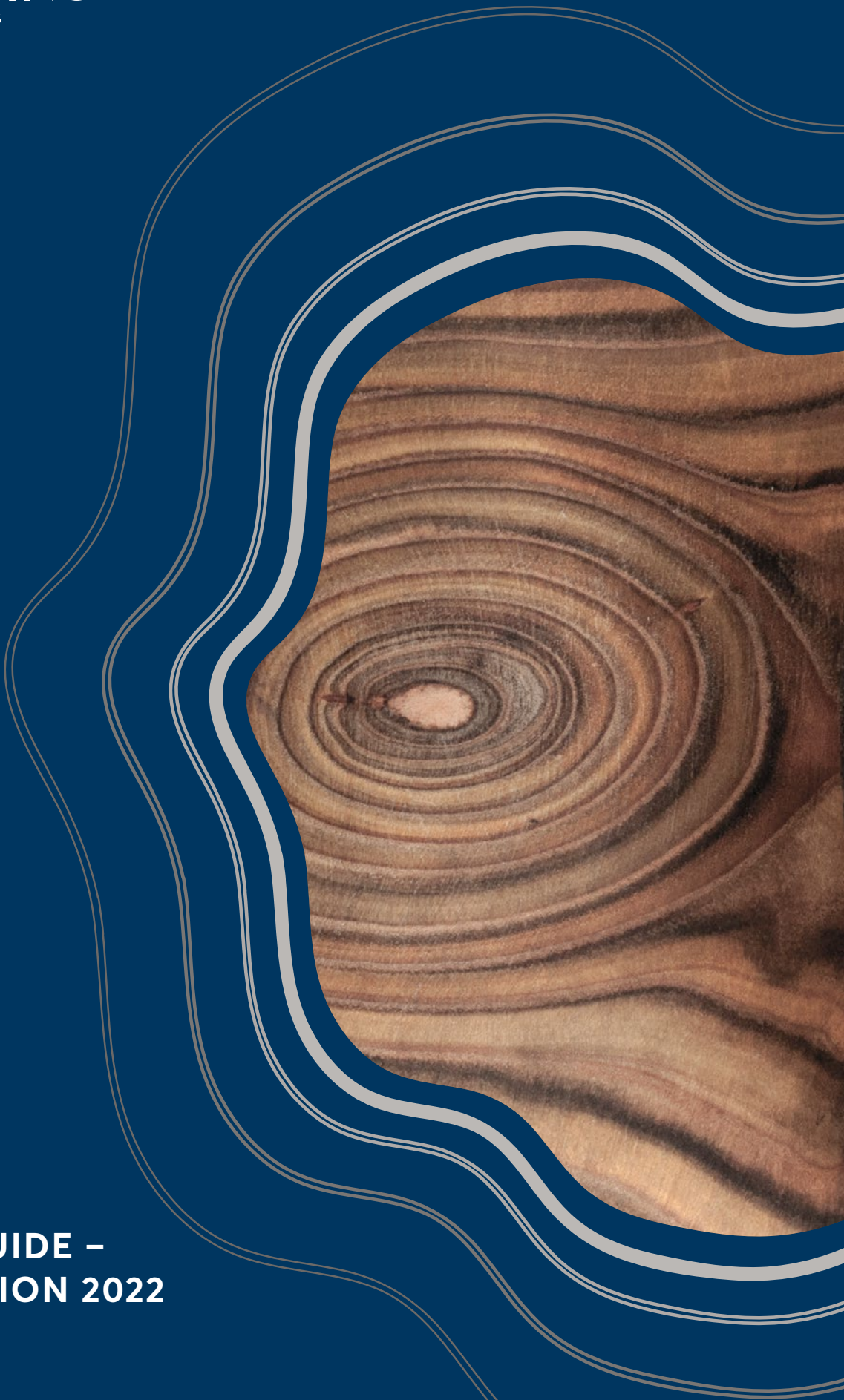




**BOWMANS**

THE VALUE OF KNOWING



**AFRICA GUIDE –  
COMPETITION 2022**





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# Recent developments in competition law on the African continent – 2021

The Africa Competition Law Guide provides answers to frequently asked questions relating to competition law regimes in various African jurisdictions. It has been prepared by competition law specialists in our Kenyan, Mauritian, South African, Tanzanian, Ugandan and Zambian offices and our alliance firms in Ethiopia and Nigeria, as well as local lawyers with whom we work across the continent.

Regulators across the continent spent much of last year evaluating and consulting on options to strengthen existing competition legislation, enhance enforcement powers and increase transparency and predictability in competition law assessment.

There has also been an accelerated focus on competition in digital markets, and public interest considerations continued to take centre stage. Softer, but equally important, were the various initiatives by competition regulators operating nationally and regionally to coordinate on investigations and enhance cooperation.

Some notable highlights are as follows below:

- **AfCFTA** – the successful implementation of the African Continental Free Trade Area (**AfCFTA**) agreement will enable firms to do business transcending national borders. This development, however, requires the adoption of market governance approaches to ensure that anti-competitive practices having cross-border effects do not erode the many benefits of the AfCFTA. Intended to guard against this is the Protocol on Competition which aims to provide a continental approach to competition law in Africa. Negotiations on the Competition Protocol have begun, with a view to finalising it during 2022.
- **Angola** – Angola joined the list of African countries to have an active, independent competition regulator when the Autoridade Reguladora da Concorrência (**ARC**) became operational in 2019. In the same year, the ARC reviewed its first merger, but it was only in 2021 that merger filing fees were introduced. Other materials to support the ARC's merger control regime and approach to restrictive practices were also published in 2021, and most recently, the ARC launched a whistle-blower portal on anti-competitive practices.
- **Common Market for Eastern and Southern Africa (COMESA)** – the COMESA Competition Commission (**CCC**) continues to be one of the most active regional competition regulators on the continent. During the past year, the CCC, for the first time, issued a penalty against firms for late notification of a merger. Subsequently, and again for the first time, the CCC fined merging parties for breach of a merger condition. The CCC also launched an investigation against beer producers operating in the common market citing possible market allocation. Various guidelines and practice notes in the amplification of the competition legislation were also published and the CCC indicated that the implementation of a corporate leniency policy is not too far behind.
- **East African Community** – The East African Community (**EAC**) Competition Authority became operational in 2018, but to date has focused on restrictive practices and is not yet accepting merger notifications. However, plans are afoot to substantively amend the competition legislation in the EAC and its 2016 Competition Act is in the process of being repealed in its entirety. The EAC Competition Bill, 2020 was passed in the Legislative Assembly during 2021, although approval from the Summit is still required before it is brought into effect. Draft Merger Regulations were also published, but these are still following regulatory processes and it is understood that the implementation of the merger regulations may take a while longer.

- **Economic Community of West African States (ECOWAS)** – signalling a shift towards greater competition law enforcement in the region, in 2021 the ECOWAS competition authority published a bid for consultancy services to, *inter alia*, assess its legal framework and develop operational tools in relation to mergers; assist to develop guidelines on case investigations, enforcement and the levying of penalties; and the adoption of a leniency policy.
- **Egypt** – during the past year, the Egyptian Competition Authority has sought to prosecute firms for failing to notify mergers, and to criminally prosecute firms for engaging in anti-competitive practices. Amendments to Egypt’s principal competition legislation is also being discussed before certain committees at the Egyptian Parliament. The proposed amendments provide for a wholesale change to the existing merger control regime, and in particular, the adoption of an ex-ante merger notification regime.
- **eSwatini** – it is expected that the eSwatini Competition Bill will repeal the current Competition Act in its entirety. Whilst it is understood that stakeholder comment on the Bill closed during 2021, it is not yet known when the Bill will be signed into law.
- **Ethiopia** – whilst there have been no significant developments in Ethiopia’s competition law regime over the past year, the institutional regulatory framework has recently changed in that the competition authority was shifted under the auspices of the Ministry of Trade and Regional Integration.
- **Ghana** – there is, as yet, no dedicated competition law regime in Ghana. However, a draft Competition Bill is receiving further review by the Ministry of Trade and is to be submitted to Cabinet. There is no indication as to when this will be done, although there are various calls to implement competition legislation in Ghana as a matter of urgency and in light of the looming Competition Protocol under the AfCFTA.
- **Kenya** – over the past year, the Competition Authority of Kenya has sought to strengthen its enforcement powers, publishing a host of regulations and guidelines, including for example, Guidelines on Informant’s Reward Scheme Policy; Buyer Power Guidelines; Joint Venture Guidelines; Block Exemption Guidelines on Certain COVID-19 Economic Recovery Priority Sectors; and Retail Code of Practice, including template contracts to reduce disputes in the retail and insurance sectors and ensuring compliance with competition and consumer protection laws.
- **Malawi** – the Competition and Fair Trading Commission aims to strengthen its enforcement powers in Malawi and had published, amongst a closed group of stakeholders, a series of guidelines on: abuse of dominance; collusive conduct; resale price maintenance; predatory pricing, price discrimination and tying; market definition; and public interest.
- **Mauritius** – in the past year, the work of the Mauritius Competition Commission (**MCC**) ranged from reviewing merger notifications to prosecuting firms for anti-competitive practices. During the year, the MCC ordered its first divestiture in the alcohol market; launched investigations into advertising incentives offered to real estate agents; began investigations into exclusivity in the local fly ash market and into match fixture lists; published a report on the outcome of its market study in the airline industry; and reviewed various mergers across the COMESA Common Market.
- **Mozambique** – Mozambique’s competition law framework was adopted in 2013, but operationalisation of the Competition Regulatory Authority (**CRA**) stalled thereafter. In 2021, the CRA became operative and began receiving notification of mergers. In the same year, the CRA published merger notification forms and issued a decree on the payment of merger filing fees. Now that merger notifications are regularly being filed with the CRA, the CRA is turning its attention towards anti-competitive practices, indicating that its future enforcement priorities will be in the fields of cement and construction; beverages; consumer goods, in particular, flour, vegetable oils, soap and sugar; pharmaceuticals; financial services; and telecommunications.



- **Namibia** – the Namibian Competition Commission published the Namibian Competition Bill in 2020, which proposes a repeal of the existing Competition Act and the introduction of sweeping changes to the competition law regime in the country. The Bill remains in draft form and no timelines for its implementation have yet been determined.
- **Nigeria** – during the year, and following an extensive lobbying process, the Federal Competition and Consumer Protection Commission (**FCCPC**) adjusted its merger filing fees, lowering its fees in some respects but also increasing its fees in other respects. The FCCPC also launched an electronic portal via which merger notifications may be submitted, pre-consultations may be arranged, and providing a filing fee calculator. In relation to anti-competitive practices, the FCCPC conducted raids at the offices of various shipping companies for alleged violations of the Federal Competition and Consumer Protection Act, 2019, and also invited public comment on proposed regulations relating to restrictive agreements and trade practices and abuses of dominance.
- **South Africa** – 2021 was another busy year for the South African Competition Commission and Department of Trade, Industry and Competition, with both agencies working together to regulate and enforce competition law in the country more stringently. Notable highlights include the launch of a market inquiry into online intermediation platforms; revised draft small merger guidelines intended to capture small mergers taking place in the digital sector that fall below the thresholds for mandatory merger notification; a competition policy for jobs and industrial development; draft guidelines on collaboration among competitors on localisation initiatives; and proposed amendments to merger notification forms.
- **Zambia** – the Zambian Competition and Consumer Protection Commission (**CCPC**) prosecuted a number of firms this year for engaging in anti-competitive behaviour, including price fixing and collusive tendering. Contravening firms were fined as much as 10% of their annual turnover, being the maximum penalty the CCPC is allowed to levy. The CCPC also launched an investigation against independent beer distributors for alleged tying and bundling and facilitating unreasonable price hikes in the market for clear beer products, and also ordered firms in the cement industry to lower their pricing.
- **Zimbabwe** – during the year, the Zimbabwe Competition and Tariff Commission fined merging parties for prior implementation of a merger; launched investigations into the price of cooking oil, as well as exclusivity agreements relating to school uniforms; and indicated its intention to prioritise investigating behaviour in digital markets.

# Our Competition Law Practice

Competition law presents various challenges for companies doing business in Africa. The number of competition law regimes across Africa has increased significantly in recent years and national regulators across the continent are increasingly active.

There are also a number of regional organisations regulating competition law, for example, the Common Market for Eastern and Southern Africa (**COMESA**), the Central African Economic and Monetary Community (**CEMAC**), and the East African Community (**EAC**), which are also strengthening their enforcement powers to effectively regulate competition law at a regional level.

We are at the forefront of developments in African competition law. We monitor competition law developments in various jurisdictions, consider the impact on our clients' business activities in Africa and strive to develop the application of the law pragmatically. Our internationally recognised competition law experts participate in special committees on competition law; actively comment on draft legislation, guidelines and amendments in a variety of African countries; and regularly contribute to local and international competition law publications. We are committed to the representation of our clients' interests and are proud to be involved in most of the prominent competition law cases across Africa.

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

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

We were named Competition Team of the Year for 2020, at the prestigious African Legal Awards hosted by Legal Week and the Corporate Lawyers Association of South Africa.

We have consistently been included in the GCR 100, a ranking of the world's top 100 competition law firms, and, according to IFLR1000, we are 'most definitely considered a front-runner in the market' and our peers praise the 'consistent quality' of our work.



# Angola



**VIEIRA DE ALMEIDA &  
ASSOCIADOS - SOCIEDADE DE  
ADVOGADOS, SP RL.**

Ricardo Bordalo Junqueiro  
Cláudia Coutinho da Costa



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

The Angolan Competition Authority (**ACA**) is the authority that enforces the Angolan competition legislation, having regulatory, supervisory and sanctioning powers. It has administrative and financial autonomy, although it is overseen by the ministerial department responsible for public finances.

The main legislative acts relevant for competition law purposes in Angola are the following:

- Competition Act (approved by Law No. 5/18, of 10 May 2018), establishing (i) the prohibition of restrictive practices of competition, including restrictive agreements, concerted practices, abuse of dominant position, and abuse of economic dependence, (ii) a merger control procedure, and (iii) a state aid regime;
- Competition Regulation (approved by Decree No. 240/18, of 12 October 2018), which complements the Competition Act, setting important procedural rules of anti-trust investigations and the relevant jurisdictional thresholds for merger control review, among other things;
- Merger Control Notification Form (approved by ACA Instruction No. 1/20, of 27 January 2020). This act approves a regular notification form and a simplified notification form;
- The Leniency Programme (approved by ACA Instruction No. 7/20, of 25 September 2020). Sets the legal framework for granting reduction of fines to undertakings concerning the infringement of anti-trust rules, according to the Competition Regulation;
- Complaints Regulation (approved by ACA Instruction No. 8/20, of 25 September 2020), which approves a complaint procedure against competition law infringements; and
- Executive Decree No. 32/21 of 1 February 2021, approving administrative fees due to the services rendered by ACA (including filing fees).

## 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

The ACA has adopted several soft law documents in 2020 and 2021, such as the Guidelines on Merger Control Filing Form, Guidelines on Setting

Fines and Guidelines on the Adoption of Merger Control Commitments, Guidance on Competition Compliance and Guidance to Associations of Undertakings. The Competition Act also contemplates that other legal instruments should be adopted, such as the condition to apply for a derogation from the standstill obligation in merger control.

## 3. Is the law actively enforced?

The law is actively enforced by the ACA in respect of mergers and restrictive practices. It is not only assessing mergers under the merger control procedure, but it is also conducting market studies and investigations in several sectors and analysing potential restrictive practices. This active trend is expected to increase. Sectors under scrutiny since 2019 are/were, *inter alia*, consumer goods, civil aviation, beverages, private education, telecoms, energy and payment services.

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

The ACA is focused on merger control and restrictive practices. It appears particularly interested in traditionally concentrated sectors in Angola.

It is also actively engaged in advocacy, having conducted a number of conferences and webinars in 2020-2021.

The ACA is also focused on establishing contacts and mechanisms to increase and facilitate interaction with sector regulators, such as the Telecom Regulator - INACOM, the Electricity and Water Regulator - IRSEA, and the Insurance Regulator - ARSEG.

The ACA is also working closely with the Angolan State within the Privatisation Programme Monitoring Group, which aims to prevent market distortions related to public contracts and public privatisation. In this regard, it should be recalled that the Angolan Government has set up an ambitious privatisation programme (PROPRIV) aiming to privatise almost 200 companies between 2019 and 2022.



## **5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?**

Under the Competition Act, a transaction is subject to merger control proceedings if it is a 'concentration' – i.e., if it involves a change of control on a lasting basis – and certain thresholds are met.

*Control* is defined as the possibility of exercising a decisive influence over the activity of an undertaking on a lasting basis, whether solely or jointly, and taking into account the elements of fact and of law, specifically the acquisition of (i) the whole or a part of the share capital; (ii) ownership rights, or rights to use the whole or a part of the assets of an undertaking; and (iii) rights or the signing of contracts which confer a decisive influence on the composition, voting or decisions of the undertaking's corporate bodies.

Although the creation of full function joint ventures is not expressly envisaged in the Competition Act, there are other legislative documents that refer to it and the ACA has already analysed concentrations involving joint ventures.

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

Foreign-to-foreign concentrations are subject to merger control clearance by the ACA to the extent that they (i) involve activities that may have effects in Angola and (ii) meet one of the thresholds for mandatory notification of concentrations to the ACA.

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

Pursuant to the Competition Regulation, concentrations are subject to prior notification to the ACA when they fulfil one of the following alternative thresholds:

- as a result of the concentration, a market share of at least 50% is acquired, created or reinforced in the domestic market of a specific product or service, or in a substantial part of it;
- as a result of the concentration, a market share equal to or higher than 30% but lower than 50% is acquired, created or reinforced in the domestic market of a specific product or

service, or in a substantial part of it, and the individual turnover in Angola of at least two of the undertakings involved in the concentration, in the previous financial year, is higher than KWA 450 million net of taxes directly related to that turnover; or

- the undertakings involved in the concentration reached an aggregate turnover in Angola in the previous financial year higher than KWA 3.5 billion net of taxes directly related to that turnover.

A concentration that does not meet the abovementioned thresholds may still be subject to a post-closing notification (albeit under a simplified notification form), if the ACA considers that the concentration will impede, distort or restrict competition and is not exempted under the rules on restrictive agreements.

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

Pursuant to the Executive Decree No. 32/21, of 1 February 2021, the following fees are due for merger control review by the ACA: (i) KWA 2 418 944.15, if turnover exceeds KWA 450 million or (ii) KWA 3 627 916.96, if turnover exceeds KWA 3.5 billion.

## **9. What is the merger review period?**

The ACA is required to adopt a decision within 120 days (Phase I) or, in case of in-depth investigations, within 180 days (Phase II) after the date on which it received a notification.

If these timelines are not complied with, the concentration is deemed to be cleared by the ACA.

However, the ACA may suspend the timelines for its review of concentrations for as long as it determines if remedies are submitted by the merging parties.

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

A concentration that meets the jurisdictional thresholds set out above is subject to mandatory prior notification and to a standstill obligation, i.e., it cannot be implemented before the adoption of an express or tacit clearance decision by the ACA.

Under Angolan Competition Law, violation of the notification and/or standstill obligation exposes the undertakings to several consequences, *inter alia*:

- Infringement of the prior notification obligation exposes the undertakings to fines between 1% and 5% of domestic turnover in the preceding year of each of the involved undertakings;
- Infringement of the standstill obligation exposes the undertakings to fines between 1% and 10% of domestic turnover in the preceding year of each of the involved undertakings;
- Ancillary penalties may apply should the ACA conclude that the infringements are particularly severe. This includes publication of the imposition of a fine in the national newspaper with the highest national circulation, the spin-off of an undertaking, transfer of control, disposal of assets, winding down of activities, or any other act or measure that it deems necessary to eliminate the harmful effects on competition;
- Periodic penalty payments on the undertakings involved of up to 10% of their average daily turnover may also apply.

**11. Are pre-notification contacts with the authorities permitted? Are pre-notification meetings normal practice?**

The Competition Law and Competition Regulation are silent on pre-notification meetings or contacts with the ACA. However, the ACA is usually open to pre-notification discussions or meetings and willing to provide guidance to companies.

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

Pursuant to the Competition Regulation, if the ACA determines that a merger is likely to impede or substantially reduce competition, the ACA is required to assess certain other factors.

The factors set out in the Competition Regulation are:

- (i) the effects of the transaction on a specific sector or region;
- (ii) employment;
- (iii) the capability of small companies or companies controlled or owned by historically disfavoured persons to become competitive;

- (iv) the capability of national industry to compete in the international market; or
- (v) technological, efficiency or any other type of competitive gain which outweighs the reduction of competition and that would probably not be obtained absent the merger.

**13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

The ACA is granted with administrative and financial autonomy although it is overseen by the ministerial department responsible for public finances. There is no legal provision that seems to allow government intervention in merger control procedure.

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

Once a filing is received by the ACA, it is legally bound to promote the publication of non-confidential details of the transaction (identification of the parties, date of filing, nature of transaction) in the national newspaper with widest circulation, so that interested third parties, including customers and competitors, may provide comments within the prescribed period of 10 days.

In addition, the Competition Act empowers the ACA to request from any public or private entity the information it deems necessary for its assessment of a merger.

Under a Phase II review, interested third parties may also intervene at a hearing, which is held prior to the adoption of a Phase II decision. This includes, *inter alia*, those who, in the course of the procedure, have objected to the concentration, suppliers, customers and competitors.

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

Once a filing is received by the ACA, it is legally bound to promote the publication of non-confidential details of the transaction (identification of the parties, date of filing, nature of transaction)



in the national newspaper with widest circulation, so that third interested parties, including customers, competitors and employees, may provide comments within the prescribed period of 10 days.

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

Merging Parties can submit proposed conditions at any stage of the ACA's review. Decisions in Phase II mergers are generally subject to a hearing during which merging parties may submit conditions.

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

Final decisions from the ACA are subject to appeal according to the applicable general rules.

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

The Competition Act prohibits anti-competitive practices, namely abuse of dominant position, abuse of economic dependence and restrictive practices (agreements between undertakings, concerted practices and decisions by associations of undertakings), which includes cartel conduct.

Although it seems that the ACA has ongoing restrictive practices investigations, there is currently no public decision on its investigations of anti-competitive practices.

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

The ACA has investigative powers to conduct the administrative procedure, and in particular to:

- Carry out inspections at the premises of undertakings or associations of undertakings involved, to search, examine, collect and seize copies or extracts from writing, and other documentation;
- Require any person to appear before the Authority to give evidence or produce any documents;

- Request from legal representatives of the undertaking or association of undertakings, or any other person, documents and other items of information, if deemed relevant for the progress of the investigation;
- Seal off the premises of undertakings where relevant documentation may be located (if authorised by a judicial warrant); or
- Request assistance from any service of the public administration, including the police, as might be necessary for the attainment of the ACA's goals.

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

Cartel participants are subject to penalties ranging from 1% to 10% of their domestic turnover. The penalties provided by the Competition Act are administrative offences, rather than criminal offences. However, criminal sanctions may also apply according to the general Angolan criminal law.

In cases where an infringement is particularly serious, the ACA may also apply ancillary penalties, including publication of the imposition of a fine in the national newspaper with the highest circulation and restrictions on participation in public tenders for up to three years. The ACA is further entitled to determine the spin-off of an undertaking, disposal of assets, winding down of activities, or to take any other act or measure that it deems necessary to eliminate the harmful effects on competition.

The Competition Act further allows the ACA to impose periodic penalty payments on undertakings of up to 10% of their average daily turnover. Periodic penalty sanctions are permissible only if objectively necessary and, *inter alia*, in cases where an undertaking fails to comply with a decision imposing either sanctions or the adoption of specific measures.

The Angolan Leniency Program is recent and was approved by Instruction No. 7/20, of 25 September. The application should include, *inter alia*, details on the infringement and the identification of companies involved.

Undertakings applying for leniency may benefit from a reduction of the fine if, *inter alia*, (i) their collaboration results in the identification of other

participants of the infringement or in the collection of information and documents relevant to prove the infringement under investigation; (ii) the ACA does not have sufficient evidence to back up the imposition of a fine.

According to Angolan Leniency Program, companies involved in a competition infringement can apply for a reduction of a fine. Full immunity is currently not possible.

The first undertaking applying for leniency may be granted a fine reduction of between 50 - 70%, the second a fine reduction of between 30 - 50% and the third a fine reduction of between 10 - 30%.

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

The Competition Act allows for the granting of exemptions from the prohibition of anti-competitive agreements. To obtain an exemption, undertakings must submit a request for prior assessment by the ACA.

Exemptions may be granted for a limited period if the undertaking is able to demonstrate successfully four cumulative conditions: (i) the agreement contributes to improving the production or distribution of certain goods or services, or to promoting technical or economic progress; (ii) an equitable part of the benefit is passed on to the users of these goods or services; (iii) the agreement does not impose any restrictions that are not indispensable to the attainment of those objectives; and (iv) the agreement does not allow for the elimination of competition in respect of a substantial part of the products in question.

The ACA's decision shall determine the conditions and duration of an exemption.

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

The Competition Act expressly prohibits vertical agreements restricting competition by object or effect which result in the imposition on distributors' resale prices, discounts, payment terms, minimum or maximum quantities, profit margins and any other trading conditions with third parties.

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

Exclusive agreements are not expressly listed and prohibited in the Angolan competition law and there is no decisional practice of the ACA in this regard. Duration and scope of the exclusivity obligation could, in principle, be considered relevant factors to the assessment of the (un)lawfulness of such a commitment by the ACA.

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

The Competition Act prohibits the abuse of dominant position.

An undertaking is deemed to hold a dominant position if its market share is above 50%. This is a rebuttable presumption. Depending on market characteristics, market share below 50% may still amount to dominance.

The following are listed as abusive behaviour if conducted by dominant firms: (i) engage in any conduct that results in agreement to restrict competition; (ii) breach, in whole or in part, a business relationship without justification; (iii) oblige or induce a supplier or consumer not to enter into business relationships with a competitor; (iv) sales below cost; (v) import any goods below the cost of the exporting country; (vi) refuse to provide, against adequate remuneration, to any other company, access to a network or other essential infrastructure under control, provided that without such access the latter company cannot, for factual or legal reasons, operate as competitor of the dominant firm.

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

According to the ACA's 2020 annual report, so far there has been only one investigation procedure regarding abuse of dominant position.

However, at the time of writing, no decision has been made public.



**26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

Yes, please refer to question 20.

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

Price discrimination is listed as a prohibited practice in the context of vertical agreements and abuse of a dominant position.

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

The ACA is required to publish decisions on its website <https://arc.minfin.gov.ao/PortalARC/#/>. However, only a few decisions on merger control have been published to date.

**VIEIRA DE ALMEIDA & ASSOCIADOS -  
SOCIEDADE DE ADVOGADOS, SP RL.**

Rua Dom Luís I, 28  
1200 151 Lisboa  
[www.vda.pt](http://www.vda.pt)

**T:** (+351) 21 311 33 92

# Botswana



## **BOOKBINDER BUSINESS LAW**

Jeffery Bookbinder  
Obakeng Lebotse



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

The relevant competition legislation is the Competition Act, 2018 [Cap 46:09] (**Act**) together with the Competition Regulations, S.I No 154 of 2019 (**Regulations**) being the regulations promulgated in terms of the Act. The Act established the Competition and Consumer Authority (**Authority**). The Act is enforced by the Authority, the Competition and Consumer Board (**Board**), which is the governing body of the Authority, the Competition and Consumer Tribunal (**Tribunal**), which is the adjudicating body of the Authority, and the High Court of Botswana.

