

**Baker
McKenzie.**

**Competition in Africa
Report 2022**

IMPORTANT DISCLAIMER:

The material in this report is of the nature of general comment only. It is not offered as legal advice on any specific issue or matter and should not be taken as such. Readers should refrain from acting on the basis of any discussion contained in this report without obtaining specific legal advice on the particular facts and circumstances at issue. Whilst the authors have exerted every effort to provide accurate and up-to-date information on laws and policy, these matters are continuously subject to change. Furthermore, the application of these laws depends on the particular facts and circumstances of each situation, and therefore, readers should consult their lawyer before taking any action.

March 2022

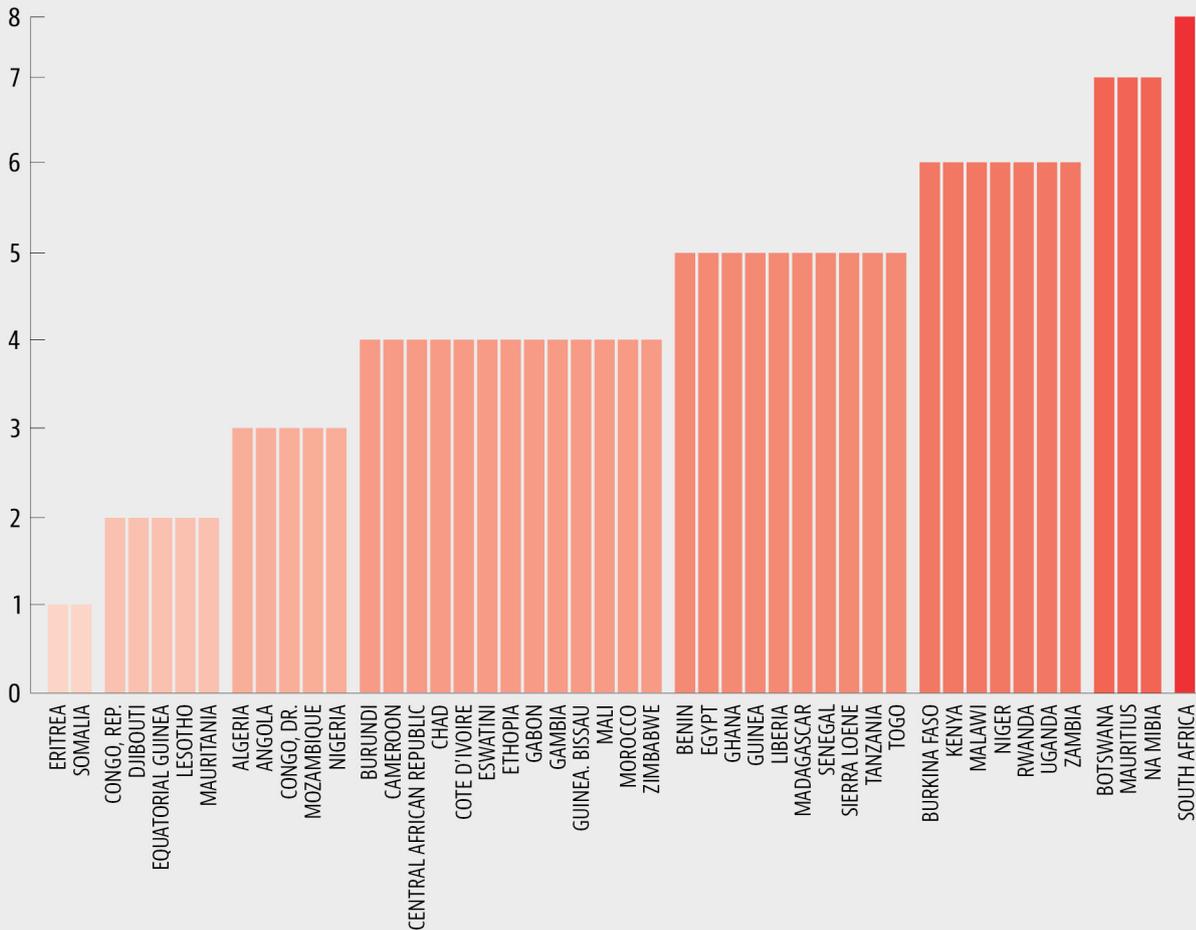
CONTENTS

Foreword	4	Malawi	163
Geographical Overview	6	Mali	172
Algeria	16	Mauritius	181
Angola	25	Morocco	189
Botswana	34	Mozambique	196
Cameroon	43	Namibia	205
Cape Verde	51	Nigeria	216
COMESA	59	Rwanda	227
Cote D'Ivoire	68	Senegal	235
Egypt	76	South Africa	244
Eswatini	85	Sudan	262
Ethiopia	96	Tanzania	270
Gabon	103	Togo	278
Gambia	120	Tunisia	286
Ghana	128	Uganda	295
Kenya	137	Zambia	303
Madagascar	152	Zimbabwe	313

FOREWORD

Competition authorities play an important role as champions, advocates and enforcers of competition policy across economies and view competition policy as a key driver of economic growth. Although over the past two years African competition regulators have actively engaged in efforts to address pandemic-related challenges, there has also been a general upward trend in competition policy enforcement across the continent. Matrices used to analyse economic transformation, such as the Bertelsmann Transformation Index, note the existence of comprehensive competition laws that are enforced (to some degree) in at least 46 African jurisdictions. The graph below, by Bertelsmann Transformation Index, denotes the existence of comprehensive competition laws that are strictly enforced, measured on a scale of 1 to 10, where 10 denotes high levels of enforcement. Almost half of the jurisdictions received a score of five or higher, demonstrating robust enforcement across much of the continent. Additionally, a review of historical scores indicates a year-on-year increase in respect of a number of African jurisdictions, with countries such as Eswatini, Ethiopia and Namibia each ranking higher than the previous year.

COMPETITION POLICY ENFORCEMENT IN AFRICA BY COUNTRY



Source: Bertelsmann Stiftung TransformTION Index Scores, 2020

Note: Measure of scale of 1 to 10, where 10 denotes the existence of comprehensive competition laws that are strictly enforced

FOREWORD

This upward trend in enforcement is highlighted by a number of significant recent developments in competition law regulation around the continent, which draw attention to the continent's collective enthusiasm in ensuring competition compliance, and its determination in promoting and protecting more effective economies.

Furthermore, a number of African jurisdictions have strengthened their competition and antitrust regimes by way of amendments to existing legislation, the introduction of new laws and regulations, and renewed fervour and political will to enforce existing laws.

This Africa Competition Report ("ACR") has been a collaborative effort between Baker McKenzie and its Africa Relationship Firms ("ARFs"), covering a detailed analysis and overview of recent developments in competition law enforcement and competition policy in 32 African jurisdictions. This report expands the scope of earlier ACRs, considering not only recent developments in competition law enforcement and competition policy in each of the highlighted jurisdictions but also providing an overview of regulatory and legislative dynamics and challenges in selected markets.



Lerisha Naidu

Partner

T +27 11 911 4323

lerisha.naidu@bakermckenzie.com



Angelo Tzarevski

Associate Director

T +27 11 911 4316

angelo.tzarevski@bakermckenzie.com



Sphesihle Nxumalo

Associate

T +27 11 911 4335

sphesihle.nxumalo@bakermckenzie.com



Zareenah Rasool

Associate

T +27 11 911 4343

zareenah.rasool@bakermckenzie.com



Jarryd Hartley

Candidate Attorney

T +27 11 911 4331

jarryd.hartley@bakermckenzie.com

GEOGRAPHICAL OVERVIEW

Status of competition law: geographical overview

Twenty-nine of the 32 surveyed African jurisdictions have national competition law, while only two have no national competition law but are members of a regional competition law body. This is illustrated in the map below:



KEY

-  Jurisdictions with national competition law
-  Jurisdictions with no national competition law but are part of a regional competition body

OVERVIEW

No.	JURISDICTION	DAWN RAIDS	FOREIGN DIRECT INVESTMENT REGIME	MERGER FILING	GUN-JUMPING LAWS	HORIZONTAL / VERTICAL RESTRAINTS
1.	Algeria	No Risk	See Chapter for Further Detail	Mandatory & Suspensory	See Chapter for Further Detail	Yes
2.	Angola	No Risk	Sector-Specific Laws	Mandatory & Suspensory	Yes	No
3.	Botswana	Low - Medium Risk	No	Mandatory & Suspensory	Yes	No
4.	Cameroon	No Risk	Yes	Mandatory & Suspensory	See Chapter for Further Detail	Yes
5.	Cape Verde	No Risk	Sector-Specific Laws	Mandatory & Suspensory	Yes	No
6.	COMESA	No Risk	No	Mandatory & Non-Suspensory	Yes	See Chapter for Further Detail
7.	Cote d'Ivoire	Low-Medium Risk	No	Voluntary & Non-Suspensory	No	Yes
8.	Egypt	High Risk	No	See Chapter for Further Detail	See Chapter for Further Detail	Yes
9.	Eswatini	No Risk	No	Mandatory & Suspensory	Yes	Yes
10.	Ethiopia	High Risk	Yes	Mandatory & Suspensory	Yes	No
11.	Gabon	No Risk	See Chapter for Further Detail	Mandatory & Suspensory	Yes	Yes
12.	Gambia	No Risk	No	See Chapter for Further Detail	See Chapter for Further Detail	No
13.	Ghana	No risk	No	Mandatory & Suspensory	Yes	Yes
14.	Kenya	Medium Risk	See Chapter for Further Detail	Mandatory & Suspensory	Yes	See Chapter for Further Detail
15.	Madagascar	No risk	Sector-Specific Laws	Mandatory & Suspensory	Yes	Yes
16.	Malawi	Medium Risk	No	See Chapter for Further Detail	No	Yes
17.	Mali	No Risk	No	Voluntary & Non-Suspensory	Yes	No
18.	Mauritius	High Risk	No	Voluntary & Non-Suspensory	No	Yes

OVERVIEW

No.	JURISDICTION	DAWN RAIDS	FOREIGN DIRECT INVESTMENT REGIME	MERGER FILING	GUN-JUMPING LAWS	HORIZONTAL / VERTICAL RESTRAINTS
19.	Morocco	No Risk	No	Mandatory & Suspensory	Yes	Yes
20.	Mozambique	No Risk	See Chapter for Further Detail	Mandatory & Suspensory	Yes	See Chapter for Further Detail
21.	Namibia	Low Risk	No	Mandatory & Suspensory	Yes	Yes
22.	Nigeria	High Risk	Yes	Mandatory & Suspensory	Yes	Yes
23.	Rwanda	Low Risk	See Chapter for Further Detail	Mandatory & Suspensory	Yes	See Chapter for Further Detail
24.	Senegal	No Risk	See Chapter for Further Detail	Voluntary & Non-Suspensory	No	See Chapter for Further Detail
25.	South Africa	Medium - High Risk	See Chapter for Further Detail	Mandatory & Suspensory	Yes	Yes
26.	Sudan	No Risk	Yes	Mandatory & Suspensory	Yes	No
27.	Tanzania	Low Risk	No	Voluntary & Non-Suspensory	Yes	Yes
28.	Togo	No Risk	No	Mandatory & Suspensory	No	No
29.	Tunisia	Moderate Risk	Yes	See Chapter for Further Detail	Yes	Yes
30.	Uganda	No Risk	No	See Chapter for Further Detail	No	No
31.	Zambia	Low Risk	No	Mandatory & Suspensory	Yes	Yes
32.	Zimbabwe	Low Risk	See Chapter for Further Detail	Mandatory & Suspensory	Yes	Yes

OVERVIEW

Notable developments across the region

Over the past two years, African competition regulators have actively engaged in efforts to address these pandemic-related effects, however, there has also been a general upward trend in competition policy enforcement across the continent. A number of African jurisdictions have strengthened their competition and antitrust regimes by way of amendments to existing legislation, the introduction of new laws and regulations, and renewed fervour and political will to enforce existing laws. The notable changes in the surveyed countries are highlighted below:

- **Algeria** – A new competition legislation is being considered. A first draft of the legislation is currently being reviewed by the Secretariat General of the Prime Ministry.
- **Angola** – The Competition Regulatory Authority conducted market inquiries on two sectors, namely telecommunications and petroleum products. Merger filing fees were introduced through Executive Decree No. 32/21 of 1 February 2021.
- **Botswana** – During the 2020/21 financial year, the Competition and Consumer Authority carried out market inquiries (mainly focusing on cartelistic conduct) in the following sectors: abattoirs, construction, waste management, government supplies and animal feed. The Competition and Consumer Authority also expressed concerns in relation to:
 - *pyramid schemes*: the authority has opened an investigation in collaboration with the Botswana Police Service.
 - *price gouging of essential products during the COVID-19 pandemic*: the authority received numerous excessive pricing complaints in relation to basic foods stuffs, healthcare products and hygiene products. The authority cautioned suppliers and has maintained continuous price monitoring in relation to these products.
 - *vehicle repair garages*: during the period July 2021 – September 2021, the authority handled 175 cases concerning the use of sub-standard parts or defective spare parts in vehicles brought in for repair and/or service, resistance of garages to effect warranty terms and unclear pricing practices.

Furthermore, the authority, in collaboration with the Organisation for Economic Cooperation and Development (OECD), is currently undertaking an impact assessment analysis of the legislative framework in the agricultural grains sector to determine the effectiveness of the legislative framework, focusing on pricing and import restrictions.

- **Cameroon** – Cameroon signed a Memorandum of Understanding with the United Kingdom, which sets out the arrangements for applying the effects of the economic partnership agreement from 1 January 2021.
- **Cape Verde** – Competence on competition matters will be vested on the Ministry of Finance in the short to medium term as there is currently no effective competition regulatory body.
- **COMESA** – there were various developments in 2021, including the following:
 - On 11 February 2021, the COMESA Competition Commission issued a Practice Note in which it amended the interpretation of the term “operate”. Prior to 11 February 2021, a party ‘operated’ in a COMESA Member State if it had turnover or assets in that Member State in excess of USD 5 million. This requirement has now been removed effective 11 February 2021, and a party will ‘operate’ in a COMESA Member State merely if it is active in it (without a minimum turnover or asset threshold). The impact of this will be to make it easier for a transaction to fall within the scope of the COMESA merger control regime.
 - The COMESA Competition Commission also issued the following guidelines, namely Draft Guidelines on Fines and Penalties, Draft Guidelines on Settlement Procedures and Draft Guidelines on Hearing Procedures.

OVERVIEW

- On 6 September 2021, the COMESA Competition Commission issued its first penalty for failure to notify a transaction within the prescribed time periods, which amounted to 0,05% of the parties' combined turnover in the common market in the 2020 financial year. This was imposed in relation to the proposed acquisition by Helios Towers Limited of the shares of Madagascar Towers SA and Malawi Towers Limited.
- In December 2021, the COMESA Competition Commission imposed a fine for failure to comply with a commitment contained in a merger clearance decision.
- The COMESA Competition Commission conducted eight investigations into restrictive business practices in 2021.
- **Egypt** – there were numerous developments in Egypt in the past year, including the following:
 - On 25 November 2020, the Competition Authority announced that the Egyptian Prime Ministry approved the Prime Minister's draft law amending certain provisions of the Egyptian Competition Law 3/2005. On 18 February 2021, the Egyptian parliament's Economic Affairs Committee started the discussions on the new amendments.
 - In addition, the Competition Authority has, in the past year, initiated market inquiries in relation to multiple sectors including healthcare, food, electronic and electrical appliances, automotive, real estate, media and petroleum sectors.
 - In April 2021, the Economic Court of Cairo issued a ruling in a criminal case brought in March 2020, by the Competition Authority, against five individual poultry brokers for colluding to fix the price of chicken to the detriment of consumers and chicken breeders. The court fined each broker 30 million Egyptian pounds (approx. EUR 1.6 million) for agreeing to fix the price of a kilogram of chicken.
 - In July 2021, the Competition Authority initiated a criminal case against two companies who agreed to submit identical offers in one of the practices of the General Authority for Veterinary Services, in violation of Egyptian competition law.
 - The head of the Competition Authority announced plans for the creation of an Arab Competition Network ("ACN") to enhance cross-border cooperation between antitrust enforcers in the Middle East. The ACN would be the first to provide Arab competition authorities with an official platform to meet and discuss prominent issues and impending changes to antitrust law. The network would be run by the 22 members of the League of Arab States, which includes Egypt, Syria, Lebanon, Iraq, Jordan and Saudi Arabia, among others.
- **Eswatini** – developments in Eswatini include the following:
 - The Competition Commission published a Competition Bill, 2020 (Draft Bill), which is intended to be presented to the Minister of Commerce, Industry and Trade. The object of the Draft Bill is to increase effectiveness, consistency, predictability and transparency in the enforcement and administration of competition law in Eswatini. It also aims to give effect to regional frameworks, such as COMESA Competition Regulations and international best practices. The Draft Bill has yet to be signed into law.
 - On 20 April 2021, the Competition Commission published guidelines on market definition, which adopt international best practices.

OVERVIEW

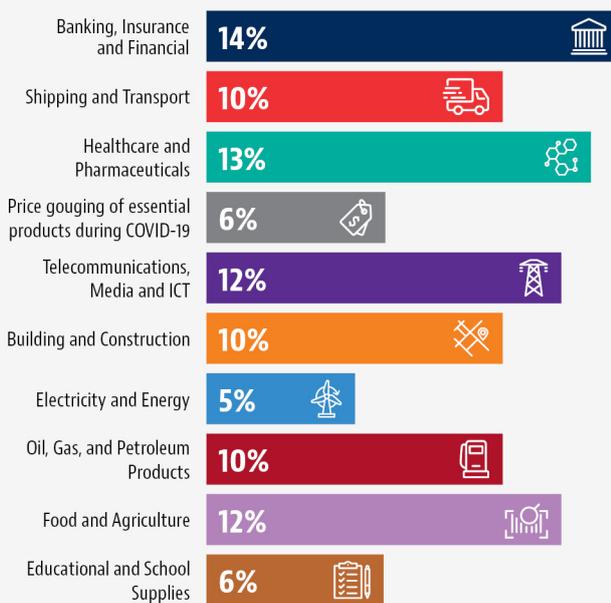
- **Ethiopia** – The Trade Competition and Consumer Protection Authority is working on regulations to provide guidance on the application of the Trade Competition and Consumer Protection Proclamation (No 813/2013). Proclamation No. 1263/2021, which is expected to be enacted into force in 2022, transfers the powers of the Trade Competition and Consumer Protection Authority to the Ministry of Trade and Regional Integration.
- **Gambia** – The Ministry of Information is currently reviewing a Merger Commission, which will be effective in maintaining and encouraging competition in markets, to promote and ensure fair and free competition, and to protect the welfare and interests of consumers. The Competition Commission has initiated the following market studies: Hajj Market Study; Rice and Sugar Market Study; Liquefied Petroleum Gas Market Study; Cement Market Study; Tourism Market Study; Banking Market Study; and Vehicle Procurement Market Study.
- **Ghana** – A draft Competition and Fair Trade Practices Bill is before parliament for consideration.
- **Kenya** – There have been various recent developments in Kenya, including the following:
 - The Competition Authority finalised its study into the regulated and unregulated credit markets in Kenya and issued its report in May 2021.
 - The Competition Authority further developed the Retail Trade Code of Practice 2021, in consultation with stakeholders in the retail sector, to address the abuse of buyer power issues arising from the sector.
 - In 2021, the Competition Authority conducted a dawn raid in the steel industry.
 - The Competition Authority issued draft joint venture guidelines in 2021, to clarify the rules and filing requirements of joint venture arrangements.
- **Malawi** – Notable developments in Malawi include the following:
 - Amendments to the Competition and Fair Trading Act and the regulations have been proposed and submitted to the Ministry of Justice.
 - Furthermore, the Competition and Fair Trading Commission has new drafted new guidelines on various topics, including abuse of dominance and collusive conduct, exclusive dealing arrangements and resale price maintenance, market definition, discriminatory and tying conduct, and public interest, amongst others. These guidelines have been circulated to various stakeholders for comment, but have yet to be published.
 - The Competition and Fair Trading Commission recently concluded a market inquiry in the funeral services market, and is currently conducting a market study on digital markets.
- **Mauritius** – The Competition Commission concluded a market study in the pharmaceutical sector on 8 June 2021.
- **Mozambique** – There were numerous in Mozambique in 2021, including the following:
 - The Competition Regulatory Authority became operational in January 2021.
 - Regulations on Merger Notifications Forms were enacted by means of Resolution No. 1/2021 of 22 April 2021. The Regulations prescribe the different forms to be completed for merger notifications, as well as the details of the information and documentation required.
 - Regulations on Filing Fees were enacted by means of Ministerial Diploma No. 77/2021 of 16 August 2021. Filing fees are currently set at 0.11% of the turnover of the parties in the previous year, up to a maximum of MZN 2,250,000.
 - Amendments to the Competition Regulations were enacted by means of Decree No. 101/2021 of 31 December 2021.

OVERVIEW

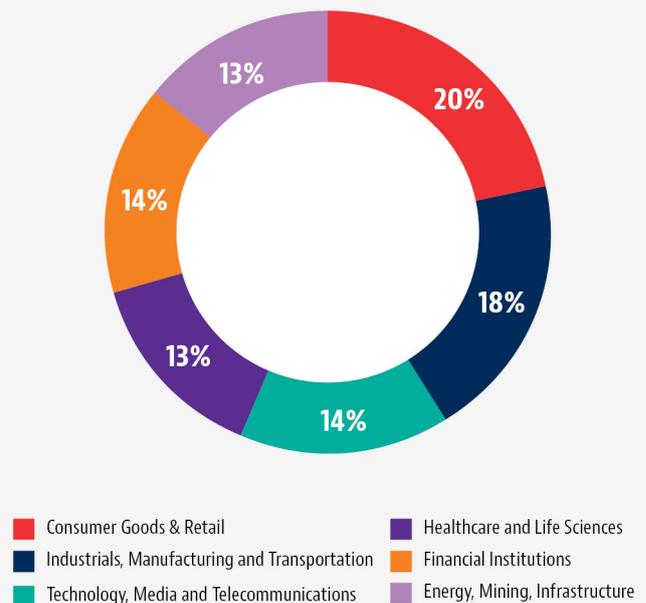
- **Namibia** – A Competition Bill is in progress and the Competition Commission expects to submit the final version of the Competition Bill to the Ministry of Industrialisation and Trade by the end of June 2022.
- **Nigeria** – On 2 August 2021, Nigeria adopted the Merger Review (Amended) Regulations 2021, which set out new fees applicable for merger filings. The Federal Competition and Consumer Protection Commission launched and publicised an investigation into the alleged anticompetitive conduct of five companies in the shipping and freight forwarding industry in October 2021.
- **South Africa** – there were various developments in South Africa in 2021, including the following:
 - On 19 May 2021, the Competition Commission launched the Online Intermediation Platforms Market Inquiry, focusing on four broad online intermediation platforms and market dynamics that specifically affect business users, namely: eCommerce marketplaces, online classified marketplaces, software app stores and intermediated services (such as accommodation, travel, transport and food delivery). The inquiry is ongoing with a provisional report scheduled for release in the first half of 2022, and the final report scheduled for release on 4 November 2022.
 - On 7 April 2021, the Competition Commission released its market inquiry reports on Land Based Public Transport.
 - Furthermore, in April 2021, the Competition Commission published its final report on an impact assessment study it conducted in relation to COVID-19. The report sets out the findings of the Competition Commission regarding the impact of the COVID-19 block exemptions and the enforcement work done by the Competition Commission during the pandemic.
 - The Competition Commission's fifth Essential Food Pricing Monitoring Report, which is released quarterly focused on tracking the impact of the COVID-19 pandemic and consequent economic crisis on food markets.
 - In November 2021, the Competition Commission released its Economic Concentration Report, which highlights patterns of concentration and participation in the South African economy. The report includes details on the Competition Commission's power to launch market inquiries into highly concentrated industries, as well as its increased authority to impose structural remedies on businesses in these sectors.
 - In May 2021, the Competition Commission issued, for comment, draft guidelines on Small Merger Notifications, which contain specific guidance applicable to the assessment of digital mergers.
 - The Competition Commission prohibited a merger solely on public interest grounds, making it the first transaction to be prohibited on non-competitive grounds. Ultimately, however, the merger was conditionally approved before the Competition Tribunal.
 - In March 2022, the Competition Commission issued Guidelines on Collaboration between Competitors on Localisation Initiatives, which are aimed at providing guidance to industry and government on how industry players may collaborate in identifying opportunities for localisation and implementing commitments related to localisation initiatives in a manner that does not raise competition concerns.
 - In March 2022, the Competition Commission launched a market inquiry into the South African fresh produce market, which will examine whether there are any features in the fresh produce value chain, which lessen, prevent or distort the competitiveness of the market.
 - The Competition Commission concluded various settlement agreements with market players (e.g., grocery retailers, laboratories) to reduce prices of goods and services.
- **Zimbabwe** – In March 2021, the Competition and Tariff Commission published draft guidelines on Horizontal Agreements for comment.

OVERVIEW

KEY SECTORS FOR COMPETITION ENFORCEMENT ACROSS THE REGION (TOP 10 SECTORS)



SECTORS BY BAKER MCKENZIE INDUSTRY GROUPS



Collaboration efforts amongst competition authorities in the region

Various African competition authorities have signed Memoranda of Understanding (“**MOU**”) to foster cooperation in the enforcement of competition policy and law. Specifically, there exists MOU between the national competition authorities of the countries set out below:

- Angola – Portugal.
- Botswana – South Africa
- Eswatini – South Africa –Taiwan
- Kenya – South Africa
- Malawi – Tanzania – Zambia
- Mauritius – Seychelles – South Africa
- Namibia – South Africa
- Nigeria – United States
- South Africa – Mauritius – The Russian Federation – Brazil – Namibia – Eswatini – Kenya –Barbados – Botswana
- Zambia – Malawi – Zimbabwe – South Africa
- Zimbabwe – Zambia

OVERVIEW

Regional competition law bodies and instruments

Over the years, regional competition agreements (RCAs) have been adopted in Africa in terms of which regional competition bodies have been established to enforce competition provisions. These RCAs generally offer deeper levels of integration and a higher degree of co-operation on competition enforcement.

The table below reflects regional bodies and instruments and the national authorities' memberships:

Jurisdiction	Regional Competition Bodies / Instruments							
	COMESA ¹	EAC ²	WAEMU ³	SADC ⁴	AfCFTA ⁵	ACF ⁶	ECOWAS ⁷	CEMAC ⁸
Algeria	x	x	x	x	✓	✓	x	x
Angola	x	x	x	✓	✓	✓	x	x
Botswana	x	x	x	✓	✓	✓	x	x
Cameroon	x	x	x	x	✓	✓	x	✓
Cape Verde	x	x	x	x	✓	x	✓	x
Cote d'Ivoire	x	x	✓	x	✓	✓	✓	x
Egypt	✓	x	x	x	✓	✓	x	x
Eswatini	✓	x	x	✓	✓	x	x	x

- Common Market for Eastern and Southern Africa (COMESA):** the authority responsible for the implementation of the regional competition provisions in the common market for Eastern and Southern Africa. It conducts investigations of cross-border anti-competitive cases and reviews merger transactions, co-operating where necessary with the National Competition Authorities of the Member States.
- East African Community (EAC):** the EAC Competition Act gives the EAC Competition Authority exclusive original jurisdiction in the determination of violations of the EAC Competition Act, i.e. anti-competitive behaviour that has cross-border effect.
- West African Economic and Monetary Union (WAEMU):** The WAEMU Competition Commission has exclusive jurisdiction over competition provisions in the union.
- Southern African Development Community (SADC):** is an inter-governmental organisation, which aims to further regional socio-economic cooperation and integration as well as political and security cooperation among 16 countries in southern Africa. SADC members signed and approved the Declaration on Competition and Consumer Policies in 2009 and cooperate on competition matters under various SADC committees / working groups.
- African Continental Free Trade Area (AfCFTA):** on 1 January 2021, trading began in African countries that had ratified the AfCFTA agreement and submitted their tariff offers. All countries in Africa, except for Eritrea, have now signed the agreement and 41 countries have ratified it so far, including most of Africa's major economies (South Africa, Kenya, Nigeria and Ghana, for example). Phase two of AfCFTA negotiations have begun, which include discussions on competition policy, investment protection and intellectual property rights, as well as deciding on the rules for governing trade on digital platforms. The intention is to conclude these negotiations by the end of 2022.
- African Competition Forum (ACF):** the ACF is an informal network of African national and multinational competition authorities. The principal objective of the ACF is to promote the adoption of competition principles in the implementation of national and regional economic policies of African countries.
- Economic Community of West African States (ECOWAS):** is a regional political and economic of fifteen countries located in West Africa. The ECOWAS Regional Competition Authority is made responsible for enforcement of the regional competition provisions. It was established in 2008 but only launched on 12 July 2018 (hosted by Gambia).
- Central African Economic and Monetary Community (CEMAC):** the CEMAC Executive Secretariat is responsible for the implementation of the regional competition provisions in the Central African Economic and Monetary Community.

OVERVIEW

Jurisdiction	Regional Competition Bodies / Instruments							
	COMESA ¹	EAC ²	WAEMU ³	SADC ⁴	AfCFTA ⁵	ACF ⁶	ECOWAS ⁷	CEMAC ⁸
Ethiopia	✓	✗	✗	✗	✓	✓	✗	✗
Gabon	✗	✗	✗	✗	✓	✓	✗	✓
Ghana	✗	✗	✗	✗	✓	✓	✓	✗
Kenya	✗	✗	✗	✗	✓	✗	✓	✗
Madagascar	✓	✓	✗	✗	✓	✓	✗	✗
Malawi	✓	✗	✗	✓	✓	✓	✗	✗
Mali	✗	✗	✓	✗	✓	✓	✓	✗
Mauritius	✓	✗	✗	✓	✓	✓	✗	✗
Morocco	✗	✗	✗	✗	✓	✓	✗	✗
Mozambique	✗	✗	✗	✓	✓	✓	✗	✗
Namibia	✗	✗	✗	✓	✓	✓	✗	✗
Nigeria	✗	✗	✗	✗	✓	✓	✓	✗
Rwanda	✓	✓	✗	✗	✓	✓	✗	✗
Senegal	✗	✗	✓	✗	✓	✓	✓	✗
South Africa	✗	✗	✗	✓	✓	✓	✗	✗
Sudan	✓	✗	✗	✗	✓	✗	✗	✗
Tanzania	✗	✓	✗	✓	✓	✓	✗	✗
Togo	✗	✗	✓	✗	✓	✓	✓	✗
Tunisia	✓	✗	✗	✗	✓	✓	✗	✗
Uganda	✓	✓	✗	✗	✓	✗	✗	✗
Zambia	✓	✗	✗	✓	✓	✓	✗	✗
Zimbabwe	✓	✗	✗	✓	✓	✓	✗	✗

ALGERIA



ALGERIA

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

A new law on competition is in the works to replace Ordinance No. 03-03 of 19 July 2003 on Competition, as amended in 2008 and 2010 ("**Competition Law**"). As of February 2022, a first draft was being reviewed by the Secretariat General of the Prime Ministry.

The Competition Council published its Official Competition Bulletin in February 2021 with the contributions of the participants to a conference held in October 2019 on the issue of competition in the context of the digital economy. The Official Competition Bulletin may be accessed [here](#). Participants made a number of recommendations to reform the Competition Law.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

Subject to the response to question 3, the Competition Council has not initiated any new market inquiries.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

The Competition Council has previously expressed concern regarding the pharmaceutical sector, including the creation of monopolistic market structures within this sector. Allegations were made on the National Union of Pharmacy Operators' website, stating that a study ought to be conducted in relation to this sector. Following these allegations, a study was conducted by European Union experts, between 2015 and 2018, on the market of medicines for human use in Algeria. Following this study, it was recommended that the national drug market be opened to European imports. The study noted the existence of (i) oligopolies and dominant positions having a negative impact in terms of availability, price, quality and accessibility of medicines; (ii) conflicts of interest within the supply chain (i.e., production, import and distribution); and (iii) inadequate management of supply and demand dynamics triggering recurring shortages for certain medicines, including basic medicines. Further, on 10 February 2021, the Competition Council issued a statement to defend the study and qualify its conclusions. In its statement, the Competition Council clarified that the recommendations of the study "are not binding on public authorities and market players", specifying that the players concerned "can implement of them or ignore them if they prove to be irrelevant and incompatible with the policies adopted in this area".

The Competition Council is also currently conducting a study in relation to competition in the maritime transport sector. This study began in 2020 and is still ongoing.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

Subject to the response to question 3, the Competition Council has not publicly identified any specific sectors as strategic for competition law enforcement.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

No. Dawn raids are currently not a high risk in Algeria.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

No. We are not aware of such new regulations or measures introduced by the Competition Council.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

No.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

No. We are not aware of such initiatives by the Competition Council.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

Yes. Please refer to the information regarding the pharmaceutical and maritime sectors mentioned above.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

The Algerian foreign direct investment regime was eased in 2020 and 2021, with the removal of the 51 / 49% rule, in terms of which, foreign investors are required to partner with Algerian resident nationals holding at least 51% of the share capital. This rule was eased for all foreign direct investment, except in certain strategic sectors, including (i) military industries under the Ministry of Defense; (ii) importation of raw materials and products for resale "as is"; and (iii) for 44 activities in strategic sectors, such as pharmacy, transportation and energy and mining.

A number of industry sectors are regulated in Algeria and require specific approvals or licenses from the supervisory ministry, including telecommunication, pharmaceutical products, medical devices, oil and gas, automotive, mining, insurance and banking.

For instance, mergers involving companies operating in the upstream hydrocarbon sector in Algeria are subject to prior authorisation by the State, which in this context, enjoys a right of pre-emption.

- 12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').**

Please refer to the response above.

MERGER CONTROL DEVELOPMENTS

- 13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?**

No.

- 14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?**

No. We are not aware of such official proposals.

- 15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.**

In terms of Ordinance 03-03 on Competition, a merger notification is voluntary and non-suspensory if the transaction is "unlikely to affect competition", and notification is left solely at the discretion of the parties to the transaction.

However, if a transaction is "likely to affect competition", a merger notification will become mandatory and suspensory, in that stakeholders to the transaction cannot implement any part of the transaction that is irreversible, or close the transaction, prior to a decision by the Competition Council. Prior to making its decision on whether to approve or prohibit the transaction, the Competition Council must seek the opinion of the Minister in charge of the sector in issue, whereafter the Competition Council will have three months to inform the parties of its decision.

Failure to notify and prior implementation are sanctioned by Ordinance 03-03. That being said, local counsel are unaware of any cases that have been brought against an entity for gun-jumping and / or prior implementation of a notifiable transaction.

As reported in the Official Competition Bulletin, only four mergers have been filed during an eight-year period.

- 16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.**

As stated above, a merger notification is voluntary and non-suspensory if the transaction is "unlikely to affect competition". Local counsel are unaware of any cases that have been brought against an entity for failure to notify such transactions.

- 17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.**

We are not aware of such cases.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

There was no such case.

Notably, the Competition Council only published one decision in 2021, which may be accessed [here](#). In this decision, the Competition Council approved a concentration in terms of Article 15 of the Competition Law between Sanofi and Chelplapharm. Sanofi had asked the Competition Council in 2020 to approve a sale of assets to Chelplapharm whereby the global distribution rights on a drug, including distribution within Algeria, were transferred to Chelplapharm. The Competition Council ruled that it had the necessary jurisdiction to review the concentration based on the fact that Chelplapharm would have direct control of the drug in Algeria as a result of the transfer (i.e., through clientele, trademarks, orders, AMM, know-how, inventory, etc.) and that Chelplapharm would replace Sanofi in its position of dominance in the Algerian market, with a 60% market share for the drug. The concentration was approved on the basis that the concentration would have no impact on the relevant market or on competition, and that Chelplapharm provided a written commitment that the transaction would not impact clients, trigger unjustified price increases or cause shortages, and that the current market situation would be maintained.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

In one instance, in the transaction involving Linde Gaz AG and Praxair Inc. in 2017, a merger between parties that did not have a physical presence in Algeria was notified. The rapporteur explained that, since the concentration process will be carried out between the two companies operating abroad, knowing that the company PRAXAIR has no branches in Algeria, while the company LINDE is the sole supplier of industrial gases in Algeria, the activities of the two companies concerned in Algeria do not overlap and will not directly affect competition within the Algerian market. Accordingly, the Competition Council approved the economic concentration.

In the case mentioned in the previous response, Sanofi and Chelplapharm, both companies were also located outside of Algeria.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

No.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

No.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

A change of control does not automatically trigger a notification. Such notification would only be required if the change of control would negatively impact the free play of competition.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Algerian merger control does not take public interest consideration into account.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

Algerian merger control does not take public interest consideration into account.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

In theory, a "greenfield" or joint venture merger could be caught under merger review regime if it results in an abuse of a dominant position or creates a monopoly. In practice, we are not aware of any instance where such mergers have been notified.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

We are not aware of such cases.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

According to the Competition Law, the Competition Council must respond to a merger filing within a period of three months from the date of notification, based on the opinion of the Supervisory Ministry of the relevant sector.

In a more complex transaction, the Competition Council may require the advice of another relevant administration, authority or ministry prior to approving the transaction. This may cause the approval process to take longer. In practice, the process generally takes between three to six months.

28. Please indicate whether, legally or in practice, your competition authority allows for "hold separate" arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

A hold separate arrangement is not prohibited, as long as it does not affect the free play of competition.

29. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.

Sequential closing is possible, however, we are not aware of such cases.

PROHIBITED PRACTICES

30. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

In 2019, the Competition Council imposed a daily penalty of DZD 500,000 (approx. USD 3,850) on a supplier, which persisted until the cessation of an abuse of dominant position and refusal to sell, in the case of *Archipel vs. United Tobacco Company*.

31. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

No. We are not aware of any published cases.

32. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Algeria has a broad prohibition on exclusivity, which applies to production, distribution and service operations. Article 10 of the Competition Law, states that "A practice shall be deemed to have the effect of preventing, restricting or distorting free competition and shall prohibit any act and/or contract, whatever its nature and purpose, which confers on an undertaking exclusivity in the exercise of an activity falling within the scope of this Order".

Non-compete restraints are not expressly regulated under Algerian law. Therefore, they are not prohibited, insofar as they have no impact on the free play of competition in Algeria.

We are not aware of prosecutions by the Competition Council in 2021 against entities for implementing exclusivity clauses or non-compete restraints.

33. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

No.

34. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

The Competition Law has provisions prohibiting the abuse of economic dependence by a buyer vis-à-vis a supplier. Economic Dependence is defined as a "...commercial relationship in which one of the enterprises has no comparable alternative solution if it wishes to refuse to contract under the conditions imposed on it by another enterprise, customer or supplier". Pursuant to Article 11 of the Competition Law, the abusive exploitation by an enterprise of the state of dependence of another enterprise, customer or supplier shall be prohibited if it is likely to affect the free play of competition. Such abuse may consist of:

- a) a refusal to sell, without legitimate reason for the refusal;
- b) concomitant or discriminatory selling;
- c) sale that is conditional on the acquisition of a minimum quantity;
- d) the obligation to resell at a minimum price;
- e) the termination of a commercial relationship on the sole ground that the partner refuses to submit to unjustified commercial conditions; and
- f) any other act that would reduce or eliminate the benefits of competition in a market.

The Competition Council has not brought any case against entities accused of abusing buyer power.

35. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Yes. Cartel conduct/anti-competitive conduct is criminalised in Algeria. Apart from the above-mentioned Competition Council decision, we are not aware of any criminal charges brought, or convictions made, against any persons and/or entities for engaging in anti-competitive conduct.

REGIONAL BODIES / COOPERATION

36. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Since 2021, Algeria is a party to the African Continental Free Trade Agreement ("AfCFTA"). Representatives of the Competition Council recently took part in the meetings with AfCFTA member states to negotiate competition policy in continental Africa.

37. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

To the best of our knowledge, no Memorandum of Understanding has been signed with any jurisdiction.

38. Please describe trends on the level of enforcement of the regional body.

Not applicable.

39. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Not applicable.

40. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

Not applicable.

41. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Not applicable.

**Baker
McKenzie.**

Baker McKenzie



Celine Van Zeebroeck

Of Counsel

T +1 202 452 7083

celine.vanzeebroeck@bakermckenzie.com

In collaboration with:



Cabinet TABET Avocats & Conseils

Lamine Tabet

Avocat - Partner

T +213 (0) 21 43 59 43

l.tabet@cabinettabet-dz.com

ANGOLA



ANGOLA

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

The legal framework on competition includes the Competition Act, approved by Law No. 5/18 of 10 May 2018, and the Competition Regulations, approved by Presidential Decree No. 240/18, of 12 October 2018. These legislative developments have been strengthened by the establishment of the Angolan Competition Regulatory Authority (“**CRA**”), which became operational following Presidential Decree No. 313/18 of 21 December 2018, as amended by Presidential Decree No. 110/19, of 16 April 2019, which approved bylaws of the CRA and the presidential appointment of its board of directors (“**Board**”).

The CRA has published a number of Secondary Regulations on various matters, of which we would like to emphasise No. 7/20, setting forth the leniency regime.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

The CRA has conducted market inquiries in relation to the following sectors, namely (i) civil aviation; (ii) telecommunications; and (iii) electricity, in 2020.

In 2021, as far as we are aware, the CRA conducted market inquiries in relation to the following sectors, namely (i) telecommunications and (ii) petroleum products.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

The CRA has issued competition and/or pricing recommendations with regard to the following sectors namely (i) payment services; (ii) civil aviation; and (iii) electricity.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

In order to ensure greater speed and efficiency in the investigation processes of anti-competitive conduct, via denunciation, the CRA launched the Complaints Portal on Restrictive Competition Practices. The purpose of this portal is to facilitate the provision of information on all types of acts, the effects of which, are embodied in restrictive practices of competition, namely (i) abuse of dominant position; (ii) abuse of economic dependence; (iii) horizontal agreements restricting competition; (iv) vertical agreements restricting competition; (v) decisions by associations of companies harmful to competition; and (vi) transactions or mergers of companies not notified. These restrictive practices apply equally to all sectors and industries.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

There have been no instances in which the CRA has undertaken a dawn raid. That being said, the CRA possesses the authority that is typical of competition watchdogs, including the authority to carry out unannounced inspections.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

No.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

No.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

No.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No.

10. Has the competition authority identified industries / markets / sectors that it consider to be concentrated? If so, please provide details.

No.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

Mergers involving foreign buyers or acquirers, which entail a concentration relevant from a competition perspective, are addressed in light of the company concentration provisions included in the Competition Act.

Other than that, foreign direct investments are governed by Private Investment Law (Law no. 10/21, of 22 April 2021) ("PIL") and the Regulations thereto, as approved by Presidential Decree no. 250/18, of 30 October 2018.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

The PIL applies to all sectors but also provides certain benefits depending on the sectors in which the investment is made. Notably, priority sectors include education, technical and professional training, scientific research and innovation, agriculture, food and agro-industry, amongst others.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

According to the information disclosed on the CRA website, no notified transactions have been prohibited since January 2021.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

The CRA has been funded through the State Budget, due to it lacking own revenues. This situation has been modified and merger filing fees have been set through Executive Decree No. 32/21, of 1 February 2021, issued by the Finance Ministry, according to which the following fees are due: (i) AKZ 2,418,944.15 (approx. USD 5,822) on notified transactions with combined revenue above AKZ 450 million (approx. USD 1,083,114); and (ii) AKZ 3,627,916.96 (approx. USD 8,732) on notified transactions with combined revenue above AKZ 3.5 billion (approx. USD 8, 424, 224). For notified transactions with combined revenue below AKZ 450 million (approx. USD 1,083,114) no filing fees have been set.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

Yes. The submission of a merger notification is mandatory and suspensory. A merger cannot be completed until clearance is received from the CRA. There is no record of any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

No. Filing obligations are mandatory.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

We are not aware of any such cases.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

We are not aware of any such cases. That said, the legal basis to interdict an acquisition of shares or assets of another firm would have to be grounded on said operation being harmful to competition, i.e., the operation must be liable to restrict, prevent or distort competition. The substantive test for the assessment of a concentration is the "dominance test", pursuant to which concentrations should be prohibited if they are likely to create or strengthen a dominant position that may significantly impede effective competition in the relevant markets. The Competition Law Regulation, however, appears to empower the CRA to prohibit a concentration that significantly impedes effective competition, even in the absence of a dominant position.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Foreign-to-foreign mergers that meet one or more notification thresholds are covered to the extent they have, or may have, effects in the territory of Angola. Therefore, the Competition Act may apply whenever all parties, or the target alone, carry out business in Angola, whether directly or indirectly, despite the fact that neither of the undertakings concerned are established in the country.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

The CRA approved several mergers during 2021, however, no mergers were approved subject to novel or otherwise noteworthy conditions.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

No.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

Internal restructurings are not caught. Purely internal transactions, where ultimate control remains within a group of companies, are not caught by company concentration provisions.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Reported mergers, subject to prior clearance and which have been made public, have been approved on the basis that the mergers do not entail an impediment on effective competition. Angolan merger control does not take public interest considerations into account.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

Angolan merger control does not take public interest considerations into account.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

The establishment of a joint venture is caught by notification requirements. Notification may be required for the establishment of a new joint venture even if only the parents generate revenue in the jurisdiction but not the joint venture itself. The concept of "concentration" covers the creation of a full-function joint venture on a lasting basis.

The "undertakings concerned" for the establishment of a joint venture (i.e., the relevant parties for meeting the revenue thresholds), are all undertakings that can exercise decisive influence over the joint venture. Typically, these parties include majority shareholders and any minority shareholders with the ability to block strategic decisions, thus exercising control over

the joint venture. In the establishment of a new joint venture, the joint venture itself is not considered to be an “undertaking concerned”. In a change of control over an existing joint venture, the joint venture itself is also considered to be an “undertaking concerned”. This is relevant as it sets forth how the thresholds are applied in the case of a joint venture.

Alternately, where the creation of the joint venture has the object or effect of coordinating the competitive behaviour of undertakings that remain independent, such coordination shall be assessed under the rules applicable to prohibited agreements and practices.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

The acquisition of a minority shareholding will only constitute a concentration if the shareholding acquired also confers control upon the acquiring company. Put differently, the acquiring company must obtain the right to exercise control over the acquired company, alone or jointly with other companies, notably through a shareholders’ agreement or a similar arrangement.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

Under the Competition Act, the CRA has a 120-day term to decide on transactions filed. If the referred time limit for the CRA to make a decision lapses without any decision being issued, the transaction will be considered to have been tacitly approved by the CRA.

Where an in-depth investigation is initiated by the CRA (to investigate whether the merger is considered likely to create or reinforce a dominant position in Angola, resulting in significant impediments to competition in the market or in a substantial part of it), a final decision must be issued within 180 days from commencement of the investigation.

On average the CRA has taken three months to notify a decision. Only with regard to a more complex transaction, which involved the parties undertaking certain remedies and commitments for it to obtain clearance, the CRA took close to seven months to reach a decision.

28. Kindly indicate whether the competition authority enjoys the power to “stop the clock” for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

The CRA has the ability to “stop the clock” after a review has started. The submission of commitments by the parties “stops the clock” for the period determined by the CRA. During a review, the CRA may ask for further information from the parties, assesses commitments (and in this case, the deadline for a decision is suspended) and conduct a hearing of the notifying parties and third parties who have expressed opposition to the transaction, before issuing a final decision. We have no knowledge of past decisions in this respect.

29. Please indicate whether, legally or in practice, your competition authority allows for “Carve out” / “hold separate” arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

There is no information on record at this stage. The merger regime is suspensory, meaning that if the transaction is caught by the notification requirements, it may not be implemented before the CRA has issued clearance. National clearance obligations typically suspend the transaction at an international level, i.e., the transaction may not be implemented globally until all required national

approvals have been obtained. That being said, it is possible to implement a transaction outside Angola prior to receiving clearance provided the CRA grants an exemption, upon submission of a reasoned request by the company or companies, derogating the stand-still obligation.

- 30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained)). If so, kindly describe cases where this has happened.**

Please refer to the previous response.

PROHIBITED PRACTICES

- 31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.**

There is no record of penalties having been imposed on any entities as a result of being engaged in prohibited practices.

- 32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.**

According to information on its website, the CRA opened one investigation in 2019, on alleged anticompetitive practices. No further information has since been provided, including whether the investigation is concerned with vertical relationships.

- 33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.**

Exclusivity clauses and non-compete restraints are not expressly provided for in the Competition Act and will therefore be assessed on a case-by-case basis. Exclusivity clauses and non-compete restraints may be deemed an infringement of competition rules if, in the specific case, they are likely to constitute practices which restrict competition, notably by restraining market entry. To the best of our knowledge, no prosecution has been launched against entities for implementing these type of clauses.

- 34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.**

To the best of our knowledge, no investigation has been launched and/or publicised since January 2021.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

The Competition Act does not contain specific provisions on the abuse of buyer power, however the conduct could be caught by the prohibitions of abuse of a dominant position and/or abuse of economic dependence. In the absence of a dominant position or economic dependence, the abuse of buyer power does not fall within the scope of the competition legislation.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Cartel conduct and/or anti-competitive conduct is not criminalised, but is rather defined as an administrative offence that is subject to fines. However, criminal liability may arise where the relevant anti-competitive conduct involves actions that may be deemed a crime, such as fraud, embezzlement, and abusive conduct, for example. Accordingly, even though the legislation does not expressly provide for specific types of crimes related to anti-competitive conduct, the actual conduct or practice may entail certain actions that are criminalised.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Angola is a member of the Southern African Development Community ("**SADC**"), whose members signed and approved the Declaration on Competition and Consumer Policies in 2009 ("**Declaration**"). Under the Declaration, SADC members undertook to set up a system for effective cooperation in the application of the competition and consumer protection laws of each member state. The Competition and Consumer Policy and Law Committee ("**CCPOLC**") was established under the Declaration, and is tasked with fostering cooperation and dialogue among competition authorities and encouraging the alignment of legislation. The CCPOLC facilitates cooperation and consultation in competition-related matters, but does not operate as a regional body aimed at controlling anti-competitive practices within the SADC area.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

The CRA and its Portuguese counterpart, the Competition Authority ("**AdC**"), signed a Memorandum of Understanding, on 21 December 2020. According to a press release from the CRA, the Memorandum of Understanding formalises the already solid partnership between the two entities. In this document, both Authorities expressly reiterate their mutual interest in establishing a strong and stable cooperation relationship, based on the sharing of relevant information of a non-confidential nature, exchange of ideas, transmission of technical knowledge and exchange of experiences, in the various fields of competition promotion and defence policy. The bilateral cooperation established between the AdC and the CRA is essentially based on six pillars, namely (i) development and promotion of joint studies and research on competition; (ii) establishment of technical and institutional assistance platforms in all areas inherent to the promotion and defence of competition; (iii) promotion of staff training and exchange initiatives; (iv) sharing of experiences in the implementation of good practices in the field of defence and promotion of competition; (v) exchange of publications, studies, or reports, as well as non-confidential information about legislative developments and processes; and (vi) promotion of joint competition promotion and defence events.

39. Please describe trends on the level of enforcement of the regional body.

Not applicable.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Mergers are notifiable domestically, where they meet the relevant thresholds for notification, regardless of whether the merger is also notified at a regional level.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

Not applicable.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Not applicable.

In collaboration with:



Miranda & Associados

Luis M. S. Olivera

Partner

T +351 217814800

luis.oliveira@mirandalawfirm.com

Renato del Almeida

Managing Associate

T +351 217814800

renato.almeida@mirandalawfirm.com

BOTSWANA



BOTSWANA

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

The Competition Act, 2018 ("**Competition Act**") came into force on 2 December 2019. The Competition Act repeals the Competition Act, 2009 and introduces the following significant changes:

- a) With effect from 2 December 2019, the competition authority has been renamed the Competition and Consumer Authority Botswana ("**CCAB**");
- b) The Competition and Consumer Board was established as the governing body of the CCAB, responsible for its affairs and policy direction;
- c) The Competition and Consumer Tribunal was established to adjudicate over breaches of the Competition Act or any appeal brought in terms of the provisions of the Competition Act;
- d) Criminal sanctions now apply to any officer or director of an enterprise who contravenes the horizontal restrictive practice provisions of the Competition Act. An officer or director may be liable for a fine of up to BWP 100,000 (approx. USD 9,033.11) or imprisonment for up to five years, or both;
- e) Personal liability may be imputed to any director or officer contravening the resale price maintenance provisions of the Competition Act. A fine of up to BWP 50 000 (approx. USD 4,516.56) may be imposed;
- f) The Competition Act expands the general prohibition against abuse of dominance, by introducing specific conduct that amounts to abuse, including: predatory conduct, tying and bundling of products, loyalty rebates, margin squeeze, refusal to supply or deal with other enterprises (including a refusal to grant access to an essential facility), requiring or inducing any customer to not deal with other competitors, discriminating in terms of price or other trading conditions and exclusive dealing; and
- g) Introduction of a financial penalty for failing to notify a merger or for prior implementation of a merger, calculated as a fine not exceeding 10% of the consideration or the combined turnover of the parties involved in the merger, whichever is greater.

In line with the amendments to the Competition Act, the Merger Assessment Regulations, 2013, have been updated.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

Where the CCAB has reasonable grounds to suspect that, in light of observed price rigidities or other circumstances, a restriction or distortion of competition may be occurring within a particular sector of the economy or within a particular type of agreement occurring across various sectors, the CCAB may initiate a market inquiry. During the 2018/19 financial year, the CCAB undertook the following market inquiries:

- a) A market inquiry in the liquefied petroleum gas market, in collaboration with other agencies in the SADC region and through the African Competition Forum. The findings of the study indicated that there is extreme market concentration in the upstream market, with high profit margins; and
- b) An inquiry is ongoing into the pharmaceutical sector in Botswana. The objectives of the inquiry are to (i) identify competition issues that need to be addressed in Botswana's pharmaceutical sector; (ii) understand the landscape of the pharmaceuticals sector in Botswana; (iii) understand the relationship between stakeholders within the pharmaceuticals sector subject to the value chain; and (iv) assess potential barriers to entry that may prevail along the pharmaceuticals supply value chain in Botswana.

During the 2020/21 financial year, the CCAB has carried out market inquiries (mainly cartel conduct) related to the following sectors:

- a) Abattoirs – this inquiry concerned a “refusal to deal” complaint by a vertically integrated abattoir;
- b) Construction (bidding market) – this inquiry followed an allegation of bid rigging in public procurement tenders;
- c) Waste Management (bidding market) – this inquiry followed an allegation of bid rigging in public procurement tenders;
- d) Government Supplies (bidding market) – this inquiry followed an allegation of bid rigging in public procurement tenders; and
- e) Animal Feed – this inquiry involved an investigation of alleged cartel conduct in relation to poultry and pig feed supplies.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

The CCAB has expressed concern in relation to the following sectors:

Pyramid schemes

The CCAB has opened an investigation in a number of cases including WhatsApp Gifting, Mufhiwa and others. For effective implementation of the Competition Act in relation to the said deceptive offences, the CCAB is collaborating with the Botswana Police Service, which is the entity responsible for criminal investigation and possible referral to the Directorate of Public Prosecutions

Price gouging of essential products during the COVID-19 pandemic

The CCAB received numerous reports from the public in respect of excessive pricing of basic food stuffs, healthcare products and hygiene products. The CCAB cautioned suppliers against this prohibited conduct and maintained continuous surveillance of pricing in the affected products.

Vehicle repair garages

During the period July 2021 – September 2021, the CCAB handled 175 cases concerning the use of sub-standard parts or defective spare parts in vehicles brought in for repair and/or service, resistance of garages to effect warranty terms and unclear pricing practices. The CCAB emphasised that consumers have a right to return goods to a supplier in their merchantable state.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

The CCAB, working together with the Organisation for Economic Cooperation and Development (“OECD”), is currently undertaking an impact assessment analysis of the legislative framework in the agricultural grains sector to determine the effectiveness of the legislative framework focusing on pricing and import restrictions. The CCAB is conducting education initiatives in the sector, including with regulators, as it is unclear if the existing legislation addresses competition concerns in this sector.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

No, dawn raids are a low to medium risk in Botswana. During the preceding year, only one dawn raid was undertaken in the poultry and feeds sector, following allegations of cartel conduct. The investigation is still ongoing.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

During periods of national lockdown, the CCAB permits electronic filing of merger applications. No formal regulations have been published.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

The CCA is currently investigating businesses and persons alleged to be involved in deceptive practices or any other trade malpractices in the supply of products intended to fight against COVID-19. Investigations are still ongoing.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

Yes. In March 2021, the CCAB entered into a settlement agreement with Gaborone Container Terminal Proprietary Limited ("GABCON") in an abuse of dominance case in the container haulage market. The CCAB had alleged that GABCON had engaged in an abuse of dominance through refusal to deal and excessive pricing. While the matter was before the Tribunal, the parties entered into a settlement agreement in terms of which, GABCON admitted to have abused its dominance in the container haulage market through refusal to deal and to desist from the said conduct.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

No.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

No. The Competition 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.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

Not applicable.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

No.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

No.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

Yes. Merger notification is mandatory and suspensory. No gun jumping cases have been considered in the 2021 financial year.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

No. Please refer to the response above.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

No.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

No.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

The Competition 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.

In the proposed acquisition by Lonsa Everite Proprietary Limited of the Everite Business, the EBP Business, the EP Business, Sheet Rite Proprietary Limited, Sky Sands Proprietary Limited and the Sky Sands Business, none of the parties had a presence in Botswana. The Target Enterprises were found to have income from Botswana derived from the manufacture and supply of building materials into Botswana.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Yes. In the proposed acquisition of 100% of the issued share capital in Kruger Agencies Technology Proprietary Limited ("KAT") by Mr Jagdish Shah, the CCAB approved the acquisition subject to, *inter alia*, the following conditions:

- a) the director of KAT shall be employed as a manager in the company for at least one year with the intention to train a citizen to undertake the role within 18 months; and
- b) for all positions held by expatriate staff in KAT, the acquirer shall appoint citizen understudies who shall take over the role.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

Yes. The CCAB requires notification of internal restructurings.

The proposed acquisition of control over Puma Energy Holdings Proprietary Limited ("Puma Energy") by Trafigura Proprietary Limited, a wholly owned subsidiary of Trafigura Group Proprietary Limited ("Trafigura") involved an internal restructuring, in terms of which, Trafigura, an existing shareholder, acquired control of Puma Energy. Both parties to the merger are subsidiaries of the Trafigura Group.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

Yes.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Public interest grounds have been applied mainly in relation to employment, and in particular, a prohibition on merger specific retrenchments. The following mergers included a prohibition of retrenchment condition:

- a) The proposed acquisition of 100% issued share capital in Aon Holdings Proprietary Limited by Min Holdings Proprietary Limited. The CCAB determined that the proposed merger may have a negative impact on public interest matters in Botswana, as a result, it directed that there shall be no merger specific retrenchments.
- b) The proposed acquisition of the 100% shares in Blue Pebbles Proprietary Limited by Zexmon Investments Proprietary Limited. The merger was approved with the condition that there will be no merger specific retrenchments for a period of three years from the date of implementation.
- c) The proposed lease of Phakalane Hotel and Convention Centre by Cresta Marakanelo Limited from Nectar Holdings Proprietary Limited and Real Time Services Proprietary Limited, and the acquisition of certain sale assets by Cresta Marakanelo Limited from Nectar Holdings Proprietary Limited and Phakalane Estates Proprietary Limited. This acquisition was approved subject to the condition that Cresta Marakanelo Limited will prioritise employees of Phakalane Estates Proprietary Limited, who were working at the Phakalane Hotel and Convention Centre, when recruiting for its new business situated at the Phakalane Hotel and Convention Centre.
- d) The proposed acquisition of 100% of the issued share capital of Barloworld Motor Botswana Proprietary Limited by NMI Durban South Africa Motors. The merger was approved subject to the condition that there shall be no merger specific retrenchments or redundancies that may affect the employees of the merged enterprises.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

None.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

The Competition Act does not specifically refer to joint ventures. That being said, joint ventures that are classified as mergers will be notifiable, if they meet the thresholds for mandatory notification. There have been no greenfield or joint venture mergers notified in the 2021 financial year.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

None.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

For non-complex mergers, the CCAB finalises its assessment within 30 working days. In relation to complex mergers, the assessment period takes 90 working days.

28. Kindly indicate whether the competition authority enjoys the power to “stop the clock” for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

Yes. Upon receipt of a merger, if the CCAB determines that further information is required, and requests such information from the parties in writing, the CCAB is entitled to suspend assessment of the merger until the information is received.

29. Please indicate whether, legally or in practice, your competition authority allows for “Carve out” / “hold separate” arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

Yes. The CCAB recognises that due to notification of mergers in multiple jurisdictions, such mergers may be subject to staggered approvals in the various jurisdictions and therefore, the CCAB allows “hold separate” arrangements in respect of the Botswanan approval.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.

