substantial lessening and prevention of competition in the VANS market.

The Tribunal found that the practical effect of Telkom's strategy of not competing on merit with the independent VANS providers but claiming instead that the independent VANS providers were conducting business illegally and thereby justifying its actions of freezing their networks, impeded the growth of Telkom's competitors and retarded innovation in the market. The harm to competition was likely to be exacerbated in an industry characterised by network effects. Further, the Tribunal agreed with the Commission that Telkom had refused to supply essential facilities to independent VANS providers and had induced customers not to deal with them.

The 2019 Amendment Act introduces significant amendments to the existing abuse of dominance provisions. A theme flowing through all the amendment provisions is the reduced onus on the Commission in the cases it wishes to pursue. It appears this is a reflection of the perspective that the current provisions of the Act, and the tests therein, read with questions of onus, are too high a threshold for the Commission to discharge especially insofar as they are required to show anti-competitive effect. In this regard, the 2019 Amendment Act provides for, *inter alia*, (i) changes to the definition of excessive pricing, (ii) prohibitions on refusal to supply, (iii) changes to the definition of predatory pricing, (iv) the introduction of margin squeeze as a specific offence and (v) the prohibition against abuse of buyer power.

#### **24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

A number of abuse of dominance cases have been adjudicated by the South African competition authorities. For example, in 2001, Nationwide Airlines lodged a complaint against South African Airways (SAA). After investigating the complaint, the Commission found that SAA was abusing its dominant position and referred its findings to the Tribunal. In 2005, the Tribunal ruled that the two incentive schemes that SAA had used to compensate travel agents for their services provided a compelling commercial incentive for travel agencies to sell SAA tickets in preference



to those of its rivals. Further, the Commission found that SAA's Explorer scheme — a system of rewarding travel agency staff with SAA tickets on the basis of the number of SAA tickets they sold — reinforced the exclusionary effects of the incentive schemes. The Tribunal concluded that the practical effect of the incentive schemes was to induce suppliers not to deal with SAA's competitors and SAA was fined ZAR 45 million for the abuse of its dominant position.

In the Telkom case referred to above, Telkom was fined ZAR 449 million for the abuse of its dominant position between 1999 and 2004, when it was a monopoly provider of telecommunications services.

In a 2015 decision by the CAC, the CAC upheld an appeal by Sasol Chemical Industries Ltd (SCI) against a decision by the Tribunal that SCI had charged excessively for propylene and polypropylene between 2004 and 2007.

During the course of 2010, the Commission had pursued SCI before the Tribunal for alleged excessive pricing in two vertically related markets over a period of four years from January 2004 to December 2007. The Commission alleged SCI had charged excessive prices to domestic customers of purified propylene and polypropylene in contravention of section 8(a) of the Act which provides that '[i]t is prohibited for a dominant firm to—(a) charge an excessive price to the detriment of consumers'. The Tribunal found that SCI had contravened section 8(a) of the Act in that:

'[i]n purified propylene it has been able to charge its only customer, Safripol, a competitor in the downstream polypropylene market, a price that counter-intuitively increases with increases in volume and has also been able to restrict the monthly volume of the lower priced 'Tier 1' purified propylene sold to Safripol. In the polypropylene market, SCI has segmented the market between the high-priced local (domestic) and the lower-priced export market by selling exports on a delivered basis, thus preventing arbitrage in the domestic market by re-entry of its cheaper polypropylene.'

The Tribunal found that SCI's excessive prices, maintained by its exercise of market power, resulted in a missed opportunity for innovation and development for the domestic manufacture

of downstream plastic goods. Cheaper polypropylene prices for local plastic converters could enhance local production thereby enabling them to compete more effectively with imported final plastic products, manufacture locally rather than overseas and introduce new products to South African consumers.

The Tribunal sentenced SCI as follows for its contraventions relating to purified propylene:

- SCI was required to pay an administrative penalty of ZAR 205.2 million;
- SCI may not discriminate between the purified propylene price charged internally within Sasol and the price charged to third-party customers; and
- SCI and the Commission must submit a proposed pricing remedy to the Tribunal within 90 days of the decision of the Tribunal.

In relation to polypropylene, SCI was sentenced as follows:

- SCI was required to pay an administrative penalty of ZAR 328.8 million; and
- SCI was required to sell polypropylene on an ex-works basis without discriminating in price between any of its customers no matter where they are located.

In June 2015, the CAC published its judgment in which it upheld SCI's appeal against the Tribunal's decision.

In reaching its decision, the CAC emphasised:

- that every excessive pricing case would have to be determined on its own facts;
- as the facts of the appeal differed significantly from the Mittal decision. The appropriate test was not whether or not the price was excessive, but rather the production cost to SCI; and
- if the cost of an essential component of the product, whose prices are under scrutiny, can be justified on rational grounds, this should be the yardstick against which the complaint is assessed.



The Commission sought leave to appeal the CAC's decision to the Constitutional Court. However, in November 2015, the Commission's application was dismissed by the Constitutional Court.

More recent and ongoing abuse of dominance cases include investigations in the construction sector where the Commission has initiated complaints against Afrimat Ltd and its subsidiary for alleged excessive pricing of clinkerash aggregate, Blurock Quarries (Pty) Ltd and Procon Precast CC for alleged abuse of dominance in the supply of crusher dust and the manufacture and supply of bricks and blocks. A complaint has been initiated against Transnet SOC Ltd for alleged excessive pricing and price discrimination in the provision of freight rail services and excessive pricing in the provision of port services. The Commission also alleges that Transnet has engaged in exclusionary conduct in the prioritisation of cargo and berthing at port terminals.

### **25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

Yes. Conduct which is unlawful attracts a penalty for a first infringement. Conduct which is not per se unlawful is subject to a 'rule of reason' analysis, in terms of which the anti-competitive effects of a firm's conduct are weighed up against the pro-competitive gains and the latter must be greater than, and off-set, the anti-competitive effects. Under the 2019 Amendment Act, conduct which is not per se unlawful now also attracts a penalty for a first infringement. Please refer to question 19 for further detail on the penalties for repeat offences.

The Tribunal may impose an administrative penalty on firms for the abuse of a dominant position which may not exceed 10% of the firm's annual turnover in South Africa and its exports from South Africa during the firm's preceding financial year.

### **26. Are there Rules in relation to price discrimination?**

Yes. However, price discrimination is prohibited only where a firm is dominant in a relevant market and only where specific criteria are established. Section 9 of the Act sets out the elements of prohibited price discrimination, as well as certain

justifications that may be relied upon by a dominant firm, even where all the elements of prohibited price discrimination are present.

In order to establish that a dominant firm's actions constitute prohibited price discrimination, the Commission (or a complainant, as the case may be) is required to show that the conduct:

- relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; or
- is likely to have the effect of substantially preventing or lessening competition; and
  - involves discriminating between those purchasers in terms of the price charged;
  - any discount, allowance, rebate or credit given or allowed;
  - the provision of services in respect of the goods or services in question; or
  - the payment for services provided in respect of the goods or services.

Where these criteria are met, certain justifications may nevertheless be raised by the dominant firm as a defence to the allegation of unlawful price discrimination. Specifically, the dominant firm's conduct will not be unlawful if the firm can establish that the differential treatment:

- makes only reasonable allowance for differences in cost or likely cost;
- is a result of good faith attempts to meet a price or benefit offered by a competitor;
- is in response to changing conditions affecting the market for the goods or services, including:
  - any action in response to actual or imminent deterioration of perishable goods;
  - any action in response to the obsolescence of goods;
  - a sale pursuant to a liquidation or sequestration; or
  - a sale in good faith in discontinuance of business in the goods or services concerned.



The 2019 Amendment Act introduces certain changes to section 9 of the Act. These changes include:

- the introduction of prohibited price discrimination on the basis of an action by a dominant firm, as the seller of goods or services, that is likely to have the effect of impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons to participate effectively;
- the removal of the volume-based justification for differential treatment by a dominant firm in respect of a purchaser classified as a small and medium business or firm controlled or owned by an historically disadvantaged person;
- the introduction of a prohibition from avoiding selling, or refusing to sell, goods or services to a purchaser that is a small and medium business or a firm controlled or owned by historically disadvantaged persons; and
- a reverse onus on a dominant firm to show that its action did not impede the ability of small and medium businesses and firms controlled or owned by historically disadvantaged persons to participate effectively once a prima facie case has been established.

**27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

The Tribunal's decisions are available on its website ([www.comptrib.co.za](http://www.comptrib.co.za)). The Commission is the decision-maker in respect of intermediate mergers and is required by law to publish in the *Government Gazette* reasons for the prohibition or conditional approval of mergers. Information is made publicly available on the Commission's website in respect of mergers that have been notified to the Commission. It also publishes media statements in respect of significant decisions and other developments on its website.

The Commission's website is [www.compcom.co.za](http://www.compcom.co.za)

# eSwatini



**HENWOOD & COMPANY**

John Earl Henwood



### **1. What is the relevant competition legislation and who are the enforcers?**

The relevant competition legislation is the Competition Act, 8 of 2007 and the Competition Commission Regulations of 2010, promulgated in terms of the Act. The Act and the Regulations came into force on 1 April 2008 and June 2010, respectively, and are enforced by the Eswatini Competition Commission (the Commission) and the High Court.

### **2. Are there any proposed amendments or new regulations expected to come into force?**

There are no proposed amendments to the Act, nor are there new Regulations which are either being debated by Parliament or expected to come into force. However, the Commission has developed External Merger Guidelines, available on the Commission's website ([www.compco.co.sz](http://www.compco.co.sz)), to amplify what is provided in the Act and Regulations as well as to give a practical perspective on what is required of parties when submitting merger notifications to the Commission. There is a new Cartel Conduct and Corporate Leniency Policy that has been adopted by the Commission and is now in force. The policy has not been tested or challenged in Court or applied on a practical case by the Commission.

The Commission has indicated that there will be an amendment to the Act in order to do away with a number of conflicting provisions. These provisions have been highlighted in a paper published by the Commission titled: Domestication of the COMESA Competition Regulations by Amending the Competition Act of 2007 and Associated Competition Regulations Notice of 2010 (the Paper).

In the Paper, the Commission recognised that a number of amendments had to be effected in accordance with the COMESA Regulations starting with the need to amend a number of definitions, including the definition of:

- Joint venture;
- Merger;
- Dominant position;
- Secretariat and Commission;
- Person; and
- Enterprise.

The Paper also recognises that the Act and Regulations thereof do not explicitly consider joint ventures as transactions that may affect competition as those are known to have competitive consequences.

Proposals in the paper also relate to intellectual property, and how intellectual property should not be wholly exempt from the Act's application. Further, it is proposed that the legislation should be broadened to include confidential information outside of the merger context and that price fixing and other cartel behaviour should be deemed illegal without extrinsic proof of any surrounding circumstances such as lack of scienter (knowledge) or other defences and without any need for discussion of economic effect.

The Paper also seeks to recognise the effect of lack of thresholds in eSwatini as that is likely to affect investment in the Kingdom. It is also suggested that the fines that may be imposed under the Act are not likely to produce the desired effect. The authors have proposed that a fine be imposed and calculated from the date on which the transaction is implemented.

The Paper is merely a proposal of changes to the Act and does not entail that the changes will be effected as proposed.

### **3. Is the law actively enforced?**

Competition law enforcement is very robust at present in eSwatini. Since the appointment of the first Board of Commissioners in 2008, the Commission has developed its own policies and guidelines such as the External Merger Guidelines, Leniency Policy, guidance on market enquiries, SCC International guidelines – complaints and investigations, and continues to develop itself in line with regional and international best practice in competition enforcement and policy. Each year, the Commission records a significant increase in the number of merger notifications received varying both in size and complexity.

Enforcement is at its peak with two matters taken up to the High Court (*Ngwane Mills (Pty) Ltd v Eswatini Competition Commission and Others*: High Court Civil Case No. 2589/ 2011) and the Supreme Court (*Eagles Nest and Five Others v*

Eswatini Competition Commission and Another: Supreme Court Case No. 1/ 2014) level where competition law and policy have been challenged. In both cases, the Commission has been successful in defending its application and interpretation of the competition laws in eSwatini.