## **2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?**

There have been no recent developments in the law.

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

The Act is actively enforced by the Authority, both in respect of mergers and in relation to prohibited practices. Since its establishment in October 2011, the Authority has dealt with over 494 cases. The majority of the cases brought to the Authority are mergers, but there have been a number of abuse of dominance cases and cases of restrictive business practices which have been investigated by the Authority.

In July 2017, the Authority referred four cases of possible resale price maintenance to the Competition Commission (now referred to as the Tribunal). The referred cases were against four wholesalers accused of entering into vertical agreements with banner group members and allegedly involved resale price maintenance in contravention of section 26(1)(b) of the Repealed Act. The Authority has since entered into settlement agreements with each of the wholesalers.

In a separate matter, the Authority had initiated an inquiry following an anonymous tip-off that soccer teams in the local football league were precluded from playing at the national stadium because of an advertising agreement between the Botswana National Sports Commission (**BNSC**) and a local mobile phone service provider. It was alleged that the advertising agreement was couched in

such a way that competitors of the mobile phone service provider and any teams they sponsored were precluded from carrying out activities at the national stadium. The agreement allegedly prohibited teams in the local football league from playing at the national stadium as the local football league was sponsored by a competitor of the mobile phone service provider. The Authority engaged BNSC and the mobile services provider. The Authority's intervention led to teams in the local football league being able to play their matches at the national stadium.

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

In December 2020, the Authority prohibited a merger in the property ownership and letting space in Botswana, on the basis that the transaction would *inter alia* give rise to horizontal overlaps, would enhance the dominance of the acquiring firm in the relevant market, increase market concentration and would result in the removal of an effective competitor. The Authority was also of the view that barriers to entry in the relevant market were high, with limited countervailing power.

More recently, and in May 2021, the Authority entered into a settlement agreement with Gaborone Container Terminal (Pty) Ltd (**1**) in a matter before the Tribunal. The Authority alleged, and GABCON admitted, to having abused its dominance by imposing restrictions on a group of private hauliers, preventing them from efficiently servicing their customers.

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

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



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

### 5. What kind of transactions constitute a notifiable merger and how are joint ventures treated?

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

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

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

- beneficially owns more than one-half of the issued share capital of the enterprise;
- is entitled to vote a majority of the votes that may be cast at a general meeting of the enterprise, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;
- is able to appoint or veto the appointment of a majority of the directors of the enterprise;
- is a holding company, and the enterprise is a subsidiary of that company as contemplated in the Companies Act [Cap 42:01];
- has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust, in the case of an enterprise being a trust;
- owns the majority of the members' interests or controls directly or has the right to control the majority of members' votes in the close corporation, in the case of the enterprise being a close corporation; or

- has the ability to materially influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the bullet points above.

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

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

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

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

A merger is notifiable if it meets the following thresholds:

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



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

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

## **9. What is the merger review period?**

The Authority has an initial period of 30 business days to conduct its investigation and make a decision in respect of the merger. Where the Authority requests further information, it may extend the review period for a further 30 business days from the date of receipt of that information. If a hearing is convened, a decision must be delivered within 30 business days of the date of conclusion of the hearing. Where the Authority is of the opinion that the issues involved are of a complex nature, it may extend the period, for a further period not exceeding 60 business days. If the Authority does not make a decision within the period prescribed, the merger will be deemed to be approved by the Authority.

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

Parties to a notifiable merger may not implement the merger (i) before obtaining the requisite approval; or (ii) prior to the period for the Authority's review having lapsed without the Authority having made a determination in relation to the merger. Where the Authority forms a reasonable suspicion that a merger is being, or has been, implemented in contravention of the Act, the Authority may give direction in writing to the enterprise(s) concerned, *inter alia*, requiring the parties to provide information regarding the suspected merger or restraining the parties from implementing the merger pending the Authority's investigation and approval. Prior implementation now attracts a penalty not exceeding 10% of the consideration or combined turnover of the parties, whichever is greater.

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

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

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

The Act specifically provides for public interest considerations to be taken into account. As part of the merger assessment process, the Authority may take into account any factor it considers relevant to the broader public interest, including:

- whether the merger would result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition, or to the acquisition or strengthening of a dominant position in a market;
- the effect that a merger will have on a particular industrial sector or region;
- employment;
- the production or distribution of goods or the provision of services;
- exports;
- citizen empowerment; and
- the ability of national industries to compete in international markets.

The Authority has taken into consideration non-competition factors such as public interest, employment and citizen empowerment in the assessment of mergers. For example, the Authority has approved a number of mergers, on condition that the merged entities would not retrench any Botswana-based employees for a period of two or three years from the date of implementation of the merger.

## **13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

The Act does not provide for government intervention. However, where a merger raises issues of public interest, the Minister of Investment, Trade and Industry may provide comments in writing to the Authority within a reasonable period, and such comments must be considered by the Authority in making a decision.

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

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

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

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

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

In terms of the Act, the Authority may, if it considers it appropriate, determine that one or more hearings should be held in relation to a proposed merger. In such cases, the Authority is required to give reasonable notice in writing. The parties are then required to submit to the Authority, within 30 business days of receipt of the notice, any representations that they may wish to make in relation to the proposed action.

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

Mergers are investigated by the Authority and any person or firm aggrieved by a decision of the Authority has 60 business days from the date of the decision to lodge an appeal with the Tribunal.

A person or firm aggrieved by any decision of the Tribunal may, within 30 business days after the decision of the Tribunal, appeal or make an application for judicial review to the High Court of Botswana.

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

The Act regulates prohibited practices and specifically prohibits certain horizontal restrictive practices (unlawful competition between competitors). The Act stipulates that no enterprise shall enter into a horizontal agreement with another enterprise to the extent that such agreement involves certain practices, such as:

- price-fixing (either direct or indirect);
- dividing markets (by allocating customers, suppliers, territories or specific types of goods or services); and
- bid rigging (except where the person requesting the bids or tenders is informed of the terms of the agreement before the time that the bids or tenders are made).

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

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



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

The Act confers broad investigative powers on the Authority. Notably, the Act empowers the Authority to subpoena any person considered by the Authority to be relevant to the investigation. Part VIII of the Act stipulates the investigative powers of the Authority in respect of prohibited horizontal and vertical agreements. Section 36 to section 38 of the Act empowers the Authority, either on its own initiative or upon receipt of information or a complaint from any person, to initiate an investigation into any practice that it reasonably suspects constitutes a contravention of the prohibited horizontal or vertical agreements provisions of the Act, or amounts to an abuse of a dominant position in the market.

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

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

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

Notwithstanding these broad powers of investigation, the Authority is not empowered to demand the production or disclosure of information or documents which would be subject to legal professional privilege in a court of law. However, the Authority is empowered to demand and be provided with the names and addresses of an

enterprise's clients where required. Further, the Act empowers the Authority to conduct dawn raids with or without a warrant. Recently, the Authority conducted four dawn raids in the medical aid and motor vehicle industries as well as suppliers of government food rations and one dawn raid in the chicken, day-old chick and chicken feed supply industry.

An investigation in terms of the Act may only continue for a period of 12 months, after which the Authority must either refer the matter to the Tribunal for prosecution if the Authority determines that a prohibited practice has been established, or issue a certificate of non-referral to the complainant.

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

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

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

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

- price-fixing (either direct or indirect);
- dividing markets (by allocating customers, suppliers, territories or specific types of goods or services);
- bid rigging (except where the person requesting the bids or tenders is informed of the terms of the agreement before the time that the bids or tenders are made); and
- resale price maintenance.

The Authority has a leniency policy in place. An application for leniency may be made either orally or in writing at the premises of the Authority. Initial contact can be made by telephone to secure a

place in the marker queue, provided the Authority is provided with the name of the applicant and a description of the cartel conduct including the market.

Upon such application, the Authority shall respond in writing, within three days after the application was made, acknowledging receipt of such application for leniency, specifying the way the application has been received by the Authority. In the event of a dispute as to whether an application for leniency was made, the acknowledgement letter of the Authority shall be conclusive evidence of such application. The enterprise making a leniency application should immediately provide the Authority with all the evidence relating to the suspected breach available to it at the time of application for leniency.

The leniency policy may be accessed [here](#).

Criminal sanctions are now applicable for officers or directors of enterprises who commit acts of price fixing, market division and bid rigging, with the officer or director becoming liable for a fine not exceeding BWP 100 000.00 or a term of imprisonment not exceeding five years, or both.

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

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

- the maintenance of lower prices, higher quality or greater choice for consumers;
- the promotion or maintenance of the efficient production, distribution or provision of goods and services;
- the promotion of technical or economic progress in the production, distribution or provision of goods and services;
- the maintenance or promotion of exports from Botswana or employment in Botswana;
- the strategic or national interest of Botswana in relation to a particular economic activity being advanced;

- the provision of social benefits which outweigh the effects on competition;
- the agreement occurring within the context of a citizen empowerment initiative of Government; or
- the agreement in any other way enhancing the effectiveness of the Government's programmes for the development of the economy of Botswana, including the programmes of industrial development and privatisation; provided that the prevention or lessening of competition is proportionate to the benefits for the public and does not allow the enterprise concerned to eliminate competition completely.

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

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

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

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

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

An exclusive agreement may be prohibited by the Authority if, following an investigation by the Authority, such agreement is found to have the object or effect of preventing or substantially



lessening competition in a market for any goods or services in Botswana. The factors to be considered are, *inter alia*, whether the agreement in issue limits or controls production, market outlets or access, technical development or investment.

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

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

The Authority will consider a dominant position to exist in the supply of goods or services if (i) 25% of those goods or services are supplied by one enterprise, or are acquired by one enterprise; or (ii) 50% of those goods or services are supplied by three or fewer enterprises, or are acquired by three or fewer enterprises. The Act provides that, in determining whether an abuse of a dominant position has occurred, the Authority may have regard to whether the agreement or conduct in question:

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

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

Yes, the Authority has removed a barrier to entry in the machining/line boring services market following an intervention it initiated upon receipt of information that Komatsu Botswana (Pty) Ltd and Barloworld Equipment Botswana (Pty) Ltd were engaged in the conduct of abuse of dominance, by refusing to register or list suppliers on their vendors list database for the provision of machining/line boring services.

Further, the Authority had also referred a case against GABCON alleging that GABCON had imposed restrictions on a group of private hauliers, preventing them from efficiently servicing their customers. The matter was subsequently settled.

**26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

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

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

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

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

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

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

**BOOKBINDER BUSINESS LAW**

9th Floor, iTowers North  
Lot 54368, CBD Gaborone  
Private Bag 382, Gaborone  
Botswana

**T:** +267 391 2397

**W:** [www.bookbinderlaw.co.bw](http://www.bookbinderlaw.co.bw)





# Burundi



**BOWMANS**



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

The relevant competition legislation is Law No. 1/06 of 25 March 2010 (**Act**), which came into effect in March 2010. No ministerial orders have yet been issued to support the application of the Act, albeit it is understood that a draft decree relating to the establishment of the competition regulator was submitted to the President of Burundi in April 2017 and is awaiting Presidential assent.

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

### 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

There have been no recent developments.

### 3. Is the law actively enforced?

Although the Act is in effect, it is not possible to enforce given that the Commission has yet to be established.

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

The Commission has yet to be established.

### 5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?

In terms of the Act, a mandatory obligation is placed on merging parties to notify the Commission of concentrations meeting a prescribed threshold (see question 7). A concentration is deemed to arise where:

- two or more undertakings unite through merger or acquisition or any other form of horizontal, vertical or heterogeneous takeover;

- there is a transfer of ownership or use of all or part of the property, rights or obligations of a company; or
- the transaction has the effect or purpose of allowing a company or a group of companies to directly or indirectly exercise a dominant influence in the relevant market.

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

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

This is as yet unclear.

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

The thresholds for mandatory notification have yet to be prescribed. Where the individual and combined turnover of the undertakings concerned exceed the threshold prescribed by the Ministry of Trade, notification is mandatory. Notification is also mandatory where the individual and combined turnover of the undertakings concerned are below the thresholds prescribed by the Ministry of Trade, and such mergers must be notified to the Commission within 15 days of their completion.

### 8. What filing fees are payable?

Filing fees have not yet been prescribed.

### 9. What is the merger review period?

Notifiable concentrations cannot be implemented for a period of three months commencing on the date of notification to the Commission.



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

The Act establishes a tiered structure whereby the ability to pre-implement a concentration is contingent upon the threshold being exceeded. Concentrations categorised as falling below the threshold may be implemented prior to their notification to the Commission provided that the Commission is notified within the prescribed period after completion of the concentration. Concentrations categorised as exceeding the thresholds shall not be implemented prior to notification and approval by the Commission. There are no penalties for pre-implementation, but the Commission has the right to cancel the merger.

**11. Are pre-notification contacts with the authorities permitted? Are pre-notification meetings normal practice?**

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

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

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

**13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

See question 15.

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

Not applicable.

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

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

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

Not applicable.

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

In terms of the legislation, the Commission will consider applications for review of its decisions where circumstances have changed. Decisions, which will need to be motivated and made publicly available, will be capable of being appealed. Such an appeal will have no suspensive effect.

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

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

- limit access to the market;
- interfere with price setting through market forces, by artificially increasing or decreasing prices;
- distort the market, distribution channels and sources of supply;
- limit or control production, markets, investment or technical development;

- distort or fix conditions to a tender without informing the tenderer; or
- amount to a refusal to sell.

As the Commission is not yet operational, there are no examples of the Commission pursuing firms for engaging in cartel conduct.

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

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

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

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

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

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

The undertaking must pay the penalty within a period of 60 days, commencing on the date of notification of such penalty. Where there is a delay in paying the penalty, the undertaking is liable for further payment whereby a daily amount is imposed, equivalent to a hundredth of the original

penalty. Upon the non-payment of a penalty, the Commission may order the temporary closure of the undertaking. Where the undertaking produces a variety of products, the closure affects the products subject to the anti-competitive practice(s).

An undertaking that suffers losses or damages as a result of anti-competitive practices may apply to the Commission for an order for damages if it can establish a causal link between the anti-competitive practices and any damage suffered by it.

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

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

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

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

Minimum resale price maintenance is prohibited, save in the case of books, newspapers, or any other publications or where the sale of a particular product is specifically regulated.

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

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



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

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

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

However, if the undertaking can establish that the practices concerned are aimed at or result in an increase in the quality of goods or services, or the improvement in production or the reduction of costs, in addition to an improvement in the technical, technological or economic processes, the practices mentioned above will be deemed to fall outside the scope of the abuse of dominance. The practices must not result in any anti-competitive effect going beyond what is strictly required to achieve the gains. Furthermore, the practices must not eliminate all forms of competition in a substantial part of the particular sector.

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

Not applicable.

**26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

The Commission may impose the same sanctions for the abuse of dominance as those which may be imposed for restrictive agreements and practices. See question 10.

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

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

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

Not applicable.

# Cameroon



**BESONG & CO.**

Bayee A. Besong



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

The relevant competition legislation in Cameroon is Law No. 98/013 of 14 July 1998 (**Act**); Decree No. 2005/1363/PM of 6 May 2005 (**Decree**), which establishes the composition and operation of the National Competition Commission (**NCC**); and Ministerial Order No. 0000003/MINCOMMERCE of 16 February 2010 (**Order**), which sets thresholds, conditions and declarations and deals with the notification of mergers and acquisitions to the NCC.

The NCC, which falls under the Ministry of Commerce, enforces the legislation. Cameroon is a member of the Economic and Monetary Community of Central Africa (**CEMAC**), which oversees anti-competitive practices in terms of Regulation No. 06/19-UEAC-639-CM-33 of 7 April 2019 (**CEMAC Regulations**). While the CEMAC Regulations regulate transactions that have an impact on the CEMAC market (i.e. more than one CEMAC Member State), the Cameroonian law applies to transactions that affect the Cameroonian market only.

### **2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?**

We are not aware of any proposed amendments to the competition law and regulations, nor are we aware of any proposed new regulations.

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

Yes, the NCC actively enforces the merger control regime and actively investigates anti-competitive market practices. In a 2012 case, the NCC found a local company guilty of anti-competitive practices and imposed a pecuniary sanction against the company in the amount of 525 000 000 FCFA (approximately 1 million USD). More recently, it is the practice of the NCC to address warning letters to parties after being made aware (presumably via media) of contemplated transactions.

The NCC has also previously conducted market inquiries in several sectors, including, *inter alia*, energy, telecommunications, ports and airports, where there were suspicions that companies' practices might affect fair competition. These inquiries arose either at the request of a public body or on the NCC's own initiative.

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

There is no clear view on the priority areas of the NCC. However, the Act focuses on contractual agreements or arrangements, monopolies and mergers and acquisitions.

### **5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?**

In terms of Section 15 of the Act, a merger is any transfer of the property of one or more companies to another which gives rise to a new company or to the absorption of the company transferring its property. An acquisition is the transfer of all or part of the shares, assets, rights and obligations of one or more companies to another company which enables the latter to exercise control over all or part of the activities of the transferring companies. A transaction must be notified to the NCC if it constitutes a merger or an acquisition as defined above in the Act and meets the threshold criteria set out in question 7 below. Joint ventures are not explicitly dealt with in the Act.

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

Yes. There is no basis in law to exclude a Cameroon filing for foreign-to-foreign transactions that meet the thresholds. Local presence is not a requirement for a merger to be notified, as turnover generated in Cameroon is sufficient to trigger a notification if the thresholds are met. We have been advised that the NCC pays special attention to failure to notify foreign-to-foreign mergers, either of its own volition, or when flagged by an interested third party. There are ongoing matters of this kind in Cameroon. The penalty for a failure to notify is calculated with reference to the revenues deemed to be generated from Cameroon.

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

In terms of Section 2 of the Order, a merger is notifiable to the NCC when:

- the combined turnover of the merging parties in the preceding financial year, is equal to or greater than four billion FCFA; or

- the combined market shares held by the merging parties is equal to or greater than 30% of the relevant market.

We understand that the thresholds could be met by a single party, although we note that the turnover threshold applies to the local market. We consider it implicit in this that the target would need to have a presence or turnover in Cameroon. Put differently, an acquiring firm alone could not satisfy the turnover or market share threshold and be required to notify in circumstances where a target firm has no nexus to Cameroon. Similarly, it is sufficient if a target firm alone satisfies the thresholds for merger notifiability.

The table below provides guidance on the calculations:

CUMULATIVE TURNOVER AT THE TIME OF THE MERGER (IN CFA FRANCS)	MINIMUM PROVISION RATE	MAXIMUM PROVISION RATE	MINIMUM	MAXIMUM
4 000 000 001 to 5 000 000 000	0.30%	0.33%	9 000 000	16 500 000
5 000 000 001 to 8 000 000 000	0.28%	0.30%	14 000 000	24 000 000
8 000 000 001 to 12 000 000 000	0.25%	0.26%	20 000 000	31 200 000
12 000 000 001 to 15 000 000 000	0.20	0.22%	24 000 000	33 000 000
More than 15 000 000 000	0.18%	0.20%	27 000 000	>

### 9. What is the merger review period?

In terms of Section 19(1) of the Act, the NCC has three months from the date of declaration (notification) in which to provide a ruling. During this time, the NCC can issue either a provisional decision, or it may issue a final decision.

However, Section 19(1) of the Act further provides that, where in the course of the three months, the NCC is unable to give a final ruling for want of more information (which must be solicited within 30 days following the date of declaration) it shall inform the merging parties of its provisional ruling. We understand that this “provisional ruling” does not constitute a ruling in the true sense, like an approval or a prohibition; it is merely a request for more information. The extension (in the form of this provisional ruling) will be for another three months, bringing the total review period to six months.

In terms of Section 19(1) of the Act, upon expiry of the three-month period, and where no provisional or final decision has been issued, the merger shall be deemed to be approved.

### 8. What filing fees are payable?

The Act, the Decree and the Order are silent on the fees payable for a notifiable merger. There is no maximum filing fee set for merger filings. In practice, a committee will be set up to assess each merger to determine an appropriate filing fee, falling within a range specified by the NCC’s Internal Rules based on the value of the transaction in Cameroon. In mergers involving very large amounts, parties can expect a fee of up to 0.2% of the parties’ cumulative turnover generated by entities in Cameroon, pursuant to section 4(1)(b) of the NCC Internal Rules.

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

According to Section 18 of the Act, merging parties cannot implement a merger for a period of 3 (three) months after the notification of the merger.

Section 19 provides that the NCC must grant the merging parties a provisional decision if it fails to issue a final decision during the three-month period mentioned above. Merging parties will have to comply with the final decision, which cannot be issued later than six months after the notification of the transaction to the NCC.

Failure to notify a merger to the NCC is a contravention of the Act and exposes the parties to a penalty as described in question 20.

The Act and Regulations do not provide for “ring-fencing” arrangements.



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

The Act does not make provision for pre-notification contacts or pre-notification meetings with the NCC.

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

Non-competition factors are relevant in the assessment of mergers to the extent that when a merger may give rise to a competition issue, it may nevertheless be allowed. Section 17 of the Act provides that any merger or acquisition which seriously undermines or is likely to seriously undermine competition, may be permitted where the parties to the merger or acquisition prove to the NCC that the merger has improved or will improve the performance of the national economy in a way that outweighs the negative effects of the merger or acquisition on market competition and that the improvement to the national economy would not be achieved without the merger or acquisition.

### **13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

The Act does not make provision for government intervention in merger transactions.

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

Section 36(a) of the Act empowers the members of the NCC to request any commercial or industrial enterprise, craftsman, cooperative, agricultural concern or professional body to furnish them with any information or documents necessary for the conduct of their investigations. Section 36(d) further empowers the NCC to conduct hearings in which the persons heard may, if they so desire, be assisted by legal counsel. By virtue of these provisions, the NCC is entitled to contact customers and competitors of the merging parties as part of the merger review process.

However, we are not aware of any cases in which this type of contact with customers and/or competitors has taken place. Generally, the NCC's decisions are based on its independent assessment of the documents required to be submitted as part of the merger notification. The situation is different in cases where the NCC received a complaint from a competitor or customer or any other third-party objecting to a merger.

Where the NCC requests information from customers or competitors, the extent to which such submissions may be influential on the decision of the NCC is at the exclusive discretion of the NCC.

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

In terms of the provisions of Section 36(a) of the Act, only commercial or industrial enterprises, craftsmen, cooperatives, agricultural concerns or professional bodies can be contacted. However, the Act does not provide limitations as to who may lodge a complaint to the NCC. Therefore, any person or entity can file a complaint with the NCC and in this way should be able to make submissions as part of the merger review process.

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

No. In practice, the first occasion that parties become aware of the outcome of the NCC's investigations is when the NCC issues its final decision.

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

Section 41 of the Act provides that, within a period of 45 days following the notification of a decision by the NCC, the merging parties may challenge the decision by petitioning the chairman of the NCC by way of a letter. The letter must be accompanied by evidence in support of the challenge.

If within 15 days from the date of receipt of the petition letter, the NCC and the petitioner fail to



reach an agreement on the issues, the petitioner is given the opportunity to approach the Court of First Instance in the same jurisdiction as the NCC on the matter. The decision of the Court of First Instance is final and is not subject to any appeal. In the absence of any decision of this court, the decision of the NCC remains valid.

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

The Act prohibits any agreements and arrangements between individuals or entities that:

- set prices, rates, scales or discounts or obstruct the freedom to set those prices, rates, scales or discounts;
- limit production capacities and quantities manufactured, sold, stored, leased or transported;
- establish (jointly) conditions for submitting a bid without informing the person who has called for that bid; or
- have the effect of eliminating or restricting competition substantially in the market either by preventing access to a market or by sharing in any way whatsoever buyers or suppliers on a market.

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

- where such agreements or arrangement have been previously notified to the NCC;
- where the NCC concludes that such agreements and arrangement clearly help to enhance performance by:
  - reducing the prices of the good or service concerned in the agreement or arrangement;
  - considerably improving the quality of the said good or service; or
  - improving efficiency in the production or distribution of such good or service.

These exceptions will only be granted where there is proof that the net contribution of efficiency cannot be achieved in the absence of the agreement or arrangement and the agreement or arrangement is less restrictive to competition than other

agreements or arrangements which give rise to the same enhancement of efficiency.

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

Section 36 of the Act empowers the members of the NCC, in carrying out investigations for which they are authorised, to:

- request any commercial or industrial enterprise, craftsman, cooperative agricultural concern or professional body to furnish them with any information or document necessary for the conduct of such investigation;
- request evidence in support of marketing/sales conditions for the goods and services provided;
- have free access to all premises used for industrial and commercial purposes, even where such premises belong to third parties and whether or not a judicial police officer is present. However, where such premises are private dwellings or where such visits occur outside regular working hours, the chairman of the NCC must request the presence of a judicial police officer, who shall be ordered by the President of the Court of First Instance of the area;
- conduct hearings in which persons being heard may, if they so desire, be assisted by counsel; and
- seize documents where they deem necessary. Such documents must, however, be returned to their owners as soon as the investigation is over, or the purpose of the seizure is achieved.

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

- Where the NCC concludes that a company is abusing its dominant position, it may order the company to stop the practice in question. If the company does not comply with this order, it will be required to pay a penalty equivalent to 50% of the company's profit or 20% of its turnover in the Cameroonian market during the year preceding the year in which the contravention was committed. In the event of a repeat of unlawful conduct, the penalties mentioned above may be doubled. We are not aware of any leniency policy in place.



The legislation does not impose criminal sanctions and all penalties imposed are paid as fines. In addition, companies that have suffered damages as a result of anti-competitive behaviour can claim damages if they can show the causal link between the infringements and alleged damage.

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

There is no provision made for exemptions under the current domestic legislation.

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

There is no direct provision to this effect. However, Section 5 of the Act prohibits agreements and arrangements that have the effect of fixing prices, rates, scales or discounts or impeding the freedom to set those prices, tariffs, rates or discounts individually.

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

There are no legal provisions directly applicable to exclusive agreements. Generally, exclusive agreements are not unlawful but may be unlawful if they raise any competition issues. There are no guidelines on the circumstances in which an exclusive agreement would be lawful or unlawful.

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

Yes, the Act prohibits the abuse of a dominant position. The threshold for dominance is a market share of 30% or more.

Section 10 of the Act provides that dominance of a company or a group of companies is assessed by:

- market share;
- the company's or companies' technological advantage over competitors; and
- barriers to market entry set by the dominant firm or firms.

The adoption of any of the following measures is considered an abuse of a dominant position:

- preventing a competitor from establishing a position in the market or eliminating a competitor from the market;
- exerting pressure on distributors to the effect of preventing the flow of products of its competitors; or
- engaging in actions that have the effect of increasing production costs of competitors.

Where the practices of a dominant firm, particularly through the reduction of production or distribution costs, aim at improving economic performance, such practices shall not be considered improper even if they result in the elimination of competitors, the curbing of their activities or the limitation of market access possibilities for new firms. Any case of abuse of dominance may be referred to the NCC only where the practice has been ongoing for less than 24 months.

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

We are not aware of any examples of the authorities taking action against firms for the abuse of a dominant position.

**26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

Yes. Refer to question 20.