Yes.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

None.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

The CCAB is investigating a case against Conduit Investments Proprietary Limited, after receiving a complaint from a whistleblower alleging that the company (a crusher dust producer and supplier) could be abusing its market power by charging its customers (both brick moulding businesses and individual customers) a much higher price for crusher dust. The allegation is that Conduit Investments Proprietary Limited also competes with customers that mould bricks, as it also has presence in the downstream market. This case remains ongoing.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Exclusivity and non-compete restraints are not specifically prohibited. That being said, they may be prohibited by the CCAB if, following an investigation by the CCAB, the conduct 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 CCAB will consider, inter alia, whether the agreement in issue limits or controls production, market outlets, access, technical development or investment.

The CCAB has only considered exclusivity clauses in the context of retail lease agreements. An inquiry into the shopping mall retail property market, concluded by the CCA in 2019, held that anticompetitive foreclosure may arise through exclusive dealing – preventing competitors from selling to customers, through the use of exclusive purchasing obligations and rebates. Therefore, exclusive dealing is a form of abuse of market power, since anticompetitive foreclosure may arise through such a practice. To date, there have been no prosecutions.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

Yes. In the case of Cotton Fields Proprietary Limited v Total Botswana Proprietary Limited, the CCAB is investigating an allegation of resale price maintenance by Total Botswana Proprietary Limited. The allegation is that Total Botswana Proprietary Limited dictates the price and margins at which its merchants or fuel stations (that have entered into a merchant agreement) are to resell petroleum products and participating goods and services to Total Cardholders. The investigation is still ongoing.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

No.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Yes. However, no charges or convictions have been brought against any person.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Botswana is not a member of any regional body with a competition law regime.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Yes. The CCAB has the following memoranda of understanding in place, namely (i) SADC Memorandum of Understanding on Inter-Agency Cooperation in Competition Policy, Law and Enforcement; and (ii) Memorandum of Understanding with the Competition Commission of South Africa

39. Please describe trends on the level of enforcement of the regional body.

Not applicable.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Not applicable.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

None.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

None.

In collaboration with:

PEOLEGAL



Peo Legal

Chabo Peo

Partner

T +267 3975779

chabo@peolegal.co.bw

CAMEROON



CAMEROON

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

There have been no recent changes to national competition law. That being said, at a sub-regional level, the latest revision of the CEMAC Regulation on Competition occurred in 2019 ("**Regulation**"). This revision brought about the following substantial changes:

- a) the Regulation replaced the two previous regulations, which dealt with company and state practices in the field of competition;
- b) the Regulation takes into account the replacement of the Executive Secretariat by the Commission, and more generally the amendment of the CEMAC Treaty and the UEAC Convention in 2009;
- c) with respect to community competition bodies, the Regulation established two bodies, namely (i) the Commission, a decision-making body; and (ii) the Community Competition Council ("**CCC**"), which replaces the Competition Supervisory Body (*Organe de surveillance de la Concurrence*). Like the Competition Supervisory Body, the CCC plays an advisory role in competition matters and is responsible for investigations, which was previously a responsibility held by the Commission;
- d) the Regulation provides useful clarifications on the relationship between community and national competition authorities, delineating the division of competence in the application of community competition law, and the obligation of collaboration between these bodies;
- e) with regards to the thresholds set for notification of concentration operations, the Regulation provides that any merger or acquisition which involves two or more CEMAC member states shall be notified to the CEMAC authority; and
- f) the thresholds for the notification of any concentration operation have been amended to state that notification shall be compulsory if the combined turnover of the parties to the transaction is greater than 10 billion francs (excluding taxes).

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

The National Competition Commission ("**NCC**") has previously carried out inquiries in several sectors of the economy, either at the request of a public administration body or upon its own initiative, when the practices of certain companies were likely to affect fair competition. These inquiries were conducted in, inter alia, the energy, telecommunications, port and airport, and money transfer sectors. Currently, there is no plan to initiate any market inquiries in relation to any other sector or industry.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

No. The NCC generally does not issue public statements expressing concerns in relation to any sector or industry. However, the relevant sector or industry representatives are usually notified directly of any specific concerns that the NCC might have.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

No. Please refer to the response above.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

No. Dawn raids are not a high risk in Cameroon.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

There have been no changes to the regulations or measures related to competition enforcement in response to the COVID-19 pandemic.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

There is no publicly available information regarding such an action.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

This is the exclusive competence of the Cameroonian Government, through the Minister of Trade.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No. The NCC has not taken any action.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

No. The NCC has not identified any industries, markets or sectors considered to be concentrated.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

Yes. There is a foreign direct investment review regime. The said regime is regulated by the CEMAC Foreign Exchange Regulation (Regulation n 2/18/CEMAC /UMAC/CM signed on the 21st December 2018).

The regulatory bodies in charge of the review of foreign direct investment notifications are the Central Bank and the Ministry in charge of credit and money (Ministry of Finance).

There have been several foreign direct investment notifications to date.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

The foreign direct investment regime applies to all sectors.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

We are not aware of any such case. This information is not publicly available.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

There is no official proposal to amend merger filing fees and/or monetary thresholds in Cameroon. At a sub-regional level, the latest monetary thresholds were introduced in the Regulation. Following this introduction, a merger or acquisition shall be notified to the CEMAC authority when:

- a) the parties to the transaction have a combined turnover greater than 10 billion francs (approx. USD 16, 458, 780); OR
- b) collectively, they hold more than 30% of the market share; OR
- c) the concentration operation may have an impact on at least two CEMAC member states.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

The submission of a merger notification is mandatory and suspensory in Cameroon, once the required thresholds are met which thresholds are as follows:

However, a merger notification shall be mandatory only when the thresholds set by the legislator are met, which thresholds are as follows:

- a) the combined turnover of the parties to the concentration during the year preceding the current year is 4 billion francs or above; or
- b) the market shares held by the parties to the transaction shall be equal or greater than 30%.

A transaction cannot be implemented prior to receiving approval from the NCC either as per a notice to the filing parties or through implied consent after a period of three months from receipt of the filing. However, local counsel are unaware of any case brought by the NCC against entities for failure to notify a transaction, as this information is not publicly available.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

Please refer to the response above.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

Such a situation has not arisen in Cameroon as yet.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

We are not aware of any such cases.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

There have been cases in which parties to a transaction did not have physical presence in Cameroon, but was nonetheless notified. Below, we have summarised a notable case in this regard.

In 2017, joint control over Intouch SAS was acquired by three different companies, namely TOM, Worldline and InTouch Corp. The purpose of the transaction was to offer, through existing or future operating companies, a solution enabling the aggregation of payment systems, and thus, facilitating the management of payment services through the use of a third-party medium (mobile phone, personal digital assistant or any other medium) in Africa and certain Middle Eastern countries. Initially, Intouch Corp held 100% of the shares in Intouch SAS. However, post-transaction, InTouch Corp would have had 48% of the share capital of Intouch SAS whereas TOM and Worldline were intended to receive 26% each. The operation was notified to the NCC on the basis that the turnover of parties to the transaction met the required thresholds.

Hence, as a general rule, the test for an operation to be notified in Cameroon shall be whether it meets the required thresholds.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

In Cameroon, mergers are generally approved unconditionally. Where, upon the review of a merger notification, the NCC is in doubt of a fact, it will usually request the parties to provide justifications or further particulars.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

In cases which involve a change in control, in principle, the NCC requires the notification of any merger which meets the thresholds, whether such a merger involves a change in ultimate control or not.

Although the legislator is not precise as to the issue, it is submitted that the term "merger" the National Competition Law, 1998 ("National Competition Law") refers to any transfer of assets and liabilities from one or more companies to another, giving rise to a new company or the absorption of the transferring company. From the foregoing, a merger may trigger notification obligations, whether it involves a change in ultimate control or not, provided that it meets the required thresholds.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

The NCC requires the notification of an acquisition provided that such restructuring involves any change in the control (irrespective of the change being in ultimate or direct control) of the target company and the thresholds for filing are met. This, however, is not the case for mergers which shall not mandatorily involve a change of control.

Although the legislator is not precise as to the issue, it is submitted that the term "acquisition", as contemplated in the National Competition Law refers to any transfer of all or part of the assets, rights and obligations of one or more companies to another company which enables the latter to exercise decisive influence over all or part of the activities of the companies being transferred. From the foregoing, an acquisition involving a change of control, be it a direct, indirect or ultimate change of control in a group of companies, shall be notified as soon as it meets the thresholds.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

We are not aware of approved mergers subject to public interest grounds since January 2021, as this information is not made publicly available.

Kindly note that the law provides for circumstances in which mergers may be approved subject to public interest grounds. This approval may be obtained if parties prove that the merger will bring real efficiencies to the national economy beyond the detrimental effects on competition in the market.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

We are not aware of any transaction that has been prohibited based on public interest grounds alone.

25. Describe the circumstances in which 'greenfield'/ joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

A joint venture merger may be caught under the merger control regime when such joint venture meets the notification thresholds.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

For the purpose of the National Competition Law, a non-controlling minority share acquisition will not trigger a notification obligation.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

In terms of the competition laws of Cameroon, no distinction is made between complex and non-complex transactions. Generally, a merger must be approved within a maximum period of six months from the date of notification, failing which, the merger will be deemed to be approved. In practice, transactions are approved by the NCC within a minimum period of three months from the date of notification. However, approval may be delayed in the event of a request from the NCC for additional information.

28. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

No. The NCC does not enjoy such power.

29. Please indicate whether, legally or in practice, your competition authority allows for "hold separate" arrangements (*this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately*). If so, kindly describe cases where this has happened.

From a practical perspective, "hold separate" arrangements are allowed.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (*for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained)*). If so, kindly describe cases where this has happened.

A transaction may be implemented sequentially. Nevertheless, we are not aware of any precedent case where this situation has arisen.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

The National Competition Law provides for general penalties, such as fines, injunctions to put an end to the incriminated practices (anticompetitive practice) which may be accompanied by a penalty payment and payment of damages.

More specifically, when the NCC concludes that there is an abuse of dominance, it will order that the concerned undertakings put an end to the prohibited practices.

A fine equal to 50% of the profit or 20% of the turnover made in the Cameroonian market during the financial year preceding the year in which the offence was committed, may be imposed in the case of cartel conduct.

In the event of non-compliance with the above fines, the NCC may order the temporary closure of the offending undertakings.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

We are not aware of any such cases.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Exclusivity clauses and non-compete restraints are null and void. Any interested person is entitled to apply to the NCC for purposes of cancelling exclusivity clauses or non-compete restraints. Moreover, these practices are punishable by a fine equal to 50% of the profit derived by the relevant entity or 20% of the turnover derived in the Cameroonian market in the financial year preceding the year during which the infringement was committed. In addition, the NCC can order companies to cease the conduct or to pay damages, including interest.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

No such investigation has been reported.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

Yes. The legislation contains provisions on the abuse of buyer power. However, we are not aware of any cases brought by the NCC against accused entities.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Yes. Cartel conduct and anti-competitive conduct is criminalised in Cameroon. However, no criminal charges have been brought, or convictions made, against any persons and/or entities for engaging in anticompetitive conduct since January 2021.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Cameroon is a member of CEMAC. Accordingly, activities in Cameroon should be conducted with the CEMAC in mind.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Yes. Cameroon signed several memoranda of understanding with a number of jurisdictions. Some recent Memoranda of understanding are highlighted below:

- a) a Memorandum of Understanding with the United Kingdom, which sets out the arrangements for applying the effects of the economic partnership agreement from 1 January 2021 between the United Kingdom and Cameroon; and
- b) a Memorandum of Understanding with South Africa (Law No. 2018/004 of 6 April 2018), ratifying the Memorandum of Understanding on Economic Cooperation between the Republic of Cameroon and the Republic of South Africa.

39. Please describe trends on the level of enforcement of the regional body.

We understand that the CEMAC frequently consults Cameroon on competition issues, as the Cameroonian legislation is more elaborate than those of other CEMAC member states.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

No. Except the transaction involves more than one CEMAC member state.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

We are not aware of any such cases. This information is not publicly available.

42. Please describe any announced cooperation between your local competition authority and regional body (ies) in relation to new or ongoing investigations.

We are not aware of any such cases.

**Baker
McKenzie.**

Baker McKenzie



Fabien Hecquet

Senior Associate

T +33 1 44 17 6561

fabien.hecquet@bakermckenzie.com

In collaboration with:

ETAH-NAN & C
ATTORNEYS SOCIÉTÉ D'AVOCATS

Etah-Nan & Co

David Etah Akoh

Managing Partner

T + (237) 233 42 56 09 / 233 42 91 65

david.etah@etahnan.com

CAPE VERDE



CAPE VERDE

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

Competition is governed by the Competition Act, approved by Decree-Law No. 53/2003 of 24 November 2003 ("**Competition Act**"). According to the Competition Act, the bodies responsible for overseeing and enforcing competition rules are the Minister for Industry, Trade and Energy ("**MITE**") and the National-Directorate for Industry, Trade and Energy ("**NdITE**"), which carries out the research and checks, and prepares the file for ministerial decision.

A key development must be noted, in response to recent information made public, the competence on competition matters will be transferred to the Ministry of Finance in the short/medium term. This will warrant deep and extensive modifications to the existing legislation.

The legislation envisages that a Competition Council be set up, to take up an executive role as the relevant competition authority with regard to restrictive practices and an advisory role in support of the MITE with regard to merger control. This Council has not been set up as yet.

A small number regulatory bodies have been set up, with marginal powers on competition matters. The most important by ambit is *Agência Reguladora Multisectorial da Economia* ("**ARME**"), a multi-sectoral regulatory agency created by Decree-Law No. 50/2018, of 20 September 2018. ARME is tasked with economic and technical regulation over the business sectors of communications, energy, water, postal services and passenger transport. Until the Competition Council is in place, ARME takes up an advisory role on merger control in the context of said sectors.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

To the best of our knowledge, no market inquiries have been initiated in relation to any sector/industry.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

We are not aware of concerns having been publicly expressed in relation to any industries/sectors in general.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

No. Please refer to the response above.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

No. Under the Competition Act, NdITE holds powers to conduct dawn raids (ARME in relation to the business sectors under its oversight purview) but, to the best of our knowledge, none have been carried out.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

No.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

Not applicable.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services? If so, please provide details.

No. However, ARME has shown oversight proactivity with regard to the industries/sectors within its purview, namely communications, energy, water, postal services and passenger transport. ARME has shown oversight primarily in relation to economic regulation through price and margins controls, and occasionally in the context of certain pricing practices, such as competitive discounts, promotions and the like, most notably in the communications sector.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

Not applicable.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

Not applicable.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

Mergers and acquisitions involving foreign buyers may be subject to competition control clearance, in light of the company concentration provisions included in the Competition Act.

12. If the acquired or merged company is a party to a foreign direct investment agreement (i.e., an "Establishment Convention", as per local designation), it must be confirmed whether the agreement contains provisions regarding change of control, or requires governmental approval.

The foreign direct investment regime is set forth in Law No. 13/VIII/2012, of 11 July 2012 (as amended) and in Decree-Law No. 42/2015, of 27 August 2015.

13. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

A fast-track foreign direct investment regime applies to investments up to 5 million CVE (approx. USD 48,954), but excludes those in the financial sector and those made by investors whose capital is at least 50% owned in by foreign States.

MERGER CONTROL DEVELOPMENTS

14. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

Not applicable.

15. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

Merger filing fees have yet to be published. In practice, no filing fees have been requested when filing a merger.

16. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

Yes. The submission of a merger notification is mandatory and suspensory, and therefore a merger subject to notification cannot be completed before being filed with the NdITE and cleared by the MITE, either as per a notice to the filing parties or through implied consent after a certain term has lapsed.

There is no publicly available information regarding any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction.

17. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

No. The filing obligation is mandatory, if the notification thresholds are satisfied.

18. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

Not applicable.

19. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

Not applicable.

20. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

We are not aware of any such cases. Nevertheless, foreign-to-foreign transactions are caught if the relevant thresholds are met, regardless of the place of incorporation or activity of the parties.

21. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Merger filings tend to be cleared through implied consent, rather than allowing a screening and upon the formal issuing of a decision by the MITE.

22. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

Not applicable.

23. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

Purely internal transactions, where ultimate control remains within a group of companies are not caught by company concentration provisions.

24. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Public interest considerations are not taken into account in merger reviews in terms of applicable legislation.

25. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

Public interest Considerations are not taken into account in merger reviews in terms of applicable legislation.

26. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

Only full-function joint ventures are caught under the merger review regime, provided they meet the applicable thresholds.

27. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

Minority shareholdings acquisitions will only trigger a filing if they result in the acquisition of control.

28. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

Upon receiving the notification and (in theory) gathering other data it may deem appropriate, the NdITE will send the file to the MITE for final decision. The NdITE has 30 calendar days to hear the applicants in relation to any particular issue, to carry out any other due diligence it (or the applicants) may deem relevant, and then submit the file to the MITE for decision. The 30-day term may be suspended if additional information is requested from the merging parties.

The MITE then has 30 days, counted as from the filing of the notification. In practice, this has been interpreted as counting from the date when the MITE receives the file from the NdITE, to either, approve the proposed transaction, or submit the notification to the Competition Council for advice (which Council is not yet operational).

The MITE is empowered to grant or refuse approval. If the MITE, directly or through the NdITE, fails to issue a decision within the 30-day deadline (i.e., 60 days in total, from the date of filing) the transaction is deemed cleared through implied consent.

In light of the above, the formal or tacit approval generally takes between 60 and 90 calendar days, without taking into consideration possible suspensions, as mentioned above.

29. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

The authority has the ability to "stop the clock" after a review has started. During a review, the authority may ask for further information from the notifying parties and conduct a hearing before issuing a final decision. In such cases, the deadline for a decision is suspended. There is no publicly available information regarding any past decisions in this respect.

- 30. Please indicate whether, legally or in practice, your competition authority allows for “hold separate” arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.**

The merger regime is suspensory, meaning that if the transaction is caught by the notification requirements, it may not be implemented before formal or tacit clearance from the MITE. National clearance obligations typically suspend the transaction at an international level, i.e., the transaction may not be implemented globally until all required national approvals have been obtained. There is no publicly available information regarding hold separate arrangements being expressly accepted by the authorities.

- 31. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.**

Please refer to the response above.

PROHIBITED PRACTICES

- 32. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.**

The Competition Council may impose fines on entities engaged in prohibited practices, such as cartel conduct and abuse of dominance, for example. However, as the Competition Council is not yet operational, ARME is empowered to impose such fines in the communications, energy, water, postal services and passenger transport sectors. There is no publicly available information regarding any penalties having been imposed.

- 33. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.**

Not applicable.

- 34. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.**

Exclusivity clauses and non-compete restraints are not expressly regulated under the Competition Act and would therefore be assessed on a case-by-case basis. Exclusivity clauses and non-compete restraints may be regarded as an infringement of the competition rules if, in the specific case, they are likely to constitute practices that restrict competition, notably by impeding the entry or expansion of new competitors in a specific market.

There is no publicly available information regarding any prosecution has been launched against entities for implementing such clauses.

35. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

There is no publicly available information regarding any such investigation investigation since January 2021.

36. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

The Competition Act does not contain specific provisions on the abuse of buyer power. However, the conduct could be caught by the prohibitions of abuse of a dominant position and or abuse of economic dependence. In the absence of a dominant position or economic dependence, the abuse of buyer power would fall beyond the scope of competition legislation.

37. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Cartel conduct and anticompetitive conduct is not criminalised, but is rather categorised as an administrative offense, subject only to administrative fines. Criminal liability may arise where the anticompetitive conduct involves actions that may be deemed a crime, such as fraud, embezzlement and abusive conduct, for example. Therefore, even though the legislation does not expressly provide for specific types of crimes expressly related to anticompetitive conduct, the actual conduct or practice may entail certain actions that are criminalised.

REGIONAL BODIES / COOPERATION

38. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Cape Verde is a member of the Economic Community of West African States ("ECOWAS"). The ECOWAS Supplementary Act A/SA.1/06/08 on Community Competition Rules and the Modalities of their application, and Supplementary Act A/SA.2/06/08, establishing a Regional Competition Authority to cooperate with national competition authorities, apply. The ECOWAS Regional Competition Authority was launched on 12 July 2018 (hosted by the Gambia), but its operation and effectiveness remain unclear with regard to most areas. Nonetheless, activities in Cape Verde should be conducted with ECOWAS in mind.

39. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Not applicable.

40. Please describe trends on the level of enforcement of the regional body.

Having been launched on 12 July 2018, the level of enforcement of the Regional Competition Authority for ECOWAS is unclear.

41. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

A merger is notifiable regionally before the ECOWAS Regional Competition Authority if it affects trade between member states of ECOWAS. There are no explicit rules defining the allocation of jurisdiction between the national and ECOWAS levels.

42. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

Not applicable.

43. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Not applicable.

In collaboration with:



Miranda & Associados

Luis M. S. Oliveira

Partner

T +351 21 781 48 00

luis.oliveira

@mirandalawfirm.com

Sofia Coelho Pereira

Managing Associate

T +351 217 814 800

sofia.pereira

@mirandalawfirm.com

Sandra Tavares Magalhães

Senior Associate

T +351 217814800

sandra.magalhaes

@mirandalawfirm.com

Ilvio Pacol Mango

Associate

T +351 217814800

ilvio.mango

@mirandalawfirm.com

COMESA



COMESA

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

The Common Market for Eastern and Southern Africa (“COMESA”) Competition Commission (“Commission”) has not proposed or enacted any amendments to its COMESA Competition Regulations of 2004 (“COMESA Regulations”). However, the Commission has suspended the sections in its Merger Assessment Guidelines relating to its Phase 1 and Phase 2 merger assessment review periods as of 6 February 2020. It is currently consulting Member States to arrive at more optimal review periods.

On 11 February 2021, the Commission issued a Practice Note in which the Commission amended its interpretation of the term “operate” to mean that a party will operate in COMESA, merely if it is active in within the region. There is no minimum threshold or asset threshold. This interpretation will mean that many more transactions will fall within the scope of the COMESA Regulations’ merger control regime.

On 2 September 2021, the Commission issued a Practice Note on Procedure for the Conduct of Hearings before the Committee on Initial Determination (“CID”). This note seeks to provide clarity and legal certainty on the procedures to be followed in the conduct of hearings before the CID by the parties to an investigation.

The Commission also called for comments on its Draft Guidelines on Fines and Penalties, Draft Guidelines on Settlement Procedures and Draft guidelines on Hearing Procedures, respectively. The period to submit comments ended on 12 November 2021.

2. To the extent that there are any market inquiry provisions, has the Commission initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

Yes. The COMESA Competition Rules allows the Commission to initiate inquiries into sectors of the economy. The Commission has initiated 10 market studies / inquiries to date.

3. Has the Commission publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

Yes. The Commission has published a press release where it expressed concern in respect of the airline industry. Specifically, the Commission stated that airlines were forcing customers to comply with terms that were contrary to the COMESA Competition Regulations and urged them to cease such conduct.

The Commission has previously launched investigations into the following sectors as well:

- pharmaceutical;
- construction;
- beverage (both alcoholic and non-alcoholic);
- shipping;
- aviation;

- money transfers;
- agriculture and agribusiness; and
- sports (in relation to the commercialisation of media and marketing rights of football events).

4. Has the Commission identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

Subject to the response to question 3, the Commission has not identified such sectors.

5. Are dawn raids by the Commission a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

No.

6. Has the Commission introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

The Commission published a Notice of Interim Measures in Merger Review of the COMESA Competition Commission due to the COVID-19 Pandemic. These measures related to, *inter alia*, the issues listed below.

- a) Encouraging parties to mergers to submit notifications and filing of mergers and acquisitions electronically.
- b) Considering the initial engagement with the Commission (even in the absence of a complete notification where the gathering of information is affected by the pandemic) to constitute notification and not, therefore, penalising parties for failing to submit complete information within the 30 day period provided by the legislation.
- c) Suspending onsite investigations and face-to-face meetings, although consultations and meetings can still be held using teleconferencing facilities.
- d) Extending the 120-day investigation period where travel bans, lockdowns, and other pandemic-related factors affect the ability of the Commission to complete its investigation within the 120-day period.

7. Has the Commission taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

No.

8. Has the Commission been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

No.

9. Has the Commission adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No.

10. Has the Commission identified industries / markets / sectors that it consider to be concentrated? If so, please provide details.

No.

- 11. Please indicate whether there is a foreign direct investment review regime at COMESA level in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.**

There is no COMESA-specific regime applicable to foreign investors. That being said, individual member states may have a foreign direct investment review regime. There is no general obligation imposed by COMESA competition legislation to notify mergers or acquisitions by foreign investors in COMESA member states.

- 12. If there is a foreign direct investment regime, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').**

Not applicable.

MERGER CONTROL DEVELOPMENTS

- 13. Have any notified transactions been prohibited by the Commission in your jurisdiction since January 2021? If so, on what basis?**

No.

- 14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?**

No. However, please refer to the response to question 1 above, in relation to the amendment of the meaning of the term "operate".

- 15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the Commission brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.**

Notification is mandatory and non-suspensory. The Commission may impose an administrative penalty of up to 10% of the turnover derived from the Common Market for gun-jumping / failure to notify.

In September 2021, the Commission imposed an administrative fine, in the transaction where Helios Towers Limited proposed to acquire the shares of Madagascar Towers S.A and Malawi Tower Limited, for a failure to notify the transaction in the prescribed period (which is no later than 30 days from the parties' decision to merge). Here, the Commission only imposed a fine of 0.05% of their combined turnover in the common market in 2020. However, this was on account of mitigating factors such as the parties' cooperation with the Commission, the fact that the breach did not cause harm in the market, and the fact the parties had no record of prior contraventions. The merger was subsequently approved, after the parties paid a fine of USD 102,101.78.

- 16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the Commission brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the Commission has specifically requested notification of mergers.**

Please refer to the response above.

17. Please describe any cases in which the Commission fined any entity for failing to comply with merger conditions.

Fines for breach of merger conditions, while previously unheard of in COMESA, are now a reality. On 13 December 2021, the Commission issued a press release informing the public that the CID had imposed a fine on ATC Heston B.V. (“**ATC**”) for failure to comply with a commitment contained in the decision concerning its acquisition of 100% shareholding in Eaton Towers Holding Limited.

The commitment was that ATC would ensure that the Uganda Operating Entities (“**UOE**”) would not discriminate among mobile network operators (“**MNO**”) in Uganda, in the provision of leasing space on its telecommunication towers and roof tops, or related services. The UOEs were to develop an objective criterion to use when determining the MNOs it leases space to. This criterion was to be submitted to the Commission for consideration within one month of the approval of the transaction. Instead, the criterion was submitted 10 months after the required timeline, and only after the Commission followed up with the parties. The Commission considered this to be a breach of an order made under the competition legislation, and recommended the imposition of a fine of USD 96,614.25. The CID, however, considered the fine too harsh and found that the Commission had not taken sufficient notice of mitigating factors. The fine was subsequently lowered by 30% to USD 67,629.98.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the Commission in your jurisdiction, as well as the basis for this.

The COMESA Competition Regulations provide wide powers and orders that the Commission make, including prohibiting or restricting an acquisition by a person of the whole or part of an undertaking (in respect of public interest considerations in mergers), and may make an order relating to matters, including the transfer or vesting of property, rights, liabilities or obligations, and the creation, allotment, surrender or cancellation of any shares, stocks or securities (in respect of mergers generally). We are not aware of cases where this has occurred.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in the COMESA region and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in the COMESA region do not have any subsidiaries or assets in the country, what is the local nexus test / local effects test to establish merger review jurisdiction?

The Commission has, thus far, not required parties to notify foreign-to-foreign transactions. However, this must be considered in light of the fact that the minimum asset or turnover threshold for a firm to “operate” in COMESA has been removed (subject to the proviso that the parties do not derive two-thirds of their aggregate turnover in COMESA within one and the same member state). Thus, foreign-to-foreign transactions may now be more likely to fall within the purview of transactions that are notifiable to the Commission.

20. Has the Commission approved any mergers subject to novel or otherwise noteworthy conditions?

Not to the best of our knowledge.

21. Please indicate whether the Commission has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

The Commission does not consider internal restructurings, without a change of ultimate control, to constitute a merger and does not view it as a notifiable transaction.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

Please refer to the response above.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

There have been no mergers approved subject to public interest grounds since January 2021.

24. Please describe cases where the Commission has prohibited a merger transaction based on public interest grounds alone.

There have been no mergers prohibited on public interest grounds alone.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the Commission.

"Greenfield" or joint venture mergers are caught under the COMESA Competition Regulations where the entity performs, on a lasting basis (typically five or more years), all the functions of an autonomous economic entity.

On 27 September 2021, the Commission was notified of a proposed transaction where Sumitomo Corporation, Vodafamily Ethiopia Holding Company Limited and CDC Group Plc proposed to form a greenfield joint venture for the purposes of bidding for a full-service telecommunications licence under the Ethiopian telecommunications regulatory framework. The joint venture was found to be unlikely to lead to competition concerns, as there is no market share accretion nor vertical integration arising from the transaction, the public interest was also not implicated. The transaction was thus approved on 6 December 2021.

On 30 September 2021, the Commission was notified regarding the establishment of full function greenfield joint ventures in Kenya and Uganda by Nutreco International B.V. and each of Unga Farm Care E.A. Limited and Unga Millers (Uganda) Limited. The purposes of the transaction is to consolidate certain parts of Nutreco and Unga's animal feed and aquafeed businesses currently conducted in Kenya, Rwanda, and Uganda within the COMESA region. The joint venture was found to be unlikely to substantially prevent or lessen competition in the Common Market (or a substantial part thereof), nor be contrary to the public interest. The CID determined further that the transaction was unlikely to frustrate the objective of full market integration of the Treaty establishing COMESA. The transaction was thus also approved on 6 December 2021.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

A non-controlling minority interest will not be considered to amount to a notifiable merger in terms of the COMESA Competition Regulations. The legislation uses a very wide control test to establish the notifiability of a merger. However, any interest that does not confer control within the meaning of the legislation will not be notifiable.

27. On average how long does the Commission take to approve a non-complex transaction? What about a complex one?

The Commission has 120 calendar days to make a decision on a merger. The Commission has suspended its Phase 1 and 2 review periods, effective 6 February 2020 and is currently consulting with member states to arrive at optimal merger review periods. Thus, currently only the 120-day upper time limit for consideration is effective.

In 2021, the Commission took between 7 – 18 days to provide a comfort letter, between 45 – 119 days for mergers with unconditional clearance and between 92 – 145 days for mergers with conditional clearance. The 145 day period accounts for extensions to the 120-day investigative period in terms of the Interim Measures in Merger Review of the COMESA Competition Commission due to the COVID-19 Pandemic mentioned in the response to question 6 above.

28. Kindly indicate whether the Commission enjoys the power to “stop the clock” for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

The Commission has 120 days after receiving notification to examine a merger. However, in the event of an incomplete notification, the examination period only begins on the day following receipt of complete information. The time period is thus suspended until a complete notification is lodged. There is no publicly available information regarding any cases where this has occurred.

29. Please indicate whether, legally or in practice, your competition authority allows for “hold separate” arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

Yes. However, this is not strictly necessary, as mergers can be implemented prior to approval, as long as the transaction has been notified within 30 days of the decision to merge. The Commission has, however, recommended caution, as the parties will carry the risk of the whole or part of the merger possibly being prohibited after implementation has already commenced. That being said, there is no publicly available information regarding cases where this has occurred.

30. Please indicate whether, legally or in practice, the Commission allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.

Please refer to the response above.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

There have been no penalties imposed on entities engaged in prohibited practices thus far. However, a Cautionary Notice was published by the Commission in February 2021, which warned that the Commission considers that it has given ample time to undertakings active in the common market, through soft enforcement, to ensure that their agreements are consistent with the COMESA Competition Regulations. The Cautionary Notice states that in future, the Commission will focus on hard enforcement, including investigation and punishment of offenders.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

Yes. The Commission has initiated the following investigations, namely:

- a) On 15 January 2018, the Commission began an investigation into Coca-Cola Beverages Africa (“CCBA”) for resale price maintenance clauses in distribution agreements between CCBA and independent distributors in the Common Market. These agreements were found contain clauses that stipulated profit margins to be enjoyed by the distributors, and commissions applicable, at different levels of the market. The agreements were further found to contain vertical restraints. In response to the CIDs determination, CCBA agreed to remove the offending clauses from their agreements and to implement a compliance programme. No fine was issued.

- b) An investigation against Confédération Africaine de Football (“CAF”), in relation to the exclusive commercialisation of media and marketing rights for African football tournaments with Lagardère Sports S.A.S., which is ongoing.
- c) An exclusive dealing agreement between Eveready East Africa Limited and Clorox Sub-Saharan Africa for the production and distribution of bleaching agents. No contravention was found.
- d) Exclusive distribution agreements between Parmalat and exclusive distributors in Malawi, Eswatini, Zambia, and Zimbabwe. No contravention was found.
- e) Distribution agreements between AB InBev and third-party distributors in Comoros, DRC, Djibouti, Kenya, Libya, Malawi, Mauritius, Seychelles, Uganda and Zambia. The investigation revealed possible anticompetitive effects, and AB InBev thus made undertakings to remedy the likely harm. The Commission approved these undertakings.
- f) An investigation into an agreement between Shoprite Uganda and GS1 Kenya (“GS1”) which required suppliers of products to Shoprite supermarkets in Uganda to obtain their barcodes from GS1. No contravention found.
- g) In June 2021, an investigation was initiated into possible market allocation and/or territorial restrictions by beer manufacturing companies AB InBev, Castel, Diageo and Heineken among themselves and in distribution agreements with independent third-party distributors respectively. The investigation is ongoing.

33. Please explain how exclusivity clauses and non-compete restraints are treated. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Exclusivity clauses and non-compete restraints will be prohibited if implemented (or intended to be implemented) in the common market if they may affect trade between member states and have the object or effect of prevention, restriction, or distortion of competition. The Commission’s Guidelines on Restrictive Business Practices sets out how the Commission will approach an assessment of restrictive business practices. There have been no prosecutions against entities for implementing exclusivity clauses or non-compete restraints. However, the Commission has investigated exclusivity clauses, as discussed in the above response. Non-compete restraints continuing for five years after the termination of a distribution agreement were found to raise potential anticompetitive foreclosure concerns by the Commission. However, restraints of two to three years have previously been found to be acceptable. Having said that, the duration of a restraint is not necessarily determinative as each case will be assessed on its own merits.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

The Commission conducted eight investigations into restrictive business practices in 2021.

In June 2021, the Commission publicised that it would be commencing an investigation into beer manufacturing companies Ab InBev, Castel, Diageo and Heineken for market allocation agreements between themselves and/or territorial restrictions in distribution agreements with third party independent distributors. The investigation is ongoing.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

The COMESA Competition Regulations prohibit a dominant firm from directly or indirectly imposing purchase or selling prices. We are not aware of any cases brought by the Commission in terms of this provision.

36. Is cartel conduct/ anti-competitive conduct criminalised in the COMESA region? If so, have any criminal charges been brought/ convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

No. The COMESA Competition Regulations do not provide for criminal sanctions for cartel conduct or anticompetitive conduct.

REGIONAL BODIES / COOPERATION

37. Please confirm whether the Commission has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

The COMESA Commission has signed memoranda of understanding with the following competition authorities:

- Competition and Fair-Trade Commission of Malawi;
- Eswatini Competition Commission;
- Fair Trade Commission of Seychelles;
- Competition Authority of Kenya;
- Egyptian Competition Authority;
- Madagascar Competition Council;
- Competition and Prevention of Monopolistic Practices Council of Sudan;
- Competition and Competition Protection Commission of Zambia;
- Competition Commission of Mauritius; and
- Competition Commission of the Democratic Republic of the Congo.

The COMESA Commission has also previously cooperated with the European Commission and South African Competition Commission, among others, although there is no official agreement with these authorities.

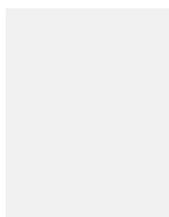
38. Please describe trends on the level of enforcement of the Commission.

The COMESA Commission is the most active regional competition regulator in Africa. While it has previously focused mostly on merger control enforcement, it has recently become more active in investigating prohibited practices.

39. If a merger is notifiable to the Commission and the thresholds for domestic notification are also triggered, are parties required to notify both domestically and regionally?

COMESA notification may not dispense with the requirement to notify domestically in member states. Certain member states will still require domestic notification despite a COMESA notification. Examples of such states are Egypt, Ethiopia, Madagascar, Mauritius, Sudan, Uganda and Zimbabwe.

**Baker
McKenzie.**

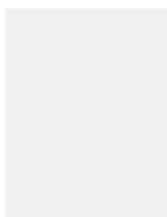


Lerisha Naidu

Partner

T +27 11 911 4323

lerisha.naidu@bakermckenzie.com



Angelo Tzarevski

Associate Director

T +27 11 911 4316

angelo.tzarevski@bakermckenzie.com

CÔTE D'IVOIRE



CÔTE D'IVOIRE

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

Since 2019, no new amendments or guidelines relating to the national competition legislation has been proposed or enacted. In 2019, Ordinance no. 2019-389 dated 8 May 2019 amended Ordinance no. 2013-662 dated 20 September 2013, which is the basis of the national competition legislation. Article 3 of the Ordinance no. 2013-662 has been clarified, and states that the Government may regulate the prices of goods and services of primary necessity or mass consumption products, after consultation of the National Competition Commission ("**Competition Commission**"), in the event of excessive price increases resulting from an exceptional crisis situation or a manifestly abnormal functioning of the market of a good or service.

The Government may also, on the basis of proposals resulting from consultations between the State and the economic operators concerned, and after consultation of the Competition Commission, fix, cap or approve by decree price margins for goods and services in the following cases, namely (i) stabilisation of price levels for basic and consumer goods and services in the event of a significant market disturbance; and (ii) guard against speculation, in all its forms, with a view to preserving the consumer's purchasing power.. The measures taken in this context may not exceed six months and are not renewable.

Côte d'Ivoire is a member of the WAEMU and ECOWAS, both of which have a competition law regime.

However, although the ECOWAS has enacted regional competition legislation (the ECOWAS Supplementary Act on Competition Rules prohibiting anti-competitive business conduct which prevents, restricts or distorts competition within the common market of ECOWAS), these rules have not been applied to date. In fact, the application of these rules could raise conflicts of jurisdiction between the two regional organisations.

Accordingly, activities in Côte d'Ivoire must be assessed by reference to WAEMU. The WAEMU Commission has exclusive jurisdiction in relation to certain competition law related matters (e.g., merger control) within its Member States.

No new amendments or guidelines relating to the WAEMU competition legislation has been proposed or enacted neither.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

The Competition Commission has not initiated any market inquiries in relation to any sector.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

No. The Competition Commission has not publicly expressed concern in relation to any industry or sector.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

No.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

The risk of dawn raids by the Competition Commission is moderate to low, as is the risk of dawn raids by the WAEMU Commission. There is no publicly available information regarding any dawn raids conducted by the Competition Commission or the WAEMU Commission.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

No.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

No.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

No.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

No.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

No. There is no foreign direct investment review regime in relation to mergers involving foreign buyers, and there is no publicly available information regarding any plans announced to introduce such a regime.

However, pursuant to article 10 of the Regulation 09/2010/CM/UEMOA relating to financial external relations of the WAEMU Member States, any constitution of foreign investments and transfer of investments between non-residents are subject to a statistical reporting obligation to the Directorate of External Finance and to the Central Bank of the West African Countries.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

Not applicable.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

The WAEMU Commission has exclusive jurisdiction in relation to merger control within its Member States. The Competition Commission has only subsidiary powers in this matter, mainly to assist the WAEMU Commission. There is no publicly available information regarding any transaction notified to the WAEMU Commission that has been prohibited since January 2021.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

No. There is no publicly available information regarding official proposals to amend merger filing fees and/or monetary thresholds.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

Not all mergers are subject to control by the competition authorities. The WAEMU Regulation deals only with mergers which could lead to an abuse of a dominant position. Thus, a merger is likely to be censored by the WAEMU Commission only if the operation (i) creates or strengthens a dominant position; and (ii) has the effect of significantly impeding effective competition within the common market.

The submission of a merger notification is not mandatory, however, parties to a transaction are required to notify the transaction to the WAEMU Commission if they wish to avail themselves of the benefit of an exemption or a negative clearance.

The merger notification is not suspensory. Regulation no. 02/2002/CM/UEMOA provides that no fine can be pronounced for acts implemented after notification to the WAEMU Commission and prior to the decision by which the WAEMU Commission grants or refuses to grant an exemption, provided that they remain within the limits of the activity described in the notification. This provision implies that the parties can implement the operation described in the notification without waiting for the WAEMU Commission's decision. However, when implementing the transaction prior to clearance, parties run the risk of being ultimately refused the benefit of the negative clearance or exemption and may be required to re-establish the pre-existing legal situation.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

The submission of a merger notification is non-suspensory and voluntary. There is no publicly available information regarding any cases by the WAEMU Commission has yet to bring a case against entities for failure to notify a transaction post-completion.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

There is no publicly available information regarding any case in which the WAEMU Commission fined an entity for failing to comply with merger conditions.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

There is no publicly available information regarding any case in which the acquisition of shares or assets of another firm was interdicted by the WAEMU Commission.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

There is no publicly available information regarding such cases.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

There is no publicly available information regarding any case in which the WAEMU Commission approved a merger subject to novel or otherwise noteworthy conditions.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

There is no publicly available information regarding any such case.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

According to Section 4.3 of Regulation No. 02/2002/CM/UEMOA, the WAEMU antitrust legislation applies to:

- a) a merger between two or more undertakings previously independent;
- b) the transaction whereby one or more persons who already control at least one company, or one or more undertakings, acquire directly or indirectly, either through the acquisition of a stake in the capital or the purchase of assets or through a contract or any other means, the control of all or part of one or more other undertakings;
- c) the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity."

As such, it is arguable that a change in direct control, within a group of companies, which does not affect change in ultimate control, does not trigger an obligation to notify, insofar as the new entity interposed does not already control another entity.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

There is no publicly available information regarding any case in which a merger has been approved subject to public interest grounds since January 2021.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

There is no publicly available information regarding any case in which the WAEMU Commission has prohibited a transaction based on public interest grounds alone.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

Joint ventures are caught under the merger review regime if the joint venture performs, on a lasting basis, all the functions of an autonomous economic entity and if the creation of the joint venture (i) creates or strengthens a dominant position; and (ii) has the effect of significantly impeding effective competition within the WAEMU common market.

Several joint venture mergers have been notified to the WAEMU Commission and are currently being reviewed. For example, the WAEMU Commission has been notified of a request for negative clearance or individual exemption by the companies Orange and MTN in the context of a project to create a joint venture called JVCO responsible for managing a technical interoperability platform between mobile money transfer services. The Commission has also been notified of a request for negative clearance from Orange Abidjan Participations S.A., NSIA Banque Côte d'Ivoire S.A. and Diamond Bank S.A. in connection with the creation of a joint venture called Orange Abidjan Compagnie S.A. which will develop its activity in the banking sector. The decisions of the WAEMU Commission on these notifications have not yet been made public.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

There is no publicly available information regarding any case in which a non-controlling minority share acquisition has been found to constitute a notifiable merger.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

The WAEMU competition legislation provides for two types of proceedings, namely (i) a non-contradictory procedure; and (ii) a contradictory procedure.

In respect of a non-contradictory procedure, the WAEMU Commission has six months from the date of notification to grant or refuse a negative clearance or exemption. If, within six months of notification, no decision has been adopted by the WAEMU Commission, the WAEMU Commission shall be deemed to have implicitly adopted a negative clearance decision or an individual exemption decision depending on the case.

If the WAEMU Commission has doubts as to the compatibility of the agreement within the WAEMU common market, it may then decide to initiate the adversarial procedure. If, within 12 months of the initiation of the adversarial procedure, the WAEMU Commission has not adopted any decision; this silence shall be deemed to be an implicit decision of negative clearance or individual exemption.

28. Kindly indicate whether the competition authority enjoys the power to “stop the clock” for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

The WAEMU Commission enjoys the power to “stop the clock” for a review of a merger. If, during the adversary procedure, provisional measures are adopted, the 12-month period (as mentioned in the response above) shall be suspended until the provisional measures expire.

29. Please indicate whether, legally or in practice, your competition authority allows for “hold separate” arrangements (*this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately*). If so, kindly describe cases where this has happened.

Where a practice is brought before the WAEMU Commission, it may adopt provisional measures. Such measures may include the imposition of conditions necessary to prevent any potential anti-competitive effect and we assume the WAEMU Commission can, on this ground, allow for “carve out” arrangements. However, we are not aware of any such case.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (*for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained)*). If so, kindly describe cases where this has happened.

The WAEMU competition legislation does not expressly provide for provisions allowing for a transaction to close sequentially. However, this is not prohibited.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

There is no publicly available information regarding any noteworthy penalties that were imposed on entities engaged in prohibited practices.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

No. There is no publicly available information regarding any such case.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Exclusivity clauses and non-compete restraints are not prohibited per se. Depending on the circumstances, such restraints may, nevertheless, constitute an abuse of a dominant position and may be subject to sanction. There is no publicly available information regarding prosecutions against entities for implementing exclusivity clauses or non-compete restraints.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

The WAEMU has not publicised any new investigations since January 2021.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

Yes. The WAEMU competition legislation contains provisions on the abuse of buyer power. However, there is no publicly available information regarding any case being brought against entities accused of abusing buyer power.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

No. Sanctions taken by the WAEMU Commission in this matter are not of a criminal nature.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Côte d'Ivoire is a member of the WAEMU and ECOWAS, both of which have a competition law regime.

However, although the ECOWAS has enacted regional competition legislation (the ECOWAS Supplementary Act on Competition Rules prohibiting anti-competitive business conduct which prevents, restricts or distorts competition within the common market of ECOWAS), these rules have not been applied to date. In fact, the application of these rules could raise conflicts of jurisdiction between the two regional organisations.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

There is no publicly available information regarding any such Memorandum of Understanding.

39. Please describe trends on the level of enforcement of the regional body.

The WAEMU Commission's activity is very low. The WAEMU Commission has issued less than a dozen decisions in 12 years.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

No notification is required domestically. The WAEMU Commission has exclusive jurisdiction regarding mergers.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

There is no publicly available information regarding any such cases.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

There is no publicly available information regarding announced cooperation between the local Competition Commission and the WAEMU Commission in relation to new or ongoing investigations.

**Baker
McKenzie.**

Baker McKenzie



Fabien Hecquet

Senior Associate

T +33 1 44 17 6561

fabien.hecquet@bakermckenzie.com

In collaboration with:

Cabinet de l'Indénié

SCPA de l'Indénié - Avocats

7 bis, boulevard des Avodirés (Abidjan-Plateau) – 20 BP 1322

Abidjan 20 (Côte d'Ivoire)

T +225.27.20.20.34.55

info@cabinetindenie.com

Marie-Sédrine Grogga

Avocat à la Cour

mariesedrine.grogga@cabinetindenie.com

EGYPT



EGYPT

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

On 25 November 2020, the Egyptian Competition Authority ("ECA") announced that the Egyptian Prime Ministry approved the Prime Minister's draft law ("draft law") amending certain provisions of the Egyptian Competition Law 3/2005 ("ECL"). On 18 February 2021, the Egyptian parliament's Economic Affairs Committee started the discussions on the new amendments.

The draft law adds the definition of concentration to the ECL, whereby a concentration shall be deemed to have occurred whenever there has been a change in control of a firm or upon the establishment of a material influence on a lasting basis. Situations that could give rise to the change in control include:

- a) the merger of two or more previously independent persons or parts of these persons;
- b) the acquisition of the ability of one or more persons to exercise control or material influence, directly or indirectly, over the whole or parts of one or more other persons, whether by the purchase of securities or assets, by contract or by any other means; or
- c) the establishment or acquisition of a joint venture by two or several other persons, performing (on a lasting basis) all the functions of an autonomous economic entity.

The draft law further lists certain transactions that are exempt from the definition of a concentration, offers clear definitions of control and material influence and mandates the notification of concentrations to the ECA, prior to the conclusion of the agreement in order to attain clearance on the concerned transaction.

Furthermore, the draft law prohibits concentrations where they are likely to significantly restrict or harm the freedom of competition in a particular market, or part of it, and especially when the concentration creates or entrenches a dominant position or facilitates a violation of the ECL.

During its assessment, ECA must consider defences submitted by the concerned parties, such as the failing firm defence and any economic efficiencies resulting from the concentration. The ECA reserves the right to approve otherwise anticompetitive concentrations if it is likely that one of the notifying parties will exit the market absent the transaction and the procompetitive effects of keeping the firm's assets in the market outweigh the anticompetitive effects of the transaction. Possible efficiency claims will also be considered by the ECA when evaluating concentrations.

More recently, the Ministry of Health has adopted a new enforcement policy before approving any merger or acquisition transaction. The Minister of Health now refers the files of all of the proposed transactions to seek the prior opinion of the ECA.

Lastly, in October 2021, the head of the ECA and the head of the General Authority for Government Services, signed the issuance of the "Periodic Book" on the authority's instructions on how to implement the articles related to competition protection contained in the Law No. 182 of 2018 regulating contracts concluded by public authorities and its executive regulations, which emphasised the need to notify the ECA in the event of a suspicion of collusion in any of the contractual operations within the administrative authorities.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

It has been announced that the ECA is currently conducting market studies in the automotive and healthcare industries.

During the past year, the ECA initiated market inquiries in relation to multiple sectors including health care, food, electronic and electrical appliances, automotive, real estate, media and petroleum sectors.

Additionally, the year 2021 witnessed the discussion of about 228 examination cases and studies of issues in various economic sectors. The examination cases received by the ECA during the year 2021 included about 14 sectors, including health care, real estate activities, building materials, food, automobile industry, media, textiles, education, paper and packaging industry, chemical industries, gas and petroleum materials, communications, and professional activities. Scientific and technical, e-commerce, tourism, shipping, electronic devices, and agriculture.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

The ECA also publicly expressed its concern over the health care sector following the proposed transaction in which a major group of hospitals, the Cleopatra Hospitals Group, intended to acquire another hospital group, Alameda Hospitals. The proposed transaction would have negatively affected the health care sector. As such, the ECA continues to monitor this sector closely.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

Yes. The ECA has indicated that the automotive and healthcare sectors are among the priority sectors.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

While the risk of actual dawn raids decreased recently, the ECA frequently conducts sudden visits to hold meetings with relevant persons within a company. These visits are not actual dawn raids. The risk of this strategy has been very high lately.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

The ECA undertook an initiative to provide free economic and legal consultations to companies operating in different markets, regarding the compliance of their decisions with the ECL during the COVID-19 pandemic, and the exemption conditions stated in Article 6 paragraph 2 of the ECL.

The ECA highlighted that in light of the exceptional circumstances brought about by COVID-19, it has been fully aware of the importance of facilitating and enabling innovation and necessary technologies. This can be through collaboration on innovative efforts by and between competitors and fostering any necessary coordination among them to achieve more efficient means of producing scarce or fundamental products necessary to combat the spread of the virus, especially in the medical supplies sector or the pharmaceutical and health care sectors.

The ECA, together with the Prime Minister of Egypt, arranged for the fixing of prices in relation to certain medical supplies required for health and safety during the COVID-19 pandemic. However, this decision has since been suspended.

For the 2021 Competition Advocacy Contest, the International Competition Network and the World Bank Group awarded the ECA an Honorable Mention in recognition of its efforts in response to the COVID-19 pandemic.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

The ECA has issued at least six infringement decisions in 2021, including cases related to cartels and abuse of dominance. There are also several non-cooperation infringement decisions and others related to the failure to notify transactions to the ECA post-closing.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

It is unlikely that the ECA would impose price caps, as this would be a sensitive matter in Egypt. However, there have been a number of price fixing cartels and bid rigging decisions that were intended to curtail increasing prices in some markets.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

To date, the ECA has not taken specific measures to address firms that are active in the digital market. However, the ECA has hosted a pan African meeting with other African national competition authorities to set the standards for enforcement in the digital markets. More recently, the ECA has issued a joint statement on enforcement in digital markets with other national competition authorities in Africa setting an action plan for cooperation.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

No specific markets have been identified.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

No.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

No.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

Currently, the ECL only requires post-merger notification. Therefore, the ECA does not have the authority to prohibit a transaction. However, the ECA submitted a proposal to amend the ECL and the amendments specifically mandate the ECA with the power to supervise and control mergers and acquisitions. Entities intending to undertake mergers or acquisitions within the definition of economic concentrations must notify and obtain the ECA's pre-approval thereof. In addition, the ECA has issued an advisory opinion rejecting a merger in the health sector, to the Minister of Health, to consider before approving the transaction. Eventually, the deal was abandoned by the parties.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

Yes.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

No. Please refer to the response to question 13 above.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

Yes. On 18 October 2021, the ECA brought cases against entities for failure to notify a transaction post-completion within the legal timeframe in violation of the provisions of Article 19 of the ECL. In total, in 2021, the ECA issued 10 infringement decisions against parties for failing to notify the ECA post-closing.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

We understand that in 2021 the ECA issued 10 infringement decision. That being said, we understand that these cases were settled with the ECA.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

In December 2020, the ECA issued a non-binding preliminary decision not to grant approval for Cleopatra Group's acquisition of Alameda Healthcare Group due to indications of negative impact on the health care sector in Egypt. This transaction included the sale of assets.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus text /local effects test to establish merger review jurisdiction?

We understand that there were 10 cases in total. However, the specifics of those cases have not been made public.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

None that we are aware of.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

No. The ECA does not require notification of internal restructurings if it does not involve a change in ultimate control.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

Yes. A notification is required.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

There is no publicly available information regarding this.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

There is no publicly available information regarding this.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

There are no specific exclusions under the ECL for greenfield/joint venture mergers. The ECL does not differentiate between full function and non-full function joint ventures.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

Yes. This is a notifiable merger transaction under the applicable enforcement policy.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

As mentioned in the response to question 10, merger notification in Egypt is non-suspensory. The ECL only requires post-transaction notification. However, when the ECA undertook an exceptional assessment of the Careem and Uber transaction, it took eight months to issue its final decision regarding the transaction, with only one extension requested during this period.

28. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

Not relevant to Egypt.

29. Please indicate whether, legally or in practice, your competition authority allows for "hold separate" arrangements (*this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately*). If so, kindly describe cases where this has happened.

There are no provisions in the ECL that would prohibit this arrangement.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (*for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained)*). If so, kindly describe cases where this has happened.

Not relevant to Egypt.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

In April 2021, the Economic Court of Cairo issued a ruling in a criminal case brought in March 2020, by the ECA, against five individual poultry brokers for colluding to fix the price of chicken to the detriment of consumers and chicken breeders. The court fined each broker 30 million Egyptian pounds (approx. EUR 1.6 million) for agreeing to fix the price of a kilogram of chicken.

In December 2020, the ECA found that Al-Ahram Beverages Group has been proven to have violated the provisions of the ECL in the alcoholic beverage distribution market. The ECA had previously received a number of notifications about competitors being harmed by Al-Ahram Beverages Group forcing its customers from hotels, restaurants, bars, distributors and retailers not to deal with its competitors, linking its various products, and granting "loyalty discounts" that restrict competition and harm the distribution of competing products in the market.

The evidence showed that Al-Ahram Beverages Group committed a number of prohibited practices under Article 8 of the ECL, and the group enjoyed the economic power that enables it to act in the market independently of its competitors and customers, and shows its ability to influence the prices of products or quantities offered without competitors being able to limit this impact in the alcoholic beverage distribution market.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

Yes. In the school uniform case, the ECA issued an infringement decision against the vertical exclusive agreement entered into between a store and a school.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

In the case of dominance, exclusivity and non-compete clauses are prohibited per se under the ECL. However, if there is no dominance, the ECA will seek to establish the anticompetitive effect to the said restrictions. There have not been any prosecutions against entities for implementing exclusivity clauses or non-compete clauses, since January 2019.

However, during April 2020, in a case regarding non-compete restraints, an expert report was submitted, which is usually highly persuasive to courts, where the court upheld a non-compete obligation. While this case is different from the non-compete obligation mentioned in this question, it is still relevant as it relates to a shareholder who opened an independent company and started competing with the original company on the same business. The expert concluded that the claimant (i.e., the original company) is entitled to damages arising from this form of competition and that the claimant is entitled to restrict the ability of the shareholders in competing with its business under the ECL.

In January 2021, the ECA condemned a private school in Fayoum Governorate due to its agreement with a ready-made clothing store to manufacture and sell its school uniforms exclusively in violation of the provisions of Article 7 of the ECL. The ECA confirms that the exclusive practices related to school uniforms have no justification and do not benefit the Egyptian consumer, but rather harm the consumer and make them bear burdens that they would not have been able to bear in light of the freedom of competition.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

Yes. The ECA has issued infringement decisions in the market of school uniforms and also a bid rigging case in the petroleum sector.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

Yes. The ECL contains provisions relating to the abuse of buyer power. These provisions have been commonly applied in cases involving buying cartels (attempting to lower prices from suppliers).

We are also aware of at least one investigation that took place in relation to abuse of dominance by a dominant buyer.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Yes. Cartel conduct/anti-competitive conduct is criminalised under the ECL.

In January 2022, the ECA decided that three companies working in the chemical industries had violated the provisions of Article 6, paragraph (c) of the ECL when they coordinated and colluded among themselves to enter together in a number of tenders offered by the Egyptian Petroleum Research Institute.

In November 2021, the ECA found that 21 owners of dermatological and cosmetic clinics had violated the ECL by making horizontal agreements and agreeing with each other to fix the prices of some treatment and cosmetic services provided to consumers. The ECA decided to take legal measures against the companies and warned them not to carry out such agreements.

In July 2021, the ECA decided to initiate a criminal case against two companies who agreed to submit identical offers in one of the practices of the General Authority for Veterinary Services, in violation of Article 6 (c) of the ECL. The ECA warned the two companies not to coordinate with regard to progressing or refraining from entering into tenders, auctions, practices and all other supply offers.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Egypt is a member of the COMESA. Therefore, activities in Egypt should be conducted with COMESA in mind.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

No. Egypt has not signed any Memorandum of Understanding with any other jurisdictions.

However, the head of the ECA has announced plans for the creation of an Arab Competition Network ("ACN") to enhance cross-border cooperation between antitrust enforcers in the Middle East. The ACN would be the first to provide Arab competition authorities with an official platform to meet and discuss prominent issues and impending changes to antitrust law. The network would be run by the 22 members of the League of Arab States, which includes Egypt, Syria, Lebanon, Iraq, Jordan and Saudi Arabia, among others. The platform is necessary to enable the exchange of expertise in Arab competition policy and to provide support to jurisdictions that are looking to enact their own antitrust legislation.

39. Please describe trends on the level of enforcement of the regional body.

The new management of the ECA, appointed in 2021, is cooperating with the COMESA Competition Commission and has established a cooperation system that enables it to enforce competition law provisions and penalise competition law violations. Please refer to the chapter relating to COMESA for additional information in relation to its regional enforcement activity.

The ECA, also conducted an examination and study of 18 notifications of mergers and acquisitions that took place in the COMESA, and 152 notifications of mergers and acquisitions and the establishment of unions inside Egypt.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Yes.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

The Minister of Health engaged with the ECA, as described in further detail, above.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

There has been extensive cooperation between COMESA and the ECA. In addition, cooperation between the ECA and the African network has also been increasing.