#### 4. What are the current priorities or focus areas of the competition authorities?

Generally the Commission does not make known to the public its priority areas. However, they do from time to time inform the public of certain sectors that are under investigation. There have been investigations in the medical and health sectors with particular reference to medical aid schemes, the insurance sector with specific references to exclusivity clauses, as well as the poultry and animal feed milling industries.

These investigations have been instituted from a number of different avenues ranging from consumer complaints, competitors and industry players to general public concerns. It is difficult to ascertain how far these investigations have been carried out in light of the fact that the Commission does not issue clear and concise reports in that regard.

The Commission has, however, entrenched its position on exclusivity clauses as expounded in the Act. The Commission published a document titled *Guidance on Market Enquiries* in February 2015 to give internal stakeholders some guidance on how the Commission conducts market enquiries, in order to complement the Commission's function and enforcement of merger control, curtailment of cartels and abuse of dominance as well as other anti-competitive practices prohibited under the Act. The document sets out, *inter alia*, a proposed strategy that the Commission intends to adopt in identifying priority markets that require the Commission's intervention in order to ensure the protection of consumer welfare.

#### 5. What kind of transaction constitutes a notifiable merger?

A transaction is required to be notified to the Commission if it (i) constitutes a merger (as defined in the Act); and (ii) constitutes economic activity within, or having an effect

within, eSwatini. Currently, there are no thresholds in place, which means that any acquisition of control, including restructuring and re-organising, that falls within a definition of a merger must be notified. However, the Commission has stated that there is no need to notify a transaction where neither party has a presence in eSwatini.

For the purposes of the Act, a 'merger' is defined as the acquisition of a controlling interest in:

- any trade involved in the production or distribution of any goods or services; or
- an asset which is, or may be, utilised for or in connection with the production or distribution of any commodity.

The Act does not define what a controlling interest is, but the Regulations provide that a person will be deemed to have a controlling interest if that person:

- beneficially owns more than one-half of the voting rights and/ or more than half of the economic interest of the target firm;
- is entitled to vote a majority of the votes that may be cast at a general meeting of the firm;
- is able to appoint or veto the appointment of a majority of the directors of the firm; or
- has the ability to exercise decisive influence over the policies of the firm and its strategic direction.

Any of the above elements qualifies as a controlling interest and will therefore constitute a notifiable merger and capture horizontal, vertical and conglomerate mergers. A transaction constituting a joint venture, sale of business or any other arrangement which results in the acquisition of *de facto* or *de jure* control of a firm, constitutes a notifiable merger.

#### 6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?

The Act and Regulations couch the definition of a merger in wide terms with the result that any economic activity which falls within the definition of a merger within the country, or having an effect in the country, requires prior notification to and approval of the Commission. There are currently no financial thresholds in place.





### **7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

Parties to a notifiable merger may not implement the merger before obtaining the requisite approval of the Commission. An implementation of a notifiable merger prior to obtaining approval from the Commission is viewed as a serious contravention of the Act and any party found to have so contravened the Act, attracts penal and criminal sanctions of a fine not exceeding SZL 250 000, or imprisonment for a term not exceeding five years, or both.

The Act further provides that where the offence is committed by a body corporate, every director and officer of such body corporate or, if the body of persons is a firm, every partner of that firm, shall be guilty of that offence, provided that such director, officer or partner shall not be guilty of the offence if he or she proves on a balance of probabilities that such offence was committed without his or her knowledge or consent or, that he or she exercised all due diligence to prevent the offence. The liability extends to agents or attorneys representing the corporate entities in the transaction.

The Commission now adopts a strict approach towards entities that implement notifiable transactions without the prior approval of the Commission and in addition to issuing a demand for notification to the entities; the Commission further imposes a fine against the entities in accordance with section 35(1) of the Competition Act.

### **8. What filing fees are required?**

The filing fee for a merger is based on the value of the combined annual turnover or assets of the merging enterprises. For the purposes of fees, mergers fall into two categories: small and large. A small merger is one where the parties' combined assets or turnover is valued at SZL 8 million or less. Small mergers are notifiable but are exempt from the payment of notification fees. In terms of Article 11 of the Regulations, the filing fee for all other mergers between entities whose assets or revenue over SZL 8 million is 0.1%

of the combined annual turnover or assets of the entities, whichever is greater, according to Article 11(8) of the Competition Regulations, 2010.

Put differently, the Regulations do not envisage the combination of the annual turnover of one firm and the assets of the other firm to determine the filing fee. The amount charged for notification of a merger is capped at SZL 600 000 for any single merger notified.

### **9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

If a foreign-to-foreign merger constitutes economic activity within, or having an effect within eSwatini, notification is required. In terms of the Regulations (Regulation 21), the merging parties are required to ring-fence the transaction and set out in their filing how their interest in eSwatini will be insulated from the implementation of the worldwide transaction. They are also expected to make legally enforceable undertakings that will ensure that their interest in eSwatini will not be affected by the closing of the transaction in other jurisdictions. The ring-fencing procedure is not *per se* done in the form of an application requesting authorisation from the Commission to ring-fence. Rather, it is more of an informative position communicated to the Commission by the parties for notice.

### **10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

The Commission has adopted and encourages pre-notification meetings. These meetings serve the purpose of, firstly, to guide the parties on the filing where the parties seek such direction; and secondly, to ascertain if all the requirements of the Act and Regulations have been complied with by the notifying parties before the Commission accepts the filing and signs a Completeness of Filing form (Form 6, or an affidavit, as provided for in Regulation 24) with the appointed representative of the parties. There is no obligation on the parties to hold a pre-notification meeting for guidance, but it is now mandatory to meet with the Commission and sign the Completeness of Filing form before the Commission will accept that a transaction has been notified.

### **11. To what extent are non-competition factors relevant to the assessment of a merger?**

While the Commission's focus is on anti-competitive practices which have, as their object or effect, the prevention, restriction or distortion of competition to an appreciable extent in the country, non-competition factors are relevant. The Commission has previously considered issues of public interest and policy such as employment (i.e. whether or not the employees will be retained by the merged entity) and technological benefits, when considering whether or not to approve a merger, with or without conditions.

### **12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

In Part 4 of Form 3, in which the parties are required to submit a notification of a transaction, the Commission requires from each of the parties, a list of their five largest customers and their contact details. The Commission contacts these customers to request their submissions regarding the proposed transaction which are taken into consideration insofar as they are relevant to any competition concerns that the Commission may need to look into in assessing whether the transaction should be approved without conditions, with conditions, or prohibited altogether. The Commission may also contact competitors or market players for information which may or may not be taken into account depending on its nature and relevance.

### **13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

Regulation 22 provides that any person, including a person not involved as a party in a proposed merger, may voluntarily submit any document, affidavit, statement or other relevant information at any time before the conclusion of the merger investigation. Regulation 26 also provides for third-party interventions, which may be made orally or in writing. On rare occasions, employees of the

merging entities are allowed to make submissions on the proposed merger and, if valid employment concerns arise, the Labour Commission is required to intervene and look into these.

### **14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

Regulation 28 makes provision for oral hearings. A party to a merger may request an oral hearing after the investigator has finalised the report on the merger investigation, but before the Commission has taken a decision on the merger.

### **15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

Section 40 of the Act provides that a party who is aggrieved by the decision of the Commission made under the Act or the Regulations can appeal to the High Court. In terms of the Constitution, the High Court is empowered to review decisions of the Commission. The appeal must be lodged within 30 days of service of notice of that decision to the party. An appeal against a decision of the Commission does not automatically stay the decision of the Commission unless such stay is granted by the High Court.

### **16. Does the legislation apply to joint ventures?**

The Competition Act is not clear about joint ventures; however, transactions constituting a joint venture, sale of business or any other arrangement which results in the acquisition of de facto or de jure control of a firm, constitutes a notifiable merger. Accordingly, the Act covers all agreements or arrangements between parties in a vertical merger, such as:

- joint ventures;
- distribution arrangements;
- franchise agreements; and
- exclusive supply arrangements.



**17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

The Act, at section 30 (5), specifically lists the following as prohibited conduct:

- price fixing;
- collusive tendering;
- bid-rigging;
- market and customer allocation agreements;
- sales or production quota allocation arrangements; and
- any collective action to enforce arrangements.

The Commission has not in the past conducted any investigations on cartel conduct. Its Cartel Conduct and Corporate Leniency Policy has been finalised and published.

**18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?**

The Act confers broad investigative powers on the Commission, including powers of entry and inspection (dawn raid) to search for information in relation to cartel conduct. The Commission may also, for the purposes of carrying out its functions, summon and examine witnesses and call for and examine documents, hear oral evidence, and call upon any company to provide information in relation to an industry under investigation. This has to be done under an issued search warrant. Further to these powers, the new leniency policy lays out conditions precedent to a grant of immunity to a party involved in cartel conduct as well as requirements that may qualify that party for a reduced penalty. This has yet to be exercised in eSwatini.

**19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

Any conduct that is in contravention of the Act attracts criminal and penal liability of a fine of SZL 250 000 or imprisonment not exceeding five years, or both. Cartel conduct falls within such prohibited conduct.

The Act further provides that where the offence is committed by a body corporate, every director and officer of such body corporate or, if the body of persons is a firm, every partner of that firm, shall be guilty of that offence, provided that such director, officer or partner shall not be guilty of the offence if he/ she proves on a balance of probabilities that such offence was committed without his/ her knowledge or consent, or that he/ she exercised all due diligence to prevent the Commission of the offence. The Commission has published a leniency policy on its website.

**20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

The Commission is empowered to authorise any act if it considers that the advantages to the country outweigh the disadvantages. However, it is not empowered to authorise conduct which is prohibited in terms of the Act.

**21. Is minimum resale price maintenance prohibited?**

Yes, resale price maintenance is specifically prohibited in section 31(f) of the Act.

**22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

Exclusive agreements are not per se prohibited under the Act unless they limit access to markets or otherwise unduly restrain competition in the country. Neither the Act nor the Regulations specify the factors to be considered when determining the lawfulness or unlawfulness of exclusive agreements. However, the Commission considers pro-competitive factors and if these outweigh the anti-competitive effects, the agreements will be allowed. Section 30(1) of the Act prohibits 'any category of agreements, decisions, concerted practices which have, as their object or effect, the prevention, restriction or distortion of competition to an appreciable extent in the country or in any part of it...'

The Commission has in practice applied and enforced this section in one matter involving a lease agreement between The Gables and Hammond Brothers t/a eZulwini Pick n Pay Supermarket. The lease agreement contained an exclusivity clause between the parties and the Commission concluded in its findings that such a clause contravened section 30(1) and was thus prohibited. Applying the rule of reason principle, the Commission in its investigation sought to ascertain whether the competitive gain of the clause outweighed its anti-competitive effect and concluded that the clause was invalid and of no force or effect as it was inconsistent with the spirit of the Act.

**23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

Dominance of a firm is not per se prohibited but the Act prohibits the abuse of a dominant position. Although there are no thresholds determinative of dominance, the Act defines a dominant position as a position in a market in which an enterprise as a supplier or an acquirer of goods and services, either alone or together with any interconnected body corporate, is in a position to act independently of competitors and consumers over the production, acquisition, supply, or price of goods or services in that market.

Further, the Act prohibits a firm from engaging in specific acts if they limit access to markets or otherwise unduly restrain competition, or have or are likely to have, adverse effects on trade or the economy in general, such as:

- predatory behaviour towards competitors;
- discriminatory pricing and discrimination in the supply and purchase of goods;
- making the supply of goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods or the provision of competing goods or other services;
- making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier;
- imposing restrictions as to where or to whom or in what form or quantities goods supplied or other goods may be sold or exported;

- resale price maintenance;
- trade agreements fixing prices between persons;
- refusals to supply goods or services to potential purchasers; and
- denials of access to arrangements or associations which are crucial to competition.