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

Section 78 of Law No. 2015/018 of 21 December 2015, governing commercial activity in Cameroon, prohibits the practice of unjustified discriminatory prices or sale conditions by any commercial enterprise against another.

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

No website exists where the decisions of the NCC are published. However, with respect to prior notifications of potential mergers, following the spirit of Section 19 of the Act, the NCC is only

required to notify the party of its decision. With respect to established offences, Section 40(1) of the Act provides that penalties decided upon by the NCC, after examination of the offences, shall be notified to the offenders by post with acknowledgment of receipt or by any other verifiable means indicating the offenders had been served.

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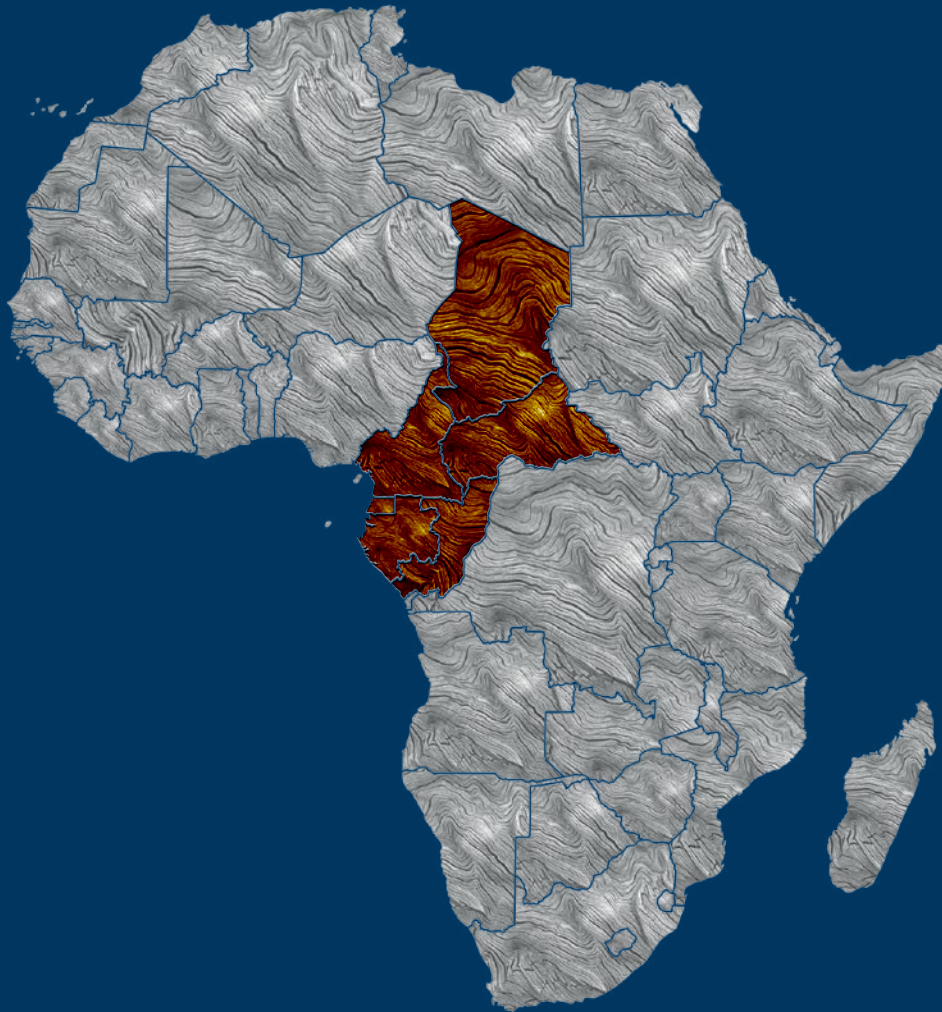
553 Boulevard de la Liberté  
Akwa, PO Box 5140  
Douala, Cameroon

**T:** +237 691 72 4668  
**D:** +237 677 35 3363  
**E:** [bbesong@besongco.com](mailto:bbesong@besongco.com)





# CEMAC



**BESONG & CO.**

Bayee A. Besong

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

The Economic and Monetary Community of Central Africa (**CEMAC, Community or Common Market**) was established in 1994 and consists of six Member States, namely Cameroon, Republic of Congo, Central Africa Republic, Equatorial Guinea, Chad and Gabon.

CEMAC became operational pursuant to the ratification of the Treaty of N'Djaména of 1994 by the Member States in 1999. The primary competition legislation is Regulation No. 06/19-UEAC-639-CM-33 of 7 April 2019 (**Regulations**) and Regulation No. 000350 on the Procedure for the Application of Competition Rules of 25 September 2020 (Procedural Regulations) was subsequently published.

The Regulations are enforced by the CEMAC Commission (**Commission**), relying on recommendations by the Community Competition Commission (**CCC**), a technical competition body to be established within the Commission.

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

## 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

The Procedural Regulations were promulgated on 25 September 2020 and deals with the content of a merger notification, the management of deadlines, access to the CCC's records and filing fees payable.

## 3. Is the law actively enforced?

Yes. After years of political crises in the region, the CCC and Commission have begun to actively enforce the competition laws.

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

The current priority for the CCC is merger review.

## 5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?

A notifiable merger takes place where a transaction amounts to a 'merger' and where such a merger has 'community dimension' (see paragraph 6 below).

A merger is said to occur:

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

A merger is not effected in the following circumstances:

- when financial institutions or insurance companies, whose normal business includes the transaction and trading of securities on their own behalf or on behalf of others, temporarily hold equity interests they have acquired in a company for resale; or
- where the control is exercised on a provisional basis by an enterprise mandated by a public authority under the laws of a member state in the course of a bankruptcy or insolvency proceeding.

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

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



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

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

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

In terms of the Regulations, a merger is notifiable to the CCC if it has community dimension. A merger has community dimension when:

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

Mergers with community dimension fall within the exclusive competence of the Commission under the supervision of the Community Court of Justice (**Court**). However, the Commission will inform the Member States' authorities of the notification. Where a merger occurs in a member state which does not have a national competition law and/or a national competition authority, the Commission must review that merger.

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

Merger notifications are subject to a merger filing fee of 0.25% of the merging parties combined turnover generated from the Common Market.

## **9. What is the merger review period?**

The Commission has a maximum period of 6 months from the date of receipt of a complete merger notification to make a decision, and within 7 working days thereafter, merging parties must be notified of such decision. This period may be extended for up to an additional 1 month, in circumstances where remedial measures to address competition concerns arising from a merger are in the process of being formalised. After this period, the merger is deemed to be approved.

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

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

The fine for the pre-implementation or the non-notification of a merger may not exceed either:

- (i) 10% of worldwide sales of all the parties to the merger, or (ii) 20% of the sales of these parties in the Common Market, during the last financial year (excluding taxes). The penalty is based on the sales figures declared by the undertakings concerned in the sector of activity relating to the merger. The same fine will apply to non-compliance with merger conditions, implementation of a prohibited merger, or the disrespecting of injunctions imposed pursuant to a finding of incompatibility with the Regulations. In addition, the Commission may impose a daily penalty of between 1 million Francs CFA and 20 million Francs CFA for each day of non-compliance with prescriptions set out in its decision.

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

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

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

If the Commission established that a merger has resulted, or is likely to result, in a substantial lessening of competition within any market, including the creation of a dominant position in the market, it must consider whether or not the merger (i) may result in any technological gain that may offset the harm to competition; and/or (ii) whether the transaction can be justified on public interest grounds, e.g. employment (a closed list of public

interest factors is not provided). In practice, the CCC and Commission consider the effect a merger has on public interest, and in particular, employment. Member States that have been notified of the merger may also request the Commission to take measures to ensure the protection of legitimate interests related to the following:

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

**13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

Yes. At each relevant ministerial level for each Member State, the Commission may seek to obtain an opinion from the ministerial staff on a proposed merger.

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

The fine for cartel conduct or the abuse of a dominant position may not exceed either (i) 10%

of worldwide sales of all the parties to the merger, or (ii) 20% of the sales of these parties in the Common Market, during the last financial year (excluding taxes), or a more appropriate financial year. Repeat offenses will attract a fine of twice the calculated amount. Factors that will be considered in the establishment of a fine will include the turnover relevant to the infringement, the sector concerned, proportionality, the damage done to the CEMAC economy, the company's cooperation in the investigation and the absence of any dispute on its part. In addition to penalties, the CCC may also recommend injunctions against an undertaking to cease the prohibited practice, and the Commission can impose penalties for non-compliance with the injunctions. No criminal sanctions exist, and no leniency policy is in place.

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

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

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

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

The Regulations do not contain a section dealing specifically with restrictive vertical practices or minimum resale price maintenance. However, the ambit of Article 30 dealing with anti-competitive agreements is sufficiently wide to include a prohibition of minimum resale price maintenance, as Article 30 prohibits, among others (i) the limitation of the free exercise of competition by other firms; (ii) price-fixing by the artificial favouring of price increases or decreases; or (iii) a limitation on marketing. To the extent that Article 30 applies to



minimum resale price maintenance, the defence/exemption provisions contained in Article 32 would also be available to the parties to the agreement. For these provisions, refer to question 18 above.

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

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

If reviewed under Article 33 (i.e. the dominance provision), the exclusive agreement will be prohibited if the object or effect of the agreement is to prevent, restrict or distort competition in the Common Market. Article 33 contains 'named' acts constituting abusive exploitation by a dominant firm, such as the acts below, which may be relevant in the context of exclusive agreements:

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

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

the parties to the agreement is dominant and they have engaged in one of the named acts of abusive exploitation.

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

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

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

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



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

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

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

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

Yes. Refer to question 20.

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

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

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

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

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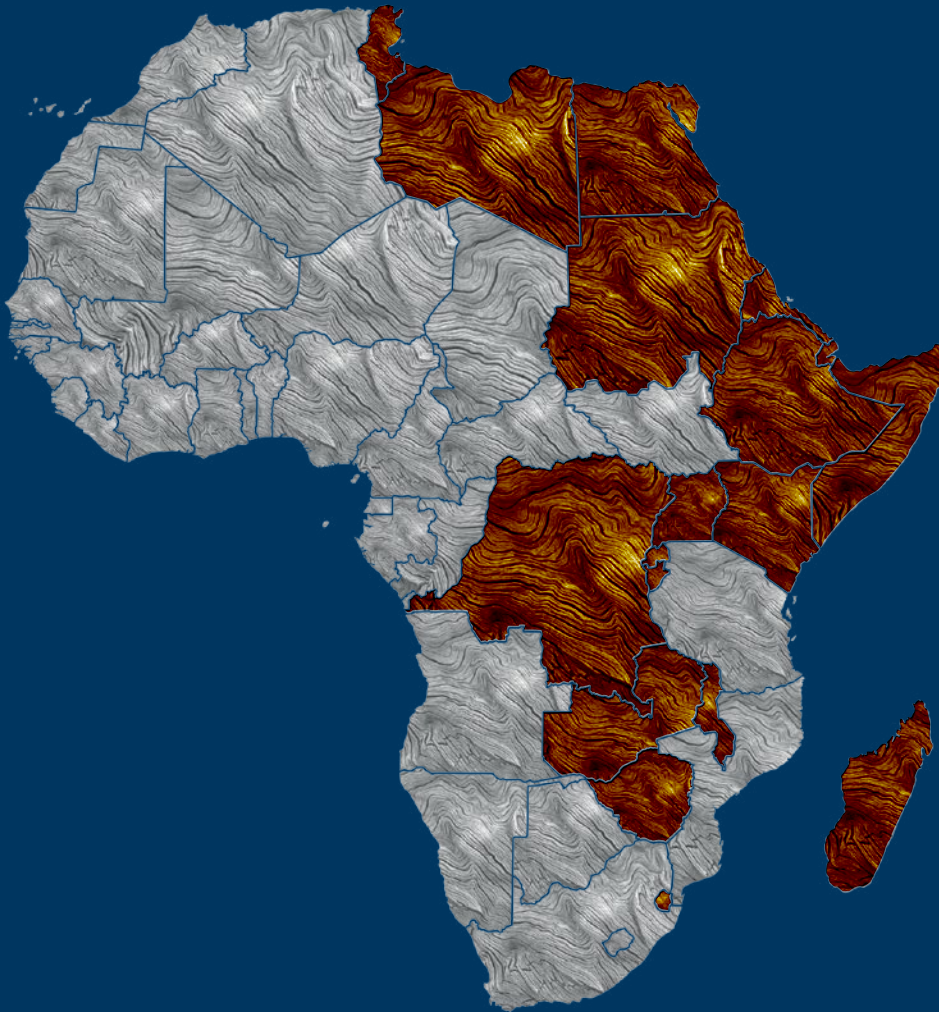
553 Boulevard de la Liberté  
Akwa, PO Box 5140  
Douala, Cameroon

**T:** +237 691 72 4668

**D:** +237 677 35 3363

**E:** bbesong@besongco.com

# COMESA



## **BOWMANS**

Joyce Karanja  
Xolani Nyali  
Michelle Kimonye



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

The Common Market for Eastern and Southern Africa (**COMESA**) is a regional organisation which was established under the Treaty Establishing the Common Market for Eastern and Southern Africa (the **COMESA Treaty**) signed on 5 November 1993 in Kampala, Uganda and whose mission is to promote economic integration through trade and investment in the Eastern and Southern Africa (the **Common Market**).

COMESA comprises 21 Member States: Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, eSwatini, Somalia, Tunisia, Uganda<sup>1</sup>, Zambia and Zimbabwe.

As at the time of writing, five of the COMESA Member States (Djibouti, Eritrea, Libya, Somalia and Uganda) have no domestic competition law regimes in place and a further three COMESA Member States (Burundi, Democratic Republic of Congo and Rwanda) have domestic competition law regimes but enforcement has not yet commenced.

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

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

The COMESA Court of Justice in [Polytol Paints & Adhesives Manufacturers Co. Ltd vs The Republic of Mauritius \[Reference No. 1 of 2012\]](#) delivered on 31 August 2013 stated that, by virtue of the COMESA Treaty, the COMESA Treaty and regulations are binding on all COMESA Member States.

## 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

The Commission has recently prepared and published for public comment three (3) draft instruments, which are aimed at providing guidance on (i) the factors that guide its determination of administrative fines and penalties; (ii) the processes and procedures that it follows when conducting hearings; and (iii) the stages that it follows when negotiating and concluding settlement agreements or arrangements with parties being investigated for infringing the Regulations.

The Commission has to date entered into a total of eleven (11) cooperation frameworks with COMESA Member States, namely: Egypt, eSwatini, Kenya, Madagascar, Malawi, Mauritius, Seychelles, Sudan, Zambia and Zimbabwe, with the most recent signed on 19 April 2021 with the National Competition Commission of the Democratic Republic of Congo.

## 3. Is the law actively enforced?

Yes, the law is actively enforced.

### Mergers

Numerous mergers have been reported to the Commission since it was established in January 2013. As at August 2021, at least 270 mergers had been notified to the Commission, 29 of which were notified in the period between January and August 2021. The majority of mergers notified have been unconditionally approved, with only some being approved subject to conditions. Notably on 21 September 2021, the Commission issued its first ever fine for failure to notify a transaction to the Commission within thirty (30) days of the parties' decision to merge, as prescribed in Article 24 (1) of the COMESA Competition Regulations.

### Anti-Competitive Business Practices and Conduct

The Commission published a notice in March 2017 notifying the public that it had commenced an investigation into the commercialisation of media and marketing rights for African football tournaments agreements entered into, among others, by the Confédération Africaine de Football (CAF) and Lagardère Sports SAS, a sport marketing agency and member of the Lagardère Group, based in France.

<sup>1</sup> As at the time of writing, Uganda's membership of COMESA had been suspended.

This first investigation by the Commission in respect of potentially anti-competitive conduct is ongoing.

The Commission also investigated a complaint in relation to allegations of potential anti-competitive conduct by Shoprite Holdings Limited (Shoprite) and GS1 Kenya Limited (GS1 Kenya). The complainant alleged that suppliers who wish to merchandise their products in Shoprite supermarkets in Uganda must obtain their barcodes from GS1 Kenya. The Commission concluded its investigation on 10 July 2020 after determining that the conduct by Shoprite did not have the effect of preventing, restricting or distorting competition within the Common Market. The Commission further determined that the conduct by Shoprite was unlikely to lead to abuse of its dominant position and unlikely to negatively affect trade between the Member States.

In addition, the Commission has initiated investigations into alleged prohibited practices under Article 19 of the Regulations. As at the time of writing, however, there is no record of concluded enforcement action in relation to investigations of prohibited practices under Article 19 of the Regulations.

On 24 June 2021, the Commission published a notice that it had commenced investigations into potential violations of Articles 16 and 19 of the COMESA Competition Regulations by four (4) beer manufacturing companies operating in the Common Market. Article 16 of the Regulations prohibits all agreements which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition in the Common Market. Furthermore, Article 19 prohibits agreements or arrangements between competitors which, among others, allocate customers and markets within the Common Market. The Commission stated that it has observed that the manufacturers have market allocation arrangements among themselves and/or territorial restrictions in their distribution agreements with third party independent distributors. The Commission has preliminary concerns that the market allocation and territorial restrictions reinforce national borders thus affecting trade between Member States and restricting competition in the Common Market. As such, the Commission will assess the agreements and existing arrangements to determine their effect in the Common Market and apply appropriate measures as per the Regulations.

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

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

Since it became operational, the Commission's priority has been dealing with approval applications (in particular, merger notifications) as well as Requests for Authorisation. As discussed above, more recently, the Commission has also commenced investigations into alleged anti-competitive business practices. Consumer protection matters also appear to be an area of focus, with the establishment of the COMESA Consumer Protection Committee in April 2021 and the Commission issuing a number of warning notices to the public in 2021 in relation to recalled consumer products by various brands.

#### **5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?**

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

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

A merger where either the acquiring firm, or the target firm, or both, operate in two or more COMESA Member States (i.e. a merger with a 'regional dimension') and where certain thresholds of combined annual turnover or assets (whichever is higher) are exceeded, constitutes a notifiable



merger and must in the ordinary course be notified to the Commission. The requirement that firms operate in two or more Member States is met where the firms concerned have a presence or generate turnover in two or more Member States.

The meaning of the term “operate” with respect to the ‘regional dimension’ consideration was recently clarified by the Commission in a Practice Note issued on 11 February 2021. The Practice Note confirmed that the definition of “operate” as provided in earlier guidelines published by the Commission in relation to merger control, which indicated that an undertaking was considered to ‘operate’ in a COMESA Member State if the higher of its annual turnover or value of assets in that Member State exceeded USD 5 million, was no longer applicable. The Practice Note clarified that the USD 5 million threshold ceased to be a consideration for purposes of the regional dimension test in March 2015 when the Commission published its Rules on the Determination of Merger Notification Thresholds and Method of Calculation, setting out the current thresholds on merger notifiability.

The Practice Note explains that the regional dimension test would be satisfied in any one of the following instances, where:

- i. either the acquiring firm and target firm operate in at least two Member States;
- ii. the acquiring firm operates in at least two Member States, while the target firm operates in only one Member State; or
- iii. the target firm operates in at least two Member States, while the acquiring firm operates only in one Member State.

Further to the ‘regional dimension test’, the thresholds for notifiable mergers are that:

- the combined annual turnover or value of assets (whichever is higher) of the merging parties in the Common Market equals or exceeds USD 50 million; and
- each of at least two of the merging parties has annual turnover or assets in the Common Market of USD 10 million or more. In circumstances where each of the merging parties generates two-thirds or more of their annual turnover in one and the same Member State, a COMESA filing will not be required. Instead, national notification obligations will apply.

In terms of the Regulations, where a Member State attains knowledge of a merger notification submitted to the Commission, the Member State may request the Commission to refer the merger for consideration under the Member State’s national competition law if the Member State is satisfied that the merger, if carried out, is likely to disproportionately reduce competition to a material extent in the Member State concerned or in any part of the Member State (Article 24(7) of the Regulations).

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

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

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

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

The Regulations apply to ‘all economic activities... within or having an effect within’ the Common Market. Foreign-to-foreign mergers are notifiable if they have a regional dimension and if the thresholds are met. See question 5 above.

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

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

- either the acquiring firm, or the target firm, or both, must operate in two or more COMESA Member States;
- the combined annual turnover or value of assets (whichever is higher) of the merging parties in the Common Market must be USD 50 million or more; and
- each of the merging parties must have an annual turnover or asset value in the Common Market of at least USD 10 million. Further, where each of the merging parties generates two-thirds or more of their annual COMESA turnover in one and the same Member State, or where two-thirds of each of the merging parties' assets held in COMESA are held in one and the same Member State, the parties need not file with COMESA. In such instances, national notification obligations apply instead.

For threshold calculation purposes, the Commission considers the turnover and asset value of the target and its subsidiaries, as well as the value of the acquiring undertaking, its subsidiaries, its parents up to the ultimate controlling firm and all firms controlled by them. Interestingly however, the Commission is of the view that where post-merger, the selling firm is to remain a controller of the target, then the turnover and asset value of the selling firm is also relevant for purposes of calculating whether the thresholds for notification are satisfied.

## 8. What filing fees are payable?

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

## 9. What is the merger review period?

In terms of Article 25 of the Regulations, the Commission shall make a decision on the notification within 120 calendar days after receiving a complete notification. The Guidelines provide for a two-phased review process, with Phase 1 mergers (being those that the Commission considers non-

complex) subject to a 45-day review period and Phase 2 mergers (which the Commission considers complex) subject to the full 120-day review period. Where the Commission is of the view that a longer period is necessary, it can seek an extension from the Board of Commissioners (the **Board**) prior to the expiry of the 120 days and inform the parties accordingly. The Regulations do not provide for a specific extension period, which implies that the length of extension sought might differ in accordance with the peculiarities of each particular case. However, the Guidelines provide that *"the Commission may extend the periods of Phase 1 and Phase 2 with the approval of the Board so long as all such extensions do not cumulatively exceed 30 days. The Commission will provide prior notice of an extension to the notifying party"*. In February 2020, the Commission suspended the Phase 1 and Phase 2 review period. This suspension has not been lifted to date.

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

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

The Regulations are silent on whether a merger may be implemented prior to clearance. The Commission has confirmed that parties to a notifiable merger, who have filed, may implement a merger prior to approval being granted, although they run the risk of their merger having to be unbundled at a later stage if, for example, the Commission were to prohibit the merger.

Implementation of a merger in contravention of the Regulations will result in the merger having no legal effect, in which case rights or obligations imposed on the merging parties by any agreement will not be legally enforceable in the Common Market.



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

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

The Commission permits and encourages pre-notification contacts where necessary. Pre-notification contacts can be helpful to clarify and agree with the Commission beforehand on the approach that will be taken in a particular merger filing and the specific information that the Commission will require.

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

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

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

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

- maintaining and promoting effective competition between persons producing or distributing commodities and services in the region;
- promoting the interests of consumers, purchasers, and other users in the region, with regard to the prices, quality and variety of such commodities and services;
- promoting through competition, the reduction of costs and the development of new commodities; and
- facilitating the entry of new competitors into existing markets.

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

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

The Commission has previously imposed conditions relating to the public interest as part of its merger approval. For example, on 13 November 2019, the Commission received a notification for approval of a merger involving Marinvest S.r.l., Ignazio Messina & C. S.p.A. and RORO Italia S.r.l. The Commission found that the relevant markets were moderately to highly concentrated and that the merging parties enjoyed significant market shares in some of the relevant markets. To address certain concerns raised by the Commission, the merging parties undertook to, among other things, ensure that no merger-specific retrenchments occur within a period of two years following the closing date of the merger, which the Commission accepted.

### **13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

The Regulations are silent on government intervention in merger transactions.

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

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



customers. The Commission typically contacts competitors and customers either directly or through national regulators.

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

Employees are not typically contacted as part of the merger review process. However, the Commission will take into account concerns in respect of the impact that a merger will have on employment, where a COMESA Member State raises such concerns. A number of transactions have been approved by the Commission subject to conditions aimed at mitigating the negative impact of a transaction on employment. Please also see the response to question 14.

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

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

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

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

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

in Khartoum, Sudan. To date, there has not been any appeal to the COMESA Court of Justice on any merger matter.

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

Yes, the Regulations prohibit the following practices where undertakings are *"engaged in the market in rival or potentially rival activities"*:

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

As mentioned above, the Commission recently commenced investigations into potential violations of Article 16 (Restrictive Business Practices) and Article 19 (Prohibited Practices) of the COMESA Competition Regulations by four (4) beer manufacturing companies operating in the Common Market.

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

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



In terms of the application of the Regulations and domestic competition law of the Member States, it is stipulated that the Regulations have primary jurisdiction over an industry or a sector of an industry which is subject to the jurisdiction of a separate regulatory entity, regardless of whether domestic or regional. The only further exemptions are those made by national legislation.

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

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

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

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

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

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

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

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

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

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

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

Abuse of dominance is prohibited by Article 18 of the Regulations. An undertaking is considered dominant in a market if, by itself or together with an interconnected company, it occupies such a position of economic strength that would enable it to operate in the market without effective constraints from its competitors or potential competitors. A dominant position refers to the ability to unilaterally influence price or output in the Common Market or any part of it.

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

- restricts, or is likely to restrict, the entry of any undertaking into a market;
- prevents or deters, or is likely to prevent or deter, any undertaking from engaging in competition in a market;
- eliminates or removes, or is likely to eliminate or remove, any undertaking from a market;
- directly or indirectly imposes unfair purchase or selling prices or other restrictive practices;
- limits the production of goods or services for a market to the prejudice of consumers;

- as a party to an agreement, makes the conclusion of such agreement subject to acceptance by another party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the agreement; or
- engages in any business activity that results in the exploitation of its customers or suppliers, so as to frustrate the benefits expected from the establishment of the Common Market.

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

There are no examples at this stage.

**26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

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

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

The Regulations do not specifically prohibit price discrimination.