**Baker
McKenzie.**



Dr. Mohamed Elfar

Counsel, Cairo

T +20 2 2461 5520

mohamed.elfar@bakermckenzie.com



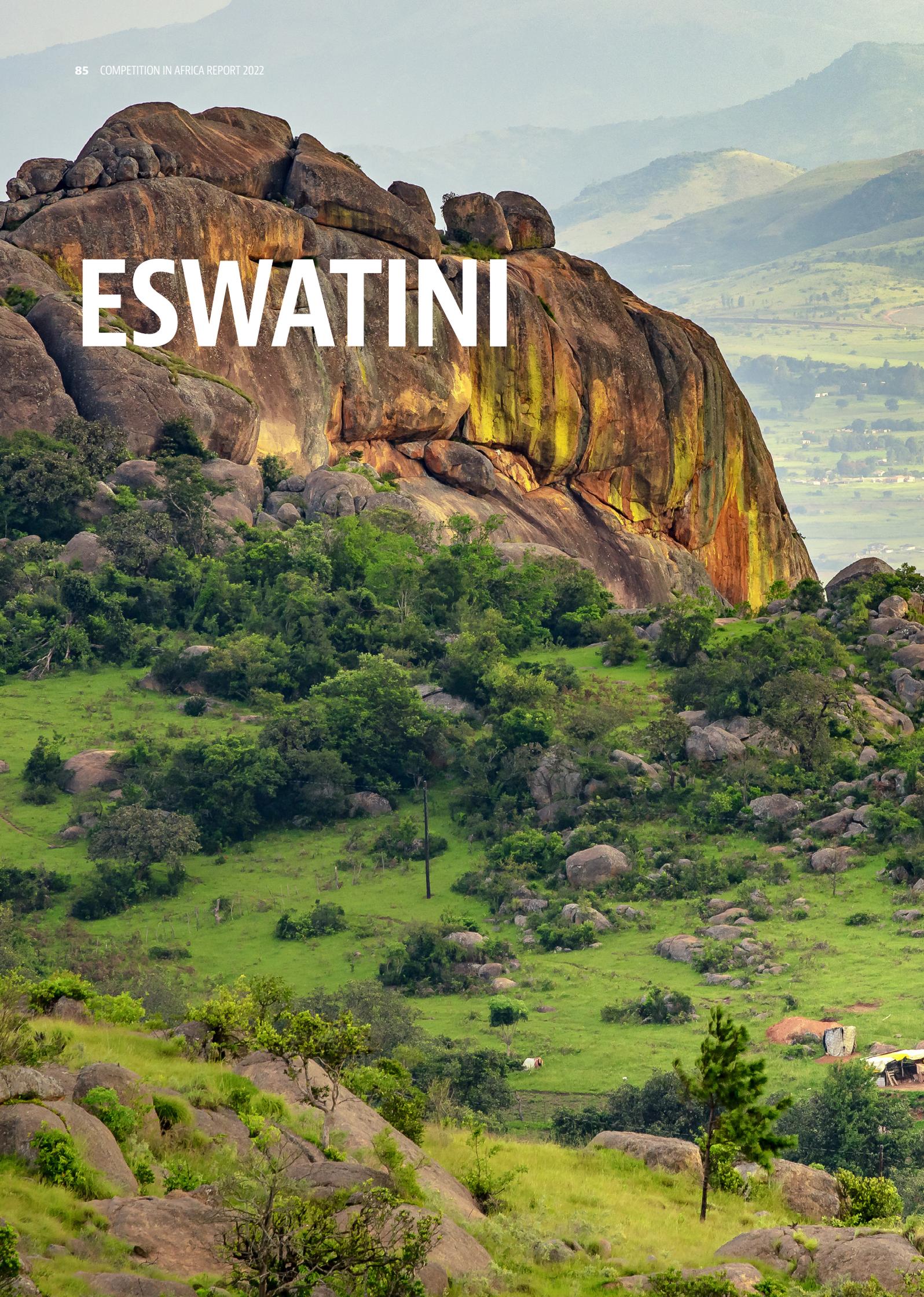
Hania Negm

Associate, Cairo

T +20 2 2461 5520

hania.negm@bakermckenzie.com

ESWATINI



ESWATINI

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

1. Draft Bill

The Eswatini Competition Commission (“**ESCC**”) published a Competition Bill, 2020 (“**Draft Bill**”) on its website, which is intended to be presented to the Minister of Commerce, Industry and Trade. The object of the Draft Bill is to increase effectiveness, consistency, predictability and transparency in the enforcement and administration of competition law in Eswatini. It also aims to give effect to regional frameworks, such as COMESA Competition Regulations and international best practices. The Draft Bill, once promulgated into law, will provide for:

- the prevention of anticompetitive trade practices;
- the establishment of a more effective and efficient merger review and control regime;
- better coordination with sector-specific regulators;
- the promotion of competition in the national economy;
- the promotion of fair trading and consumer protection;
- the imposition of fines, penalties and sanctions;
- clarity on the powers, duties and functions of the Eswatini Competition Commission;
- the establishment of the Competition Tribunal;
- repeal of the Competition Act, 2007; and
- other incidental matters.

To the best of our knowledge, the Draft Bill has yet to be signed into law.

2. Penalty Guidelines

The ESCC further published guidelines to assist it in imposing appropriate administrative penalties (“**Penalty Guidelines**”), which will ensure that it uses a consistent and fair process. According to the Penalty Guidelines, the ESCC has a discretion on whether to take into account certain aggravating factors listed under regulations to the Eswatini Competition Act. In the event that the ESCC does consider these factors, it must take into account all the identified factors to maintain uniformity in penalty setting.

The identified aggravating factors should be weighted in order to objectively set a value. There must be consideration for mitigating factors and the principle of proportionality. There should also be base penalties (i.e., the lowest penalty percentage or starting point for a penalty) and there should ultimately be a formula to assist the ESCC on how it will arrive at a specific figure for a penalty.

The ESCC will consider the following mitigating factors:

- a) the role of the enterprise, for example, that the enterprise was acting under duress or pressure;
- b) the fact that the alleged offender has not been the subject of previous enforcement action on similar conduct;
- c) whether the alleged offender is willing to accept lesser enforcement options e.g., giving undertakings or entering into a consent agreement; and
- d) the level of cooperation with the ESCC in expeditiously concluding its investigation.

In terms of the Penalty Guidelines, the ESCC may proportionately reduce the penalty imposed in cases where a company is facing commercial challenges, where there was a lesser degree of harm to the market or where continued existence of a company serves the public interest by ensuring that there is a viable and effective competitor in the market. The ESCC may only consider using the principle of proportionality after the calculation of the administrative penalty.

The Penalty Guidelines set the base penalty for cartel activity and abuse of dominance at 1% of the turnover of the infringing firm. In relation to anticompetitive trade practices, consumer protection infringements and implementation of mergers without notification, the base penalty is set at 0.5% of the infringing firm's turnover. The Penalty Guidelines further contain a formula for penalty calculation, including a scorecard for mitigating and aggravating factors.

3. Market Definition Guidelines

On 20 April 2021, the ESCC published guidelines on market definition ("**Market Definition Guidelines**") to ensure that market definition is not glossed over by the ESCC if it is not challenged on the efficacy of its relevant market analysis; to prevent investigators from using their personal views in an analysis instead of judicially defensible methodology; and as a guideline for its new staff.

The Market Definition Guidelines adopts international best practices for market definition, such as defining markets from the product side and geographical point of view; recognising that markets are all unique and these unique market features are what make markets distinct from other markets and enable market players to act or strategize differently for different markets; and adopting international best practice for product and geographic definition and analysis.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

In January 2019, the ESCC published its findings on the Retail Banking Market Inquiry, which analysed the state of competition in the banking industry, following public concerns regarding prices for banking services in the country.

The ESCC also published its Draft Report on the Broiler Chicken Market Inquiry, which revealed that:

- there are no significant barriers to entry, aside from the fact that new prospective entrants will have to face inherent costs of start-up and doing business in this market;
- there is a 27% levy imposed on broiler chicken meat and some broiler chicken meat products imported from outside the Southern African Customs Union countries. Furthermore, there is 15% value added tax imposed to all poultry imports, including processed meat. The ESCC was concerned that these levies limit import competition and competition in general, and recommended that they be lowered for processed broiler chicken meat products in order to encourage import competition;
- members/shareholders of Kikilikigi (one of the three major firms in the broiler growing market) are prohibited from selling shares to non-members/non-shareholders. According to the ESCC, this conduct may be anticompetitive as the shares are not openly sold to the public and as such, the prohibition forecloses new entrants into the market. The ESCC recommended that Kikilikigi should desist from compelling existing shareholders to sell their shares to existing shareholders only;
- contract growers are mostly shareholders of the processing firms, where they produce and supply processing firms according to set quotas, which are mainly proportional to their shares. They also supply the live market with chickens. According to the ESCC, the practice of contract growing is not unique to Eswatini as it is applied in other countries such as Brazil, Zimbabwe, Zambia and South Africa. The ESCC made no recommendations in this regard; and

- the slaughtering and processing market is oligopolistic as it has only three players that have the capacity to supply the whole nation with broiler chicken meat and products, although small abattoirs exist, who supply small restaurants, schools and individual customers in small communities. The ESCC found that there are no significant barriers to entry into the slaughtering and processing market.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

We are not aware of any such confirmation from the ESCC.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

We are not aware of any such confirmation from the ESCC.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

The ESCC has not publicised any information in relation to dawn raids since January 2019.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

Yes. In March of 2020, the Deputy Prime Minister published Coronavirus Regulations, 2020 ("COVID-19 Regulations"). The COVID-19 Regulations facilitate various issues that are incidental to the COVID-19 pandemic, including the regulation of prices, unfair practices and the supply of goods during the pandemic.

1. Price control

The price control provisions of the COVID-19 Regulations prohibit firms from implementing price increases that are detrimental to consumers, particularly where:

- the price does not correspond, or is not equivalent, to the increase in the cost of providing that good or service;
- the new price increases the net margin or mark-up on that good or services, above the average margin or mark-up for that good or service; or
- the offer to supply, or enter into an agreement to supply any goods or services at a price that is unfair, unreasonable or unjust.

2. Unfair Practices

This provision prohibits suppliers from:

- engaging in undesirable conduct, including the use of unfair tactics when marketing their goods or service and when supplying goods or services to a consumer; and
- offering to supply, or enter into agreement to supply any goods and services at a price that is unfair, unreasonable or unjust.

▪ **3. Supply of goods**

In terms of this provision, suppliers are required to develop and implement reasonable measures to:

- ensure reasonable and equitable access of goods to customers, which may include limiting the number of items which a consumer may purchase; and
- maintain adequate supply of stock.

Where there are restrictions on the purchase of supplies, suppliers are required to prominently display a notice in their outlet pertaining to such restrictions.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

The ESCC has not publicised any information on cases that it has finalised in relation to a breach of the COVID-19 Regulations. However, the ESCC has issued notices to businesses, cautioning them to desist from anticompetitive behaviour during the COVID-19 pandemic. The ESCC has been particularly concerned with excessive pricing during the COVID-19 pandemic, and has stressed the penalties that businesses will incur if found to have engaged in unfair trading practices.

In April 2021, the ESCC launched an investigation into a price increase by Dups Funeral Home and Cremation (Pty) Ltd, after the funeral home announced that it would be charging an additional fee for all COVID-19 related deaths.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

We are not aware of any such cases.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

The Retail Banking Market enquiry identified the Retail Banking Market as oligopolistic with only five players.

The Broiler Chicken Market enquiry concluded that there are only three major firms in the broiler growing market.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

There is no specific foreign direct investment merger review regime. The Swaziland Investment Promotion Act, 1998 governs Foreign Investment in Eswatini and is administered by the Eswatini Investment Promotion Authority. We are not aware of any plans to introduce a FDI merger review regime at this stage.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

The Swaziland investment Promotion Act restricts foreign direct investment in the following sectors:

- a) manufacture of firearms, ammunition, chemical and biological weapons, and other defence weapons;
- b) manufacture involving radioactive materials;
- c) manufacture of explosives;
- d) manufacture involving hazardous waste treatment or disposal; and
- e) security printing (currency notes) and minting.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

We are not aware of any such cases.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

We are not aware of any proposals to amend the merger filing fees. In relation to the monetary thresholds, the legislation does not provide for thresholds for the notification of mergers and all mergers are notifiable regardless of the size of the firms/ transaction. There are, however, thresholds for determining the filing fees applicable to a notified merger. These have not been amended either.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

Yes. Approval from the ESCC is required before a notifiable merger may be implemented. Pre-implementation of a merger attracts criminal and administrative sanctions of a fine not exceeding SZL 250,000 (approx. 16675), or imprisonment for a term not exceeding five years, or both.

We are not aware of firms being prosecuted for gun-jumping or pre-implementation.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

No. Please refer to the response above.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

We are not aware of any such cases.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

We are not aware of any such cases.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

The ESCC has previously stated that there is no need to notify a transaction where neither party has a presence in Eswatini. However, if a nexus or an effect within Eswatini can be established, it must still be notified.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

We are not aware of any such cases.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

The ESCC requires notification of a merger wherever there is a change or acquisition of a form of control which meets the definition of a merger. A merger is defined as an acquisition of a controlling interest in any trade involved in the production or distribution of any goods or services; or any asset which is or may be utilised for or in connection with the production or distribution of any commodity. This will include internal restructurings if there is an acquisition of a controlling interest even if ultimate control does not change. The Competition Act, 2007 ("**Competition Act**") does not define control but the ESCC Regulations provide that a person will be deemed to have a controlling interest if that person:

- a) beneficially owns more than one-half of the voting rights and/or more than half of the economic interest of the target firm;
- b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm;
- c) is able to appoint or veto the appointment of a majority of the directors of the firm; or
- d) has the ability to exercise decisive influence over the policies of the firm and its strategic direction.

The acquisition of any of these controlling interests will constitute a notifiable merger.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

Acquisition of any of the controlling interests mentioned above will result in a change of control and will be notifiable despite the fact that it does not result in a change of ultimate control.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

There have been no such cases since January 2021.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

To the best of our knowledge there have been no merger transactions prohibited on public interest grounds alone.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

"Greenfield" (or, in fact, any) joint ventures are considered to be notifiable mergers under the merger review regime where the transaction will result in the acquisition of *de facto* or *de jure* control of a firm. That being said, we are not aware of any cases where this has occurred.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

Eswatini defines mergers using a control test. Therefore, where there is no change of control it will not constitute a merger for the purposes of Eswatini merger control.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

The ESCC has 90 days to review a merger notification, calculated from the date of receipt. The initial 90-day period may be extended for a period not exceeding 60 days; however, the Eswatini Competition Act does not contain provisions relating to instances where the ESCC fails to issue a determination within the initial or after the expiry of the extended period.

28. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

A merger application must be accompanied by a certificate of completeness in Form 6 and in the form of an affidavit of an officer of the company attesting to its accuracy. If the ESCC determines that the document contains misleading information, it may issue a notice requiring the party to submit correct information. Where such a notice is issued, the parties will be deemed to have not fulfilled their notification requirements even if the initial investigation period or an extension had already begun.

29. Please indicate whether, legally or in practice, your competition authority allows for "hold separate" arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

The international closing of a proposed merger is not allowed before the filing of a merger application before the ESCC. In foreign-to-foreign mergers, the parties are required to ring fence the transaction and set out, in their filing, how the interests in Eswatini will be insulated from the implementation of the worldwide transaction. They must also make legally enforceable undertakings that will ensure that the parties' interest in Eswatini will be managed and run without interference from the merged firm following closing of the international transaction. That being said, we are not aware of any cases where this has happened.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.

Please refer to the response above.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

There have been no publicised noteworthy penalties that have been imposed on any entities for engaging in prohibited practices that we are aware of.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

Yes. In May 2020, the ESCC issued its decision on the School Uniform Suppliers case. The case relates to conduct by various suppliers in terms of which they concluded exclusive supply agreements with some schools for the supply of school uniforms. The ESCC found that these agreements had the object or effect of restricting competition in the market for the supply of school uniforms. The ESCC also found that the exclusive supply agreements created barriers to entry for new participants, and were detrimental to consumers as they increased prices for school uniforms, which would otherwise be lower in a competitive environment.

The ESCC further found that certain suppliers engaged in discussions on prices to be charged for school uniforms and price increases, which further distorted competition in the market. The above non-compete conduct was deemed inconsistent with the Competition Act and various directives were issued against both, the schools, and the uniform suppliers in order to remedy the effects of the conduct.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

1. Exclusivity Clauses

In terms of the Competition Act, agreements, decisions or concerted practices that seek to distort or have the effect of significantly distorting competition in the country, or a particular part of it, are prohibited. The ESCC will, therefore, seek to establish the following elements in an inquiry relating to the legality exclusivity clauses:

- whether an agreement exists;
- the object or effect of that agreement; and
- if the object or effect is the distortion or prevention of competition, whether it does so to an appreciable extent.

In August 2019, the ESCC published a report on its investigation into exclusivity agreements between various schools and school uniform suppliers. The findings revealed that 192 schools, both, in the public and private sectors, concluded exclusive supply agreements with uniform suppliers, which in turn, compelled parents to purchase school uniforms from only that supplier. The ESCC, in assessing the agreements, considered various aspects of the market for school uniforms, applying the above methodology and an effects analysis, which looked at:

- the foreclosure effects of the exclusivity clauses;
- the exit of certain suppliers from the market for school, uniforms as a result of the exclusivity arrangements;
- the limited choice of suppliers for consumers seeking to procure uniforms;
- limited access to the market by competitors; and

- the barriers to entry in the market for school uniforms.

The ESCC concluded that the agreements entered into by the schools and school uniform suppliers have the effect of restricting, preventing or distorting competition to an appreciable extent and that the adverse effects of the supply agreements outweigh the procompetitive effects in the market. The ESCC also found that the supply agreements resulted in the creation of barriers to entry, foreclosed competitors in the market, limited access of competitors in the market and limited choice of school uniform suppliers to consumers in the market.

2. Non-Compete Restraints

Non-compete clauses will be analysed on a case-by-case basis. Where non-compete clauses are aimed at market allocation or division, these will be automatically prohibited. However, where these clauses exist in the context of a sale of business, they may be justifiable.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

As mentioned above, in April 2021, the ESCC launched an investigation into a price increase by Dups Funeral Home and Cremation (Pty) Ltd, after the funeral home announced that it would be charging an additional fee for all COVID-19 related deaths.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

No.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Yes. That being said, we are not aware of any criminal sanctions being imposed or prosecutions pursued, for anticompetitive conduct.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Yes. Eswatini is a member of COMESA. Therefore, activities in Eswatini should be conducted with COMESA competition laws in mind.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Eswatini has entered into memorandums of understanding with South Africa, Taiwan, and COMESA.

39. Please describe trends on the level of enforcement of the regional body.

Please refer to the chapter relating to COMESA for additional information in relation to its regional enforcement activity.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

If a transaction notified with COMESA, it does not need to be notified to the ESCC.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

We are not aware of any specific cases in this regard.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

We are not aware of any specific cases in this regard.

**Baker
McKenzie.**



Lerisha Naidu

Partner

T +27 11 911 4323

lerisha.naidu@bakermckenzie.com



Angelo Tzarevski

Associate Director

T +27 11 911 4316

angelo.tzarevski@bakermckenzie.com

ETHIOPIA



ETHIOPIA

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

The Ethiopian Commercial Code 1243/2013 ("**Commercial Code**") was amended to include a section on mergers and divisions. The Commercial Code now regulates amalgamations or takeovers. It has a narrower application than the Trade Competition and Consumer Protection Proclamation (No 813/2013) ("**TCCP**").

The Trade Competition and Consumer Protection Authority ("**TCCPA**") is working on additional regulations to provide guidance on the application of the TCCP.

However, Proclamation No. 1263/2021, which is expected to be published and enacted into force in early 2022, transfers the powers and liabilities of the TCCPA to the Ministry of Trade and Regional Integration. The TCCPA has already, in practice, ceased to be an independent authority, and has replaced its name with that of the Ministry of Trade and Regional Integration. The TCCPA also uses the Ministry's name in its official communications and documents. To the best of our knowledge, Proclamation No. 1263/2021 has yet to come into force.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

Although the Competition Law of Ethiopia ("**CLE**") has no express provision relating to market inquiries, the TCCPA may conduct such inquiries, as the TCCP empowers it to perform any activity necessary to attain its objectives. That being said, in practice, and to the best of our knowledge, there have not been any formal market inquiries initiated by the TCCPA in any sector or industry.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

The TCCPA has given warnings to entities in the cement, brewery and pharmaceutical sectors.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

No.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

Yes. The TCCPA has carried out dawn raids, particularly in the cement, brewery and pharmaceutical sectors, and has given warnings to the entities. Dawn raids have been largely undertaken against businesses that are alleged to be engaged in price-fixing.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

No.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

No.

- 8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.**

Not to the best of our knowledge.

- 9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.**

No.

- 10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.**

Not to the best of our knowledge.

- 11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.**

Yes. The Investment Proclamation No. 1180/2020 ("Investment Proclamation") applies to foreign direct investment into Ethiopia. The Ethiopian Investment Commission, established under the Investment Proclamation, is the relevant regulatory body.

- 12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').**

Yes. The Investment Proclamation applies to foreign direct investment into Ethiopia, excluding investments in the prospecting, exploration and development of minerals and petroleum.

MERGER CONTROL DEVELOPMENTS

- 13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?**

We are not aware of any transactions that have been prohibited since January 2021.

- 14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?**

There are no filing fees. The monetary thresholds have not been amended or proposed to be amended.

- 15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.**

Yes. Notification is suspensory and mandatory in relation to intermediate and large mergers. There is no obligation to notify small mergers.

In 2017, an ETB 500 million (approx. USD 9,756,097) fine was imposed on Coca-Cola and Ambo Mineral Water for failure to notify. However, the fine was reversed on appeal. In 2021, the highest court in Ethiopia ruled in favour of Coca-Cola and Ambo Mineral Water.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

Not applicable.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

There have been no cases where the TCCPA pursued a case of failure to comply with merger conditions and, therefore, no fines have been imposed in this regard.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

We are not aware of any such cases.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction but do not have any subsidiaries or assets in the country, what is the local nexus test / local effects test to establish merger review jurisdiction?

We are not aware of any such cases. The TCCP does not provide any guidance on this point. However, it is likely that the position is that the nexus will be established if the entity derives some turnover in Ethiopia and the transaction is carried out or will have an effect in Ethiopia subject to the notification thresholds.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

No.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

The TCCPA requires notification if the threshold or notification requirements are met, irrespective of whether it is a purely internal re-organisation (i.e., within the same control group) or not.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

Ethiopia does not solely apply a control test. Any transaction which falls under the definition of a merger and fulfils the threshold requirements will need to be notified.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

We are not aware of any such cases.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

We are not aware of any such cases.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

Joint ventures are caught under the merger review regime if they involve the acquisition of shares, securities, or assets. They will constitute a merger and will be notifiable if they meet the threshold requirements. It is not a requirement for the joint venture to function autonomously (full-function) or be established on a long-lasting basis.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

Acquisitions of shareholdings will be notifiable if they meet the thresholds. Whether it was a minority shareholding, or entails a change of control, is irrelevant.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

The assessment of a non-complex transaction takes between 10 to 15 days. Complex transactions take between 30 to 45 days to be approved.

28. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

The TCCP does not provide any guidance on this. We are not aware of any procedure which allows the TCCPA to do this.

29. Please indicate whether, legally or in practice, your competition authority allows for "hold separate" arrangements (*this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately*). If so, kindly describe cases where this has happened.

No.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (*for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained)*). If so, kindly describe cases where this has happened.

No. There is no differentiation between local and multi-jurisdictional mergers, both are subject to the same requirements. Thus, a global merger will require notification before it takes effect in Ethiopia.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

The TCCPA imposed a penalty on two entities in the cinema and pharmaceutical sectors for cartel conduct.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

No.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

The CLE does not contain specific provisions relating to exclusivity clauses and non-compete restraints. However, since merger applicants are required to provide conditions attached to the transaction in their merger notification, the TCCPA would assess the implications of exclusivity clauses and non-compete restraints on competition in the relevant market. If such conditions constitute restraints and have the effect of prohibiting or significantly lessening competition in the relevant market, the TCCPA will reject the restraints while approving the merger.

No prosecution has been instituted against entities for implementing exclusivity and non-compete restraints since January 2019.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

Not to our knowledge.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

The TCCP contains provisions relating to abuse of market dominance which includes directly or indirectly imposing an unfair purchase or selling price. We are not aware of any cases brought against any entity.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Cartel conduct and other forms of anticompetitive conduct are criminalised in Ethiopia. However, to the best of our knowledge, there has been no criminal charge or conviction made against any person or entity for engaging in anticompetitive conduct.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Ethiopia is a member of COMESA. Therefore, activities in Ethiopia should be conducted with COMESA in mind.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Not to the best of our knowledge.

39. Please describe trends on the level of enforcement of the regional body.

Please refer to the chapter in relation to COMESA.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Yes. A merger will be notifiable both domestically and regionally (where the merger may have a cross-border effect). In respect of merger notifications submitted to the COMESA Competition Commission by entities that have business interest or activities affecting Ethiopia, it is common that COMESA Competition Commission will inform the TCCPA and seek the opinion of the TCCPA.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

We are not aware of specific cases in this regard.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Not applicable.

**Baker
McKenzie.**



Lerisha Naidu

Partner

T +27 11 911 4323

lerisha.naidu@bakermckenzie.com



Angelo Tzarevski

Associate Director

T +27 11 911 4316

angelo.tzarevski@bakermckenzie.com

GABON



GABON

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

Between January and December 2021, Gabon did not adopt any new competition regulations.

The competition regime in the Gabonese Republic is governed by the following domestic law and Community legislation:

- Regulation n° 06/19-UEAC-639-CM-33 of 7 April 2019 on competition;
- Directive n° 01/19-UEAC-639-CM-33 of 8 April 2019 on the institutional organisation in CEMAC Member States for the application of Community competition rules;
- Regulation No. 000350 on the procedure for the application of competition rules;
- Law No. 014/98 of 23 July 1998 establishing the competition regime in the Gabonese Republic; and
- Decree No. 00665/PR/MEFBP of 9 August 2004 on the creation, competence and organisation of the Directorate-General for Competition and Consumer Affairs.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the Competition Authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

Under the provisions of Article 22 of Decree No. 00665/PR/MEFBP of 9 August 2004 on the creation, powers and organisation of the Directorate General for Competition and Consumer Affairs ("DGCC"), the DGCC's Fraud Control and Litigation Directorate may carry out periodic inspections and report on and punish any infringement of competition regulations in the Gabonese Republic.

According to local counsel's exchanges with the DGCC, investigations are carried out periodically and can be launched at any time during a financial year on the orders of the hierarchy according to the instructions issued by it. The DGCC has jurisdiction over all sectors/industries in the Gabonese Republic.

For the time being, no market investigations are currently underway. However, market investigations may be carried out annually on all sectors/industries.

3. Has the Competition Authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

Yes. The Competition Authority has, on several occasions, publicly expressed its concern in relation to the supply of water, electricity and general foodstuffs. These statements by the Competition Authority are generally focused on consumer protection, in terms of the quality of services and products provided, and on the control of the approved prices of certain commodities.

Besides the Competition Authority, it is primarily the press, certain trade unions and NGOs that often question the government and public opinion on the anticompetitive practices observed in certain sectors, notably energy, water, cement, transport and wood.

4. Has the Competition Authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

The Competition Authority has not formally identified specific sectors as strategic or key sectors for the purposes of competition law enforcement.

However, the Community Regulation identifies sectors that may be considered strategic or key for Member States in the context of competition law enforcement. Specifically, Article 5 of Regulation n°06/19-UEAC-639-CM-33 of 7 April 2019 on competition in the CEMAC zone ("CEMAC Competition Regulation") mention the following sectors of activity: agriculture; insurance; audio-visual; civil aviation; banking; water; forestry; energy; oil; ports; telecommunications; and transport.

5. Are dawn raids by the Competition Authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the Competition Authority.

No. According to local counsel's exchanges with the DGCC, these controls are infrequent.

Moreover, the DGCC indicated that they had not received any instruction from the Minister in charge of the economy, in accordance with the provisions of Article 35 of Law No. 014/1998 of 23 July 1998 establishing the competition regime ("Law Establishing the Competition Regime"), requesting them to investigate whether legal acts or operations constituting the concentration had been concluded or entered into by companies in the meantime.

In accordance with Articles 42 to 44 of the Law Establishing the Competition Regime, the DGCC has the right to conduct unannounced investigations by day and by night on the instructions of the Minister in charge of the Economy. In this respect, the competent agents may, on presentation of their professional cards and subject to the regulations in force:

- ask any natural or legal person to provide documents relating to their activities;
- visit any industrial, commercial, agricultural, craft or cooperative establishment;
- require copies and, if necessary, seize documents that they consider necessary for their investigation; and
- access the service documents of any public administration, notwithstanding the seal of secrecy.

6. Has the Competition Authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

Yes. The Competition Authority has introduced new competition enforcement measures in response to the COVID-19 pandemic.

The purpose of these measures is to freeze the prices of products used in the fight against the spread of COVID-19, in particular hydro alcoholic gels and masks, as set out in Order No. 73/MEF of 16 March 2020.

7. Has the Competition Authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

According to local counsel's discussions with the DGCC, no entity has been investigated for infringement of competition law during the COVID-19 pandemic. Therefore, no action has been taken by the Competition Authority in this respect.

8. Has the Competition Authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

Yes. The Competition Authority has played a proactive role in the fight against pricing practices but has not concluded settlement agreements with companies in this context.

In the fight against corporate pricing practices, the DGCC has initiated two decrees subjecting imported foodstuffs of first necessity to the price freeze and controlled freedom regimes respectively adopted by the Gabonese government on 13 May 2019 and 14 April 2020.

The main purpose of these texts were to fix, for a period of six months, the maximum wholesale, semi-wholesale and retail prices of certain imported essential products in Libreville and in the provincial capitals, the list of which appeared in the annex to each of the two orders.

The DGCC has also initiated a draft text in response to the COVID-19 pandemic aimed at curbing the rising prices of hydro alcoholic gels and masks. On 16 March 2020, the government adopted the draft text and issued Order No. 73/MEF setting the price framework for hydro alcoholic gels and masks. The purpose of this order is to freeze the prices of products used in the fight against the spread of the COVID-19 pandemic.

In principle, the Competition Authority is required to respect the principle of freedom of prices and trade enshrined in Articles 2 and 4 of the Law Establishing the Competition Regime. On its official website, the DGCC states that “with the exception of prices of products regulated by the State, the setting of the price of a product or a service obeys the law of the market”.

9. Has the Competition Authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No. The Competition Authority has not adopted any new regulations or measures applicable to companies operating in the digital market space.

However, it is important to note that according to Articles 3 and 4 of the CEMAC Competition Regulation, companies operating in the digital market space are subject to the competition legislation in force regardless of their geographical location, sector or nature of their activities, as long as they are likely to have an effect on competition in the said area.

Moreover, on the homepage of the DGCC's official website, a note from its Director General states that in practice, the DGCC intervenes on the one hand, on the entire value chain of food and non-food consumption as well as services, and on the other hand, on all stages of economic activity, from production, processing, imports to distribution. In short, the DGCC has broad powers of intervention, regardless of the form of trade concerned, whether it is a shop or an e-commerce site.

10. Has the Competition Authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

Following local counsel's exchanges with the DGCC, to date the Competition Authority has not yet identified any industries, sectors or markets that it considers to be concentrated.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

We confirm that there is a review regime for all foreign direct investments in Gabon.

Mergers involving foreign buyers/acquirers are subject to the common law review regime, namely, a prior declaration obligation to the Bank of Central African States (“BEAC”) and the Ministry in charge of the economy in accordance with the provisions of Regulation n°02/18/CEAM/UMAC/CM of 21 December 2018 on foreign exchange regulations in the CEMAC zone (“**Foreign Exchange Regulations**”).

In accordance with Article 4 of Instruction n°003/GR/2020 specifying the conditions and modalities for carrying out operations relating to direct and portfolio investments with foreign countries, the investor or their agent must complete the declaration formalities at least 30 days before the operation is carried out.

Article 6 of the above-mentioned Instruction states that when examining the declaration, the BEAC analyses the conformity of the elements and information provided, particularly in relation to the Foreign Exchange Regulations and the regulations on the fight against money laundering and the financing of terrorism. At the end of this examination, the BEAC takes note of the declaration, specifically whether it complies with the provisions of the abovementioned legislation. Otherwise, it may request additional information, require the implementation of additional measures to ensure the compliance of the reported transaction, or oppose its implementation.

In addition, Article 122 of the Foreign Exchange Regulations stipulates that foreign direct investments must be declared to the BEAC and the ministry in charge of the economy within 30 days of the transaction.

It should be noted that, apart from transfers between companies belonging to the same group of companies, mergers involving companies operating in the hydrocarbon sector in Gabon are subject to prior authorisation by the State, which, in this context, enjoys a right of pre-emption in accordance with Article 56 of Law No. 002/2019 of 16 July 2019 regulating the hydrocarbon sector in the Gabonese Republic ("**Petroleum Code**").

Similarly, with respect to equity investments in insurance companies, note that in accordance with Article 329-7 of the Insurance Code in force in the Gabonese Republic, the following operations are subject to prior authorisation by the Minister in charge of the Economy:

- any transaction that has the effect of conferring, directly or indirectly, on a natural person or legal entity shareholder acting alone, either a holding of up to 20% of the share capital or a majority of the voting rights at the general meeting;
- any operation that has the effect of conferring directly or indirectly, on a shareholder who is a natural person or legal entity acting in concert with other natural persons or legal entities, either a holding of up to 33% of the share capital or a majority of the voting rights at the general meeting; and
- any transaction that has the effect of conferring, directly or indirectly, on several shareholders that are legal entities linked by parent-subsidiary relationships, either a holding of up to 50% of the share capital or a majority of the voting rights at the general meeting.

Based on local counsel's experience with foreign direct investment operations in CEMAC in general, and Gabon in particular, they have observed that both, foreign direct investment notifications and merger/concentration notifications are quite frequent.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

We confirm that there is a foreign direct investment regime in Gabon applicable to all sectors.

In accordance with the provisions of Articles 3 and 17 of Instruction No. 003/GR/2020 specifying the conditions and modalities for carrying out operations relating to direct and portfolio investments with foreign countries, the following transactions are subject to the said investment regime:

- the acquisition of holdings or subscriptions of shares in existing or new companies for amounts representing at least 10% of the capital of the investment company;
- acquisitions of real estate;.

- investments in a company under the control or indirect influence of the investment firm, in related companies, as well as debts between related companies, with the exception of those between credit institutions;
- the acquisition of holdings or subscriptions of shares in existing or new companies for amounts of less than 10% of the capital of the investment firm; and
- debt securities other than equity securities in real estate acquisitions.

The foreign direct investment regime is defined in the following main texts:

- Regulation n°17/99/CEMAC-20-CM-03 of 17 December 1999 on the CEMAC Investment Charter;
- Law 15/98 instituting the Investment Charter of Gabon;
- Law n°014/1998 establishing the competition regime in the Gabonese Republic; and
- Decree No. 0673/PR/MECIT of 16 May 2011 applying the investment charter to foreign investments in the Gabonese Republic.

In accordance with the provisions of Law 15/98 instituting the investment charter, Gabonese legislation enshrines the principles of:

- the freedom to undertake any activity of production, provision of services or trade regardless of nationality;
- the property rights attached to land, buildings, operating equipment and those attached to movable property, securities, patents and other elements of industrial and intellectual property; and
- the right of a foreign investor to repatriate the capital invested and the profits made by their operation, as well as the repatriation of savings on salaries made by their expatriate staff, for example.

However, it should be noted that, in accordance with the provisions of Decree n°0673/PR/MECIT of 16 May 2011 on the application of the investment charter to foreign investments in the Gabonese Republic, the Government may, at its discretion, in particular to ensure the defence of national interests, by decree taken on the proposal of the Minister in charge of the Economy:

- subject to prior authorisation:
 - foreign exchange transactions, capital movements and settlements of any kind between Gabon and foreign countries;
 - the constitution, change of consistency and liquidation of Gabonese assets abroad;
 - the constitution and liquidation of foreign investments in Gabon; and
 - the import and export of all materials and all other material movements of value between Gabon and foreign countries;
- order the repatriation of foreign debts outside the CEMAC zone arising from the export of goods, the payment of services and, in general, all income or products abroad; and
- appoint intermediaries exclusively to carry out foreign exchange transactions, capital movements, settlements of any kind, import and export of any material and all other material movements of value between Gabon and foreign countries.

In addition, it should be noted that the Gabonese State requires prior authorisation from the Minister in charge of the Economy for foreign investments in any of the following sectors:

- activities in the gambling sector;
- research, development or production activities relating to means intended to counter the illicit use of pathogenic or toxic agents in the context of terrorist activities and to prevent the health consequences of such use;

- activities relating to equipment designed for the interception of correspondence and the remote detection of conversations, without prejudice to the penalties provided for by the provisions of the Penal Code;
- service activities relating to the evaluation and certification of the security offered by new information and communication technology products and systems;
- activities relating to cryptology means and cryptology services;
- activities carried out by companies holding national defence secrets;
- activities relating to research, production or trade in arms, munitions, powder and explosive substances intended for military purposes or war materials and the like;
- activities carried out by companies that have concluded a contract for the design or supply of equipment related to national defence or public security, either directly or by subcontracting, for the production of a good or service;
- activities related to the sustainable exploitation of forest products; and
- activities related to the exploration and exploitation of mines and hydrocarbons.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the Competition Authority in your jurisdiction since January 2021? If so, on what basis?

According to local counsel's exchanges with the DGCC, the notified transactions have not been prohibited by the Competition Authority since January 2021.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

According to local counsel's discussions with the DGCC, there are no proposals to change merger filing fees or monetary thresholds.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

Yes. The submission of a merger notification is suspensive and mandatory in Gabon. In accordance with the provisions of Article 62 of the CEMAC Competition Regulation, all merger operations are subject to prior control and can only be carried out after the decision of the Competition Authority.

In addition, apart from the foreign direct investment review regime defined above, there is also a regime for the control of economic concentration/merger operations. In accordance with the provisions of Article 57 of the CEMAC Competition Regulation, notification formalities for merger control purposes are compulsory, regardless of the activity and location of the head office of the companies concerned, provided that they are likely to have a substantial impact on competition in the CEMAC market. Consequently, this review regime applies to foreign buyers.

In the context of the implementation of merger control, the notification is sent to the Community authority, including the CEMAC Commission, when the companies involved in the transaction have a combined turnover in the Common Market of more than CFAF 10 billion excluding tax (approx. USD 16,458,780), or when they together hold more than 30% of the market, or when the transaction involves at least two Member States in accordance with Articles 59 et seq. of the CEMAC Competition Regulation; and below the said thresholds, the notification is addressed to the national authority, which is the Ministry of the Economy/DGCC, in accordance with the provisions of Articles 33 et seq. of the Law Establishing the Competition Regime.

In accordance with Article 58(1) of the CEMAC Competition Regulation, notification is mandatory in the following cases:

- when two or more previously independent undertakings merge;
- when one or more undertakings, whether by capital participation, contract or any other means, directly or indirectly acquire control of the whole or parts of one or more other undertakings; or
- when a joint venture is created, which constitutes an autonomous entity on a lasting basis.

Moreover, Article 33 of the Law Establishing the Competition Regime specifies that any proposed economic concentration or any concentration likely to affect competition, in particular by creating or strengthening a dominant position, must be submitted to the Competition Authority for an opinion when the enterprises that are parties to the act, that are the subject of it or that are economically linked to them, have together carried out more than 25% of the sales, purchases or other transactions on a national market of substitutable products or services or on a substantial part of such a market.

Concerning the section on prosecution for failure to notify in advance, it should be noted that, according to local counsel's exchanges with the DGCC, no entity has been investigated or sanctioned for skimming off the top and/or implementing a notifiable transaction in advance.

Consequently, no prosecution procedure has been initiated by the Competition Authority.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

Not applicable. See the answer to the previous question.

17. Please describe any cases in which the Competition Authority fined any entity for failing to comply with merger conditions.

Based on local counsel's exchanges with the DGCC, there have been no cases at national or even Community level where the Competition Authority has fined an entity for non-compliance with the merger conditions.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

Based on local counsel's exchanges with the DGCC, there have not yet been any cases of prohibition of acquisition of shares or assets of another company by the competition authorities in Gabon.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Based on local counsel's exchanges with the DGCC, there have not yet been any cases of notification of transactions in which the parties (acquirer and target) do not have a physical presence in Gabon.

The current regulation does not expressly provide for this situation. However, on the basis of the principles mentioned above, concerning the cases where notification is mandatory, we estimate that if the target and acquiring entities operate in the CEMAC zone, through subsidiaries located in at least two Member States, the transaction should be subject to mandatory notification. The same would apply if the transaction is considered likely to have a significant impact on the national or Community market.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Based on local counsel's discussions with the DGCC, the Competition Authority has not approved any mergers subject to new or relevant conditions.

However, it should be noted that the Competition Authority can approve mergers under new or interesting conditions in accordance with the provisions of Article 37 paragraph 2 of the Law Establishing the Competition Regime. This Article specifies that the Minister in charge of the Economy may, on his own authority, or with the Minister of the economic sector concerned, after consulting the DGCC, enjoin the companies, by a reasoned decree with a deadline, to make the completion of the operation subject to the observance of requirements likely to contribute to economic and social progress to a sufficient extent to compensate for the harm to competition.

21. Please indicate whether the Competition Authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

According to local counsel's exchanges with the DGCC, there have been no cases where the Competition Authority has required notification of intra-group restructurings (which do not involve a change of ultimate control).

Note that under Article 32 of the Competition Act, local counsel understand that the notification requirement does not apply in the case of intra-group restructuring operations.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

As indicated above, changes of control that may occur within the same group do not constitute economic concentrations within the meaning of the regulations in force.

In accordance with the regulations in force, local counsel understand that this restructuring must not result in the creation of a joint venture constituting an autonomous entity on a lasting basis, nor in the exercise of a decisive influence over one or more other undertakings (outside the group) or in the creation or strengthening of a dominant position and which appreciably affects competition in the CEMAC market, or in a part of it, as detailed below.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

According to local counsel's exchanges with the DGCC, no merger has yet been approved on public interest grounds in Gabon, not since January 2021, nor recently.

However, it should be noted that the Competition Authority can invoke public interest grounds to allow a transaction to take place that may undermine competition law.

In accordance with Article 68 of the CEMAC Competition Regulation, when it appears that a concentration substantially affects competition in the common market or a significant part of it, the CEMAC authority shall, before taking a decision, assess:

- whether the operation makes a sufficient contribution to technological progress or brings about a competitive gain to offset the harm to competition; and
- whether the operation can be justified on grounds of public interest such as to outweigh the harm to competition. This is the case for the preservation of competition in a sector of activity or in a geographical area of the Union, the need to safeguard employment or the strengthening of the international competitiveness of Union undertakings.

24. Please describe cases where the Competition Authority has prohibited a merger transaction based on public interest grounds alone.

According to local counsel's discussions with the DGCC, the Competition Authority has not yet prohibited a merger on the sole basis of public interest grounds.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the Competition Authority.

In accordance with Article 62 of the CEMAC Competition Regulation and Article 33 of the Law on Competition, the economic concentration control regime applies in the following cases:

- when the undertakings involved in the operation together achieve a turnover of more than ten billion CFA francs (excluding tax) on the CEMAC market and together hold more than 30% of the market;
- when two or more previously independent companies merge;
- when one or more undertakings directly or indirectly acquire, whether by capital participation, contract or any other means, control of the whole or parts of one or more other undertakings;
- where a joint venture is created which constitutes an autonomous entity on a lasting basis;
- where the transaction is likely to affect competition, in particular by creating or strengthening a dominant position;
- where the undertakings which are parties to the act, the subject of the act or economically linked to them, together, account for more than 25% of sales, purchases or other transactions on a national market for substitutable products or services or on a substantial part of such a market.

In view of the above, local counsel understand that mergers and joint ventures are subject to mandatory notification for merger control review under the applicable regulations when one of the criteria listed above is applicable.

However, according to local counsel's exchanges with the DGCC, it appears that there have been no notifications of this type in Gabon.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

In accordance with local counsel's exchanges with the DGCC, and in the light of the legislation in force, an acquisition of minority shares without control may be considered as constituting a merger subject to a prior notification requirement, in particular:

- when the undertakings which are parties to the transaction, which are the subject of the transaction or which are economically linked to them, have together achieved more than 25% of the sales, purchases or other transactions on a national market for substitutable products or services or on a substantial part of such a market; or
- where the undertakings involved in the transaction have a combined turnover on the CEMAC market of more than CFAF 10 billion (excluding tax) (approx. USD 16,458,780), they have a combined market share of more than 30%.

Consequently, even in the case of the acquisition of minority shares, the operation must be notified in advance to the Competition Authority when one of the criteria listed above is met.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

For non-complex transactions:

- The national Competition Authority has three months from the date of notification to give its opinion; and
- The CEMAC authority has six months to give its decision.

For complex transactions:

- The national Competition Authority has six months from the date of notification to give its opinion (where the Minister in charge of the economy refers the case to the Competition Authority in the context of the examination of a notification); and
- The CEMAC authority has seven months to render its decision (where the parties to a merger undertake to take measures to remedy, where appropriate, the anticompetitive effects of the merger).

It should be noted that, in practice, it is difficult to estimate the actual average duration of the procedures as, on the one hand, the law does not provide for an emergency procedure in this respect and, on the other hand, the Competition Authority generally examines notifications in the light of the legal deadlines given to it to give its decision.

28. Kindly indicate whether the Competition Authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

The regulations in force do not provide for this procedure. The Competition Authority is obliged to decide within the legal time limits indicated above. Therefore, local counsel are of the opinion that neither the national nor the CEMAC authorities have the power to stop the clock for the examination of a merger.

29. Please indicate whether, legally or in practice, your Competition Authority allows for “hold separate” arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

The regulations in force do not expressly provide for this procedure. On the other hand, in accordance with Article 37 of the Law on the Competition Regime, the Minister in charge of the economy may, on his own authority, or with the Minister responsible for the economic sector concerned, after consulting the Competition Commission, enjoin undertakings, by means of a reasoned decree with a time limit, to:

- either not proceed with the proposed concentration and restore the previous legal situation;
- either modify or complete the operation and take any measure likely to ensure sufficient competition; or
- make the implementation of the operation subject to the observance of requirements likely to contribute to economic and social progress to a degree sufficient to offset the harm to competition.

Article 71 of the CEMAC Competition Regulation also provides that the parties to a merger may undertake to take measures to remedy the anticompetitive effects of the transaction, if any, either at the time of notification or at any time before the authority has taken a decision.

The various options presented above have the effect of increasing the time required to process the notification as presented above.

30. Please indicate whether, legally or in practice, your Competition Authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.

The regulations in force do not expressly provide for this procedure. According to local counsel's discussions with the DGCC, the above observations also apply to mergers involving a sequential closing scheme.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

The DGCC has informed local counsel that no criminal proceedings have yet been initiated and there have been no convictions of persons or entities for engaging in anticompetitive behaviour.

The anticompetitive practices defined in the Law Establishing the Competition Regime are prohibited under penalty of criminal sanctions in accordance with articles 57 to 59 of the said law. Entities engaged in prohibited practices will be punished with a prison sentence of one to 12 months and a fine of CFAF 50,000 (approx. USD 82) to 50,000,000 (approx. USD 82,293).

In addition, in the event of conviction, the court may impose additional penalties, including confiscation of all or part of the seized goods for the benefit of the State, permanent closure of the business, and publication of the decision in a legal gazette and by any other means of posting, the costs of which will be borne by the convicted person.

At Community level, the CEMAC Regulation on competition provides for the following sanctions:

1. In the case of an agreement or abuse of a dominant position:

The CEMAC Competition Commission may order the undertakings concerned to put an end to the infringements, by injunction, accompanied, if necessary, by penalty payments, within a given time limit, as well as a fine accompanied by appropriate measures to publicise the decision in the event of non-compliance with its injunctions. (See Article 49)

Note that in accordance with Article 5 of the above-mentioned Regulation, the fine may not exceed 10% of the turnover before tax achieved worldwide and 20% in the CEMAC common market during the last closed financial year or a more appropriate financial year in the period during which the infringement was committed. In the event of a repeat offence, the fine is doubled. Penalties are determined individually and, for each undertaking, where more than one is involved. Account may be taken of the cooperation of the undertaking in establishing the reality of the prohibited practice and of the absence of any dispute on its part.

In accordance with Article 52 of the same Regulation, the Commission may impose on undertakings, groups of undertakings and associations of undertakings periodic penalty payments of between CFAF 1 million (approx. USD 1,645) and CFAF 20 million (approx. USD 32,917) per day of delay, starting from the date set in its decision, to compel them to comply

2. In case of concentration:

In accordance with Article 72 of the CEMAC Competition Regulation, the Commission may, by decision, impose a fine on undertakings having participated in a concentration, the amount of which shall take into account the sales of the undertakings concerned in the sector of activity concerned, in relation to the concentration, and which may not exceed 10% of the turnover before tax achieved at the world level and 20% in the CEMAC common market during the last financial year ended, in the following cases:

- the operation has not been notified;
- after the finding of incompatibility, the injunctions have not been complied with;
- the transaction has been notified but is prohibited and yet implemented;
- the transaction was cleared subject to conditions that were not complied with; and
- the transaction was implemented before the Commission's decision.

In addition, Article 74 of the above-mentioned Regulation provides that where a concentration incompatible with the common market has already been implemented, the Commission may order the separation of the undertakings or assets brought together, the cessation of joint control, or decide on any other appropriate course of action, by way of interim measures, to restore effective competition, where necessary.

In accordance with Article 77 of the same Regulation, the Commission may also, by decision, impose on undertakings, penalties of between 1 million (approx. USD 1,645) and twenty million (approx. USD 32, 917) CFA francs per day of delay, from the date fixed in its decision, for any failure to comply with its prescriptions.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

According to local counsel's discussions with the DGCC, the Competition Authority has not yet initiated any proceedings against parties to a vertical relationship for breach of competition law.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

According to the provisions of Article 102 of the CEMAC Competition Regulation, companies in a legal monopoly situation are subject to the rules governing anticompetitive practices, and in particular, those relating to the abuse of a dominant position, subject to limitations justified by reasons of public order, public security, public health and environmental protection.

Article 102 (2) and (3) specify that a monopoly is said to be legal when the State grants exclusive rights to a private or public undertaking to operate a public service or to produce goods and services. In particular, companies in a monopoly situation must avoid abusive practices such as

- tying;
- imposing discriminatory or unfair conditions of sale;
- refusing to sell;
- unjustified termination of commercial relations; and
- using the revenue they derive from their monopoly activities to subsidise their activities in other sectors.

Thus, according to Article 4 of the Law on Competition, prices of goods and services as well as imports and exports may be determined freely in Gabon.

However, there are exceptions to this principle. In this regard, Article 4 paragraph 2 of the above-mentioned law provides that the Government may, if necessary and after the opinion of the Competition Authority, regulate the prices of goods and services, particularly when price competition is distorted in sectors where monopolies have been established or which are subject to special price regulations.

In addition, the Government may also, where necessary and notwithstanding the operation of competition, take measures to:

- prevent excessive price increases resulting from a crisis situation or an abnormal functioning of the market for a good or service; and
- prohibit or restrict, after the opinion of the Competition Authority, the import of one or more specific products which cause or threaten to cause injury to established national production, or clearly jeopardise the start-up of national production. They may be subject to quotas or surcharges.

Finally, Article 6 of the same law states that the freedom of imports and exports must not undermine the protection of national treasures and industrial, commercial or intellectual property, nor the fight against goods and services resulting from counterfeiting of which an economic operator is guilty. Thus, in accordance with Decree No. 325/PM/CPMEADS of 2 July 2015 on the application of certain provisions of the Law Establishing the Competition Regime, the government may, by order of the Minister in charge of the Economy, grant exclusive import exceptions for certain products of nascent industries for a specified period. The implementation of this procedure gives rise to the establishment of specifications between the beneficiary entity and the administration. These specifications will serve as a basis for the administration to conduct periodic audits and controls to ensure that the beneficiary entity complies with the terms and conditions of the exclusivity granted by the Government. In case of default or failure by the beneficiary entity, the Government may terminate the exclusivity granted.

Therefore, in accordance with the law in force, we understand that only the Government is entitled to grant exclusivities under the conditions indicated above. Thus, exclusivity clauses and non-competition restrictions implemented outside this context are contrary to the law and may lead to sanctions.

However, according to local counsel's exchanges with the DGCC, no entity has been prosecuted for applying exclusivity clauses or non-competition restrictions in Gabon.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

According to local counsel's discussions with the DGCC, the Competition Authority has not launched or made public any new investigations since January 2021 against entities for engaging in prohibited practices.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

Yes. The competition legislation in force in Gabon contains provisions on the abuse of buyer power. In fact, according to Article 10 of the Law on Competition, it is prohibited to use practices aimed at abusing the state of economic dependence of an enterprise or group of enterprises on a client or supplier enterprise that does not have an equivalent solution.

The law also prohibits the situation of economic dependence in which a company voluntarily places itself, as long as it has an equivalent solution. This practice constitutes an infringement of the Competition Act, when it has the object or effect of preventing, restricting or distorting competition in the national market or in a substantial part of it.

Nevertheless, according to local counsel's exchanges with the DGCC, it seems that the Competition Authority has not yet initiated proceedings against entities accused of abuse of buyer power.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Yes. As mentioned above, anticompetitive conduct is prohibited in Gabon. In accordance with Article 23 of the Competition Regime Act, anticompetitive practices are prohibited under penalty of criminal sanctions on the basis of Articles 57 to 59 of the said Act, without prejudice to the penalties provided for in Article 56 thereof.

However, the DGCC has informed local counsel that no criminal proceedings have yet been initiated and there have been no convictions of persons or entities for engaging in anticompetitive behaviour.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Gabon is a member of CEMAC, which is a regional body grouping together the Central African countries of Gabon, Cameroon, Equatorial Guinea, Central African Republic, Congo and Chad and has a common competition law regime.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

No. According to local counsel's exchanges with the DGCC, Gabon has not signed a specific memorandum of understanding with another jurisdiction on competition matters.

39. Please describe trends on the level of enforcement of the regional body.

In accordance with Articles 19 and 20 of the CEMAC Competition Regulation, the Commission has a general competence, in collaboration with the national authorities, to apply Community competition law in all areas concerning, in particular

- the common market of the Economic Union;
- the achievement of the objectives of the common market of the Economic Union; and
- the application of the regulations in force and the enforcement of sanctions.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

No. When a merger is notifiable and the regional notification thresholds are also triggered, the parties are required to notify only at the regional level.

In terms of to Article 59(1) of the CEMAC Competition Regulation, mergers with a community dimension fall under the exclusive competence of the Commission under the control of the Community Court of Justice.

41. Please describe cases where a regional body has engaged with your local Competition Authority in relation to enforcement of competition law cases or merger reviews.

According to local counsel's exchanges with the DGCC, these procedures are confidential and therefore no communication on the details of the related operations is allowed.

However, it should be noted that the modalities of cooperation between the Community authority and the national authorities in the context of the application of the competition law or the examination of mergers are defined by the regulations in force.

In accordance with Article 19 of the CEMAC Competition Regulation, please note that in general, the regional Competition Authority has general jurisdiction in all member states of the CEMAC zone in collaboration with each of the respective national authorities.

In this respect, Article 25 of the above-mentioned Regulation specifies that the Community authority, the Community Competition Council ("**CCC**"), being the body of the Community authority in charge of examining notification files and issuing an opinion on the basis of which the authority takes its decision, and the national competition authorities must apply the Community competition rules in close and constant liaison.

In addition, Article 26 provides that the Community authority and the national authority are obliged to keep each other informed of the initiation of each procedure.

Article 27 of the same Regulation states that:

- the Commission, the CCC and the national authorities shall cooperate in accordance with arrangements for the exchange of information laid down in a Commission Procedural Regulation;
- the Commission and the CCC shall periodically transmit to the national authorities information on ongoing cases throughout the Union;
- the national authorities periodically provide the Commission and the CCC with information on ongoing cases; and
- together, the Commission, the CCC and the national competition authorities, the sectoral regulators of the Member States form a network for information sharing, operational capacity building and the consistent application of the Community competition rules.

Moreover, Article 57 paragraph 2 of Regulation n°000350 on the procedure for the application of competition rules provides that in the framework of the examination of a merger, the CCC may ask the CEMAC Member States to carry out investigations on the national legal, regulatory and administrative framework of the sector concerned, on the markets in question, on the actors of these markets, producers, purchasers, customers, subcontractors, final consumers.

42. Please describe any announced cooperation between your local Competition Authority and regional body(ies) in relation to new or ongoing investigations.

According to local counsel's exchanges with the DGCC, no such announcement has been made to date, either by the national Competition Authority or by regional bodies, notably the CEMAC Commission and the CCC.

**Baker
McKenzie.**

Baker McKenzie



Celine Van Zeebroeck

Of Counsel

T +1 202 452 7083

celine.vanzeebroeck@bakermckenzie.com

In collaboration with:



Alevina & Partners Consulting

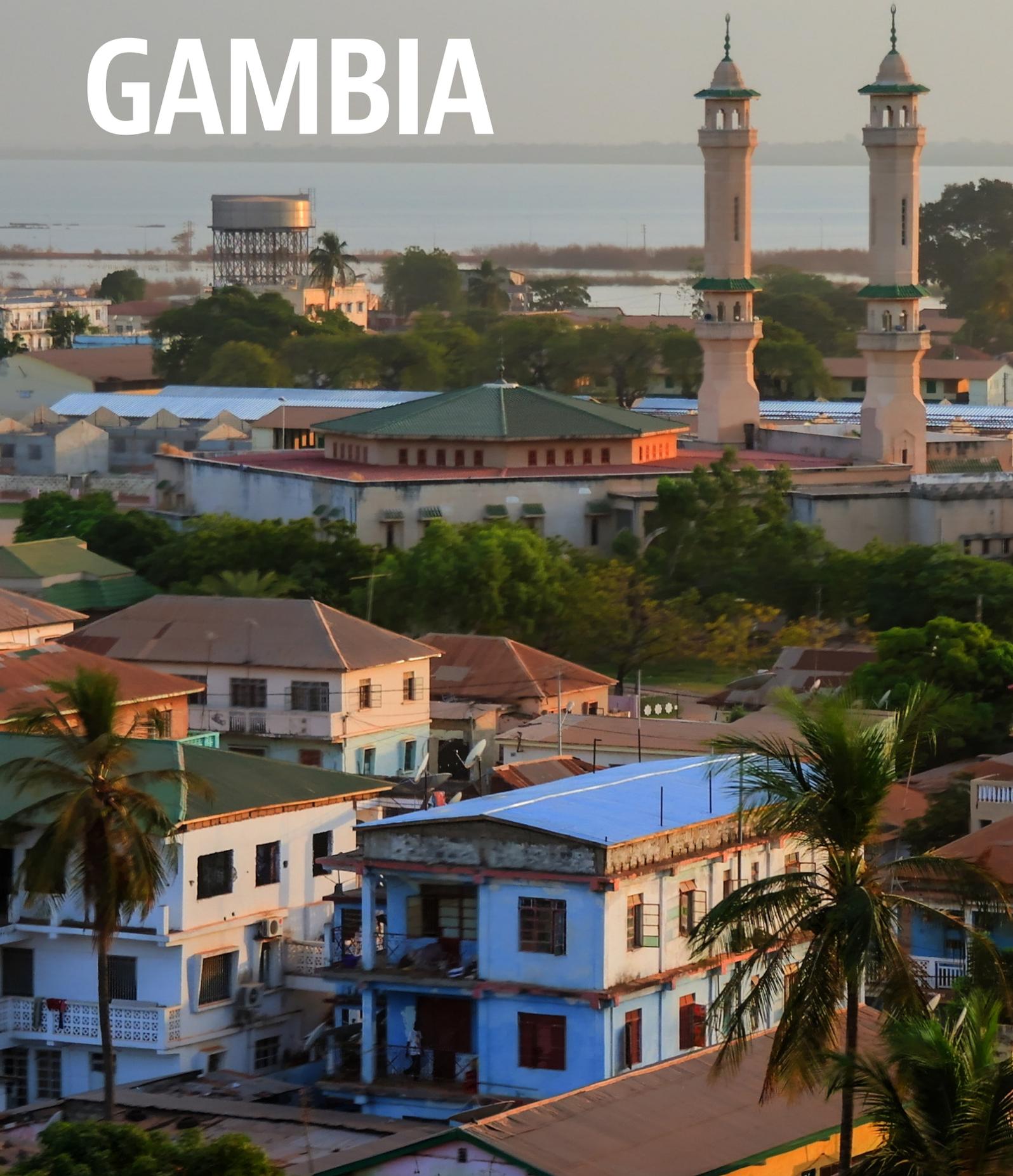
Audrey Alevina

Partner

T +241 (0)77 61 97 09 | +31 (0)6 21 89 85 54

audrey@alevinapartners.com

GAMBIA



GAMBIA

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

Guidelines regarding the interpretation of the Competition Act were published on 1 April 2019. The various sectors of the economy are regulated by industry-specific regulators/regulatory bodies that serve as competition authorities to promote competition and prevent anticompetitive behaviour, such as the Information Communication Act 2009, the Consumer Protection Act 2014, the Essential Commodities Act, 2015, which is aimed at regulating in the interest of the general public, the importation, distribution and retailing of essential commodities in The Gambia, to ensure their availability at fair and reasonable prices, and for connected matters. Finally, the Gambia Public Utilities Regulatory Authority Enforcement Regulations of 2009.

The Commission of the Economic Community of West African States ("**ECOWAS**") officially launched its Regional Competition Authority in Banjul, The Gambia. The formal launching of ERCA took place in May 2019, following a meeting of the Technical Committee of Trade and Competition Experts in Banjul, The Gambia.