These prohibitions appear to apply to all firms, not only to firms holding a dominant position.

The Act specifically prohibits dominant firms from engaging in conduct with the object or effect of preventing or restricting competition, including:

- price fixing;
- collusive tendering and bid-rigging;
- market or customer allocation agreements;
- collective action to enforce arrangements; and
- the allocation by quota of sales or production, subject to any law to the contrary.

**24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

There are currently no ongoing investigations that we are aware of, but it is only a matter of time before the competition authorities turn the spotlight onto the position of dominant players in the economy.

**25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

The Act generally covers all conduct that is in contravention of the Act (anti-competitive trade practice) and imposes a penal sanction of up to SZL 250 000 or imprisonment for a period not exceeding five years, or both.

The Act further provides that where the offence is committed by a body corporate, every director and officer of such body corporate or, if the body of persons is a firm, every partner of that firm, shall be guilty of that offence, provided that such director, officer or partner shall not be guilty of the offence if he/ she proves, on a balance of probabilities that such offence was committed without his/ her knowledge or consent or, that he/ she exercised all due diligence to prevent the Commission of the offence.



Additionally, the Commission is empowered to impose an administrative penalty not exceeding 10% of the total turnover of a company to ensure compliance with the Act. Where the company has subsidiaries, all the companies belonging to the same economic unit will be considered for the computation of the penalty.

**26. Are there Rules in relation to price discrimination?**

Yes. Section 31(b) of the Act contains provisions which prohibit price discrimination.

**27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

The Commission does not publish its decisions on its website ([www.compco.co.sz](http://www.compco.co.sz)); however, other information, including the Act, Regulations, policies and press statements, is published there. The Commission has also established an Advocacy department through which it hopes to interact with the public and stakeholders. Occasionally, the press publishes the outcomes of approved transactions together with the conditions attached to the transaction by the Commission.

**28. General**

It is proposed that the current legislation be amended to provide *inter alia*:

- to change the method of calculating filing fee to move from a percentage based to a set amount rather than a sliding scale based on turnover;
- specific exemptions be set out from premerger notification, e.g. purchases in the ordinary course of business, inheritance transfers be specifically exempted;
- that the criminal sanctions provided for in the current Act be removed and replaced with penal sanctions tied to turnover.
- that thresholds be set such that transactions below a minimum threshold need not be notified in order to do away with the current approach that every transaction which is defined as a merger, is notifiable; and
- that a streamlined and simpler process of notification be adopted particularly for the smaller mergers.

These and other amendments have been formulated and the Commission is now in the process of seeking stakeholder comment and input. We expect that an amended Act will most probably be published during the course of this year.



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# Tanzania



**BOWMANS**

Wilbert Kapinga |  
Charles Mmasi



### **1. What is the relevant competition legislation and who are the enforcers?**

The relevant competition legislation includes the Fair Competition Act, 2003 (the FCA), the Fair Competition Procedure Rules, 2018 and the Fair Competition Tribunal Rules, 2012. The FCA deals with both competition law and consumer protection law, and is enforced by the Fair Competition Commission (the FCC). The decisions of the FCC may be taken on appeal or review to the Fair Competition Tribunal (FCT) established under the FCA (although certain decisions relating to telecommunication spectrum management and licensing may be taken on appeal to the High Court of Tanzania). Decisions by the FCT may be reviewed by the Court of Appeal of Tanzania (the CAT), while decisions of the High Court may be taken on appeal or review to the CAT. The CAT is the final appellate Court in Tanzania.

Competition and consumer protection in the energy and water sectors are regulated by the Energy and Water Utilities Regulatory Authority (EWURA) under the Energy and Water Utilities Regulatory Authority Act, 2001. Decisions of the EWURA may also be taken on appeal to the FCT.

The Land Transport Regulatory Authority (LATRA) deals with competition and consumer protection in land transport sector under the Land Transport Regulatory Authority Act, 2019. Decisions of LATRA may also be taken on appeal to the FCT.

Mergers and acquisitions in the banking sector are notifiable to the FCC. However, in terms of the Banking Financial Institutions Act, 2006, the primary regulator and approving authority of mergers and acquisitions of banking and financial institutions is the Bank of Tanzania.

Decisions of other regulators, such as the Tanzania Civil Aviation Authority established under the Civil Aviation Act, 2006, may be taken on appeal to the FCT.

Mergers and acquisitions in the electronic and postal sector are notifiable to the FCC. However, the primary regulator of the electronic and postal communications sector is the Tanzania

Communications Regulatory Authority as established under the Electronic and Postal Communications Act, 2010.

### **2. Are there any proposed amendments or new regulations expected to come into force?**

A draft amendment of the FCA is pending parliamentary process. If passed the FCA will be renamed as the Fair Competition and Consumer Protection Act. The amendment is intended to address institutional weaknesses in the FCC, introduce agency effectiveness and strengthen anti-competitive trade clauses. It is expected that criminal sanctions for cartel behaviour will be included and references to intention and negligence in determining anti-competitive conduct will be removed.

### **3. Is the law actively enforced?**

The FCC is an active regulator in relation to the control of transactions required to be notified to it under the FCA's merger control provisions. In recent years, the FCC has vigorously pursued investigations of potentially anti-competitive behaviour and consumer complaints, and has imposed various sanctions for violations of the law. Some recent investigations include those in the mining, beer, oil marketing and insurance industries.

### **4. What are the current priorities or focus areas of the competition authorities?**

The current priorities of the competition authorities are to ensure a level playing field in the market and to showcase Tanzania as a viable investment environment with an efficient regulatory framework empowered to restrain counterfeit trade, cartels and monopolistic tendencies.

### **5. What kind of transaction constitutes a notifiable merger?**

A merger is required to be notified to the FCC if it (i) constitutes a merger; and (ii) meets the relevant pecuniary thresholds. For the purposes of the FCA, a 'merger' is defined as an acquisition of shares, a business or other assets, whether inside or outside of Tanzania, resulting in the change of control of a business, part of a business or an asset of a business in Tanzania.

## 6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?

According to the Fair Competition (Threshold for Notification of a Merger) (Amendment) Order, 2017 (GN No. 222), which came into effect on 2 June 2017, the current pecuniary thresholds are TZS 3.5 billion determined from the combined market value of assets or turnover of the merging parties. The turnover is based on the latest audited financial statements of the merging parties.

## 7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?

The merger regime in Tanzania is suspensory. A notifiable merger is prohibited unless at least 14 days have lapsed after a certificate of complete filing has been given by the FCC following the filing. The FCC has to decide within the 14 days whether the proposed merger should be investigated. If it is determined that the merger should be examined, such merger or acquisition is not permitted to take place for a period of 90 days to allow the FCC to conduct and complete its examination of the proposed merger. The FCC may extend the period of investigation for a further 30 days after the first 90 days. It is an offence to give effect to a notifiable merger that has not been notified to the FCC at least 14 days prior to its implementation.

The failure to notify a notifiable merger, or the prior implementation of a notifiable merger, constitutes an offence in terms of the FCA. The FCA grants the FCC power to impose a fine of between 5% and 10% of an entity's annual turnover for failure to notify a merger. The FCC Rules of Procedure, 2018 create an obligation on the acquiring firm to notify a notifiable merger. The FCC may impose a penalty 'where a person commits an offence against the Act...' or is ...'involved in such an offence'.

## 8. What filing fees are required?

The fees payable to the FCC for filing merger notifications are calculated based on the combined market value of assets or turnover of the merging parties as set out in their latest audited accounts, whichever is higher. For merging parties with an annual turnover:

- of TZS 3.5 billion to TZS 25 billion, the fee is TZS 25 million;
- exceeding TZS 25 billion but less than TZS 100 billion, the fee is TZS 50 million; and
- of TZS 100 billion or above, the fee is TZS 100 million.

The fee for filing an application for exemption of an agreement is set at TZS 8 million plus an annual fee of TZS 2 million multiplied by the number of years requested for exemption. The fee payable to the FCC for reviewing an agreement is TZS 8 million. The fee for filing a complaint under the FCA is TZS 500 000.

However, no fee is chargeable to:

- a person submitting information concerning an alleged prohibited practice; or
- a consumer submitting a complaint against an alleged prohibited practice.

There is a fee of TZS 3 million for a withdrawal of a complaint. In cases where an application is refused, the filing fee paid for the application is non-refundable.

## 9. Is it necessary to obtain approval for foreign-to-foreign mergers?

It is necessary to obtain approval for a foreign-to-foreign merger if such a merger (i) involves an acquisition of shares, a business, or other assets; (ii) results in the change of control of a business, part of a business or an asset of a business in Tanzania; and (iii) meets the applicable threshold.



**10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

The Tanzanian fair competition legal regime does not provide for pre-notification contacts with the competition regulatory authorities, however, the FCC may be approached for guidance and consultation in circumstances where the merger is considered complex.

**11. To what extent are non-competition factors relevant to the assessment of a merger?**

Non-competition factors such as market and labour efficiencies of a transaction may be taken into account by the FCC in the assessment of a merger. Such considerations may lead the FCC to approve mergers subject to conditions relating to these factors.

**12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

The competition authorities procure submissions from the public and industry and consumer organisations which the authorities may consider to have an interest in the proposed transaction. The interventions of interested persons and other stakeholders are taken into consideration in the authorities' decision-making process.

**13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

Any other person, including competitors, consumers, employees and suppliers who demonstrates sufficient interest in the merger may make submissions to the competition authorities.

**14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

In practice the FCC, of its own volition or upon request, gives merging parties an opportunity to make submissions in support of the merger notification prior to prohibiting or approving a merger with or without conditions.

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

Any party aggrieved by the decision of the FCC may lodge an appeal with the FCT.

**16. Does the legislation apply to joint ventures?**

The FCA applies to joint ventures that are caught by the definition of a merger and meet the thresholds for mandatory notification to the FCC. The FCA prohibits giving effect to an agreement if the object, effect or likely effect of the agreement is to appreciably prevent, restrict or distort competition.

**17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

The FCA regulates prohibited practices and specifically prohibits certain horizontal restrictive practices (unlawful conduct between competitors). The FCA prohibits any agreement (an arrangement or understanding, formal or informal and written or unwritten) that has the object, effect or likely effect of appreciably preventing, restricting or distorting competition, including:

- price fixing between competitors;
- collective boycott by competitors;
- restricting output between competitors; and
- collusive bidding or tendering.

There are examples of pending proceedings before the FCC pursuing firms for alleged cartel conduct.

### **18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?**

Section 71 of the FCA empowers the FCC to summon any person who it believes is able to provide information, produce a document or give evidence that will assist in an investigation and will require the person(s):

- to furnish the information in writing signed by him or her, or, in the case of a body corporate, signed by a competent authorised officer or a legal officer of the body corporate;
- to produce the document to the FCC; or
- to appear before the FCC to give evidence orally.

Searches and seizures may be conducted by the authorities upon obtaining a warrant from the FCT. Upon granting of the warrant, the police and members of the FCC are entitled to enter the relevant premises, conduct a search and make copies, or take extracts of documents therein.

### **19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

Any person who commits an offence under the FCA is liable to a fine ranging from 5% to 10% of the offender's annual turnover. The FCA also empowers the FCC to issue compliance and compensatory orders. In addition, if the FCC is satisfied that a monetary value can reasonably be placed on the damage, including loss of income suffered by a person as a result of an offence under the FCA, the convicted person may be liable to a fine of twice such monetary value, which the FCC may order to be paid to the person suffering the damage. Where a person charged with an offence under the FCA is a corporate entity, every person who, at the time of the commission of the offence, was a director, manager or officer of the corporate entity, may be charged jointly in the same proceedings with such corporate entity; and where the corporate entity is convicted of the offence, every such director, manager or officer shall be deemed to be guilty of that offence unless he or she proves that the offence was

committed without his or her knowledge or that he or she exercised all due diligence to prevent the commission of the offence.

There is no leniency policy in place in Tanzania.