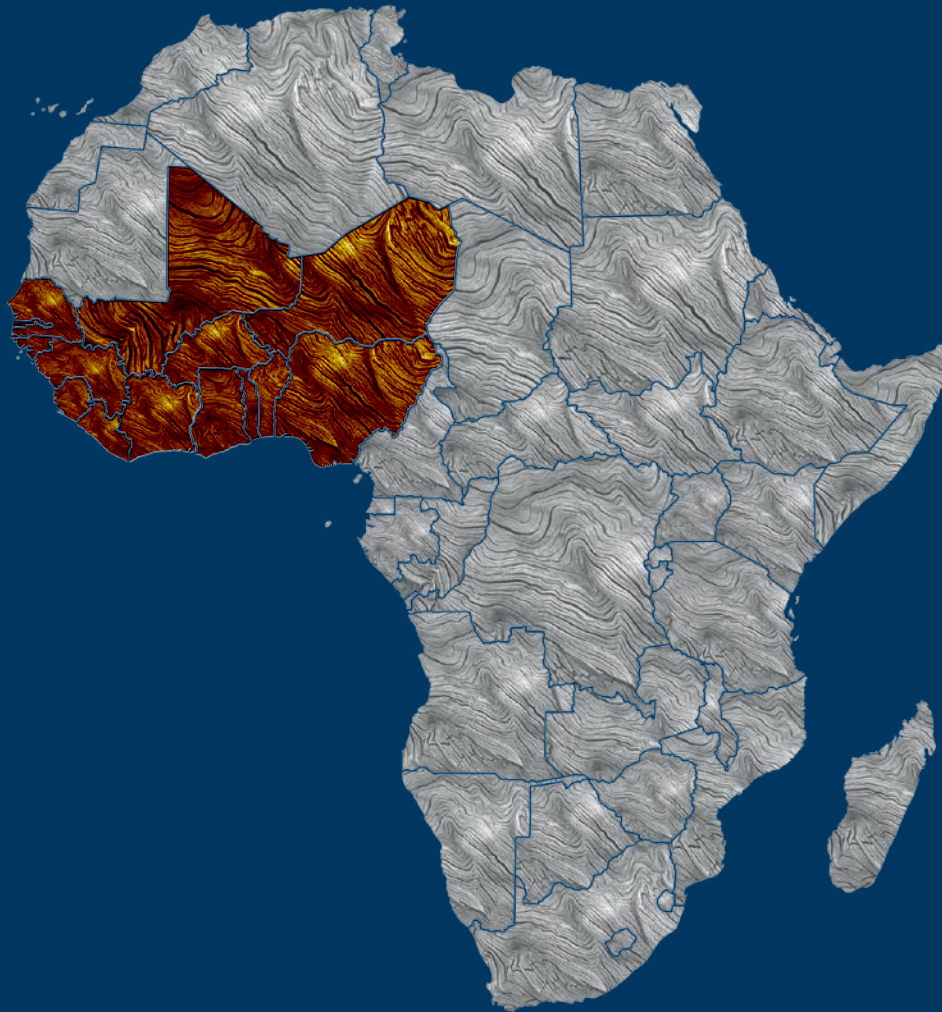
**28. Does the authority publish its decisions and, if so, is there a website where such decisions are available?**

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





# ECOWAS



## UDO, UDOMA & BELO-OSAGIE

Yinka Edu  
Faridah Orimobi  
Itorobong Udom

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

The Economic Community of West African States (**ECOWAS**) is a regional political and economic union located in West Africa. The ECOWAS Regional Competition Authority (**ERCA**) was launched by the Commission of ECOWAS in Banjul, The Gambia, on 31 May 2019.

The relevant competition legislation is the Supplementary Act A/SA. 1/06/08 Adopting Community Competition Rules and the Modalities of their Application within ECOWAS (**Competition Act**), and the Supplementary Act A/SA. 2/12/08 On The Establishment, Functions and Operation of the Regional Competition Authority for ECOWAS (**ERCA Act**). In addition to the ERCA, the Competition Act established a Consultative Competition Committee (**Consultative Committee**), which is composed of members who are experts in the area of competition, and each Member State is to be represented by two of such members. The ERCA Act also stipulates that the ECOWAS Community Court of Justice is the appellate court for decisions by ERCA, and its decisions in this regard are final. Also in effect is the Supplementary Act A/SP.9/02/12 Relating To The Common Rules on Certain Categories Of Agreements, Decisions And Concerted Practices Relating To Rules Of Competition in Air Transport Services Within ECOWAS Member States, which has established modalities of exemption from the Competition Act in matters of air transport services within the members states of ECOWAS.

ECOWAS comprises 15 Member States: Benin, Burkina Faso, Cape Verde, The Gambia, Ghana, Guinea, Guinea Bissau, Ivory Coast, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

At the time of writing, there is no domestic competition regime in Togo, Guinea-Bissau, Ghana or Benin. However, all countries within the West African Economic Monetary Union (**WAEMU**), which has a regional competition law regime, must ensure that activities are conducted within the bounds of the WAEMU competition laws. These countries are Benin, Burkina Faso, Ivory Coast, Guinea-Bissau, Mali, Niger, Senegal and Togo. The Gambia and Nigeria are the only two ECOWAS Member States that have properly functioning domestic regulators.

## 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

The Consultative Committee met on 12 October 2021 to examine draft legal texts required to operationalise the ERCA including a draft Supplementary Act amending the Supplementary Act on the Establishment, Functions and Operation of the ECOWAS Regional Authority; draft Regulation on Mergers and Acquisitions relating to the rules of procedure of ERCA, draft Regulation relating to leniency and immunity rules and procedures for competition within ECOWAS and a draft Memorandum of Understanding between ERCA and the respective national competition authorities of Member States. Conclusions and recommendations emanating from this meeting are to be presented to the ECOWAS Ministers of Trade, in charge of competition matters, during November 2021.

## 3. Is the law actively enforced?

There is no indication that the law is being actively enforced, but understand that the ERCA is to fully commence operations in January 2022.

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

See answer to question 2.

## 5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?

There is no provision in the ERCA Act and the Competition Act that expressly requires parties to notify the ERCA of a merger, however, the ERCA defines prohibited transactions as every (i) merger; (ii) takeover; (iii) joint venture; or (iv) other acquisition or business combination, including interconnected directorships whether of a horizontal, vertical or conglomerate nature between or among enterprises, where the resultant market share in the ECOWAS Common Market, or any significant part thereof, attributable to any good, service, line of commerce, or activity affecting commerce, shall result in the abuse of a dominant market position resulting in a substantial reduction of competition.



“Control” of a company is defined as the power of a physical or moral person to secure by means of either:

- the holding of shares or the possession of voting power in relation to that company;
- any other power conferred by the company's constituent documents or other documents regulating the company; or
- the effective exercise of power of decision within the company; so that the company's business is conducted in accordance with that individual's wishes.

There is no distinction made as to the kind of joint ventures that are notifiable (e.g. full-function v. non full-function).

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

There is no provision in the ERCA Act and the Competition Act that expressly deals with foreign-to-foreign transactions and how they should be treated, however, based on the definition of prohibited transactions, a foreign-to-foreign merger may be notifiable to the extent that their resultant market share in the ECOWAS common market or any significant part thereof, attributable to any good, service, line of commerce, or activity affecting commerce, would result in abuse of a dominant market position, thereby resulting in a substantial reduction of competition.

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

The Competition Act only provides for one provision relating to mergers, prohibiting those which will result in abuse of a dominant position. It seems that it is envisaged that where the merger is going to create a dominant market position which will reduce competition, the parties would approach the ERCA for approval, on the basis of public interest.

#### **Dominance/market power**

One or more enterprises hold a dominant position in a relevant market if, singularly or collectively, it/ they possess a substantial share of the market that enables it/them to control prices or to exclude competition. Transactions are prohibited where the resultant market share in the ECOWAS common

market, or any significant part thereof, attributable to any good, service, line of commerce, or activity affecting commerce, shall result in abuse of dominant market position resulting in a substantial reduction of competition.

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

No filing fees have been prescribed.

#### **9. What is the merger review period?**

The ERCA Act and the Competition Act are silent on any merger review periods.

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

The ECOWAS regime is not suspensory and merger notifications are not compulsory.

However, a prohibition may apply to every (i) merger; (ii) takeover; (iii) joint venture; or other acquisition or business combination including interconnected directorships whether of a horizontal, vertical or conglomerate nature between, or among enterprises where the resultant market share in the ECOWAS common market shall result in an abuse of a dominant position resulting in a substantial reduction of competition.

If a merger is prohibited, it is automatically void and has no effect in any ECOWAS Member State. Prohibited transactions may, however, be authorised by the ERCA if the transaction 'is in the public interest'.

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

N/A

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

The Competition Act provides that an otherwise prohibited merger, acquisition or other business combination may be authorised where it is assessed by the ERCA to be in the public interest. However, the Competition Act does not provide further detail about the factors that constitute public interest.

**13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

No, the Competition Act does not provide for government intervention in merger transactions (separate from the competition authority) in relation to transactions that are likely to have an effect on trade within ECOWAS. However, the Competition Act states that the ERCA shall collaborate with other existing competition agencies in the implementation of its competition rules, and it established a Consultative Committee, which is composed of members who are experts in the area of competition, and each Member State shall be represented by two of such members.

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

N/A

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

N/A

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

N/A

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

N/A

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

The Competition Act provides that any abuse, or acquisition and abuse of a dominant position, by one or more enterprises within the ECOWAS

common market or in a substantial part thereof, shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist of:

- limiting access to a relevant market or otherwise unduly restraining competition;
- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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

The ERCA is empowered to carry out searches in accordance with legal procedures and to inspect and temporarily remove any documents or extracts under the control of any person for the purpose of making copies, in accordance with legal procedures.

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

The ERCA is empowered, pursuant to the ERCA Act, to impose appropriate sanctions against infringing persons and may also require such persons to pay compensation to persons that have suffered losses as a result of such anti-competitive conduct. The legislation does not provide for a leniency policy and it does not impose criminal sanctions.

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

The Competition Act empowers the ERCA to authorise certain otherwise prohibited decisions or category of decisions by associated enterprises, agreements or category of agreements between



enterprises or concerted practices or category of concerted practices, which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not:

- impose on the concerned enterprises, restrictions which are not indispensable to the attainment of these objectives; or
- afford such enterprises the possibility of eliminating competition in respect of a substantial part of the products in question.

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

The legislation does not expressly deal with minimum resale price maintenance.

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

Exclusive agreements are prohibited to the extent that they may affect trade between ECOWAS Member States and have the object or effect of preventing, restricting, distorting or eliminating competition within the common market.

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

See answer to question 18.

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

None that we are aware of.

**26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

Any abuse or acquisition and abuse of a dominant position by one or more enterprises within the ECOWAS common market, or in a substantial part thereof, shall be prohibited as incompatible with the common market insofar as it may affect

trade between Member States. Where any person fails to terminate such arrangement within a time determined by the ERCA, such person commits an offence and is liable to a fine. The ERCA is also empowered to order the infringer to pay compensation, in such amount as the ERCA shall determine, to any person who has suffered losses as a result of its anti-competitive practices.

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

The ERCA Act provides that the ERCA shall have the power to issue injunctions to prohibit discrimination or preference in price matters and other related aspects.

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

The ERCA Act requires the ERCA to maintain a register of authorisations granted, in a form it shall determine, which shall be open to consultation by the public. However, we are not aware of any decisions that have been made by ERCA nor that there is a website where such decisions are available.

**UDO, UDOMA & BELO-OSAGIE**

St Nicholas House  
10th, 12th & 13th Floors  
Catholic Mission Street  
Lagos  
Nigeria

**T:** +234 1 2774920, 2719811, 2719812  
+234 1 2774921, 2774922, 2719813

**E:** [uubo@uubo.org](mailto:uubo@uubo.org)

**W:** [www.uubo.org](http://www.uubo.org)



# Egypt



**MATOUK BASSIOUNY & HENNAWY**

Amr A Abbas  
Aliaa Emara



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

The relevant competition legislation in Egypt is the Law No. 3 of 2005 Promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices, as amended (the **Law**) and the Executive Regulations of 2005, issued by Prime Ministerial Decree No. 1316 of 2005, as amended in 2010 by Prime Ministerial Decree No. 2957 of 2010 (the **Regulations**).

The Law and the Regulations is enforced by the Egyptian Competition Authority (the **ECA**) whose principal functions include opining on legislation, policies and regulations relating to the regulation of competition, to play a supervisory role and investigate anti-competitive practices and conduct inspections and prepare an annual report on the activities of the ECA and its future plans.

Further, Egypt is a member of the Common Market for Eastern and Southern Africa (**COMESA**) and, therefore, the COMESA Competition Regulations also apply in Egypt.

## 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

The Law was amended in 2008 and again in 2014, by Law No. 56 of 2014 (the **2014 amendments**). The 2014 amendments changed the Law in various respects, bringing Egypt's competition law regime more in line with international competition law principles. Of particular relevance was the increased autonomy of the ECA, introduced by the amendments to Article 11 by granting the ECA the greater authority to opine on legislation, policies and decrees that may impede on competition regulation and, most significantly, to Article 21 of the Law was amended to grant the ECA Chairperson the authority to decide on whether to initiate criminal proceedings where violations have occurred. This was previously the responsibility of the Prime Minister or his delegate. The approval of the majority of the ECA's Board members must be obtained before criminal proceedings are initiated.

On 20 September 2016, the office of Egyptian Prime Minister Sherif Ismail published the 2016 Executive Regulations (the **2016 Regulations**) in the official gazette. While an attempt has been made to align

the 2016 Regulations with EU competition laws, they have been widely criticised for containing a rebuttable presumption i.e. that different companies being headed by members of the same family (including spouses, siblings, parents and grandparents) are a single economic entity.

In 2018, the ECA shared a proposed draft Amendment Law with stakeholders for comment, making provision for a pre-merger notification regime. In 2018, the proposed draft amendment with stakeholders was published for commentary. The indication is that the amendments are still to be presented to Parliament and the new Law still appears to be a long way off.

The most recent amendment to the Regulations was by virtue of Law No. 15 of 2019 published on 8 April 2019, introducing the imposition of new penalties for any violation of Ministerial decrees setting out fixed prices for essential goods. The penalty ranges from £E100 000 to £E5 million.

In January 2019, the Egyptian Cabinet has approved a draft law amending certain provisions of the Law, mainly aiming to grant the ECA more powers to fight against monopolistic practices, e.g. to impose administrative fines, ensuring greater independence for the ECA from the government (the Constitution grants full independence to the ECA to perform its supervisory role), and developing investigative mechanisms enabling the authority to be more effective. This draft law is being discussed and considered before Parliament and has not been officially approved yet.

Notably, the Law was amended in April 2020 to exclude the banking sector from the ECA's jurisdiction. The banking sector is now subject only to the supervision of the Central Bank of Egypt.

## 3. Is the law actively enforced?

The law is actively enforced however, as of yet, the ECA does not have the power to review notified mergers and only does so for internal purposes. Although the ECA does not yet operate a pre-merger notification regime, the ECA is actively pursuing mergers that may have anti-competitive effects in Egypt based on Article 6 of the Law. The ECA have a post-notification regime and does not have jurisdiction to block transactions, but it can monitor transactions affecting the Egyptian

economy and subject violators to potential criminal fines. The ECA has previously investigated several companies for failing to timeously notify the ECA of transactions that met the thresholds and referred at least three of them for criminal prosecution and the companies ultimately settled the pending criminal charges.

Where a proposed merger would amount to an anti-competitive agreement between competitors, the ECA may investigate it to determine whether it would effectively amount to an anti-competitive agreement between competitors. This was the case with the acquisition of Careem by Uber.

Parties considering mergers or acquisitions that may have anti-competitive effects in Egypt should consider engaging with the ECA to ensure compliance with its merger control regime. The ECA's heightened enforcement efforts, and its coordination with international competition bodies, suggest that the agency will likely expect stricter compliance with its merger control requirements as it prepares to transition towards mandatory pre-merger notifications.

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

The focus areas of the ECA over the past year have been investigations into alleged prohibited practices and consumer protection. The main sectors impacted were health, food, and electronic trade.

#### **5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?**

Although the Law requires the notification of mergers, the ECA does not have the power to approve or prohibit mergers before implementation. It is a post-notification regime. However, on the basis of Article 6 of the Law which prohibits anti-competitive agreements between competitors, the ECA is advising parties to a merger transaction which may have a negative effect on the Egyptian market to enter into discussions with it before implementing the relevant transaction.

Article 19 of the Law states that *"Persons whose annual turnover of the last balance sheet exceeded one hundred million pounds shall notify the Authority upon their acquisition of assets, proprietary or usufructuary rights, shares,*

*establishment of unions, mergers, amalgamations, appropriations, or joint management of two or more persons according to the rules and procedures set forth in the Executive Regulations of the current Law."* The Authority must be notified within 30 days as of the date of effectiveness of the notified legal action, in terms of Article 44(6) of the Regulations.

Article 5 of the Regulations further provides that *"actual control means every arrangement, agreement or ownership of stocks or shares, regardless of its percentage, in a manner that leads to the control of the management or decisions-taking."* This wording is very broad and leaves scope for a broad range of transactions to be notifiable, even if the Law does not define an acquisition of control and instead refers to the notification of an acquisition of assets, proprietary or usufructuary rights, shares, establishment of unions, mergers, amalgamations, appropriations, or joint management of two or more persons. In terms of the 2018 Merger Guidelines, an internal restructuring within a group of companies will be notifiable if it leads to a direct or indirect change of control. To date, we understand that the ECA's practice has varied in this regard and so a cautious approach is advisable. Furthermore, based on a strict interpretation of Article 19, the acquisition of a minority shareholding would also trigger the notification requirement if the acquiring party's annual turnover in Egypt on the most recent balance sheet exceeds £E100 million.

A merger is not notifiable where companies whose normal activities include dealing in securities acquire securities with an intention to dispose of them within one year, but subject to the following conditions: (i) the acquisition will not involve acquiring the majority of the shares of such undertaking; (ii) the acquired percentage of shares will not result in the ability to appoint a board member or manager; and (iii) the acquirer shall not exercise any voting rights or take any procedures that involve meddling in the economic decisions of such undertaking or control it directly or indirectly. Further, in terms of the 2018 Merger Guidelines, a capital increase or decrease in an undertaking will be notifiable if it leads to a change in control, also *de facto* control.



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

In terms of the 2018 Merger Guidelines that were issued in September 2018, a foreign-to-foreign transaction will be notifiable to the ECA if at least one of the relevant parties, i.e. either the acquirer or the target, has a turnover in Egypt as per its last approved financials, which meets the reporting threshold. This is regardless of whether such party has assets or subsidiaries in Egypt, or whether the relevant products will ultimately end up in Egypt.

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

The 2015 notification form and guidelines published on the ECA's website in 2015 state the statutory financial thresholds applicable to mergers. Although it does not appear from the notification form itself, a merger is only notifiable to the ECA if the combined annual turnover of the acquiring and target entities in Egypt is at least £E100 million Egyptian Pounds, taking into account the turnover and not the value of assets when calculating the merger thresholds.

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

No filing fees are payable for merger notifications.

## **9. What is the merger review period?**

The ECA does not currently have the power to review notified mergers. In the absence of formal review powers, there is no statutory review period provided for and merger parties will not be notified of the ECA's completion of the review and its results. It is understood that the ECA is preparing to assume the power to review mergers but as of yet no review period has been decided upon.

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

Approval from the ECA is not required before a notifiable merger may be implemented.

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

The Law and Regulations does not provide for pre-notification contacts or pre-notification meetings and as the ECA currently have a post-notification regime, pre-notification contacts and meetings are not necessary or common in practice except when the transaction is between competitors which may negatively affect competition in Egypt. In 2018, the ECA started to interfere in certain mergers and acquisitions between competitors under its power to combat horizontal monopolistic practices (cartels).

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

The Law and Regulations are silent on the factors to be considered when assessing a merger however, when assessing anti-competitive agreements between parties having vertical relations, the ECA is mandated by Article 12 of the Regulations to evaluate the contract or agreement on a case-by-case basis, taking into account the following factors: (i) the effect of the agreement or contract on the freedom of competition in the market; (ii) the existence of benefits accrued to the consumer from the agreement or contract; and (iii) the considerations of preserving the quality of the product, its reputation, safety, and security requirements, in a manner that does not harm competition.

## **13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

Certain laws mandate the approval of the sector regulator such as in (i) the health sector where acquisitions of hospitals must be approved by the Ministry of Health; and (ii) the telecommunications sector where acquisitions of mobile operators must obtain approval from the NTRA. The ECA has full independence to perform its supervisory role. However, as mentioned above, the banking sector is excluded from the supervisory role of the ECA.

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

No. Not applicable as the merger review process is post-merger.

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

The Law and Regulations are silent on who else can make submissions and employees are not typically contacted as part of the merger review process.

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

Not applicable as the ECA have a post-notification regime and does not have jurisdiction to block transactions. Yet when ECA interferes in a potential merger between competitors, the merging parties are given an opportunity to make representation as part of ECA's review; and the parties may submit an exemption from Article 6 prohibition regarding cartels for the merger to the ECA.

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

A decision made by the ECA with regards to prohibited conduct may be challenged before the administrative courts and will also be reviewed by the Economic Criminal Court if the conduct is referred to it by the Public Prosecutor.

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

Yes, in terms of Article 6 of the Law, per se prohibited practices related to horizontal agreements are regulated, specifically agreements or contracts, either verbal or written, between competing persons in any relevant market which may lead to cause any of the following:

- Increasing, decreasing or fixing prices of sale or purchase of products subject matter of dealings.
- Dividing product markets or allocating them on ground of geographical areas, distribution centres, type of customers, goods, market shares, or seasons or periods of time.
- Coordinating with regard to proceeding or refraining from participating in tenders, auctions, negotiations and other calls for procurement.
- Restricting processes of manufacturing, production, distribution, or marketing of goods or services. This includes restricting product type or volume or limiting the availability thereof.

At the request of the concerned parties, the ECA may exempt certain agreements from the prohibition, provided that the agreement is aimed at achieving economic efficiency and it is established to the ECA that it will achieve benefits for consumers that exceed its anti-competitive effect.

Article 11 of the Regulations goes further to state that when assessing whether there has been coordination with regard to participation in tenders, auctions, negotiations, etc., that the following are indicators of such prohibited conduct:

- Submitting similar offers, which include the agreement on common rules for the calculation of prices or the determination of the offer conditions.
- Agreeing on the person who will submit the offer, which includes the prior agreement on the person who will be awarded the tender either by alternation, or on geographical basis or on customer division basis.
- Agreeing on the submission of fictitious offers.
- Agreeing on preventing a person from submitting or participating in submitting offers.

By way of examples of the ECA's actions on cartels, in 2006 the ECA conducted a study on the cement markets in Egypt to ascertain whether increases in prices were attributable to the existence of anti-competitive agreements or practices and found that cement firms had engaged in price-fixing and the limitation of the marketing of goods, respectively. In 2008, the twenty executives of the nine cement firms were fined £E200 million, £E10 million on each company for contravening the Law.



In December 2015, the ECA accused four pharmaceutical distributors – Ibsina, Ramco Pharm, Multipharma and United Company of Pharmacists – of collusion and referred the case to the Prosecutor's office. In March 2018, the Cairo Economic Court fined the four companies £E5.58 billion for fixing prices offered to small and medium-sized pharmacists across the country. This has been the largest fine in the history of the ECA.

More recently in April 2021, the Economic Court issued fines of £E30 million each to five major poultry brokers for fixing the sale price of live chickens per kilo. The court found that the brokers agreed to set the selling price of white chickens from breeders to wholesalers at Republic level. The court found that breeders incurred huge financial losses, which resulted in the exit of some of them from the market for raising white chickens and negatively affected prices, consumer welfare and was harmful to the market.

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

The ECA has wide-ranging powers to enforce the Law, including the power to take all the necessary measures to gather information and investigate any person who breaches the provisions of the ECL. An investigation of cartel conduct may be initiated by a complainant, or by the ECA.

According to Article 38 of the Regulations, the ECA has the power to carry out the following procedures after disclosing their identity and presenting it to the concerned party:

- Reviewing records and documents, as well as obtaining any information or data from any governmental or non-governmental authority for the purpose of handling cases submitted to the Authority.
- Entering, during official working hours, work places or headquarters of persons subject to examination. If the need arises, the ECA can call for the assistance of the police.
- Carrying out the necessary procedures of collecting information necessary for examination and interrogating any person regarding his committing of any breach of the provisions of the Law.

These procedures are required to be completed within a period not exceeding 90 days from the date of referral to the relevant management at the ECA.

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

In terms of Article 20 of the Law, the ECA shall order a party infringing Articles 6 (horizontal agreements), 7 (vertical agreements) and/or 8 (abuse of dominance), to adjust its position and to redress the violation immediately, or within a period of time specified by the Board of the ECA, failing which the impugned agreement will be considered void. The ECA may also issue a decision to stop the prohibited practice immediately or within a period of time.

The above shall apply without prejudice to the criminal and civil liability arising from such breaches.

Following the 2014 amendments, the penalty is based on a percentage of turnover generated by the sale of the products relevant to the violations. The determination of the percentage is as follows:

- For violations of Article 6 on horizontal agreements, a fine of between 2% and 12% of the turnover for the product concerned during the violation period applies. If the total turnover of the relevant product cannot be ascertained, then the fine shall not be less than £E500,000 and not more than £E500 million; and
- For violations of Article 7 on vertical arrangements or Article 8 on abuse of dominance, the fine shall be between 1% and 10% of the turnover of the product concerned during the violation period. If the total turnover of the concerned product cannot be ascertained, then the fine shall not be less than £E100,000 and not more than £E300 million.

However, the minimum and maximum limits of the fine shall be doubled in case of recidivism of violating the provisions of any of Articles 6, 7, 8 of this Law, and in case of the failure to abide by the decisions rendered by the Authority in accordance with Article 20 of this Law. The Economic Court, not the ECA, is entitled to impose fines for contraventions and has absolute discretion in determining the fines within the limits set out in the Law, but it is the ECA Chairperson who has the

authority to decide on whether to initiate criminal proceedings through a written request to the Public Prosecutor, where violations have occurred, and where the majority of the ECA's Board members approve. Once the ECA submits its written request, it is for the Public Prosecutor to decide to file the criminal case before the Economic Criminal Court.

Previously, the Law did not contain any provisions providing for leniency for cooperation in competition investigations. In 2008 this was amended, and the addition of Article 26 provided for a partial leniency policy, whereby a court may exempt violators, of Articles 6 and 7, of up to half of the sanctions, if the violators take the initiative to report to the ECA violations of the Law, and who submit supporting evidence, or to such whistle-blowers whom the Court considers having contributed to the disclosing and establishing of the elements of the offence at any of its stages.

Partial immunity seemed to be available to all those who cooperated by submitting evidence in support of the ECA's investigation. A notable feature of the 2008 Leniency Policy was that, unlike many other competition jurisdictions, it applied beyond cartels and/or other horizontal restraints to include vertical restraints.

The 2014 amendments to Article 26 introduced a full immunity regime which provides leniency to the first violator who discloses to the ECA any anti-competitive behaviour violating Article 6 of the Law (prohibiting horizontal agreements), conditional upon them submitting sufficient supporting evidence that shall contribute to disclosing and establishing the elements of the offence. The remaining violators may be exempt from up to half of the prescribed sanction if the court deems that they have provided information establishing elements of the offence or were of aid in the process of revealing the violation during the investigations or at the time of trial. Going forward, first leniency applicants would be deemed to be state witnesses for purposes of criminal investigations conducted by the Prosecutor General, without risking criminal liability. Leniency would automatically extend to all past and present managers and employees of the firm.

We understand that the 2016 Regulations have been amended to provide more comprehensive guidelines in relation to the procedures governing

corporate leniency applications, including the level of cooperation required by the leniency applicant.

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

The ECA may exempt all or some of the acts prohibited in terms of Articles 6, 7 and 8 if committed by private sector companies that manage public utilities. To obtain such an exemption, the relevant undertaking must prove that the activity is in the public interest or that it provides benefits to the consumer and that these benefits outweigh the anti-competitive effects. Such an exemption, when granted, is valid for two years, and may be renewed upon request made 60 days prior to the end of the initial exemption period.

The exemption request and the request of renewal of this exemption is subject to a fee of £E10 000 at the time of the submission of the request and evidence of the payment needs to be attached.

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

The Law provides that agreements or contracts between a person and any of its suppliers or customers are forbidden if they are intended to restrict competition.

The provisions dealing with vertical agreements have been amended over the years and have become more stringent, especially on the dominant firm. Vertical constraints in distribution and franchise agreements after the amendment in September 2016 could only be justified by considerations regarding safeguarding the quality and reputation of products, as well as their safety, in accordance with Article 12 (3) of the Executive Regulations. Therefore, the Decree could arguably manifest a new twist in commercial practice regarding vertical constraints that prohibit members of a distribution network from passively selling products to retailers outside the geographic area of their sale activities.