The ECOWAS Regional Competition Authority ("**ERCA**") is established to implement the Regional Competition Rules adopted by the ECOWAS Authority in 2008. These Rules essentially promote, maintain and encourage competition while enhancing economic efficiency in production, trade and commerce at the regional level.

The establishment and function of the ECOWAS Authority is set out in Supplementary Act, A/SA.1/06/08 ("**Supplementary Act**").

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

Although the Gambia Competition and Consumer Protection Commission ("**GCCPC**") has no express provision relating to market inquiries, the Gambia Competition Commission ("**GCC**") is empowered to launch "market studies" under section 15(k) of the Gambian Competition Act. The Ministry of Information is also currently reviewing a Merger Commission which will be effective in maintaining and encouraging competition in markets, to promote and ensure fair and free competition, and to protect the welfare and interests of consumers.

The GCC has initiated the following market studies:

- Hajj Market Study;
- Rice and Sugar Market Study;
- Liquefied Petroleum Gas (LPG) Market Study;
- Cement Market Study;
- Tourism Market Study;
- Banking Market Study; and
- Vehicle Procurement Study.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

Generally, the GCC analyses the market of basic commodities and has, on several occasions, expressed its concern in consumer rights violations and in the rise in prices of these basic commodities – such as rice and sugar, for example. Anticompetitive practices, such as price fixing and tie-ins, existed in the rice and sugar importation business. There were allegations of predatory pricing leading to foreclosure of some businesses and some abandoning sugar and/or rice importation.

On 10 January 2018, the GCC issued a press statement warning commercial banks on late interbank fund transfers in respect of employees' salaries. The GCC noted that "when payment is made to the employer's bank, it can take up to 72 hours before the money gets to the account of employees who do not have an account with the bank of the employer. This has forced many people to leave the banks of their choice for the employer's bank to receive timely payment. This conduct constitutes a flagrant violation of section 31 of the Competition Act 2007.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

Yes. The GCC as identified the following sectors as key sectors for the purposes of competition law enforcement:

- Cement;
- Rice;
- Sugar;
- Tourism;
- Real estate;
- Vehicle procurement;
- Banking; and
- LPG.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

No. Dawn raids are not a high risk in The Gambia. No dawn raids have been conducted by the GCC since January 2018.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

Local counsel are not aware of any new regulations or measures in relation to competition enforcement in response to the Covid-19 Pandemic

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

Not applicable.

- 8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.**

Local counsel are not aware of any settlement agreements reached between the GCC and firms.

- 9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.**

Local counsel are not aware of any new regulations or measures that will apply to firms that are active in the digital market space.

- 10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.**

Not applicable.

- 11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.**

As the merger control provisions are concerned with effects on domestic markets or local entities, a purely foreign-to-foreign transaction that does not affect local market share (monopoly situation) would not be caught by merger control provisions.

- 12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').**

Not applicable.

MERGER CONTROL DEVELOPMENTS

- 13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?**

Not applicable.

- 14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?**

No. The GCC has decided not to receive or deal with mergers until the merger regulations that are required to be made under section 33 of the Competition Act have been finalised and become effective. As such, the merger provisions under section 32 of the Competition Act will not take effect until the regulations are enacted. Mergers are currently governed by the Companies Act.

- 15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.**

The GCC is currently not accepting merger notifications. However, in terms of section 33 (2)(a) of the Competition Act, the Minister of Trade may create a regulation prescribing measures relating to the control of mergers. These measures may include a provision requiring parties to a merger to notify the GCC of such merger, either in advance of its implementation in The Gambia, or within a defined period following the implementation in The Gambia. Please note, however, that this regulation is yet to be enacted.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

Not applicable.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

There have been no such cases given that the GCC is currently not accepting merger notifications.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

Not applicable.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

A filing is required if either of the entities or the resulting entity owns 30% of the market or if the market concerned has 70% of supply in the control of three or fewer entities.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Given the infancy of the GCC, no merger notifications have been accepted and/or analysed by the GCC.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

None that local counsel are aware of.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

Given the infancy of the GCC, no merger notifications have been accepted and/or analysed by the GCC.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

None that local counsel are aware of.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

None that local counsel are aware of.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

None that local counsel are aware of.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

None that local counsel are aware of.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

Not applicable.

28. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

Not applicable.

29. Please indicate whether, legally or in practice, your competition authority allows for "Carve out" / "hold separate" arrangements (*this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately*). If so, kindly describe cases where this has happened.

Not applicable.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (*for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained)*). If so, kindly describe cases where this has happened.

Not applicable.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

Local counsel are not aware of any such penalties.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

None that local counsel are aware of.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

In the context of merger and acquisition transactions, a non-compete or an exclusivity clause may be agreed in the form of an undertaking by a seller to refrain from competitive activities. Such agreements may be in breach of the cartel prohibition.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

None that local counsel are aware of.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

None that local counsel are aware of.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Cartel conduct is criminalised by virtue of the provisions of section 49(5) of the Competition Act. However, no criminal charges have been brought against any person or enterprise since January 2019.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

The Gambia is a member of ECOWAS. In 2014, the ECOWAS Authority of Heads of State and Government granted the government of The Gambia hosting rights for ERCA. The formal launching of ERCA took place in May 2019, following a meeting of the Technical Committee of Trade and Competition Experts in Banjul, The Gambia.

The Gambia is mandated by its membership of ECOWAS, the World Trade Organisation, the World Intellectual Property Organisation, the United Nations Conference on Trade and Development, and the African Continental Free Trade Area to have a competition policy in place.

Activities in The Gambia should be conducted with ECOWAS in mind.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

We are not aware of any memoranda of understanding signed by our jurisdiction with other jurisdictions.

39. Please describe trends on the level of enforcement of the regional body.

Not applicable.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Parties should notify the GCC if they are aware that they will be caught by the merger control provisions. The Public Utilities Regulatory Authority must also be notified.

In addition, we are not aware if the ECOWAS Regional Competition Authority is accepting merger notifications given that it is relatively new. However, in terms of ECOWAS competition policy, the ECOWAS Regional Competition Authority will only be notified of a merger if such merger will affect competition in two or more ECOWAS member states.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

None that local counsel are aware of.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Local counsel are not aware of any announced cooperation or new or ongoing investigations by the competition authorities.

In collaboration with:



Amie Bensouda & Co

Amie Bensouda

Managing Partner

T +220 4496453

amie@amiebensoudaco.net

Abdul Aziz Bensouda

Partner

T +220 7730007

aziz@amiebensoudaco.net

Fatou Mbenga

Trainee

T +220 4495110|4495111|4495112|

4495123|7790007

fatou@amiebensoudaco.net

GHANA



GHANA

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

Presently, there is no overarching competition legislation or regime in Ghana. Ghana, however, has sector specific laws that regulate competition in the relevant sectors, including the insurance sector for example. Although a new Insurance Act, 2021 (Act 1061) has been passed, the change of control provisions still require the prior approval of the National Insurance Commission, where there is to be a transfer of all or part of an insurance business, or merger of an insurance business with another business.

Also, a draft Competition and Fair-Trade Practices Bill ("**Competition Bill**") is before parliament but has not yet been passed into law. The principal objective of the Competition Bill is to maintain and encourage competition in markets, to promote and ensure fair and free competition, and to protect the welfare and interests of consumers.

Under the Competition Bill, provision is made for the establishment of a Competition Commission of Ghana. The mandate of the Commission would be to monitor trading practices in the country, to ensure fair trade practices and prevent restrictive trade practices.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

Local counsel are not aware of any plans by any industry regulator to initiate any market inquiries in any sector or industry in Ghana.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

Local counsel are not aware of any publicly expressed concerns by any industry regulator in relation to any industry or sector.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

Local counsel are not aware of any specific sectors identified by any industry regulator as strategic or key sectors for purposes of competition law enforcement.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

No. There is no competition law regulator in Ghana, and local counsel are not aware of dawn raids being conducted by sector regulators, in relation to competition in their respective sectors.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

No. Local counsel are not aware of any new regulations or measures related to competition, introduced in response to the COVID-19 pandemic.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

Local counsel are not aware of any competition legislation introduced during the COVID-19 pandemic.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

There is no competition authority in Ghana and the sectoral competition legislation largely focus on change of control.

In the energy sector, the rates charged by the public utilities must be in accordance with guidelines provided by the Public Utilities Regulatory Commission ("PURC"). The PURC generally publishes approved rates in the national Gazette every quarter and all public utilities are required to have their rates approved by the PURC.

In the telecommunications sector, although the National Communications Authority ("NCA") is mandated to act where it determines anticompetitive pricing. Local counsel are not aware of an instance where the NCA has exercised its authority.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No. Local counsel are not aware of any new regulations or measures that will apply to firms that are active in the digital market space.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

No. Local counsel are not aware of any industries, markets or sectors that is considered to be concentrated.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

There is no generally applicable foreign direct investment review regime in relation to mergers, in Ghana. Foreign direct investment in relation to mergers, is reviewed in each sector, with merger control regulation in the same manner as all other mergers which do not involve foreign direct investment. Mergers are regulated in each sector by the following regulators:

SECTOR	REGULATOR
Banking	Bank of Ghana
Insurance	National Insurance Commission
Telecommunications	National Communications Authority
Mining	Minister of Lands and Natural Resources and the Minerals Commission
Energy	Petroleum Commission and the Minister for Energy
Capital Markets/ Securities Industry (in relation to publicly listed companies)	Securities and Exchange Commission

Local counsel are not aware of any cross-border mergers that have been notified in Ghana. Typically, mergers involving foreign direct investment notified to regulators involve locally registered companies, one or all of which has foreign participation.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

Yes. There is a foreign direct investment regime in Ghana which generally applies to all sectors except portfolio investments and enterprises set up solely for export trading and manufacturing.

The Ghana Investment Promotion Centre ("GIPC") Act, 2013 (Act 865) forms the primary legislative framework that regulates foreign investment in Ghana. Foreign investors are required to satisfy the provisions of the GIPC Act as well as the provisions of sector-specific laws.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

Local counsel are not aware of any notified transactions that has been prohibited by any sector regulator in Ghana since January 2021.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

There are no proposals to amend merger filing fees and/or monetary thresholds and no such amendments have been effected.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

Yes. The submission of a merger notification is suspensory and mandatory in Ghana.

Local counsel are not aware of any relevant industry regulator bringing cases of gun-jumping and/or prior implementation of a notifiable transaction against a regulated entity since.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

No. The submission of a merger notification is suspensory and mandatory in Ghana.

Local counsel are not aware of any industry-specific regulator bringing cases against entities for failure to notify a transaction post-completion.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

Local counsel are not aware of any cases in which the competition authority has fined an entity for failing to comply with merger conditions.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

Local counsel are not aware of any cases in which the acquisition of shares or assets of another firm was interdicted by a relevant regulatory authority in Ghana.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Local counsel are not aware of any cases in which parties (acquirer and target) did not have physical presence in Ghana and the transaction was nonetheless notified.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Local counsel are not aware of any mergers that were approved subject to novel or noteworthy conditions.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

Notification of internal restructurings that do not involve a change in ultimate control is required as follows:

- a) In the banking sector, the Bank of Ghana must be notified where a person's aggregate ownership interest in the regulated entity after acquiring an interest in the entity, whether directly or indirectly, would increase to 5%, 10%, 20%, 30%, 50%, and 75% of the equity of the regulated entity. Also, the Bank of Ghana must be notified for a disposition of shares in a regulated entity, which would result in the person holding less than 5%, 10%, 20%, 30%, 50% or 75% of the equity of the regulated entity.
- b) In the energy sector, the Minister of Energy or the Petroleum Commission must be notified if the effect of a share transfer would result in a third party or affiliate of the shareholder taking over the interest of a shareholder who owns 5% or more of the shares of the regulated entity.
- c) In mining sector, a person may not become a controller of a mining company without first notifying the Minister of Lands and Natural Resources and obtaining approval. A "controller" is a person, who alone or with associates, is entitled to control the exercise of more than 20% of the voting power at any general meeting of the mining company or a company which is a subsidiary of a mining company.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

It depends.

- In the banking sector, an obligation to notify the Bank of Ghana could be triggered as a result of a change in direct control over an entity through the interposition of a new entity where the aggregate ownership interest of that person would be 5% or more. So, a change in ultimate control is not required to trigger the notification obligation in the banking industry.
- In the mining industry, an obligation to notify the Minister could be triggered as a result of a change in direct control over an entity through the interposition of a new entity where the entity would exercise 20% of the voting power.
- In the telecommunications industry, an obligation to notify the NCA could be triggered as a result of a change in direct control over an entity through the interposition of a new entity, where a significant interest would be acquired. "Significant interest" is, however, not defined under the law.
- An obligation to notify the Securities and Exchange Commission as a result of a change in direct control over an entity through the interposition of a new entity where the acquisition is 5% or more of the shares of a company listed on the Ghana Stock Exchange or its holding company. So, a change in ultimate control is not required to trigger the notification obligation in the banking industry.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Public interest considerations are not part of Ghana's merger review.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

Local counsel are not aware of any cases where a sector regulator has prohibited a merger transaction on public interest grounds alone.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

Local counsel are not aware of any circumstances in which greenfield/joint ventures have been caught under a merger review regime.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

Local counsel are not aware of any circumstances in which non-controlling minority share acquisitions have been found to constitute a notifiable merger.

In the banking sector, however, acquisition of an interest in a regulated entity, which results in the person holding at least 5% of the equity of the regulated entity is a notifiable transaction.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

Timelines for obtaining approval vary on a sector-by-sector basis and typically depend on a variety of issues such as the amount of time which the regulatory may need to conduct the relevant due diligence exercises.

In the insurance and energy sectors for instance, there is no statutorily mandated timeframe within which the regulator must approve the transaction. In these sectors, the regulators are only expected to provide a response within a reasonable time. On the other hand, the Bank of Ghana's guidelines for approving transactions indicate that approval would be granted within six months of the Bank of Ghana receiving a completed application. Nevertheless, in some instances, it may take longer to receive approval depending on the nature of the due diligence exercise the Bank of Ghana has to conduct, among others.

In the mining sector, the regulator has two months within which to communicate a decision. If the statutory timeframe elapses without a decision being communicated, the transaction may proceed.

In the telecommunications sector, although the regulator must be notified at least 30 days before the transaction closes. There is no indication of a timeframe within which the regulator must communicate its objection or otherwise. So, in practice, parties do not only notify the regulator but also apply for a "no objection" to ensure certainty in proceeding with the transaction.

28. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

Sector regulators are generally not statutorily mandated to stop the clock. In practice, however, where an application for approval is incomplete and the regulator requests for additional documents, time ceases to run with respect to the timeline for approving the transaction.

The Bank of Ghana, for instance, has issued a Mergers and Acquisitions Directive which indicates that the six months' timeframe for approving a transaction only starts to run after the Bank of Ghana has received a complete application. After an application for approval is submitted, the Bank of Ghana has 10 days within which to review the application and notify the parties of any deficiencies. The parties would be given a deadline for submitting the missing information and no further action would be taken until the requested information is submitted.

- 29. Please indicate whether, legally or in practice, your competition authority allows for "hold separate" arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.**

Where the requisite approval has not been obtained in Ghana, the transaction may be implemented in other jurisdictions where approval has been obtained, so long as such implementation does not impact the company in Ghana or trigger a requirement for notification and approval in Ghana.

- 30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.**

Legally, a transaction may close sequentially. But we are not aware of any cases where this has happened.

PROHIBITED PRACTICES

- 31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.**

Local counsel are not aware of any such penalties imposed on any entities engaged in prohibited practices in Ghana.

- 32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.**

Local counsel are not aware of any cases brought by an authority in Ghana against parties in a vertical relationship for infringing the competition legislation.

- 33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.**

Exclusivity clauses and non-compete restraints are not statutorily prohibited. Local counsel are, therefore, not aware of any prosecution by a regulator against entities for implementing exclusivity clauses or non-compete restraints.

Generally, exclusivity and non-compete clauses in commercial contracts would be enforceable in the Ghanaian courts if the terms are demonstrated to be reasonable as between the contracting parties. If found to be unreasonable, such terms may be unenforceable on public policy grounds.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

Local counsel are not aware of any new investigations launched by an authority against any entity in Ghana, for engaging in prohibited practices since January 2021.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

The Protection Against Unfair Competition Act, 2000 (Act 589) is the only piece of legislation which impacts competition and competitive practices across sectors. It, however, only deals with unfair commercial practices such as acts which damage the goodwill or reputation of another company or mislead the public and does not contain provisions on abuse of buyer power. The sector specific legislations that deal with competition in the relevant sectors also do not contain provisions which expressly deal with abuse of buyer power.

Local counsel are not aware of any instance where an authority has accused a regulated entity of abusing buyer power or brought a case against a regulated entity for abusing buyer power.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Yes.

In the energy sector, the National Petroleum Authority Act, 2005 ("NPA Act") criminalises the formation of cartels, monopolies, and unfair competition in the petroleum industry, as well as cartelisation in the petroleum downstream industry. "Cartelisation" refers to an agreement, combination of or concerted action by refiners, importers or dealers or their agents, to fix prices, restrict output, divide markets either by allocating products or areas to restrain trade or free competition.

The penalty for forming a cartel or a monopoly is imprisonment for a minimum of 10 years, or a minimum fine of GHS 60,000 (approx. USD 10,380), or both. The minimum fine in the case of cartelisation is GHS 180,000 (approx. USD 31,140).

Local counsel are not aware of criminal charges or convictions that have been made under either the Unfair Competition Act or the NPA Act.

In the telecommunications sector, companies which are classified as having significant market power and dominant, are prohibited from engaging in certain conduct which amount to an abuse of their dominant position. However, engaging in such conduct or failing to conduct in the prescribed manner is not criminalised. The regulator may, however, apply to the High Court for an order to compel the regulated entity to act in the prescribed manner.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Ghana is a member of the Economic Community of West African States ("ECOWAS"), which has a competition law regime.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Ghana is a signatory to the ECOWAS Regional Competition Rules. Local counsel are not aware of any Memorandum of Understanding signed by Ghana with another jurisdiction which impacts competition.

39. Please describe trends on the level of enforcement of the regional body.

The ECOWAS Regional Competition Authority is relatively new. Local counsel understand that the RCA is presently focused on fostering a stronger competition culture in the region.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Certain sector regulators in Ghana must be made aware of notifiable transactions. In addition, the ECOWAS Regional Competition Authority must be notified of a merger if it affects two or more ECOWAS member states.

To the extent that the merger will only affect Ghana, the notification requirements of the ECOWAS will not be triggered.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

Local counsel are not aware of any instances where the regional body has engaged with Ghana's local competition authority in relation to enforcement of competition law cases or merger reviews.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Local counsel are not aware of any announced cooperation between our local competition authority and regional body(ies) in relation to new or ongoing investigations.

In collaboration with:



Kimathi & Partners

Kimathi Kuenyehia Sr.

Managing Partner
T +233 (0) 24 79 60 465
kimathi@kimathilegal.com /
ak@africalegalnetwork.com

Akua Serwaa Asomani-Adem

Solicitor & Barrister
T +233 (0) 302 770 447
akua@kimathilegal.com

KENYA



KENYA

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

Since January 2019, a number of new laws, rules, and guidelines relating to competition law have been enacted. These include:

a) The Competition Amendment Act, 2019 ("Competition Amendment Act")

The Competition Amendment Act, which came into force on 31 December 2019, amends the Competition Act, 2010, to create a more robust framework for the regulation, monitoring, assessment, and review of abuse of buyer power. The key change introduced by the Competition Amendment Act is a provision empowering the Competition Authority of Kenya ("CAK") to investigate and take action against conduct amounting to an abuse of buyer power. Provisions relating to buyer power were initially introduced into the Kenyan competition regime in 2017 by the Competition Amendment Act, 2016 ("2016 Amendment Act"). However, the 2016 Amendment Act did not specifically grant the CAK powers to monitor and investigate abuses of buyer power. Pursuant to the Competition Amendment Act, the CAK is now empowered to investigate abuses of buyer power and to conduct market inquiries into any matter relating to abuse of buyer power. The CAK is further empowered to monitor sectors that are experiencing or likely to experience incidences of abuse of buyer power.

b) The Competition General Rules, 2019 ("Competition General Rules")

The Competition General Rules, which came into force on 6 December 2019, have introduced changes to the merger notification thresholds, requirements, and filing fees. They further clarified certain procedural aspects of Kenya's competition law regime relating to merger control, restrictive trade practices (i.e., block exemptions) and consumer welfare. The key changes introduced by the Competition General Rules are summarised below:

i. Value of assets (not just turnover) to be considered

The test on whether and what form of merger notification is required for a transaction is now based on the higher of the combined turnover or value of assets of the merging parties in Kenya. This is a departure from the previous requirements where the value of assets was only considered where the merging parties did not have any turnover in Kenya. This change may lead to merger filings being required for transactions that would otherwise not have been caught based on turnover alone.

ii. Block exemption of mergers

The following transactions will not require notification to the CAK:

- Transactions which are wholly outside Kenya with no local nexus. However, it remains unclear whether the local nexus requires the parties to have subsidiaries or branches in Kenya or whether merely deriving turnover and/or having assets in Kenya with no physical presence will suffice.
- Where the higher of the combined turnover or value of assets of the merging parties in Kenya is KES 500 million (approx. USD 5 million) or less. The block exemption for small transactions is long overdue and will provide significant respite for small investments in Kenya.
- Where a COMESA merger filing has been made and at least two-thirds of the higher of the turnover or value of assets is not derived from Kenya. Parties are now required to only inform the CAK within 14 days of submitting a COMESA merger filing. This is a welcomed change, as it removes the previous mandatory requirement for dual-notification of the same transaction to the CAK and COMESA and promotes the COMESA Competition Commission's objective of being a one-stop-shop for regional competition matters.

iii. Revised merger thresholds and filing fees

The Competition General Rules provide revised merger notification thresholds and merger filing fees, which are set out in the table below.

Merger notification thresholds (higher of combined turnover or value of assets of merging parties)	Type of merger application	Merger filing fee	Comments
Combined: KES 0 – KES 500 Million (approx. USD 4,327,131).	Excluded from notification	None	A merger notification is not required (i.e., there is a block exemption) if the higher of the combined annual turnover or value of assets of the acquirer and the target is less than KES 500 million (approx. USD 4,327,131).
Combined: KES 500 Million (approx. USD 4,327,131) – KES 1 Billion (approx. USD 8,654,262). Target is above KES 500 Million (approx. USD 4,327,131).	Exclusion application	None	An exclusion application is required where the higher of the combined annual turnover or value of assets of the acquirer and target is more than KES 500 million (approx. USD 4,327,131) but less than KES 1 billion (approx. USD 8,654,262).
Combined: Over KES 1 Billion (approx. USD 8,654,262) – KES 10 Billion (approx. USD 86,542,621). Target is above KES 500 Million (approx. USD 4,327,131).	Merger filing required	KES 1 Million (approx. USD 8,654)	There is a mandatory requirement to make a notification where the higher of the combined annual turnover or value of assets of the acquirer and the target is above KES 1 billion (approx. USD 8,654,262) and the higher of the target's annual turnover or value of assets is above KES 500 million (approx. USD 4,327,131).
Combined: Over KES 10 Billion (approx. USD 86,542,621) – KES 50 Billion (approx. USD 432,713,110). Target is above KES 500 Million (approx. USD 4,327,131).	Merger filing required	KES 2 Million (approx. USD 17,308)	
Combined: Over KES 50 Billion (approx. USD 8,654,262). Target is above KES 500 Million (approx. USD 4,327,131).	Merger filing required	KES 4 Million (approx. USD 34,617).	

iv. Extension of merger notification forms

The merger notification forms have been amended, with merging parties now required to provide additional information including:

- details of previous merger filings made by the merging parties and their affiliates;
- other entities where directors of the merging parties hold the positions of directors and/or shareholders; and
- nationalities of the directors of the merging parties.

▪ **c) The Revised Guidelines on Relevant Market Definition (“Revised Market Definition Guidelines”)**

In July 2019, the CAK published the Revised Guidelines on Relevant Market Definition to update the previous Guidelines on Relevant Market Definition, which have been in place for several years (“**Previous Market Definition Guidelines**”). The Revised Market Definition Guidelines seek to provide clarity on the approach the CAK takes when defining markets in Kenya and when determining what constitutes market power. The definition of a relevant market under the Revised Market Definition Guidelines is similar to the definition under the Previous Market Definition Guidelines, save for the addition of the production methodologies involved, raw materials used, and route-to-market considerations to the product market definition.

▪ **d) The Fining and Settlement Guidelines, 2020 (“Fining and Settlement Guidelines”)**

The Fining and Settlement Guidelines set out the principles for the determination of administrative penalties and the procedure for pursuing settlements as provided for under the Competition Act in relation to:

- contraventions relating to restrictive agreements, decisions and practices by undertakings or associations of undertakings, abuse of dominance, and abuse of buyer power; and
- mergers implemented without prior authorisation by the CAK.

The Fining and Settlement Guidelines provide that the CAK will work from a starting point, known as a base amount, which may be adjusted based on aggravating and mitigating factors. The proportion of adjustment of the base amount under the Fining and Settlement Guidelines will be based on factors such as:

- the nature, duration, gravity, and extent of the contravention;
- any loss or damage suffered as a result of the contravention; and
- the market circumstances in which the contravention took place.

The following guidelines, which were proposed by the CAK in January 2018, have not yet been finalised and published:

- i. The Competition (Abuse of Buyer Power) Rules;
- ii. Revised Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act;
- iii. Search and Seizure Guidelines; and
- iv. Consumer Protection Guidelines.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

On 21 February 2020, the CAK notified the public that it would carry a sector study into the regulated and unregulated digital credit markets in Kenya, under financial and technical support from organisations known as Innovation for Poverty Action and Financial Sector Deepening Kenya. The CAK indicated that the main objective of the study is to identify and address potential consumer protection concerns in the regulated and unregulated digital credit markets.

The CAK finalised its study and issued a report in May 2021. Some of the findings of the CAK include: (i) there were increased levels of concentration of loans linked to mobile money providers; and (ii) there were multiple borrowing in an environment with high information asymmetry on positive repayment between banks and non-banks, which raises potential risks for competition and consumer choice in the long run. The CAK, therefore, recommended the development of policies that will contribute to a more competitive digital credit ecosystem.

The report on the digital credit market inquiry and previous market inquiries and sector studies conducted by the CAK in previous years are accessible under the “Planning, Policy and Research” tab on the CAK’s website.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

The CAK has not publicly expressed concern in relation to any industry or sector. However, on 13 March 2020, after the first case of COVID-19 was reported in Kenya, the CAK issued a cautionary notice to the public on the intention of some manufacturers and retailers to collude to increase prices and/or hoard various consumer goods.

In addition, the CAK initiated investigations on bread suppliers in 2019. The CAK was investigating compliance with product standards, such as labelling requirements, set by the national standards body (Kenya Bureau of Standards). Most of the retailers that were subject of the CAK's investigation were asked to amend their bread labels and the matters were closed.

Further, the CAK initiated investigations in April 2020, in relation to delays by some retailers in paying their suppliers. The CAK initiated the prompt payments investigation on the grounds of the buyer power provisions of the Competition Act.

Overall, the CAK appears to be paying a lot of attention to the activities of retailers in the country.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

The sectors, which the CAK has focused on in the past few years for purposes of competition law enforcement, are mostly informed by complaints made in relation to the sectors. For instance, following the enactment of the Competition (Amendment) Act, 2019 which, among others, empowered the CAK to monitor the activities of sectors and undertakings where there is ongoing or likelihood of abuse of buyer power, there have been a number of abuse of buyer power complaints lodged with the CAK relating to players in the insurance and retail sector. This led to the CAK conducting investigations into the two sectors and eventually resulted in the development of model contracts for use by buyers and suppliers in the retail and insurance sectors. Similarly, concerns around the steel industry have resulted in investigations into the sector for alleged restricted trade practices and collusion. Further, the CAK developed the Retail Trade Code of Practice, 2021, in consultation with the stakeholders in the retail sector to address the abuse of buyer power issues arising from the sector.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

The risk of dawn raids by the CAK in Kenya is moderate. As far as local counsel are aware, there have only been three dawn raids undertaken – (i) back in 2015, in the fertiliser sector, where at least two companies were raided; (ii) in 2018, several paint manufacturing and distribution companies in Kenya were raided; and (iii) more recently in 2021, there was a dawn raid in the steel industry. Local counsel are not aware of any dawn raids that have been conducted by the CAK in 2022.

Additionally, the CAK has been successful in gathering evidence, using more conventional methods of investigation. In Kenya, dawn raids are normally used as a last resort as they are quite disruptive and are subject to the CAK obtaining search warrants in some cases.

We expect that the CAK may undertake more dawn raids in future, once the Search and Seizure Guidelines proposed by the CAK are promulgated into law.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

The CAK has not introduced any specific competition enforcement regulations in response to the COVID-19 pandemic. However, the CAK has implemented measures to ensure ease of correspondence and filing of documents with the CAK during this period. The CAK issued a notice that all applications should be made through its E-Filing Portal, which is accessible on its website.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

The mentioned measures are still in place and accurate. There have been no further regulations or measures related to the COVID-19 pandemic.

On 16 March 2020, the CAK penalised a retailer for raising the price of its hand sanitisers from the usual selling price of KES 800 (approx. USD 8.00) to KES 1,000 (approx. USD 10.00). The CAK treated this matter as one of unconscionable conduct that is contrary to the provisions of section 56 of the Competition Act. The CAK ordered the retailer to contact and refund all the customers who purchased 960 pieces of the hand sanitisers above the usual selling price, and submit evidence confirming that the funds had been returned by 26 March 2020.

The CAK also issued cease and desist orders in March 2020 to various manufacturers and distributors who had entered into exclusive agreements relating to brand exclusivity, allocation of territories, and allocation of quantities supplied.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details. We are not aware of any other action taken by the CAK on any entities for infringing competition laws in Kenya.

Agreements by firms to cap prices of products or services would be deemed to be a restrictive trade practice, contrary to section 22 (1) (b) of the Competition Act. The CAK has been proactive in investigating alleged cases of restrictive trade practices and penalising any entity found guilty of engaging in a restrictive trade practice. Recently, in 2021, the CAK warned professional bodies against colluding to set prices. This followed attempts by engineers and accountants to set minimum client fees.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

Although the CAK has stated that it acknowledges the unique competition issues that could arise in relation to digital markets and that digital markets remain on its radar, there are no separate competition regulations or measures developed for digital markets in Kenya. The only reference relating to digital markets is in the Revised Guidelines on Relevant Market Definition, which acknowledge that the traditional aspects of market definition that make reference to a product market and a geographic market may not be sufficient when dealing with complex markets like digital or multi-sided platforms. In dealing with digital markets, the Market Definition Guidelines require the CAK to consider:

- substitutability of the products being offered by these virtual market and identify if there exists a constraint from competing virtual and/or physical markets; and
- substitutability, at one side of the market, in contact with the wider market for the basic products.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

Local counsel are not aware of any industries, markets or sectors that the CAK considers to be concentrated.

- 11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.**

Foreign direct investments relating to mergers involving foreign buyers or acquirers fall within the ambit of the Competition Act and are, therefore, subject to review by the CAK if they meet the merger thresholds. There have been a number of mergers involving foreign buyers or acquirers in Kenya. For instance, in the financial year 2019/2020, the CAK reported that there were 72 mergers with an international dimension.

That being said, there are no separate foreign investment filings that need to be made.

- 12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').**

The foreign direct investment regime, which is governed by the Competition Act, applies to all sectors.

MERGER CONTROL DEVELOPMENTS

- 13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?**

Local counsel are not aware of any notified transactions that have been prohibited by the CAK. Typically, the CAK does not withhold its approval, but where there are significant competition concerns, it can grant approval subject to the fulfilment of certain conditions by the merging parties. The conditions imposed may largely relate to public interest concerns, such as restrictions on the termination of employees. Local counsel are, however, aware of transactions in which the CAK has approved subject to a condition that the merging parties dispose of certain sections of their business or outlets in certain geographic regions within a specified period of time post-closing. This was to address concerns identified by the CAK in its merger analysis, that the transaction could result in the parties becoming dominant in certain geographic regions following the merger.

- 14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?**

Yes. The Competition General Rules amended the merger filing thresholds and fees as indicated above in question 1.

- 15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.**

The Kenyan competition regime is suspensory and parties are prohibited from implementing a notifiable transaction until the CAK grants its approval.

The CAK has penalised parties for consummating notifiable transactions without obtaining prior CAK approval. The penalties imposed so far have generally ranged between 3% and 7% of the parties' combined turnover derived from Kenya. Based on publicly available information, in 2020, the CAK imposed a penalty of KES 549,019 (approx. USD 5,490) on an entity that had implemented a notifiable transaction without obtaining approval from the CAK. However, not all information on fines and penalties imposed is publicly available. The maximum financial penalty that can be imposed is 10% of the parties' combined turnover derived from Kenya. In addition, there are criminal sanctions that attract a fine of up to KES 10 million (approx. USD 86,542) and/or imprisonment of up to five years.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

As indicated in the response above, the Kenyan competition regime is suspensory and parties are prohibited from implementing a notifiable transaction until the CAK grants its approval.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

Local counsel are not aware of any cases in which the CAK fined any entity for failing to comply with merger conditions. Note however that not all such information is made publicly available.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

As indicated in the response above, the CAK has penalised parties for consummating notifiable transactions that include the acquisition of shares or assets without obtaining the prior approval of the CAK approval.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus text /local effects test to establish merger review jurisdiction?

In considering whether a transaction has a nexus to Kenya, where the parties do not have a presence in Kenya, such as through a subsidiary, the CAK would consider if the parties to the transaction derived any turnover or held any assets in Kenya, through any means, such as by making sales directly into Kenya or by having third party distributors in Kenya. Note, however, that such transactions and approvals are not always made publicly available and, therefore, local counsel are not aware of any specific transaction falling within this category that has been published by the CAK. In addition, local counsel have been involved in transactions falling under this category, which have been approved by the CAK, but the information may not be publicly available. However, the CAK Annual Report for the financial year 2019/2020 indicates that a total of 72 mergers with an international dimension were notified to the CAK in the period which are differentiated from 49 mergers with a local dimension.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Most of the conditions imposed by the CAK relate to the retention of employees and restrictions against amending the terms of supplier and distributor contracts for a specified period of time. However, in 2020, the CAK imposed noteworthy conditions on KenolKobil Plc in its acquisition of Gulf Energy Holdings Limited. The acquisition was approved subject to the condition that:

- (a) in addition to the retention of 102 employees of Gulf Energy Holdings Limited for a period of 24 months, the basic remuneration for all employees transferred to the merged entity should not be reduced for 24 months, and other employment benefits shall, taken as a whole, be no less favourable than those provided as at the date of the signing of the agreement; and
- (b) for the duration of the existing contracts between Gulf Energy and the small and medium enterprises operating within the retail station market, the merged entity shall ensure that these enterprises enjoy the same benefits within the contract as provided at the signing of the contract.

Further, in a transaction involving the acquisition of a minority stake in retail chain, Naivas Supermarkets, by French private equity fund Amethis Finance, the CAK required the merged entity to ensure that all the reconciled and agreed outstanding debts owed to the supermarket's suppliers are paid to the extent permitted by the contracts entered into between the parties. The CAK required this to be done prior to the implementation of the proposed transaction.

In relation to the proposed merger between Telkom Kenya Limited ("**Telkom**") and Airtel Networks Kenya Limited ("**Airtel**"), the CAK had imposed eight conditions in its merger determination, seven of which the parties considered onerous. The parties filed the first-ever merger review application to the Competition Tribunal (since its establishment) challenging the conditions imposed by the CAK as part of its approval of the transaction. The conditions imposed by the CAK included:

- (a) a requirement for the spectrum in the 900 MHz and 1800 MHz acquired by the merged business from Telkom, to revert back to the Government of Kenya;
- (b) a blanket prohibition from selling or transferring any of the parties' operating licences and spectrum licenses; and
- (c) a blanket prohibition on the merged entity from entering into any form of sale agreement within five years, which would have had the effect of restricting the merged business from even selling shares to raise further capital or any commercial sale of assets in the ordinary course of business.

The application at the Competition Tribunal successfully challenged the merger conditions, with the Kenya Competition Tribunal finding it necessary to either overturn or amend six of the conditions. The Kenya Competition Tribunal ruled that the CAK's conditions relating to spectrum and licenses did not address any competition law concerns and were an unreasonable and unjustified curtailment of the merged entity's right to property. It also held that instead of a blanket ban against entering into any form of sale agreement, the merged entity could dispose up to 40% of its shareholding at any time during a five-year period. Further, the ruling clarified that the merged entity was not to be restricted from disposing of its assets and shares in the ordinary course of business.

More recently in 2021, in a transaction involving the transfer of 84.99% of the issued share capital in Century Microfinance International (a deposit-taking microfinance institution) by Branch International Limited (an app-based financial services provider), the CAK issued its approval subject to the following conditions:

- (a) that each party maintains the terms agreed with its borrowers in respect of all loans existing in their loan books at the time of the acquisition; and
- (b) that each party retains its existing performing and non-performing loans in accordance with their terms up to and until the expiry of such loans so long as the said terms are not in contravention of the provisions of the Competition Act.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

The CAK does not consider internal restructurings that do not involve a change in ultimate control to be notifiable transactions.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

No obligation to notify would be triggered by the mere interposition of a new entity where there is no change in the ultimate control of the target entity. The Competition General Rules provide that merger involving a holding company and its subsidiary, wholly owned by undertakings belonging to the same group, or amalgamations, involving subsidiaries wholly owned by undertakings belonging to the same group, shall not be subject to notification.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Based on the merger determinations publicly published by the CAK, the merger mentioned above involving the transfer of 84.99% of the issued share capital in Century Microfinance International by Branch International Limited was conditionally approved. The explanation provided by the CAK for arriving at the conditions to maintain existing loan terms (described above) is that the CAK was concerned that the parties may subject existing loans to new terms, thereby negatively affecting existing borrowers.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

As mentioned above, local counsel are not aware of any merger transactions that have been prohibited by the CAK. Where there is a public interest concern, the CAK would typically approve the merger and impose conditions meant to address the public interest concerns.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

As mentioned above, the CAK published the JV Guidelines in 2021 to clarify how joint venture mergers would be treated. The JV Guidelines provide that a joint venture would be notifiable if it is a "full-function" joint venture, meaning that it operates as a self-standing, independent business and if it meets the merger filing thresholds. A "full-function" joint venture must perform, for a duration of 10 years or more, or on a lasting basis for a period less than 10 years with renewal provisions, and must enjoy all the functions of an existing or new autonomous economic entity, which meets the various criteria set out in the guidelines including the following (amongst others):

- (a) operating in a market and performing the functions normally carried on by undertakings operating in the relevant markets;
- (b) having a management dedicated to its day-to-day operations and access to resources in order to conduct for a long duration or a lasting basis in its business activities within the area provided for in the joint-venture agreement; and
- (c) the joint venture entity must have activities that go beyond one specific function of the parents.

From the determinations published by the CAK, a filing was submitted by Elopak AS and Nampak Southern Holdings Limited in relation to their proposed joint venture. Elopak did not have any turnover or assets within Kenya, whilst Nampak had subsidiaries in Kenya at the time of the filing. The CAK approved the transaction unconditionally. As mentioned above, not all such notifications are publicly published by the CAK.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

The CAK would not consider non-controlling minority share acquisitions notifiable mergers on the basis that there is no change of control in the target entity. However, there is a possibility that the CAK may consider the acquisition by one or more minority shareholders of shares, in the course of a single transaction, where they together hold a majority of shares, a notifiable merger on the basis that the shareholders are acquiring joint control.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

The CAK is required to make a determination within 60 days of receipt of a notification, or of further information (as the case may be); and where there is a hearing conference, the CAK must give its decision within 30 days after the hearing conference. If the CAK deems the issues raised by the merger to be complex, it can extend the timeline by a further 60 days. The time starts running from the date on which a complete merger notification or application for exclusion is received together with the appropriate fee, if applicable. On average, the CAK generally takes:

- (a) two to three weeks to approve exclusion applications;
- (b) between 40 – 75 days to approve full non-complex merger filings; and
- (c) between 60 – 120 days to approve full complex mergers.

28. Kindly indicate whether the competition authority enjoys the power to “stop the clock” for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

The CAK may “stop the clock” from running where it has requested for further information from a merger party in the course of analysing a filing. There are no specific instances where the CAK has “stopped the clock” that local counsel can describe, as this would be confidential information, however, it is usual practice for the CAK to do so where significant or vital information is outstanding from a merger party.

29. Please indicate whether, legally or in practice, your competition authority allows for “Carve out” / “hold separate” arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

It may be possible (albeit difficult in practice) for an acquirer to have in place, a separate arrangement to carve out the Kenyan aspect of a transaction where approval from the CAK is not obtained by a specific date, on the basis that the change of control in Kenya (which is what the CAK is concerned with) will not take place in the absence of a CAK approval. However, this would require a legal ring-fencing whereby the shares in the Kenyan operations are transferred to another group entity, owned and controlled by the sellers, rather than a mere contractual ring-fencing. With regard to contractual ring-fencing, based on publicly available information, local counsel are not aware of any such arrangement having been implemented in practice. It is difficult to implement a contractual ring-fencing in Kenya as technically this is not permitted under Kenyan laws, but parties can have discussions with the CAK regarding the CAK allowing such an arrangement to proceed.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained)). If so, kindly describe cases where this has happened.

Legally, a transaction having a Kenyan aspect may be closed sequentially, provided that the closing related to the aspect of the transaction triggering a filing in Kenya takes place after CAK approval has been obtained. It is unlikely that the CAK would be concerned with a closing in another jurisdiction that does not result in a change of control in Kenya. However, from publicly available information, local counsel are not aware of any transactions having a Kenyan aspect that have closed sequentially. As mentioned above, it is difficult to implement a contractual ring-fencing in Kenya, as technically, this is not permitted under Kenyan laws, but parties can have discussions with the CAK regarding the CAK allowing such an arrangement to proceed.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

Penalties imposed by the CAK are not publicly disclosed in all cases. However, based on publicly available information, the highest penalty local counsel are aware of in respect of prohibited practices was a fine of KES 20.799 million (approx. USD 191,630). The fine was imposed on Basco Paints for engaging in alleged collusive conduct with other manufacturers and distributors of paint products. In 2020, the CAK imposed penalties ranging from KES 47,711 (approx. USD 440) to KES 776,025 (approx. USD 7,150) on juice companies for misrepresenting the quality of their products on their packaging.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

Other than investigations relating to abuse of buyer power highlighted below, local counsel are not aware of any investigations instituted by the CAK in relation to parties in a vertical relationship since January 2019. However, from the penalty highlighted under question 14 above, imposed on Basco Paints, it appears that the CAK may have instituted such investigations privately.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Exclusivity and non-compete clauses are treated as restrictive trade practices in Kenya. This is pursuant to the provisions of section 21 of the Kenya Competition Act, which covers:

- (a) agreements between undertakings;
- (b) decisions by associations of undertakings;
- (c) decisions by undertakings; or
- (d) concerted practices by undertakings,

that have as their object or effect the prevention, distortion, or lessening of competition in trade of any goods or services in Kenya, or a part of Kenya.

The CAK has issued directions to some companies to remove exclusivity provisions in their contracts following filing of complaints to the CAK. The CAK also issued an order to major manufacturers and distributors of essential foodstuff such as maize flour, wheat, edible oils, rice, toilet paper, sanitiser and facemasks, to expunge any exclusivity arrangements entered into without the CAK's approval, in a bid to alleviate the impact of COVID-19.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

Yes. The CAK has launched investigations in relation to abuse of market power by retailers and has imposed fines in relation to this conduct. The CAK has also conducted investigations in relation to various anticompetitive practices among players in the paints industry. This investigation resulted in the highest penalty ever imposed by the CAK, of KES 20.799 million (approx. USD 191,630), imposed on Basco Paints.

The CAK has also conducted investigations into an alleged influx of illegal oil marketers in the country following a petition by a number of oil marketers to the National Assembly. The oil marketers alleged that the market had been penetrated by unlicensed and illegal agents who were supplying jet fuel below the landing cost to the detriment of legitimate suppliers. Following the investigation, the CAK concluded that there was effective competition in the market among the existing oil marketing companies and that the product was price above the landing cost.

The CAK continues to exercise its investigative powers and has looked into various sector players in the maize flour sector, bakery sector, fresh juice production sector and edible oils and fats.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

Yes. As mentioned in question 1 above, the Kenyan Competition Act, as amended by the Competition Amendment Act, contains provisions on the abuse of buyer power. The Competition Amendment Act defines buyer power as the influence exerted by an undertaking or group of undertakings in the position of purchaser of a product or service to:

- (a) obtain from a supplier more favourable terms; or
- (b) 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.

Abuse of buyer power is considered an offence under the Competition Amendment Act and the relevant penalties are imprisonment for a term not exceeding five years or a fine not exceeding KES 10 million (approx. USD 86,542), or both. In addition, the CAK can impose a financial penalty of up to 10% of the infringing undertaking's gross annual turnover for the previous year.

The CAK has investigated various retail companies accused of abusing buyer power by their suppliers, on the basis of failing to settle their invoices promptly or imposing other conditions for the supply of goods which the suppliers believe are unfair.

One of the most prominent cases on buyer power in Kenya is the Majid Al Futtaim Hypermarkets Limited ("**MAF**") case in which Orchards Limited (one of MAF's suppliers) alleged abuse of buyer power by MAF and raised various complaints to the CAK in relation to the supply of its products to MAF's Carrefour outlets. Based on publicly available information, some of Orchards' complaints included unilateral delisting, refusal by MAF to take delivery of products, unjustifiable return of merchandise and MAF requiring the supplier to pay a rebate in the form of a listing fee for each product listing. Following its investigations, the CAK found that MAF possessed and abused buyer power and issued various orders against MAF including an order to (i) amend its supply agreements to expunge all provisions that provide for or facilitate abuse of buyer power; (ii) refund rebates deducted from Orchards' invoices; (iii) pay a financial penalty of 10% of its gross annual turnover in Kenya from its Carrefour franchise from the sale Orchards' products for the year 2018 in the sum of KES 124,768 (approx. USD 1,071).

MAF appealed the CAK's decision to the Competition Tribunal that upheld that MAF did indeed have and abuse buyer power. The Competition Tribunal upheld most of the CAK's orders including that MAF's supply agreements should be amended to remove the offending provisions and that MAF should refund the deducted rebates and pay the financial penalty imposed by the CAK. Based on publicly available information, this decision is the subject of an appeal.

In the Annual Report for the financial year 2019/2020, the CAK has indicated that it has finalised a total of 18 cases relating to buyer power which shows that CAK has increased its focus in this area. An overview of the recent buyer power cases handled by the CAK shows that 66% of them related to delayed payments, 15% on unilateral termination of contracts, 10% on delisting, 3% on unjust return of goods and 2% each in relation unfair transfer of costs, transfer of risks and imposition of unfair terms in contracts.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Yes. Cartel conduct is criminalised under section 21 of the Kenya Competition Act. Section 21 prohibits restrictive trade practices (i.e., agreements between undertakings, decisions by associations of undertakings, decisions by undertakings, or concerted practices by undertakings, that 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).

Types of conduct listed in the Kenya Competition Act that would apply to cartels or be termed anticompetitive include:

- (a) directly or indirectly fixing purchase or selling prices or any other trading conditions;
- (b) dividing markets by allocating customers, suppliers, areas or specific types of goods or services;
- (c) collusive tendering; or
- (d) otherwise preventing, distorting, or restricting competition.

In addition to financial penalties, the Competition Act provides for imprisonment for a term not exceeding five years and a fine not exceeding KES 10 million (approx. USD 92,135) as the criminal penalties for engaging in cartel or anticompetitive conduct. Local counsel are not aware of any instances where criminal sanctions have been imposed on any person or undertaking in respect of cartel or anticompetitive conduct. Local counsel are also not aware of any criminal charges brought or convictions made against any persons and/or entities for engaging in any anticompetitive conduct since January 2019.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Kenya is a member of the COMESA and the EAC, both of which have competition law regimes (the EAC Competition Act is, however, only partially operational). In addition, Kenya is a member of the AfCFTA, which entered into force on 30 May 2019.

Therefore, activities in Kenya should be conducted with COMESA and EAC in mind.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Local counsel are only aware of a Memorandum of Understanding between the Competition Commission of South Africa and the CAK signed on 6 October, 2016 which enables the two authorities to share information, conduct joint investigations and enforcement activities, subject to their respective national laws and regulations.

39. Please describe trends on the level of enforcement of the regional body.

Based on our interactions, the COMESA Competition Commission keeps abreast of current business transactions in COMESA member states and has sometimes written to parties who have implemented mergers without notification based on information made public in the media or other public information channels. Please refer to the chapter relating to COMESA for additional information in relation to its regional enforcement activity.

As mentioned in response to question 19 above, the EAC Competition Authority has not commenced full operations. Therefore, local counsel do not have any comments on its level of enforcement at this time.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

In respect of the COMESA competition regime, a merger would only be notifiable to the COMESA Competition Commission if it met the requirements for notification under both the COMESA and CAK regime, pursuant to the provisions of the Competition General Rules. Once the merging parties have made the notification to the COMESA Competition Commission, the Competition General Rules stipulate that they only inform the CAK in writing of the notification.

As for the EAC regime, mergers are notifiable both, to the CAK and the EAC Competition Authority.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

Under the COMESA competition regime, the COMESA Competition Commission is empowered to share documents and information relating to mergers with the relevant authorities of the concerned member states solely for purposes of assessing the competitive effects of the merger. Therefore, the COMESA Competition Commission has reached out to the CAK, in the past, in merger reviews involving Kenya. Additionally, there is a Cooperation Framework Agreement dated 27 April 2016 between the COMESA Competition Commission and the CAK in the Application and Enforcement of the COMESA Competition Regulations which enables cooperation between the COMESA Competition Commission and the CAK in relation to enforcement of competition law cases and merger reviews. In practice, in the course of merger notifications, local counsel have found that the COMESA Competition Commission typically requests parties to waive confidentiality to information for purposes of sharing it with the national competition regulators.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Local counsel are not aware of any announced cooperation between the CAK and the regional competition bodies. In the past, the CAK and the COMESA Competition Commission cooperated by sharing information during investigations. For instance, the CAK facilitated the COMESA Competition Commission to get evidence from local broadcasting stations on an alleged exclusive contract relating to the commercialisation of marketing and media rights of football tournaments.

In collaboration with:



Anjarwalla & Khanna LLP

Anne Kiunuhe

Partner

T +254 703 032 222

ak@africalegalnetwork.com

Dominic Rebelo

Partner

T +254 703 032 222

djr@africalegalnetwork.com

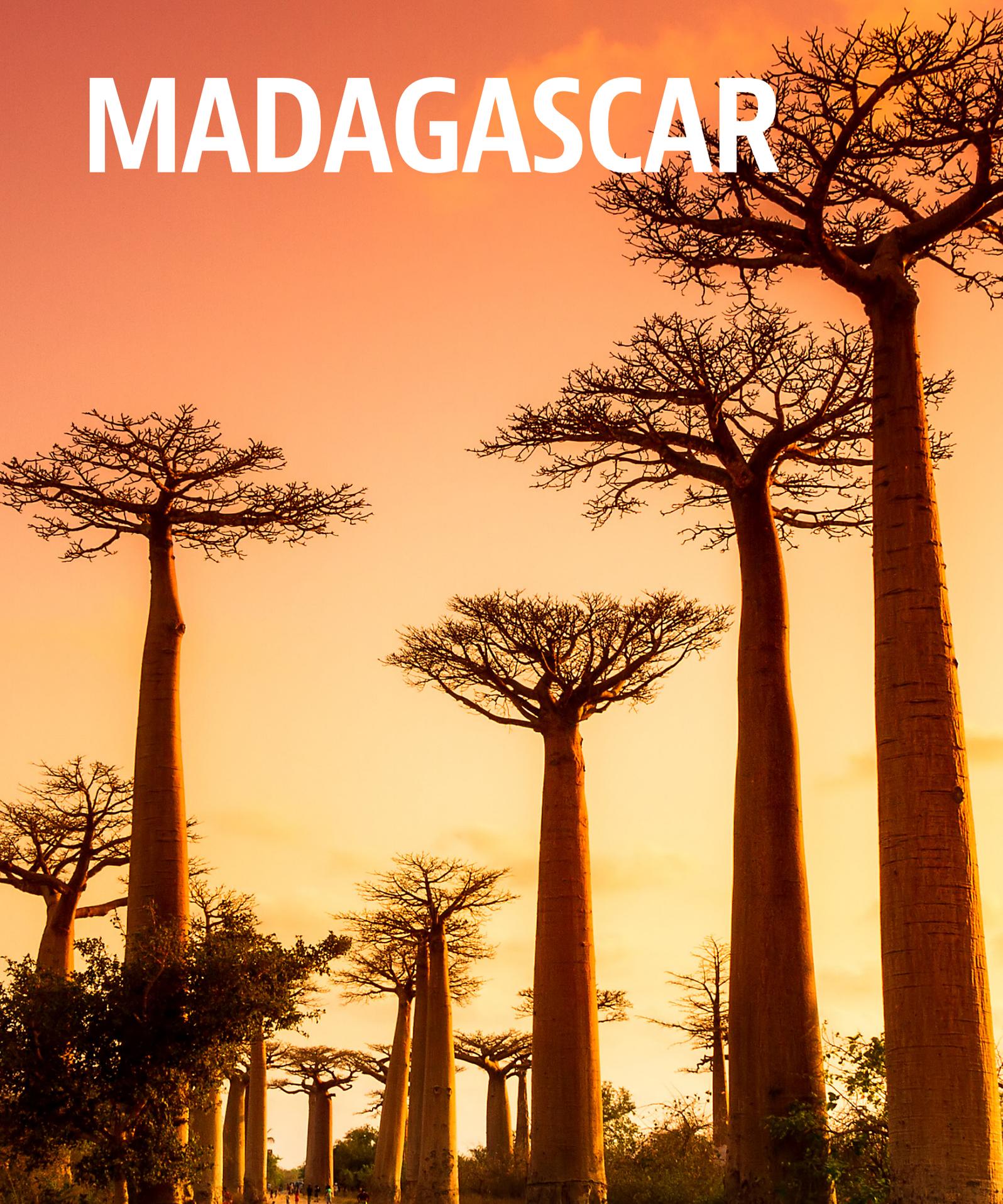
Edwina Warambo

Senior Associate

T +254 (0)20 364 0000

eow@africalegalnetwork.com

MADAGASCAR



MADAGASCAR

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

The Madagascar competition regime comprises the Competition Law No. 2005-020 of 17 October 2005 and Decree No. 2008-771 of 28 July 2008 (collectively, "**Competition Law**"). The Competition Law has been amended by Law No. 2018-020 of 29 June 2018, which was published in the official Gazette on 11 February 2019. Subsequently, there have been no amendments to the Competition Law.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

The National Authority responsible for Corrective Commercial Measures ("**National Authority**") is currently investigating the pasta and blanket industries. The National Authority, established by Decree No. 2014-1726, is an administrative public institution attached to the Ministry of Trade. The National Authority is authorised to make inquiries into unfair commercial practices that are disruptive to the national economy. In addition, it can take corrective measures to stabilise any industry or sector in accordance with the rules of the World Trade Organisation.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

On 6 June 2019, the National Authority publicly expressed concern in relation to the detergent powder industry. The market was deeply destabilised by unregulated imports from China, which endangered local firms. The National Authority has temporarily added additional taxes on the importation of powder detergent in order to restore balance in the market. That being said, as of 6 June 2019, local counsel are not aware of any specific concerns publicly expressed by the Competition Council relating to any specific industry or sector.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

In view of decisions of the Competition Council published on its website, since 2017, the specific sectors considered by the Competition Council as strategic or key sectors of competition law are as follows:

- coffee sector;
- rice sector
- Primary Necessity Products (PNP);
- vanilla sector; and
- beer and rum sector.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

No. As far as local counsel are aware, the Competition Council has not conducted any dawn raids since January 2019. The Competition Council has jurisdiction to hear all cases relating to competition, including monopolies, concentrations, abuses of a dominant position and potentially anticompetitive agreements. The Competition Council is empowered to examine anticompetitive practices that may prevent, restrict or distort competition significantly in a market located within the territorial scope of the Unfair Competition Act. Furthermore, the Competition Council is empowered to implement competition policy through market surveillance missions and investigations relating to anticompetitive conduct. As of January 2019, local counsel are not aware of any searches conducted by the Competition Council.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

To date, local counsel are not aware of any new regulations or competitive actions taken in response to the COVID-19 pandemic.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

Local counsel note that no actions have been taken or sanctions imposed by the Competition Council against specific entities for violating competition law during the COVID-19 pandemic.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

To the best of local counsel's knowledge, the Competition Council has not, to date, entered into any settlement agreements with specific companies to cap the prices of products or services.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

Local counsel are not aware of any new regulations or measures adopted by the Competition Council that apply to companies operating in the digital market sector.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

In principle, the decisions and opinions issued by the Competition Council are published in the Special Bulletin of the Competition Council, pursuant to Article 27(3) and 57(5) of Decree No. 2008-771 of 28 July 2008 establishing the conditions for the application of the Competition Act ("**Application Decree**").

In practice, this Special Bulletin of the Competition Council is not available to the public.

However, the Competition Council may, at its discretion, make certain of its opinions and decisions public on its website.

Local counsel are not in a position to indicate whether specific industries, markets or sectors have been considered by the Competition Council as constituting economic concentrations, in the absence of publication of the opinions and decisions of the Competition Council on its website.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

There is no provision in current Malagasy regulations providing for a specific foreign direct investment review regime relating to mergers involving foreign buyers. That being said, there are certain sector-specific regulations that apply.

Foreigners are free to invest in Madagascar, subject to compliance with the regulations in force, pursuant to Article 2 of Law No. 2007-036 of 14 January 2008 on investment in Madagascar, which states:

“Any individual or legal entity, Malagasy or foreign, is free to invest and set up business on national territory, in compliance with the laws and regulations in force, subject to the provisions applicable to certain sectors of activity which are subject to specific regulations. These include banking, insurance, mining, oil, telecommunications, medical, paramedical and pharmaceutical activities.”

It should be noted, however, that pursuant to Article 35 of the Competition Act, any investor is required to notify the Competition Council, for prior control, of any proposed merger operation that is likely to affect competition, meeting the criteria set out in Article 56 of the Implementing Decree. As a reminder, Article 34 of the Competition Act defines economic concentration as “any situation resulting from any act, regardless of its form, which involves the transfer of ownership or use of all or part of the assets of an enterprise, the purpose or effect of which is to enable an enterprise or group of enterprises to exercise, directly or indirectly, a decisive influence over one or more other enterprises”.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to ‘national security’).

As mentioned above, no specific regime for foreign direct investment is provided for in current Malagasy regulations. However, texts have been adopted to promote foreign investment in Madagascar, including:

- Law No. 2015-039 of 9 December 2015 on Public and Private Partnerships;
- Law No. 2017-023 of 21 August 2018 on Special Economic Zones;
- Law No. 2007-036 of 14 January 2008 on Investments in Madagascar;
- Law No. 2017-020 of 10 April 2018 on the Electricity Code in Madagascar; and
- Law No. 2001-031 of 8 October 2002 establishing a special regime for major investments in the Malagasy mining sector.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

Local counsel are not in a position to indicate whether any notified transactions have been prohibited by the Competition Council since January 2021, as there is no publication on the Competition Council’s website.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

It should be noted that Article 35, paragraph 2 of the Competition Act provides that “the notification fee for economic concentration is set at 0.05% of the annual turnover of the undertakings involved in the concentration”. Apart from the aforementioned provision, local counsel are not aware of any official proposal or text to change the merger notification filing fees.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

According to Article 27 of Decree No. 2008-771, implementing Law No. 2005-020, the submission of a merger notification to the Council is suspensory and the merger cannot be implemented in Madagascar prior to the parties receiving approval.

Any merger that affects competition must be notified in advance to the Competition Council for review (Article 35(1) of the Competition Act and Article 57(5) of the Implementing Decree).

Article 56 of the Implementing Decree further provides that "The proposed concentration or the concentration shall be deemed to impede competition when the undertakings which are parties to the transaction or which are the object of the transaction or which are economically related to them have either together achieved more than 30% of sales, purchases or other transactions on the national market for substitutable products or services, or on a substantial part of this market, or have a total annual turnover excluding tax of more than ten billion Ariary [approx..USD 2.5 million], provided that at least two of the undertakings involved in the concentration have an annual turnover excluding tax of at least two billion five hundred million Ariary".

Article 35 of the Competition Act specifies that "If the Council decides after studying the situation that the transaction is likely to affect competition, it may either prohibit it or authorise it provided that specific measures are taken to avoid the effects detrimental to competition".