### **20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

There is a mechanism under the FCA to apply to the FCC for an exemption of an agreement or merger. On application by a party to agreements affecting competition, or application by a party to a merger, the FCC may, upon satisfaction that the agreement or merger results or is likely to result in benefits to the public, grant a conditional or unconditional exemption. In the case of an exemption for an agreement, the exemption shall not exceed a period of five years. As for applications for a merger exemption, the period of exemptions is not to exceed one year from the date the exemption is granted.

### **21. Is minimum resale price maintenance prohibited?**

The FCA does not refer to minimum resale price maintenance specifically. However, minimum resale price maintenance may amount to price fixing, price restricting, the control of prices, tariffs, surcharges or other charges which constitute contraventions in terms of the FCA.

### **22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

Exclusive agreements whose object, effect or likely effect is to appreciably prevent, restrict or distort competition are unlawful. However, such agreements would not be unlawful if (i) none of the parties to the agreement has a dominant position in a market affected by the agreement; and (ii) either the combined market shares of the parties to the agreement of each market affected by the agreement is less than 35%





or none of the parties to the agreement are competitors. In circumstances where an exclusive agreement is unlawful on account of violating the FCA, the agreement will still be legally enforceable if the clauses of the agreement creating exclusivity are severable from the rest of the agreement.

**23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

The FCA prohibits the abuse of a dominant position. A person is regarded as dominant in a market if (i) acting alone, that person can profitably and materially restrain or reduce competition in that market for a significant period of time; and (ii) that person's share of the relevant market exceeds 35%.

In determining whether a person holds a dominant position in a market, the following factors are taken into account:

- competition from imported goods or services supplied by persons not resident or carrying on business in Tanzania; and
- the economic circumstances of the relevant market, including:
  - the market shares of persons supplying or acquiring goods or services in the market;
  - the ability of those persons to expand their market shares; and
  - the potential for new entries into the market.

A dominant person in a market is prohibited from using that position of dominance if the object, effect or likely effect of the conduct is to appreciably prevent, restrict or distort competition.

**24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

There are no publicly reported cases of the FCC pursuing any firms for alleged abuse of a dominant position.

**25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

The FCA imposes fines upon persons who commit an offence under the FCA. The fine levied under the FCA is between 5% and 10% of that person's annual turnover. Where a person charged with an offence under the FCA is a corporate entity every person who, at the time of the commission of the offence, was a director, manager or officer of the corporate entity, may be charged jointly in the same proceedings with such corporate entity; and where the corporate entity is convicted of the offence, every such director, manager or officer shall be deemed to be guilty of that offence unless he/ she proves that the offence was committed without his/ her knowledge or that he/ she exercised all due diligence to prevent the commission of the offence.

**26. Are there Rules in relation to price discrimination?**

There are no Rules in the legislation relating to price discrimination.

**27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

The FCC website publishes selected decisions under the public register section. Further, any person interested in a decision of the FCC may request a copy of the decision from the director general of the FCC.

The FCC's webpage is [www.competition.or.tz](http://www.competition.or.tz)

# Uganda



**BOWMANS**

David Mpanga



### 1. What is the relevant competition legislation and who are the enforcers?

There is no general law that currently prescribes thresholds for mandatory merger notification in Uganda.

To date, no legal regime has been put in place governing competition law in Uganda. There is the Competition Bill, 2004 (the Bill), which is yet to be tabled before Parliament. However, specific laws regulate competition in particular sectors. Examples include:

SECTOR	LAW	REGULATOR
Banking	Financial Institutions Act, 2004 (FIA)	Central Bank of Uganda (Central Bank)
Capital markets	Capital Markets (Takeover and Mergers) Regulations, 2012	Capital Markets Authority
Communications	Communications Act, 2013, and the Communications (Fair Competition) Regulations, 2005 (collectively, the Communications Act)	Uganda Communications Commission
Energy/ electricity	Electricity Act, 1999 (Cap. 145) (Electricity Act)	Electricity Regulatory Authority (ERA)
Insurance	Insurance Act No. 6 of 2017	Insurance Regulatory Authority
Petroleum	Petroleum Supply Act, 2003 (PSA)	Ministry of Energy and Mineral Development
Pharmaceuticals	National Drug Policy And Authority Act Cap. 206	National Drug Authority
Other products	The Uganda National Bureau of Standards Act Cap. 327	The Uganda National Bureau of Standards

### Proposed Laws/ Bills

The Bill was proposed to:

- foster and sustain competition in the Ugandan market in an attempt to protect consumer interest;
- safeguard the freedom of economic action of various market participants;
- prevent practices which limit access to markets or otherwise unduly restrain competition, affecting domestic or international trade or economic development; and
- establish a Uganda Competition Commission.

The Bill, if enacted into law, would provide for a uniform regulation of competition standards to provide recourse for sectors that do not specifically provide for it by statute. Unfortunately, the Bill has been shelved since 2004 to date.

In addition to sector-specific legislation, two regional treaties are relevant to competition law in Uganda:

- the East African Community Competition Act, 2006 which has the force of law in Uganda by virtue of the East African Community Act, 2002 (including the East African Community Competition Regulations, 2010); and
- the COMESA Competition Regulations, 2004 and the COMESA Competition Rules, 2004.

There are no institutions in place created under the East African Community Act to enforce the East African community competition regime.

See the separate section dealing with COMESA.

### 2. Are there any proposed amendments or new regulations expected to come into force?

There are no proposed amendments or new regulations that have come into force.

### 3. Is the law actively enforced?

At the sectoral level, the law is enforced and consumers as well as actors are gradually becoming aware of competition regulation and applying it.

The law is not actively enforced and is still undergoing several developments to create enforcement frameworks.

There is no dedicated domestic competition law regime in place. Our application of anti-trust law is restricted to sector-specific laws and regulators like the Uganda Communications Commission under the communications industry.

### 4. What are the current priorities or focus areas of the competition authorities?

Uganda hasn't developed a uniform domestic competition legal regime and as such, there is no regulatory body in place. The anti-trust regulation falls back to sector specific regulators which focus on any area that triggers unfair competition in their relevant industries.

For instance, the Uganda Communications Commission focuses on:

- anti-competitive agreements, decisions or concerted practices;
- abuse of a dominant position;
- anti-competitive mergers, take-overs, consolidations, acquisitions or such anti-competitive changes in the market structure resulting from changes in ownership, control, composition and structure of operators; and
- all other practices and acts with an effect on fair competition including unfair methods of competition, unfair or deceptive acts or practices, the purpose or effect of which is to distort competition in the communications market.

### 5. What kind of transaction constitutes a notifiable merger?

Generally, most of the sector-specific laws establish what constitutes a merger without prejudice to the common legal understanding or hallmarks of a merger, but do not focus on establishing what constitutes a notifiable merger.

We note some considerations of what constitutes a notifiable merger in the existing legal frameworks. For instance, Article 23(5) of the COMESA Competition Regulations of 2004 provides that a notifiable merger is one with a regional dimension with a value at or above the prescribed threshold.



The Communications sector provides a blanket or wide description of what constitutes a transfer. It includes change in control which is described to include so many types of transactions. For clarity, read section 42 (1), (2), (3) and (5).

- (1) A licence issued by the Commission shall not be transferred without the written consent of the Commission.
- (2) An operator may apply to the Commission in the prescribed manner for consent to transfer a licence.
- (3) An application under subsection (2) shall be accompanied by an application for grant of a licence by the person to whom the operator intends to transfer the licence.
- (5) For the purposes of this section—
  - (a) 'transfer of licence' includes the acquisition of control of the licence holder;
  - (b) 'control' as used with respect to any person shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management of that person, whether through the ownership of shares, voting, securities, partnership or other ownership interests, agreement or otherwise.

The clause requires an operator to notify the Commission if any transaction proposed to be undertaken will result in a change of control as widely described in section 42 (5) (b) which creates a wide interpretation of what would constitute a notifiable merger.

The law does not specifically set out which transactions constitute a notifiable merger. Most legislation stipulates activities and transactions that will require scrutiny for anti-trust elements but hardly set out what constitutes a notifiable merger.

#### **6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?**

There is no general law that currently prescribes the thresholds for mandatory merger notification in Uganda. However, certain sector specific legislation regulates this.

The Capital Markets (Takeovers and Mergers) Regulations of 2012 prescribe the threshold for a merger by prohibiting a person from exercising

effective control in the listed company they intend to takeover. These Regulations prohibit a person from acquiring voting rights of a listed company which together with voting rights already held by that person would entitle that person to exercise effective control in the listed company without complying with the takeover procedure.

Effective control is exercised where a person:

- holds more than 15% but less than 50% of the voting rights of a listed company, and who acquires in any one year more than 5% of the voting rights of such company;
- holds 50% or more of the voting rights of a listed company and acquires additional voting rights in the listed company;
- acquires a company that holds effective control in the listed company or together with the voting rights already held by an associated person or related company, resulting in acquiring effective control; or
- acquires a shareholding of 20% or more in a subsidiary of a listed company that has contributed 50% or more to the average annual turnover in the last three financial years of the listed company preceding the acquisition.

This is enhanced by the Capital Markets Authority (Amendment) Act of 2016, according to which the Capital Markets Authority may monitor takeovers and mergers in respect of listed companies in Uganda and adopt measures for the supervision and regulation of takeovers and mergers in order to protect the interests of investors and provide for orderly and well-informed capital markets. The same authority may make regulations providing for takeovers, mergers and acquisitions of securities in listed companies.

Additionally, regional laws provide specific Rules in relation to thresholds for mandatory merger notification. Rule 4 of the COMESA Rules on the Determination of Merger Notification Threshold (as amended) provides that thresholds for merger notification are that the combined annual turnover or combined value of assets (whichever is higher) in the Common Market of all parties to a merger should be equal to or exceed (COMESA dollars) COM\$ 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 should be equal to or exceed COM\$ 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.

**7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

Except as required by particular sector legislation, there is no general law in Uganda that prohibits the pre-implementation of a merger. For instance;

- Insurance Regulatory Authority – sections 75 and 100 of the new Act require notification to the authority and its approval before any change in control – this includes mergers.
- Bank of Uganda – section 19 (1) restricts or limits a group of related persons from collectively owning more than 5% in the shareholding of a financial institution without express approval from BOU in writing.
- Uganda Communications Commission – Operators are not allowed to engage in activities that may lead to unfair competition like mergers. Regulation 6(6) of the Fair Competition Regulation prohibits pre-implementation of mergers prior to authorisation by the Commission.

**8. What filing fees are required?**

There is no general law in Uganda that provides for the payment of filing fees. However, regional legislation such as the COMESA Competition (Amendment) Rules, 2014 requires notification of a merger to be accompanied by a fee calculated at 0.1% of the combined annual turnover or combined value of assets in the Common Market of the parties to a merger, whichever is higher: provided that the fee does not exceed COM\$ 200 000 (COMESA dollars).

**9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

This depends on the regulatory framework of the sector. Where the operations of parties or ownership of a locally operating company are affected by a foreign-to-foreign merger, notification will be required. For as long as the

merger will affect the ownership, structure and management of a company operating in Uganda, approval is required. By operation, we focus on licensed sectors such as insurance, communication, etc. For instance, a substantial foreign shareholder merging with a foreign entity will trigger notification requirements, since that foreign party is a controlling member of the locally licensed entity. For instance, the Uganda Communications Act specifically gives a wide consideration as to what constitutes a transfer of licence to include the acquisition of control of the licence holder with ‘control interpreted as the possession, directly or indirectly, of the power to direct or cause the direction of the management of that person, whether through the ownership of shares, voting, securities, partnership or other ownership interests, agreement or otherwise.

**10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

The various sector-specific laws do not provide for pre-notification meetings. However, subject to confidentiality agreements that may relate to the proposed transaction, it is possible to approach authorities to hold a pre-notification meeting in respect of a proposed transaction.

It is noteworthy that some sector regulators allow sector players to contact the regulator for guidance on a potential or proposed transaction that is likely to create completion or raise concerns. For instance, in the communications sector, the Communications (Fair Competition) Regulations allow for an operator to notify the Commission for guidance on whether the operator’s agreement and conduct comply with the provisions of fair competition under the Act or the rules of fair competition under these Regulations.