There are recent indications from the ECA that minimum resale price maintenance would be considered anti-competitive as it deprives the consumers from potential lower prices. Thus, it may fall under the prohibited practises according to Article 7 of the Law.



While vertical restraints of competition which fall within Article 7 are subject to a 'rule of reason' analysis, care must be taken when setting up distribution arrangements in Egypt, especially if the firm is dominant and involved in restrictive distribution practices.

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

Exclusive agreements are not expressly prohibited under Article 7. Exclusive agreements may, however, be unlawful under Article 7 of the Law if they restrict competition and Article 8 of the Law further provides that a person holding a dominant position is prohibited from undertaking an act that would lead to the exclusive distribution of a specific product solely, on the basis of geographic areas, distribution centres, clients, seasons or periods of time among persons with vertical relationships.

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

Yes, the abuse of dominance is per se prohibited in terms of Article 8 of the Law which provides that a person holding a dominant position in a relevant market shall be prohibited from carrying out any of the following:

- a) Undertaking an act that leads, fully or partially, to the non-manufacturing, or non-production or the non-distribution of a product, for a certain period or certain periods of time.
- b) Refraining to enter into agreements or contracts regarding a product with any Person or totally ceasing to deal with him in a manner that results in restricting that Person's freedom to access, continue or exit the market at any time.
- c) Undertaking an act that would lead to the exclusive distribution of a specific product solely, on the basis of geographic areas, distribution centres, clients, seasons or periods of time among Persons with vertical relationships.
- d) To impose as a condition, for the conclusion of a contract or agreement of a product, the acceptance of obligations or products unrelated

- by their very nature or by commercial custom to the original transaction or agreement.
- e) Discriminating in agreements or contracts, of any kind, between sellers or buyers whose contractual positions are similar, whether was this discrimination in the prices, the quality of the products, or other terms of transaction.
- f) Refusing to produce or provide a product that is circumstantially scarce when its production or provision is economically possible.
- g) Dictating on Persons dealing with him not to permit a competing person to have access to their utilities or services, despite this being economically viable.
- h) Selling products below their marginal cost or average variable cost.
- i) Obliging a supplier not to deal with a competitor.

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

Yes, in August 2015 the ECA found Oriental Weavers to have abused its dominant position as the market leader in machine-made carpets by enforcing exclusivity clauses in some distributors' contracts, which foreclosed competitors from freely distributing their products. Oriental Weavers claimed to only have a 39% share of the domestic market. However, the ECA found that it has a 90% market share in Egypt and media reports suggest that it enjoys approximately 50% of the global market. In October 2015, the violation had been referred to the Public Prosecutor's office, to launch its own fresh investigation before deciding whether to take the case to court. The Public Prosecutor since decided to drop the charges brought against Oriental Weavers due to insufficient evidence. The company amended its contracts with distributors to remove the exclusivity conditions.

In January 2017, the ECA referred the then-Chairman of the Confederation of African Football (CAF) Issa Hayatou to the Public Prosecutor on accusations of granting the exclusive right of commercial exploitation of the African Union (AU) championship's broadcast rights to the French firm Lagardère. Later in March 2017, the Public Prosecutor referred Hayatou to the Economic Court. The CAF renewed a contract with Lagardère in September 2016, giving Lagardère the right to broadcast the CAF championships until 2028 and allegedly ignoring an offer made by an



Egyptian company, Presentation Sports, which was \$200 million more than Lagardère's offer. The allegations included that the CAF did not put the broadcast rights into an open bidding process after deliberately ignoring several requests to open up tendering in a way that would ensure fair competition. Instead, it granted the rights to Lagardère without considering Presentation Sports' offer. According to Lagardère, its engagement with the CAF over a bid for the AU championship started a year and half before the contract was signed. Presentation Sports only approached the CAF weeks before the contract was signed. He attributes the securing of the contract to their substantial experience in the industry.

According to ECA former Chair, Mona El-Garf, the CAF violated Article 8 (dealing with abuse of dominance) and along with a fine of 700 million Egyptian pounds (€37.5 million), the ECA ordered the CAF to immediately terminate its exclusive licensing agreement with Lagardère for the Egyptian market and open up broadcast rights to public tenders. The ECA also referred the case to the COMESA Competition Commission, which has accepted to hear the complaint, noting that other COMESA countries have reported the same objection. The CAF appealed the decision of the ECA.

The appeal court ruled in favour of the ECA and said that the CAF must open up its global broadcasting and marketing rights for public tender. It found that the CAF has a dominant position in Egypt's sports broadcasting market as the sole licensor of media and marketing rights for all African football tournaments, and that the ECA sufficiently showed that its exclusive licensing agreement with the television station Lagardère Sports abused the league's dominant position and likely restricted competition in the broadcasting sector. It also said that, if the infringement continues, the current confederation administration will be jointly liable for the unlawful conduct committed by the previous administration.

Further to the ECA's order that the CAF terminate its exclusive 12-year global media and sponsorship licensing agreement with Lagardère, Lagardère Sports applied to the International Chamber of Commerce (ICC) for emergency interim relief, but this was rejected and the ICC ordered Lagardère Sports to pay the arbitration costs and contribute over €60,000 towards CAF's legal costs.

Finally, the Economic Court of Egypt imposed a fine of EGP 500 million each on the involved former CAF officials for the aforementioned infringement. This was later reduced on appeal to EGP 200 million each.

In August 2017, the ECA ruled that six electricity distributors, which are all owned by the state-owned Egyptian Electricity Holding Company, abused their dominance in the market by forcing customers to buy electricity meters as a condition for supplying them with electricity. Only North Delta Distribution Company was named as a defendant. The ECA also found that consumers paid excessive amounts for the meters. Electricity regulations in Egypt state that meters are owned by the distributors and not the customers (customers face criminal liability if meters are damaged or broken and distributors have the power to remove meters from households). Customers should never have been charged for the meters, but instead should have been able to buy meters independently, install them independently or receive free meters.

The ECA gave the companies 30 days to publish an announcement in a widely circulated newspaper stating they have ceased the conduct and said that they must also allow customers to use other meters. In this regard, the companies must affix notices inside their offices displaying the products of the competitors. If the companies fail to implement the remedies and do not appeal against the decision within 60 days of the decision being issued, the agreements with consumers will become void and customers will be entitled to refunds. The ECA did not refer the case to the Public Prosecutor's office, which is necessary to impose fines. The ECA said it worked closely with Egypt's electricity regulator during the investigation. Mona El-Garf, the head of the competition enforcer, was also a member of the regulatory authority's board. The ECA said that it had jurisdiction over the conduct (despite arguments by the distributors to the contrary) as it covers all sectors of Egypt's economy even if there are specific sectoral regulations.



**26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

Yes. Refer to question 20.

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

While the Law does not contain express provisions in respect of price discrimination, Article 8 of the Law prohibits any person holding a dominant position in a relevant market from discriminating in agreements between sellers or buyers whose contractual positions are similar, whether was this discrimination in the prices, the quality of the products, or other terms of transaction.

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

Yes. The ECA publishes press releases on its website, which can be accessed at <http://www.eca.org.eg/>

**MATOUK BASSIOUNY & HENNAWY**

**E:** [amr.abbas@matoukbassiouny.com](mailto:amr.abbas@matoukbassiouny.com)

**T:** + (202) 2796 2042

**F:** + (202) 2795 4221

**W:** [www.matoukbassiouny.com](http://www.matoukbassiouny.com)

# eSwatini



**HENWOOD & COMPANY**

John Earl Henwood



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

The relevant competition legislation is the Competition Act, 8 of 2007 (**Act**) and the Competition Commission Regulations of 2010, promulgated in terms of the Act (**Regulations**). The Act and the Regulations came into force on 1 April 2008 and June 2010, respectively, and are enforced by the Eswatini Competition Commission (the **Commission**) the High Court and ultimately the Supreme Court.

The advent of Competition Law in Eswatini was not smooth in the beginning. The historically aggressive nature in which the Commission approached the enforcement of the Act and the notification of mergers in particular, was met with some resistance by the business community. However, over time, and with a softening of the approach of the Commission to the enforcement and interpretation of the Act, there has been an increasing acceptance of the Commission and its work in the country. The implementation of a leniency programme by the Commission, in an effort to encourage parties to notify mergers has also made a notable difference in the business communities' compliance with the merger control provisions of the Act.

### 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

Yes, the Competition Draft Bill, 2020 (**Bill**) was published in 2020. The objectives of the Bill are to increase effectiveness, consistency, predictability and transparency in the efficiency and administration of competition law in eSwatini to remove criminal sanctions that presently prevail and to give effect to regional frameworks such as the COMESA Competition Regulations and international best practices.

Notably, the Bill establishes a Competition Tribunal with the function of hearing any matter referred to it by the Commission, hearing appeals made in terms of the Act and performing other functions assigned to it in terms of the Act.

In April 2021, the Commission published two documents for public comment: a draft Market Definition Guideline and a draft Guidelines on Advisory Opinions to Non-Governmental Persons.

### 3. Is the law actively enforced?

Competition law enforcement is very robust at present in eSwatini. Since the appointment of the first Board of Commissioners in 2008, the Commission has developed its own policies and guidelines such as the External Merger Guidelines, Leniency Policy, guidance on market enquiries, SCC International guidelines – complaints and investigations, and continues to develop itself in line with regional and international best practice in competition enforcement and policy. Each year, the Commission records a significant increase in the number of merger notifications received varying both in size and complexity.

Enforcement is gaining momentum with two matters taken up to the High Court (*Ngwane Mills (Pty) Ltd v Eswatini Competition Commission and Others*: High Court Civil Case No. 2589/2011) and the Supreme Court (*Eagles Nest and Five Others v Eswatini Competition Commission and Another*: Supreme Court Case No. 1/2014) level where competition law and policy have been challenged. In both cases, the Commission has been successful in defending its application and interpretation of the competition laws in eSwatini.

In the further matter of *MTN Swaziland v eSwatini Competition Commission (2020) SZSC 01* (Supreme Court), the competition authorities were ordered to refund certain notification fees in respect of a transaction that the parties were obliged to notify at the insistence of the Secretariat of the Commission, which transaction was later found to be not notifiable by the Courts when challenged.

Although the Act has been in place for some fourteen years, the Commission took a number of years to set itself up, and it is only in the last few years that the Commission has focused in enforcing the conduct and mergers provisions of the Act.

However, on 23 April 2020, the Commission issued a press release that all ongoing investigations were adjourned until such time as the Government of eSwatini issues a notice ending the partial shutdown imposed as a response to the COVID-19 pandemic. The partial shutdown is still in effect.

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

Generally, the Commission does not make known to the public its priority areas. However, the Commission does, from time to time, inform the public of certain sectors that are under investigation. There have been investigations in the medical and health sectors with particular reference to medical aid schemes, the insurance sector with specific references to exclusivity clauses, as well as the poultry and animal feed milling industries.

These investigations have been instituted from a number of different avenues ranging from consumer complaints, competitors and industry players to general public concerns. It is difficult to ascertain how far these investigations have been carried out in light of the fact that the Commission does not issue clear and concise reports in that regard.

The Commission has, however, entrenched its position on exclusivity clauses as expounded in the Act. The Commission published a document titled Guidance on Market Enquiries in February 2015 to give internal stakeholders some guidance on how the Commission conducts market enquiries, in order to complement the Commission's function and enforcement of merger control, curtailment of cartels and abuse of dominance as well as other anti-competitive practices prohibited under the Act. The document sets out, *inter alia*, a proposed strategy that the Commission intends to adopt in identifying priority markets that require the Commission's intervention to ensure the protection of consumer welfare.

#### 5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?

A transaction is required to be notified to the Commission if it (i) constitutes a merger (as defined in the Act); and (ii) constitutes economic activity within, or having an effect within, eSwatini. Currently, there are no thresholds in place, which means that any acquisition of control, including restructuring and re-organising, that falls within the definition of a merger must be notified.

For the purposes of the Act, a 'merger' is defined as the acquisition of a controlling interest in:

- any trade involved in the production or distribution of any goods or services; or

- an asset which is, or may be, utilised for or in connection with the production or distribution of any commodity.

The Act does not define what a controlling interest is, but the Regulations provide that a person will be deemed to have a controlling interest in an entity if that person:

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

Any of the above elements qualifies as a controlling interest and will therefore constitute a notifiable merger and capture horizontal, vertical and conglomerate mergers. A transaction constituting a joint venture, sale of business or any other arrangement which results in the acquisition of *de facto* or *de jure* control of a firm, constitutes a notifiable merger.

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

If a foreign-to-foreign merger constitutes economic activity within, or having an effect within eSwatini, notification is required.

In terms of the Regulations (Regulation 21), if the date of closing is likely to occur before the finalisation of the Commission's investigation, the merging parties are required to ring-fence the transaction and set out in their filing how their interests in eSwatini will be insulated from the implementation of the worldwide transaction. They are also expected to make legally enforceable undertakings that will ensure that their interest in eSwatini will not be affected by the closing of the transaction in other jurisdictions. The ring-fencing procedure is not per se done in the form of an application requesting authorisation from the Commission to ring-fence. Rather, it is more of an informative position communicated to the Commission by the parties for notice and, in terms of the Merger Guidelines, must be raised with



the Commission timeously in order to give the Commission sufficient time to issue a decision. In practice though, requests to ring-fence an international transaction are usually granted with relative ease.

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

The Act and Regulations couch the definition of a merger in wide terms with the result that any economic activity which falls within the definition of a merger within the country, or having an effect in the country, requires prior notification to and approval of the Commission. There are currently no financial thresholds in place and the Commission has taken a hard-line approach that any transaction which meets the requirements of the Act for a merger is notifiable, even where the target has no local presence. The standard that the Commission has sought to apply is that where a transaction amounts to some sort of economic activity within the country, that transaction would be notifiable if it meets the definition of a merger. However, this view has not been judicially determined, and is currently being challenged before the eSwatini courts.

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

The filing fee for a merger is based on the value of the combined annual turnover or assets (whichever is the greater) of the merging enterprises. For the purposes of fees, mergers fall into two categories: small and large. A small merger is one where the parties' combined assets or turnover is valued at SZL 8 million or less. Small mergers are notifiable but are exempt from the payment of notification fees. In terms of Article 11(8) of the Regulations, the filing fee for all other mergers between entities whose assets or turnover are above SZL 8 million is 0.1% of the combined annual turnover or assets of the entities, whichever is greater.

Put differently, the Regulations do not envisage the combination of the annual turnover of one firm and the assets of the other firm to determine the filing fee. The amount charged for notification of a merger is capped at SZL 600 000 for any single merger notified.

The parties must therefore be aware that the transaction price payable in respect of any acquisition,

is not the determining factor on the notification fee payable. It is possible that a transaction for a purchase price of anything less than SZL 8 000 000 may still attract notification fees, based on the turnover or assets of the merging parties.

The Commission determines the filing fee based on global turnover or asset values, as opposed to turnover generated from eSwatini, or assets within eSwatini. However, in the context of a group structure, the Commission only considers the specific entity entering into the merger and will not take into account the group's assets and annual turnover as a whole.

### **9. What is the merger review period?**

The Commission must consider and make a determination in relation to a proposed merger within 90 business days from the date on which the Commission receives the notification. According to the Merger Guidelines, the Commission may extend the review period (i) where the Commission requires information from third parties or industry participants, the review period may be extended by 30 business days; or (ii) where the Commission is of the view that the initial investigation period is inadequate, it may extend the review period by 60 business days. The Act does not deal with the consequence of a failure to keep to these time periods by the Commission. In practice, the Commission approves most merger transactions in approximately 40–45 business days. It is only in complex matters that the Commission requires the 90-day period.

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

Parties to a notifiable merger may not implement the merger before obtaining the requisite approval of the Commission. The only exception being an international transaction which may be ring-fenced in accordance with Regulation 21 (see question 6 above), unless the provisions of Regulation 22 have been complied with (see question 6). An implementation of a notifiable merger prior to obtaining approval from the Commission is viewed as a serious contravention of the Act and any party found to have so contravened the Act, attracts penal and criminal sanctions of a fine not exceeding SZL 250 000, or imprisonment for a term not exceeding five years, or both.

According to the Merger Guidelines, the determination of whether or not the parties have implemented a merger will be determined by the particular facts of each case. However, the following incidents, viewed collectively or individually, depending on the circumstances, could be construed as constituting implementation: (i) attending board and management meetings of the target firm whilst the parties are waiting for approval; (ii) providing the target firm with guidance on how to conduct its business in anticipation of the merger; (iii) exchanging commercially and competitively sensitive information after the due diligence process; (iv) using information obtained from the due diligence process in effecting changes in either company prior to approval; and (v) appointments and announcements of new management prior to approval.

The Act further provides that where the offence is committed by a body corporate, every director and officer of such body corporate or, if the body of persons is a firm, every partner of that firm, shall be guilty of that offence, provided that such director, officer or partner shall not be guilty of the offence if he or she proves on a balance of probabilities that such offence was committed without his or her knowledge or consent or, that he or she exercised all due diligence to prevent the offence. The liability extends to agents or attorneys representing the corporate entities in the transaction.

The Commission now adopts a strict approach towards entities that implement notifiable transactions without the prior approval of the Commission and, in addition to issuing a demand for notification to the entities, the Commission may further impose a fine against the entities in accordance with section 35(1) of the Act.

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

The Commission has adopted and encourages pre-notification meetings. These meetings serve the purpose of, first, guiding the parties on the filing where the parties seek such direction; and second, ascertain if all the requirements of the Act and Regulations have been complied with by the notifying parties before the Commission accepts the filing and signs a Completeness of Filing form (Form 6, or an affidavit, as provided for in

Regulation 24) with the appointed representative of the parties. There is no obligation on the parties to hold a pre-notification meeting for guidance, but it is now mandatory to meet with the Commission and sign the Completeness of Filing form before the Commission will accept that a transaction has been notified.

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

While the Commission's focus is on anti-competitive practices which have, as their object or effect, the prevention, restriction or distortion of competition to an appreciable extent in the country, non-competition factors are relevant. The Commission has previously considered issues of public interest and policy such as employment (i.e. whether or not the employees will be retained by the merged entity) and technological benefits, when considering whether or not to approve a merger, with or without conditions.

#### **13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

Not applicable.

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

In Part 4 of Form 3, in which the parties are required to submit a notification of a transaction, the Commission requires from each of the parties, a list of their five largest customers and their contact details. The Commission contacts these customers to request their submissions regarding the proposed transaction which are taken into consideration insofar as they are relevant to any competition concerns that the Commission may need to look into in assessing whether the transaction should be approved without conditions, with conditions, or prohibited altogether. The Commission may also contact competitors or market players for information which may or may not be taken into account depending on its nature and relevance.



Further to this, Regulation 26 provides for third-party intervention. In terms of Regulation 26, a third party may either at their own initiative or at the request of the Commission make submissions to the Commission either in confidence or not, in relation to any merger notification. In such circumstances, the submissions are availed to the merging parties to enable them to comment or respond thereto.

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

Regulation 22 provides that any person, including a person not involved as a party to a proposed merger, may voluntarily submit any document, affidavit, statement or other relevant information at any time before the conclusion of the merger investigation. Regulation 26 also provides for third-party interventions, which may be made orally or in writing. On rare occasions, employees of the merging entities are allowed to make submissions on the proposed merger and, if valid employment concerns arise, the Labour Commission is required to intervene and look into these.

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

Regulation 28 makes provision for oral hearings. A party to a merger may request an oral hearing after the investigator has finalised the report on the merger investigation, but before the Commission has taken a decision on the merger.

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

Section 40 of the Act provides that a party who is aggrieved by the decision of the Commission made under the Act or the Regulations can appeal to the High Court. In terms of the Constitution, the High Court is empowered to review decisions of the Commission. The appeal must be lodged within 30 days of service of notice of that decision to the party. An appeal against a decision of the Commission does not automatically stay the decision of the Commission unless such stay is granted by the High Court.

Recently, the Supreme Court of eSwatini has determined the right of the High Court to review any decision of the Commission is an avenue open to any party dissatisfied with a decision of the Commission in spite of the fact that this right is not specifically mentioned in the Act.

A dissatisfied party now has an election to either appeal in terms of Section 40 or apply for review in terms of the Common Law.

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

The Act, at section 30(5), specifically lists the following as prohibited conduct:

- price fixing;
- collusive tendering;
- bid rigging;
- market and customer allocation agreements;
- sales or production quota allocation arrangements; and
- any collective action to enforce arrangements.

The Commission has not in the past conducted any investigations on cartel conduct. Its Cartel Conduct and Corporate Leniency Policy has been finalised and published.

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

The Act confers broad investigative powers on the Commission, including powers of entry and inspection (dawn raid) to search for information in relation to cartel conduct. The Commission may also, for the purposes of carrying out its functions, summon and examine witnesses and call for and examine documents, hear oral evidence, and call upon any company to provide information in relation to an industry under investigation. This has to be done under an issued search warrant. Further to these powers, the Corporate Leniency Policy sets out conditions precedent to a grant of immunity to a party involved in cartel conduct as well as requirements that may qualify that party for a reduced penalty. This has yet to be exercised in eSwatini.



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

Any conduct that is in contravention of the Act attracts criminal and penal liability of a fine of SZL 250 000 or imprisonment not exceeding five years, or both. Cartel conduct falls within such prohibited conduct.

The Act further provides that where the offence is committed by a body corporate, every director and officer of such body corporate or, if the body of persons is a firm, every partner of that firm, shall be guilty of that offence, provided that such director, officer or partner shall not be guilty of the offence if he/she proves on a balance of probabilities that such offence was committed without his/her knowledge or consent, or that he/she exercised all due diligence to prevent the commission of the offence. The Commission has published a leniency policy on its website.

To date, there has not been any criminal prosecution arising from contravention of the Act. The Commission has rather sought to impose administrative penalties as a means of enforcement.

In October 2016, the Commission Gazetted a regulation increasing the administrative penalties to an amount not exceeding 10% of the total turnover of a company in order to ensure compliance with the Act. However, there seems to be a disconnect between the penalties provided for in the Act and those set out in the Regulations.

The Commission has published guidelines for the formula it uses in order to determine the penalty. The Competition Commission penalty setting guidelines can be accessed on the Commission's website at [www.compcom.co.sz](http://www.compcom.co.sz).

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

The Commission is empowered to authorise any act if it considers that the advantages to the country outweigh the disadvantages. However, it is not empowered to authorise conduct which is prohibited in terms of the Act.

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

Yes, resale price maintenance is specifically prohibited in section 31(f) of the Act.

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

Exclusive agreements are not per se prohibited under the Act unless they limit access to markets or otherwise unduly restrain competition in the country. Neither the Act nor the Regulations specify the factors to be considered when determining the lawfulness or unlawfulness of exclusive agreements. However, the Commission considers pro-competitive factors and if these outweigh the anti-competitive effects, the agreements will be allowed.

Section 30(1) of the Act prohibits 'any category of agreements, decisions, concerted practices which have, as their object or effect, the prevention, restriction or distortion of competition to an appreciable extent in the country or in any part of it...'. The Commission has in practice applied and enforced this section in one matter involving a lease agreement between The Gables and Hammond Brothers t/a eZulwini Pick n Pay Supermarket. The lease agreement contained an exclusivity clause between the parties and the Commission concluded in its findings that such a clause contravened section 30(1) of the Act and was thus prohibited. Applying the rule of reason principle, the Commission in its investigation sought to ascertain whether the competitive gain of the clause outweighed its anti-competitive effect and concluded that the clause was invalid and of no force or effect as it was inconsistent with the spirit of the Act.

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

Dominance of a firm is not per se prohibited but the Act prohibits the abuse of a dominant position. Although there are no thresholds determinative of dominance, the Act defines a dominant position as a position in a market in which an enterprise as a



supplier or an acquirer of goods and services, either alone or together with any interconnected body corporate, is in a position to act independently of competitors and consumers over the production, acquisition, supply, or price of goods or services in that market.

Further, the Act prohibits a firm from engaging in specific acts if they limit access to markets or otherwise unduly restrain competition, or have or are likely to have, adverse effects on trade or the economy in general, such as:

- predatory behaviour towards competitors;
- discriminatory pricing and discrimination in the supply and purchase of goods;
- making the supply of goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods or the provision of competing goods or other services;
- making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier;
- imposing restrictions as to where or to whom or in what form or quantities goods supplied or other goods may be sold or exported;
- resale price maintenance;
- trade agreements fixing prices between persons;
- refusals to supply goods or services to potential purchasers; and
- denials of access to arrangements or associations which are crucial to competition.

These prohibitions appear to apply to all firms, not only to firms holding a dominant position. The Act specifically prohibits dominant firms from engaging in conduct with the object or effect of preventing or restricting competition, including:

- price fixing;
- collusive tendering and bid rigging;
- market or customer allocation agreements;
- collective action to enforce arrangements; and
- the allocation by quota of sales or production, subject to any law to the contrary.

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

None that we are aware of.

#### **26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

The Act generally covers all conduct that is in contravention of the Act (anti-competitive trade practice) and imposes a penal sanction of up to SZL 250 000 or imprisonment for a period not exceeding five years, or both.

The Act further provides that where the offence is committed by a body corporate, every director and officer of such body corporate or, if the body of persons is a firm, every partner of that firm, shall be guilty of that offence, provided that such director, officer or partner shall not be guilty of the offence if he/she proves, on a balance of probabilities that such offence was committed without his/her knowledge or consent or, that he/she exercised all due diligence to prevent the commission of the offence.

Additionally, the Commission is empowered to impose an administrative penalty not exceeding 10% of the total turnover of a company to ensure compliance with the Act. Where the company has subsidiaries, all the companies belonging to the same economic unit will be considered for the computation of the penalty.

#### **27. Are there rules in relation to price discrimination?**

Yes. Section 31(b) of the Act contains provisions which prohibit price discrimination.

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

The Commission does not publish its decisions on its website ([www.compco.co.sz](http://www.compco.co.sz)); however, other information, including the Act, Regulations, policies and press statements, is published there. The Commission has also established an Advocacy department through which it hopes to interact with the public and stakeholders. Occasionally, the press publishes the outcomes of approved transactions together with the conditions attached to the transaction by the Commission.

**JOHN EARL HENWOOD**

Henwood & Company  
Mantambe House, Lot 1/ 649  
Ben Dunn Street  
PO Box 4206

Mbabane  
H100  
eSwatini

**T:** +268 2405 0385

**W:** [ejh@tripec.co.sz](mailto:ejh@tripec.co.sz)





# Ethiopia



**AMAN ASSEFA & ASSOCIATES**

Aman Assefa  
Redeat Stiphanos

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

The relevant competition legislation is the Trade Competition and Consumers Protection Proclamation (No. 813/2013) (the **Proclamation**). The Proclamation established the Trade Competition and Consumers Protection Authority (the **Authority**) and the Federal Trade Competition and Consumers Protection Appellate Tribunal (the **Tribunal**). The Proclamation is enforced by the Authority, consisting of the adjudicative bench exercising the judicial powers of the Authority; the Tribunal, which decides appeals against decisions of the Authority; and the Federal Supreme Court. Also relevant is the Authority's Merger Directive issued in 2016 (**Merger Directive**).