Pursuant to the above-mentioned provisions, pending the decision of the Competition Council, which may either prohibit or authorise the merger transaction, the said transaction may not be implemented.

From the foregoing, under the Malagasy competition regulations in force, the submission of a merger notification is mandatory and the completion of the said merger is suspensive to the decision of the Competition Council.

However, local counsel are not in a position to indicate whether the Competition Council has initiated proceedings against entities accused of "gun-jumping" and/or prior implementation of a transaction subject to notification.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

As indicated in the answer to the previous question, in accordance with the provisions of Article 27 of Decree No. 2008-771 of 15 February 2008 setting the conditions for the application of Law No. 2005-020 of 17 October 2005 on competition, the submission of a merger notification likely to affect competition is mandatory and the completion of the said merger is suspensive to the decision of the Competition Council

Pursuant to Article 36 of the Competition Act, parties that carry out a merger without prior notification to the Competition Council are liable to a fine of 1% of the annual turnover of such parties.

However, local counsel are not in a position to indicate whether proceedings against entities for failure to notify a merger have been initiated by the Competition Council, as there is no publication on the Competition Council's website.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

Local counsel are not in a position to indicate whether the Competition Council has sanctioned an entity for non-compliance with the merger notification obligation, as there is no publication on the Competition Council's website on this subject.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

Local counsel are not in a position to indicate in which cases the acquisition of shares or assets of another company has been prohibited by the Competition Council, nor the reasons for the prohibition, as there is no publication on the Competition Council's website on the subject.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus text /local effects test to establish merger review jurisdiction?

To date, local counsel are not aware of any case in which an entity without a physical presence in Madagascar has made a prior notification to the Competition Council.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Local counsel are not in a position to indicate whether the Competition Council has approved any mergers subject to new or noteworthy conditions in the absence of any publication on the Competition Council website.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

Article 34 of the Competition Act states that "the concentration of economic power takes place, inter alia, through mergers, takeovers, joint ventures and all other forms of control of a horizontal, vertical or heterogeneous nature. The takeover or acquisition of an interest in one enterprise by another is the purchase by a second enterprise of all the shares and/or equity interests in the first enterprise or of a sufficient percentage to be able to exercise control, even without the consent of the enterprise".

Furthermore, Article 55 of the Implementing Decree states that "Control arises from rights, contracts or other means which, alone or in combination and taking into account the factual or legal circumstances, confer the possibility of exercising decisive influence on the activity of an undertaking, and in particular (i) rights of ownership or use of all or part of the assets of an undertaking, and (ii) rights or contracts which confer decisive influence on the composition, deliberations or decisions of the organs of an undertaking".

Article 35(4) further provides that "If the Council decides after studying the situation that the transaction is likely to affect competition, it may either prohibit it or authorise it provided that specific measures are taken to avoid the effects detrimental to competition".

In view of the above, notification to the Competition Council is only required in the context of economic mergers resulting in a change of control.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

As previously indicated, if the proposed transaction results in a change of control, in whatever form, of the structure carrying out economic activities on the territory of Madagascar, and if the criteria provided for in Article 56 of the Implementing Decree are met, the transaction must be notified to the Competition Council.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Public interest grounds are not part of Madagascar's merger review.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

Public interest grounds are not part of Madagascar's merger review.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

If the purpose of the greenfield / joint venture merger is a change of control, in whatever form, and if it meets the criteria set forth in Article 56 of the Implementing Decree, the said merger must be notified to the Competition Council.

As mentioned above, the notifications made to the Competition Council are neither publicly available nor available on the Competition Council website.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

Since the acquisition of shares in a company does not result in a change of control of that company, this operation cannot be considered as an economic concentration that must be notified to the Competition Council.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

On average, the Council takes two to three months to approve a non-complex transaction. Complex transactions; normally receive approval within six months.

28. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

Article 57, paragraph 4 of the Implementing Decree sets forth the principle that the starting point of the time limit, which must not exceed six months following notification, is set at the date of issuance of the acknowledgements of receipt, provided that the file is complete".

The Competition Council has a period of six months from the date of notification to study the transaction submitted to it and to issue its decision. If the Competition Council does not issue a decision within the six-month period, the economic concentration submitted to it is deemed to be approved by the Competition Council.

There is no provision in the Competition Law and the Implementing Decree that expressly provides for the Competition Council to suspend the aforementioned six-month period.

From the above, we understand that once the Competition Council is notified of a proposed economic concentration, it is obliged to render its decision within a maximum period of six months from the date of issuance of the acknowledgement of receipt of the notification to the parties concerned. However, it would appear that the timer will only begin to run once the file is complete, the Competition Council may thus stop the clock if the notification is defective and/or until the file is complete

29. Please indicate whether, legally or in practice, your competition authority allows for “hold separate” arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

An economic concentration, within the meaning of Article 34 of the Competition Act, which has not been authorised by the Competition Council, may not be carried out by the parties concerned, pursuant to Article 35 of the Competition Act.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.

Given the principle of sovereignty of each State and the independence of each jurisdiction, regardless of any authorisations required by foreign jurisdictions, the parties to an economic merger authorised by the Competition Council may carry it out.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

In accordance with the provisions of Article 55 of the Competition Act, “violations of the obligation to invoice and the transparency of the transaction and marketing circuit referred to in Articles 13, 14, 15, and 16 of this Act are punishable by a fine of two to five times the value incriminated, without being less than 20,000,000 Ariary” (approximately USD 5,000).

Article 56 of the Competition Act states that “The imposition of minimum prices in violation of Article 20 and the abuse of economic dependence provided for in Article 28 are punishable by a fine of 5 times the incriminated value without being less than 10,000,000 Ariary” (approximately USD 2,500).

Article 57 of the Competition Act states that “Refusal to sell in violation of Article 21 is punishable by a fine of twice the incriminated value without being less than 10,000,000 Ariary” (approximately USD 5,000).

Article 58 of the Competition Law states that “Sale at a price lower than the actual purchase price, in violation of the provisions of Article 24, and violations of the provisions set forth in Article 25 shall be punished by a fine of two to five times the incriminated value without being less than 10,000,000 Ariary” (approximately USD 5,000).

Article 59 of the Competition Law states that “The grabbing in violation of Article 23 shall be punished, regardless of the provisional administrative measures, with a fine of 50 times the incriminated amount without being less than 50,000,000 Ariary” (approximately USD 12,500).

Article 60 of the Competition Law states that “The subordination of sale referred to in Article 22 and the restrictive of competition clause referred to in Article 19 are punished by a fine of five times the incriminated value without being less than 5,000,000 Ariary” (approximately USD 1,250).

Article 63 of the Competition Law states that "Any person who has taken part in a fraudulent and decisive manner in the conception, organization or implementation of the agreements and abuses of dominant positions referred to in Articles 29 to 31, shall be punished by imprisonment of six months to five years and a fine of 5,000,000 Ariary to 50,000,000 Ariary" (approximately USD 1,250 to USD 12,500).

Local counsel are unable to indicate which of the above sanctions have been applied to entities engaged in prohibited anticompetitive practices, as this has not been published on the Competition Council's website.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

Local counsel are not in a position to indicate any situation in which the Competition Council has initiated proceedings against parties to a vertical relationship for infringement of competition law in the absence of a publication on the Competition Council's website.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

The non-competition clause is defined in Article 19 of the Competition Act, which states "A non-competition clause is a clause by which a party to a contract promises its co-contractor not to engage in one or more specific activities. In order to be valid, the non-competition clause must be limited in its object as well as in time and space".

To be valid, the non-competition clause must, therefore, be limited in time and space.

With respect to the exclusivity clause, Article 29 of the Competition Act provides that "concerted practices, agreements between undertakings, express or tacit understandings or coalitions whose object or effect is to prevent, restrict or significantly distort competition within the national market or an important part thereof are prohibited. Cartels consist in limiting market access or the free exercise of competition by other undertakings".

It follows from the aforementioned provision that any agreement, expressed in the form of a clause, having the effect of limiting access to the market or the free exercise of competition by other companies constitutes a practice prohibited by the regulations in force.

To this effect, Article 63 of the Competition Act states that "Any person who has taken part in a fraudulent and determining manner in the conception, organisation or implementation of the agreements and abuses of dominant positions referred to in Articles 29 to 31, shall be punished by imprisonment of six months to five years and a fine of 5,000,000 Ariary to 50,000,000 Ariary" (approximately USD 1,250 to USD 12,500).

Article 60 of the Competition Law further provides that "The subordination of sale referred to in Article 22 and the restrictive of competition clause referred to in Article 19 are punishable by a fine of five times the incriminated value without being less than 5,000,000 Ariary" (approximately USD 12,500).

However, local counsel are unable to indicate cases in which the Competition Council has prosecuted entities for enforcing exclusivity clauses or non-competition restrictions in the absence of publication on the Competition Council's website.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

Local counsel are not in a position to indicate whether, since January 2021, the Competition Council has launched any new investigations against entities for prohibited practices. No such publication has been made on the Competition Council's website.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

Provisions relating to abuse of dominance can be equated with “abuse of purchasing power”.

Abuse of dominance is defined in section 30 of the Competition Act as “a situation in which one or more undertakings are in a position to exercise leadership which enables them to compel their competitors to conform to their attitude, or to abstain from pressure from their competitors. This abuse consists in particular in... imposing, directly or indirectly, unfair purchase or sale prices or other restrictive practices”.

Abuse of dominance is prohibited by section 30 of the Competition Act and is punishable by the penalties set out in section 63 above.

However, local counsel are not in a position to indicate whether the Competition Council has imposed sanctions on entities for abuse of a dominant position, as there is no publication on the Competition Council’s website on this subject.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

No. The Malagasy regulations in force do not expressly sanction cartels. However, this practice can be assimilated into an anticompetitive practice punished by the regulations.

Anticompetitive practices are punishable under Articles 55 to 65 of the Competition Act, which provide for fines and imprisonment.

Malagasy regulations also consider that anticompetitive practices are qualified as “offences” and not as “crimes”, and are punishable by imprisonment and/or fines, as provided for in Articles 55 to 65 of the Competition Act.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Madagascar is a member of COMESA. Accordingly, activities in Madagascar should be conducted with COMESA competition laws in mind.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Local counsel are not aware of any signed memorandum of understanding on competition.

39. Please describe trends on the level of enforcement of the regional body.

The COMESA Competition Commission often seeks advice from the Council when merger notifications are tabled before the COMESA Competition Commission and have a bearing on Madagascar. The Competition Council also relies on the COMESA Competition Commission’s decisions as the basis for its decisions on regional anticompetitive practices. Please refer to the chapter relating to COMESA for additional information in relation to its regional enforcement activity.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Yes. A merger will be notifiable both, domestically and regionally, provided that the notification requirements are met. The Council issued a notice on 27 March 2018, stating that the notification of a merger to the Council does not preclude or oust the competence of the COMESA Competition Commission to assess the merger transaction.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

As mentioned above, the Council relies on the COMESA Competition Commission's decisions as the basis for its decisions on regional anticompetitive practices.

However, due to local counsel's confidentiality obligations, we are unable to report on specific cases in which the Competition Commission has sought COMESA's advice in connection with the enforcement of the Competition Act or merger review.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Local counsel are not aware of any future cooperation between the Competition Council and a regional body.

**Baker
McKenzie.**

Baker McKenzie



Fabien Hecquet

Senior Associate

T +33 1 44 17 6561

fabien.hecquet@bakermckenzie.com

In collaboration with:



LEXEL Juridique & Fiscal

M. Tafita RATSIMBA

Conseil juridique et Associé de Lexel

T +261 (0)32 11 159 26

tafita.r@lexel.mg

MALAWI



MALAWI

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

Amendments to both, the Competition and Fair Trading Act (“CFTA”) and the regulations, have been proposed and submitted to the Ministry of Justice. However, the amendments are not anticipated to be ready for enactment any time soon. The Competition and Fair Trading Commission (“CFTC”) has drafted new guidelines on various topics, including abuse of dominance and collusive conduct, exclusive dealing arrangements and resale price maintenance, market definition, predatory, discriminatory and tying conduct, and public interest, among others. These guidelines have been circulated to various stakeholders for comment, but have yet to be published.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

The CFTA contains the following market enquiry provisions:

- (a) According to section 42 of the CFTA, the CFTC is required to keep the structure of production of goods and services in Malawi under review to determine where concentrations of economic power or anticompetitive trade practices exist, whose detrimental impact on competition and the economy outweigh the efficiency advantages, if any.
- (b) Under section 37(1) of the CFTA, where an application for authorisation of a merger or takeover is made to the CFTC, the CFTC is entitled to require any participant in the market within which the merger or takeover will occur, to grant to the CFTC access to records of sales accounted for by the merging parties, or by other leading enterprises in that relevant sector.

The CFTC concluded a market inquiry in the poultry sector a couple of years ago, and most recently, concluded one in the funeral services market. The objective of the inquiry was to establish whether there are anticompetitive and unfair trading practices or agreements in the funeral services market. The CFTC indicated that it also sought to understand whether there are unilateral, collusive or vertical arrangements that prevent, restrict or distort competition in the market. The enquiry further sought to establish whether the arrangements that exist between insurance service providers and funeral service providers pose any consumer rights concerns.

Following the market inquiry, on 8 February 2022, the CFTC issued a press release advising the general public that NICO Life and Goodwill Funeral Services had an oral agreement that was anticompetitive and further, that they had made decisions and engaged in concerted practices that were anticompetitive, in violation of Section 32 (1) of the CFTA. The CFTC issued the following orders:

- (a) NICO Life should open up to other funeral service providers by entering into agreements with them through competitive bidding processes;
- (b) NICO Life should pay a fine of MWK 500,000 (approx. USD 623) for engaging in anticompetitive conduct; and
- (c) Goodwill Funeral Services should pay a fine amounting to MWK 68,736,941 (approx. USD 85,601), being the financial gain generated from engaging in the anticompetitive conduct.

Local counsel understand that the CFTC is currently conducting a market study on digital markets. No further details regarding this market study are available at this time.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

The CFTC had expressed concern about the funeral services industry and conducted a market inquiry into this sector.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

The CFTC had expressed some concern in relation to the cooking oil sector and investigated four cooking oil manufacturing companies. Upon further investigation, the CFTC found no conclusive evidence that the four Respondents' conduct amounted to unconscionable conduct. The CFTC has indicated that it will continue to monitor this market.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

Dawn raids are not high risk. The CFTC, exercising its consumer protection function, has conducted dawn raids on electronic product suppliers who were suspected of supplying refurbished computers to consumers and passing them off as new computers. As far as local counsel are aware, dawn raids are not a common occurrence.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

No.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

Various pharmacies have been fined by the CFTC for overpricing COVID-19 prevention supplies. The fines ranged from MWK 500,000 (approx. USD 623) to MWK 2,000,000 (approx. USD 2,490). The CFTC also cautioned bus operators against excessive pricing of bus services during the COVID-19 pandemic.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

The CFTC issued fines to pharmacies and other suppliers of COVID-19 prevention supplies, at the beginning of the COVID-19 pandemic, for excessive pricing of goods. However, local counsel are not aware of the CFTC reaching settlement agreements with firms to cap prices of products or services.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

No. Local counsel understand that no formal study has been conducted.

- 11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.**

Local counsel are not aware of any formal FDI review regime. However, exchange control approval from the Reserve Bank of Malawi is required before shares can be transferred to non-residents.

- 12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').**

Please see the response to the question above.

MERGER CONTROL DEVELOPMENTS

- 13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?**

Local counsel have been informed by the CFTC that there were no merger notifications during the course of 2021.

- 14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?**

Local counsel understand that such proposals were made by the CFTC. However, as the proposed regulations have been pending for several years now, they have not been implemented.

- 15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.**

The submission of a merger notification is suspensory and mandatory in respect of mergers which are likely to result in a substantial lessening of competition in any market in Malawi. Section 35 of the CFTA makes it an offence for any person to participate in effecting a merger or takeover that is likely to result in substantial lessening of competition in any market in Malawi, in the absence of authority from the CFTC. In addition, no merger or takeover made in contravention of the CFTA shall 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.

The consequences of participating in a merger or takeover that is likely to result in substantial lessening of competition, without prior approval from the CFTC, are severe. Therefore, it is advisable for parties to apply for approval and await clearance before effecting such a merger or takeover.

- 16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.**

Notification is non-suspensory and voluntary for transactions which are unlikely to result in a substantial lessening of competition in any market in Malawi. There is no stipulated time period for notifying a merger. However, the CFTC can and has investigated parties who have concluded mergers without notifying the CFTC to determine whether the transaction has resulted in substantial lessening of competition. In one such case, the CFTC asked the parties to notify the merger (but waived

the merger notification fee). The investigation found that the merger was not likely to result in substantial lessening of competition and therefore did not contravene Section 35 of the CFTA.

The CFTC has stated that it does not condone post-merger notifications and encourages parties to voluntarily notify mergers to avoid action by the CFTC, should the merger be found to substantially lessen competition.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

Local counsel are not aware of any such case.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

Local counsel are not aware of a case in which the CFTC interdicted the acquisition of shares or assets in any matter notified to it.

However, the CFTC provided its input to the COMESA Competition Commission in relation to the Malawi aspect of a proposed transaction that was notified to the COMESA Competition Commission concerning an offer made by GardaWorld Security Corporation (“**GardaWorld**”) to acquire the entire issued and to be issued share capital of G4S through Fleming Capital Securities Inc., which is indirectly owned by GardaWorld. The CFTC was of the view that the Malawi aspect of the acquisition would result in a substantial lessening of competition in Malawi – the Kenyan Competition authority expressed similar concerns. The parties voluntarily chose not proceed with the merger for unrelated reasons.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Local counsel are not aware of such case.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

None that local counsel are aware of.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

The CFTA does not expressly address this point. However, in the view of local counsel, internal restructuring would not be likely to impact competition.

Please note that for the purpose of the CFTA:

- (a) any two companies are to be treated as affiliated enterprises if one of them is a company of which the other is a subsidiary or if both of them are subsidiaries of the same company; and
- (b) a group of affiliated enterprises shall be treated as a single enterprise.

So long as the companies are affiliated in the manner specified in the CFTA, an internal restructuring involving such affiliated entities would not be notifiable. Any other reorganisation would be notifiable if the merger is likely to result in a substantial lessening of competition.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

Please see the response to the question above. It is unlikely that such restructuring would need to be notified, as it is unlikely to result in substantial lessening of competition.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Local counsel have been informed by the CFTC that there have been no merger notifications since January 2021.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

Local counsel are not aware of any case in which this has occurred.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

Malawi law does not make specific reference to joint ventures. According to a Q & A published on the CFTC's website, joint ventures are not notifiable. Local counsel are not aware of any greenfield / joint venture mergers that were notified.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

The definition of a merger in the CFTA requires the acquisition of a controlling interest in an undertaking or an asset. "Controlling interest" is defined as follows – a controlling interest, in relation to:

- (a) 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
- (b) any asset, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset.

It could be argued that that a non-controlling minority share acquisition would not be classified as a "merger" for the purposes of the CFTA. However, the term "controlling interest" is defined very widely in the CFTA and is thus likely to capture many minority shareholding acquisitions. Local counsel, therefore, recommend applying the general test of whether or not the acquisition is likely to result in substantial lessening of competition before deciding whether or not to notify.

Local counsel are not aware of any non-controlling minority share acquisition that was notified.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

In terms of section 39 of the CFTA, the CFTC is required, within 45 days of receipt of an application or the date on which the applicants provide the information sought by the CFTC, if that date is later, to make an order concerning an application for authorisation of a merger or takeover.

It is noted that the CFTC has sometimes "requested" permission to extend the review period, even where the parties have submitted all the required information. The CFTC has requested this on the basis that it had not yet concluded its investigations.

In practice, the CFTC can take up to three months to issue a decision (regardless of the complexity of the transaction). This is normally because the CFTC's board only meets quarterly and, in some cases, where the Government delays to appoint a board, there is no board to issue a decision. In certain circumstances the CFTC may, at the request of the parties, issue conditional or temporary authorisation, which allows the parties to proceed with the merger until the final approval is issued by the board.

28. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

The CFTA requires the CFTC to make an order concerning an application for authorisation of a merger within 45 days of receipt of an application or the date on which the applicants provide the information sought by the CFTC. If the information provided is not complete, the CFTC "stops the clock" and the counting of days begins when the full information required by the CFTC is provided.

29. Please indicate whether, legally or in practice, your competition authority allows for "Carve out" / "hold separate" arrangements (*this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately*). If so, kindly describe cases where this has happened.

There is no specific provision for this in the CFTA and local counsel are not aware of any cases where this has happened in practice.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (*for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained)*). If so, kindly describe cases where this has happened.

There is no specific reference in Malawi competition law to sequential closing of transactions. In the view of local counsel, the transaction can close sequentially, so long as the Malawi parties to the transaction do not effect a merger that results in substantial lessening of competition, without the CFTC's approval.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

The CFTC recently imposed a fine of MWK 500,000 (approx. USD 623) on NICO Life Insurance Limited and a fine of MWK 68,736,941 (approx. USD 85,601) on Goodwill Funeral Services for engaging in anticompetitive business practices, as described in detail above.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

No. As far as local counsel are aware, the CFTC has not brought any cases against parties in a vertical relationship for infringing the CFTA.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

The CFTC normally requests parties to notify it of any exclusivity clauses and non-compete restraints. In 2020, the CFTC ordered Seedco (Malawi) Limited to apply for authorisation of their exclusive distributorship and resale price maintenance schemes. Neither, the exclusive dealing arrangement, nor the resale price maintenance were approved by the CFTC, but as far as local counsel are aware, no fines were imposed. Local counsel are not aware of specific prosecution against entities for implementing these clauses.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

The CFTC regularly launches (and publicises) investigations against entities for engaging in prohibited practices, including investigations on alleged anticompetitive conduct and unconscionable conduct by banks, insurance companies and other private companies.

The CFTC also exercised its consumer protection function by launching investigations on various entities for, among others, alleged misrepresentation of products and misleading conduct, alleged supply of products that are likely to cause injury or physical harm to consumers, alleged liability for defective goods, failure to offer warranty or guarantee and unconscionable conduct, alleged exclusion of liability for defective goods and failure to give warranty or guarantee on goods for long use, alleged misleading conduct and offer of prizes with no intention of giving. One noteworthy fine was a MWK 2,113,099,660 (approx. USD 2,581,440) fine on Airtel Malawi for engaging in unconscionable conduct. Airtel Malawi has SINCE appealed against this fine.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

Local counsel are not aware of any specific provisions on abuse of buyer power. However, it is noted that the CFTC has engaged with buyers in the tobacco industry, following complaints from tobacco farmers, in a bid to ensure fair prices. The CFTC has stated that it has played a monitoring role in this matter, together with the Tobacco Commission, but has not opened cases against any party.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Cartel conduct or anticompetitive conduct, more generally, is criminalised in Malawi. Local counsel are not aware of any criminal charges or convictions made against any persons or entities for engaging in anticompetitive conduct. The CFTC usually imposes fines on parties engaging in such conduct.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Malawi is a member of COMESA. Therefore, activities in Malawi should be conducted with COMESA competition laws in mind.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Local counsel understand that Malawi has signed memorandums of understanding with Tanzania and Zambia.

39. Please describe trends on the level of enforcement of the regional body.

Please refer to the chapter relating to COMESA for additional information in relation to its regional enforcement activity.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

According to the COMESA Competition Regulations and the COMESA Competition Rules on the Determination of Merger Notification Thresholds and Methods of Calculation, 2015, a merger is notifiable to the COMESA Competition Commission if it has a regional dimension (i.e., where both/either the acquiring entity and/or the target entity operate in two or more COMESA Member States) and if the merging entities' combined annual turnover or combined assets, meet prescribed thresholds.

If a merger is notifiable to the COMESA Competition Commission, there is no requirement to also notify domestically.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

Local counsel are not aware of cases in which a regional body has engaged with the local competition authority in relation to enforcement of competition law cases. In terms of merger reviews, the COMESA Competition Commission does engage the local authority in relation to any merger that has a Malawi aspect. The CFTC expressed its concerns in relation to a proposed acquisition of the security company G4S by Gardaworld through Fleming Capital Securities, Inc. (the Kenyan Competition Authority also expressed similar concerns). The parties withdrew the merger application for unrelated reasons.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

The CFTC entered into a memorandum of understanding with the COMESA Competition Commission on 4 September 2015.

Pursuant to the memorandum of understanding, the two authorities agreed to cooperate where they are investigating related matters, and to share relevant information to ensure effective enforcement of their respective competition laws. They also agreed to consult on matters of competition enforcement and policy and keep each other informed of significant competition policy and enforcement developments in their jurisdictions. They further agreed to cooperate in advancing technical assistance and capacity building programmes through integrated strategies.

Local counsel are not aware of any announcement of cooperation in relation to any new or ongoing investigations.

In collaboration with:



Savjani & Co.

Krishna Savjani OBE SC

Managing Partner

T +265 182 4555

savjaniandco@africa-online.net

Reena Purshotam

Senior Associate

T +265 1 824 555

rpurshotam@savjaniandco.mw

MALI



MALI

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

Malian competition law is governed by the following laws:

- a) Treaty of the West African Economic and Monetary Union ("WAEMU");
- b) Regulation No. 02/2002/CM/UEMOA of 23 May 2002 on anticompetitive business practices;
- c) Regulation No. 03/2002/CM/UEMOA on procedures applicable to cartels and abuse of dominant position within the West African Economic and Monetary Union;
- d) Law No. 2016-066/ of 24 February 2016 on the organisation of competition;
- e) Ordinance No. 2017-2013/P-RM of 6 March 2017 creating the General Directorate for Trade, Consumption and Competition; and
- f) Decree No. 2017-0199/P-RM setting the terms of application of the Ordinance of 6 March 2017 on the organisation and operating methods of the Directorate General for Trade, Consumer Affairs and Competition.

There have been no recent amendments to the abovementioned laws.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

The local competition authority, the *Direction Générale du Commerce, de la Consommation et de la Concurrence* ("DGCCC") carries out checks and investigations in various sectors of the economy, including: trade; industry and handicraft; health; agriculture; food; breeding and fishing; mining and energy; electricity and water; oil; telecommunication; transportation; and tourism and culture.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

No. The DGCCC has not expressed public concern regarding a particular industry or sector.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

The DGCCC is responsible for developing and implementing Mali's trade and competition policy. It is responsible for organising, developing and supporting trade promotion activities in order to increase their role in the economic and social development of the country. The key sectors of the economy that the DGCCC has identified for purposes of competition law enforcement are as follows: trade; industry and handicraft; health; agriculture; food; breeding and fishing; mining and energy; electricity and water; oil; telecommunication; transportation; and tourism and culture.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

The DGCCC may carry out any searches it deems necessary. These searches are carried out during working hours (between 08h00 and 17h00).

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

Local counsel are not aware of any new regulations introduced in response to COVID-19.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

Local counsel are not aware of any new measures or sanctions imposed on entities during the health crisis (COVID-19).

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

The DGCCC regularly takes measures to guarantee the price of products and services on the Malian market, including, for example, in relation to the price of basic necessities such as rice, sugar, milk, oil, cereals and other consumer products.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No. The DGCCC has not expressed public concern regarding a particular industry or sector.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

No. The DGCCC has not identified any particular industry, market or sector that it considers to be concentrated.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

In Mali, there is an authorisation and control system for foreign direct investment.

These foreign investments which are external financing must comply with Regulation No. 09/2010/CM/UEMOA relating to the external financial relations of the Member States of the WAEMU. This financing requires, in all cases, a control of the Minister in charge of Finance and verifications or declarations with the Central Bank of West African States.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

Local counsel are not aware of any particular exception to the application of Regulation No. 09/2010/CM/UEMOA relating to the external financial relations of the Member States of the WAEMU.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

Local counsel are not aware of such case.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

Local counsel are not aware of such proposal or actual amendment.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

Mergers must comply with the rules set by:

No. Local counsel are not aware of any lawsuits filed against entities accused of gun-jumping or prior implementation of a notifiable transaction.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

Submission of a merger notification is non-suspensive and voluntary.

Local counsel are not aware of any lawsuits being brought against entities for not notifying a transaction after completion within the stipulated time.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

There is no inventory of cases where sanctions have been imposed. The information system remains manual and not computerised.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

There is no inventory of cases in which the acquisition of shares or assets from another entity has been prohibited by the DGCCC. The information system remains manual and not computerised.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Even if one of the parties does not have a presence in Mali, competition laws remain applicable, including sanctions.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Local counsel are not aware of any such instance.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

Local counsel are not aware of any such case.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

A notification requirement could be triggered following a direct change of control over an entity, by the interposition of a new entity within the group, although the restructuring does not result in an ultimate change of control.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

There is no directory of mergers approved or disapproved by the DGCCC. The information system remains manual and not computerised.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

There is no directory of mergers approved or disapproved by the DGCCC. The information system remains manual and not computerised.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

The following circumstances constitute a concentration:

- a) the merger between two or more previously independent companies;
- b) the operation by which one or more persons already holding control of at least one company, or one or more companies, acquires directly or indirectly, whether by taking equity stakes or buying elements of assets, contract or otherwise, control of all or parts of one or more other businesses; and
- c) the creation of a joint venture performing in a sustainable manner all the functions of an autonomous economic entity.

As such, greenfield / joint ventures are caught within the relevant provisions and are notifiable.

There is no directory of mergers approved or disapproved by the DGCCC. The information system remains manual and not computerised.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

Local counsel are not aware of any such circumstances.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

There is no specific duration to obtain the approval of the DGCCC. It depends on the complexity of the transaction and the stakes. It is advisable to allow between three and seven months.

28. Kindly indicate whether the competition authority enjoys the power to “stop the clock” for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

The DGCCC has the right to suspend the examination of a merger operation until the parties meet the requirements of Malian law. This may occur, in particular, in the event of non-compliance or violations of the legal provisions on anticompetitive practices.

29. Please indicate whether, legally or in practice, your competition authority allows for “hold separate” arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

The DGCCC authorises “hold separate” agreements. If the authorisation is not obtained in Mali, the acquirer can choose not to take over the company in Mali and implement the transaction in another WAEMU country where the approval has been obtained.

Prohibited mergers are declared null and void and without legal effect. Prohibited mergers, acquisitions or business concentrations may be permitted or exempted if the transaction involved is in the public interest.

The following circumstances are not subject to prohibitions under national legislation – any agreement, decision, concerted practice, or category thereof, or any association of companies, which contribute to (i) improving production; (ii) improving the distribution of products; or (iii) the promotion of technical or economic progress, while reserving, for users, a fair share of the resulting profit. These circumstances are not subject to prohibitions, on the condition that they (i) do not impose restrictions on the undertakings concerned, which are not essential to achieve these objectives; and (ii) do not give undertakings the possibility, for a substantial part of the products in question, of eliminating competition.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.

Not applicable.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

When an infringement of competition law is established, Malian law provides as penalties a fine of between CFA francs 50,000,000 (approx. USD 82240) and CFA francs 100,000,000 (approx. USD 164480) (this fine may be increased to 10% of the turnover achieved, during the last financial year ended at the date of the decision, by each of the undertakings that participated in the infringement).

The WAEMU Commission may, by means of a decision, impose periodic penalty payments on enterprises and associations of enterprises at the rate of CFA francs 50,000 to CFA francs 1,000,000 (approx. USD 82 to USD 1644) per day of delay, from the date it sets in its decision, to compel them to put an end to an offence, to put an end to any prohibited action, to provide complete or exact information that it has requested by decision, or to submit to a verification that it has ordered by decision.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

It is possible to distinguish agreements between companies into two categories, namely, so-called "vertical" agreements and so-called "horizontal" agreements. This distinction is important because the former are considered to be, in principle, less restrictive of competition than the latter.

Although potentially restrictive of competition, vertical agreements nevertheless have positive effects for competition. Any entry into a market requires heavy investment and entails risk. It is often facilitated by the conclusion of agreements between producers wishing to enter a new market and local distributors. Efficient distribution is also an element of inter-brand competition that provides benefits to the consumer.

This specific quality of vertical agreements justifies a more flexible policy on the part of the DGCCC with regard to them. According to this policy, the WAEMU Commission will consider that all vertical agreements are, in principle, outside the scope of the law, with the exception of two types of agreements whose anticompetitive effects are deemed to be greater than their positive effects for competition, in particular, in that they impede the integration of the markets in question. These two categories are, on the one hand, agreements involving absolute territorial protection and, on the other hand, those relating to the fixing of the resale price.

All vertical agreements between parties occupying a dominant position on the market in question also remain under the strict control of the WAEMU Commission. In other words, none of the vertical agreements fall outside the scope of the law on abuse of dominant position.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Local counsel are not aware of any lawsuits brought against entities for implementing exclusivity clauses or non-competition restrictions.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

No. The DGCCC has not launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

No. The Competition Law does not contain provisions on the abuse of buyer power.

Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/ convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Conduct of a cartel or anticompetitive conduct is an offense in Mali.

REGIONAL BODIES / COOPERATION

36. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Mali is a member of the WAEMU.

37. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Yes. Mali has signed a memorandum of understanding with the countries of the West African sub-region which is the Treaty of the WAEMU. The following regulations are derived from this Treaty, namely:

- a) Regulation No. 02/2002/CM/UEMOA of 23 May 2002 on anticompetitive business practices, and
- b) Regulation No. 03/2002/CM/UEMOA relating to procedures applicable to cartels and abuse of dominant position within the WAEMU.

38. Please describe trends on the level of enforcement of the regional body.

There have been no recent enforcement developments by the regional body in Mali.

39. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Notification at the national level is sufficient.

40. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

By application of the provisions of the WAEMU Treaty, aid granted by States or through State resources in any form whatsoever is incompatible with the Common Market and prohibited when it distorts or is likely to distort competition by favoring certain companies or certain products.

Pursuant to the provisions of the WAEMU Treaty, Member States shall refrain from any measures likely to impede the application of the law. In particular, they are prohibited from enacting or maintaining, with regard to public undertakings and undertakings to which they grant special and exclusive rights, any measure contrary to the rules and principles provided for by the Union Treaty.

Member States are also prohibited from enacting measures allowing private companies to evade the constraints imposed by the WAEMU Treaty.

Undertakings entrusted with the management of services of general economic interest or having the character of a fiscal monopoly are subject to the rules of the Treaty relating to competition.

However, in the event that the application of these rules frustrates performance of the particular mission assigned to them, the DGCCC, in accordance with the WAEMU Treaty, may grant exemptions to the Treaty.

41. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Local counsel are not aware of such cases.

**Baker
McKenzie.**

Baker McKenzie



Fabien Hecquet

Senior Associate

T +33 1 44 17 6561

fabien.hecquet@bakermckenzie.com

In collaboration with:



Athena Legis

Bérenger Meuke

Docteur en Droit des Affaires (Université de Lyon 3)

Avocat, Associé

Barreaux du Cameroun et du Mali

Ancien Membre du Barreau de Lyon

T 00 (223) 75157541 / 00 (237) 6 97 35 86 12

bme@athenalegis.com / berengermeuke@yahoo.fr

MAURITIUS

An aerial photograph of a tropical coastline in Mauritius. The image shows a lush green peninsula with a white sand beach curving along the edge. The water is crystal clear, revealing a vibrant turquoise and blue gradient. In the foreground, white waves are breaking against a darker blue sea. The background features rolling green hills and a large, prominent mountain peak under a sky filled with soft, white clouds. The overall scene is idyllic and scenic.

MAURITIUS

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

The Competition Act 2007 ("Act") was amended in July 2019 to add a new subsection 39 (2), which provides that an officer of the Competition Commission of Mauritius ("CCM") is a "public officer", so that he may enjoy additional immunity against legal liability under the Public Officers Protection Act. There have been no subsequent changes to the Act.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

Yes. The Executive Director ("ED") of the CCM investigative arm may undertake a market study to examine the conditions of competition in a particular sector. The ED may also conduct an enquiry to determine whether there are reasonable grounds to believe that a restrictive business practice is occurring or about to occur and where such reasonable grounds exist, the ED may initiate an investigation.

A study was initiated in Construction industry in 2017 to identify and assess the potential barriers to entry or constraints to the process of competition in the various markets in the construction industry. It was completed on 19 June 2018 and found that there was a high degree of concentration among the various markets. Some major players are also vertically integrated. There are risks that the market may become prone to anticompetitive conduct again and the CCM recommended a constant monitoring of the sector.

Since 2019, the CCM has enquired in various traditional and modern sectors of the Mauritian economy and has investigated several sectors of the economy with regard to abuse of monopoly, mergers, and collusive agreements.

The market study in the pharmaceutical sector was initiated in 2019 to understand and publicise the conditions of competition in the sector and to come up with recommendations to make the market more competitive. It was completed on 8 June 2021 and concluded as follows:

- (a) The import and supply of pharmaceuticals to the public and private healthcare institutions is mainly controlled by wholesale private firms.
- (b) Potential competition concerns identified within the pharmaceutical industry arise from the current regulatory framework, and this includes perceived conflict of interests among the board members of the regulator, lack of transparency and predictability regarding the regulator's operating procedures.
- (c) An analysis of the pricing system tends to show that local prices of pharmaceutical products are higher when benchmarked with international reference prices.
- (d) It was recommended that more transparency should prevail in the registration process, pricing control policies need to be reviewed and finally to consider reviewing the law to allow parallel imports to mitigate the robust IP rights regime.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

Yes. The CCM publicly expressed concern regarding the banking sector, specifically with respect to payment cards. The CCM imposed the following measure in the banking sector, namely that two major card companies and their legal representatives providing payment card services have been directed to cap the default Issuer of Interchange Fee on payment cards at 0.5% for all card-present POS transactions, effected in Mauritius, for a period of five years.

The CCM has also expressed concerns on the pricing of Mobile Telephony Services and has requested the ED to conduct further enquiries in the matter.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

There are ongoing investigations and local counsel are unable to comment at this stage.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

Dawn raids are a high risk. Where the ED considers it necessary to investigate without giving a warning, the ED might consider carrying out an entry and search exercise in order to find evidence. The investigative route chosen is at the ED's discretion and will depend on the allegations and the particular circumstances. However, the Act requires that the ED obtain a search warrant from a Magistrate before carrying out such exercise. Once the search warrant is obtained, the ED is under no obligation to give advance notice of the dawn raid to the parties concerned. A raid team will usually consist of officers of the CCM, IT experts trained in IT forensics, and police officers (if authorised by the Magistrate in the search warrant).

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

Yes. The CCM released guidance to businesses on COVID-19-related collaboration ("**Guidance Programme**"). The Guidance Programme was introduced amidst the current COVID-19 pandemic to spur the recovery of the economy in general and to ensure that markets continue to deliver for consumers. The Guidance has since been repealed and replaced by a Flash Guide: Caution for businesses – Competition Law best Practices. The Flash Guide reminds businesses that the CCM will observe their activities closely and that the law will be enforced with much rigor post-COVID-19.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

Local counsel are not aware of any enforcement action by the CCM against entities for infringing competition legislation during the COVID-19 pandemic. This information is not made publically available.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

Yes. Please refer to the response in relation to payment card services above.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

Yes. In the construction industry, as described in more detail above.

- 11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.**

No. There is no such specific regime. However, all foreign direct investment or mergers involving foreign buyers or acquirers must be made through the Economic Development Board ("EDB"), which operates under the aegis of the Prime Minister's Office ("PMO"). The EDB processes the application for foreign direct investment and forwards it to the PMO, where the Prime Minister would use their discretion to grant or refuse the application. There is no indication of any change in the present regime.

- 12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').**

Please refer to the response above. National security is a major consideration that would weigh heavily in the Prime Minister's decision.

MERGER CONTROL DEVELOPMENTS

- 13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?**

There has been no such prohibition.

- 14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?**

No such proposal has been published.

- 15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.**

No. There is no legal obligation on merging parties to notify or seek the approval of the CCM before implementing a merger transaction. Nonetheless, the Act provides parties to a merger situation with the possibility of seeking the guidance of the CCM on whether or not the merger may substantially lessen competition, and as such, whether or not the merger is in conformity with the Act. Such application for guidance is voluntary, but commonly referred to as merger notification. The parties would invariably wait for a decision of the CCM before embarking on the proposed merger.

- 16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.**

Yes. Merger notifications are voluntary and non-suspensory. There are no cases brought against an entity for failure to notify a transaction post-completion within the stipulated time. Yes. There are no instances where the authority has specifically requested notification.

- 17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.**

None. A fine is not applicable for failure to comply with merger conditions – the CCM cannot inflict any fine, as a merger situation can only be remedied as opposed to being penalised. The CCM may give the enterprise such directions as it considers necessary, reasonable and practicable to remedy, mitigate or prevent the substantial lessening of competition, and any adverse effects that have resulted from, or are likely to result from, the substantial lessening of competition.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

None. However, in April 2021, the CCM allowed an acquisition of shares in a "rum" industry to proceed by imposing conditions to prevent what it termed a "merger situation".

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Local counsel have not come across such a case.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Yes. The CCM approved two mergers in June 2019 and July 2020 respectively, subject to undertakings given by the parties, which satisfy the CCM that they address all concerns about any prevention, restriction, distortion or substantial lessening of competition.

Local counsel do not have a full picture of the novel conditions, as some aspects of these have been kept confidential by the CCM.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

No.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

No. As stated above, there is no requirement of notification.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Only one in April 2021. As stated above, the case concerned an acquisition of shares, by a public "rum" company in another public listed "rum" company, in terms of which, the acquirer intended to double its shareholding to 66.6%. The CCM imposed conditions, by requiring the potential acquirer to divest in a third rival rum company, so as to prevent a "merger situation" which would have lessened competition in the rum industry.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

None.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

Local competition laws do not catch such mergers or potential mergers.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

None.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

Each case will depend upon its own merits and is entertained diligently. For example, an application for guidance may be disposed of within a period of six months. Complex cases include those which are the subject of an investigation by the ED, followed by a decision by the Commissioners of the CCM (adjudicative arm), which generally take much longer.

28. Kindly indicate whether the competition authority enjoys the power to “stop the clock” for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

No.

29. Please indicate whether, legally or in practice, your competition authority allows for “hold separate” arrangements (*this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately*). If so, kindly describe cases where this has happened.

There is no such provision.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (*for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained)*). If so, kindly describe cases where this has happened.

There is no such provision.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

The ED has completed two investigations in the supply of chemical fertilisers in Mauritius. The findings of the ED were that two domestic companies that are the two main suppliers of fertilisers in Mauritius and have operated a cartel to fix prices, allocate the market and have participated in bid rigging. Such conduct (collusive agreements) is illegal and in breach of the Act. The ED recommended the imposition of financial penalties totalling MUR 76.4 million (approx. USD 1,928,777) on the enterprises concerned and a decision by the CCM is still pending.

Additionally, in August 2021, several members of the Association of Private Health Plans Administrators were fined for participating in a collusive agreement. The original fines were reduced after some of those members had made application for a reduction under the Leniency clause.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

Yes. The CCM has brought cases against two payment card companies for abuse of monopoly. In June 2019, the CCM endorsed the recommendation of the ED to reduce the current level of the Issuer of Interchange Fee from 1% to a capped fee of 0.5% to make the upstream network market (dominated by the two payment card companies) and the downstream issuing and acquiring markets (dominated by two banks) more competitive. The aggrieved parties have given notice of appeal.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Exclusivity clauses and non-compete restraints may be treated as a collusive agreement if they restrict, prevent or distort competition significantly, as defined under sections 41 to 43 of the Act. These are the only breaches for which financial penalties may be levied, where the CCM is satisfied, on a balance of probabilities, that the breach was intentional or negligent.

There have been several cases brought before the CCM in this regard, but in almost all of these cases, the defaulting enterprise has pleaded for immunity or leniency, as provided for by section 59(7) of the Act.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

Yes. The CCM initiated and completed several such investigations. These investigations are accessible on the CCM's website.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

The Mauritius competition regime does not have provisions dealing specifically with the abuse of buyer power. However, such cases may be assimilated as abuse of monopoly.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

No. This conduct is dealt with by the CCM, which only has civil jurisdiction, as pointed out in the answer to question 16 above. The ED has statutory powers under Part IV of the Act to investigate cartel and anticompetitive conduct. The CCM may consider a report drafted by the ED pursuant to an investigation, with the view of confirming or setting aside the findings of the ED. In addition to imposing financial penalties, the CCM may give the defaulting enterprise directions where it considers it necessary, reasonable and practicable to:

- (a) remedy, mitigate or prevent the adverse effects on competition that the CCM has identified; or
- (b) 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.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Mauritius is a member of COMESA and SADC.

Therefore, activities in Mauritius should be conducted with the COMESA and SADC in mind.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Memoranda of Understanding have been signed with the following authorities:

- (a) Fair-Trading Commission of the Republic of Seychelles;
- (b) Competition Commission of South Africa;
- (c) Among the members of SADC community; and
- (d) COMESA Competition Commission.

39. Please describe trends on the level of enforcement of the regional body.

Please refer to the chapter relating to COMESA for additional information in relation to its regional enforcement activity.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

There is no requirement for domestic notification.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

Local counsel are not aware, as this information is not publicly available.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

None.

In collaboration with:



Madun Gujadhur Chambers

Moorari Gujadhur

Barrister / Partner

+230 211 5151

moorari@madungujadhurchambers.com

Shyam Servansingh

Barrister / Partner

shyam@madungujadhurchambers.com

MOROCCO



MOROCCO

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

There have been no amendments to the competition legislation since January 2019, however, the Competition Council published a report in 2019 in which it clarified the criteria for merger filings.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

According to the Competition Council's activity report, market inquiries have been conducted regarding the most sensitive sectors of the Moroccan economy.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

Yes. Concern has been expressed regarding the following industries, namely:

- Automotive;
- Hotel and catering; and
- Transport.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

Yes. Key sectors for competition law enforcement are the following, namely:

- Pharmaceuticals;
- Online payment markets by credit card;
- Private clinics and similar establishments; and
- Wholesale markets for fruit, vegetables, red meat and fish.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

The Competition Council has not conducted any dawn raids, thus far.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

The Competition Council has given advice on the regulation of the prices for hydro-alcoholic gels and protective masks, in accordance with competition legislation, considering that freedom of prices do not prevent the administration from taking temporary measures against excessive price increases or decreases, motivated by exceptional circumstances, after consulting the Competition Council.

However, the duration of application of these measures may not exceed six months, extendable once, by the administration.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

Not to the best of local counsel's knowledge.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

The Competition Council has facilitated the pooling of competitors for the purchase or production of goods and services and have acted on the prices and availability of raw materials or finished products. In order to preserve competition, the Competition Council has issued general guidelines and directives.

Additionally, the Competition Council has put in place, price ceilings and enforcement measures against abusive operators.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

Yes. Identified sectors are the following:

- Buildings and public works;
- Private higher education; and
- Sugar.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

No. Not to the best of local counsel's knowledge.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

Please refer to the response above.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

No.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

No.

- 15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.**

Yes. Merger notification is suspensory in Morocco. Accordingly, the parties to a proposed transaction cannot implement the transaction without the prior approval of the Competition Council.

- 16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.**

No.

- 17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.**

None, to the best of local counsel's knowledge.

- 18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.**

None, to the best of local counsel's knowledge.

- 19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?**

None, to the best of local counsel's knowledge.

- 20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?**

None, to the best of local counsel's knowledge.

- 21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.**

The Competition Council does not require the notification of internal restructurings.

- 22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.**

Yes.

- 23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.**

None, to the best of local counsel's knowledge.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

None, to the best of local counsel's knowledge.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

None, to the best of local counsel's knowledge.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

None, to the best of local counsel's knowledge.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

The examination by the Competition Council generally takes approximately 60 days (Phase 1), except in the case of an in-depth examination (Phase 2). So far, only one notified transaction was subject to an in-depth examination. Phase 2 examination takes approximately 90 days.

28. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

The Competition Council can stop the clock if the parties to the transaction undertake to implement measures, in order to limit the anticompetitive effect of the transaction. In this case, the Competition Council can stop the review until the signing of such engagements.

29. Please indicate whether, legally or in practice, your competition authority allows for "hold separate" arrangements (*this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately*). If so, kindly describe cases where this has happened.

Legally, the Competition Council has the power to impose such arrangements. However, in practice, this has never occurred.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (*for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained)*). If so, kindly describe cases where this has happened.

No.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

None, to the best of local counsel's knowledge.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

None, to the best of local counsel's knowledge.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

There is no specific definition under Moroccan law for exclusivities or non-compete restraints. Local counsel are also not aware of any prosecutions against entities for implementing exclusivity clauses or non-compete restraints.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

The Competition Council did not launch any investigation for anticompetitive practices in 2021. However, the Competition Council launched an investigation for failure to notify a merger operation.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

Yes. The competition legislation contain provisions on the abuse of buyer power. However, since its creation, the Competition Council has never issued a decision on an abuse of buyer power.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Yes. Anticompetitive conduct is criminalised in Morocco. That being said, criminal charges have yet to be brought against any infringing entity.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

No.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

No.

39. Please describe trends on the level of enforcement of the regional body.

Not applicable.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

The merger must only be notified domestically.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

Not applicable.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Not applicable.

**Baker
McKenzie.**



Kamal Nasrollah
Partner
Casablanca
T +212 522 77 95 95
kamal.nasrollah@bakermckenzie.com



Keltoum Boudribila
Associate
Casablanca
T +212 522 77 95 95
keltoum.boudribila@bakermckenzie.com

MOZAMBIQUE



MOZAMBIQUE

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

Since the Competition Regulatory Authority became operational, in January 2021, the following amendments have been enacted:

- (i) Regulations on Merger Notification Forms - approved by means of Resolution No. 1/2021, of 22 April 2021. These Regulations prescribe the different forms to be completed, depending on the specifics of the concentration (i.e., the simplified form and/or regular form) and details the information and documentation that shall be provided together with each form;
- (ii) Regulations on Filing Fees – approved by means of Ministerial Diploma No. 77/2021, of 16 August 2021. Filing fees are currently set at 0,11% of the turnover of the previous year, up to the maximum limit of MZN 2,250,000 (approx. USD 35,000); and
- (iii) Amendments to the Competition Regulations – approved by means of Decree No. 101/2021, of 31 December 2021. This statute (i) amended the current turnover thresholds for purposes of determining whether a transaction is subject to notification; and (ii) established the requirements where a concentration should follow the simplified form.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

The Competition Regulatory Authority became operational in January 2021. Thus far, no market inquiries have been initiated.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

Thus far, no specific concerns were publicly expressed in relation to any industry or sector.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

Thus far, no specific sectors have been identified as strategic or key for purposes of competition law enforcement.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

Thus far, no dawn raids have been carried out by the Competition Regulatory Authority. However, dawn raids may be carried out at the discretion of the Competition Regulatory Authority, whenever it deems appropriate or required.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

No.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

No.

- 8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.**

No.

- 9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.**

No.

- 10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.**

No.

- 11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.**

The general investment legal framework is governed by the Investment Law, approved by Law No. 3/93, of 24 June 1993 and the Investment Regulations, approved by Decree-law No. 43/2009, of 21 August 2009 (as amended by Decree No. 48/2013, of 13 September 2013 and by Decree No. 20/2021, of 13 April 2021).

As a rule, foreign and/or domestic investment may be freely entered into. The approval of a foreign investment project through the APIEX, the Agency for Promotion of Investment and Export (*Agência para Promoção do Investimento e Exportação*), is not mandatory and depends entirely on the foreign investor's will. However, it is recommended to obtain an investment authorisation mainly in order to secure certain foreign exchange, tax and customs benefits and incentives alongside with a more favourable regime for the hiring of expatriate employees. As a general rule, investment projects may be freely developed throughout the Mozambican territory, without any limitation in terms of (i) the area of activity; or (ii) the destination of goods or services. There are also some specific provisions for investments carried out in Special Economic Zone (*Zona Económica Especial*) or in a Free Industrial Zone (*Zona Franca Industrial*).

Foreign direct investment is also subject to foreign exchange control, and foreign direct investment inflows are subject to registration with the Central Bank of Mozambique within 90 days as from the date of entrance of the relevant funds in-country.

- 12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').**

The general investment legal framework expressly sets forth that investments on the petroleum (upstream) and mining sectors are not subject to the rules set forth therein. As a rule, the investment rules applicable to said sectors are subject to sector-specific legislation, which contain specific rules with respect to foreign direct investment or investments governed under contractual arrangements executed with the State.

MERGER CONTROL DEVELOPMENTS

- 13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?**

Local counsel are not aware of any transaction having been prohibited by the Competition Regulatory Authority thus far.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

The merger filing fees were amended in August 2021 by means of Ministerial Diploma No. 77/2021, of 16 August 2021. The current filing fees are set at 0.11% of the turnover of the previous year with a maximum limit of MZN 2,250 (approx. USD 35).

Further, the monetary thresholds for notification purposes were recently amended by Decree No. 101/2021, of 31 December 2021. At present, a concentration operation is subject to prior notification where one of the following conditions are met:

- (i) acquisition, creation or reinforcement of a market share equal or higher than 50%;
- (ii) creation or reinforcement of a market share ranging between 30% and 50%, provided that the turnover generated in Mozambique of at least two companies participating in the concentration is higher than MZN 105 million net (roughly approx. to USD 1.65 million) in the previous financial year;
- (iii) the aggregate turnover (in the previous financial year) of the companies participating in the concentration is higher than MZN 925 million net (roughly approx. USD 14.49 million), provided that the turnover generated in Mozambique of at least two companies participating in the concentration is higher than MZN 105 million net (roughly approx. USD 1.65 million)

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

Yes. Where applicable, a merger notification is deemed suspensory and mandatory to the extent that a prior approval or non-opposition decision issued by the Competition Regulatory Authority is required for the relevant transaction to be implemented. Failure to obtain the prior approval or non-opposition decision attracts the payment of fines and caused the underlying transaction to be deemed null and void. That being said, the Competition Regulatory Authority only began reviewing merger notifications in January 2021, following its establishment in the same month. To the best of local counsel's knowledge, thus far, no cases have been brought against any entities for failure to comply with merger notification related requirements, including gun-jumping.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

No. As per the above response, a merger notification is deemed suspensory and mandatory.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

To the best of local counsel's knowledge, thus far, no fines, nor other penalties, have been applied by the Competition Regulatory Authority for failure to comply with merger conditions.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

To the best of local counsel's knowledge, to date, no acquisition of shares or assets of another firm has been interdicted by the Competition Regulatory Authority.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Local counsel are not aware of any transaction with such features being notified and/or approved thus far. In any case, the Competition Law applies to all activities / transactions carried out in-country, or which may have effects therein. Therefore, in theory, it is indeed possible for a transaction to be notified where the parties have no physical presence in-country, provided that the relevant transaction has some effects therein.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Yes.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

We are not aware of any case where the Competition Regulatory Authority has required notification of internal restructurings.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

In principle, no. The Competition Regulations provide that transactions that imply a change of temporary or transition control and from which does not result an effective concentration of economic power between seller and acquirer, nor changes the structure of the market, shall not qualify as a concentration operation for merger control purposes and, as a result, shall not be subject to notification-related requirements.

However, it is stressed that the Competition Regulatory Authority only became operational in January 2021 and, therefore, the merger provisions have not yet been fully tested.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

There is still limited information on transactions submitted for approval of the Competition Regulatory Authority. In any case, thus far, local counsel are aware of one transaction where the Competition Regulatory Authority proposed the imposition certain conditions purportedly based on public interest grounds – specifically, for the benefit of small and medium enterprises. These conditions are, however, still under discussions and a final decision on the underlying transaction is still pending.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

Local counsel are not aware of any case where the Competition Regulatory Authority has prohibited a merger transaction based on public interest grounds alone.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

For the purposes herein, it is assumed that "greenfield" joint ventures are those aimed at commencing a new business activity, rather than combining existing activities of the joint venture parties.

Under the law, concentration operation is defined as follows (i) an act consisting of the merger of two or more companies that were previously independent; (ii) the acquisition of control, direct or indirect, of one company or part of one or more companies; or (iii) the creation or acquisition of one common company aimed at developing autonomous economic activities in a lasting manner.

Hence, there may be cases where a "greenfield" joint venture merger may be deemed a concentration operation subject to merger control, notably where the "greenfield" joint venture falls under item (iii) above. In such a scenario, the transaction would be subject to the merger control provisions set forth in the competition legal framework if and where the relevant thresholds pertaining to market share and turnover are met.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

Subject to the market share and turnover thresholds being met, where the non-controlling minority share acquisition involves, in parallel, the acquisition of rights or the entering into agreements that grant a dominant influence on the composition or resolutions of the corporate bodies of a company, such transaction may be found to constitute a notifiable merger. This, however, should be assessed on a case-by-case basis.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

The Competition Law sets forth a statutory 60-days timeframe for the Competition Regulatory Authority to issue a decision. Further, failure to issue a decision within the referenced 60-day period is deemed to constitute a tacit approval. The referenced timeframe applies irrespective of the relevant transaction being deemed simple or complex. Local counsel are not aware of a decision being issued before said 60-days period having lapsed.

It is also stressed that the Competition Regulatory Authority takes the view that a tacit approval shall only occur in a scenario where there is a total inaction during the 60-days period referenced (i.e., no action whatsoever is carried out as from the date of submission of the notification). This understanding is, at the very least, subject to debate. In a scenario where the Competition Regulatory Authority insists on this view, some disputes between operators and the Competition Regulatory Authority may be triggered in the near future.

28. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

The Competition Regulatory Authority may "stop the clock" in case of request of additional information or documentation, provided that the request is made within the statutory timeframe of 60 days. In such cases, the 60-days period is suspended. The clock starts ticking again by effect of the law once the relevant information or documentation is provided to the Competition Regulatory Authority.

29. Please indicate whether, legally or in practice, your competition authority allows for "hold separate" arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

The competition legal framework is silent on this matter. Given that the Competition Regulatory Authority only recently became operational, there is still limited experience and/or case law. Other than that, the merger provisions in force have not yet been fully tested.

In any case, local counsel are not aware of “hold separate” arrangements being put in place. However, nothing in the law prevents any such paths.

- 30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.**

The competition legal framework is silent on this matter. Again, given that the Competition Regulatory Authority only recently became operational, there is still limited experience and/or case law. Other than that, the merger provisions in force have yet to be fully tested. There is no information publicly available on transactions closed sequentially. However, nothing in the law prevents such an option.

PROHIBITED PRACTICES

- 31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.**

To the best of local counsel’s knowledge, thus far, no prohibited practices have been investigated nor have penalties been imposed in connection thereto.

- 32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.**

Local counsel are not aware of any cases brought by the Competition Regulatory Authority against parties in a vertical relationship for infringing the competition legislation, given the infancy of the Competition Regulatory Authority.

- 33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.**

The competition legal framework does not provide for specific clauses on exclusivity and/or non-compete restraints. However, under the general principle of contractual freedom – and save for certain sector-specific provisions stating otherwise – as a rule, parties to a contract are free to agree on exclusivity clauses and non-compete restraints, provided that this does not contravene public policy principles or amount to an abusive clause under the general laws in force. Thus, the specific contents of exclusivity clauses and non-compete restraints shall be assessed on a case-by-case basis. From a strict competition standpoint, exclusivity clauses and non-compete restraints could be subject to assessment and/or control by the Competition Regulatory Authority in a scenario where they encompass, trigger or result in prohibited practices under the scope of the competition legal framework.

- 34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.**

Local counsel are not aware of any investigations launched and publicised against any entities for engaging in prohibited practices since the Competition Regulatory Authority became operational in January 2021.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

The competition legal framework does not contain specific provisions relating to the abuse of buyer power. That being said, there are certain general rules on economic dependency that are provided for therein.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Neither the competition legal framework, nor the Criminal Code expressly criminalises cartel conduct or anticompetitive conducts. Under the competition legal framework, these practices are deemed administrative offenses, subject to the payment of fines. However, one must stress that criminal liability may arise where the relevant anticompetitive conduct encompasses any action or omission which may be deemed a crime under the Mozambican Criminal Code and/or any other ancillary legislation – such as fraud, embezzlement, and abusive conduct, for example. Hence, even though the law does not expressly provide for specific types of crimes expressly related to anticompetitive conducts, the actual conduct or practice may entail certain actions or omissions that are criminalised. This needs to be assessed on a case-by-case basis.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Mozambique is a member of the SADC, whose members signed and approved the Declaration on Competition and Consumer Policies back in 2009 (“**Declaration**”). Under the Declaration, SADC members undertook to establish a system for effective cooperation in the application of competition and consumer protection laws of each member State. In accordance with the Declaration, the Consumer Policy and Law Committee (“**CCOPOLC**”) was established in order to, amongst other things, foster cooperation and dialogue among competition authorities and encourage convergence of laws.

The CCOPOLC aims to facilitate cooperation and consultation in competition-related matters. However, it does not operate as a regional body aimed at controlling anticompetitive practices within the SADC area.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Local counsel are not aware of any memorandum of understanding or other sort of contractual arrangement regarding competition-related matters being signed with other jurisdictions.