The guidance by the Commission may identify whether the agreement or conduct is likely to infringe any relevant provisions of fair competition under the Act or these Regulations; or whether the conduct or agreement would be likely to be granted an exemption if an application in that regard, was made.



However, seeking guidance may limit an organisation's options to the view of the Regulator. That is, where guidance is given, the Commission does not re-open a case unless:

- there are reasonable grounds for believing that there has been a material change of circumstances since the guidance was given; or
- there is reasonable suspicion that materially incomplete, misleading or false information was given; or
- a complaint is received from a third party.

#### **11. To what extent are non-competition factors relevant to the assessment of a merger?**

Given that no general law has been enacted, non-competition factors for the assessment of a merger are largely dependent on established sector-specific laws or policies. In certain sectors, non-competition factors are relevant to the assessment of a merger while other sectors are silent on same. For instance, under the Uganda Communications Act, section 54 provides for exceptions to fair competition considerations where the Commission is satisfied that the competition act or omission:

- contributes to the improvement of any goods or services;
- contributes to the promotion of communications services in Uganda in accordance with sector laws and laws of Uganda;
- does not impose on the parties restrictions which are not indispensable to attaining the objective specified in (i) and (ii) above; and
- gives the parties the ability to substantially reduce competition in respect of the goods or services in question.

It is on a case by case basis for each sector and at the discretion of the regulator.

#### **12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

There is no competition authority in place in Uganda as there is no general law applicable to competition. However, some established

sector regulations provide for the engagement of the public which includes both customers and competitors. In some cases, the option is at the discretion of the Regulator to exercise that consultation as it deems fit. For instance; In the Communications (Fair Competition) Regulation, regulation 8 (3)-(5) where an exemption application is filed with the Commission, the commission has the discretion to consult the public and invite comments on the effect of the application. The Insurance Act, 2017 also requires the applicants for a merger to notify the public by publishing notice of the merger/ amalgamation through the *Uganda Gazette*. This notice requires affected persons in the public to submit their concerns to the Insurance Regulatory Authority in writing within 30 days.

#### **13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

As previously mentioned, there is no competition authority in place in Uganda as there is no general law applicable to competition. This will therefore depend on the sector regulation available. For instance, in the communications sector, the commission can consult the general public which includes employees. In the insurance sector, members of the public concerned or aggrieved by a merger/ amalgamation can submit their concerns in writing. Furthermore the Employment regime, on its own, provides for protection of employees during such transitions. Section 28 of the Employment Act, 2006 requires consent of employees to be sought before transfer of their contracts from one employer to another in cases of a merger or acquisition.

#### **14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

This will depend on established specific sector regulation. In the communications sector, there are no express provisions accommodating an opportunity for the merging party to make representations before a decision is made. Regulation 5 of the Uganda Communications (Fair Competition) Regulations 2005 provides merging parties the opportunity to make

representations before the Communications Commission. Such parties may appear before the Communications Commission either in person or through an advocate.

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

Where a merger has been prohibited in terms of a sector-specific law, an aggrieved party can challenge the decision of the relevant authority by way of appeal to the High Court of Uganda.

**16. Does the legislation apply to joint ventures?**

Yes, anti-trust legislation covers joint ventures since a joint venture changes the structure or control of a company.

**17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

Uganda does not have specific legislation defining what constitutes a cartel and setting out restrictions on cartels. However, some sector specific legislation restricts industry operators from engaging in practices that may amount to, or create, cartel practices.

For instance, while the Petroleum Supply Act (PSA) regulates prohibited practices and specifically prohibits certain horizontal restrictive practices (unlawful conduct between competitors), the Communications Act and Electricity Act each contain an umbrella provisions within which horizontal restrictive practices may fall.

The PSA is more expressive as it stipulates that participants in the petroleum supply chain shall not form cartels or attempt to control prices or create artificial shortages of products or services, or engage in any other restrictive practices or any other acts or omissions which are contrary to the principles of fair competition or are intended to impede the functioning of the free market for petroleum products in Uganda.

The Communications Act provides that an operator shall not engage in any activities, whether by act or omission, which have, or are intended to or likely to have, the effect of unfairly preventing,

restricting or distorting competition in relation to any business activity relating to communication services, including entering into any agreement or engaging in any concerted practice with any other party, which unfairly prevents, restricts or distorts competition. This wording is inclusive of all business conduct deemed to undermine the sector and would logically, include cartels.

The Electricity Act provides for a breach of fair competition. A licensee is in breach of fair competition if the licensee conducts any activity, alone or together with others which, in the opinion of the Electricity Regulatory Authority (ERA), is intended to or is likely to have the effect of restricting, distorting or otherwise preventing competition in connection with any activity licensed under the Electricity Act or is prejudicial to the interests of consumers. This provision does not expressly identify cartels but highlights that any business practices/ conduct that has the same effect creates unfair competition and is prohibited.

We are not aware of any instances in Uganda where the authorities in a given sector have pursued firms for engaging in cartel conduct. Further, we are also not aware of any specific complaints that have been made to authorities in respect of cartel conduct by operators in regulated industries.

**18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?**

There is no general law that specifically confers investigative powers on any authority to investigate cartels. However, sector-specific legislation confers some powers of investigation on officials with regard to business conduct which includes anti-competitive conduct in general. Although most legislation does not out rightly mention cartels, the description of prohibited business conduct can be construed to include the operations of cartel.

In terms of the Electricity Act, the ERA may investigate any licensee or systems operator who commits any act or omission in breach of fair competition. Under section 74(2) of the Electricity Act, any person with a complaint of breach of fair competition against a licensee shall lodge a complaint to the ERA and the ERA shall, if it appears that a breach of competition has been committed, investigate the act or omission and, where appropriate, issue an order to remedy the breach.



The ERA may appoint inspectors for the purposes of verifying compliance by a licensee with the Electricity Act. An inspector may, *inter alia*, enter and inspect at any reasonable time any premises owned by or under the control of a licensee in which the inspector believes, on reasonable grounds, there to be a document or information relevant to the enforcement of the Electricity Act and examine the document or information or remove the document or information for examination or reproduction, as the case may be.

Under section 8 of the FIA, the Central Bank may, if it has reason to believe that a person is transacting or carrying out a prohibited practice, authorise an officer of the Central Bank to:

- enter into any premises which the Central Bank has reason to believe are occupied or used by any person for an unauthorised purpose;
- search any book, record statement, document or other item used;
- seize or make a copy of any book, record or statement;
- question any person who is present on the premises, auditors, directors, members or partners of any person conducting business on the premises;
- examine any book, record, statement, document; or
- require any person to produce the book, record, statement, document to the officer of the Central Bank issuing the notice.

The Communications Act empowers the Communications Commission to appoint inspectors who are furnished with powers of search and seizure for the purposes of verifying compliance with the provisions of the Communications Act. An inspector may, *inter alia*, enter and inspect at any reasonable time any place owned by or under the control of an operator in which the inspector believes on reasonable grounds there to be any document, information, or apparatus relevant to the enforcement of the Communications Act and an inspector may examine the document, information or apparatus or remove it from examination or reproduction, as the case may be.

The Insurance Regulatory Authority also has the mandate to appoint a special investigator under section 123 to investigate control of an insurance company or what may be deemed as prohibited business, among several other things.

**19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

There are no established general laws against cartels. We rely on reference to prohibited types of business conduct in sector regulations. For instance, the PSA imposes criminal sanctions against any person who breaches its fair competition provisions (see question 17). The PSA prescribes a fine not exceeding UGX 2.4 million, or imprisonment not exceeding five years, or both, upon conviction for a contravention. The legislation also provides that where a person charged with any offence under the PSA is a body corporate (although the definition of a body corporate is unclear), every person who, at the time the offence was committed, was a director, manager, secretary or similar officer or agent of that body corporate, may be charged jointly or severally in the same proceedings with the body corporate and on conviction, is liable to the penalty prescribed for the offence. In addition, any partner in an unincorporated enterprise, firm or joint venture shall be jointly and severally liable for the acts or omissions of any other partner insofar as the acts concern the enterprise, firm or joint venture.

Notwithstanding the above, a director, manager, secretary or similar officer, partner or agent, will not be liable if he or she proves to the satisfaction of the Court that the act in question was committed without his/ her knowledge, consent or connivance, and that he/ she took all necessary steps to prevent the commission of that act, having regard to all the circumstances.

An employer who employs in or for his/ her operation or place of business any agent, clerk, servant or other person, is answerable and liable for any act or omission of an employee that constitutes a contravention of the PSA, insofar as it concerns the business of the employer.

Any holder of a permit or licence, any consumer of a petroleum product, or any recognised consumer organisation may initiate civil legal proceedings before a Court of competent jurisdiction.

### **CAPITAL MARKETS (TAKEOVER AND MERGER) REGULATIONS 2012**

Although not specifically penalising cartel conduct, in terms of Regulation 35 of the Capital Markets (Takeover & Merger) Regulations 2012, where a person refuses or fails to furnish any document, paper or information required under the Regulations, the Capital Markets Authority may, if it is satisfied after giving the person an opportunity to be heard that the refusal or contravention was wilful, impose a civil penalty or sum of money not exceeding 200 currency points as may be specified in the order. A currency point is worth UGX 20 000.

### **COMMUNICATIONS ACT**

The Communications Act does not impose specific penalties on firms for their participation in cartel activities, however, it imposes a general sanction of a fine not exceeding UGX 600 000 upon conviction for a contravention. In addition, a person who sustains loss or damage as a result of any act or omission that is contrary to the Communications Act may, in a Court of competent jurisdiction, sue for and recover the loss or damage suffered from any person who engaged in, directed, authorised, consented to and/ or participated in the act or omission.

### **ELECTRICITY ACT**

The Electricity Act provides that a licensee found to be in breach of fair competition by the ERA shall pay such amount of compensation as the ERA may determine to the consumer for any loss caused to him/ her.

There is currently no leniency policy in place for cartel conduct in Uganda.

### **20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

There is currently no specific legislation in this regard. However, sector-specific legislation makes provision for exemptions in limited circumstances:

- The PSA provides for exemption from its provisions in the case of a declaration of a petroleum supply emergency. Save for this, prices for petroleum products through the supply chain are governed by forces of supply and demand in a free and competitive market.
- The Communication Act under section 23 and regulation 8 of the Communications (Fair Competition) Regulation provides for an exemption to carry out certain prohibited acts to the extent that the Communications Commission is satisfied that the Act contributes to the improvement of goods and services in Uganda and generally promotes communications services as stipulated in the Communications Act.

### **21. Is minimum resale price maintenance prohibited?**

There is currently no specific legislation providing for the prohibition of minimum resale price maintenance.

### **22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

The Contracts Act, 2012, and common law principals provide and protect the concept of freedom of contract, but this is subject to lawfulness of the purpose of the contract. Where the purpose is established as prohibited conduct in any legislation, it will be deemed an illegal contract which cannot be enforced. The legality largely depends on the provisions of sector laws and the interpretation of 'exclusive agreement'. It is more likely to be considered under blanket provisions which may be all inclusive in nature





like the Uganda Communications Act, which has an umbrella provision restricting practices and agreements that may lead to a distortion of the industry. That is, under section 53 any abuse by an operator, independently or with others, of a dominant position which unfairly excludes or limits competition between the operator and any other party; or entering into an agreement or engaging in any concerted practice with any other party, which unfairly prevents, restricts or distorts competition; or effecting anti-competitive changes in the market structure and, in particular, anti-competitive mergers and acquisitions in the communications sector. Even without express mention, it can be read into the blanket provision if it results in the effect the law is created to fight. Exclusive contracts may be perceived as agreements that distort the market unfairly.

In the decided High Court case of EzeeMoney (Uganda) Ltd v MTN Uganda Ltd High Court Civil Suit No. 330 of 2013, MTN was considered to have abused its dominant position by 'forcing' mobile money agents not to take on EzeeMoney services. This is a vivid example of how exclusive agreements can become the subject of legal scrutiny and be considered illegal as a result of contravening considerations of fair business practices established by sector regulation.