### 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

There are no recent developments in the law or proposed amendments or regulations. However, the institutional regulatory framework has recently changed in that, effective September 2021, the Authority was shifted under the auspices of the Ministry of Trade and Regional Integration.

### 3. Is the law actively enforced?

The Proclamation and Merger Directive are actively enforced, both in respect of mergers and prohibited practices.

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

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

### 5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?

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

- when two or more business organisations, previously having independent existence,

amalgamate, or when such business organisations pool the whole or part of their resources for the purpose of carrying on a certain commercial activity; or

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

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

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

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

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

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

A merger is notifiable if the turnover or assets of one or combined assets, turnover or registered capital (whichever combination is higher as per the Authority's practice) of one or both the acquiring and/or the target company is ETB 30 million or higher.



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

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

No filing fees have been published to date.

#### **9. What is the merger review period?**

The Proclamation does not prescribe the time periods within which the Authority must conduct its investigation and make a determination. These are however set out in the Merger Directive. The Merger Directive requires that the Authority make decisions on intermediate mergers within 15 working days from the date a complete merger notification is submitted, subject to the possibility for an extension by a period not exceeding 10 working days, for phase one of the investigation. The Merger Directive also provides that decisions on large mergers shall be made within 30 working days, subject to the possibility of an extension by a period not exceeding 15 working days for phase one. The Authority may at its discretion decide to carry out a phase-two investigation for intermediate and large mergers with an additional 10 and 15 working days, respectively.

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

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

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

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

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

The Proclamation does not contain any express reference to non-competition factors to be considered for purposes of a merger assessment. Article 10(2) of the Proclamation states that the effect of the merger on 'trade competition' must be considered. However, paragraph 20 of the Merger Directive provides that a 'merger assessment shall be conducted from trade competition, public interest and market perspectives'. In this regard, the following public interest factors must be considered by the Authority:

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

#### **13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

It is not clear whether there is scope for government intervention in merger transactions other than the Authority. Aside from the competition law compliance, the tax authority may intervene if the transaction is subject to tax law (Example – Capital Gains Tax). Also, separate from the competition law, the Ministry of Trade, Ethiopian Investment

Commission and the Documents Authentication and Registration Agency may intervene with varying roles to ensure regulatory compliance.

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

Article 10(3)(b) of the Proclamation provides that, during the course of the Authority's investigation of a merger, the Authority may 'invite, by a notice published on a newspaper having wide circulation, any business person who is likely to be affected by the said merger, to submit his written objections, if any'. In reality, this is not effectively sought.

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

The Directive under Paragraph 21.1 stipulates that pursuant to the Authority's issuance of a notice of objection, any entity objecting the merger may lodge its objection. Hence, anyone including employees can lodge their objections. As such, nothing under the law or practice precludes employees from making submissions pursuant to the call for objection by the Authority or otherwise. Also, while nothing in the Directive or Proclamation is provided regarding as to who the Authority reaches out to during its investigations, the Authority, if it finds it useful for its investigation, may reach out to any individual or party, including employees.

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

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

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

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

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

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

- it has the effect of preventing or significantly lessening competition, unless a party to the agreement, concerted practice or decision can prove that any technological, efficiency or other pro-competitive gain resulting from the agreement outweighs that effect; or
- it involves directly or indirectly, fixing a purchase or selling price or any other trading condition, collusive tendering, or dividing markets by allocating customers, suppliers, territories or specific types of products or services.

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

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

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

The Authority may also conduct dawn raids with or without police assistance. A search and seizure order requested by investigating officers of the Authority shall be granted by an adjudicative bench of the Authority in accordance with the provisions



of the Criminal Procedure Code. Upon the granting of the order, an investigating officer is empowered to enter business premises where the relevant products are stored, or stop a vehicle loaded with the relevant products; take samples of products necessary for the investigation, examine and take copies of records and documents kept in any form; and seize products.

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

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

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

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

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

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

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

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

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

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

When reviewed under the abuse of dominance provisions, an exclusive agreement will be deemed to be abusive if any party to the agreement is dominant and involved in: (i) the limitation of production, or the hoarding, diverting, prevention or withholding of products from being sold in the regular channels of trade (Article 5(2)(a) of the Proclamation); (ii) imposition of unfair selling or purchase prices; (iii) making the supply of particular goods or services dependent on the acceptance of competitive or non-competitive goods or services or imposing restrictions on the distribution or manufacture of competing goods or services or making the supply dependent on the purchase of other goods or services having no connection with the goods or services sought by the customer; (iv) discrimination between customers on the basis of price and other conditions in the supply and purchase of products and services without justifiable economic reason (Article 5(2)(f) of the Proclamation); or (v) the imposition of restrictions as to where or to whom or in what conditions or quantities or at what prices the products or services shall be resold or exported, without justifiable economic reason (Article 5(2)(h) of the Proclamation).



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

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

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

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

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

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

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

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

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

#### **26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

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



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

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

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

No.

**AMAN ASSEFA & ASSOCIATES**

PO Box 13166  
Addis Ababa  
Ethiopia

**T:** +251 114 702868  
**M:** +251 911 505659  
**E:** aman.assefa@aaclo.com  
**W:** www.aaclo.com

# Ghana



**AB & DAVID**

Benjamin Kpakpo Sackar  
Akosua Kyeiwaa Akowuah



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

There is no dedicated competition law regime in Ghana. A draft bill, the Competition Bill, is receiving further review by the Ministry of Trade and will be resubmitted to Cabinet. There is no indication as to when this will be done.

Policy think-tanks have urged Government to prioritise its competition policy since competition legislation is a necessary condition for the implementation of phase 2 of the African Continental Free Trade Area (AfCFTA).

Currently, the legislation that is of general application and makes express reference to 'competition' in Ghana is the Protection Against Unfair Competition Act, 2000 (Act 589) (**Unfair Competition Act**). However, the Unfair Competition Act does not apply in the same way as anti-trust or competition legislation applies in other jurisdictions and in the context of mergers and/or acquisitions. The Unfair Competition Act provides a general mechanism for the protection of business goodwill and reputation, proprietary information – whether or

not it is registered – and the prevention of acts that cause or are likely to cause confusion with respect to another person's enterprise.

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

There is also the Ghana International Trade Commission (GITC) Act which is also of a general character but its scope is related to competition issues related to international trade. The GITC Act set up the GITC which was recently inaugurated pursuant to the World Trade Organisation (WTO) regime.

Although there is no general anti-trust or competition legislation, various sectoral laws and regulators are responsible for the promotion of fair competition and, in certain sectors, merger control as well.

SECTOR	LAW	REGULATOR
Banking	Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) (Banking Act)	Bank of Ghana
Mining	Minerals and Mining Act, 2006 (Act 703) (Mining Act)	Minerals Commission
Energy	Energy Commission Act, 1997 (Act 541)	Energy Commission
Aviation	Ghana Civil Aviation Act, 2004 (Act 678)	Ghana Civil Aviation Authority
Telecommunication	Electronic Communications Act, 2008 (Act 775) (ECA)	National Communication Authority
Pensions	National Pensions Act, 2008 (Act 766)	National Pensions Regulatory Authority
Insurance	Insurance Act, 2021 (Act 1061) (Insurance Act)	National Insurance Commission
Public utilities: electricity and water	Public Utilities Regulatory Commission Act, 1997 (Act 538)	Public Utilities and Regulatory Commission
Petroleum, Oil and Gas	Petroleum (Exploration and Production) Act, 2016 (Act 919) Petroleum Commission Act, 2011 (Act 821)	Petroleum Commission

The most notable of these are:

- Merger control provisions in relation to public companies, which are contained in the Securities Industry Act, 2016 (Act 929) and accompanying SEC Rules (Takeover and Mergers Code), with the Securities and Exchange Commission being mandated to review, approve and regulate takeovers, mergers and acquisitions of public companies.
- Ghana is a member of the Economic Community of West African States (**ECOWAS**). The ECOWAS Competition Authority is responsible for regulating mergers and acquisitions with a regional dimension and aims to function in a similar way to the COMESA Competition Commission. The ECOWAS Supplementary Act on Competition Rules, 2008 (**ECOWAS Competition Rules**) prohibits anti-competitive business conduct which prevents, restricts or distorts competition within the common market of ECOWAS. Prohibited acts include agreements, decisions and concerted practices which, for instance, fix prices or trading conditions, limit or control production, share markets, customers and sources of supply. There are however, no publicly recorded decisions relating to Ghana where the ECOWAS Competition Rules have been applied.
- Ghana also signed and ratified the Kigali Declaration in 2018 and is consequently a member of the newly formed AfCFTA, which came into force in May 2019. In terms of the agreement establishing the AfCFTA, a Competition Protocol will be concluded as part of phase 2 negotiations.

## **2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?**

Currently, there are no proposed amendments or new regulations in respect of anti-trust applicable to mergers, takeovers and acquisitions. As noted in the response to question 1, there is no indication as to when the Competition Bill will become law, though it will presumably be prioritised given Ghana's obligations in terms of the agreement establishing the AfCFTA.

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

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

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

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

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



a person is subject, in a manner contrary to honest business practices. The international obligations include World Trade Organisation protocols and agreements such as those on anti-dumping issues and subsidies.

It is unclear from the Unfair Competition Act whether the processes or steps to implement mergers or to embark on acquisitions qualify as an “act or practice” to which the Unfair Competition Act would be applicable. In practice, mergers and acquisitions have completed without express reference to compliance with the Unfair Competition Act.

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

### 5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?

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

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

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

following documents to be delivered to the Registrar of Companies for registration and issuance of a certificate of merger to the company:

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

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

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

Additionally, the sector-specific laws referred to earlier require notification and approval of certain mergers. Examples of notifiable transactions under the various sectoral legislation are set out below. Under the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930), the following transactions require notification to and approval by the Bank of Ghana:

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

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

See the response to question 7 for a brief discussion of what constitutes a merger in terms of the SEC Rules.

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

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

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

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

Generally, there are no thresholds when it comes to the notification of mergers. The relevant sectoral regulator may, however, need to be notified of a merger prior to its implementation (as discussed in question 5). By way of example:

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

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

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

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

#### **9. What is the merger review period?**

As discussed above, there is no active competition-specific regulator and as such there are no specified periods in which mergers must be approved. Sectoral regulators for the markets in which parties to a merger operate may have their own review periods. For example, under section 49 of the Banking Act, approval from the Bank of Ghana must be obtained at least three months prior to an acquisition or disposal of 5% or more in a bank or specialised deposit-taking institution in Ghana.



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

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

**11. Are pre-notification contacts with the authorities permitted? Are pre-notification meetings normal practice?**

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

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

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

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

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

**13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

As discussed, there is no specific competition authority. However, the Securities and Exchange Commission reviews, regulates and approves mergers within the securities market, and may do so together with other sectoral regulators.

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

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

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

Sectoral regulators consider employee issues to be key and will generally require that an adequate plan has been put in place to address any employment issues, including retrenchments (see the response to question 12). Approval may be granted conditionally subject to compliance with certain employment-related obligations.

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

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

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

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



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

Although the Unfair Competition Act does not expressly prohibit cartel conduct, it generally prohibits an act or practice which is contrary to honest business practices. With regard to the sectoral legislation, there are no specific prohibitions on cartel conduct and there are no examples of regulators pursuing firms for cartel conduct. However, as discussed under question 19, regulators are generally vested with powers to prohibit and investigate any conduct including those that may be anti-competitive in nature which will extend to cartel conduct.

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

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

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

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

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

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

for breach of a relevant law. An aggrieved person generally may seek civil remedies in Court.

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

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

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

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

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

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

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

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



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

Although neither the sectoral legislation nor the Unfair Competition Act has specific or express prohibitions against the abuse of a dominant position, the ECOWAS Competition Rules specifically prohibit the abuse of a dominant position acquired through the possession of a substantial share of the market which enables the control of prices. Furthermore, if a practice is shown to be contrary to honest business practices, it will be in contravention of the Unfair Competition Act.

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

There are no examples of authorities pursuing firms for abuse of a dominant position.

**26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

No – an aggrieved party may seek civil remedies in Court.

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

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

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

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

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

**AB & DAVID**

8 Dr. Isert Road, North Ridge  
PO Box TF 330  
Accra  
Ghana

**T:** (+233 30) 225 3073; 225 3074; 701 2129

**D:** (+233 20) 211 0073

**E:** [benjamin@abdavid.com](mailto:benjamin@abdavid.com)

**W:** [www.abdavid.com](http://www.abdavid.com)

# Kenya



## **BOWMANS (KENYA)**

Joyce Karanja  
Rogers Ngelese



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

The relevant legislation is the Competition Act, No. 12 of 2010 (the **Act**) which came into force on 1 August 2011 and the Competition (General) Rules, 2019 (the **Rules**). The Act repealed the Restrictive Trade Practices, Monopolies and Price Control Act (Chapter 504 of the Laws of Kenya).

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

## 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

### The Competition Tribunal

The Tribunal, which determined its first case on 20 April 2021, became operational on 3 May 2019 with the swearing in of its four members.

### Guidelines issued by the Authority

The Authority published the External Guidelines on the Informant Reward Scheme Policy (the **Informant Reward Guidelines**), which came into effect on 1 January 2021 and which were introduced to incentivise persons with relevant, actionable information regarding violations of the Act to furnish the Authority with such information. The incentive under the Guidelines is a monetary compensation paid at the conclusion of the investigation amounting to one percent (1%) of the administrative penalty subject to a cap of KES 1 million. The Informant Reward Guidelines do not apply to informants who have participated directly in the anti-competitive conduct in question; such informants would be required to approach the Authority in the manner described under the separate Leniency Programme Guidelines.

The Joint Venture Guidelines (the **JV Guidelines**), which came into effect on 1 June 2021, augment the Rules by expounding on the different forms of joint ventures, the filing parties in a joint venture transaction, the basis for determining the assets and turnovers in joint ventures and the Authority's approach to reviewing and analysing joint venture transactions. The JV Guidelines also clarify that joint

ventures that fall outside the scope of the merger regime are subject to scrutiny under the provisions of the Act and the Rules regulating restrictive trade practices.

## 3. Is the law actively enforced?

Yes. Although the Authority started out with a primary focus on merger control, in recent years it has become more active in the enforcement of restrictive trade practices including abuse of buyer power, as well as consumer protection.

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

The Authority launched its third five-year strategic plan on 1 July 2021 (covering the period between 1 July 2021 and 30 June 2025). The plan is themed “*Expanding Enforcement Frontiers for Increased Consumer Welfare and Sustainable Economy*” and will entail a focus on the impact that the digital economy has on competition; in addition to abuse of buyer power, bid rigging and abuse of dominance.

## 5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?

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

Section 41(1) of the Act states that a merger occurs when one or more undertakings, directly or indirectly, acquires or establishes direct or indirect control over the whole or part of the business of another undertaking. Section 41(2) states that a merger, as defined in section 41(1), may be achieved in any manner including:

- the purchase or lease of shares, acquisition of an interest or purchase of assets of the other undertaking in question;
- the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently, whether or not the business in question is carried on by a company;

- the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;
- acquiring by whatever means the controlling interests in a foreign undertaking that has a controlling interest in a subsidiary in Kenya;
- in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;
- vertical integration;
- exchange of shares between or among undertakings which results in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or
- amalgamation, takeover or any other combination with the other undertaking.

A merger is only notifiable if it meets the mandatory thresholds set by the Rules.

### Joint Ventures

Joint ventures that are not full-function do not qualify as mergers. The Rules define a full-function joint venture as one that functions as an autonomous economic entity for a period of ten years or more. For joint ventures jointly controlled by a party to a merger and third parties, the turnover and assets of the joint venture will be attributed equally between the controlling parents, irrespective of the size of their financial or other interests.

The Joint Venture Guidelines consider that there are three merger parties to a joint venture transaction, namely the joint venture parents and the joint venture vehicle (as opposed to an acquirer and target). Consequently, in determining the applicable turnover and asset values for a joint venture transaction, the combined value of the turnover and assets attributable to the parent undertakings, as well as the joint venture vehicle in Kenya, are taken into account.

The Joint Venture Guidelines provide that the main aim of determining asset and revenue thresholds is to inform the CAK on the likely competition impact a joint venture transaction is likely to have in a market, acknowledging that parent entities may exercise market power through their investment in the joint venture.

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

Section 6 of the Act makes provision for extraterritorial application of the Act and provides that the Act shall apply to conduct outside Kenya by:

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

Therefore, if a foreign-to-foreign merger (i) results in the direct or indirect change of control of a business, part of a business or an asset of a business in Kenya in any manner; and (ii) meets the thresholds set out in the Merger Threshold Guidelines contained in the Rules, then it will require notification to the Authority.

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

The thresholds for mandatory merger notification are outlined in the Merger Threshold Guidelines contained in the Rules. Prior to the introduction of these thresholds, all mergers (which met the test of a merger under the Act) were notifiable.



The Merger Threshold Guidelines provide for three types of mergers as set out below:

<b>NOTIFIABLE MERGERS (parties must submit a merger notification form in the prescribed form)</b>	<b>EXCLUSION APPLICATIONS (requiring parties to submit an exclusion application in the prescribed form)</b>	<b>MERGERS THAT DO NOT REQUIRE APPROVAL (do not need notification/ approval of the CAK)</b>
Where the combined turnover or asset value (whichever is higher) of the merging parties exceeds KES 1 billion and the turnover or asset value of the target undertaking (whichever is higher) is above KES 500 million.	Where the combined turnover or asset value (whichever is higher) of the merging parties is between KES 500 million and KES 1 billion. * Note: in practice, the CAK also grants exclusions to mergers where the turnover or asset value (whichever is higher) of the target is below KES 500 million, even if the combined turnover or asset value (whichever is higher) of the merger parties exceeds KES 1 billion.	Mergers where the combined turnover or value of assets (whichever is higher) of the merging parties does not exceed KES 500 million.
Where the firms operate in the carbon-based mineral sector, if the value of the reserves, the rights and the associated assets to be held as a result of the merger exceeds KES 10 billion.	If the firms are engaged in prospecting in the carbon-based mineral sector, irrespective of asset value.	Where the merger meets the COMESA Merger Notification Threshold and 2/3rds or more of their turnover or assets (whichever is higher) is not generated or located in Kenya.
Where the turnover or assets (whichever is higher) of the acquiring undertaking is above KES 10 billion and the merging parties are in the same market or can be vertically integrated, unless the transaction meets the COMESA Merger Notification Thresholds.		
Where the undertakings operate in COMESA, meet the COMESA Merger Notification Thresholds but 2/3rds or more of their turnover or assets (whichever is higher) is generated or located in Kenya.		

It is important to note that where transactions are notifiable to the COMESA Competition Commission (the CCC) and as such do not require approval from the CAK, the merging parties are required to inform the CAK in writing that the transaction has been notified to the CCC within 14 days of filing the notification to the CCC. There is no prescribed format for this notification.

## 8. What filing fees are required?

The Merger Threshold Guidelines contained in the Rules prescribe merger filing fees as outlined below:

COMBINED TURNOVER OF THE MERGING PARTIES	FILING FEE PAYABLE
KES 500 000 001 to KES 1 billion	No filing fee payable (exclusion filing is still required)
KES 1 000 000 001 to KES 10 billion	KES 1 million
KES 10 000 000 001 to KES 50 billion	KES 2 million
Above KES 50 billion	KES 4 million

## 9. What is the merger review period?

The CAK must make a determination on a merger application within 60 days after the date on which the CAK received the notification. However, the CAK may, within 30 days of receipt of the notification, request for further information in writing from one or more of the undertakings involved. If this is the case, the CAK must then make the determination within 60 days after the date of receipt of such additional information.

If the CAK considers it appropriate, it may determine that a hearing conference (oral representations done in a meeting with the CAK) be held in relation to a merger, in which case the CAK must give written notice to the undertakings involved before expiry of the applicable 60 days. If this happens, the CAK must then make a determination within 30 days of the date on which the hearing conference is concluded.

The CAK has the power to extend any of the above periods due to the complexity of the issues involved, as long as the extension is done before that period's expiry, is in writing, and does not exceed 60 days.

In respect of exclusion applications, the CAK must make a determination within 14 days of receipt of an exclusion application. Note, however, that the CAK may request for further information within the 14-day period from the merging parties which in essence "stops the clock" until such information is provided.

Although the Act and its ancillary legislation are silent on whether days means calendar or business days, the CAK treats "days" as "calendar days" (not business days).

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

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

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

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

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

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

The Act is silent on pre-notification meetings. However, the Rules permit an undertaking(s) to seek an advisory opinion from the Authority on whether it needs to notify a transaction under the Act. Further, in practice, the Authority is willing to have pre-notification meetings upon request from the merging parties. Pre-notification consultations with the Authority are advisable, particularly in respect of complicated, high profile, or time-sensitive matters.

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

Section 46(2) of the Act allows the Authority, in making its determination in relation to a proposed



merger, to take account of any criteria which it considers relevant to the circumstances involved in the proposed merger. As such, the Authority has the discretion to take non-competition factors into account.

The factors stipulated in the Act, which may be considered by the Authority include:

- the extent to which the proposed merger would be likely to result in a benefit to the public, which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking which is not a party to the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
- the extent to which the proposed merger would be likely to affect a particular industrial sector or region;
- the extent to which the proposed merger would be likely to affect employment;
- the extent to which the proposed merger would be likely to affect the ability of small undertakings to gain access to or to be competitive in any market; and
- any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.

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

### **13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

Merger transactions in regulated sectors such as insurance, banking, and telecommunications are generally subject to regulatory approval from the various sector regulators.

In addition, the CAK has entered into memoranda of understanding with a number of national agencies (such as the Communications Authority of Kenya, Public Procurement Regulatory Authority, etc) and regional agencies (such as the COMESA Competition Authority).

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

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

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

With regard to the extent to which submissions by customers and competitors are considered, the Market Definition Guidelines provide that submissions by customers and competitors will be used for purposes of market definition only where they are sufficiently backed by factual evidence.

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

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



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

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

The Act does not require, but does empower, the Authority to give the merging parties an opportunity to make representations before issuing its decision to approve or prohibit a merger. Under the Act, where the Authority decides to prohibit or conditionally approve a proposed merger, it must issue written reasons for its determination to the merging parties. The Authority's decision can be challenged through an application for review to the Tribunal, as discussed further in question 17 below.

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

The Act makes provision for parties dissatisfied with the Authority's decision on a merger to appeal to the Tribunal, which is established under section 71 of the Act. Section 48 of the Act provides that no later than 30 days after notice is given by the Authority in the Kenya Gazette of its determination on a proposed merger, a party to the merger may apply to the Tribunal for the Authority's decision to be reviewed. The Tribunal has its own rules of procedure and timing. Within 30 days after receiving the application to review the Authority's decision, the Tribunal is required to issue a notice of the application in the Kenya Gazette and invite interested parties to make submissions to the Tribunal in regard to the matter being reviewed.

Within 4 months of the date on which an application for review is made, the Tribunal is required to make a determination either:

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

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

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

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

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

Under the Act, the Authority is empowered to regulate cartel conduct, including any agreements or concerted practices which have the object or effect of preventing, distorting or lessening competition in any goods or services in Kenya. The following definitions in the Act in this respect are worth noting:

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

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

Examples of the type of practices prohibited by the Act include direct or indirect price fixing, dividing markets by allocating customers, suppliers, areas, or specific types of goods or services, collusive



tendering, and distorting, restricting, or preventing competition.

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

The Authority is also empowered to grant block exemptions for any category of decisions, practices or agreements between firms, and has issued the Block Exemption Guidelines which are contained in the Rules.

By way of examples of the Authority's actions on cartels, in 2016, the Authority conducted its first dawn raid at the offices of fertiliser producers Mea Limited and Yara East Africa, both of which are members of the Fertiliser Association of Kenya, on the allegation of price collusion between the two fertiliser companies. In December 2018, the Authority conducted a dawn raid on four paint manufacturers: Crown Paints Plc, Basco Products Kenya Limited, Kansai Plascon Kenya Limited and Galaxy Paints and Coatings Limited also on allegations of price collusion.

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

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

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

- require the person (or director or other competent officer in the case of a body corporate) to provide information relating to the investigation within the time and in the manner specified in the notice;

- require the person to appear before the Authority to give evidence or produce any documents;
- require the person to produce certain documents to the Authority or to a person specified in the notice to act on the Authority's behalf; and
- request the person in possession of certain records to give copies of the records to the Authority.

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

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

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

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

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

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

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

Once an application for exemption is made, the Authority is required to publish notice of the application in the Kenya Gazette. The notice should indicate the nature of the exemption sought by the applicant and call upon interested persons to submit to the Authority, within 30 days of the publication of the notice, any written representations which they may wish to make in regard to the application.

The Act also empowers the Authority to issue block exemptions and in this respect the Authority has published the Block Exemption Guidelines set out in the Third Schedule to the Rules, which apply to the following categories of vertical agreements:

- franchise agreements;
- stadia and sport branding rights agreements;
- content development and broadcasting agreements; and
- one-off sporting and promotional events.

In addition, the Act also makes provision for exemptions with respect to export agreements, intellectual property rights and professional rules.

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

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

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

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

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

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

Neither the Act nor the prohibition in general expressly stipulate the factors to be taken into account in determining whether the exclusive agreement has the object or effect of preventing, distorting or lessening competition in the Kenyan market. However, the Act particularly prohibits any agreement which, among other things, limits or controls production, market outlets or access, technical development, or investment. Exclusive agreements that have the effect of limiting or controlling production, market outlets or access, would, on the face of it, likely be deemed to be unlawful, unless exempted.

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

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

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



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

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

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

Conduct that amounts to abuse of a dominant position includes:

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

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

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

#### **26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

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

#### **27. Are there rules in relation to price discrimination?**

As at the time of writing, there are no Rules expressly relating to price discrimination. However, the Act does prohibit agreements, decisions or concerted practices which apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. The Consolidated Guidelines on Restrictive Trade Practices also offer some guidance on this.

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

The Authority is required to publish its decisions in the Kenya Gazette. The Authority also publishes a summary of its decisions, during the relevant year, in its annual report.

The Authority has also recently begun publishing its determinations on its website [www.cak.go.ke](http://www.cak.go.ke).

# Malawi



**PFI PARTNERSHIPS**

Elton Jangale



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

The relevant legislation is the Competition and Fair-Trading Act [Chapter 48:09 of the Laws of Malawi] (**Competition Act**), which is complemented by the Competition and Fair-Trading Regulations (G.N. 20/2006) (**Regulations**). The core objective of the Competition Act is to promote competition in Malawi. The Competition Act is enforced by the Competition and Fair-Trading Commission (**Commission**), which is established under the Act. The Commission comprises a Board of Commissioners (**Board**) and a management team (**Secretariat**). The Board has the ultimate mandate for competition regulation in Malawi. The Board has also an auxiliary mandate for consumer protection.

The Competition Act promotes competition in Malawi using three main strands, i.e. regulating anti-competitive trade practices; prohibiting abuse of dominant positions; and controlling mergers. Anti-competitive trade practices in Malawi, or in any substantial part of Malawi, which are likely to result in the prevention, restriction or distortion of competition to an appreciable extent, such as cartel conduct, collusive tendering and bid rigging, market allocation, predation, excessive pricing, price fixing and resale price maintenance, are prohibited under the Competition Act, although in practice, such prohibited practices are unevenly regulated by the Commission.