39. Please describe trends on the level of enforcement of the regional body.

Not applicable.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Where the applicable thresholds are met, mergers must always be notified domestically, irrespective of the relevant transaction being also subject to regional notification due to its transnational scope.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

Not applicable, to the extent that Mozambique is not a member of regional bodies with powers over competition-related matters. From a domestic standpoint, merger reviews are subject to the authority of the Competition Regulatory Authority only. Other than that, we are not aware of engagements between the Competition Regulatory Authority and competition regional bodies for enforcement of competition law cases.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Not applicable.

In collaboration with:



Pimenta e Associados in association with Miranda & Associados

Paulo Pimenta

Managing Partner

T +258 214 93050

paulo.pimenta@pimentalawfirm.com

Suheil Salem

Advogado / Attorney

suheil.salem@pimentalawfirm.com

NAMIBIA



NAMIBIA

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

A Competition Policy was tabled for approval by Cabinet and the Competition Bill is being circulated for comment. The Namibian Competition Commission ("NaCC") expects to submit the final version of the Bill to the Ministry of Industrialisation and Trade by the end of June 2022. The timing for any changes to come into effect is not clear.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

In terms of the current Namibian Competition Act, the NaCC does not have the power to initiate market enquiries, although the Competition Bill makes provision for these powers.

The NaCC has previously conducted market studies into the automotive, franchising, and retail industries in Namibia. Local counsel understand that during 2019, the NaCC researched the banking and housing industries. The NaCC Research Division completed the following studies:

- a) Franchising study;
- b) Automotive study;
- c) Administered prices study, which considered the electricity, port, water and transport sector pricing strategies;
- d) Land study, which considered the trend in merger activities in land acquisitions by non-Namibians over the past five years;
- e) Price reports on the poultry sector; and
- f) Price changes caused by COVID-19 on a basket of goods.

Furthermore, the NaCC Research Division has been undertaking studies concerning the following industries:

- a) Banking sector, considering pricing strategies by banks in Namibia;
- b) Construction sector, considering the role of procurement and collusive practices, although this has been placed on hold due to budgetary constraints; and
- c) Health study, considering the impact of the Namaf judgment and the role of health practitioners in pricings in the market.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

The NaCC has not formally and publicly expressed concern in relation to any specific industry or sector. That being said, the NaCC formally and publicly warned schools against entering into exclusive supply agreements with suppliers on the basis that this practice promotes uncompetitive behaviour.

The NaCC considers the aim of research studies to give greater information on sectors and industries to feed into merger and acquisition and economic analysis and investigations, when necessary. The choice of industries in which to undertake market studies is informed by several factors, including the following:

- a) public complaints, that may be insufficient to warrant an investigation; and

- b) the NaCC's sector prioritisation exercise (which uses several criteria to rank sectors in terms of priority for studying, and which look at factors such as the prevalence of complaints in those sectors, prevalence of merger and acquisition and economic activity, the sector's contribution to the macro-economy (GDP, employment, etc.), amongst others.

Additionally, the Minister responsible for Industrialisation and Trade may also request the NaCC to undertake market studies on competition related matters, based on the needs of the Ministry. Therefore, market studies are not necessarily an indication of concern or anticompetitive behaviour only, but rather of a need to better understand the dynamics of those industries to aid enforcement and merger and acquisition analysis.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

The NaCC has not formally and publicly identified any specific sectors as strategic as key sectors for purposes of competition law enforcement.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

No. The first, and to date only, dawn raid undertaken by the NaCC occurred between 15 and 17 September 2016, when the NaCC searched and seized data from Puma Namibia at their main office in Windhoek and their refueling facility at the Eros Airport in Windhoek. The investigation concerned a complaint of excessive pricing by Puma Namibia with regard to jet fuel and avgas products sold at the Eros Airport and Ondangwa Airport refueling facilities. Puma Namibia objected to the issue and execution of the warrant in question. The High Court of Namibia heard the main matter on 6 September 2018 and issued judgment on 8 November 2018. The Court ordered that the warrant issued previously be set aside with costs and that all hard copy documents seized as well as all electronic data seized and copied be returned to Puma Namibia within two days of the order. The NaCC appealed to the Supreme Court of Namibia against the judgment by the High Court. The Supreme Court, on 8 September 2020, ordered that the appeal be dismissed with costs.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

The NaCC has not introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic. The NaCC, in a media statement issued on 18 May 2020, formally expressed its concern with, and warned against, significant increases in prices of various products in the wake of the prevailing COVID-19 pandemic following the receipt of various complaints from the public. The complaints related to food and basic consumer items, health and hygiene products, as well as other industries such as construction, transport, accommodation, furniture, household appliances and motor vehicle parts.

The NaCC listed certain items as essential in the prevailing COVID-19 outbreak relating to (i) health and hygiene products; (ii) food and basic consumer items; (iii) any other measure that may be used as a preventative measure against COVID-19; and (iv) any item used for the treatment of potential COVID-19 symptoms.

Complaints relating to listed items will be afforded more priority than the rest of the complaints. The NaCC admitted that it does not have direct consumer protection power, but nevertheless, aims to impose, where legally permissible, remedies in relation to the alleged prevailing price gouging practices absent an adequate consumer protection regulatory framework.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

The NaCC has to yet to taken action against any entities for infringing competition legislation during the COVID-19 pandemic.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

The NaCC listed certain items relating to (i) health and hygiene products; (ii) food and basic consumer items; (iii) any other measure that may be used as a preventative measure against COVID-19; and (iv) any item used for the treatment of potential COVID-19 symptoms as essential in the prevailing COVID-19 outbreak; and has stated that it will prioritise complaints relating to listed items, as opposed to the rest of the complaints relating to price gouging.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

The NaCC has not adopted any digital market-specific regulations or measures.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

The NaCC has not formally identified industries, markets or sectors that it considers to be concentrated.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

There is currently no foreign direct investment review regime in Namibia in relation to mergers involving foreign buyers or acquirers. The Investment Promotion Act was promulgated but has yet to be brought into force.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

Not applicable.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

Local counsel were unable to identify any transaction that was prohibited by the NaCC in Namibia since 2021.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

No. There are no official proposals to amend merger filing fees and/or monetary thresholds.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

The filing obligation is mandatory, pre-closing, and suspensory. Implementation of a merger prior to approval by the NaCC is prohibited under the Namibian Competition Act (section 44(1) read with sections 51, and 53).

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

The filing obligation is mandatory, pre-closing, and suspensory. Implementation of a merger prior to approval by the NaCC is prohibited under the Namibian Competition Act (section 44(1) read with section 51, and 53).

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

Local counsel are not aware of any cases where the NaCC fined an entity for failing to comply with merger conditions.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

Local counsel are not aware of any cases where the NaCC interdicted the acquisition of shares or assets of an undertaking.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Pursuant to section 3(1) of the Namibian Competition Act, the Act applies "to all economic activity within Namibia or having an effect in Namibia". Furthermore, paragraph (f) of schedule 2, which constitute the filing forms for a merger as well as the threshold test, refer to "annual turnover in, into or from Namibia".

There have been cases where there was room to argue that economic activity between the acquirer and the target occurs outside Namibia. The question that then arises is whether "annual turnover in, into or from Namibia" is the equivalent of "annual turnover in, into or from a Namibian-based customer". For example: A is a South African-based manufacturer and B is a Namibian-based customer of A. Sales by A to B were invoiced and paid in Rand; ownership of and risk in the goods passed from A to B in South Africa; and contractually delivery of the purchased goods occurred in South Africa (following which the goods were transported to Namibia and imported by B).

Unfortunately, there is no case law or jurisprudence on this issue. In a recent inquiry to the NaCC regards its general view or position in circumstances where a target undertaking sells goods to a Namibian based customer, but where the economic activity occurs outside of Namibia (put differently, whether "annual turnover in, into or from Namibia" is considered, by the NaCC, as the equivalent of "annual turnover in, into or from a Namibian-based customer"), the NaCC advised that: "[W]e do not, at present, have a general position on it". Although there is room to argue that where economic activity between the target and the acquirer occurs outside of Namibia, local counsel cannot provide certainty as to the effects doctrine and the implementation doctrine vis-à-vis developing or justifying extraterritorial jurisdiction. That being said, mergers have been filed on the basis of the example set out above.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Yes.

1. *Rio Tinto Namibia Holdings Limited / China National Uranium Corporation ("CNUC") in relation to Rössing Uranium Limited ("RUL")*

1.1 Employment

a) There shall be no merger specific retrenchments of employees of RUL for a period of two years from the implementation date.

- b) RUL shall maintain a ratio of at least 95% local employees to 5% foreign employees until the expiry of the current life of the RUL mine. This ratio is determined based on an average percentage calculated over the applicable reporting period.
- c) RUL shall maintain a ratio of at least 95% local employees to 5% foreign employees at management level until expiry of the current life of the RUL mine. This ratio is determined based on an average percentage calculated over the applicable reporting period and shall, at all relevant times, be calculated in relation to the management compliment.
- d) RUL shall not employ any non-Namibian person at management level on any basis other than on a two-year fixed term contract.
- e) The terms and conditions of employment of the employees of RUL pre-merger shall not be altered to be less favourable post-merger.

1.2 Procurement

- a) RUL shall not implement any changes to its 30 July 2013 Procurement Policy without the prior consent of the NaCC, if such changes will have the effect of providing for less favourable terms to local suppliers. This condition will persist until the expiry of the current life of mine.
- b) The merged undertaking shall procure a minimum of 80% of any services, goods, or products below a value of NAD 250,000 per project from companies which:
 - i) are majority Namibian owned and registered; and
 - ii) employ a minimum of 75% Namibian citizens.

1.3 Transfer pricing

- a) RUL shall conduct all transactions with a Connected Person in accordance with the arm's-length principle and furthermore in accordance with section 95A of the Income Tax Act No 24 of 1981 (as amended, and as may be amended from time to time) read with Practice Note No 2 of 2006 and any determination, directive, rules, or regulations, which may become applicable in this regard.
- b) If and when RUL is audited by the Department of Inland Revenue, in respect of allegations of transfer pricing, as provided for in section 95A of the Income Tax Act 24 of 1981, RUL shall submit the outcome of such audit to the NaCC within 10 business days of the report becoming available to RUL.

1.4 Future notification

- a) Any member of the acquiring group who wishes to acquire a controlling interest in a company which is the holder of an exclusive prospecting licence or mining licence (target undertaking) ("**Proposed Transaction**") and the Proposed Transaction's thresholds falls below the requisite thresholds, shall notify the NaCC of the Proposed Transaction before the implementation thereof. On 5 August 2019, CNUC requested a review of the NaCC's decision.

The decision was taken on review to the Minister of Industrialisation and Trade who upheld the Commission's decision.

2. Inihc Limited / China Africa Resources Namibia Limited

Post-merger, there will be no adverse changes to the water supply during the acquiring undertaking's ownership of the Berg Aukas Project and that Namwater will continue to source water from the Berg Aukas mine uninterrupted.

1.3 Commercial Investment Corporation (Pty) Ltd / Geka Pharma (Pty) Ltd

- a) In the event that any entity of the acquiring group is a master distributor and appoints any entity within the group as a distributor, it may not withhold supplies in relations to scheduled medicines to its competitors in Namibia.

- b) In the event that the acquiring group and any of its affiliate(s) is a master distributor who appoints any entity within the group as a distributor, those entities of the acquiring group must maintain the single exit price ("SEP") at which the acquiring group buys scheduled medicine related to the master distributor agreement for further distribution in Namibia.
- c) In the event that any entity of the acquiring group is a master distributor who appoints any entity within the group as a distributor, those entities of the acquiring group must maintain the SEP or any other price recommended, set by principals, agents or manufactures when selling scheduled medicines related to the master distributor agreement, as identified by NMRC or any other competent body responsible for defining scheduled medicines in Namibia from time to time.
- d) In terms of the selling of such scheduled medicine, the acquiring group or any of its affiliates are allowed to deviate from the SEP and offer discounts to pharmaceutical outlets as agreed upon with manufacturers or principals from whom they buy or on behalf of whom they sell such medicine. The acquiring group may offer discounts in relation to scheduled medicine that it sells, which are nearing their expiration date.
- e) If any pharmaceutical wholesalers or competitors to the acquiring group, at the pharmaceutical wholesale level in Namibia, places an order for scheduled medicine related to the master distributor agreement with a master distributor or any entity within the group appointed as a distributor and is informed that there is no stock of such ordered medicine, but any entity within the acquiring group has stock of the medicine so ordered, then those members of the acquiring group must supply the medicine to that pharmaceutical wholesaler or competitor at the delivered price.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

The NaCC does not require notification of internal restructurings on the basis that (and only if) ultimate control does not change.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

The NaCC will not require notification where direct control over an entity changes through the interposition of a new entity in the group if the restructure does not result in a change in ultimate control.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Mergers approved subject to public interest grounds since January 2021 were approved conditionally subject thereto that (i) employees are employed or remain employed on terms that are on the whole not less favourable than prior to the implementation of the merger; and (ii) that no job losses will occur as a result of the merger for a period of time following the implementation of the merger, usually two years, although there have also been cases where the period was stipulated at three years and five years, respectively.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

Local counsel are not aware of any merger transactions prohibited based on public interest grounds alone.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

Greenfield joint venture mergers may be caught under the merger review regime depending on how the transaction is structured. Where a division, assets or a part of a business is acquired or transferred to a special purpose vehicle, the actual division, assets or part of a business, whether legally incorporated or not, can constitute the transferred undertaking. Insofar as a greenfield joint venture does not result in a change of control, nor anticompetitive conduct, it will not necessarily be notifiable.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

Non-controlling minority share acquisitions can be found to constitute a notifiable merger on the basis that the minority share acquisition affords such shareholder with the possibility of exercising decisive control or influence over another and therefore constitute joint control over the target undertaking. Joint control may be found to exist where there is not equality between two or more parent companies, in votes or representation in decision-making, and minority shareholders have additional rights which allow them to veto decisions:

- which are essential for the strategic commercial behaviour of the undertaking in question;
- which are essential to the appointment of senior management;
- regarding the determination of the budget or business plan;
- on investments where investments constitute an essential feature of the market in which the undertaking is active; and
- related to market-specific rights or decisions which are important in the context of the particular market of the undertaking, i.e., the decision on the technology to be used by the undertaking where technology is a key feature of the joint venture's activities, product differentiation, or innovation, for example.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

The NaCC takes approximately six weeks to approve a non-complex merger and up to six months to determine a complex merger.

28. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

The NaCC can "stop the clock" for the review of a merger in circumstances where the NaCC:

- requests to be provided with further information in which case the review period is stopped, and runs afresh when the information is provided in which case the review period can be extended with up to 30 business days;
- considers issues involved to be complex, in which case the review period can be extended with up to 60 business days; or
- considers it appropriate to hold a conference in relation to a proposed merger (in terms of section 46), in which case, a determination must be made within 30 business days from the date of the conference.

29. Please indicate whether, legally or in practice, your competition authority allows for “Carve out” / “hold separate” arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

“Hold separate” arrangements are not expressly provided for, but have been negotiated with the NaCC in circumstances where approval was issued in other jurisdictions but not yet in Namibia.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.

Such cases will similarly require or constitute hold separate arrangements. As mentioned above, these are not legally provided for, but have been negotiated with the NaCC in circumstances where approval was issued in other jurisdictions but not yet in Namibia.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

Yes. In the auto parts case:

Various insurers participated in discussions in and/or agreed on the setting of maximum mark-ups that panel beaters could charge for vehicle repairs where part replacement is required. The setting of maximum rates that panel beaters could charge for their labour in the repair of vehicles, was regarded as giving rise to restrictive agreements or concerted practices between parties in a horizontal relationship, which prevented or substantially lessened competition by means of fixing prices and other trading conditions. Santam and Hollard settled with the NaCC for NAD 15 million (approx. USD 1,007,358) and NAD 5.5 million (approx. USD 369,364), respectively. The NaCC lodged legal proceedings at the High Court of Namibia (being the court of first instance) against the remaining insurers.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

Yes. In the automotive glass repairs case:

The NaCC ruled that various insurers entered into exclusive vertical agreements with windscreen retailers to provide glass-repairing services for vehicles insured by insurance companies were anticompetitive by object, as it afforded the contracted automotive windscreen retailers preferential rights, sole distribution rights and or the waiving of excess fees. In addition, some of the agreements provided for a rebate system, which allowed the insurance companies to receive rebates in return for having particular proportions of their business referred to the concerned windscreen retailers. It is noteworthy that the agreements expressly provided that they are not exclusive. The NaCC lodged legal proceedings at the High Court of Namibia (being the court of first instance) against the insurers and contracted windscreen retailers, some of which have settled with the NaCC with a view of curbing legal costs.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Namib Mills case:

The NaCC ruled that Namib Mills (Pty) Ltd ("**Namib Mills**") abused its dominant position in the market for the production and supply of wheat flour, by concluding loan agreements with certain bakeries, which loan agreements included a clause requiring the bakeries to purchase their wheat flour requirements from Namib Mills for the duration of the loan. The High Court had to determine whether section 26(1) of the Namibian Competition Act should be interpreted:

- a) on a *per se* basis (i.e., that the NaCC need not prove that alleged conduct had an anticompetitive effect in order for it to be unlawful); or
- b) as requiring an effects-based assessment (i.e., conduct must have an anticompetitive effect in order for it to be deemed unlawful).

The High Court ruled that section 26 of the Competition Act falls within the *per se* rule approach, in that "it allows courts to presume that certain types of conduct have anticompetitive effects without engaging in a detailed analysis to ascertain whether the conduct in fact had such an effect and should be prohibited, as opposed to an effects-based approach, which involves a detailed inquiry into the harm to competition flowing from a particular business practice and then balancing it against any pro-competitive benefits that may result.

See also, the automotive glass repair case discussed above.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

Local counsel are not aware of new investigations launched since January 2021 against entities for engaging in prohibited practices. The NaCC did launch an investigation into the automotive industry and required a plethora of dealerships, franchisors and panel beaters to make submissions. The investigation remains pending.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

The Namibian Competition Act does not contain express provisions on the abuse of buyer power. However, it does contain a general prohibition (section 26(1)) against any conduct that amounts to the abuse of a dominant position in a market in Namibia and where circumstances allow for an allegation to fall within the (wide) ambit of the general prohibition the NaCC can bring a case against entities accused of abusing buyer power.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Conduct prohibited under the Namibian Competition Act does not give rise to criminal liability. However, by way of an example, cartel conduct or anticompetitive conduct with an element of corruption or bribery may result in prosecution and conviction under the Namibian Anti-Corruption Act, the Prevention of Organised Crime Act, and other similar legislation.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

The NaCC is not a member of any regional competition law body or regime.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

The NaCC has entered into a Memorandum of Understanding with the South African Competition Commission, and is a member of the Southern African Development Community Secretariat working group for competition law, in terms of which the relevant authorities undertake to, inter alia, cooperate in matters that have or may have cross border effects on competition.

39. Please describe trends on the level of enforcement of the regional body.

Namibia is not a member of any regional competition law body or regime.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Namibia is not a member of any regional competition law body or regime.

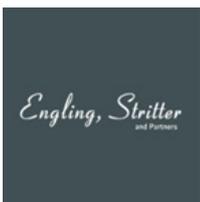
41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

Local counsel are not aware of any engagements between the NaCC and regional bodies in relation to enforcement of competition law cases or merger reviews.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Local counsel are not aware of any announced cooperation between the NaCC and regional bodies in relation to new or ongoing investigations.

In collaboration with:



Engling, Stritter and Partners

Alet Louw

Partner

T +264 (0) 64 40 5660

alet.louw@englinglaw.com.na

NIGERIA



NIGERIA

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

The Federal Competition and Consumer Protection Bill 2018 was signed into law by the President of Nigeria on 30 January 2019 ("**FCCPA**" or "**Act**"). The FCCPA repealed the Consumer Protection Act and the provisions of the Investment and Securities Act relating to merger control. The FCCPA also established the Federal Competition and Consumer Protection Commission ("**FCCPC**" or "**Commission**") with the responsibility of reviewing all mergers and other business combinations or arrangements, among other functions.

Between 3 May 2019 and March 2020, merger notifications and filings were jointly reviewed by the Securities and Exchange Commission ("**SEC**") and the FCCPC, but starting from April 2020, merger control notifications and filings were required to be submitted to the FCCPC. The SEC, however, reviews mergers and acquisitions by or involving public companies as well as transactions involving a change of shareholding of capital market operators.

On 20 November 2020, the FCCPC published the Merger Review Regulations (Regulations), Merger Review Guidelines, and other ancillary instruments for the purpose of providing a robust guideline on competition related matters such as computation of fees, description of control, merger filing exemptions and other matters, which clarified a number of grey areas in the competition regulatory space.

In a bid to strengthen the application of the recently enacted regulations, in October 2021, the FCCPC launched an online merger notification portal ("**Portal**") to automate the submission of merger notifications by merging parties. The Portal eliminates the need for physical submission of documents relating to merger transactions at the Abuja offices of the FCCPC and enables merging parties consult with and obtain clarifications from the FCCPC online, before filing a formal merger notification and also contains a fee calculator to enable parties automatically assess the fees without need for recourse to the FCCPC.

Also in January 2022, the FCCPC signed a regulatory Memorandum of Understanding with the Nigerian Shippers' Council, which is expected to regulate pricing, promote fair competition among operators in the industry and ensure that the playing field is level for all in the market, without undue entry barriers.

From a sectoral perspective:

- The Companies and Allied Matters Act, 2020 ("**CAMA 2020**") was enacted on 7 August 2020, which repeals and replaces the Companies and Allied Matters Act, 1990. The CAMA 2020 permits the merger of incorporated trustees with similar aims and objects, under the terms and conditions prescribed in regulations made by the Corporate Affairs Commission. CAMA 2020 also provides a legal framework for mergers involving of two or more companies, as well as compromise, arrangement or reconstruction between two or more companies.
- The Nigerian Communications Commission ("**NCC**") published the NCC Licensing Regulations 2019 ("**NCC Regulations**") which became effective on 11 January 2019. The NCC Regulations prohibit the issuance of an individual license to an applicant that has a controlling interest in another licensee, where the NCC is satisfied that anticompetitive issues would likely arise upon grant of such licence. Furthermore, where a licensee wishes to transfer ownership or control of more than 10% of its total share capital, it is required to apply to the NCC for an approval of the transfer, 90 days prior to the proposed date of such transfer, or such other period stated in the licence conditions or determined by the NCC. The NCC is mandated to refuse the transfer where it makes a determination that the acquisition of ownership or control of the licensee is likely to lead to anticompetitive issues in that segment of the telecommunications market.

- The National Broadcasting Commission (“NBC”) published certain amendments to the 6th edition of the Nigeria Broadcasting Code (“NBC Code”) on 26 March 2020. The NBC Code prohibits a broadcaster or a licensee from entering into any form of agreement, contract or arrangement that is intended to prevent, restrict or distort competition in the broadcast media industry in Nigeria. Based on the above, a broadcaster or a licensee is prohibited from entering into any form of broadcasting rights acquisition either in Nigeria or anywhere in the world to acquire any broadcasting right(s) in such a manner as to exclude persons, broadcasters or licensees in Nigeria from sub-licensing the same. Any such agreement entered in contravention of the NBC Code is void. There are, however, concerns around the power of the Director General of the NBC and the Nigerian Minister of Information to issue the NBC Code without recourse to the board of the NBC. In the event that the NBC Code is found to be issued without recourse to the due procedure for issuance of guidelines or codes under the NBC Act, the NBC Code will be deemed void.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

The FCCPC has conducted the market inquiries and investigations listed below:

- a) Investigation of competition and possible consumer rights violations by dominant PayTV service providers.
- b) Surveillance regarding price gouging and arbitrary increases in prices of protective and hygiene products on account of COVID-19 concerns.
- c) Investigation of anticompetitive conduct of five companies in the shipping and freight forwarding industry.
- d) Investigation of distribution companies over arbitrary billing and mass disconnection of electricity within the power sector.
- e) Setting up a regulatory committee to investigate the complaints of violation of consumer rights in the money lending industry, with the aim of shutting down an illegal money lending businesses.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

Yes. The FCCPC expressed concerns over competition and possible consumer rights violations by dominant PayTV service providers, and price gouging by suppliers and retailers of protective and hygiene products during the COVID-19 pandemic.

The FCCPC has also expressed concerns over the anti-competitive conduct of five companies in the shipping and freight forwarding industry, including the formation of a cartel by these companies. Additionally, in December 2021, the FCCPC expressed concerns that the electricity, banking and aviation sectors have again topped its 2021 consumer-related complaints chart as they did in the year 2020.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

No.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

Yes. Dawn raids are a high risk in Nigeria. Recently it was reported that operatives of the FCCPC and the National Agency for Food and Drug Administration and Control conducted a joint dawn raid at a popular skin care facility in Surulere, Lagos. It was reported that during the dawn raid, operatives of both regulators removed various skin care products and chemicals for laboratory analysis and ordered an interim suspension of operation, and use of unapproved products/chemicals and procedures. However, it is noted that this raid is in relation to consumer protection and quality control not competition.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

Yes. The FCCPC released a publication entitled *"Business Guidance Relating to COVID-19 On Business Co-operation / Collaboration and Certain Consumer Rights Under the Federal Competition and Consumer Protection Act"* in April 2020. The publication provides clarity for businesses and consumers regarding authorisations for cooperation among businesses during the COVID-19 pandemic, and regarding consumer rights under Part XV of the FCCPA during the COVID-19 pandemic.

The FCCPC released an additional publication entitled *"Guidance Regarding FCCPC's Merger Notification Process / Interpretation of the Law on Other Competition Issues Under the FCCPA During COVID-19 Pandemic"*, in April 2020, in relation to continuing operations regarding certain competition and consumer protection regulations during the Pandemic.

Another measure introduced by the FCCPC in October 2021 to alleviate the pressures of remote working as a result of the pandemic, is the launching of an online merger notification Portal to automate the submission of merger notifications by merging parties. The Portal eliminates the need for physical interface between the FCCPC and merger parties, while facilitating the merger review process.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

Yes. In June 2020, the FCCPC filed an action against four major pharmacies and supermarkets at the Federal High Court, for allegedly taking advantage of the COVID-19 outbreak in the country by increasing the prices of key hygiene products. Furthermore, in August 2020, the FCCPC conducted investigations on various pharmacies, in response to multiple social media posts about alleged excessive pricing by the pharmacies, of hydroxychloroquine, which was considered effective for managing COVID-19.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

In January 2022, the FCCPC signed a regulatory Memorandum of Understanding with the Nigerian Shippers' Council which is expected to, inter alia, regulate pricing and competition in the shipping industry.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

In view of the provisions of section 17(a) of the FCCPA, which empowers the FCCPC to administer and enforce provisions of every Nigerian law with respect to competition and protection of consumers, it was reported that in November 2021, the FCCPC entered into a partnership with the National Information Technology Development Agency to create a more robust and concerted regulatory approach to the protection and use of consumer information and data by firms within the digital market space.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

No.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

Yes. There is a foreign direct investment review regime in relation to mergers involving foreign buyers or acquirers, and this is regulated by the FCCPC. Such transaction will be subject to merger review if:

- a) it attains the jurisdictional threshold for merger control filing in Nigeria which is (i) a combined annual turnover of the acquirer and the target in, into or from Nigeria, of NGN 1 billion or above (approx. USD 2.4 million); or (ii) an annual turnover of the target in, into or from Nigeria, of NGN 500 million (approx. USD 1.2 million); or
- b) it affects the market structure by preventing or lessening competition in Nigeria.

Where a merger occurs purely as a result of a transaction involving undertakings wholly domiciled outside Nigeria (i.e., foreign to foreign mergers with Nigerian component), the Commission will assess the merger if it has a local nexus, for instance, if it has subsidiaries in Nigeria and attains the jurisdictional threshold for merger control filing. Although the Regulations do not prescribe the yardstick for determining the local nexus, a transaction that has an impact on the Nigerian economy will generally fall within this category.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

The foreign direct investment regime applies to all sectors except for sectors or activities that have already been excluded from investment in the interest of national security. These sectors and activities include (i) production of arms, ammunitions; (ii) production of and dealing in narcotic drugs and psychotropic substances; (iii) production of military and para-military wears and accoutrement such as police, immigration and prison services wears; and (iv) such items as may be prohibited by the Federal Executive Council from time to time.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

Local counsel are not aware of any notified transactions that have been prohibited by the FCCPC.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

In light of concerns expressed as regards the excessive filing fees, in 2021, the FCCPC amended the merger filing fees by enacting the Merger Review (Amended) Regulations 2021, as discussed in detail above.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

The submission of large mergers that meet the regulatory triggers, or small mergers that are required by the FCCPC to be notified ("**Notifiable Mergers**"), is both suspensory and mandatory, as the rules provide that all Notifiable Mergers must be first notified, and no notifiable merger may be implemented without the prior approval of the FCCPC.

Local counsel are aware of investigations which have been opened by the FCCPC against entities accused of gun-jumping and/or prior implementation of a notifiable transaction, but are not aware that the investigations have developed into cases before the courts.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

The submission of a merger notification in relation to small mergers is voluntary, save as otherwise directed by the FCCPC, in which case it will become suspensory in nature.

Local counsel are not aware of any case against entities for failure to notify a transaction post-completion within the stipulated time period.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

Local counsel are not aware of any such cases.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

Local counsel are not aware of any such case.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Whilst local counsel are not aware of any direct case where either party makes sales and derives turnover in Nigeria (despite not having any subsidiaries or assets in the country), it is noted that the rules do contemplate that such instances will constitute a foreign merger that has a local nexus.

A foreign merger is said to have a "local component or nexus" where:

- a) the target has a direct or indirect local subsidiary or subsidiaries; or
- b) the merging parties (i.e., the acquirer or target) have in the preceding year derived revenue from business activities in Nigeria, which also amounts to the turnover requirements for large mergers which is:
 - a. a combined annual turnover of the acquirer and the target in, into or from Nigeria, of NGN 1 billion or above (approx. USD 2.4 million); or
 - b. an annual turnover of the target in, into or from Nigeria, of NGN 500 million (approx. USD 1.2 million) in the preceding financial year.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Save for the general condition to notify the Commission of any change in the transaction, and a requirement for the transaction to be implemented within 12 months of the grant of the approval, local counsel are not aware of any mergers subject to novel or otherwise noteworthy conditions.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

The FCCPC does not require a notification for internal reorganisations that do not occasion a change of control.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

Save for instances where such reorganisation may have a likelihood of affecting the market or impeding competition, it will not trigger a notification requirement given that the ultimate control remains the same.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Local counsel are not aware of any mergers that have been approved subject to public interest grounds since January 2021.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

Local counsel are not aware of any cases where the Commission has prohibited a merger transaction based on public interest grounds alone.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

Given the rather flexible notion of what constitutes a "joint venture", it might be difficult to fully describe the circumstances in which greenfield joint venture mergers are caught under the merger review regime. However, as a general proposition under Nigerian competition law, a joint venture which involves:

- a) the economic integration of the parties' business activities (such as the pooling of resources to create a new business enterprise which essentially eliminates competition between the parties in the new business enterprise's field of activity);
- b) the formation of a new business enterprise with all the functions of an autonomous economic entity, competing with other undertakings in a relevant market, and has sufficient resources and staff to operate independently on the relevant market;
- c) is on a more or less permanent basis; and
- d) the formation of a new business enterprise whose assets or turnover (or in the case of greenfield joint venture assets only) value is above the large notification threshold.

The abovementioned joint venture arrangements will be caught under the merger review regime. Local counsel are not aware of instances of such mergers that have been notified to, or considered by, the FCCPC.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions have been found to constitute a notifiable merger and the basis for this.

There are certain circumstances under which non-controlling minority share acquisitions have and can be found to constitute a notifiable merger. Local counsel have seen an instance where the holder of a minority interest was deemed to have the ability to influence the target to compete less aggressively or competitively in the market for various reasons (in that the holder may have a unilateral incentive to compete less aggressively as it benefits through its minority interest if the target faces less competition).

A major consideration for this reasoning is that under the relevant provisions of the Companies and Allied Matters Act 2020, a shareholder of over 25% is in the unique position of blocking special resolutions that require the approval of 75% of the shares. Given the weighty and extensive nature of matters that can be influenced by this block of minority shareholding, the FCCPC will, as a matter of course, assess the merger for material influence.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

For small mergers notified upon request by the FCCPC, the timeline for approval is typically about 20 to 40 business days from the date on which all merger notification requirements are met.

For large mergers, as well as foreign-to-foreign mergers with a Nigerian component, the timeline is approximately 60 to 120 business days.

However, for foreign-to-foreign mergers with a Nigerian component, there is a fast-track process under which applicants who pay an extra fast track fee of NGN 10,000,000.00 (approx. USD 25,000.00) will have their application review expedited with a period that is reduced for all applicable processes during the first detailed review by 40%. That being said, it is expected that the specific timeline will generally depend on the complexity of the transaction.

28. Kindly indicate whether the competition authority enjoys the power to “stop the clock” for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

The FCCPC enjoys the power to “stop the clock” for the review of a merger notification and the statutorily prescribed timing of review of the notification can be impacted by a “stop-the-clock”. For instance, where the FCCPC has requested information from the parties, or if the filing is incomplete, the FCCPC can stop the clock until the information is provided or until the filing is deemed complete by the FCCPC.

The FCCPC has made use of this tool in a growing number of cases in the last year, for example, it suspended its review of a merger between a leading fast food chain company and a foreign investment entity during the course of the merger review process. The FCCPC has also stopped the clock about twice on the review of an acquisition by a pan-African investment company of a leading power generation company in Nigeria.

29. Please indicate whether, legally or in practice, your competition authority allows for “hold separate” arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

In practice, hold separate arrangements are feasible, to the extent that the other part of the transaction, which is expected to proceed offshore (without having procured the necessary FCCPC regulatory approvals), does not have a Nigerian/local connection or nexus.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.

In practice, sequential closing arrangements are feasible, to the extent that the transfer of shares in the other offshore companies, which are affiliated to the local target, will not occasion an indirect transfer of control or constitute transfers that have a local nexus or connection, as described above.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

The FCCPC, in furtherance of an investigation over competition and possible consumer rights violations by dominant PayTV service providers, secured an injunction against a PayTV service provider, pre-empting a price increase by the provider.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

Local counsel are not aware of any such cases.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

The FCCPA generally prohibits any agreement among entities or a decision of an association of entities that has an actual or likely effect of preventing, restricting or distorting competition in any market, unless such agreement or decision is duly authorised by the FCCPC, in accordance with the provisions of the FCCPA. The FCCPA also prohibits an entity or association from requesting another entity or association to refuse to sell or purchase any goods or services, intending to cause harm to certain entities.

In addition, the FCCPA prohibits agreements in restraint of competition. However, entering into a contract of service that contains provisions by which a person, other than a body corporate, agrees to accept restrictions as to the work which that person may engage in during or after the termination of the contract, is permitted under the FCCPA, provided that the restriction period is not more than two years.

There is no guidance from case law regarding the interpretation of the exclusivity and non-compete provisions of the FCCPA. To the best of local counsel's knowledge, there have been no prosecution against entities for implementing exclusivity clauses or non-compete restraints.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

In 2020, the FCCPC, in conjunction with the Medical and Dental Council, launched and publicised an investigation against a Lagos based cosmetics surgeon on the grounds that the cosmetics surgeon's activities are unsafe for consumers and that the surgeon made false, misleading and deceptive representation in relation to the marketing of their services.

Additionally, in October 2021, the FCCPC launched and publicised an investigation into the anticompetitive conduct of five companies in the shipping and freight forwarding industry, including the formation of a cartel by these companies.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

No. The FCCPA contains no provisions on the abuse of buyer power. Instead, it provides for abuse of a dominant market position.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Yes. Anticompetitive conduct is criminalised under Part XIV of the FCCPA. To the best of local counsel's knowledge, no criminal charges have been brought, nor convictions made, in this regard.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Yes. Nigeria is a member of the ECOWAS. The ECOWAS has a competition regulatory framework regime – the ECOWAS Regional Competition Rules and the ECOWAS Regional Competition Authority ("ERCA"), launched on 31 May 2019 and is charged with implementing the ECOWAS Regional Competition Rules. However, Nigeria is yet to domesticate the ECOWAS Regional Competition Rules.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

The FCCPC and the Economic and Financial Crimes Commission in Nigeria have signed a Memorandum of Understanding with the United States' Federal Trade Commission. The purpose of the Memorandum of Understanding is to enhance communication and cooperation in a joint effort to combat cross-border fraud, as well as to work together on consumer protection investigations. The Memorandum of Understanding also establishes a joint implementation committee to develop joint training programs and provide assistance regarding specific investigations. Furthermore, the Memorandum of Understanding affirms the participants' ongoing support for econsumer.gov, a joint project of agencies from 40 countries for reporting international scams online. The Memorandum of Understanding is a framework for voluntary cooperation and does not change existing laws in either country.

39. Please describe trends on the level of enforcement of the regional body.

To the best of local counsel's knowledge, there have been no enforcements by the ERCA. There are, however, reports of plans by the ERCA to make its advisory committee operational.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Mergers in Nigeria are only required to be notified domestically.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

None.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

None.

In collaboration with:

TEMPLARS

Templars

Ijeoma Uju

Partner

T +234 1 2703 982, 2799 396,

4611 890, 46 11 294

ijeoma.uju@templars-law.com

Tolulope Falokun

Associate

T +234 1 2703 982, 2799 396, 081 1570 8339

tolulope.falokun@templars-law.com

RWANDA



RWANDA

GENERAL

- 1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.**

No amendments or guidelines have been implemented relating to competition legislation in Rwanda.

- 2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.**

As far as local counsel are aware, the Rwanda Inspectorate Competition and Consumer Protection Authority ("RICA") has not initiated or indicated any plans to initiate market inquiries in relation to a specific sector.

- 3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.**

RICA has not publicly expressed concern in relation to any industry or sector. However, in April 2021, RICA issued a directive requiring warehouse operators, wholesalers and as factories dealing in legumes, cereals, cassava, and livestock feed to secure aflatoxin testing facilities by the end of May 2021. This decision was made based on the prevalence of these harmful toxins in some traded agricultural commodities. The directive indicated that any person or company that tests the commodity and finds the presence of aflatoxins is required to record and report all the details about the consignments in question to RICA and that process owners operating without meeting the requirements will be punished in accordance with the law.

- 4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.**

As far as local counsel are aware, RICA has not publicly identified any specific sectors as strategic or key sectors for purposes of competition law enforcement.

- 5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.**

As far as local counsel are aware, the risk of dawn raids by RICA in Rwanda is low. Local counsel are unaware of any dawn raids that have been undertaken by RICA.

- 6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?**

As far as local counsel are aware, RICA has not introduced any specific competition enforcement regulations in response to the COVID-19 pandemic.

- 7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?**

Local counsel are not aware of any action taken by RICA against entities for infringing competition legislation during the COVID-19 pandemic.

- 8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.**

No. Local counsel are not aware of any such activity being undertaken by RICA.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

There are currently no separate competition regulations or measures developed for digital markets in Rwanda.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

Local counsel are not aware of any industries, markets or sectors that RICA considers to be concentrated. There is no jurisprudence on the point and the position has yet to be tested with RICA.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

Foreign direct investments relating to mergers involving foreign buyers or acquirers fall within the ambit of the Rwandan Competition Act and, therefore, are subject to review by RICA. The Rwandan Competition Act does not distinguish between foreign-to-foreign mergers and local mergers. The Rwandan Competition Act provides for thresholds for a notifiable merger to be published, however, no thresholds have been published as yet therefore all transactions that constitute mergers are notifiable. There being no jurisprudence on the point and as far as local counsel are aware, the position has not been tested with RICA. That being said, there is no separate foreign investment filing that must be made.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

The foreign direct investment regime which is governed by the Rwanda Competition Act applies to all sectors. Please refer to the response above.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

Local counsel are not aware of any notified transactions that have been prohibited by RICA.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

Currently, there are no merger filing fees payable in Rwanda and local counsel are not aware of any proposals in this regard.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

Yes. The merger regime in Rwanda is suspensory and mandatory. According to the Rwandan Competition Act, any merger that is not notified or notified in manner contrary to the law shall be legally null and void and rights or obligations arising from any agreement pertaining to such merger shall not be enforceable.

In addition, RICA may impose administrative sanctions if the parties to a merger fail to give notice of such a merger as required by the law which may include an administrative fine of 5% to 10% of the enterprise's annual turnover of the preceding fiscal year in which the violation has occurred.

RICA is also vested with powers to order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to a merger that is not notified.

Local counsel are not aware of instances where RICA has brought cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction. This information is not publicly available.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

No. As indicated in our response above, the competition regime in Rwanda is suspensory and mandatory parties are thus prohibited from implementing a notifiable transaction until RICA grants its approval.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

Local counsel are not aware of any cases in which RICA fined any entity for failing to comply with merger conditions as this information is not publicly available. There is no jurisprudence on the point and as far as local counsel are aware it has not been tested with RICA.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

Local counsel are not aware of any such cases as this information is not publicly available. There being no jurisprudence on the point and as far as local counsel are aware it has not been tested with RICA.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

In considering whether a transaction has a nexus to Rwanda where the parties do not have a presence in Rwanda, such as through a subsidiary, RICA would consider if the parties to the transaction derived any turnover or held any assets in Rwanda. Local counsel are not aware of any specific transaction falling within this category that has been published by RICA. There is no jurisprudence on the point, and as far as local counsel are aware, it has not been tested with RICA.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

None that local counsel are aware of.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

RICA does not consider internal restructurings that do not involve a change in ultimate control to be notifiable transactions. The Rwandan Competition Act defines a merger as the direct or indirect acquisition or establishment of a controlling interest in the whole or part of the business of a competitor, supplier or any other person. Internal Restructurings do not, therefore, meet this definition.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

No obligation to notify would be triggered by the mere interposition of a new entity where there is no change in the ultimate control of the target entity.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Based on publicly available information, there has yet to be a merger to be approved subject to public interest grounds.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

As mentioned above, local counsel are not aware of any merger transaction that has been prohibited by RICA.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

RICA has not currently published any specific rules or guidelines on joint ventures. Therefore, these transactions would be notifiable, provided that they meet the definition of a merger as set out under the Rwandan Competition Act.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

There is no jurisprudence on the point, and as far as local counsel are aware, the position has not been tested with RICA.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

RICA has an initial period of 30 days after parties submit the merger notification, to examine the merger and make a determination. This 30-day time period may be extended for a period not exceeding 15 working days, in which case, RICA is required to issue an extension certificate to the parties.

28. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

RICA has the right to "stop the clock" from running where it has requested for further information from a merger party in the course of analysing a filing. In certain instances, RICA has indicated that the review of the merger has stopped running until the parties provide the additional information requested, particularly where significant or vital information is outstanding from a merger party.

- 29. Please indicate whether, legally or in practice, your competition authority allows for “hold separate” arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.**

Legally, an acquirer can have in place, a hold separate arrangement in respect of the Rwandan aspect of a transaction where approval from RICA is not obtained by a specific date, on the condition that the change of control in Rwanda, will not take place in the absence of RICA approval. However, from publicly available information, local counsel are not aware of any such arrangement having been implemented in practice. There being no jurisprudence on the point, and as far as local counsel are aware, the position has not been tested with RICA.

- 30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.**

Legally, a transaction having a Rwandan aspect may be closed sequentially provided that the closing related to the aspect of the transaction triggering a filing in Rwanda takes place after RICA approval has been obtained. It is unlikely that RICA would be concerned with a closing in another jurisdiction, which does not result in a change of control in Rwanda. There is no jurisprudence on the point, and as far as local counsel are aware and the position has not been tested with RICA.

PROHIBITED PRACTICES

- 31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.**

As far as local counsel are aware, no prohibited practices have been investigated, and no penalties have been imposed as yet.

- 32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.**

Local counsel are not aware of any investigations instituted by RICA in relation to parties in a vertical relationship and local counsel do not believe that RICA has instituted any cases so far.

- 33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.**

Exclusivity and non-compete clauses are treated as restrictive trade practices and are prohibited. This is pursuant to the provisions of Article 7 of the Rwandan Competition Act which covers:

- a) agreements, whether written or non-written, or any other form of agreement designed to fix prices, hinder or prevent the sale, supply or purchase of goods or services between persons, or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services;
- b) agreements that limit or control production of goods, markets, technical development or investment;

- c) agreements to share markets or sources of supply of goods;
- d) concerted refusals to supply goods or services to any potential consumer or not to purchase goods or services from a potential supplier; and
- e) collective denials of access to an arrangement or association.

Local counsel are not aware of any prosecutions by RICA against entities for implementing exclusivity clauses or non-compete restraints. There being no jurisprudence on the point, and as far as local counsel are aware and the position has not been tested with RICA.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

No.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

No.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

No. Cartel conduct is criminalised under Article 7 of the Rwandan Competition Act. In terms of the Act, cartel conduct is per se unlawful. Any form of agreements, decisions and concerted practices, which have as their object the undermining, prevention, restrictions or distortion of competition shall be prohibited.

In terms of Article 52, a contravention of the Rwandan Competition Act attracts an administrative fine of 5% to 10% of the enterprise's annual turnover in the preceding fiscal year in which the contravention occurred. Article 55 also provides that in the event of "faults" provided under the Act, committed by an individual or an enterprise that cannot reveal its annual turnover, an administrative fine of between RWF 20,000 (approx. USD 19) and RWF 5,000,000 (approx. USD 4,913) may be imposed.

There are no criminal penalties for engaging in cartel or anticompetitive conduct. Local counsel are not aware of any instances where criminal sanctions have been imposed on any person or undertaking in respect of cartel or anticompetitive conduct. Local counsel are also not aware of any criminal charges brought or convictions made against any persons and/or entities for engaging in any anticompetitive conduct.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Rwanda is a member of COMESA and the EAC, both of which have competition law regimes (the EAC Competition Act is, however, only partially operational).

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

None that local counsel are aware of.

39. Please describe trends on the level of enforcement of the regional body.

Based on our interactions, the COMESA Competition Commission keeps abreast of current business transactions in COMESA member states and has, on occasion, written to parties who have implemented mergers without notification based on information made public in the media or other public information channels. Please refer to the chapter relating to COMESA for additional information in relation to its regional enforcement activity.

As mentioned above, the EAC Competition Authority has not commenced full operations. Therefore, local counsel do not have any comments on its level of enforcement at this time.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Yes. The parties would be required to notify RICA and the COMESA Competition Commission if the merger notification threshold is met as well as the EAC Competition Authority once it starts to review mergers.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

Under the COMESA competition regime, the COMESA Competition Commission is empowered to share documents and information relating to mergers with the relevant authorities of the concerned member states solely for purposes of assessing the competitive effects of the merger. Local counsel are not aware of instances where the COMESA Competition Commission has reached out to RICA with respect to merger reviews involving Rwanda.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Local counsel are not aware of any announced cooperation between RICA and the regional competition bodies.

In collaboration with:



Anjarwalla & Khanna LLP

Anne Kiunuhe

Partner

T +254 703 032 222

ak@africalegalnetwork.com

Dominic Rebelo

Partner

T +254 703 032 222

djr@africalegalnetwork.com

Edwina Warambo

Senior Associate

T +254 (0)20 364 0000

eow@africalegalnetwork.com

SENEGAL



SENEGAL

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

Competition law in Senegal is regulated by the community law of the West African Economic and Monetary Union ("WAEMU") and the Economic Community of West African States ("ECOWAS").

On 14 June 2021, the Competition Advisory Committee, which is a body of WAEMU composed of two officials from every Member State, held a meeting to adopt six draft decisions in certain sectors in the sub-region, including the confectionery, cement, mass distribution and cosmetics sectors in Senegal.

In the same way, the ECOWAS Regional Competition Authority ("ERCA"), in collaboration with the Department of Trade, Customs and Free Movement of Persons of the ECOWAS Commission, organised from 12 to 14 October 2021 in Abidjan, in the premises of the ECOWAS Resident Representation to the Republic of Côte d'Ivoire, for the third meeting of its Consultative Competition Committee ("CCC") with a view to validating the instruments necessary for its effective operationalisation.

The work of this meeting was marked by presentations and discussions on the report of the activities of the CCC, the draft Supplementary Act amending the Supplementary Act on the establishment, powers and functioning of the ECOWAS Regional Competition Authority, the draft Regulation on mergers and acquisitions, the draft Rules of Procedure of the ERCA, the draft Rules and Procedures on Leniency and Immunity in Competition Matters within ECOWAS and finally the draft standard memorandum of understanding between the ERCA and the national competition authorities of the Member States.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

Investigations by economic sector are an option provided for by Article 19 of Regulation 3/2002 on antitrust procedures within the WAEMU.

In Senegal, the National Competition Commission is provided for by law, but in practice it is not functional. As a result, there is no publicly available data.

Thus, local counsel are not aware of any case where the authorities have initiated an investigation into a specific sector of activity. However, on an individual level, local counsel are aware of one case in 2013 relating to a company in the household appliances sector.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

In Senegal, the National Competition Commission exists on paper, but, in practice, it is not functional. As a result, there is no publicly available data.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

In the aviation sector, an Act was adopted to establish common rules on exemptions for certain categories of agreements, decisions and practices relating to competition in air transport services in the ECOWAS Member States. This is the additional Act A/SA.9/02/12.

Beside the aviation sector, the competition authority has not identified any specific sectors as strategic or key sectors for purposes of competition law enforcement.

In some specific sectors, such as telecommunications and advertising, there are specific regulatory authorities, namely the ARTP and CNRA, respectively. They intervene to regulate anticompetitive practices.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

Dawn raids are not expressly provided by applicable regulation. The law speaks of ex officio or on request findings (*visites d'office ou sur demande*). However, in practice, the authorities always notify their arrival except in case of searches or flagrante delicto.

As noted above, in Senegal, the National Competition Commission is not functional. Therefore, dawn raids by the National Competition Authority are not a high risk in the Senegalese jurisdiction.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

The competition authority has not introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

We are not aware of any such action taken by the competition authority against any entities for infringing competition legislation during the COVID-19 pandemic.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

Prices are determined by free competition, except for those prices for which the government has stipulated approved prices. These are generally basic commodities.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

The competition authority has not adopted any new regulations or measures that will apply to firms that are active in the digital market space.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

No.

- 11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.**

There is no foreign direct investment review regime in Senegal in relation to mergers involving foreign buyers or acquirers. In general, there is an investor declaration regime for statistical purposes.

Some sectors regulate foreign investment by imposing national shareholding requirements. For example, in the fishing sector, fishing companies must have a minimum of 51% of their shares held by nationals or ECOWAS citizens. Other examples include the telecommunications, oil and mining industries.

Regarding foreign direct investment reported to the Minister of Finance for statistical purposes, a letter must be sent by investors to the Minister of Finance, which must contain the following information:

- a) Designation of the enterprise or company abroad or in the WAEMU Member State concerned in which the investment is to take place;
- b) Nature of the investment;
- c) Amount of the investment;
- d) Financing arrangements, timeframe for completion; and
- e) Reasons for, and impact of, the planned investment.

- 12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').**

Please refer to the response above.

MERGER CONTROL DEVELOPMENTS

- 13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?**

No notified transactions have been prohibited by the National Competition Commission in Senegal since January 2021.

- 14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?**

No.

- 15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.**

No. There is no obligation to notify and the law does not give any suspensive character to a notification.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

The submission of a merger notification is voluntary and non-suspensory in Senegal. Therefore, there is no time period applicable.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

Not applicable.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

The National Competition Commission is not competent to rule on the validity of mergers and acquisitions. Its role is limited to ruling on mergers and acquisitions that may constitute an anticompetitive practice. Furthermore, there is no publicly available data.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Please refer to the response above.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Please refer to the response above. Apart from competition law, where no conditions are set, the regularity of the merger is subject to compliance with company law.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis..

There is no notification required for internal restructurings.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

In general, there is no obligation to notify. The role of the National Competition Commission is to rule on practices that may distort free competition.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Local counsel are not aware of cases of mergers that have been approved subject to public interest grounds since January 2021. The National Competition Commission is not competent to rule on the validity of mergers. Its role is limited to ruling on mergers that may constitute an anti-competitive practice

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

Local counsel are not aware of cases where the competition authority has prohibited a merger transaction based on public interest grounds alone. The National Competition Commission is not competent to rule on the validity of mergers. Its role is limited to ruling on mergers that may constitute an anticompetitive practice.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

The National Competition Commission is not competent to rule on the validity of mergers. Its role is limited to ruling on mergers that may constitute an anticompetitive practice.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

The National Competition Commission is not competent to rule on the validity of operations. Its role is limited to ruling on operations that may constitute an anticompetitive practice.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

The National Competition Commission is not competent to approve transactions. Its role is limited to ruling on mergers that may constitute an anticompetitive practice.

28. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

N/A. Please refer to the response above.

29. Please indicate whether, legally or in practice, your competition authority allows for "Carve out" / "hold separate" arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

Not applicable. Please refer to the response above.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.

Not applicable. Please refer to the response above.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

Most decisions that have been taken are in the field of state aid. The regime is provided for in the Additional Act A/SA.1/06/08, adopting the Community Competition Rules and their application within ECOWAS, as well as the Regulation on anticompetitive commercial practices n°02/2002/CM/UEMOA of 23 May 2002.

They are defined as aid granted by States or through State resources in any form whatsoever, when they distort or are likely to distort competition by favouring certain undertakings or the production of certain goods.

The WAEMU Commission may, by decision, impose on companies and associations of companies fines of between CFA francs 500,000 and CFA francs 100,000,000 (between approx. USD 822 and USD 164,587), the latter amount being increased to 10% of the turnover realised during the previous financial year of each of the companies that took part in the infringement, or 10% of the assets of these companies, when, deliberately or through negligence, their actions constitute anticompetitive practices

In the case opposing Air France to the unions of travel agencies and tourism of Senegal, the WAEMU Commission, by Decision No. 02-D-02 dated December 27, 2002, enjoined Air France to cease the practices deemed anticompetitive under penalty of a fine of CFA francs 20,000,000 (approx. USD 32,917).

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

Local counsel are not aware of any cases brought by the National Competition Commission against parties in a vertical relationship for infringing the competition legislation. However, as mentioned in previous answers, in Senegal, there is no publicly available data concerning the activities of the National Competition Commission.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Local counsel are not aware of any prosecution against entities for implementing exclusivity clauses. Exclusivity clauses are prohibited because they distort free competition. It is prohibited by the Regulation on anticompetitive commercial practices n°02/2002/CM/UEMOA of 23 May 2002. Additionally, these clauses are prohibited by Decree n° 70-13/35 dated 7 December 1970.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

Local counsel are not aware of new investigations that the National Competition Commission has launched and publicised against any entities for engaging in prohibited practices since January 2021. However, as mentioned in previous answers, in Senegal, the National Competition Commission is, in theory, provided for by the texts, but in practice, is not functional. Therefore, there is no publicly available data.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

In general, according to the Regulation on anticompetitive business practices n°02/2002/CM/UEMOA dated 23 May 2002, the exploitation of a dominant position is prohibited. This also includes the dominant position of the buyer. For example, it is prohibited to conclude contracts conditional on the acceptance by partners of additional services or unequal conditions.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Cartel conduct or anticompetitive conduct is criminalised in Senegal. Local counsel are not aware of any criminal charges brought or convictions made against any persons and/or entities for engaging in any anticompetitive conduct. Furthermore, there is no publicly available data on the activities of the National Competition Commission.

By way of illustration, infringement of the provisions prohibiting illegal prices are punishable by imprisonment of one to three months at most, and a fine of CFA francs 100,000 to 200,000,000 (approx. USD 164 to USD 329,175), or one of these penalties only, without prejudice to the confiscation of the amount corresponding to the gain derived from the practice of illegal pricing.

In the case of fraudulent manoeuvres, the prison sentence is increased to one to two years and the fine to CFA francs 200,000 to 400,000,000 (approx. USD 329 to USD 658,351).

The competent court may also impose a ban on engaging in commercial activities for a period of six months to one year.

Any failure to comply with the court decision to close or ban a business is punishable by a fine of CFA francs 500,000 (approx. USD 822) per day of delay from the date of the court decision.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Senegal is part of the ECOWAS and WAEMU. Both have a competition law regime.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Local counsel are not aware of the signature of any memorandum of understanding with another jurisdiction. However, during the third meeting of the competition advisory board in Abidjan from 12 to 14 October 2021, a draft memorandum of understanding was adopted between the ECOWAS ERCA and national regulatory bodies of Member States, including Senegal.

39. Please describe trends on the level of enforcement of the regional body.

The WAEMU Commission is the body that enforces any competition law infringement. WAEMU Commission decisions usually consist in injunctions under penalty of payment of a fine. The WAEMU Commission's decision can be appealed before the WAEMU Court of Justice. The latter can decide to overrule or modify the WAEMU Commission's decision. An analysis of the WAEMU Commission's decisions shows that the most recurrent anticompetitive practices submitted to the WAEMU Commission relate to state aid.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

In Senegal, there is no obligation to notify a merger, either domestically, or regionally.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

One of the notable cases in which the regional body has engaged with the local competition authority is the case opposing Air France to the unions of travel agencies and tourism of Senegal, which was brought before the WAEMU Court of Justice to rule on a prejudicial issue.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

The WAEMU Commission must cooperate with national structures in accordance with Directive n° 02/2002/cm/UEMOA relating to cooperation between the WAEMU Commission and the national competition structures of Member States. However, Senegal's National Competition Commission is not functional and there is no publicly available data on possible cooperation activities between the WAEMU Commission and the National Competition Commission.

**Baker
McKenzie.**

Baker McKenzie



Celine Van Zeebroeck

Of Counsel

T +1 202 452 7083

celine.vanzeebroeck@bakermckenzie.com

In collaboration with:



Mamadou MBAYE

E: mmbaye@magp.sn
A: Kér Diaba GAYE, Rue 81 X 94
Mermoz pyrotechnie
T: (+221)33.922.66.86
www.magp.sn

SCP Mame Adama Gueye & Partners.

Mamadou Mbaye

T +221 773 320 249

mmbaye@magp.sn

SOUTH AFRICA



SOUTH AFRICA

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

1. Amendment to the Competition Act

In February 2020, a number of provisions that were introduced by the Competition Amendment Act No. 18 of 2018 ("**Competition Amendment Act**"), aimed at amending the Competition Act No. 89 of 1998 ("**Competition Act**"), came into effect. The relevant provisions deal with price discrimination and abuse of buyer power by dominant firms and have implications for the right of informants to claim confidentiality and on the accessibility of confidential information.

The price discrimination provisions prohibit discrimination by dominant sellers against small and medium-sized businesses and firms owned or controlled by historically disadvantaged persons, when setting prices. The appropriate test is whether the relevant discriminatory conduct impedes the ability of such firms to participate (i.e., sustain themselves) effectively in the relevant market.

The buyer power provisions prohibit dominant buyers, in sectors designated by the Minister of Trade Industry and Competition ("**Minister**"), from requiring or imposing unfair trading conditions or prices on sellers within the designated sectors.

2. Price Discrimination Regulations

To facilitate the interpretation and application of the above provisions, the Minister has published Price Discrimination Regulations and Buyer Power Regulations.

The Price Discrimination Regulations provide guidance for determining the application of the price discrimination provisions to firms owned or controlled by historically disadvantaged persons; and set out the relevant factors and benchmarks for determining whether a dominant firm's conduct constitutes discrimination that impedes the participation of small and medium businesses and firms controlled or owned by historically disadvantaged persons ("**HDP**").

An important point to note is that the Price Discrimination Regulations apply only to firms controlled or owned by historically disadvantaged persons that purchase less than 20% of the relevant good or service supplied by the dominant seller over the same period as the alleged discrimination.

3. Buyer Power Regulations

The Buyer Power Regulations provide separate factors for prices and trading conditions respectively, which should be considered when seeking to establish whether the price or trading condition is unfair. Beneficiaries of the Buyer Power Regulations are firms operating in the grocery wholesale and retail sector, the agro-processing sector, and the ecommerce and online services sector. An important point to note is that the Buyer Power Regulations protect HDPs that supply 20% or less of the purchases of the dominant buyer for the relevant goods or service.

4. Automotive Aftermarket Guidelines

The Commission has published final Guidelines for Competition in the South African Automotive Aftermarket ("**Guidelines**"). The Guidelines offer practical guidance to players in the automotive aftermarket industry, urging them to adopt pro-competitive measures and to promote greater participation of SMEs and HDPs in the market.

5. School Uniforms

The Commission embarked on an extensive advocacy and awareness drive against anti-competitive behaviour in the procurement of school uniform. It engaged key stakeholders in the basic education sector as part of this process. These included, amongst others, the governing body associations and the Department of Basic Education. The Commission assisted the department in drafting a circular on school uniform guidelines. Subsequently, the guidelines were adopted by various school groups and governing bodies as a set of rules to regulate procurement of school uniform. Many schools immediately started to implement the guidelines and identified items like school ties, blazers, and caps, for example, as part of limited exclusive clothing.