**23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

There is no general law in place to address competition but developed sector-specific laws do regulate abuses of a dominant position. Examples of such sectors include;

- In the communications sector, the Communications Act prohibits the abuse of a dominant position. The Communications Act stipulates that an operator shall not engage in any activities, whether by act or omission, which have, or are intended to or are likely to have, the effect of unfairly preventing, restricting or distorting competition in relation to any business activity relating to communication services. Prohibited activities include any abuse of a dominant position

by an operator, either independently or with others, which unfairly excludes or limits competition between such operator and any other party. However, the Act does not provide a threshold used to determine what amounts to dominance.

- Although not an express reference to the abuse of a dominant position, the PSA provides that participants in the petroleum supply chain shall not, *inter alia*, attempt to control prices or create artificial shortages of products or services, or engage in any other restrictive practices or any other acts or omissions which are contrary to the principles of fair competition or are intended to impede the functioning of the free market for petroleum products in Uganda.
- Similarly, without expressly referring to the abuse of a dominant position, the Electricity Act stipulates that a licensee is in breach of fair competition if they conduct any activity, alone or together with others, which in the opinion of the ERA is intended to have or is likely to have the effect of restricting, distorting or otherwise preventing competition in connection with any activity licensed under the Electricity Act.

**24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

We are not aware of any instance in this jurisdiction where sector regulators have pursued firms for abusing a dominant position. However, we are aware of industry operators challenging other operators for abuse of a dominant position. Some are through regulatory bodies like the Fair Competition Commission in the communications sector or cases filed in the Commercial Division of the High Court of Uganda. For instance in EzeeMoney (Uganda) Ltd v MTN Uganda Ltd High Court Civil Suit No. 330 of 2013, the plaintiff has instituted a suit against the defendant, alleging that the defendant had:

- engaged in activities intended to have the effect of restricting or distorting competition in relation to the business activity of

communication services contrary to section 53(1) of the Uganda Communications Act, 2013; and

- breached the statutory duty not to deny customers services unfairly contrary to section 56 of the Uganda Communications Act, 2013.

In this case, the plaintiff’s case was premised on, amongst other things, the fact that MTN forced mobile money agents to sign exclusivity agreements prohibiting them from offering Ezeemoney services, it punished those who breached these agreements by confiscating their implements, and it also influenced an aggregator to decline offering aggregation services to Ezeemoney. Ezeemoney claimed that these breached several provisions under the Communications Act that prohibited abuse of dominant position and unfair competition. The gist of which was whether or not a mobile telecommunications firm with a dominant position in the telecommunications market in Uganda was abusing that dominant position. The Court found in favour of Ezeemoney and awarded it damages of UGX 2.3 billion.

This is a good example of ‘exclusive agreements’ that would be found unfair with the effect of distorting the market.

**25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

This largely depends on sector-specific legislation. For instance, under the Communications Act and the Petroleum Act (described in question 19) the Regulator has general penalties for unauthorised or illegal conduct and this can be interpreted to include the conduct of abuse of a dominant position.

**26. Are there Rules in relation to price discrimination?**

There are no general laws on price discrimination, however, certain sectors have addressed their markets on the issue. For instance;

- The Electricity Act provides that a licensee shall not, in fixing tariffs and terms of supply, show undue preference or discrimination amongst customers similarly situated or in similar circumstances.

- The PSA also provides that participants in the supply chain shall sell their products to all persons without any form of deliberate discrimination by means of quality, quantity and price.
- The Communications industry restricts price discrimination through the Fair Competition Regulations which show what changes to price are unacceptable and constitute unfair conduct. This is set out in the Schedule to the Regulation.

**27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

We are not aware of any specific website hosted by any of the various sector regulators that may contain their decisions.



# Zambia



**CORPUS LEGAL PRACTITIONERS**

Sydney Chisenga

### 1. What is the relevant competition legislation and who are the enforcers?

The relevant legislation is the Competition and Consumer Protection Act No. 24 of 2010, and various guidelines/ regulations issued from time to time, which are enforced by the Competition and Consumer Protection Commission (the CCPC). All disputes are adjudicated upon by the Competition and Consumer Protection Tribunal (the Tribunal), which, generally, has jurisdiction to hear appeals from a person who, or an enterprise which, is aggrieved, with an order, decision or direction of the CCPC.

### 2. Are there any proposed amendments or new regulations expected to come into force?

A draft Competition and Consumer Protection Amendment Bill (Bill) is currently before the Zambian Ministry of Justice for consideration. The Bill is expected to be published for public comment in the coming months. A stakeholders' workshop will be arranged as soon as the Bill has been published. In the past few years, the CCPC has published guidelines on Calculating Merger Filing Fees, Abuse of Dominance, Administration of Fines and Settlement Procedures. The leniency programme has also come into effect.

### 3. Is the law actively enforced?

The CCPC actively enforces the Act. Since its inception under preceding legislation, the CCPC has conducted investigations into prohibited restrictive and anti-competitive practices, conducted dawn raids, reviewed mergers and fined companies for failure to notify mergers. The Act gives the CCPC the power to undertake an investigation, either upon receipt of a complaint or at its own instigation, where there are reasonable grounds to believe that there is or is likely to be a contravention of the Act.

The CCPC has signed Memoranda of Understanding (MoU) with sector regulators where there is an element of competition and consumer protection in the sectoral legislation. This measure is aimed at enhancing the monitoring of competition in the domestic economy through co-ordination and harmonisation of matters relating to competition with sector regulators.

The CCPC is also a signatory to the MoU with the COMESA Competition Commission and competition authorities of the SADC.

### 4. What are the current priorities or focus areas of the competition authorities?

The current focus areas of the CCPC are cartel regulation, merger control, restrictive business practices and abuse of dominance cases. The CCPC is also focusing on the sensitisation to the general public of their consumer rights under the Act.

### 5. What kind of transaction constitutes a notifiable merger?

The Act essentially defines a merger as the acquisition of a legal interest by an enterprise in another enterprise. Therefore, a merger occurs where an enterprise directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses.

A merger, as contemplated under the Act, occurs in the following instances:

- where an enterprise purchases shares or leases assets in, or acquires an interest in, any shares or assets belonging to another enterprise;
- where an enterprise amalgamates or combines with another enterprise; or
- where a joint venture occurs between two or more independent enterprises.

A person or entity will be considered to have control over an enterprise if that person:

- beneficially owns more than half of the issued share capital of the enterprise;
- is entitled to vote a majority of the votes that may be cast at a general meeting of the enterprise, or has the ability to control the voting of a majority of those votes either directly or through a controlled entity of that enterprise;
- is able to appoint or veto the appointment of a majority of the directors of the enterprise;
- is a holding company and the enterprise is a subsidiary of that company;



- has the ability to materially influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise the element of control referred to in the first four bullet points; or
- has the ability to veto strategic decisions of the enterprise, such as the appointment of directors and other strategic decisions which may affect the operations of the enterprise.

The Merger Guidelines state that there are three types of mergers typically assessed by the Commission, namely horizontal, vertical and conglomerate mergers. Horizontal mergers are those between enterprises operating in the same relevant market(s) at the same level of the supply chain and could be of concern because they could result directly in the elimination of competition. Vertical mergers take place between enterprises operating at different levels of the supply chain and mostly concern the Commission when one of the merging parties has a dominant position or market power in either market. Conglomerate mergers are between undertakings in different markets, but may in some cases result in reduced competition.

#### **6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?**

A merger transaction requires authorisation by the CCPC in any instance where the combined turnover or assets (whichever is higher) of the merging parties in Zambia is at least 50 million fee units (ZMW 15 million) in the merging parties' most recent financial year for which figures are available.

#### **7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?**

Enterprises may not implement a merger before obtaining the requisite approval from the CCPC. If a merger is implemented without the prior approval of the CCPC, the merger is void and the enterprise commits an offence. The enterprise may be liable for a fine not exceeding 10% of its annual turnover and the directors can be prosecuted.

#### **8. What filing fees are required?**

According to the Competition and Consumer Protection (General) Regulations of 2011 (Regulations), the prescribed fee for an application for authorisation is 0.1% of the turnover/ assets (whichever is higher) with a maximum cap of 16 666 667 fee units (ZMW 5 million).

The combined turnover or assets refers to the combined annual turnover or combined assets of the entity located in Zambia in which the target entity has an interest. The notification fee is based on the total values of the turnover or assets of the economic entity in Zambia, even if proportions of these amounts are generated outside the market(s) for the merger assessment. For parties wholly domiciled outside Zambia, the notification fee will be based on the total value of turnover generated in Zambia. It should further be noted that it is the position of the CCPC that if a merging party has subsidiaries located in Zambia, they form a single economic unit.

Further, the Regulations provide that an application for negative clearance (where the value of the applicant's turnover or assets is less than or equal to 100 million fee units or ZMW 30 million), is approximately ZMW 21 000. If the applicant's turnover or assets exceed 100 million fee units (ZMW 30 million), the filing fee for an application for negative clearance is 150 000 fee units, i.e. approximately ZMW 45 000.

#### **9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

Foreign-to-foreign mergers that have an indirect or direct effect on the structure of local markets are notifiable.

The CCPC focuses on foreign-to-foreign mergers where the merging foreign entities have a subsidiary or interest in an undertaking operating or located in Zambia. An enterprise in Zambia that comes within the control of a foreign enterprise will be subject to notification and review as far as the operation has an effect on competition in Zambia. In such a case, the turnover or assets that will be assessed will be those of an enterprise present



(i.e. the enterprise is duly registered in accordance with Zambian law and generates turnover within Zambia) or with a presence in Zambia (i.e. the enterprise is not duly registered in accordance with Zambian law but has sales in Zambia). In the event that the control of a Zambian enterprise comes about purely as a result of a merger or acquisition involving enterprises wholly domiciled outside Zambia, the CCPC will nonetheless assess the merger if it has a local nexus. The CCPC will assert jurisdiction over such transactions only if the foreign enterprise has a local nexus of sufficient materiality, such as having subsidiaries in Zambia or having made 10% of its sales in Zambia over the last three years.

**10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

Although the Act does not provide for pre-notification contact with the CCPC, the CCPC does, in practice, encourage such meetings. For parties applying to the CCPC to either authorise a horizontal or vertical agreement or merger, or to grant an exemption or negative clearance for a transaction, the CCPC encourages pre-application meetings. During such meetings, the CCPC and the parties to the transaction determine the information required for a notification, which may result in a significant reduction of the information required. It is normal practice to hold pre-notification meetings with the CCPC for mergers in order to conclude the transaction efficiently.

**11. To what extent are non-competition factors relevant to the assessment of a merger?**

The CCPC applies the public interest test (weighing both public benefit and public detriment) in almost all merger evaluations. However, there is no definition in the Act nor in the Regulations of what ‘public interest’ is. There is no exhaustive list of factors that fall under the public interest test but fundamentally, issues such as employment and the effect of the proposed merger on the economy in the relevant market or region affected by the merger are of paramount consideration.

**12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

As part of its assessment process, the CCPC typically conducts public consultations by seeking comments from relevant industry players and other stakeholders with respect to proposed mergers. To the extent that competitors and customers may be consulted, competitors and customers play a role in the review process. The Act does not define the meaning of ‘public’ and therefore both customers and competitors are considered to fall within the ambit of ‘public’ as contained in the Act.

**13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

As indicated above, as part of its assessment process, the CCPC typically conducts public consultations with respect to proposed mergers. The Act does not define the meaning of public and therefore employees are considered to be part of the public under the Act and can accordingly make submissions during the assessment process. However, in practice this rarely happens.

**14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

Neither the Act nor the Regulations provide for the merging parties to be afforded an opportunity to make representations before a decision is issued. In some instances, at the discretion of the CCPC, parties may be requested to make representations or clarify certain aspects of the merger.