In accordance with the Competition Act, the role of the Commission is to ensure market players are not engaged in anti-competitive conduct and any other business practices that have or would likely have negative effects on competition. The mandate of the Commission covers any activity that has any amount of commercial value. The Commission uses a two-pronged approach to discharge its mandate. On the one hand is the preventive approach, which seeks to assist market players to voluntarily comply with the provisions of the Competition Act; and, on the other hand, is the enforcement approach which seeks to prohibit market players from engaging in any anti-competitive conduct.

The Commission has investigated and prohibited various anti-competitive business practices, including suspected cartel, price recommendations by industry associations, resale price maintenance and abuse of dominant position. The Commission

is yet to block a merger for being anti-competitive. The Commission has cleared several potentially anti-competitive mergers subject to the merging parties adopting remedies. The Commission has mostly accepted or imposed structural remedies and been reluctant to impose or accept behavioural remedies.

Several sanctions are prescribed for any infringement of the provisions of the Competition Act, comprising penal and administrative penalties. Recently, the Commercial Division of the High Court of Malawi sitting at the Lilongwe Registry, in *Airtel Malawi PLC vs Competition & Fair-Trading Commission* [Commercial Case No. 404 of 2021] has confirmed that the Commission can impose penal pecuniary sanctions. However, the penal custodial sanctions can be imposed by the Criminal Division of the High Court. This matter is being appealed in the Supreme Court. The Commission may exercise discretion and issue reformatory orders. Any action taken by the Commission under the enforcement approach is based on investigations which include soliciting information from the market and sourcing information through its own investigation of the parties and other stakeholders. The results of the investigations and findings are submitted to the Board in a report that is based on legal and economic analyses of the evidence gathered. The report forms the basis for deliberations and determination by the Board.

The Companies Act [Cap. 46:03 of the Laws of Malawi] (**Companies Act**) provides for the procedure and manner through which mergers involving a company or companies that are listed on the Malawi Stock Exchange (**MSE**) or unlisted companies but with more than ten shareholders (**Prescribed Companies**) must be authorised to merge by the Panel on Takeovers and Mergers (**Merger Panel**). By regulating the procedure and manner through which mergers for the Prescribed Companies are conducted, the Companies Act seeks to protect the interests of shareholders in the Prescribed Companies whose shares are targeted for acquisition. This is pertinent considering that consumers usually own shares in the Prescribed companies.

In terms of the Companies Act, the Commission has been designated as the Merger Panel, which is required to regulate takeover bids, mergers and acquisitions and other transactions that have or may have, directly or indirectly, an effect on the

ownership or control of the Prescribed Companies. This provision requires the Commission to assess all offers for takeover, acquisition or exchange share ownership of the Prescribed Companies to ensure that there is fair and equal treatment of all shareholders in a target Prescribed Company and to ensure that shareholders are not denied an opportunity to make an informed decision on the merits of an offer.

### **2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?**

Yes. The Commission has since October 2020 been undertaking a two-year-long major institutional and legislative reform, which involves, *inter alia*, a comprehensive review of the Competition Act, the Consumer Protection Act [Chapter 48:10 of the Laws of Malawi], related laws and ensuing regulations. In October 2021, the Commission published for stakeholder comment, a series of guidelines covering behavioural conduct, market definition and public interest. It is most likely that any new laws will only come into effect at the earliest in 2022.

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

The Commission actively enforces the Act in both competition and consumer protection. The Commission has also been active in advocating awareness in competition and consumer protection compliance.

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

Due to economic disruption caused by the effects of the COVID-19 outbreak, the Commission has focused investigating on exploitative pricing and conduct by traders. A lot of the Competition's activities has been on consumer protection due to persistent supply disruptions of goods and services and continuous price increases. There has been no activity in merger control by the Commission in 2021. It is likely that focus on merger control will return once the impact of COVID-19 on the local business and industry starts to wane.

### **5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?**

The Competition Act does not create a mandatory merger notification regime. Any transaction that is likely to result in substantial lessening of competition in a market in Malawi is required to be notified to the Commission for approval. The Act is silent on how joint ventures must be treated. The Commission is yet to review and decide on a joint venture.

Merger notifications can be notified to the Commission before or after consummation of the merger. The Commission accepts notifications at any time. If notified after consummated, it is advisable that the notification be made without further delay because parties that notify the Commission after a merger has been consummated risk being required to unbundle the merger if it is found to be anti-competitive. A notification of a merger can be made by any or both of the merging parties or by a person authorised by the parties.

To notify a merger, parties need to complete and submit an application form, which is obtainable from the offices or website of the Commission. The application for merger authorisation must be accompanied by the latest audited financial accounts and a payment of notification fees. In addition to the forms, parties are required to submit all relevant documents that can help the Commission to access the likely impact of the merger on competition. The documents may include reports of market studies conducted by the parties or other authorities in the industry. The application is submitted by delivery to the Commission of hard copies which may be duplicated by soft copies submitted online by emailing. The Commission will usually conclude on a merger review if all required information has been submitted. Failure or delay in submitting all required information will cause delay to the Commission in concluding on the merger review.

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



judicial review)], the Supreme Court held that a decision by the Commission ordering merging or merged parties to notify their merger remains valid until challenged by way of appeal in the High Court of Malawi before expiry of 15 days of the decision of the Commission. The Court went on to state that a decision by the Commission was not open for judicial review; it is the decision-making process by the Commission which is amenable for judicial review.

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

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

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

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

On 4 September 2015, the Commission executed a memorandum of understanding (**MOU**) with the COMESA Competition Commission, to ensure co-operation between the two authorities. The MOU includes undertakings relating to:

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

In August 2021, the Commission launched its new strategic plan. The plan, in place for a five-year period (2021 - 2026) is rooted in five strategic pillars: Competition Regulation, Consumer Protection, Advocacy and Awareness, Financial Management and Sustainability and Corporate Governance and Management.

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

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

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

There are no minimum thresholds for merger notifications, and all mergers likely to have effect to a substantial lessening of competition in Malawi are notifiable.

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



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

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

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

#### **9. What is the merger review period?**

The Commission is required to make an order within 45 days from the date on which it receives all necessary documents in support of the merger. Non-submission of all required documents will delay conclusion of a merger review. The Commission does not specify whether these are business days or calendar days, but the Commission appears to have assumed it is calendar days.

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

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

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

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

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

#### **12. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

No. The Board of the Commission mandated by the Competition Act to be independent and act independently of any influence, including government intervention. For instance, ministers responsible for industry, trade or economic development do not have statutory authorities to intervene in the powers of the Commission.

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

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



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

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

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

Yes, merging parties can make representations before a decision is issued provided that they submit a request to make a submission. There is no formal process to make representations before a decision is issued. The recent trend has been for concerned third parties, such as competitors, customers or consumers, to make prior requests in writing to the Commission to make representations at the hearings.

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

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

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

Whether or not the 15-day period can be extended was considered by a judge in the High Court of Malawi in the context of an application for authorisation of an exclusivity agreement which was determined under section 44 of the Competition Act. In the commercial case [No. 2 of 2014 (High Court, Commercial Division)], *Airtel Malawi Ltd versus The Competition and Fair-Trading Commission*, the court held that it did not have the power to grant an extension to the 15-day period. Although this case did not deal with a merger specifically, it is likely to be applicable in merger cases.

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

Yes, the Competition Act regulates prohibited practices and specifically prohibits cartels and particular horizontal restrictive practices (i.e. unlawful conduct between competitors). Any category of agreements, decisions or concerted practices likely to result in the prevention, restriction or distortion of competition to an appreciable extent in Malawi or in any substantial part of Malawi, is prohibited. Section 33(3) of the Competition Act gives examples of business practices which have or would likely have negative effects on competition

and are, therefore, prohibited. These include: cartels, such as price fixing or market allocation agreements among competing firms; bid rigging; resale price maintenance; predation; abuse or misuse of market power; and exclusive arrangements or agreements.

The Commission takes proactive action to identify market players that are potentially involved in cartel conspiracy or markets which may be affected by cartelisation. Cartel detection tools used by the Commission involve analyses of observable economic data and firm behaviour, systematic monitoring of media as well as tracking firms and individuals to detect behaviour which is inconsistent with a healthy competitive process. In October 2021 and following an increase in the price of liquid fuel in Malawi, the Commission issued a warning to trade associations to cease and desist from announcing fixed price adjustments and also engaging in price gouging, both of which are contraventions of the Competition Act.

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

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

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

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

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

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

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

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

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



the person responsible for any such agreement, arrangement, undertaking, act or omission. There is no leniency policy in place.

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

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

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

The Commission is prohibited from authorising acts, agreements or understandings of a kind described as cartels, trade agreements to fix price and abuse of dominance under sections 33(3) and 41(1) of the Competition Act, respectively. An example of an application for authorisation is the case of Chibuku Products Ltd (**CPL**) in which an application by CPL was made to the Commission pursuant to section 44 of the Competition Act, for authorisation to distribute CPL's products through appointed exclusive distributors. Although the Commission determined that the proposed distribution arrangement had the likely effect of restricting competition in the distribution of CPL's products, the Commission authorised the arrangement subject to certain amendments of restrictive clauses in the distribution agreement. The arrangement had positive elements which outweighed the anti-competitive effects. In particular, it ensured the availability of CPL's products in remote areas at reasonable prices.

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

The Competition Act does not distinguish between minimum and maximum resale price maintenance. Resale price maintenance is prohibited if it limits access to markets or otherwise unduly restrains competition or has, or is likely to have, an adverse effect on trade or the economy in general, and not necessarily a minimum price maintenance. In

a recent competition matter against a beverages manufacturing and bottling company, Castel Malawi Limited (**Castel**), the Commission made no distinction between minimum and maximum resale price maintenance and went on to order Castel to cease and desist from recommending prices which were tantamount to resale price maintenance.

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

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

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

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

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

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

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

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

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

In 2018, the Commission did not find any abuse or misuse of dominant position in a merger approval matter relating to the acquisition by Central Poultry (2000) Ltd (**Central Poultry**) of some substantial business assets of Crown Agro Industries Ltd. Allegations of abuse of dominant position were levelled against Central Poultry by some small-scale poultry farmers. The merger was approved subject to some conditions which were targeted at preventing any abuse by Central Poultry in the future.

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

In 2013, the Commission investigated and dismissed a case in which Fasa Products Ltd (**Fasa**) was accused of engaging in anti-competitive business practices. It was alleged that Fasa had appointed

exclusive distributors for soya pieces and was refusing to allow other wholesalers to purchase the product directly from the factory shop.

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

There is no specific penalty for abuse of dominance, however, it is an offence for any person that has a dominant position of market power to misuse that power.

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

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

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

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

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



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

The Act requires the Commission to publish its decisions in the Government Gazette (**Gazette**), an official document accessible to the public. In practice, the Commission rarely publishes its decision in the Gazette. Some decisions by the Commission are available in summary form on the Commission's website [www.cftc.mw](http://www.cftc.mw) under 'Media/ Press Release'.

**PFI PARTNERSHIPS**

Competition, PPP & Commercial Law  
5 Garden Court, Chimutu Road  
off Chilembwe Road, Area 11  
PO Box 30556  
Lilongwe 3  
Malawi

**E:** [pfi@pfi.mw](mailto:pfi@pfi.mw)

# Mauritius



## **BOWMANS (MAURITIUS)**

Shianee Calcuttea



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

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

## 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

### Amendments to Rules of Procedure

Following the amendment to the Competition Commission Rules of Procedure 2009, the final report of the Executive Director of the Commission (**Executive Director**) is not required to be published on the website of the Commission.

### Market Study of the Pharmaceutical Industry

A pharmaceutical market study was carried out by the Commission and a final report was released by the Commission on 8 June 2021 to identify potential hurdles to competition across the pharmaceutical supply chain and to come up with recommendations to address same. The Commission identified the following concerns in relation to the pharmaceutical industry –

- a) Lack of transparency in the registration process having the potential effects of undermining the certainty and predictability of the registration process and thus, entry of new products;
- b) Potential situation of perceived conflict of interest given that the Pharmacy Board and its Trade and Therapeutic Committee could comprise private pharmacists involved in the wholesale pharmacy business;
- c) Current pricing mechanism may be resulting in high prices of pharmaceutical products; and
- d) The current intellectual property (**IP**) regime could be a source of prevention of competition in the supply of pharmaceutical products.

The study has come up with proposals to address the competition concerns identified, which are

broadly in relation to implementation of industry best practices to promote transparency and good governance; an alternative pricing mechanism to ensure affordability; and regulatory reforms to the IP regime to foster intra-brand competition including –

- a) Guidelines of the Pharmacy Board on the registration process to be made publicly available;
- b) The composition of the Pharmacy Board and its sub-Committees to be done in such a manner that minimises such perceived and actual conflicts of interest;
- c) An assessment of the feasibility of introducing the regressive mark-up system to address the pricing issue;
- d) An assessment of the intellectual property regime for opening up competition in the market for the supply of pharmaceutical products, in particular an evaluation of the benefits against the potential harm in the market. This assessment is also likely to be relevant for other products which are protected under the current IP regime.

## 3. Is the law actively enforced?

Yes. On 20 August 2021, the Commission published its annual report for the period 2019 to 2020. During the period under review, 61 complaints were reported to the Commission while, 14 competition issues were generated internally. The complaints and internally generated issues were examined and 18 enquiries were initiated. This figure, added to the 18 ongoing enquiries at the beginning of the period under review, brought the total number of enquiries handled by the Commission during this year to 36. Out of these 36 enquiries, 13 were closed because no reasonable grounds could be found to believe that restrictive business practices were occurring. Three enquiries proceeded to investigation and one advice was submitted to the Minister.

Between July 2019 and June 2020, the Executive Director initiated five investigations, wherein one enquiry generated three distinct investigations and completed three investigations. At the end of the financial year, there were eleven ongoing investigations and two ongoing market studies.

Following an investigation by the Executive Director, the Commission recently determined that two agreements between members of the Association of



Private Health Plans and Administrators pertaining to medical insurances and medical schemes are in breach of the Act by virtue of them being collusive in nature, and imposed financial penalties on certain parties to the agreements amounting to MUR 11.3 million.

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

In the wake of the COVID-19 crisis, the Commission published a communique recognising that some businesses may be called upon to collaborate amongst themselves in the public interest, to ensure that Mauritians continue to be supplied with essential products and services during these unprecedented times. The Commission provided assurance that the competition law enforcement would not unduly constrain or impede necessary and critical cooperation in public interest, and would not go further or last longer than what is necessary. But, at the same time, the Commission made it clear that it will not tolerate commercial conducts on the part of dominant suppliers who opportunistically seek to exploit the crisis to the detriment of consumers.

The Commission also set out some basic recommendations for trade associations, which aim to i) ensure that cooperation between association members does not go beyond legitimate purposes, and ii) prevent a course of action that inadvertently strayed into the prohibition on collusive agreement (cartels).

The Commission intends to further promote its corporate leniency policy. The Commission has improved on its online inquiry/complaint submission during the lockdown period in Mauritius and continues to accept complaints and inquiries electronically, even after the lockdown.

#### 5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?

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

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

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

According to the Competition Commission Guidelines on Mergers CC-5 (**Merger Guidelines**), the test for control is whether material influence is capable of being exercised rather than the actual exercise of such influence. The existence of control will be determined based on a case-by-case analysis of the entire relationship between the merging parties.

The amendments to the Merger Guidelines have introduced three ways by which control over another enterprise may be acquired. In order of increasing degree of control, they are: material influence, *de facto* control, and controlling interest.

For the purposes of assessing material influence, the test is whether the acquirer has the ability to influence, and not whether such influence has actually been exercised. Such material influence does not confer on the acquirer the ability to control the policy of the target, but rather to materially influence such policy.

As for *de facto* control, it is a level of control which occurs where a person, who despite holding less than half of the total shares issued by the target, is able to control the target, generally through an additional agreement which allows such person to do so.

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



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

Joint ventures in Mauritius are treated in a similar manner as that of two or more entities collaborating under the Act and the Merger Guidelines. Parties to the joint venture may consult the Commission before going forward with the merger to get insights into any competition restrictions they may be violating.

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

For the purposes of the Act, a merger situation occurs when two or more enterprises, of which one enterprise operates in Mauritius, either by itself or through a company incorporated in Mauritius, are brought under common ownership or control. As discussed above, there are no obligations to obtain approval or notify the Commission in relation to mergers, although the Commission has the power to review a merger situation. Where foreign-to-foreign mergers impact the Mauritian market, the Commission, with the assistance of other authorities, might review the merger to ensure that the local market is not harmed.

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

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

- all the parties to the merger, supply or acquire products and services of any description, and will, following the merger, together supply or acquire 30% or more of all those products or services on the market; or
- one of the parties to the merger alone supplies or acquires, prior to the merger, 30% or more of products or services of any description on the market; and

- the Commission has reasonable grounds to believe that the creation of the merger situation has resulted in, or is likely to result in, a substantial lessening of competition within any market for products and services.

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

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

No filing fees are payable for merger notifications.

#### **9. What is the merger review period?**

The general timeframe for review of a notification depends on the complexity of a matter and whether the transaction is likely to raise competition concerns. For transactions which do not raise competition concerns, the timeframe for the review is generally shorter. In general, upon receipt of a notification the Commission conducts a preliminary assessment in the form of an enquiry to assess whether there are reasonable grounds to believe that the transaction may lead to a substantial lessening of competition and be reviewable under the Act.

A reply is provided to the parties upon completion of the preliminary assessment within 30 working days from the notification. Where the preliminary assessment demonstrates that the transaction is unlikely to lead to a substantial lessening of competition, the parties will be informed accordingly, and the matter will be closed. On the other hand, where the preliminary assessment demonstrates that the transaction may raise competition concerns, the parties are informed of those concerns within the 30 working days, and then an in-depth assessment is triggered.

Where an in-depth assessment is required, the Executive Director of the Commission has another 6 months to conduct his assessment. Upon completion of the in-depth assessment, the

Executive Director will produce a report and send it to the Commission for its determination.

Where the Executive Director identifies competition concerns, he will engage with the parties to discuss possible undertakings which may resolve those concerns. Normally, where parties promptly offer undertakings to the Commission which satisfactorily address the identified competition concerns, the assessment may be completed earlier than the six-month timeline for in-depth assessment.

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

There is no prohibition on the pre-implementation of a merger. Parties to a merger situation are under no legal obligation to inform (notify) or seek the approval of the Commission prior to implementing a merger transaction. Nonetheless, the Act provides parties to a merger situation with the possibility to seek the guidance of the Commission on whether or not the merger may substantially lessen competition, and as such whether or not the merger is in conformity with the Act. Seeking the guidance of the Commission on a merger situation is voluntary as per the Act. Where a merger situation harms competition, the Commission is empowered to block the implementation of such mergers or require the divestment of the assets acquired if the merger has already been implemented or impose other appropriate directions.

**11. Are pre-notification contacts with the authorities permitted? Are pre-notification meetings normal practice?**

Any party to a merger may, and is encouraged to, apply to the Commission for guidance as to whether a proposed merger is likely to substantially lessen competition in a market. Such pre-notification contacts with the Commission can be done in parallel to preparing the merger notification.

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

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

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

**13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

Normally there is no scope for government intervention in merger transactions separate from the Commission. However, the Commission may enter into a memorandum of understanding with other governmental bodies and regulators for effective exercise of their respective responsibilities and establishing mechanisms for practical co-operation, including use of sector-specific expertise for such cooperation. The Commission recently signed one such memorandum with the utility regulatory authority of Mauritius.

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

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

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

It is unclear whether employees are contacted as part of a merger investigation. Public interest benefits are narrowly defined in the Act and the effect of a merger on employment is not included in the definition. There is also no indication of employment-related conditions having been imposed by the Commission to date.



However, the Commission often investigates mergers on behalf of the COMESA Competition Commission, and could, in accordance with the provisions of the COMESA Regulations, 2004, expand its inquiry to include other public interest factors for consideration, including employment.

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

The Commission typically publishes a Statement of Issues after an investigation has been completed, allowing the merging parties to propose undertakings or otherwise engage with the Commission to remedy identified concerns. The parties to the merger may also request the Commission to convene a hearing to make representations. In terms of formulating and publishing procedural rules, the Commission shall have regard to, *inter alia*, the principles of natural justice and the need for fairness between parties.

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

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

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

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

Recently, an enquiry was opened upon press information reporting on certain decisions taken by the Executive Committee of the Petrol Retailers Association (**PRA**) to apply a percentage surcharge on purchases of petroleum products effected by consumers using payment cards. The purpose of the enquiry was to assess whether the said PRA

decisions amounted to a prohibited conduct under the Act.

The enquiry found that each card acquiring petrol service station (**PSS**) qualified as an enterprise which was deriving revenue from charging a service fee for supplying card acceptance facilities. The enquiry found reasonable grounds to believe that the PRA's decisions could amount to prohibited collusive agreement(s) having the object of fixing the fee at which PSS members supply their card-acceptance services to consumers paying for their petroleum refills by debit/credit card. The matter has proceeded to an investigation and the current status of the investigation is unknown. Previously, the Commission had recommended the imposition of a fine of MUR 76.4 million (USD 2.08 million) on Mauritius Chemical & Fertilizer Industry Ltd and United Investments Ltd, which are the two main suppliers of fertilisers in Mauritius, for operating a cartel. In a different matter in the beer industry, following a leniency application by Phoenix Beverages Ltd (**PBL**) in relation to a cartel with Stag Beverage Ltd, the latter was ordered to pay a fine of approximately MUR 20 million (USD 545 000). PBL obtained a 75% discount as leniency applicant and was fined approximately MUR 6.5 million (USD 180 000).

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

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

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

- require any person to provide an explanation of any such documents, or to state where they may be found.

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

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

The Commission has a Corporate Leniency Policy (CLP) in place, which is set out in the Competition Commission Guidelines on Collusive Agreements (CC 3). In terms of the CLP, among others, the Commission will grant an enterprise the benefit of total immunity from financial penalties for a given infringement, where the enterprise is the first to provide the Commission with evidence of the cartel before an investigation has commenced, provided that the Commission does not already have sufficient information to establish the existence of the alleged cartel activity. Immunity will also be subject to the enterprise satisfying the following:

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

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

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

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

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

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

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

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

An exclusive agreement can only be reviewed under the monopoly provisions of the Act. This means that an exclusive agreement will only be reviewable if at least one of the parties to the agreement are in a 'monopoly situation'. A monopoly situation exists in relation to the supply of products or services where:

- 30% or more of those products or services are supplied, or acquired in the market, by one enterprise; or
- 70% or more of those products or services are supplied, or acquired in the market, by three or fewer enterprises.



Exclusive conduct will be prohibited if it has the object or effect of preventing, restricting, or distorting competition, or constitutes exploitation of a monopoly situation. Exclusive agreements are therefore not unlawful in themselves, but only if they are likely to lead to anti-competitive foreclosure to the detriment of consumers. Refer to the Guidelines on Monopoly Situations and Non-Collusive Agreements (**Monopoly Guidelines**) issued by the Commission for additional factors that the Commission will consider.

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

As indicated above, a monopoly situation exists in relation to the supply of products or services of any description where:

- 30% or more of those products or services are supplied, or acquired in the market, by one enterprise; or
- 70% or more of those products or services are supplied, or acquired in the market, by three or fewer enterprises.

Conduct by a firm having a monopoly situation will be prohibited if it has the object or effect of preventing, restricting, or distorting competition, or constitutes exploitation of the monopoly situation. When reviewing a monopoly situation, the Commission shall take into account:

- the extent to which an enterprise enjoys, or a group of enterprises enjoy, such a position of dominance in the market so as to make it possible for that enterprise or those enterprises to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors;
- the availability of substitutable products or services to consumers in the short term;
- the availability of nearby competitors to whom consumers could turn in the short term; and
- evidence of actions or behaviour by an enterprise that is, or a group of enterprises that are, party to the monopoly situation where such actions or behaviours have, or are likely to have, an adverse effect on the efficiency, adaptability, and competitiveness of the economy of Mauritius, or are likely to be detrimental to the interests of consumers.

If the Commission finds that the specific conduct has led to anti-competitive effects in the market, it will assess whether any of the following public interest factors relevant to the conduct outweigh the anti-competitive effects:

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

Refer to the Monopoly Guidelines issued by the Commission for more information.

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

The Commission has carried out several investigations into abuse of dominance in the past. A recent example is the Commission's finding that Visa and MasterCard have abused their dominance in the market by the setting of interchange fees excessively high at 1%. It was found that the interchange fee can constitute up to 79% of the cost to be incurred by banks for supplying merchants with facilities for accepting card payments. It was found that, at 1%, the interchange fee was restricting competition among banks and financial institutions by preventing some of them, especially smaller institutions, from providing merchants with card acceptance facilities at lower prices. The Commission ordered Visa and MasterCard to limit their interchange fee for debit and credit card transactions to 0.5%.

Refer to the Commission's annual reports for further examples of investigations into abuse of dominant position.

#### **26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

Where it has been found that an enterprise abused its monopoly situation by engaging in a prohibited practice in terms of section 46 of the Act, and that

no public interest factors outweighed the anti-competitive effects of the conduct, the Commission may give the enterprise direction as it considers necessary, reasonable and practicable to:

- remedy, mitigate or prevent the adverse effects on competition that the Commission has identified; or
- remedy, mitigate or prevent any detrimental effects on users and consumers insofar as they have resulted from, or are likely to result from, the adverse effects on, or the absence of, competition.

Such direction may include, but is not limited to, a requirement that the enterprise shall:

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

Any person who fails without reasonable excuse to comply with a requirement imposed by the Commission shall commit an offence and shall, on conviction, be liable to a fine of up to MUR 500 000 (USD 13 500), and to imprisonment for a term of up to two years.

### **27. Are there rules in relation to price discrimination?**

The Act does not specifically deal with price discrimination; however, the Monopoly Guidelines briefly refer to this conduct. Price discrimination is not in itself anti-competitive, and the Commission will not investigate it as an abuse, unless it forms part of a strategy that indeed constitutes an abuse, e.g. predatory pricing or excessive pricing. Refer to the Monopoly Guidelines for more information.

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

Yes, the Commission publishes its decisions on its website: <https://competitioncommission.mu/>.