6. Guidelines on collaboration between competitors on localisation initiatives

On 18 March 2022, the Commission Published Guidelines on collaboration between competitors on localisation initiatives. These guidelines are aimed at mapping out initiatives to increase localisation, which refers to the level of local procurement of production or services. These Guidelines set out the circumstances when government, industry, trade unions, or NGOs may lead competitors to collaborate to advance localisation initiatives, and implement commitments related to localisation initiatives. In terms of the guidelines, localisation initiatives are to be led by a Facilitator, and the Firms participating in the localisation initiatives. They may identify opportunities for initiatives, set industry local procurement targets, set individual firm local procurement targets, and undertake demand forecasting. All collaborations under these guidelines must still be in compliance with the Act and may only be done through an appropriate forum, without revealing competitively sensitive information to other market participants (unless disaggregated), while also keeping records of all meetings where these localisation initiatives are discussed.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

On 19 May 2021, the Competition Commission ("**Commission**") launched the Online Intermediation Platforms Market Inquiry ("**Inquiry**"). The focus of the Inquiry will be limited to the following four broad online intermediation platforms and market dynamics that specifically affect business users, namely: eCommerce marketplaces, online classified marketplaces, software app stores and intermediated services (such as accommodation, travel, transport and food delivery). The Inquiry is ongoing with a provisional report scheduled for release on 10 June 2022, and the final report scheduled for release on 4 November 2022.

On 25 March 2022, the Commission also launched a market inquiry into the South African fresh produce market. This inquiry will examine whether there are any features in the fresh produce value chain, which lessen, prevent or distort the competitiveness of the market. It will focus on the following themes: (i) efficiency of the value chain; (ii) market dynamics and impact of key inputs for growers; (iii) small and HDP growers and their ability to effectively participate in the market; and (iv) barriers to entry in relation to the regulatory environment affecting the market. The final report is intended to be completed within 18 months of the publication of the final terms of reference.

The Commission has also released provisional findings and recommendations in relation to the following market inquiries that were initiated prior to January 2019:

- a) Health Market inquiry: Final Findings and Recommendations Report released in September 2019;
- b) Data Services Market Inquiry: Final Findings and Recommendations Report released on 2 December 2019;
- c) Grocery Retail Market Inquiry: Final Findings and Recommendations Report released on 25 November 2019; and

- d) Land Based Public Passenger Transport Market Inquiry: Provisional Findings on Metered Taxis and E-hailing Services released on 19 February 2020 and the Land Based Public Passenger Transport Market Inquiry Final Report released on 7 April 2021. There were two reports released, the first of which focused on the traditional markets (i.e., minibus, bus and rail), whilst the second report focused on e-hailing and metered taxi services.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

1. Sectors in relation to which the Commission has expressed concern

The Commission has expressed concern about the healthcare, data and retail sectors in its provisional findings in respect of the market inquiries referred to in the above response. In particular, the Commission found that there are features, or a combination of features, of the above sectors that may prevent, distort or restrict competition within the sectors. Since January 2019, the Commission has undertaken extensive work to address the concerns noted in the data market and the retail market.

2. Data Services Sector

In relation to the data services sector, the Commission has engaged with South African telecommunications companies in an effort to reduce the cost of data bundles. This has culminated in the Commission concluding settlements with various telecommunication companies, in terms of which, the companies have undertaken to:

- a) reduce the cost of their respective data offerings;
- b) make additional commitments to offer lifeline packages, zero-rated access to certain educational websites and websites of public benefit organisations; and
- c) provide increased transparency in relation to the pricing of data bundles.

3. Retail Sector

In the retail grocery sector, the Commission has engaged with various large chain supermarkets in an effort to abolish exclusivity clauses in lease agreements between shopping centres and the relevant supermarkets. These efforts are in line with the recommendations made by the Commission in its Grocery Retail Market Inquiry. In these recommendations, the Commission had found that exclusivity clauses contained in various leasing contracts impede competition in the South African grocery retail sector, with no compelling justifications for their continued existence.

4. Forestry Sector

The Commission has also published its final report on an impact study conducted on the forestry sector, which found that the sector is characterised by a few large vertically integrated firms that tend to dominate both upstream log supply and downstream milling and processing operations. The vertical integration is the result of numerous approved mergers and plantation acquisitions that occurred over the past 15 years, which fall below the mandatory merger notification thresholds.

The Commission made several recommendations aimed at ensuring that firms, particularly SMMEs and HDPs, are able to sustainably enter, expand and compete in the forestry sector.

5. COVID-19 Impact Study

The Commission has published its final report on an impact assessment study it conducted on the impact of the COVID-19 block exemptions and the enforcement work done by the Commission during the pandemic ("COVID-19 Report").

The study found that the COVID-19 block exemptions, granted by the Minister, in respect of three key sectors (namely the healthcare, retail property, and banking sectors) allowed the players in those markets to collaborate and coordinate helped mitigate the negative social and economic effects of the crisis. Such coordinated conduct would have contravened section 4 and/or section 5 of the Competition Act under normal circumstances.

In the healthcare sector, the block exemptions allowed patients to be moved from public to private hospitals to ensure they were provided with care when the capacity of public hospitals became constrained. Furthermore, the sector collaborated to reduce the cost of COVID-19 tests from between ZAR 1,000 (approx. USD 66) and ZAR 1,500 (approx. USD 100) to ZAR 850 (approx. USD 56).

In the retail property and banking sectors, the exemptions were used as forums for negotiation that led to financial relief being provided by landlords and lenders, respectively, to assist tenants (in respect of the former) and debtors (in respect of the latter) who were struggling to meet their financial obligations due to the pandemic.

A survey by Nielsen found that the Commission's advocacy and enforcement of the Anti-Price Gouging Regulations had a deterrent effect on price gouging, as retailers and wholesalers of essential products and basic food necessities were made aware of the Anti-Price Gouging Regulations, either through direct advocacy, word-of-mouth about the Commission's enforcement actions, or consumer activism bolstered by the Commission's advocacy work. The survey found that the Anti-Price Gouging Regulations were effective in achieving their purpose and deterring price gouging.

6. Essential Food Pricing Monitoring Report

The Commission's fifth Essential Food Pricing Monitoring Report ("**Essential Food Report**"), which is released quarterly focused on the tracking the impact of the COVID-19 pandemic and consequent economic crisis on food markets.

The Essential Food Report highlighted a decrease in the number of farmers and an increase in concentration across the value chain as well as concerns about market power across the value chain with farmers, particularly small scale farmers facing low operating margins.

The Essential Food Report show various areas of concern such as wide farm-to-retail spread in prices, large price differences between regions for fresh produce, growing margins at the processor and retailer level, as well as a general trend of price inflation from the start of the pandemic for some fresh produce as a result of global supply chain issues and exchange rate effects. It also highlighted that the increased frequency of extreme weather events, both locally and internationally, seemingly to have resulted in high food price inflation over the 18-month period prior to the release of the report.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

Yes. The Commission monitors concentration levels in what has become known as "priority sectors" to the Commission. The priority sectors are the:

- a) food and agro-processing;
- b) healthcare;
- c) intermediate industrial inputs;
- d) construction and infrastructure;
- e) banking and financial services;
- f) information and communication technology; and
- g) energy.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

Dawn raids by the Commission are a moderate to high risk in South Africa. The Commission has used, and continues to use, dawn raids as a tool to gather evidence of anticompetitive conduct by businesses in South Africa. All businesses are potentially at risk of a dawn raid by the Commission, at any time and without notice. The Commission, however, has not conducted any dawn raids since January 2019.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

Yes. The Minister issued the following Regulations in response to the COVID-19 pandemic:

1. Consumer and Customer Protection and National Disaster Management Regulations and Directions

These Regulations, published on 19 March 2020, apply to the supply of a list goods and services that have been deemed essential during the COVID-19 pandemic. The Regulations are aimed at promoting concerted conduct to prevent an escalation of the national disaster and to alleviate, contain and minimise the effects of the national disaster. The Government intends to protect consumers and customers from unconscionable, unfair, unreasonable, unjust or improper commercial practices during the national disaster. As of 5 April 2022, these regulations are no longer in force as the COVID-19 national state of disaster has been lifted.

2. Block Exemptions

These Regulations sought to exempt a category of agreements or practices in the various sectors from the application of the Competition Act, in response to the declaration of COVID-19 pandemic as a national disaster. As of 5 April 2022, these block exemptions are no longer in force as the COVID-19 national state of disaster has been lifted.

The following sectors had block exemptions:

a) Healthcare Sector

The block exemptions in this sector are aimed at promoting access to healthcare, preventing exploitation of patients, enabling the sharing of healthcare facilities, management of capacity and reduction of prices.

b) Banking Sector

The block exemptions in this sector sought to enable the banking sector to minimise the negative impact on the ability of customers, including both business and private individuals, to manage their finances during the national disaster, and be in a position to continue normal operations beyond the national disaster. They also aimed to enable the banking sector to manage the banking infrastructure, including the payment infrastructure, ATMs and branches.

c) Retail Property Sector

These exemptions sought to enable the retail property sector to minimise the negative impact of COVID-19 on the ability of designated retail tenants, including small independent retailers, to manage their finances during the national disaster and be in a position to continue normal operations beyond the national disaster.

d) Hotel Industry

The purpose of this exemption was to enable the hotel industry to collectively engage with the Department of Health and the Department of Tourism in respect of identifying and providing appropriate facilities for persons placed under quarantine, as determined by the Department of Health.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

Yes. The Commission has successfully prosecuted two firms for excessively pricing face masks during the COVID-19 pandemic. The Commission has also concluded a substantial number of settlement agreements with firms that have excessively priced on essential items such as hand sanitiser, facemasks and food items. While the Commission has largely relied on the Consumer and Customer Protection and National Disaster Management Regulations and Directions as the basis for concluding the settlement agreements, the Commission's two successful prosecutions were on the basis of an infringement of the Competition Act. This was due to the fact that the relevant conduct had occurred before the Consumer and Customer Protection and National Disaster Management Regulations and Directions had come into force.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

Yes. Since 17 March 2020, the Commission had investigated 1,199 cases, 61 of which were referred to the Competition Tribunal ("Tribunal") for adjudication. Where the Tribunal found a contravention of the anti-price gouging regulations, it either imposed an administrative penalty on the firms, ordered them to make donations to the Solidarity Fund (established to provide COVID-19 relief), ordered them to donate essential goods to members of the general public, or a combination of the three.

General confirmations and undertakings in consent agreements include the following:

- a) the conduct complained of had already ceased;
- b) the firm would refrain from engaging in such conduct in the future;
- c) the firm would donate essential goods to the public to the value of the alleged overcharge; and
- d) the firm would develop and implement a competition law compliance programme.

The majority of cases investigated by the Commission related to basic food products, face masks, and hand sanitisers. About 54% of these cases were against national retailers, including grocery retailers such as Spar, Checkers and Shoprite, as well as pharmacies such as Dis-Chem and Clicks. More recently, the Commission had been investigating alleged excessive pricing of COVID-19 PCR tests, the prices of which subsequently decreased dramatically, after settlement agreements were entered into between the Commission and a number of key clinical laboratories. The Commission went further, to call upon all laboratories conducting PCR tests to use the settlement agreements as "a guidance".

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

The Commission has not yet adopted new regulations applying to firms active in the digital space. However, it has made three notable contributions in respect of digital markets:

1. Publication of the second version of the Competition in the Digital Economy Report, which sets out the approach of the Commission will take in regulating digital markets, and the digital economy, more broadly. The paper examines the competition, regulatory and industrial policy issues at play while advocating a technology neutral approach with regulation aimed at levelling the playing field and reducing regulatory barriers to entry and expansion.
2. Online Intermediation Platforms Market Inquiry. The Inquiry is focused on whether there are any digital platform market features that may impede, restrict or distort competition and/or undermine the purposes of the Competition Act. Please see the response to question 2 above for additional information.
3. Draft Guidelines on Small Merger Notifications, which contain specific guidelines applicable to the assessment of "digital mergers". The draft guidelines indicate that the Commission will require notification of small mergers where either the acquiring firm, target firm, or both operate in one or more "digital markets" subject to meeting certain thresholds.

In addition, in February 2022, a Joint Statement was released by the heads of the Commission, Egyptian Competition Authority, Competition Authority of Kenya, Competition Commission of Mauritius, Federal Competition and Consumer Protection Commission of Nigeria noting that the authorities are committed to expanding and deepening the dialogue on digital markets amongst competition regulators on the continent. Particularly, the competition authorities agreed to collaborate by undertaking to:

- a) scope the conduct in digital markets that has been the subject of investigation in other jurisdictions on African consumers, businesses and economies with the purpose of fair regulation and enforcement in Africa (where applicable);

- b) research the barriers to the emergence and expansion of African digital platforms and firms that may contribute to enhanced competition and inclusion in these markets for the benefit of African consumers and economies;
 - c) cooperate in the assessment of global, continental, and regional mergers and acquisitions in digital markets, including harmonising the notification framework, without prejudice to confidentiality commitments;
 - d) share information in accordance with existing laws and applicable protocols; and
4. share knowledge and build capacity to deal with digital markets.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

A number of industries or sectors are considered to be concentrated in South Africa by the Commission including:

- a) Highly Concentrated industries with a presumptively dominant firm, which include farming inputs (seeds, seed treatments and fertiliser), agro-processing (grain processing for human consumption, fisheries, ostrich meat and leather), sin-industries (alcohol, gambling and cigarettes), healthcare (medical schemes and administration, pathology), communications (mobile, fibre to the home, publishing and broadcasting), upstream steel value chain (iron and ferrochrome mining, steel production) and chemicals (including plastics and ethanol); and
- b) Highly Concentrated industries without a presumptively dominant firm, which include many of the same sectors mentioned above such as farming inputs (grain storage, fungicides and insecticides, animal feed), agro-processing (grains processing for animal consumption, bread, poultry, sugar processing), healthcare (hospitals and pharmacies), transport (airlines and commercial vehicles), financial services (all areas of insurance, banks), and petrochemicals (refineries).

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

South Africa does not yet have an overarching foreign investment review regime.

Having said that, the Competition Amendment Act introduced a foreign investment review regime, in terms of which, acquisitions by foreign entities involving assets or businesses operating in sectors that are designated as "strategically important to South Africa's national security interests", will need to undergo a foreign investment review approval process. This process will be independent of any merger approval process that may or may not be required.

A committee will be established and charged with considering whether mergers involving a foreign acquiring firm have an adverse effect on national security interests. The President has yet to publish a list of national security interests and provide guidance on the notification process, procedure, and timeframes to be followed. Currently, these provisions have yet to become operative and it remains uncertain as to when the regime will come into effect.

In addition to the above, there are certain strategic industries, such as banking, insurance, mining and telecommunications, which are subject to sectoral regulation in terms of which certain transactions involving foreign acquiring firms may need to be notified to regulators.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

Please refer to the response above.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

Yes. There have been at least five mergers that have been prohibited since January 2021. The prohibited mergers include the transactions described below.

- a) A merger wherein a sunflower seed and soybean crushing and oil refinery company and a global agribusiness and logistics company sought to acquire a company which controls a soybean crushing plant, through a joint venture, on the grounds that:
 - the merger was likely to result in a substantial lessening of competition through coordinated effects due to the structural link between the two acquiring entities which would allow them to coordinate their conduct;
 - the significant collective market shares attributable to the parties to the joint venture and the low likelihood of their conduct being constrained by competitors;
 - high barriers to entry and a likelihood of the erosion of countervailing buyer power post-merger; and
 - public interest grounds, such as the merger leading to increases in the prices of soybean, which would lead to an increase in the input costs for the production of chicken feed, and consequently, increase the price of poultry, being the primary source of protein for South African consumers.
- b) A merger between the largest retailer of building materials and products and the second largest retailer of building materials and products, that is also active in the wholesale supply of building material and hardware products to retailers, on the grounds that:
 - it would result in the removal of an effective competitor with the potential to expand and compete effectively in the market;
 - the merger would afford the merging parties the ability to unilaterally increase prices or change trading terms in several geographic areas where competitors are unable to constrain them; and
 - the merger would likely strengthen the buyer and bargaining power of the merged entity. This would allow the merging parties to squeeze the margins of their suppliers and exclude their rivals from competing effectively or growing or expanding in their respective geographic market (townships or rural areas).
- c) A merger involving the acquisition by a private equity of multinational chain of fast food restaurants on the basis that it would result in a substantial decrease in ownership by HDPs. The transaction was the first prohibition by the Commission solely on public interest grounds. Following the prohibition, the merging parties and the Commission engaged in relation to further public interest commitments that the parties were prepared to offer. Upon consideration of the prohibition by the Tribunal, which was not opposed by the Commission, the Tribunal approved the transaction subject to the conditions that had been offered by the merging parties.
- d) Merger involving one of the largest hospital groups in South Africa and the owner of two multi-disciplinary hospitals in the country, which was prohibited on the grounds of substantial competition concerns.
- e) A merger wherein a producer of sodium cyanide attempted to acquire a sodium cyanide business as a going concern which was the only producer of liquid cyanide in South Africa, on the grounds that the merger was likely to result in a substantial prevention or lessening of competition due to inevitable post-merger price increases that would be detrimental to customers, particularly in gold mining sector.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

No.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

The submission of a merger notification is suspensory and mandatory in South Africa where the notification thresholds are met. A penalty of up to 10% of annual turnover in South Africa and exports from South Africa for the preceding year may be imposed on each party to the merger for a first offence and up to 25% for a repeat offence. In practice, the penalties are usually lower than this.

In May 2021, the Tribunal confirmed a consent agreement between the Commission and Kagiso Media Investments. In 2011, Kagiso Media Investments obtained 100% ownership in Mediamark, but only notified the Commission in 2019. The merger was subsequently approved and the consent agreement was concluded, which imposed an administrative penalty of ZAR 1,699,500 (approx. USD 113,351).

In July 2021, the Tribunal confirmed a consent agreement between the Commission and ETG Agro Products, after ETG Agro Products admitted to a prior implementation of a merger in 2013. The merger was subsequently approved. A penalty of ZAR 1,000,000 (approx. USD 66,687) was imposed.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

The submission of a merger notification is suspensory and mandatory in South Africa.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

On 29 June 2018, the Tribunal confirmed a settlement agreement between the Commission and RTT Group (Pty) Ltd for the breach of public interest merger conditions. The breach specifically related to the failure to notify their employees (and subcontractors) of the conditions to the merger approval within five days of the merger approval date, and the failure to provide the Commission with an affidavit confirming that the obligations under the conditions were complied with. An administrative penalty of ZAR 75,000 (approx. USD 5,002) was agreed to in the settlement.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

In the case of Goldfields Limited v Harmony Gold Mining Company Limited, the CAC held that the Tribunal had the power to interdict and prevent the implementation of a merger, and to compel notification where there was a breach of the Competition Act's requirement to notify. In this case, the court interdicted Harmony from exercising any of the voting rights associated with the shares it had acquired as a result of the early settlement agreement, which it had failed to notify.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Section 3 of the Competition Act states that the Competition Act applies to all economic activity within, or having an effect within South Africa, provided the threshold requirements are met. Physical presence is thus not a requirement. The test is if the acquirer or target has assets or derives a turnover in South Africa, in which case, notification is required. However, absent this jurisdictional nexus there is no requirement to notify.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Yes. The types of conditions that the authorities have imposed include:

- a) divestiture orders;
- b) obligations to continue to procure from SMMES or entities controlled by HDPs;
- c) setting up a development fund to facilitate entry into or participation within a market;
- d) the imposition of a moratorium on retrenchments for a certain period of time post-merger;
- e) obligations to provide training and other assistance (e.g., career guidance, counselling etc.) to employees who are retrenched as a result of a merger;
- f) obligations to pay for relocation costs employees would incur from the target businesses moving to a different province post- transaction. In exceptional circumstances, the merger parties are also obliged to consider the provision of travel assistance or permit work-from-home arrangements for those employees;
- g) obligations to continue supplying customers on certain agreed terms for a period of time post-merger; and
- h) commitments to invest in manufacturing facilities with a view to increasing export capacity.

In March 2020, the Tribunal approved the merger between PepsiCo and Pioneer Foods, which marked the first major transaction with remedies aimed at promoting a greater spread of ownership by workers. The merger was subject to a host of conditions that benefit workers and HDPs, including a Broad-Based Black Economic Empowerment ("BEE") ownership plan, that entailed the provision of common stock in the acquiring firm, to its workers, to the value of ZAR 1 billion (approx. USD 93,436,000).

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

Yes. In the case of Distillers Corporation (South Africa) Ltd v Bulmer (SA) (Pty) Ltd, the contention that the Competition Act was only concerned with ultimate or unitary control was rejected. The CAC found that more than one form of control (such as direct or indirect) can be exercised at the same time, and that the definition of a merger should be construed widely. In this case, the CAC found that the merging parties were separate legal entities pre-merger and, therefore, the transaction fell within the definition of a merger, as contemplated in section 12(1) of the Competition Act, as there was a lack of a "common controlling mind" prior to the merger. As such, an obligation to notify was triggered. What can be concluded from this case is that, a change in control occasioned by a change in direct or indirect shareholding could be notifiable as a merger.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

Yes. Please refer to the response above.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Since January 2021, there have been a number of mergers which have been approved subject to public interest conditions. That being said, below, we have highlighted three novel and interesting transactions, which highlight the overarching approach local competition authorities have taken in imposing public interest conditions.

- a) The acquisition of the direct personal lines insurance business currently underwritten by Hollard Holdings (Pty) Ltd by Dotsure limited was approved subject to three primary public interest conditions. This transaction showed an interesting approach taken by the Tribunal, in respect of relocation of employees, given that post-transaction the target business would be relocated to another province (i.e., from Johannesburg, Gauteng, to George, Western Cape). The public interest conditions were as follows:
 - a. Employment: The parties will not retrench or relocate any employees for a period of 24 months. Should the need arise to retrench employees after the 24-month period, the merger parties were obliged, for an additional 24-month period, give preference to any affected employees in relation to any vacancies.
 - b. Relocation of employees: The parties will pay relocation costs in relation incurred by employees. In exceptional circumstances, the parties will also consider the provision of travel assistance or permit work-from-home arrangements during the 24 months, post-merger. To the extent that it is reasonably practical and commercially viable, the merger parties undertake to provide voluntary severance packages ("**VSPs**") to affected employees who are unable to relocate after the 24-month period. The parties will, subject to compliance with the Labour Relations Act, offer VSPs to the affected employees before making a final decision on the employees to be retrenched.
 - c. Employee share scheme: The parties will set up an employee share scheme, within five years, that will give workers an opportunity to benefit and participate in the ultimate ownership of the merged entity.
- b) The acquisition of Pure Pharmacy Holdings by Dis-Chem Pharmacies ("**Dis-Chem**") was approved subject to various conditions, including public interest conditions. The public interest conditions related to:
 - a. limiting the number of potential retrenchments to a maximum of 37 employees, i.e., 13 positions likely to be affected due to duplications and 24 store employees that may be retrenched as a result of potential store closures of three loss-making retail pharmacy stores,
 - b. offering affected employees future employment, should there be future vacancies in the merged entity; and
 - c. a condition that Dis-Chem increase its local procurement by a significant margin over the next five years. This is to ensure that SMMEs and firms owned by HDPs in the value chain are supported and remain competitive.
- c) The acquisition of Burger King (South Africa) ("**BKSA**") and Grand Foods Meat Plant by ECP Funds IV was approved on reconsideration subject to public interest conditions which related to the following:
 - a. Expansion commitment: the merging parties made a commitment to invest no less than ZAR 500,000,000 (approx. USD 33,385,505) in aggregate capital expenditure; opening at least 60 new Burger King outlets in South Africa; employing no less than an additional 1,250 HDPs as permanent employees of BKSA;

- b. Local supplier development: a commitment to fostering, developing, and strengthening local production of supply inputs, local procurement, and the development of South African businesses in general, and HDIs in particular. This will be done through a concerted focus on BKSA's Enterprise and Supplier Development Element of the BEE Codes initiatives and consequently improving its BEE scorecard;
- c. Employee share ownership scheme: a commitment to establish an employee share ownership program for an effective 5% interest in BKSA that will allow all employees of BKSA to benefit; and
- d. Disposal of the meat plant: a commitment that the merged entity will sell the meat plant and conclude a supply agreement with the purchaser of the plant.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

The acquisition of BKSA and Grand Foods Meat Plant by ECP Funds IV was initially prohibited solely on the basis of public interest concerns. The transaction was prohibited on the basis that the acquiring entity, which has no ownership by HPDs is acquiring firms that are controlled by an empowerment entity, with 68% ownership by HDPs, thus decreasing ownership by HDPs to 0%. As such, the Commission reasoned that the transaction would have a negative effect on the promotion of a greater spread of ownership, particularly by HDPs. Thus, the Commission found that the merger could not be justified on substantial public interest grounds. This was the first transaction to be prohibited solely on public interest grounds. This decision was subsequently taken to the Tribunal for consideration, where the transaction was ultimately approved subject to certain public interest conditions, as described in more detail in the above response.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

Greenfield or joint venture mergers are not specifically mentioned in the Competition Act, but are subject to the same merger review regime as other transactions. Thus, where a joint venture acquires control over the whole or part of an existing business (which could include part of the business or assets of any of the parties to the joint venture), notification will be required subject to the merger notification thresholds.

Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

No. A minority acquisition will only constitute a merger if it results in an acquisition of control. It bears emphasising that certain minority protections may confer control for competition law purposes (e.g., the ability to approve or veto strategic decisions, ability to appoint or veto the appointment of a majority of the board etc.). Absent an acquisition of control, minority acquisitions are not notifiable.

26. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

TYPE OF MERGER	STATUTORY LIMIT	AVERAGE APPROVAL PERIOD IN PRACTICE (2018 – 2019)
Small & Intermediate Mergers	60 business days	·Non-complex: approximately 30 – 40 business days ·Complex: 60 business days
Large Mergers (includes Tribunal hearing process)	Indefinite	·Non-complex: approximately 50 business days ·Complex: 4 – 6 months

27. Kindly indicate whether the competition authority enjoys the power to “stop the clock” for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

The Commission is only entitled to “stop the clock” if it believes that a document filed in respect of a merger contains false or misleading information and must then issue a demand for corrected information, which demand must be confirmed by the Tribunal. The effect of the demand is that:

- a) even if the initial period or an extension had already begun, the parties to the merger will not have fulfilled their notification requirements until that corrected information has been filed to the satisfaction of the Commission; and
- b) the initial period for that merger begins anew on the day following the date on which the party concerned files replacing information to the satisfaction of the Commission.

There is no publicly available information of any instances where the Commission has stopped the clock to date.

28. Please indicate whether, legally or in practice, your competition authority allows for “Carve out” / “hold separate” arrangements (*this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately*). If so, kindly describe cases where this has happened.

Hold separate arrangements are not specifically dealt with in the Competition Act. Having said that, the Commission is generally open to ring-fencing arrangements that are structured to prevent delays in the implementation of a multi-jurisdictional transaction. Typically, the ring-fencing arrangement takes the form of a “hold separate” undertaking that is provided by the merging parties to the Commission. In terms of this, the parties undertake that the South African target business would be ring-fenced and held separately from the acquiring firm and global merged entity until a merger decision is issued by the Commission. Having said that, it bears emphasis that the target’s business in South Africa must be managed separately from the businesses of the merged firm (i.e., post-global closing, there must be no management control that flows through from the acquiring firm or the merged entity to the target’s business in South Africa while the ring-fencing arrangement is in place).

29. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (*for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained)*). If so, kindly describe cases where this has happened.

In principle, sequential closing in the context of global transactions may be possible as long as it does not result in a direct or indirect change in control over the target’s South African businesses pending receipt of clearance in South Africa.

PROHIBITED PRACTICES

30. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

- a) In the case of *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd*, Mittal's practice of employing import parity pricing in the South African flat steel market was found to have constituted an abuse of dominance and attracted an administrative penalty of ZAR 691.8 million.
- b) In 2007, a bread cartel was uncovered which engaged in price fixing of bread and milling costs. Tiger Brands was fined ZAR 99 million (approx. USD 6,603,015), while Pioneer Foods was fined ZAR 195.7 million (approx. USD 13,052,627,362).
- c) In 2013, the Commission reached settlements with 15 construction firms involved in collusive tendering under a "Construction Fast Track Settlement Process", which incentivised firms to come forward and make full disclosure of collusive tendering in return for lower penalties. The amount agreed with the 15 firms in the construction cartel totalled ZAR 1.46 billion (approx. USD 97,377,802).
- d) In February 2019, the Commission and the South African Broadcasting Corporation ("**SABC**") entered into a settlement agreement, in terms of which, SABC admitted to price fixing and the fixing of trading conditions, in contravention of the Competition Act. SABC undertook to pay an administrative penalty of ZAR 31,845,795.33 (approx. USD 2,124,022) and further remedies, including:
 - a. 25% bonus advertising space for Qualifying Small Agencies for a three-year period, capped at ZAR 40,000,000 (approx. USD 2,667,885) annually; and
 - b. ZAR 17,797,645.97 (approx. USD 1,187,051) contribution to the Economic Development Fund.
- e) In July 2019, South Africa's largest manufacturer and distributor of number plate blanks and embossing machines was ordered to pay an administrative penalty of ZAR 16,192,315 (approx. USD 1,079,980). The manufacturer had been using long-term exclusive agreements to contractually oblige its customers to also purchase all of their number plate blanks and embossing materials from it whenever they purchase an embossing machine. The agreements prevented the customers from switching to alternative suppliers of number plate blanks, and hindered the ability of rivals to access customers for number plate blanks in the market.
- f) In July 2020, Dis-Chem Pharmacy was ordered to pay an administrative penalty of ZAR 1,200,000 (approx. USD 80,036) for abusing its dominance and excessively pricing on facemasks during the COVID-19 pandemic. Although the penalty is not significant, the case is notable due to the authorities' reliance on temporary dominance in the context of the COVID-19 pandemic as a basis for finding Dis-Chem guilty of excessive pricing.

31. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

Yes. Please refer to the response below.

32. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Exclusivity clauses and restraints amongst parties in a vertical relationship are analysed by “rule of reason” and may be problematic if they result in a substantial prevention or lessening of competition in a market that cannot be outweighed by technological, efficiency or pro-competitive gains.

Restraints and exclusivities of long duration (i.e., generally in excess of three to five years) are likely to be more problematic than restraints / exclusivities with a shorter duration and more limited scope. Each case must be assessed on its own merits. In addition, exclusivity arrangements and restraints involving dominant entities are more likely to be problematic.

A number of matters dealing with exclusivity clauses have been prosecuted by the Commission, including:

- a) In June 2019, the Commission published a decision by the Tribunal, involving a ZAR 16 million (approx. USD 1,067,154) fine against Uniplate Group (Pty) Ltd (“**Uniplate**”), South Africa’s largest manufacturer and distributor of number plate blanks and embossing machines. Uniplate had concluded agreements with its customers who buy embossing machines, whereby it would be the exclusive supplier for all their blank plates and embossing materials, for a period of 10 years. Embossing machines and number plate blanks are used together to produce the final number plate which is affixed to vehicles. The Tribunal found the agreements to constitute a breach of competition law as they hinder the ability of Uniplate’s rivals to procure customers for number plates and further tied customers to one supplier, depriving them an opportunity to seek lower prices for blank plates and plate materials.
- b) In October 2019, the CAC dismissed an appeal by Computicket (Pty) Ltd (“**Computicket**”), where Computicket sought to challenge the Tribunal’s finding that it had abused its dominance by concluding exclusive agreements with inventory providers. The exclusive agreements were imposed by Computicket, and limited the ability of inventory providers to sell through different ticket distribution services for the entertainment industry, which covers events such as sports, cinemas, theatres, festivals and live events.
- c) Following the release of the Grocery Retail Market Inquiry in November 2019, which found that exclusive long-term lease agreements between property developers and supermarket chains which prevented the landlord from leasing premises in the same shopping centre to potential competing grocery and other retailers led to an unjustifiable foreclosure of competing retailers, particularly small and independent retailers as well as emerging challenger retailers. This, in turn, led to remedial action, and consent agreements were subsequently agreed with Shoprite and Pick ‘n Pay, to allow SMMEs and specialty and limited line retail stores (i.e., stores that sell specific product categories such as butcheries, bakeries and liquor stores, for example) to lease premises within the same shopping centre. Furthermore, both retailers agreed that no new leases including exclusivity provisions would be concluded.

Non-compete clauses can fall in two broad categories, namely:

- a) Naked non-compete restraints: These are restraints of trade that are cartelistic in nature - i.e., aimed at market division, customer / territory / supplier / goods or service allocation. Such restraints are automatically prohibited and no justifications are permitted in defence of these clauses.
- b) Garden variety restraints: These clauses resemble a stock-standard (“**garden variety**”) restraint of trade that applies in the context of post-employment restraints (i.e., provisions in an employment contract obliging the employee to refrain from competing with the employer after termination of the employment relationship); sale of business restraints (i.e., provision in a sale of business agreement obliging the seller not to compete with the business sold); and post-partnership restraints (i.e., provision in a partnership agreement obliging a retiring partner to refrain from competing with the remaining partners after leaving the partnership business). Such clauses are not automatically prohibited but they should be limited in terms of duration and scope. It is sensible to analyse these clauses on a case-by-case basis.

33. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

Yes. On 8 October 2021, the Commission received a formal complaint from the Council for Medical Schemes against the laboratories alleging that the prices for supplying PCR tests for COVID-19 was unfairly inflated, exorbitant and/or unjustifiable. In the main, it was alleged that private pathology laboratories obtained substantial cost reductions in conducting COVID-19 PCR tests and were processing significant volumes (especially during infection waves), yet the price charged by the private pathology laboratories for COVID-19 PCR tests remained persistently high and unchanged at ZAR 850.

In December 2021, the Competition Commission announced that it had reached a settlement agreement with three major laboratories, Ampath, Lancet Laboratories and Pathcare, on a substantial reduction of COVID-19 PCR test prices, from about ZAR 850 to no more than ZAR 500 (VAT inclusive) per test.

34. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

Yes. Please refer to the response Question 1 above, for a details in respect of the abuse of buyer power provisions. There have not been any cases brought against entities accused of abusing their buyer power thus far.

35. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Yes. Cartel conduct or anticompetitive conduct is an offence punishable by imprisonment, fine or both under the Competition Act. In terms of the Competition Act, directors, managers, or employees purporting to have management authority, who are responsible for, or knowingly acquiesce, in cartel conduct, may be fined up to ZAR 500,000 (approx. USD 33,348) and/or may be subjected to imprisonment for a period of up to 10 years. To date, no criminal charges have been pursued, or criminal sanctions imposed, in such cases.

REGIONAL BODIES / COOPERATION

36. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

No.

37. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Yes. The Commission has entered into memoranda of understanding with the competition authorities of Mauritius, the Russian Federation, Brazil, Namibia, Eswatini, Kenya, Barbados, SADC, BRICS and European Commission.

38. Please describe trends on the level of enforcement of the regional body.

Not applicable.

39. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Mergers are notifiable domestically in South Africa.

40. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

Not applicable.

41. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Not applicable.

**Baker
McKenzie.**



Lerisha Naidu

Partner

T +27 11 911 4323

lerisha.naidu@bakermckenzie.com



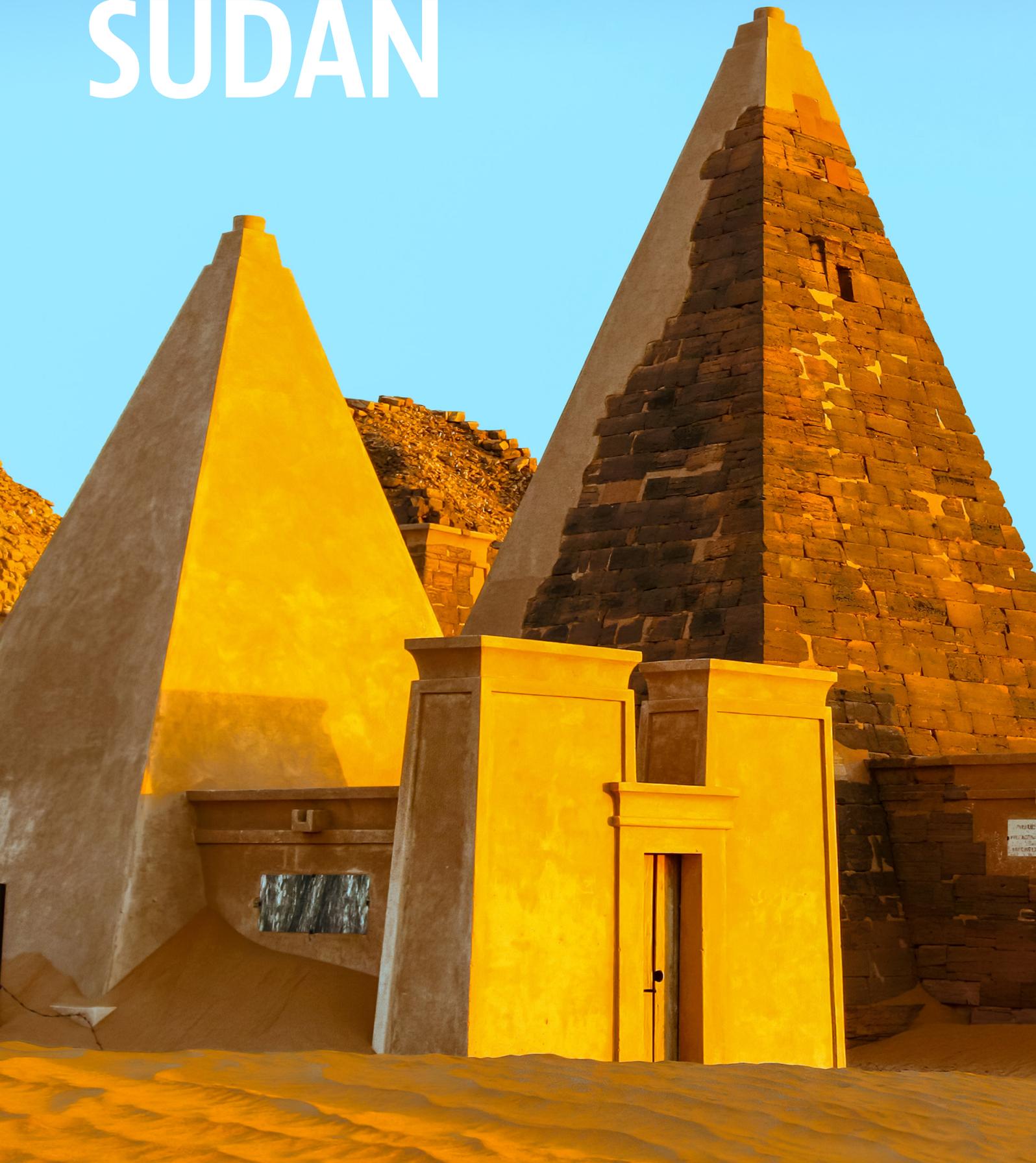
Angelo Tzarevski

Associate Director

T +27 11 911 4316

angelo.tzarevski@bakermckenzie.com

SUDAN



SUDAN

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

The Competition Council intends to amend the Regulation of Competition and Prevention of Monopoly Act, 2009 ("**RCPM Act**"), in order to align it with regional conventions. However, there has yet to be such an amendment introduced.

Additionally, the Prime Minister issued Decree No. 513 on 15 November 2020, whereby the Council for Competition and Prevention of Monopolistic Practices ("**Council**") has been formed, consisting of 11 member.

The Prime Minister has issued Decree No. 104 /2021 which structures the executive bodies of the Transitional Government in Sudan, the Decree set out the objectives, functions, powers and structure of the executive authorities. According to the new Decree the Council subordinates the Ministry of Trade and Supply. The Council maintained the same structure and functions and continued delivering services in accordance with the RCPM Act 2009. The Council issued the Executive Regulation for Prevention of Monopoly and Unfair Commercial Practices, whereby it defined the acts that contradict the concept of free competition and the acts that constitute unfair commercial practices. Additionally, the Council set a guide for internal processes to conduct its business.

Local counsel are not aware of any formal process that have since been taken towards amendment of the competition legislation or enforcement in Sudan. However, the Council's officials expressed, in the public media, the need for enforcement regulations to cope with regional and international laws and enhance the capability of the Council to control monopolistic practices.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

The Council has not initiated any formal market inquiry in any sector or industry, and there have been no plans declared by the Council with respect to market inquiries. However, the Council formed working groups, whose tasks are as follows:

- a) monitoring the market movement in the trading of goods and services; and
- b) gathering and analysing information and data about monopolistic activities that are harmful to competition and that would harm consumers and the disclosure of price lists for goods.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

The Council has expressed concern in relation to the food industry and accordingly, ministerial decrees were issued, based on Article 5 of the Law on RCPM Act, for prohibiting the monopolisation and hoarding of peanuts and sugar, for the purpose of controlling prices or distribution.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

The Council has recognised the food industry as a key sector for purposes of competition law enforcement. The Council has made efforts to control monopolistic practices and contribute to stabilising prices and stopping their continuous escalation. Commodities identified as necessary include meat, vegetables, dairy, sugar, oils, wheat flour, and rice, amongst others.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

No. Dawn raids by the Council are not a high risk. The Council has yet to build adequate capacity for conducting dawn raids.

The Consumers' Protection Society was actively involved in bakery dawn raids conducted during 2021 for infringement of pricing policies and regulations in relation to the wheat flour. The Consumers' Protection Society works in close collaboration with the Council.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

No specific measures have been implemented by the Council in response to the COVID-19 pandemic.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

No.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

No.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

No.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

The foreign direct investment regime in Sudan in relation to mergers can be conducted under the Investment Encouragement Act 2021 and the Companies Act 2015, together with the RCPM Act. The Investment and Private Sector Development Authority is the supreme authority in Sudan that is responsible for promotion and facilitation of investment in Sudan. To date the Council has received about seven notifications of mergers, most of them related to foreign direct investment.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

The foreign direct investment regime in Sudan applies to all sectors. However, certain sectors such as telecommunication, mining and national security require specific licences or permits to be issued by the relevant authorities in Sudan.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

No notified transactions have been prohibited since January 2021.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

New filing fees are expected to be introduced when the Council amends the RCPM Act.

The Council has the authority to introduce fees for services, including the filing fees. Currently, the Council is in the process of proposing new regulations for regulating fees in general. That being said, local counsel are unable to estimate the relevant time period in which we can anticipate to see the amendments be proposed or come into force.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

According to Act 11 (1) of the RCPM Act, submission of a merger notification is suspensory and mandatory in Sudan and parties are prohibited from implementing a notifiable transaction until the Council grants its approval.

As informed by the Council, no cases were brought against entities accused of gun-jumping and/or prior implementation of a notifiable transaction.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

No. As explained above, submission of a merger notification is mandatory and suspensory and mandatory.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

No. There are no any cases in which the Council has fined any entity for failing to comply with merger conditions.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

As informed by the Council, there have been no such cases.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

As informed by the Council, there have been no such cases. During 2021, the Council only received notifications of cases in which parties had a physical presence in Sudan.

20. 20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

No mergers have been approved subject to novel and noteworthy conditions.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

According to the RCPM Act, all mergers that meet the notification requirements must be notified, whether having a direct or indirect impact on the control over another entity. This includes the case of internal restructuring.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

Yes. The obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group. According to the law, any merger requires notification, whether having a direct or indirect control over an entity.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

In 2021, no cases of mergers subject to public interest grounds had been approved.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

The Council has considered the public interest as an element of its decision to prohibit the acquisition of Canar Telecommunication shares, by Zain Telecommunication, and rather issued its approval to Bank of Khartoum.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

The RCPM Act states that a merger shall be deemed prejudicial, or restrictive of competition in the market concerned, where the intention thereof is:

- a) granting any entity, the ability to specify the prices in the market concerned, by individual business on its side, without its competitors having the ability thereon;
- b) enabling one entity, or more to remove existing competitors in the market, or preventing entry of new competitors in markets, by a direct, or indirect way; or
- c) facilitating or carrying out any of the prohibited practices, provided for in the RCPM Act. No cases have been prohibited by the Council for the abovementioned reasons.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

Not applicable.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

According to the RCPM Act, the Council shall issue its decision regarding the merger within 60 days from the date of receiving the merger notification. In case it needs more time, the Council has the power to extend the time for another 30 days. Accordingly, the approval of non-complex transaction may take 60 days or less while investigation in complex transaction may require up to 90 days before approval. Otherwise, the merger shall be deemed to be approved.

28. Kindly indicate whether the competition authority enjoys the power to “stop the clock” for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

According to the RCPM Act, the Council has the authority to suspend any merger for a period not exceeding 90 days. If the Council found that the notification submitted by the concerned parties, has misleading, incomplete or incorrect information, the Council may reject the merger transaction. No cases have been recorded where the Council has rejected mergers.

29. Please indicate whether, legally or in practice, your competition authority allows for “hold separate” arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

The Council has not engaged in any hold separate arrangements.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.

This area is not regularised by the laws or policy. However, in practice, the Council monitors the movement of capital and decides on the basis of circumstances of each case.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

With respect to prohibited practices, the RCPM Act provides for monetary damages, imprisonment, or both, as a penalty for infringement, as per section 23(1) of the RCPM Act.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

No such cases have been brought.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

The provision of law in force does not cover exclusivity clauses and non-compete restraints. Alternatively, such clauses may be interpreted as forcing of dominance or abuse of market power. The Council considers, on an ad hoc basis, the implications of exclusivity clauses and non-compete restraints on competition in the relevant sector and may prohibit such clauses to avoid monopolistic and anticompetitive practices.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

No.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

Section 6 of the RCPM Act prohibits any form of abuse of power, whether by the buyer or seller. However, no such cases have been brought.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Yes. Cartel conduct is criminalised in Sudan. However, local counsel are not aware of any cases against any persons or entities accused of cartel behaviour.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Sudan is a member of COMESA. Therefore, activities in Sudan should be conducted with COMESA in mind. Additionally, Sudan joined the Greater Arab Free Area ("GAFA") in 1997, The Free Trade Area ("TFTA") in 2015 and the African Continental Free Trade Area ("AfCFTA") in 2018.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

None.

39. Please describe trends on the level of enforcement of the regional body.

Please refer to the chapter relating to COMESA for additional information in relation to its regional enforcement activity.

40. 40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

According to the RCPM Act, all mergers are notifiable domestically.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

There have been no such cases.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Not applicable.

In collaboration with:



AZTAN Law Firm

Tayeb Hassabo

Managing Partner
Head/Corporate & Business
T +249 15 520 9910
tayeb.hassabo@aztanlawfirm.net

Nora Alwasila

J. Attorney
Corporate & Business
T +249 15 520 9910
nora.alwasila@aztanlawfirm.net

TANZANIA



TANZANIA

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

There are current amendments that have been introduced by the Finance Act, 2020. Section 60 of the Finance Act has been amended to exclude, from the provisions of that section, annual turnover that has its source outside Mainland Tanzania, when computing a fine to be paid for contravention of offences referred to in that section.

Regarding prohibition of certain agreements, including price fixing, collective boycott and collusive bidding, for example, in 2021, the Written Laws (Miscellaneous Amendments) Act No 4 amended section 12(3) to provide for exemption of a longer period than five years, provided that there is a special arrangement relating to the grant of such exemption that has been approved by the Cabinet.

Further, section 14 was also amended in 2021 to provide that the application of sections 10 and 11 of the Act, relating to misuse of market power and mergers and acquisitions, respectively, shall not prejudice implementation of an agreement providing for a special arrangement, provided that such an arrangement or agreement has been approved by the Cabinet.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

There have been investigations into the tobacco and oil and gas industries, culminating in the imposition of fines on certain market players. The FCC has also investigated the steel industry (price-fixing agreement on the production, distribution and selling of reinforcement bars), the entertainment industry (anticompetitive agreement on premier league broadcasting rights (exclusive deals)), sugar industry (excessive pricing), hospitality industry, and fumigation markets.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

The Fair Competition Commission's ("FCC") jurisdiction is on the general sector of the economy. As a general rule, unless invited by the specific sector regulator, it has no authority on the regulated sectors such as energy, water, telecommunication, civil aviation and land transportation. This means the FCC has no direct jurisdiction over several sectors that form a significant part of Tanzania's economy. It has not specifically expressed its concern over these sectors. Its focus, therefore, has remained on the general sector of the economy to the exclusion of the regulated sectors.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

No. See the above response.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

Local counsel are aware of dawn raids that have been conducted on producers of counterfeit products. The authority has also seized telecom equipment, mobiles phones, solar equipment, perfumery, seeds, washing machines and confectioneries. The nature of dawn raids and the size of involved players do not raise any significant risks. Further, most of these dawn raids are carried out in cooperation with other authorities, such as the police force.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

No. There have been no new rules or measures in response to the COVID-19 pandemic and its impact on the economy.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

Local counsel are not aware of any action that has been taken against entities for infringing competition legislation during the COVID-19 pandemic. However, the FCC has warned some supermarkets and retail shops regarding artificial shortages.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

The FCC has been proactive in addressing price fixing in some industries, such as tobacco. In some cases, settlement agreements have been reached. In others, the parties involved did not prefer to settlement and, therefore, the FCC issues final findings against them. However, since the content of such settle agreements are not made public, local counsel are unaware of their content, and whether they included provisions to cap prices.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No. There have been no new rules or regulations that apply to active firms in the digital market space.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

Local counsel are not aware of any such industries or sectors.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

Mergers involving foreign buyers or acquirers are reviewed by the FCC, similar to any other merger, provided they meet a set threshold of TSH 3.5 billion (approx. USD 1,507,321) (combined assets or turnover of the merging firms). There is no special treatment or exceptions provided to these kinds of investments, except the general exception regime under section 12-14 of the Fair Competition Act. That being said, there is no separate foreign direct investment filing that needs to be made.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

There is no special regime for such purposes. Whether involving foreign direct investment or not, all mergers are regulated by the FCC under a single regime.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

Local counsel are aware of one prohibited notified transaction that relates to automobile industry on the basis of exceeding market threshold (dominance).

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

Local counsel are not aware of any proposals for amendments to filing fees/monetary thresholds. However, the government of Tanzania has expressed its plans to amend the entire competition law regime as the regime has "started to show its age". Local counsel cannot say whether such amendments will also include the threshold for merger notification.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

Submission of a merger notification is mandatory and suspensory under section 11(2) of the Fair Competition Act, as long as a threshold of TSH 3.5 billion (approx. USD 1,507,321) is met. Failure to notify a merger (gun-jumping) is, in itself, an offence. After a merger application has been lodged, the merger's consummation is prohibited (standstill obligation) until a final decision is made.

The FCC has once dealt with Tanga Fresh for gun-jumping. Tanga Fresh, a significant dairy factory, had acquired several small-scale dairies, thereby eradicating competition in the region. It appealed unsuccessfully to the Fair Competition Tribunal as the Tribunal held that Tanga Fresh was bound by notification requirement and had breached that obligation (gun-jumping) for proceeding without first being cleared by the FCC. (See Tanga Fresh v FCC, Tribunal Appeal No 5 of 2014, Fair Competition Tribunal, Dar es Salaam.)

In 2021, the FCC announced investigating the transformation and restructuring of one of the top football teams in Tanzania, Simba Sports Club, for allegedly breaching merger notification, but the decision is yet to be made.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

Notification of a merger that does not meet the threshold of TSH 3.5 billion (approx. USD 1,507,321) is not mandatory. There are no records where the FCC has specifically requested notification of such a merger.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

The Tanga Fresh case mentioned above is a good example. The FCC fined Tanga Fresh 5% of its annual turnover for failure to comply with merger regulations (gun-jumping). The fine amounted to TSH 460,945,000 (approx. USD 198,512) derived from the total annual turnover of TSH 9,210,900,000 (approx. USD 3,966,795) of its audited accounts of the year 2009.

In 2021, the FCC announced investigating the transformation and restructuring of one of the top football teams in Tanzania, Simba Sports Club, for allegedly breaching merger notification, but the decision is yet to be made.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

Local counsel are aware of one case of share or asset acquisition of one firm that was interdicted by the FCC on the grounds of exceeding the market threshold.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Local counsel are not aware of such cases. Most mergers involve at least one party operating in Tanzania, even indirectly through a subsidiary or a representative. Further, section 3 of the Fair Competition Act, limits the law to acts and conduct happening throughout Tanzania. Reading this provision and other relevant corporate laws, one can conclude that a firm must have a point of presence in Tanzania, however minimal, to be caught within Tanzania's competition regime.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

No.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

Internal restructuring that do not involve a change in ultimate control are not caught by the merger control regime. However, a notification obligation will exist if such restructuring involves acquiring shares or transferring any company assets or liability.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

Yes. Such cases will trigger notification obligations.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

The law does not recognise public interest as relevant ground. However, when granting exemptions of mergers, public interest can be considered.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

Local counsel are not aware of any such cases.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

There have been no joint ventures caught under the merger review regime in Tanzania.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

The test for merger notification does not depend on whether the parties involved have any controlling powers. On the contrary, the test is whether the combined value of the merging firms or their total assets amount to TSH 3.5 billion (approx. USD 1,507,321) and above. Thus, a non-controlling minority share acquisition that meets this threshold is subject to merger notification.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

Non-complex mergers take between 45 to 60 days. Complex mergers take 75 to 120 days. This time frame depends on other factors, such as the cooperation accorded by involved parties or the availability of required information for proper assessment. Depending on the complexity of the matter and parties involved (e.g., their physical location and size and nature of their businesses, for example), a review of a merger can be relatively more prolonged than the abovementioned average.

28. Kindly indicate whether the competition authority enjoys the power to “stop the clock” for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

Unlike other jurisdictions where competition authorities have strict time limits for merger reviews, the law in Tanzania provides the FCC with relatively sufficient time to review submitted applications. For example, under the Fair Competition Act and Fair Competition Rules of 2018, the FCC has 14 days to decide whether the notified merger will be examined. When it has been decided in favour of further examination, the law gives the authority another 90 days to review and decide on the notified merger. During this time, a standstill obligation exists. The law allows the FCC a further extension of 30 days and second or subsequent extensions if the FCC concludes that the delay has been caused by a lack of sufficient information or cooperation from any of the parties involved. With such provisions, “stop-the-clock” powers are not common in the merger review in Tanzania.

29. Please indicate whether, legally or in practice, your competition authority allows for “hold separate” arrangements (*this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately*). If so, kindly describe cases where this has happened.

There are no legal provisions or practical experience for such arrangements.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (*for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained)*). If so, kindly describe cases where this has happened.

There are no legal provisions or practical experience for such arrangements.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

The latest publicly available information regarding a price-fixing arrangement is by the Green Leaf Tobacco Company. The FCC settled with the two involved parties, while the rest were issued with official findings and penalties. The exact amount of fine is yet to be publicised.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

No such information is publicly available.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Exclusivity clauses and non-compete restraints are generally prohibited under the competition laws as they are likely to lessen competition and strengthen dominance. Currently, the FCC is investigating two cases involving exclusive broadcasting rights for possible anticompetitive concerns. However, the findings are yet to be publicised. A similar investigation regarding exclusive arrangements or agreements between soft drinks producers and their retailers and distributors is underway.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

Since January 2021, the FCC has announced plans to carry out investigation into possible anticompetitive practices in the following areas:

- a) increase of cement prices;
- b) premier league sponsorship arrangements; and
- c) exclusive arrangements between producers of soft drinks and their distributors and retailers.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

No. Such provisions do not exist under Tanzanian competition laws.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Yes. Cartel conduct is criminalised. However local counsel are not aware of any enforcement action by the FCC in this regard. Usually, the authority imposes penalties. In any case, a lot of the work the FCC undertakes in Tanzania in such cases is not in the public domain.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Tanzania is a member of the East Africa Community ("EAC"). The EAC has a regional competition authority, the East African Community Competition Authority ("EAC Authority"), established in accordance with Article 9 of the EAC Treaty. The EAC Authority came to force in 2016, and all commissioners have been appointed. Among others, the EAC Authority deals with mergers and acquisitions, consumer welfare, state aid, public procurement, restraints by enterprises (anticompetitive practices) and state aid.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Local counsel are not aware of such an arrangement.

39. Please describe trends on the level of enforcement of the regional body.

The EAC Authority is a new body that came into force in 2016. Despite that, the body is still in its organisational stage, and there has yet to be active enforcement thus far.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

All mergers with cross-border effects are notifiable to the EAC Authority, Failure to notify such mergers results in the transactions having no legal effect. Thus, in such cases, parties must notify both domestically and regionally.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

No public information is available regarding this aspect at the moment.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

No public information is available regarding this aspect at the moment.

In collaboration with:



FB Attorneys

Fayaz Bhojani

Managing Partner

T +255 22 2135994/5

fbhojani@fbattorneys.co.tz

Jonathan Mugila

Senior Associate

T +255 222 135 994/5

jmugila@fbattorneys.co.tz

Alyshah Bharwani

Associate

T +255 (0) 222 135 994/5

abharwani@fbattorneys.co.tz

TOGO



TOGO

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

No new amendment or guidelines to Law N°99-011 of 28 December 1999 on the organisation of competition in Togo ("**Competition Law**") has been proposed or enacted. However, The Regulatory Authority for Electronic Communications and Post Office ("**ARCEP**") introduced new rules for telecom and internet providers concerning the pricing process to increase competition.

At the regional level, the Economic Community of West African States ("**ECOWAS**") plans to adopt specific rules to implement the regional competition framework under the regulations and directives of 23 May 2002 of the West Africa Economics and Monetary Union ("**WAEMU**"), relating to the organisation of competition.

During its third meeting held from 12 to 14 October 2021 in Abidjan, the Consultative Competition Committee ("**CCC**") of ECOWAS presented and discussed the report of the activities of the CCC, draft procedural regulations of the ECOWAS Regional Competition Authority ("**ERCA**"), the draft regulation related to the rules and procedure of leniency and immunity of matters of competition within ECOWAS and the draft memorandum of understanding between ERCA and the national competition authorities of Member States.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

During the second meeting of the CCC, held on 22 March 2021 in Lomé, the Directorate of Domestic Trade and Competition ("**DCIC**"), Togo's administrative competition authority under the Ministry of Commerce, had planned to conduct a market inquiry on a certain number of economic sectors in order to identify priority sectors within the region that would merit special attention. However, no market inquiry has been initiated so far.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

No. The competition authority has not expressed anything publicly concerning a particular industry or sector.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

No. The competition authority has not identified any sectors or industry.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

No. Dawn raids are not a high risk in Togo.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

There were no changes to the regulations or measures related to competition enforcement in response to the COVID-19 pandemic.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

The competition authority itself has not taken any action. However, ARCEP took sanctions against a telecom operator in February 2021 for infringing the competition legislation.

At the end of a sanction procedure for violation of the principle of non-differentiation of tariffs for "on-net" (intra-network) and "off-net" (inter-network) communications, the Management Committee of the ARCEP imposed a fine of CFA francs 1,009,564,325 (approx. USD 1,661,619) against Togo Cellulaire (Togocom group), the mobile phone operator.

It also ordered Togo Cellulaire to cease this anticompetitive practice within 24 hours, subject to a penalty payment of CFA francs 50,000,000 (approx. USD 82,293) per day of delay.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

As noted above, ARCEP has been proactive in addressing pricing practices in the telecommunication sector.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

The competition authority itself has not taken any action. As noted above, ARCEP introduced new rules for telecom and internet providers concerning the pricing process.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

No. The competition authority has not identified any industries, markets or sectors considered to be concentrated.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

There is no particular foreign direct investment review regime in Togo in relation to mergers involving foreign buyers or acquirers. To the best of local counsel's knowledge, there are also no plans to introduce such a regime.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

Not applicable.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

Local counsel are not aware of any such case.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

Local counsel are not aware of any such proposal or actual amendment.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

In principle, the submission of a merger notification is voluntary and non-suspensive.

However, there is a risk that the transaction could be derailed if the notification is not made or the parties do not obtain a negative certificate from WAEMU Commission pursuant to Article 3.1 of Regulation No.3/2002/CM UEMOA regarding the procedures applicable to cartels and abuse of dominant position.

Pursuant to Article 4.3 if the WAEMU Commission "becomes aware of a concentration operation constituting a practice comparable to an abuse of a dominant position under the terms of Article 4.1, 2nd paragraph of Regulation No. 02/2002/CM/ UEMOA relating to anticompetitive practices within of WAEMU, the Commission may order companies either not to proceed with the proposed concentration or to restore the previous legal situation, or to modify or complete the operation or to take any measure likely to ensure or restore sufficient competition".