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

The Act provides for appeals to the Tribunal. Therefore, any person or an enterprise that is aggrieved by an order or direction of the CCPC may appeal to the Tribunal within 30 days of the order or direction. Any person wishing to appeal



against a decision of the Tribunal may appeal to the High Court within 30 days of the Tribunal's determination.

#### **16. Does the legislation apply to joint ventures?**

The merger provisions of the Act apply to joint venture arrangements where a joint venture occurs between two or more independent enterprises and the joint venture falls within the definition of a merger. The Merger Guidelines state that a joint venture occurs between two or more independent enterprises, with each enterprise making a substantial contribution to the implementation of a common project, which is a separate business but is jointly owned and controlled by the parent enterprises. The Merger Guidelines distinguish between full function joint ventures (which require merger approval) and auxiliary joint ventures (which do not require merger approval). A full-function joint venture performs on a lasting basis all the functions of an autonomous economic entity, competing with other enterprises in a relevant market with sufficient resources and staff to operate independently on the relevant market. Auxiliary joint ventures, on the other hand, fulfil a specific purpose for their parent enterprises (e.g. in sales, production or research and development).

#### **17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

Section 8 of the Act prohibits, and views as anti-competitive, any category of agreement, decision or concerted practice which has as its object or effect, the prevention, restriction or distortion of competition to an appreciable extent in Zambia. Section 9 of the Act specifically prohibits horizontal agreements between enterprises which:

- fix (directly or indirectly), a purchase or selling price, or any other trading condition;
- divide markets by allocating customers, suppliers or territories;
- involve bid-rigging;
- set production quotas; or
- provide for collective refusal to deal in, or supply, goods or services.

In view of the foregoing, cartel conduct is prohibited.

For example, in 2013, the CCPC's Board of Commissioners fined Omnia Fertilizer Zambia Ltd and Nyiombo Investments Ltd, 5% of its respective annual turnovers for contravening section 9(3) of the Act. The Board found that Omnia and Nyiombo participated in cartelistic behaviour while supplying fertiliser under the Farmer Input Support Programme (FISP) between 2007 and 2011. The Board further decided that both Omnia and Nyiombo should be prosecuted in accordance with section 9 of the Act, as they had entered into an anti-competitive agreement aimed at dividing the markets for the supply of fertiliser under the FISP. The Board further held that Omnia and Nyiombo's agreement had expressly stated that they would co-operate in the distribution and supply of fertiliser in Zambia and that the primary objective was for each company to focus on supplying and distributing fertiliser in the allocated zones where it had a sustainable competitive advantage.

The Board noted that the trend had been that where one of the companies submitted a tender, the other did not, leading to only one of them winning the tender. The Board also observed that the two companies were exchanging information relating to the prices of fertiliser and appeared to have engaged in bid-rigging during the tendering process for fertiliser under the FISP. Thereafter, the companies appealed and the Tribunal found the CCPC's decision to be null and void and set it aside for irregularity. In September 2014, the High Court for Zambia upheld the Tribunal's decision.

The CCPC is also known to have recently investigated wheat farmers for cartel conduct (setting production quotas by creating artificial shortages of wheat stocks on the market).

#### **18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?**

Section 55 of the Act permits the CCPC to conduct investigations, either at its own initiative or upon receipt of a complaint, where there are reasonable grounds to believe that there is, or is likely to be, a contravention of any provision of the Act. Upon commencing the investigation, the CCPC gives written notice to the person

under investigation and may also carry out public consultations during the investigation. For purposes of an investigation, the CCPC may, by notice in writing served on any person, require that person to either:

- furnish to the CCPC, in a statement signed by that person or director, member or other competent officer, employee or agent of the body corporate (as the case may be), any information pertaining to any matter specified in the notice which the CCPC considers relevant to the investigation;
- produce to the CCPC, or the person specified in the notice, any other document or article, as specified in the notice, which relates to any matter which the CCPC considers relevant to the investigation; or
- appear before the CCPC, or the person specified in the notice, to give evidence or produce any document or article specified in the notice.

Upon commencing an investigation, the Board may, pursuant to section 7 of the Act, appoint a suitable person to be an inspector on such terms and conditions as the Board may determine. Such inspector has the authority to apply to the High Court for a warrant that would enable him or her to conduct a search and seizure. Section 7(4) of the Act provides that an inspector may, with a warrant, at any reasonable time:

- enter and search any premises occupied by an enterprise or any other premises, including a private dwelling, where information or documents which may be relevant to an investigation may be kept;
- search any person on the premises if there are reasonable grounds for believing the person has personal possession of any document or article that has a bearing on the investigation;
- examine any document or article found on the premises that has a bearing on the investigation;
- require information to be given about any document or article by:
  - the owner of the premises;
  - the person in control of the premises;
  - any person who has control of the document or article; or
  - any other person who may have the information;

- take extracts from or make copies of any book or document found on the premises that has a bearing on the investigation;
- use any computer system on the premises, or require assistance of any person on the premises to use the computer system, to:
  - search any data contained in, or available to the computer system;
  - reproduce any record from the data;
  - seize any output from the computer for examination and copying; and
  - attach and, if necessary, remove from the premises for examination and safeguarding any document or article that appears to have a bearing on the investigation.

**19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

The Act empowers the CCPC to set out guidelines with respect to a leniency programme. The CCPC has a leniency programme policy in place. The leniency programme allows for partial or total exemption from any prescribed penalties that would otherwise be applicable to a participant of a prohibited agreement (i.e. any agreements deemed as anti-competitive or restrictive of competition under the Act) which confirms the existence of the prohibited agreement and self-reports its participation therein to the CCPC.

An enterprise which is found to have engaged in cartel activities is liable for a fine not exceeding 10% of its annual turnover. The Act also provides for criminal sanctions for cartel conduct. The CCPC may impose a fine not exceeding 500 000 penalty units (ZMW 150 000) or imprisonment for a period not exceeding five years, or both, on any director or manager of an enterprise that is found to have engaged in cartel activities.

The Act further provides that where a penalty is not specifically provided for the offence, the punishment upon conviction in respect of a person who commits that offence is a fine not exceeding 100 000 penalty units (ZMW 30 000) or imprisonment for a period not exceeding one year, or both.



**20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

The Act contains a provision for a mechanism to apply for exemption from certain parts of the Act. For instance, an enterprise that wishes to be exempted from a prohibition under section 12 (which relates to the prohibition of horizontal agreements) may apply to the CCPC for exemption in the prescribed manner and form upon payment of the prescribed fee.

**21. Is minimum resale price maintenance prohibited?**

The Act prohibits resale price maintenance. It is a per se prohibition. However, a supplier or producer may recommend a minimum resale price to the re-seller of a good or service if:

- the supplier or producer makes it clear to the re-seller that the recommendation is not binding; and
- the product has a price stated on it and the words ‘recommended price’ appear next to the stated price.

**22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

There is no specific prohibition of exclusive agreements unless the agreement violates one of the prohibitions in the vertical and horizontal provisions. Refer to questions 18 and 21.

**23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

The Act provides that an enterprise must refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or conduct of that enterprise limits access to markets or otherwise unduly restrains competition, or has or is likely to have an adverse

effect on trade or the economy in general. The Act defines dominant position as a situation where an enterprise or a group of enterprises possesses such economic strength in a market as to make it possible for it to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors.

The threshold for dominance relates to the supply of goods or services if 30% or more of those goods or services are supplied or acquired by one enterprise or 60% or more of those goods or services are supplied or acquired by not more than three enterprises.

Abuse of dominance includes:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting or restricting production, market outlets or market access, investment, technical development or technological progress in a manner that affects competition;
- applying dissimilar conditions to equivalent transactions with other trading parties;
- making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts;
- denying any person access to an essential facility;
- charging an excessive price to the detriment of consumers; or
- selling goods below their marginal or variable cost.

**24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

In 2016, under the Act, according to a media outlet, the CCPC fined the Zambia Airports Corporation Ltd (ZACL) 3% of its annual turnover for abusing its dominant position of market power. The media outlet further reported that the CCPC’s executive director, Chilufya Sampa, stated that ZACL was dominant and had market power and its ability to apply differential rates to airline clients and ground handlers for equivalent transactions was a



violation of section 16(1) and section 16(2) (c) of the Act. According to the media outlet, Sampa further stated that ZACL's threats to withdraw concessions to Zambezi Airlines and the application of excessive charges to ZEGA Ltd for water and the handling of Emirates Airlines constituted an abuse of dominance, as it had an effect on how these enterprises trade and the economy in general.

**25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

The CCPC may impose a fine on an enterprise for the abuse of a dominant position. The fine imposed may not exceed 10% of the enterprise's annual turnover.

**26. Are there Rules in relation to price discrimination?**

The provisions in relation to price discrimination relate to the abuse of dominance where directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions, is unlawful.

**27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

Board decisions relating to merger reviews issued by the CCPC are typically made available only to the parties involved and are not published on the CCPC's website ([www.ccpc.org.zm](http://www.ccpc.org.zm)). However, the CCPC has published certain merger decisions on its website ([www.ccpc.org.zm/press-releases/](http://www.ccpc.org.zm/press-releases/)). Members of the public may submit written requests for copies of Board decisions to the CCPC's executive director.

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# Zimbabwe



**SCANLEN & HOLDERNESS**

Nellie Tiyago-Jinjika

## 1. What is the relevant competition legislation and who are the enforcers?

The main legislation applied in Zimbabwe is the Competition Act (Chapter 14:28) (the Act) which was adopted in 1996 but only became operational in 1998. This Act applies to all economic activities within or having an effect within Zimbabwe (including the activities of the Government and other statutory bodies or parastatal organisations). The regulations that have been promulgated are: Competition (Notification of Mergers) Regulations (Statutory Instrument 270 of 2002); Competition (Authorisation of Mergers) Regulations (Statutory Instrument 295/ 1999); Competition (Fees for Application for Authorisation of Mergers and Restrictive Practices) Statutory Instrument 97 of 2001; Competition (Notifiable Merger Thresholds) Regulations (Statutory Instrument 195 of 2002); Competition (Anti-dumping and Countervailing Duties) (Investigation) Regulations (Statutory Instrument 266 of 2002); Competition (Fees for Inspection and Copying of Documents) Regulations, (Statutory Instrument 32 of 2001); Competition (Safeguards) (Investigation) Regulations (Statutory Instrument 217 of 2006); and Competition (Advisory Opinion) Regulations (Statutory Instrument 26 of 2011).

Enforcement of the competition laws is through the Competition and Tariff Commission (the Commission), a body corporate established by the Act whose role is to be the regulatory and advisory authority. The present mandate of the Commission is to implement and enforce the competition laws and policy in Zimbabwe as well as to provide advisory services on the trade tariff to the Government of Zimbabwe.

## 2. Are there any proposed amendments or new regulations expected to come into force?

A draft amended Competition Act (the draft Act) has been placed before Cabinet before being placed before the Parliamentary Legal Committee for scrutiny followed by onward transmission to Parliament for debate. The proposed amendment will result in alignment with the COMESA competition provisions. Zimbabwe is a member state of COMESA, but without domestication as required at law, the

COMESA competition provisions will be merely guidelines and not necessarily law in Zimbabwe. Penalties provided for under the COMESA Regulations will not be enforced. The draft Act has been circulated to stakeholders for comment. If adopted in the present form, some of the changes are:

- The definition of merger is to be restricted to purchasing of shares or a controlling interest in an entity with joint ventures specifically defined. The current definition is wide and implies that all transactions particularly those that involve a supplier and customer, or even just where control of the activities or assets is transferred or acquired (indirectly or directly) by any means qualify to be mergers provided that the threshold is met.
- The draft Act seeks to reduce the timeline for assessment of notifiable mergers from 90 to 60 days.
- The factors to be considered by the Commission with respect to mergers have been separated from those that deal with restrictive practices. The proposed considerations are more detailed than before. Actions in relation to abandoned mergers have now been introduced with the parties being required to notify the Commission with no refund of the filing fee to be paid to the parties.
- Inclusion under the definitions section of the following terms: acquire; assets; concerted practice; enterprise; horizontal and vertical agreements; market power; and relevant market;
- With respect to the Commission, the proposals are: extending the powers of the Commission; creation of a Competition and Tariff Commission Board to which the committees of the Commission will report; laws relating to appointment of investigating officers; requirement for the Commission to cooperate with other national regional and international competition authorities;
- The grievance procedure and issuance of interim and final orders by the Commission has been revised in manner that makes them clearer and simpler to follow. The Commission under this procedure is able to exercise corporate leniency for an entity that acts in good faith and cooperates with the Commission.



Additional changes expected:

- In terms of section 22 (1) (f) of the Finance (No. 2) Act of Zimbabwe, 2019 every enactment in which an amount is expressed in United States dollars shall, on the first effective date (22 February 2019), be construed as a reference to the RTGS dollar parity with the United States dollar, i.e. at a rate of 1:1. For the purposes of the competition provisions this meant that filing fees were converted to local currency. The mergers that are to be notified would strictly speaking be ZWL 1.2 million and above. However it has been accepted that for computations up to the date of coming into effect of the provisions the threshold would be deemed to be USD 1.2 million. This position will change in the new accounting year.
- It is expected that a Consumer Protection Unit which will enforce the Consumer Protection Act will be established through the Commission. This unit will have the power to hear and determine consumer complaints.
- Anti-dumping provisions in the Act shall be enforced by the Restrictive Trade Unit to be established.

### 3. Is the law actively enforced?

In 2018, the Commission handled 18 transactions with 11 of those being approved without conditions. Two matters were approved conditionally and the remaining matters were not concluded in 2018. 45% of the mergers and acquisitions related to Zimbabwean businesses that were seeking to expand outside the borders of Zimbabwe. The remaining 55% pertained to transactions where Zimbabwean entities were being acquired. During 2019 Q1-Q2 the commission examined 12 mergers with nine being unconditionally approved and the remaining three were yet to be concluded.

With respect to multi-jurisdictional merger notifications from the COMESA Competition Commission, the Commission considered 16 matters in 2018.

Below is a summary of the matters that have been attended to by the Commission during the period 2009 to 2018:

YEAR	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
<b>MERGERS/ ACQUISITIONS (RECEIVED)</b>										
	15	14	16	11	13	8	25	20	16	16
<b>RESTRICTIVE PRACTICES (COMPLAINTS)</b>										
	15	8	21	16	24	7	5	3	3 Decided	2

#### 4. What are the current priorities or focus areas of the competition authorities?

In 2019 a currency loss was experienced, therefore the filing fee became relatively cheap. Due to this the Commission is inundated with applications. The promulgation of the draft Act remains a priority.

The Commission continues to lobby for a trade environment that will result in commercial growth for the country. In that regard they attended the African Continental Free Trade Area Negotiating Forum Meeting in Zambia. Zimbabwe was noted as already using the Harmonised Commodity Description and Coding System (2017)<sup>1</sup> ahead of other nations.

#### 5. What kind of transaction constitutes a notifiable merger?

Mergers are defined as the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of the purchase or lease of the shares or assets of a competitor, supplier, customer or other person; the amalgamation or combination with a competitor, supplier, customer or other person; or any other means. This definition is very broad but in order for a merger to be notifiable, the transaction envisaged must meet the prescribed threshold of controlling interest to be vested in the acquiring firm.

#### 6. What are the thresholds for mandatory merger notification (e.g. assets, turnover and/ or market share)?

The current threshold for notifiable mergers is USD 1.2 million. This is determined through (i) combining the annual turnover of the acquiring firm and the target firm in, into or from Zimbabwe; or (ii) combining the assets in Zimbabwe of the acquiring firm and the target firm. International

Accounting Standards are used for computation. As stated above, application of the Finance (No. 2) Act, 2019 would result in the threshold being deemed to be ZWL 1.2 million. The present practice is that with relation to computations for years ending 2018, the threshold shall remain USD 1.2 million. Thereafter the amounts shall be in the reported currency which for Zimbabwe would be ZWL 1.2 million.

#### 7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?

Zimbabwe has a premerger notification regime. Therefore a party to a notifiable merger is required to notify the Commission in writing of the proposed merger within 30 days of either the conclusion of the merger agreement between the merging parties or the acquisition by any one of the parties to that merger of a controlling interest in another. Implementation of a merger without the approval of the Commission may result in a penalty of 10% which may be imposed on either or both of the merging parties' annual turnover in Zimbabwe as reflected in the accounts of any party concerned for the preceding financial year. The Commission may recover this penalty through civil proceedings.

#### 8. What filing fees are required?

Currently the notification filing fee is 0.5% of the combined annual turnover or combined value of assets (whichever is the greater) in Zimbabwe of the merging parties for the previous financial year. The minimum fee payable was previously USD 10 000 and the maximum was USD 50 000. However, due to the change in currency the fees payable now range from ZWL 10 000 to ZWL 50 000. Where the acquiring firm is a subsidiary company, the combined turnover of the group of companies in which the acquiring firm is a subsidiary shall be included. Where the target firm controls any other firm or business, the combined turnover of such firm shall be included. Payment of the filing fee shall be in any convertible currency calculated at the official exchange rate prevailing at the end of the immediate previous financial year.

<sup>1</sup> An apt example of this is the *Customs and Excise (Tariff) Notice, 2017 (Statutory Instrument 53 of 2017)*



**9. Is it necessary to obtain approval for foreign-to-foreign mergers?**

The merger threshold applies to the combined annual turnover or assets in Zimbabwe with no qualification with regard to the origin of the participants. If two foreign companies which are merging have a combined annual turnover or assets in Zimbabwe above the threshold, then such a merger requires the approval of the Commission.

**10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?**

The Commission welcomes pre-notification contact and is even willing to prepare a written opinion on the intended merger.

**11. To what extent are non-competition factors relevant to the assessment of a merger?**

The Commission will take a holistic view of the effect of a proposed merger. The information sought from the parties focuses on matters directly or indirectly related to competition. Factors such as the impact of a merger on employment, equity, trade policy, quality of products and services, brand development, consumer welfare, impact on stakeholders, education, reduction in barriers to entry, and price control are also considered.

**12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?**

The Commission has extensive powers to investigate a proposed merger. The investigation can include calling for written submissions and holding an enquiry into the matter. In the course of such an investigation, customer surveys may be conducted and competitors may be interviewed. The extent to which these comments and submissions will be influential is within the discretion of the Commission.

**13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?**

Any person whom the Commission deems necessary can be interviewed. Additionally, unless the merger will be prejudiced or where it is unlikely that information that will materially assist the Commission will be obtained, the Commission is required to publish a notice in the *Government Gazette* and in such newspaper as the Commission considers appropriate calling upon any interested person who wishes to do so to submit written representations to the Commission with regard to the authorisation sought.

**14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?**

Yes, this is part of the stakeholder engagement process. Merging parties may also be required to provide additional information which could be useful for a successful application.

**15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?**

An appeal against the decision of the Commission may be filed by any person aggrieved by the decision. The appeal is filed with the Administrative Court at which point the Administrative Court Rules apply with respect to the form of the notice of appeal and the manner in which the proceedings will continue thereafter.

**16. Does the legislation apply to joint ventures?**

Due to the wide definition of merger it can be inferred that joint ventures are included, as the definition expressly states that merger includes amalgamation or combination with a competitor, supplier, customer or other person. The draft Act specifically refers to joint ventures.



**17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?**

Certain practices that are akin to cartels within the following broadly defined categories of unfair business practice and restrictive practice are prohibited: an ‘unfair business practice’ which includes cartel-like activity such as bid-rigging and collusive arrangements between competitors; a ‘restrictive practice’ which is defined in broad terms and is taken to mean any of the following that restricts competition directly or indirectly to a material degree: (i) agreement, arrangement or understanding whether enforceable or not between two or more persons; (ii) any business practice or method of trading; (iii) any deliberate act or omission on the part of any person, whether acting independently or in concert with any other person; or (iv) any situation arising out of the activities of any person or class of persons.

Collusive arrangements between competitors leading to price fixing and/ or market division and anti-competitive practices have not been tolerated. Investigations into collusive arrangements have been undertaken in a number of industries and sectors, including the commercial banking services sector, the cement industry, the dry cleaning services sector and the real estate industry.

The introduction of a local currency in Zimbabwe also resulted in the creation of a market where one is able to trade foreign currency for local currency at the rate of the day. The Commission issued a warning to financial institutions requiring them to act independently in setting the rate, as there was a real possibility that financial institutions could collude to determine the exchange rates applicable at these markets.

**18. What are the authorities’ powers of investigation in relation to cartel conduct and other prohibited practices?**

The Commission has the power to investigate any restrictive practice, business agreement, arrangement, understanding or method of trading which creates or maintains a restrictive practice. A preliminary investigation may be conducted

by the Commission’s investigating officers who may arrive at the premises of the parties without notice. Investigating officers and the Commission itself are permitted to, at reasonable times, enter any premises where there is a reasonable suspicion that there is a book, record or document relating to any restrictive practice or unfair trade-practice or any actual or potential merger or monopoly situation. Any person who does not co-operate, or hinders, an investigation, commits an offence for which a fine and/ or imprisonment of six months may be imposed.

The Commission may require that during the process of investigation, the restrictive practice in question ceases and that persons make written submission to assist with the investigation. Notice of this will be published in the *Government Gazette* and a local newspaper. The notice remains valid until completion of the investigation or six months, whichever is the shorter.

**19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?**

Administrative penalties of up to 10% of the annual turnover of either or both of the acquiring and target undertakings in Zimbabwe, in the preceding year, may be imposed.

Further, any individual who enters into, engages in, or otherwise gives effect to an unfair trade practice shall be guilty of an offence and liable to a fine not exceeding level 12 (USD 2 000) or to imprisonment for a period not exceeding two years, or to both; or in any other case, to a fine not exceeding level 14 (USD 5 000).

**20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?**

There is no provision providing for exemption from parts of the Act. However, the Act does contain provisions that speak to the authorisation of restrictive practices. The draft Act includes the provision for applications for exemptions that may be made with respect to any agreements, decisions, practices or concerted practices before the implementation of these.



**21. Is minimum resale price maintenance prohibited?**

Yes, as this is an unfair business practice.

**22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?**

These are unlawful where they include giving or allowing, or offering to give or allow, a discount, allowance, rebate or credit on the condition that the other person agrees not to acquire goods or services from a competitor of the supplier, or not to re-supply specified persons or places.

**23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?**

Abuse of a dominant position or the abuse of substantial market control is prohibited unless it is proved that there exist pro-competitive features. Pro-competitive features include the fact that the practice does not in any way restrict or discourage competition to a material degree in any business, trade or industry and is unlikely to do so; or the practice is reasonably necessary to protect consumers against injury or harm; or that the termination of the practice would deny consumers other specific and substantial benefits or advantages enjoyed by them.

**24. Are there examples of the authorities pursuing firms for abusing a dominant position?**

It came to the attention of the Commission in 2018 that a major distributor of day-old chicks made their sales conditional upon the purchasing of a particular number of stock feed bags. This matter was investigated on the grounds that the conditional selling constituted a restrictive practice due to the tie-in nature of the sale arrangement.

**25. Does the legislation impose penalties on firms for the abuse of a dominant position?**

The Commission may declare the monopoly to be unlawful; require the person exercising control over the business or economic activity concerned

to take steps to terminate the monopoly within a specified period; prohibit or restrict the acquisition by the person of any undertaking or assets which in the Commission's opinion will lead to a monopoly or merger; require the person to secure dissolution of any organisation or termination of any association; and generally make such provision that is, in the opinion of the Commission, reasonably necessary to terminate or prevent a monopoly situation or alleviate its effects.

**26. Are there Rules in relation to price discrimination?**

There are no specific Rules relating to price discrimination in the present Act. However, such rules are provided for in the draft Act.

**27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

Orders that are made by the Commission may be published in the *Government Gazette* of Zimbabwe and on their website [www.competition.co.zw](http://www.competition.co.zw).

The Commission may also be contacted using the following details:

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