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

No, please refer to the response above.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

Local counsel are not aware of any such cases.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

Local counsel are not aware of any such cases.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Local counsel are not aware of any such cases.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Local counsel are not aware of any such instance.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

Local counsel are not aware of any such case.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

No. In these circumstances, a notification obligation cannot be triggered, since the operation envisaged does not, in principle, fall within the operations prohibited by the provisions of the WAEMU Treaty.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Local counsel are not aware of approved mergers subject to public interest grounds since January 2021.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

Local counsel are not aware of prohibited merger transaction based on public interest grounds alone.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

The Competition Law does not specify a particular provision relating to greenfield / joint ventures mergers. Local counsel are not aware of any such cases.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

Local counsel are not aware of any such circumstances. However, it is noted that the WAEMU treaty does not specify the degree of participation required to qualify a situation of abuse of a dominant position.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

It will take a maximum of six months from the date of the notification for the authority to approve a transaction. The law does not distinguish between a non-complex and a complex transaction.

28. Please indicate whether, legally or in practice, your competition authority allows for “Carve out” / “hold separate” arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

Local counsel are not aware of any such cases.

29. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.

The Competition Law does not specify whether transactions can close sequentially. In practice, local counsel are not aware of any case where the competition authority would have allowed a sequential closing.

PROHIBITED PRACTICES

30. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

In the telecommunications sector, “Togocellulaire” the telephone operator, was fined CFA francs 1,009,564,325 (approx. USD 1,670,584) for price differentiation practices which constitute an obstacle to effective competition, fair, equitable and sustainable on the national market.

31. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

Local counsel are not aware of any such cases.

32. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Exclusivity and non-compete restraints are not expressly prohibited in Togo. To the extent, however, that such practices would have the effect of restricting competition, creating a dominant position on the market or a state of economic dependence, they may trigger a violation of the Competition Law.

Article 53 of the Competition Law sanctions anticompetitive practices with a fine of CFA francs 2 million to CFA francs 10 million (approx. USD 3,309 to USD 16,547) and/or imprisonment for two months to two years.

Local counsel are not aware of any prosecution against entities for implementing exclusivity clauses or non-compete restraints.

33. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

No. The authority has not launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices.

34. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

No. The Competition Law does not contain provisions on the abuse of buyer power. However, the penal code clearly sanctions this practice in its article 911-2.

35. Is cartel conduct/ anti-competitive conduct criminalized in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Cartel conduct or anticompetitive conduct are criminalised in Togo. That being said, local counsel are not aware of any criminal charges brought against any persons and/or entities for engaging in any anticompetitive conduct.

REGIONAL BODIES / COOPERATION

36. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Togo is a member of WAEMU and ECOWAS, both of which have a competition law regime.

37. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Togo has not signed any memoranda of understanding with any other jurisdiction.

38. Please describe trends on the level of enforcement of the regional body.

There have been no recent enforcement developments by the regional body in Togo.

39. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Given the silence of the national law on the obligation of notification, local counsel advises, for better protection, to systematically notify domestically and the regionally.

40. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

Local counsel are not aware of any such case.

41. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

During the third meeting of the CCC of the ECOWAS Regional Competition Authority, a standard draft memorandum of understanding between the CCC and the national competition authorities of the Member States, was approved and should be effective in 2023.

**Baker
McKenzie.**

Baker McKenzie



Celine Van Zeebroeck

Of Counsel

T +1 202 452 7083

celine.vanzeebroeck@bakermckenzie.com

In collaboration with:



Amka Law Firm

Maitre AMEKOUDI Kafui A. Koffi

Avocat au Barreau du Togo

T (228) 90 96 01 85/ 22 55 86 34

kafui.amekoudi@amkalegal.com / contact@amkalegal.com

TUNISIA



TUNISIA

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

Local counsel are informed that the Tunisian authorities have asked the European Union and the Organisation for Economic Cooperation and Development (“OECD”) to support a project that aims to identify and encourage procompetitive reforms in the country.

The project includes (i) a review of national competition laws and policy to help Tunisia improve its competition policy, in line with international standards and best practices; and (ii) a study of the competitive impact of laws and regulations in two key sectors of the economy, namely tourism and banking.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

Local counsel are informed that the Tunisian authorities intend to launch investigations concerning possible price increases and restrictions on the production of disposable gloves, hydro-alcoholic gels and certain essential products.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

The competition authority, the Tunisian Competition Council (“TCC”), has expressed concerns in regard to the health sector, the banking sector and the telecommunications sector through the opening of certain investigations and decisions.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

The TCC has identified and suggested higher penalties for producers and retailers that practice excessive prices for basic goods and products related to health and hygiene.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

The dawn raids by the TCC have increased to investigate violation in the food and construction industry. The dawn raids are done on a weekly and continuous manner and many violations are detected.

The most notable dawn raid was made on 28 August 2021, in an iron warehouse, with a visit of the President of the Tunisian Republic on the premises to mediate the case and send a strong signal that the State will not tolerate those who want to control the process of market supply.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

Yes. The TCC advised on decree-laws relating to social and economic measures associated with the COVID-19 pandemic, whose objective was to repress monopolistic practices or acts of eviction and to control the prices of products that are in high demand.

The TCC also suggested, from the outset of the pandemic, that it would impose heavier penalties on producers and retailers who are found to be charging excessive prices for basic necessities and products related to health and hygiene.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

Cases have been brought by the government before the courts and local counsel are still waiting noteworthy decisions.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

Yes. The TCC has been proactive in addressing pricing practices. The competition council has imposed a fine of more than TND 10,000,000 (approx. USD 3,500,000) to four professional unions and 22 private hospitals for agreeing to increase the prices of medical interventions related to heart operations.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

As far as local counsel are aware, no.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

As far as local counsel are aware, no.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

Yes. There is an examination regime for foreign direct investments in Tunisia and it depends on the sector of activity concerned.

Broadly speaking, the applications are mainly filed with the Ministry of Commerce, which will request the opinion of the TCC.

To the best of local counsel's knowledge, a foreign investor filed a request in 2021 to operate a plant for the collection and recycling of electronic and electrical waste. There was a favourable opinion from the TCC, with recommendations including the control of the origin of waste because it is prohibited in Tunisia to import dangerous waste even for recycling.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

The principle is that investment is free, except in specific sectors. Currently the authorities are reviewing this regime in order to make it more flexible.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

Local counsel are not aware of any publicised cases involving transactions that were prohibited by the TCC since January 2021.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

Local counsel are not aware of any proposals to amend the merger filing fees.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

The submission of a merger notification is non-suspensory and voluntary in Tunisia, provided that the parties do not take any measure that would make the merger irreversible or that would alter the market situation on a lasting basis.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

The submission of a merger notification is non-suspensory and voluntary. That being said any project or operation of economic concentration that is likely to create or reinforce a dominant position in the domestic market or a substantial part of it, must be submitted to the Minister in charge of trade for approval.

The Minister will transmit the project to the TCC for its opinion. These conditions are applicable to all the companies involved in the economic merger, whether they are active parties or targets, as well as to companies related to them, under one of the following two conditions

- a) the combined average share of these companies exceeds during the last three financial years 30% of sales, purchases or any other transactions on the domestic market for substitutable goods, products or services, or on a substantial part of this market; and
- b) the total turnover achieved by these companies on the domestic market exceeds TND 100,000,000,000 (approx.USD 35,000,000).

As far as local counsel are aware, there have been no cases where the TCC has taken action against entities for failure to notify a transaction after its completion within the required time period.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

Local counsel are not aware of any such cases.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

As far as local counsel are aware, there have been no such cases.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Local counsel are aware of a case in 2016 concerning two companies operating in the cosmetics and body care sector, where a notification was made to the Minister of Trade for approval of the transaction even though the two companies had no physical presence in the market.

In order to give its opinion and determine the criteria for submitting this transaction to the Minister of Commerce for approval, the TCC was obliged to identify the parties that work with the merging parties in the national market and that manage the distribution of the merging parties products.

The TCC justified the exercise of its jurisdiction in terms of to Article 7 of Law No. 2015-36 on competition and prices, which makes no distinction in its definition of economic concentration between Tunisian and foreign companies, or whether parties are located in Tunisia or not. The Tunisian legislator has taken into account the criteria relating to the impact of the planned operation on the general balance of the national market in accordance with Article 7 paragraph 2 which states that “any project or operation of economic concentration likely to create or strengthen a dominant position in the domestic market or a substantial part of this market, must be submitted for the approval of the Minister of Trade”.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Local counsel are not aware of any mergers that have been approved subject to novel or noteworthy conditions.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

As far as local counsel are aware, no.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

Yes. As mentioned above, if the conditions for submission are triggered, a notification requirement is necessary in this case.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

A merger case has been approved in 2021 in the pharmaceutical sector on public interest grounds.

The TCC approved the vertical merger between the two companies in this case, considering that this merger will have a positive impact by contributing to the development of the national pharmaceutical industry, by supporting innovation and product diversification in this sector.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

Local counsel are not aware of any such cases.

25. Describe the circumstances in which ‘greenfield’ / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

As far as local counsel are aware, there have been no such cases.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

No. There are no circumstances in which non-controlling minority share acquisitions have been found to constitute a notifiable merger.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

The statutory deadline within which the TCC must make a decision is three months from the delivery of the acknowledgement of receipt, provided all the required documents were submitted to the TCC. If no response has been provided by the TCC within three months, the transaction is deemed to be approved. However, in certain cases the TCC may require additional documents or information, in which case the prescribed period will be paused.

In practice, the merger assessment may take six to 12 months for a complex transaction and 6 to 8 months for a non-complex transaction, provided all required documents and information have been provided.

28. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

As mentioned in the response above, the TCC has the power to stop the clock on a merger review when it requests additional information until it is provided. The TCC always mentions whether the clock has been stopped in its opinion. The last opinion of the TCC that has been issued mentions the stopping of the clock until the finalisation of the advisory file. Local counsel understand from this that the TCC has requested additional information about the proposed merger.

29. Please indicate whether, legally or in practice, your competition authority allows for "hold separate" arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

As far as local counsel are aware, there have been no such cases.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.

As far as local counsel are aware, there have been no such cases.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

There are several condemnation decisions from the TCC in 2021 that are referred to throughout this questionnaire.

For example, the TCC has condemned, in two different cases, companies for abuse of dominant position materialised by an abusive refusal to continue supplying its economic partner.

The most notable decision of the TCC in 2021 may be the one initiated by the Minister of Trade against a company that did not execute a decision rendered in summary proceedings (référé) by the TCC. The TCC confirmed by this decision the non-execution by the condemned company of the judgment and it imposed an additional penalty of TND 50,000 (approx. USD 17,500).

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

Local counsel are not aware of any cases relating to infringements of competition legislation by parties in a vertical relationship.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Exclusivity clauses are, in principle, prohibited in Tunisia.

As regards non-compete restraints, Tunisian law permits restraints on exercising a certain commerce or industry, in a specified location or for a specific duration. The TCC issued a favourable opinion on a franchise agreement allowing exclusivity with a request to reduce the contract term from 30 years to five years, renewable only once.

The TCC has issued an opinion refusing to grant an exemption in a franchise agreement considering that there is no balance between possible positive effects of the relationship and possible violation of competition. The TCC requested, in this opinion, that the authorities should take the appropriate legal measures because the entity which requested the exemption had knowingly started its activity without the express consent of the authorities.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

Yes. The TCC has launched an investigation against banks in order to preserve the economic public order and the consumer protection. The TCC has noted several indications of the existence of an agreement between some Tunisian banks on anticompetitive practices by applying additional rates on deferred reimbursements of bank loans due to the coronavirus.

On the other hand, the authorities have convicted companies working in the iron and construction sector for having, in the framework of a public tender, affected competition by presenting a high offer with false offers in order for the company that presented the high offer to obtain the public contract.

The companies were condemned to a fine of TND 124,000,000 (approx. USD 45,000).

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

Article 5 of the Tunisian competition law covers the abuse of economic dependence by a buyer vis-à-vis the supplier. The said Article prohibits "the abuse of a dominant position on the domestic market or a substantial part of that market, or the abuse of a state of economic dependency of customers or suppliers that do not have any alternative solutions for the commercialisation, supply or the provision of services".

The Article further provides that the abuse of state of economic dependency may consist of:

- a) a refusal to sell or to purchase;
- b) linked sales or purchases;
- c) imposing minimum prices for the resale of goods;
- d) imposing discriminatory conditions; or

- e) the termination of a commercial relationship without objective cause or because the other party refused to accept exorbitant commercial conditions.

Local counsel are not aware of any cases pursued by the TCC against entities accused of abusing buyer power.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Yes. Cartel conduct and anti-competitive conduct is criminalised. Please refer to the response above in this form regarding the condemnation of private hospitals. Another recent sentence was rendered on 15 December 2021, by the TCC against six companies producing construction materials for an anticompetitive agreement. The six companies were condemned to pay a fine of TND 10,600,000 (approx. USD 3,676,795). Since the decision is very recent and has not yet been published, local counsel have not been able to review it in detail.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Tunisia has been a member of COMESA since July 2018. The agreement entered into force in 2019. Going forward, all activities in Tunisia should be conducted with COMESA competition laws in mind.

A delegation from the COMESA Competition Committee visited Tunisia on 25 and 26 October 2021 and a workshop was held between this delegation and representatives of the Tunisian Ministry of Commerce and members of the TCC. During this meeting, the delegation of the COMESA Competition Committee presented the highlights of the COMESA competition regulations and the Tunisian party presented the policy of Tunisia in the field of competition.

The two parties have discussed the ways and procedures of cooperation and have also talked about the setting of a draft memorandum of understanding between the TCC and the COMESA Competition Commission.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

As far as local counsel are aware, no memorandum of understanding has been signed with any other jurisdiction.

39. Please describe trends on the level of enforcement of the regional body.

Due to the fact that Tunisia has just joined COMESA and that a first meeting was recently held between the COMESA Competition Commission delegation and representatives of the Tunisian Ministry of Commerce and members of the TCC, it is not possible to identify the level of enforcement of the regional body. Please refer to the chapter relating to COMESA for additional information in relation to its regional enforcement activity.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Even though the COMESA treaty suggests that under certain conditions, the filing with the COMESA Competition Commission substitutes the merger filing domestically, local counsel do not have information confirming such an interpretation under the domestic competition law.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

As far as local counsel are aware, there have been no such cases.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Local counsel have no information regarding new or ongoing investigations between the TCC and the regional body(ies).

**Baker
McKenzie.**

Baker McKenzie



Celine Van Zeebroeck

Of Counsel

T +1 202 452 7083

celine.vanzeebroeck@bakermckenzie.com

In collaboration with:



Gallala Law Firm

Zied Gallala

Attorney at High Court - Managing Partner

T +216 71 281 062

zied.gallala@gallalalawfirm.com

UGANDA



UGANDA

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

No recent amendments or guidelines relating to competition legislation have been proposed or enacted. This is because of the absence of substantive domestic competition legislation in Uganda, as well as a dedicated regulatory body or authority to enforce competition law. However, in 2016, the Ministry of Trade, Industries and Cooperatives developed a national competition and consumer protection policy. The policy is cognisant of the country's vision 2040, National Development Plan, National Trade Policy, and other sectoral policies and strategies aimed at minimising market distortions and promotion of sustainable development. Furthermore, the policy commits the government to implement obligations and commitments of the East African Community ("EAC"), Common Market for Eastern and Southern Africa ("COMESA") and the World Trade Organisation on consumer protection and competition.

Despite the absence of a substantive competition authority, a number of sector bodies have been active in relation to competition regulation. By way of illustration, the Uganda Communication (Competition) Regulations SI No. 93 of 2019 have been enacted under the auspices of the Uganda Communication Commission.

Additionally, there are also draft competition regulations, developed by the Civil Aviation Authority, which will apply to the Aviation sector. These regulations are undergoing stakeholder consultations.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

Local counsel are not aware of market inquiries or any plans by authorities in Uganda to initiate market enquiries in relation to any specific sector or industry in Uganda.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

As noted above, there is no competition authority in place in Uganda.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

There is no competition authority in place in Uganda and, therefore, no strategic or key sectors have been identified for purposes of competition law enforcement.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

Owing to the absence of a competition authority in Uganda, local counsel are not in a position to assess the risk associated with dawn raids.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

There are no uniform measures that have been passed in response to the COVID-19 pandemic, due to the absence of a competition authority in Uganda.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

As noted above, there is no competition authority in Uganda and as such, there is no collective action that has been taken against any entity for infringing competition legislation during the COVID-19 pandemic.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

The control over pricing practices has, so far, been provided for under sector specific legislation due to the absence of a competition authority. By way of example, the coffee sector is regulated by the National Coffee Act, 2021, which establishes the Uganda Coffee Development Authority, which is mandated to issue indicative prices at which coffee may be traded. Further, the Uganda Communications Commission, in the communications services space is tasked with ensuring accessibility and fair pricing of the services in the market.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

There are no new measures from a competition perspective that are applicable to firms that are active in the digital market space.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

Owing to the fact that there is no competition authority in Uganda, no industries, markets, and sectors have been identified in this regard.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

There is no foreign direct investment review regime in relation to mergers involving foreign buyers or acquirers in Uganda. The regulation of mergers and acquisitions in public companies is regulated by the Capital Markets Authority. Similarly, mergers and acquisitions in regulated sectors fall under the purview of the sector regulator, for instance, the Insurance Regulatory Authority, in the Insurance sector or the Central Bank, in the financial services sector. Local counsel are not aware of any plans to introduce a substantive foreign direct investment regime.

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

As noted above, there is no substantive foreign direct investment regime in Uganda.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

Owing to the absence of a competition authority and an enabling domestic competition regime, there are no notifiable transactions that have been prohibited.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

There are no merger thresholds currently applicable in Uganda. However, insight is drawn from the minds of the legislators of the Competition Bill, 2004 ("**Competition Bill**"), which is yet to be enacted into law.

The Competition Bill imposes a mandatory notification requirement to the Uganda Competition Commission for transactions where the parties jointly have assets exceeding 500 currency points or a worldwide turnover in excess of 1,500 currency points. Under the 1995 Constitution of the Republic of Uganda, as amended, a currency point is the equivalent of UGX 20,000.

From the perspective of group transactions, the proposed Ugandan competition legislation imposes a mandatory notification requirement in instances where the group belonging to the entity in which shares, assets or voting rights may have been acquired, has assets in Uganda in excess of 2,000 currency points; or a turnover exceeding 6,000 currency points or worldwide assets in excess of USD 1 billion or a turnover in excess of USD 500 million.

Apart from the monetary thresholds envisaged above, the resultant market share to be held by the undertaking upon completion of a proposed transaction may also trigger compulsory notification. This requirement applies in the context of mergers and acquisitions, leading to a combined market share of 35% in any relevant market held by the resultant undertaking.

As indicated above, the Competition Bill has not yet been enacted into law, and the proposed provisions are thus not yet law.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

Local counsel are not aware of any entities which have been accused of gun-jumping or any cases which have been brought against entities for prior implementation in any sector in Uganda.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

Generally, parties to a merger transaction in regulated sectors are obligated to notify the sector regulator. Local counsel are not aware of cases which have been brought against entities for failure to notify a transaction post-completion within the stipulated time period. However, it is prudent to note that merger assessments will differ from one sector to another.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

Local counsel are not aware of any cases in which entities have been fined for failing to comply with merger conditions in any sector in Uganda.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

Local counsel are not aware of any cases in which the acquisition of shares or assets of another firm have been interdicted by the competition authorities in Uganda.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Due to the absence of a competition authority, local counsel are not in position to describe any notifiable transactions in Uganda, in which the parties did not have a physical presence.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Local counsel are not aware of any approvals that are subject or have been subject to novel or otherwise noteworthy conditions.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

Despite the absence of a competition authority in Uganda, there are sector-based requirements to notify internal restructurings that do not involve a change in ultimate control. By way of example, Regulation 8 (2) of the Uganda Communications (Competition) 2019, triggers an approval requirement for restructuring. A similar requirement is applicable in the Insurance and Banking sectors as well.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

Yes. An obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity, within the group. By way of example, in the financial services sector, such restructures are notifiable. The sector-based requirements vary depending on the sector.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

Local counsel are not aware of any mergers that have been approved subject to public interest grounds in Uganda since January, 2021.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

Local counsel are not aware of any merger transaction which has been prohibited based on public interest grounds.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

Local counsel are not aware of any circumstances in which green field joint venture mergers may be caught under the merger review regime.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

Due to the absence of a competition authority, local counsel are not aware of any circumstances in which non-controlling minority share acquisitions have been found to constitute a notifiable merger.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

The timelines to approve a non-complex transaction will vary depending on the applicable sector. However, on average, non-complex transactions will be approved within a period of two weeks to one month.

28. Kindly indicate whether the competition authority enjoys the power to “stop the clock” for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

As noted above, there is no competition authority in Uganda. However, upon review of the Competition Bill, it can be established that in the proposed form, the competition authority will have the power to “stop the clock” for the review of a merger. Again, the Competition Bill has yet to be passed into law.

29. Please indicate whether, legally or in practice, your competition authority allows for “hold separate” arrangements (*this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately*). If so, kindly describe cases where this has happened. Local counsel are not aware of a case in any sector, where a “carve out” arrangement has been effected.

Local counsel are not aware of a case in any sector, where a “hold separate” arrangement has been effected.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (*for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained)*). If so, kindly describe cases where this has happened.

Owing to the fact that there is no competition authority in Uganda, local counsel are not in a position to confirm the practice of sequential closing arrangements.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

Local counsel are not aware of any penalties that been imposed on any entities engaged in prohibited practices.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

Local counsel are not aware of any cases which have been brought against parties in a vertical relationship for infringing the competition legislation.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Exclusivity clauses are interpreted in terms of the Contracts Act 2010. The clause must be communicated effectively, at the time the contract is concluded and not after it was concluded. Otherwise, for an exclusion clause to be incorporated into an already existing contract, the party against whom it is to operate must be given reasonable notice of its existence. Any ambiguity in the contract / agreement is to be construed against the party that intends to rely on the clause.

Non-compete restraints, on the other hand, have commonly emerged in employment related scenarios and are interpreted in a manner that is consistent with English common law.

Both exclusivity clauses and non-compete restraints are not criminalised. It appears that the remedies available to aggrieved parties are civil in nature.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

None. Local counsel are not aware of any new investigations which have been publicised since January 2021.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

As stated above, there is no substantive competition legislation in Uganda. However, applicable competition rules, in some sectors, contain provisions on abuse of power, such as the Uganda Communications (Competition) Regulations, 2019. The above notwithstanding, local counsel are not aware of any cases which have been brought against entities accused of abusing buyer power.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

As explained above, different sectoral laws prohibit anticompetitive conduct in the different sectors. By way of illustration, the Uganda Communications Act 2013 prohibits anticompetitive conduct but does not impose criminal sanctions against the same. It appears that the remedies available to an aggrieved person are civil in nature, in the form of statutory actions. Ezee Money Uganda Limited has previously brought such an action against MTN Uganda Limited. In light of the foregoing, local counsel are not aware of any criminal charges or convictions that have been brought against any person or entity for engaging in anticompetitive conduct.

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Uganda is a member state of the COMESA and therefore subject to the COMESA competition law regime. In addition to COMESA, Uganda is a member of the EAC and is therefore subject to the EAC Competition Act.

To the best of local counsel's understanding, Uganda has not been sanctioned by the Authority of the Common Market, and as such, the country has never been suspended from COMESA. Based on local counsel's enquiries, it has been established that the country defaulted on its membership contributions payment obligations, in 2019. Further, the Government of Uganda took remedial action, and in fact, notified the Authority, about certain exceptional circumstances that had gravely affected the economy and, therefore, adversely affected their ability to make the payments. The Government has since cleared its membership contributions until 2021.

The EAC Competition Act is only applicable to economic activities and sectors having a cross-border effect. However, the EAC Competition Act contains no statutory definition of the word "cross-border", but this is understood as having the ordinary meaning of cross-border, to be "an economic activity that spans the geographically defined borders of the EAC states" which are the Republic of Uganda, Rwanda, Burundi, South Sudan, Kenya and the United Republic of Tanzania. Therefore, activities in Uganda should be conducted with the COMESA and EAC competition laws in mind.

In addition to the above, Uganda has also ratified and signed the African Continental Free Trade Area Agreement, which has a competition law regime. Trading under the agreement was commenced in January 2021 but has been curtailed by the global COVID-19 pandemic. A team has been set up at the Ministry of Trade, Industries and Cooperatives, to handle implementation negotiations on certain aspects of the Agreement.

Therefore, activities in Uganda should be conducted with these regional bodies in mind.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

None.

39. Please describe trends on the level of enforcement of the regional body.

On 12 November 2021, the Government of Uganda through the Ministry of Trade, Industries and Cooperatives in partnership with the United Nations Development Programme (“**UNDP**”) held a three-day dialogue with key stakeholders to discuss opportunities presented by the African Continental Free Trade Area, and how Government, the private sector, development partners and other stakeholders could collaborate to position the country as a fast mover in harnessing opportunities presented by the agreement.

40. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Yes. A notifiable merger would necessitate both domestic (currently sector-based notifications) and regional notifications to the extent applicable. Please refer to the chapter relating to COMESA for additional information in relation to its regional enforcement activity.

41. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

Due to the fact that there is no competition authority in Uganda, there have been no cases where a regional body, such as COMESA or EAC, have engaged Uganda to enforce competition law cases or merger reviews.

42. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

None.

In collaboration with:



Engoru, Mutebi Advocates

Arnold Lule Sekiwano

Partner

T +256 0 393 216 520 / 256 0 414 231 393/4

lule@engorumutebi.co.ug

Sarah Zawedde

Associate

T +256 0 393 216 520 / 256 0 414 231 393/4

zawedde@engorumutebi.co.ug

ZAMBIA



ZAMBIA

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

There are proposed amendments to the Competition and Consumer Protection Act No. 24 of 2010 ("**CCP Act**") that are yet to be finalised. Some of the key proposed changes to the CCP Act include:

- criminal sanctions being repealed and replaced with administrative sanctions;
- granting the Competition and Consumer Protection Tribunal ("**CCP Tribunal**"), as an appellant body, more power for enforceability over mandatory orders, making the collection of levied fines easier; providing for sanctions for natural persons; and
- recognising the COMESA Competition Rules and Regulations.
- Besides the current guidelines, there are no new guidelines that have been developed. However, the Fines Guidelines have been amended. The Fines Guidelines set forth the manner in which appropriate fines to be imposed by the Competition and Consumer Protection Commission ("**CCPC**") will be determined. Imposition of fines are administrative actions taken by the CCPC to address a violation of the CCP Act. The Fines Guidelines describe the principles that the CCPC will follow in imposing administrative fines. Some key elements of the Fines Guidelines are as follows:
 - provision for aggravating and mitigating factors that the CCPC will consider in assessing the amount of the financial fine(s) to be imposed;
 - the offences punishable by administrative fines under the CCP Act; and
 - the steps to be followed in determining an administrative fine.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

PROVISIONS FOR MARKET INQUIRIES	INITIATED MARKET INQUIRIES	PLANS TO INITIATE MARKET INQUIRIES
Part V of the CCP Act makes provision for Market inquiries.	<p>The CCPC initiated a market inquiry in the agriculture sector for dairy products. The market inquiry was based on the vertical chain between the producers of dairy products and cattle farmers.</p> <p>The CCPC conducted a market inquiry into the Towing service sector. The market inquiry specifically looked at companies offering towing services in Zambia with regard to excessive towing prices over a short distance charged by the towing service companies.</p>	<p>The CCPC has plans to initiate market inquiries in the following sectors:</p> <ul style="list-style-type: none"> · Information Communications and Technology sector · Health Insurance care sector

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

Yes.

Education Sector

The CCPC has expressed concern over the practice of tying school supplies such as uniforms, books, and other supplies to securing a place for learning. This is happening at all levels of education. These being primary, secondary and tertiary (gowns tied to graduation) levels of education.

Beverages Sector

The CCPC has placed recall notices on several products after their manufacturers issued cautionary health problems. The recalls have largely affected the retail sector.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

Yes. The CCPC has identified specific sectors for the purposes of competition law enforcement. Some of these sectors include:

- Information Communications and Technology;
- Agriculture;
- Manufacturing;
- Construction; and
- Financial.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

Yes. In 2020, the CCPC conducted dawn raids on cement companies.

Dawn raids are conducted by the CCPC through authorised inspectors who may be other regulators. The CCPC obtains search warrants from a Court, which is used during a dawn raid. The CCPC also conducts surveillances to assess on the possible risks involved in the dawn raid.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

The CCPC has not introduced any new regulations. However, the following measures were implemented:

- electronic filings of complaints and merger notifications;
- online meetings and online hearings to reduce contact; and
- submissions to amend legislation relating COVID-19.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

Yes. However, these actions have not been specifically in response to COVID-19.

8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.

No. The CCPC are not price regulators and in a recent case the CCP Tribunal declined to approve a mandatory order, which would have the effect of fixing cement prices.

9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.

No.

10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.

Telecommunications Sector

The sector only has three players namely Airtel, MTN and Zamtel.

Hydro power electricity Sector

The supply of hydro power electricity is held by a dominant firm (ZESCO) holding about 89.60% of the market share.

Agriculture (Sugar) Sector

The Zambia sugar industry is dominated by three sugar milling companies, namely Zambia Sugar Plc, Kafue Sugar (Consolidated Farming Ltd) and Kalungwishi Kasama Sugar.

11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.

The CCP Act applies to any merger transaction, whether foreign or local in the same way as long as the merger has a local nexus. That being said, there is no specific foreign direct investment regime in place or filings that are required

12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').

Please refer to the response above.

MERGER CONTROL DEVELOPMENTS

13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?

No. All notified transactions are approved subject to conditions.

14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?

There are official proposals to adjust the notification thresholds upwards to allow firms particularly in the bracket of SMEs to merge without the burden of regulatory oversight. Additionally, there are proposals to reduce merger filing fees.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

The merger control regime in Zambia is suspensory and mandatory pursuant to section 26 of the CCP Act.

A transaction requires notification to the CCPC, where the combined turnover or assets, whichever is higher, in Zambia of the merging parties is at least 50 million fee units in the merging parties' most recent financial year in which these figures are available. 50 million fee units is equivalent to 15 million kwacha (approx. USD 903,615)

The CCPC has dealt with several cases involving implementation of mergers without authorisation, with recent cases being in the media/advertising sector and the construction sector, respectively. The cases were investigated as an infringement of section 37 of the CCP Act and appropriate sanctions were meted out for failure to notify. The parties were directed to formally notify the transactions for clearance by the CCPC.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

The merger regime in Zambia is suspensory and mandatory.

There are circumstances, however, in which transactions falling below the above thresholds may be notifiable and investigated. The CCPC may, where it has reasonable grounds to believe that a merger falls below the prescribed threshold, review the merger if the following factors exist:

- the merger is likely to create a position of dominance in a localised product or geographical market;
- the merger is likely to contribute to the creation of a dominant position through a series of acquisitions that are not individually subject to prior notification;
- the merger may substantially prevent or lessen competition;
- the merger is concluded outside Zambia and has consequences in Zambia that require further consideration; or
- as a result of the merger there are, or are likely to be, competition and public interest factors that must be considered.

A merger implemented without the approval of the CCPC will be considered void, and no rights or obligations imposed on the participating parties can be legally enforced in Zambia.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

Failure to comply with merger conditions constitute an offence pursuant to section 37 of the CCP Act. The CCPC has, in the past, fined entities for failure to comply with merger conditions. Examples of such cases include the fining of Puma Energy for failure to comply with merger conditions.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

The CCPC has, in the past, prohibited the acquisitions of assets of another firm. Such prohibitions were based on potential competition concerns. For example, one transaction prohibited by the CCPC involved the acquisition of mobile towers (passive infrastructure) by a dominant Tower company, which held 30.53% market shares from a Mobile Network Operator, which had a

market share of 40.32% of the passive infrastructure. The tower market, prior to this acquisition, was highly concentrated with CR3 of 92%, and the transaction would result in the acquirer assuming 70.85% of a market with no import substitutes and high barriers to entry.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

There have been no such cases. Only cases where there is a local nexus, and which lead to a change of control in a local subsidiary are captured.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

The CCPC has, in the past, approved mergers subject to novel conditions. Examples include the Zambia National Broadcasting (ZNBC) merger with Hantex, also known as TopStar. The fully functional Joint Venture established after a loan facility from Hantex was approved on condition that the Joint Venture between ZNBC and Hantex should cease to exist immediately once the loan is fully paid and all equipment should be handed over to ZNBC.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

The CCPC has not, and does not consider, notification of transactions that involve internal restructurings that do not result in a change in ultimate control.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

If the new entity taking over direct control is from within the group and the ultimate control does not change, then such a transaction will not trigger notification.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

All cases approved are subjected to public interest considerations by the CCPC. Such public interest considerations, pursuant to section 31 of the CCP Act, include the extent of promotion of technical or economic progress, the potential transfer to skills or the improvement of the production or distribution process. Other considerations include whether the transaction involves the saving of a failing firm, as the case was in the 1999 takeover of Northern Breweries by Zambian Breweries. Then Northern Breweries was a failing firm and despite the transaction being a merger to dominance, the transaction was approved to save jobs on the Copperbelt province of Zambia

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

The CCPC has yet to prohibit any merger based on public interest considerations. The blocking of mergers has been on competition concerns and not on public interest alone.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

Greenfield mergers are not subject to merger review in Zambia. Further, not all Joint Ventures are subject to merger review. The CCPC distinguishes between full function Joint Ventures and auxiliary Joint Ventures. For example, auxiliary Joint Ventures fulfil a specific purpose for their parent company. Such a Joint Venture will not be considered as a merger subject to review.

The CCPC handled a case regarding a Joint Venture, which had been established to acquire shares in an already existing and fully operational entity in the energy sector. The Joint Venture, at the time of acquisition, was already performing functions of an autonomous economic entity, was competing with other entities, and had sufficient staff and resources.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

Instances in which non-controlling minority share acquisitions have triggered merger notifications are when such transactions established indirect control by the minority shareholder. For instance, if by virtue of the minority stake, the acquirer will be able to veto a strategic decision or materially influence the policy. For examples, in 2021 the CCPC handled a transaction involving a Zambian Government owned Holding Company's acquisition of minority shareholding in a reinsurance company. Despite being a minority shareholder, post transaction, the acquirer would have had influence on the strategic direction of the company, as well as on board composition.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

In practice, the CCPC takes approximately 45 days to approve a non-complex merger (Phase 1 mergers). The period allowed for the investigation of a proposed merger is up to 90 calendar days from the date of notification, with the possibility of an extension of 30 days if prior notice is given 14 days before the expiry of the 90-day period.

28. Kindly indicate whether the competition authority enjoys the power to "stop the clock" for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

Yes. The CCPC can "stop the clock" for the review of a merger, in instances where (i) one or both of the parties to the transaction have pending court proceedings against them, which may have a bearing on the transaction; or (ii) the parties have not provided the CCPC with all necessary and required information to process the transaction.

29. Please indicate whether, legally or in practice, your competition authority allows for "hold separate" arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

In practice, the CCPC would allow for "hold separate arrangements". However, such a need within COMESA is unlikely to happen, as the notifications are done and processed by the COMESA Competition Commission. Only in circumstances where the transaction disproportionately affects Zambia can Zambia request to review the case separately and independently which may result in the transaction getting an approval except in Zambia. Outside the COMESA region, cases would have to be notified per country and one country's approval would not affect the process in other countries. Currently, all regional cases are COMESA related and hence the CCPC does not have a case where a hold separate arrangement was required.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.

There is no such requirement.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

The CCPC has imposed penalties on some entities engaged in prohibited practices, such as cartels and abuse of dominance. The penalties were as high as 10% of the entity's annual turnover. The entities that were penalised include parties in the cement sector, in which the parties colluded to fix cement prices and were fined 10% of their annual turnover.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

Yes. The CCPC had brought cases against parties in a vertical relationship for infringing the CCP Act. Examples of such cases include a case in network marketing, where the parties were enforcing a resale price of cosmetics. The parties to this case were fined 5% of their total turnover for the offence of resale price maintenance

Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

Exclusivity and non-compete clauses are treated in two ways:

First, parties to an exclusivity and non-compete clauses can apply to the CCPC for exemption of the clauses, pursuant to section 18 of the CCP Act. Clearance by the CCPC is granted if such transactions have public interest benefits pursuant to section 19 of the CCP Act.

Second, where parties implement non-compete and or exclusivity clauses without authorisation from the CCPC, such cases are subjected to investigation, and appropriate sanctions are meted.

Examples of implementation of exclusivity clauses that triggered an investigation and a fine, include the Zambia Football Governing Body and a Mobile Network Operator ("MNO"). The agreement gave exclusive advertising rights to the MNO as a sponsor during matches. The parties were fined and ordered to remove the exclusive clauses from the agreement

33. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

Yes. The CCPC has launched and publicised investigations on a number of entities for engaging in anticompetitive conduct. These sectors involve the cement, aquaculture, and manufacturing sectors.

34. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

The provisions under the CCP Act addressing abuse of dominance (section 16, as read with section 15) cover both, buyer and supplier power. The CCPC has not had a case involving buyer power, though such cases are likely to be handled in the event that they brought forth.

35. Is cartel/anti-competitive conduct criminalized in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and /or entities for engaging in any anti-competitive conduct? If so, please provide details

Yes. Cartel conduct is criminalised in Zambia. No criminal charges have been brought against an individual so far.

REGIONAL BODIES / COOPERATION

36. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Zambia is a member of COMESA, which falls under the jurisdiction of COMESA Competition Commission.

37. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

CCPC has signed Memorandums of Understanding with the following bodies and jurisdictions:

- COMESA
- Malawi
- Zimbabwe
- South Africa

The Memoranda of Understanding are premised on the administrative collaboration on the cooperative investigation on cases affecting two or more COMESA member countries and Malawi in general.

38. Please describe trends on the level of enforcement of the regional body.

Please refer to the chapter relating to COMESA for additional information in relation to its regional enforcement activity.

39. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

At present, Zambia officially recognises the COMESA Competition Commission as a one-stop-shop jurisdiction. As such, to the extent of filing, notification is made with the COMESA Competition Commission.

40. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

The COMESA Competition Commission engages the CCPC on all cases that have a bearing or effect on the Zambian market. Examples of such cases include the mergers of Apollo and Cooper, Gil and Wilmar, Igram Holdings Limited and Inversion and the 2016 acquisition of Finance Bank Zambia by Atlas Mara.

41. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

In all recalls of products announced by the COMESA Competition Commission, the CCPC cooperates and makes equal pronouncements on the local market.

In collaboration with:



Corpus Legal Practitioners

Sydney Chisenga

Managing Partner

T +2602 11 372300 / 01 / 04 | +260 966

861462

SChisenga@corpus.co.zm

Charles Mkokweza

Senior Partner

T +2602 11 372300 / 01 / 04 | +260 977

790907 +260 966 861462

CMkokweza@corpus.co.zm

Christine Mwambazi

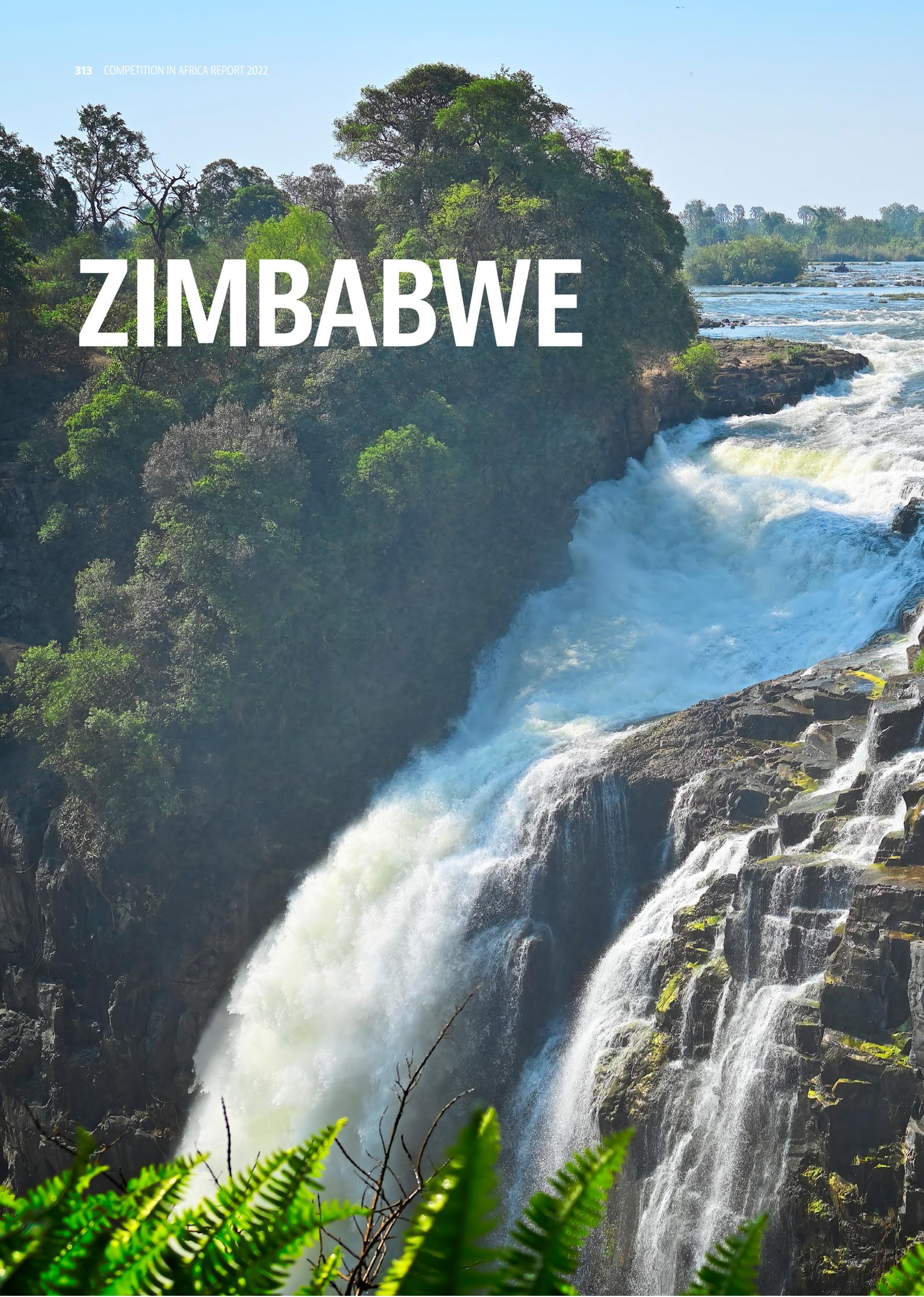
Associate

T +2602 11 372300 / 01 / 04 | +260 966

861462

CMwambazi@corpus.co.zm

ZIMBABWE



ZIMBABWE

GENERAL

1. Please describe any new amendments or guidelines relating to the competition legislation in your jurisdiction that have been proposed or enacted.

Zimbabwe is in the process of making the following changes to its competition law regime:

- The Competition Act is in the process of being overhauled.
- Competition (Advisory Opinion) Regulations were promulgated, enabling the Competition and Tariff Commission (“CTC”) to issue opinions to parties on the provisions of the Competition Act; and
- The Draft Review of the Competition Act has been submitted to the Attorney General’s office for approval.

That being said, no amendments to the competition legislation were effected in 2021.

However, in late 2020, the CTC produced a procedure manual for trade remedies investigations and invited stakeholders’ comments. In March 2021, the CTC also produced the Draft Guidelines on Horizontal Agreements and invited the public comments thereon.

2. To the extent that there are any market inquiry provisions in your jurisdiction, has the competition authority initiated or are there any plans to initiate any market inquiries in relation to any sector/industry? If so, kindly indicate these sectors/industries.

None.

3. Has the competition authority publicly expressed concern in relation to any industry/sector? If so, kindly indicate these sectors/industries.

The CTC expressed concern regarding the marketing system used in the tobacco industry and recommendations were made.

4. Has the competition authority identified any specific sectors as strategic or key sectors for purposes of competition law enforcement? If so, kindly indicate these sectors/industries.

No.

5. Are dawn raids by the competition authority a high risk in your jurisdiction? Please provide as much information as possible about dawn raids conducted by the competition authority.

Dawn raids are not a high risk in Zimbabwe. Local counsel are not aware of any dawn raids that were conducted by the CTC in 2021.

6. Has the competition authority introduced new regulations or measures related to competition enforcement in response to the COVID-19 pandemic?

No.

7. Has the competition authority taken action against any entities for infringing competition legislation during the COVID-19 pandemic?

Local counsel are not aware of any such cases. However, the CTC did put measures in place to enable entities to file notifications through digital means during the COVID-19 lockdowns.

- 8. Has the competition authority been proactive in addressing pricing practices of firms through, for example, reaching settlement agreements with firms to cap prices of products / services since? If so, please provide details.**

Local counsel are not aware of any such cases.

- 9. Has the competition authority adopted any new regulations or measures that will apply to firms that are active in the digital market space? If so, please provide details.**

No.

- 10. Has the competition authority identified industries / markets / sectors that it considers to be concentrated? If so, please provide details.**

No.

- 11. Please indicate whether there is a foreign direct investment review regime in your jurisdiction in relation to mergers involving foreign buyers / acquirers and kindly indicate the relevant review/regulatory body? If there is, please indicate whether there have been any foreign direct investment notifications to date. If there is no foreign direct investment regime, kindly indicate whether there are any plans announced to introduce it.**

The Zimbabwe Investment and Development Agency ("ZIDA") is the body that promotes and implements investment promotion strategies for the purpose of encouraging investment by domestic and foreign investors. ZIDA also facilitates entry and implementation of investment projects and assists investors with all appropriate investment-related support that may be required.

- 12. If there is a foreign direct investment regime in your jurisdiction, please indicate whether it applies to all sectors or specific sectors (such as sectors considered to relate to 'national security').**

Foreign investors may invest in any sectors of the economy of Zimbabwe, save for certain classes of business reserved in favour of Zimbabwean citizens, as contained in the First Schedule to the Indigenisation and Economic Empowerment Act ("IEE Act") and the existing non-conforming measures as set out in section 3 and 3A of the IEE Act, the Land Commission Act [Chapter 20:29], and the Legal Practitioners Act [Chapter 27:07].

MERGER CONTROL DEVELOPMENTS

- 13. Have any notified transactions been prohibited by the competition authority in your jurisdiction since January 2021? If so, on what basis?**

No.

- 14. Are there official proposals to amend merger filing fees and/or monetary thresholds or have such amendments been affected?**

The merger notification thresholds were recently amended by Statutory Instrument 126 of 2020. In terms of the new thresholds, a merger is notifiable where:

- the combined annual revenue in or from Zimbabwe, of the acquiring group and the target group is equal to or exceeds ZWD 10 million (approx. USD 27,631.943); or
- if the combined gross asset value in Zimbabwe, of the acquiring group and target group is equal to or exceeds ZWD 10 million. (approx. USD 27,631.943)

The previous thresholds were set at USD 1.2 million for either, the combined annual turnover, or the asset value of both the acquiring group and the target group.

The merger filing fee remains 0.5% of the higher amount between the combined annual revenue and the combined gross value of assets of the merging parties in Zimbabwe. The filing fee is now capped at a maximum of ZWD 800,000 (approx. USD 2,210), while the minimum filing fee is ZWD 100,000 (approx. USD 276.32)

There were no legislative changes in 2021 but the filing fees and monetary thresholds are likely to be reviewed in due course.

15. Is the submission of a merger notification suspensory and mandatory in your jurisdiction? If so, has the authority brought any cases against entities accused of gun-jumping and/or prior implementation of a notifiable transaction? If so, kindly provide details.

Yes. Merger notification is mandatory and suspensory. Should any party consummate or implement a merger without CTC approval, such party will be liable to a fine.

- On 7 March 2019, the Supreme Court of Zimbabwe confirmed the CTC's decision to fine Innskor Africa Limited USD 2.55 million for failing to notify its acquisition of National Foods in 2007. This is the largest fine to be imposed by the CTC since its inception.
- On 21 May 2020, the CTC reversed Innskor Africa Limited's acquisition of a 49% shareholding in Profeeds (Pty) Limited. The CTC uncovered that the transaction had been implemented in May 2015 and, therefore, imposed a fine of ZWD 40.5 million (approx. USD 1.6 million as at 22 June 2020), for the parties' failure to notify.
- In late 2019, the CTC imposed a fine against Intercape Ferreira Mainliner (Pty) Ltd and Pathfinder Luxury Coaches (Pty) Ltd for failing to comply with merger notification provisions. According to the CTC, the two firms entered into a joint venture involving a 50-50 shareholding agreement in which both parties contributed an equal number of assets. The CTC fined the merging firms for not being cooperative during the examination of the transaction, noting that they took five years to fully comply with the notification requirements.
- In September 2021, Dairyboard Zimbabwe (Pvt) Ltd was fined ZWD 144,192.68 (approx. USD 398) by the CTC for consummating a merger with Tavistock Estate without the CTC's approval. The fine has since been paid.

16. Is the submission of a merger notification non-suspensory and voluntary in your jurisdiction? If so, has the authority brought any cases against entities for failure to notify a transaction post-completion within the stipulated time period? If so, kindly provide details, including details of instances where the authority has specifically requested notification of mergers.

The submission of a merger notification is mandatory and suspensory.. Consummating or implementing a merger without CTC approval will attract a fine.

17. Please describe any cases in which the competition authority fined any entity for failing to comply with merger conditions.

Local counsel are not aware of any cases.

18. Please describe any cases in which the acquisition of shares or assets of another firm was interdicted by the competition authorities in your jurisdiction, as well as the basis for this.

None.

19. Please describe any cases in which parties (acquirer and target) did not have physical presence in your jurisdiction and the transaction was nonetheless notified. For example, where either party makes sales and derive some turnover in your jurisdiction do not have any subsidiaries or assets in the country, what is the local nexus test /local effects test to establish merger review jurisdiction?

Local counsel are not aware of any such cases. However, if the combined annual revenue of the acquirer and target party in or from Zimbabwe is equal to or exceeds ZWD 10 million (approx. USD 27,631), then the transaction will be a notifiable merger, notwithstanding that both parties do not have a physical presence in Zimbabwe.

20. Has the authority approved any mergers subject to novel or otherwise noteworthy conditions?

Yes.

21. Please indicate whether the competition authority has required notification of internal restructurings (that do not involve a change in ultimate control) and, if so, on what basis.

Local counsel are not aware of any such cases.

22. Please indicate whether an obligation to notify could be triggered as a result of a change in direct control over an entity through the interposition of a new entity within the group, albeit that the restructure does not result in a change in ultimate control.

The acquisition or establishment of a controlling interest in another entity is defined as a merger and this could require filing of a notification.

23. Please describe cases of mergers that have been approved subject to public interest grounds since January 2021 and kindly describe the nature of these public interest grounds.

None.

24. Please describe cases where the competition authority has prohibited a merger transaction based on public interest grounds alone.

None.

25. Describe the circumstances in which 'greenfield' / joint ventures mergers are caught under the merger review regime, and kindly provide instances of such mergers that have been notified to and considered by the competition authority.

The acquisition of a controlling interest in the whole or part of the business of another person is treated as a merger in our jurisdiction. If the merger has a value exceeding the prescribed threshold, the CTC should be notified.

26. Please indicate whether there are any circumstances in which non-controlling minority share acquisitions that have been found to constitute a notifiable merger and the basis for this.

Local counsel are not aware of any such circumstances.

27. On average how long does the authority in your jurisdiction take to approve a non-complex transaction? What about a complex one?

A non-complex transaction takes about 30 to 60 days to be approved or rejected. A complex transaction can take up to 120 days or more. There are no statutory guidelines on this.

28. Kindly indicate whether the competition authority enjoys the power to “stop the clock” for the review of a merger and under what circumstances can this happen. If so, please describe cases where the authority has stopped the clock.

The CTC has the power to prohibit or restrict the acquisition if it is satisfied that the merger is or will be contrary to the public interest or that it will lead to a monopoly situation.

29. Please indicate whether, legally or in practice, your competition authority allows for “hold separate” arrangements (this means that where clearance is not obtained in your jurisdiction by a specific date, the acquirer would opt not to take over the company in your jurisdiction but will implement the transaction in countries where approval has been obtained. The target in your jurisdiction may be left behind with the sellers for future disposal separately). If so, kindly describe cases where this has happened.

The CTC deals with matters on a case-by-case basis, and local counsel are not aware of any cases where this has happened.

30. Please indicate whether, legally or in practice, your competition authority allows for a transaction to close sequentially (for example: the shares in a target company, which triggers a filing requirement in your jurisdiction or which is active in your jurisdiction, will only be transferred after clearance in your jurisdiction has been obtained, while the shares in other companies affiliated to the target and operating in other countries thus do not trigger a filing requirement in your jurisdiction, shall be transferred as soon as clearances in those other relevant jurisdictions have been obtained (irrespective of whether clearance in your jurisdiction has been obtained). If so, kindly describe cases where this has happened.

The CTC deals with matters on a case-by-case basis, and local counsel are not aware of any cases of this nature.

PROHIBITED PRACTICES

31. Please provide information in relation to any noteworthy penalties that were imposed on any entities engaged in prohibited practices such as cartel conduct, abuse of dominance, etc.

In March 2021, the CTC launched an investigation into alleged restrictive practices in the school uniforms market. The investigation was a result of reports received from parents and guardian that certain schools were compelling parents to purchase uniforms from specific suppliers thereby denying the parents a right to choose where to buy uniforms.

The CTC found that Warren Park High School had entered into an exclusive supply agreement with ZILAB Consultants (Pvt) Ltd and Outscore Garments & Stationary (Pvt) Ltd, which agreement was restrictive to parents, in so far as the choice on where to buy uniforms was concerned. The CTC ordered, in terms of section 31 of the Competition Act, that:

- a. The exclusivity clause within the existing agreements with suppliers must be removed.
- b. The school uniform for Warren Park High School must be as generic as possible such that it is obtainable from more than one supplier.
- c. The school must follow a competitive bidding process when looking for a supplier of school uniforms.
- d. Learners shall not be required to purchase school uniforms from the school.
- e. The school shall refrain from setting or recommending school uniform prices.

32. Has the authority brought any cases against parties in a vertical relationship for infringing the competition legislation? If so, please provide details.

Local counsel are not aware of any cases of this nature.

33. Please explain how exclusivity clauses and non-compete restraints are treated in your jurisdiction. Have there been any prosecution against entities for implementing exclusivity clauses or non-compete restraints? If so, please provide details.

These are unfair trade practices, which attract criminal charges, in terms of which individuals may be liable for imprisonment for a period not exceeding two years, and fine, or both, imprisonment and fines.

34. Has the authority launched and publicised any new investigations since January 2021 against any entities for engaging in prohibited practices? If so, please provide details.

In March 2021, the CTC launched and publicised the investigation into the alleged restrictive practice by schools to compel the purchase of uniforms from specific suppliers.

35. Does the competition legislation contain provisions on the abuse of buyer power? If so, has the authority brought any cases against entities accused of abusing buyer power? If so, please provide details.

There are no legislative provisions on the abuse of buyer power.

36. Is cartel conduct/ anti-competitive conduct criminalised in your jurisdiction? If so, have any criminal charges been brought/convictions made against any persons and/or entities for engaging in any anti-competitive conduct? If so, please provide details.

Yes. Cartel conduct is criminalised in terms of the Competition Act, along with other forms of anticompetitive conduct, such as undue refusal to distribute commodities or service, collusive arrangements between competitors, exclusive dealing, resale price maintenance and predatory pricing. That being said, local counsel are not aware of any criminal charges that have been brought against persons engaging in anticompetitive conduct

REGIONAL BODIES / COOPERATION

37. Please confirm whether your jurisdiction is a member of any regional bodies that have a competition law regime (e.g., COMESA, CEMAC, EAC, etc.).

Zimbabwe is a member of COMESA. Therefore, activities in Zimbabwe should be conducted with COMESA competition laws in mind.

38. Please confirm whether your jurisdiction has signed any Memorandum of Understanding with any other jurisdiction. If so, kindly provide details.

Local counsel are not aware, as this information is not readily available.

39. If a merger is notifiable in your jurisdiction and the thresholds for regional notification are also triggered, are parties required to notify both domestically and regionally?

Mergers are notifiable domestically where they affect Zimbabwe. If the merger affects two or more Member States, notification will be required at COMESA level, without the need for domestic notification.

40. Please describe cases where a regional body has engaged with your local competition authority in relation to enforcement of competition law cases or merger reviews.

Local counsel are not aware of any such cases.

41. Please describe any announced cooperation between your local competition authority and regional body(ies) in relation to new or ongoing investigations.

Local counsel are not aware of any such cases.

In collaboration with:

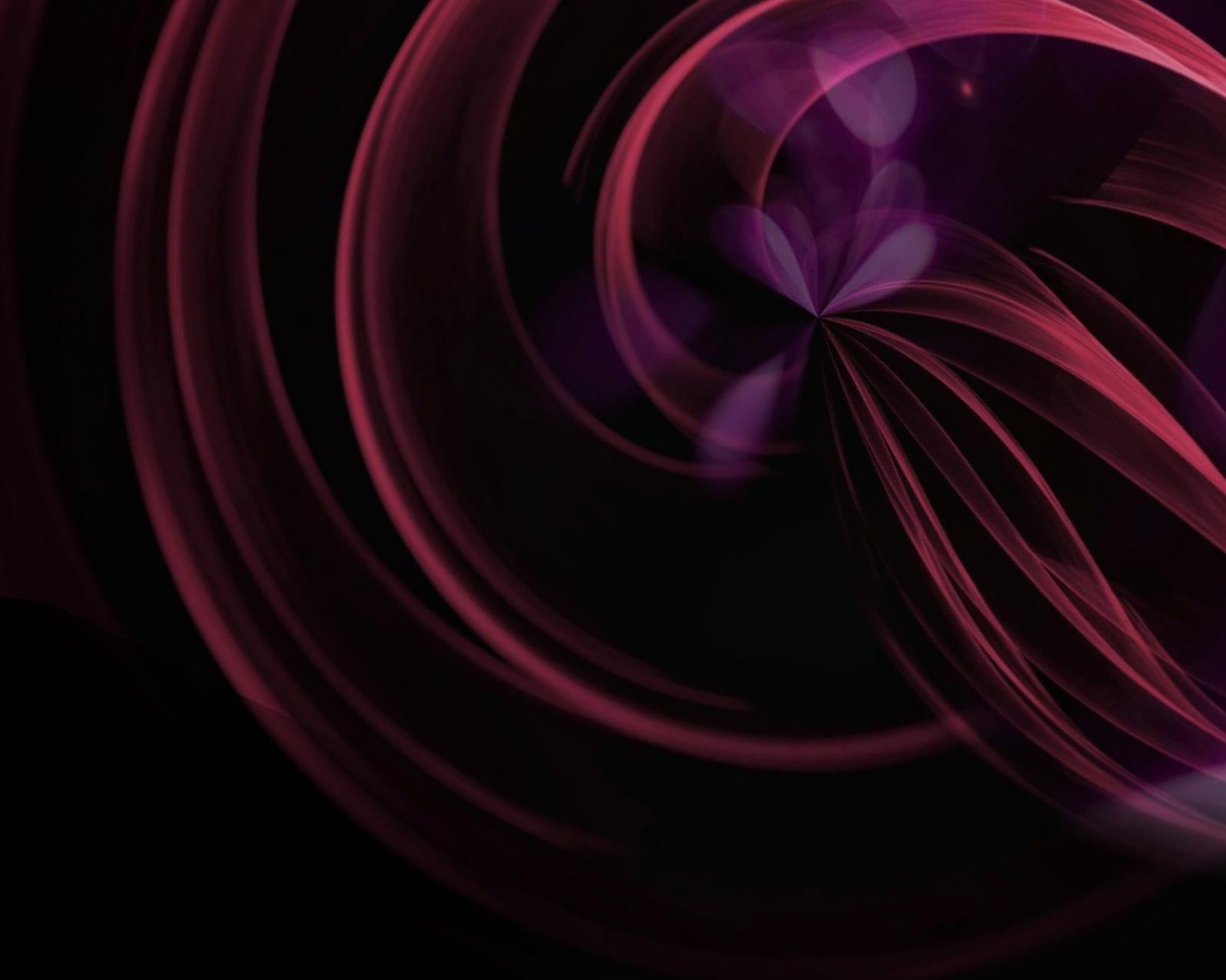


Atherstone & Cook

Amalia Manuel

Partner

T +263 242 704 244 / +263 242 794 994



Baker McKenzie helps clients overcome the challenges of competing in the global economy.

We solve complex legal problems across borders and practice areas. Our unique culture, developed over 70 years, enables our 13,000 people to understand local markets and navigate multiple jurisdictions, working together as trusted colleagues and friends to instill confidence in our clients.

bakermckenzie.com

© 2022 Baker McKenzie. All rights reserved. Baker & McKenzie International is a global law firm with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner or equivalent in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.