### **BOWMANS (MAURITIUS)**

3rd Floor, The Dot  
Avenue De Telfair,  
Moka  
80829  
Mauritius

**T:** +230 52 98 01 00

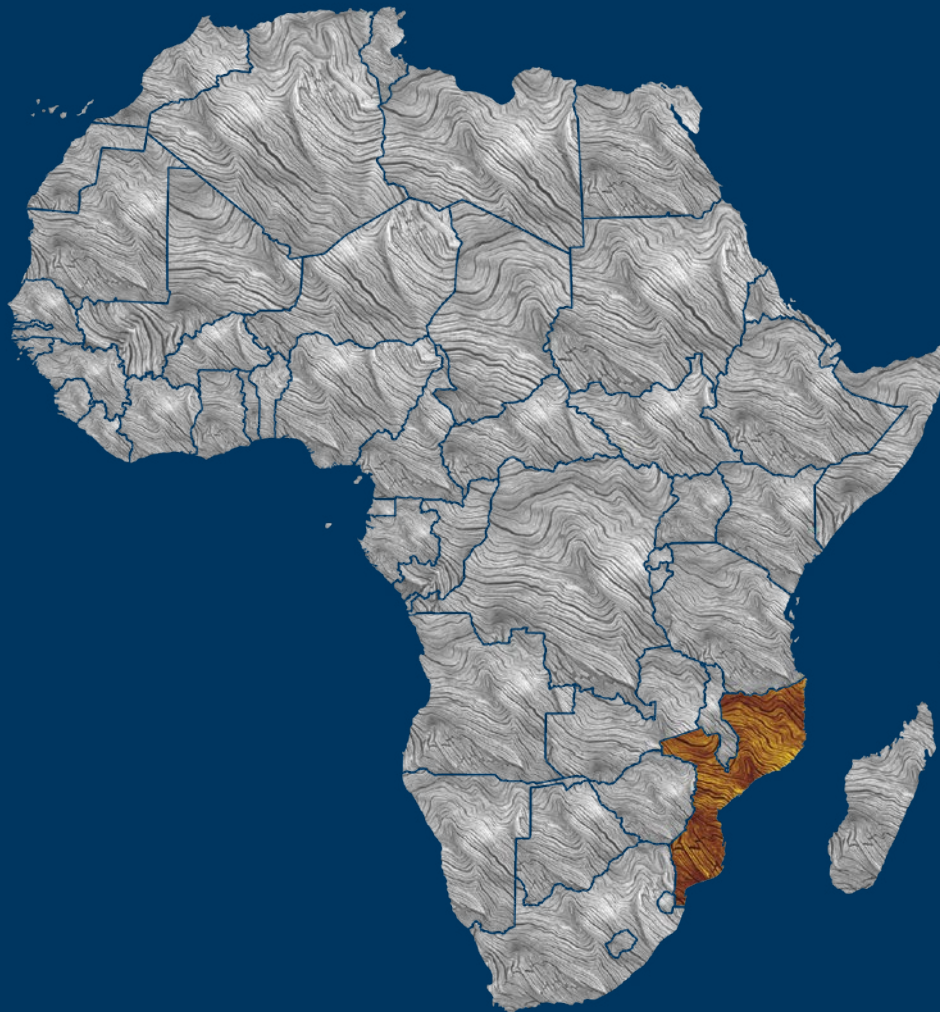
**M:** +230 52 50 57 14

**E:** [shianee.calcutteea@bowmanslaw.com](mailto:shianee.calcutteea@bowmanslaw.com)

**W:** [www.bowmanslaw.com](http://www.bowmanslaw.com)



# Mozambique



## **MDR ADVOGADOS**

Tiago Arouca Mendes,  
Managing Partner

## **MORAIS LEITÃO GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS**

Pedro Gouveia e Melo, Partner



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

Competition Law is regulated in Mozambique primarily by Law 10/2013 of 11 April 2013 (the Competition Law and Glossary to the Competition Law), and the Competition Law Regulation, approved by Decree 97/2014 of 31 December 2014 (the **Regulation**).

The administrative authority with exclusive jurisdiction to enforce the Competition Law is the Autoridade Reguladora da Concorrência (the **Authority**), an independent entity endowed with administrative and financial autonomy and with broad supervisory, regulatory, investigatory and sanctioning powers. The Statute of the Authority was recently amended and is presently contained in Decree 96/2021, of 31 December 2021 (the Statute of the Authority).

### 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

Authority Resolution 1/2021, of 22 April 2021, established the notification forms for the filing of concentrations subject to mandatory notification.

Ministerial Decree 77/2021, of 16 August 2021 (repealing Ministerial Decree 79/2014 of 5 June 2014), establishes the fees applicable to merger control notifications and requests for exemption of restrictive agreements.

In December 2021, the Government approved a new Statute of the Authority (Decree 96/2021, of 31 December 2021, which repealed Decree 37/2014, of 1 August 2014).

The jurisdictional thresholds for mandatory merger notification were amended by Decree 101/2021 of 31 December 2021, which amended the Competition Law Regulation (approved by Decree 97/2014 of 31 December 2014).

### 3. Is the law actively enforced?

It is understood that the Authority became operational during 2021. Mergers are now notified to the Authority on a regular basis and several clearance decisions have been issued to date. Whilst recent statements suggest the Authority is also

looking into anticompetitive conduct (see question 4), precisely how the law will be enforced in this regard is not yet known.

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

The President of the Authority has highlighted a number of industries which appear to raise competition issues, suggesting they will be among the investigative priorities for the Authority in the future:

- cement and construction;
- beverages;
- consumer goods, in particular flour, vegetable oils, soap and sugar;
- pharmaceutical (medicines);
- financial; and
- telecommunications.

### 5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?

The Competition Law applies to transactions that (i) are considered to be 'concentrations between undertakings', and (ii) meet the jurisdictional thresholds.

The following operations are deemed to constitute a concentration between undertakings:

- a merger between two or more independent undertakings;
- the acquisition of control, by one or more undertakings, over other undertaking(s) or part(s) of other undertakings; and
- the creation of a joint venture performing, on a lasting basis, all the functions of an autonomous economic entity (i.e. a fully functioning joint venture).

The concept of an undertaking encompasses all entities conducting economic activity through the offer of goods or services in the market, regardless of their legal status.

The following exceptions do not constitute a concentration in the meaning of the Competition Law:

- the temporary or transitional acquisition of control over an undertaking;



- the acquisition of shareholdings or assets by an insolvency administrator within insolvency legal proceedings;
- the acquisition of a shareholding merely as a guarantee;
- the temporary acquisition by financial institutions or insurance companies of shareholdings in companies active outside the financial sector, insofar as the securities are acquired with a view to their resale, if the acquirer does not exercise the corresponding voting rights with a view to determine the competitive behaviour of the target (or only exercises them with a view to prepare the sale), and if the disposal of the controlling interest occurs within one year; and
- two or more concentrations between the same undertakings in a period of five years that individually do not meet the jurisdictional thresholds. However, if the concentration resulting from the conclusion of the last agreement meets the jurisdictional thresholds, it should be notified to the Authority before closing.

The legislation also applies to joint ventures. The creation of, or the acquisition of control over, a jointly controlled undertaking constitutes a concentration whenever the joint undertaking fulfils the functions of an independent economic entity on a lasting basis (i.e. a fully functioning joint venture).

Where the creation of the joint venture has the object or effect of co-ordinating the competitive behaviour of undertakings that remain independent, such co-ordination is assessed under Articles 15 to 18 of the Competition Law.

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

Foreign-to-foreign mergers are caught by the Competition Law to the extent that they have, or may have, effects in the territory of Mozambique. Therefore, foreign-to-foreign mergers may be subject to mandatory filing if (i) both parties or the target alone achieve, directly or indirectly, sales in Mozambique (despite the fact that neither of the undertakings concerned are established in the country), and (ii) the jurisdictional thresholds are met.

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

Notification is mandatory whenever the concentration meets at least one of the following thresholds:

- the combined turnover of all the undertakings concerned in Mozambique in the preceding year is equal to or exceeds MZN 925 million, as long as each of at least two of the undertakings concerned achieved in the preceding year a turnover of at least MZN 105 million in Mozambique;
- the transaction results in the acquisition, creation or reinforcement of a share of or above 50% of the national market of a given good or service, or in a substantial part thereof;
- the transaction results in the acquisition, creation or reinforcement of a share of or above 30% of the national market of a given good or service, or in a substantial part thereof, as long as each of at least two of the undertakings concerned achieved in the preceding year a turnover of at least MZN 105 million in Mozambique.

The Competition Law provides that, even when the concentration does not meet the jurisdictional thresholds, the Authority may nevertheless, within six months of it becoming public knowledge, open *ex officio* an investigation and request the notification of the concentration, in case it is deemed to appreciably impede, distort or restrict competition and does not qualify for a public interest exemption. Parties involved in a non-reportable transaction may voluntarily submit a filing to the Authority, which may well be advisable if there is any chance that the Authority will intervene *ex officio*.

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

Pursuant to Ministerial Decree No. 77/2021, of 16 August 2021, the value of the filing fee payable by parties to a notifiable transaction is 0.11% of the turnover in Mozambique in the year prior to notification, with a maximum of MZN 2.25 million.

#### **9. What is the merger review period?**

Phase 1 may last up to 30 days from publication by the Authority of notices of the notification in two newspapers with national circulation (this must be done within five days from the date on which the Authority certifies the notification to be “complete”).

Phase 2, which includes an in-depth investigation, may last up to 60 days. In both phases, there is an additional 30-day phase during which the Authority will adopt a formal decision.

A merger may, therefore, have a statutory review period of up to 120 days, although in practice this period may be longer as requests for information have the effect of stopping the clock.

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

A concentration meeting the jurisdictional thresholds is subject to mandatory notification to the Authority within seven working days from the conclusion of the agreement or acquisition project and cannot be implemented before a non-opposition decision is (expressly or tacitly) adopted by the Authority.

Failure to file a notice of concentration within the statutory deadline subject to mandatory notification exposes the merging parties to serious negative consequences. In particular:

- the breach of the notification deadline makes the notifying party(ies) liable to fines of up to 1% of the previous year's turnover for each of those parties; and
- the validity of any legal instrument related to the transaction is dependent upon the express or tacit clearance by the Authority.

In cases where the Authority opens an *ex officio* investigation of the concentration, the statutory decision deadlines do not apply.

In addition, the early implementation of a concentration subject to mandatory filing without express or tacit clearance from the Authority, or in breach of a decision prohibiting the concentration, makes the undertakings concerned liable to fines of up to 5% of the previous year's turnover for each of the participating undertakings.

**11. Are pre-notification contacts with the authorities permitted? Are pre-notification meetings normal practice?**

The Competition Law Regulation provides for confidential and informal pre-notification contacts, and in some cases, pre-notification meetings have

been held notably when there were doubts as to whether the transaction was subject to mandatory notification. It is yet to be seen whether pre-notification meetings will become standard practice.

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

In its substantive analysis, the Authority is bound to take into account public interest reasons which may justify any impediments or restrictions to competition resulting from the notified concentration. In particular, the Authority's public interest assessment should consider the effect of the transaction on:

- a specific sector or region;
- employment;
- the capacity of small enterprises, or enterprises controlled by historically disfavoured persons, to become competitive; and
- the capability of national industry to compete internationally.

**13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

Article 6 of the Competition Law provides a guarantee of autonomy and independence to the Authority. Also bear in mind that the Competition Law is applicable to the public and private companies who operate in the Mozambican market. Due to the lack of information until the present date, there is no example of a government intervention in merger transactions.

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

Following publication of a notice of the notification by the Authority in two national newspapers (which should be made within five days of filing), any interested third party may submit comments on the transaction within the deadline established by the Authority, which cannot be less than 15 days.

Competitors should also be heard when the Authority takes into account non-competition public interest reasons (see question 12).



In addition, prior to the adoption of a final decision in the procedure, the Authority must hold a hearing involving the notifying parties, as well as any third parties that have already intervened in the procedure and expressed an adverse opinion on the merger. The hearing suspends the time periods for the adoption of a decision by the Authority.

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

While there is no specific reference in the Competition Law to employees, the Authority can request information from any relevant undertaking or individual. It may also be argued that employees can be considered 'interested third parties' and be allowed to intervene in the procedure (see question 14).

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

As mentioned in question 14, prior to the adoption of a final decision in the procedure, the Authority must hold a hearing involving the notifying party/ies, as well as any interested third parties that have already intervened in the procedure and expressed an adverse opinion on the merger. If no such third parties have come forward and if the decision is an unconditional clearance, the Authority can waive the requirement for a hearing.

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

All of the Authority's decisions on merger control, either clearing or prohibiting a merger, are subject to judicial review.

The Statute of the Authority determines that the Authority's decisions may be appealed in Court, namely to the Judicial Court of the City of Maputo, regarding procedures leading to the application of fines and other sanctions, and to the Administrative Court, regarding merger control procedures and requests for exemptions relating to restrictive agreements.

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

The Competition Law specifically prohibits, *inter alia*, agreements and concerted practices between competing undertakings resulting in the adoption of uniform or concerted commercial conduct, in fixing directly or indirectly prices or other business conditions, limiting production or distribution of products and services, and partitioning markets or supply sources.

As mentioned above, the Competition Law prohibitions have not yet been enforced.

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

In the enforcement of its sanctioning and supervisory powers, the Authority is able to interview any relevant persons, request documents, conduct searches and seizures in the premises of the undertakings concerned and, when necessary, proceed to the sealing of business premises. Searches and seizures at business premises must be conducted with a warrant of the competent judiciary authority. The Authority may request the assistance of the police force when necessary.

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

Parties involved in prohibited anti-competitive practices (including cartels, other horizontal and vertical agreements, the abuse of a dominant position and the abuse of economic dependence) are liable for fines of up to 5% of their consolidated turnover.

The following ancillary sanctions may also be applied: (i) publication of the sanction in the official journal and/or in a national or local newspaper; (ii) the interdiction of the infringing company from participation in public tenders for a period of five years; and (iii) the breakup of the company, transfer of shareholder control, sale of assets, partial termination of a business entity, and any other act necessary for the elimination of the harmful effects to competition.

No criminal sanctions are contemplated in the Competition Law.

The Regulation of the Competition Law contemplates the establishment of a leniency programme by way of a regulation published by the Authority, but no draft has yet been made public.

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

The Competition Law establishes an administrative procedure for the issuance by the Authority of an exemption to the prohibitions in the Competition Law. The request for exemption should be submitted by one or more of the undertakings that are party to an agreement, according to a form to be approved by the Authority.

The conditions for exemption are as follows:

- (i) The agreement should pursue one of the following objectives:
  - contributing to improving the production or distribution of goods and services;
  - reducing prices to consumers;
  - accelerating economic development;
  - incentivising the technological development of Mozambican companies;
  - enabling a better allocation of resources;
  - promoting national goods or services;
  - promoting exports;
  - promoting the competitiveness of small- and medium-sized national companies;
  - contributing to the consolidation of national companies; and
  - promoting the protection of intellectual property.
- (ii) The agreement must not eliminate competition or contain restrictions that are not indispensable to the attainment of the relevant objectives above.

Professional associations recognised by the Government may also request exemption for their internal Rules that have the effect of appreciably restricting competition. The exemption is granted when the Rules in question are essential to maintain the professional standards or the specificities of the profession.

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

One of the prohibited vertical restraints expressly listed in the Competition Law is the imposition on distributors of resale prices, discounts, payment conditions, profit margins or any other commercial conditions in their dealings with third parties.

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

Agreements with exclusivity provisions are not expressly prohibited by the Competition Law, but one of the examples of prohibited vertical conduct is the imposition of minimum or maximum quantities on distributors in their purchases of contractual products. This prohibition, given its broad wording, is also likely to cover obligations to purchase all or a certain percentage of the buyer's requirements of such products. Such restrictions may benefit from exemption if all the legal criteria are met.

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

The Competition Law prohibits the abusive exploitation, by one or more undertakings, of a dominant position in the national market or in a substantial part thereof, having as its object or its effect the impediment, distortion or restriction of competition.

The Regulation establishes a rebuttable presumption of dominance for an undertaking, or collectively for two or more undertakings, whose market share equals or exceeds 50%.

The Competition Law sets out an extensive but non-exhaustive list of behaviours considered abusive, such as:

- refusing to provide a product or service or to grant access to essential infrastructure without cause;
- terminating a commercial relationship without justification;
- forcing or inducing a supplier or consumer not to deal with a competitor;



- selling below cost without justification;
- importing goods below their cost in the exporting country;
- price discrimination;
- tying;
- excessive pricing; and
- any other conduct listed in Articles 17 and 18 of the Competition Law as prohibited horizontal or vertical agreements.

The Competition Law also prohibits the abusive exploitation, by one or more undertakings, of the state of economic dependence of any supplier or client which does not have an equivalent alternative. Abusive conduct may take the form of any of the vertical agreements and practices prohibited by the Competition Law.

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

None as yet.

**26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

Parties involved in the abuse of a dominant position and the abuse of economic dependence are liable for fines of up to 5% of their consolidated turnover, as well as to the ancillary sanctions referred to in question 20.

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

Price discrimination is listed as a prohibited practice in the context of vertical agreements, the abuse of a dominant position and the abuse of economic dependence of a supplier or client.

Price discrimination is considered an abuse of a dominant position where it:

- is likely to prevent, distort or restrain competition;
- relates to equivalent transactions of goods and services of the same type and quality; and
- refers to sale prices, discounts, payment conditions, granted credit or other services rendered that relate to the supply of goods and services.

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

Decisions of the Authority will be published in the official journal of Mozambique (Boletim da República). In addition, the Statute of the Authority provides that decided cases are published on the Authority's website, but this is not yet operational.

**MDR ADVOGADOS**

Av. Marginal 141, Torres Rani,  
Torre de Escritórios, 8º andar  
Maputo

**T:** +258 21 344 000

**F:** +258 84 309 6605 / +258 84 309 6606

**E:** tamendes@mdradvogados.com

Tiago Arouca Mendes, Managing Partner

**MORAIS LEITÃO  
GALVÃO TELES, SOARES DA SILVA &  
ASSOCIADOS**

Rua Castilho, 165  
1070-050 Lisboa

**T:** +351 210 091 730

**F:** +351 213 817 496

**E:** pgmelo@mlgts.pt

Pedro Gouveia e Melo, Partner

# Namibia



## KOEP & PARTNERS

Irvin Titus  
Raimund Strzelecki  
Zach Kauraisa



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

In Namibia, competition law is regulated by the Competition Act 2 of 2003 (**Competition Act**) and the rules (**Rules**) passed under the Competition Act. The Competition Act and the Rules are enforced by the Namibian Competition Commission (**Commission**).

The High Court of Namibia (**High Court**) has jurisdiction to hear and determine any matter arising from proceedings instituted under the Competition Act.

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

In 2020, the Commission proposed a draft Competition Bill (**Bill**). The Bill will repeal the current Competition Act in its entirety and introduces several important amendments to competition law in Namibia, including a reconfiguration of the competition authority's structure and power, enhancing aspects of merger control, per se prohibiting abuses of dominance and enhancing the powers of the Commission, particularly in relation to market inquiries. The Bill remains in draft form and no timelines for its implementation have yet been determined.

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

Competition law in Namibia is actively enforced in respect of merger control and restrictive practices. In relation to the former, and due to the relatively low merger thresholds, a large number of transactions fall to be notified. In relation to the latter, there has been an increase in enforcement activity in this area and, in most instances, settlement agreements were reached between the Commission and the alleged offenders before action was instituted through the Namibian courts. The Commission has also conducted market inquiries in the automobile industry, the retail sector, the cement and the poultry industries.

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

The Commission places a strong emphasis on the promotion of local content and employment retention.

### **5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?**

Section 3 of the Competition Act states that the Competition Act applies to all economic activity within, or having an effect in, Namibia. Only those instances provided for in sections 3(1)(a) to (c) are excluded from the application of the Competition Act. In other words, the Competition Act is not only concerned with the geographic location of the activity in question, but is concerned with the effect of that activity within Namibia.

Chapter 4 of the Competition Act requires that all transactions entered into by undertakings, which fall within the definition of a merger and meet the thresholds, be notified to the Commission before they are implemented. A merger is defined in section 42 of the Competition Act as occurring when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking. The Competition Act broadly defines an undertaking as any business carried on for gain or reward by an individual, a body corporate, an unincorporated body of persons or a trust in the production, supply or distribution of goods or the provision of any service. A merger contemplated in section 42 of the Competition Act may be achieved in any manner, including, *inter alia*, the purchase or lease of shares, an interest, or assets of the other undertaking in question; or amalgamation or other combination with the other undertaking. The list is non-exhaustive.

The Competition Act does not make express provision for the exclusion of certain transactions from the merger definition (e.g. where a restructuring occurs within the same economic entity). However, the Commission has indicated that it does not regard internal restructurings as requiring notification. A cautious approach is nevertheless advisable.

The trigger for notification is a change of control and, more specifically, whether a transaction falls within the ambit of section 42(3) of the Competition Act, which sets out the various ways in which control may exist.

In terms of these provisions, a person controls an undertaking if that person:



- beneficially owns more than one-half of the issued share capital of the undertaking;
- is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;
- is able to appoint, or to veto the appointment of, the majority of the directors of the undertaking;
- is a holding company, and the undertaking is a subsidiary of that company, as contemplated in the Namibian Companies Act 28 of 2004;
- in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
- in the case of the undertaking being a close corporation, owns the majority of the members' interest or directly controls or has the right to control the majority of members' votes in the close corporation; or
- has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control as mentioned in the preceding bullet points.

The Competition Act states that it is the Commission that must make a determination in respect of a merger and, in doing so, will evaluate the criteria which it considers relevant to the circumstances applicable to the proposed merger, including whether there will be an effect on competition. It is not the role of the merging parties to evaluate any effect on competition and, on the basis of their evaluation, decide whether or not to notify a merger; this evaluation is the task of the Commission.

The Competition Act does not specifically provide for, or even define, joint ventures but, in light of section 3 of the Competition Act (as mentioned earlier) all mergers, in whatever form, which take place in Namibia, or outside Namibia with an effect in Namibia, fall within the ambit of the Competition Act.

Depending on how the transaction is structured, only those joint ventures that result in a change of control and meet the thresholds, as contemplated in the Competition Act, would be notifiable to the Commission.

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

Under the Competition Act, it would be necessary for undertakings to notify and obtain approval from the Commission for foreign-to-foreign mergers, if the merger amounts to economic activity having an effect in Namibia, in addition to meeting the statutory thresholds for mandatory notification.

The concepts of economic activity in Namibia and an effect in Namibia are unclear, and no statutory definitions are available at present. Foreign precedent may be persuasive in evaluating these concepts.

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

The thresholds take a two-step approach.

**Step 1:** The first step is to look at the combined value of the undertakings. The Competition Act does not apply where the combined value of the assets and/or turnover of the acquirer and target equals or does not exceed the values set out below in sub-paragraphs (a) to (d):

- (a) the combined annual turnover in, into or from Namibia of the acquirer and target is equal to or valued below NAD 30 million;
- (b) the combined asset value in Namibia of the acquirer and target is equal to or valued below NAD 30 million;
- (c) the annual turnover in, into or from Namibia of the acquirer plus the assets in Namibia of the target is equal to or valued below NAD 30 million;
- (d) the annual turnover in, into or from Namibia of the target plus the assets in Namibia of the acquirer is equal to or valued below NAD 30 million.

If the combined value of (a) to (d) above all fall below NAD 30 million, then the merger is not notifiable. However, if one of the combinations exceed NAD 30 million, the next step is to look at the asset and turnover values of the target only.



**Step 2:** If the value of the assets and turnover of the target fall below NAD 15 million, the merger will not be notifiable (even if a combined value in (a) to (d) above exceeds NAD 30 million).

The threshold notice refers to transferred undertaking instead of target. The thresholds specifically define a transferred undertaking as the total of all the undertakings that are transferred in respect of a merger which includes any undertaking, or the business or assets of the undertaking that, as a result of a transaction, are transferred in any of the circumstances set out in section 42 of the Competition Act:

- (a) would become controlled by another undertaking; and
- (b) any other undertaking that is controlled by, or the direct or indirect control over the whole or part of its business is held by, an undertaking which would become controlled by another undertaking.

Further, the Commission may call upon the merging parties to submit a merger notification to it, within 30 days of receipt of written demand, in respect of mergers in which the value falls below the threshold amounts set out. The method of calculation of the asset or turnover value is prescribed and as a general proposition must be determined in accordance with Namibian Generally Accepted Accounting Practices or International Financial Reporting Standards.

## 8. What filing fees are required?

The fees for filing a merger notice are as follows:

- NAD 10 000 if the combined figure is valued below NAD 50 million;
- NAD 25 000 if the combined figure is valued at or above NAD 50 million, but less than NAD 65 million;
- NAD 50 000 if the combined figure is valued at or above NAD 65 million, but less than NAD 75 million;
- NAD 75 000 if the combined figure is valued at or above NAD 75 million, but less than NAD 100 million;
- NAD 125 000 if the combined figure is valued at or above NAD 100 million, but less than NAD 1 billion;

- NAD 250 000 if the combined figure is valued at or above NAD 1 billion, but less than NAD 3.5 billion; or
- NAD 500 000 if the figure is valued at or above NAD 3.5 billion.

For these purposes, the combined figure means the greater of the:

- combined annual turnover in, into and from Namibia of the acquirer and the target;
- combined assets in Namibia of the acquirer and the target;
- annual turnover in, into and from Namibia of the acquirer plus the assets in Namibia of the target; or
- assets in Namibia of the acquirer plus the annual turnover in, into and from Namibia of the target.

When determining the combined figure, the acquirer is taken to refer to all the undertakings that are acquiring undertakings in respect of the merger. An 'acquiring undertaking' is defined as: (i) any undertaking that, as a result of a transaction in any circumstances set out in section 42 of the Competition Act, would acquire or establish direct or indirect control over the whole or part of the business of another undertaking; (ii) any other undertaking that has direct or indirect control over the whole or part of the business of an undertaking referred to in (i); and (iii) any other undertaking that is controlled by, or has direct or indirect control over the whole or part of the business which is held by, an undertaking referred to in (i) or (ii).

When determining the filing fee, it is necessary to consider the assets in Namibia and the turnover in Namibia of the entire group of companies to which the acquirer belongs.

## 9. What is the merger review period?

Under the Competition Act, the Commission is required to make a determination on a proposed merger within 30 days after receipt of the merger notification. However, the Competition Act provides that this period may be extended by a further 30 days if the Commission requests additional information or if a conference (hearing) is convened. The periods referred to above can be extended due to the complexity of the issues or if the Commission deems it appropriate to do so, by a period not exceeding 60 days. In this regard, the Commission

issues a notice in writing to the undertakings involved extending the period. Any reference to days in the Competition Act and the Rules is construed as business days by the Commission.

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

No party to a notifiable merger may implement the merger before:

- it has obtained the requisite approval from the Commission; or
- the Commission's review period in relation to the proposed merger has lapsed without the former having made a determination in relation to the proposed merger.

In the event that a merger has been implemented in contravention of the provisions of the Competition Act, the Commission may make application to the High Court for:

- an interdict restraining the parties involved from implementing the merger;
- an order directing any party to the merger to sell or otherwise dispose of any shares, interest or other assets it has acquired pursuant to the merger;
- declaring void any agreement or provision of an agreement to which the merger was subject; or
- the imposition of a pecuniary penalty, which the Court considers appropriate, but not exceeding 10% of the global turnover of the undertaking during its preceding financial year.

The Commission, however, recognises that mergers in multiple jurisdictions may be subject to staggered approvals in the various jurisdictions and allow carving out or ring-fencing in respect of the Namibian approval, provided that due notice be given in advance.

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

The Competition Act does not provide for pre-notification contacts or pre-notification meetings, although the Commission is willing to hold pre-notification meetings or otherwise enter into pre-notification discussions.

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

The Competition Act provides that the Commission may base its determination of a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger. These criteria may include the following, namely, the extent to which the proposed merger would be likely to:

- prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;
- result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
- result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
- affect a particular industrial sector or region;
- affect employment;
- affect the ability of small undertakings, in particular small undertakings owned or controlled by historically disadvantaged persons, to gain access to or to be competitive in any market;
- affect the ability of national industries to compete in international markets; or
- result in likely benefits to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.

On 3 August 2020, the Commission reported that it had prohibited a proposed merger in Namibia's cement industry, citing concerns around the likelihood of post-merger co-ordinated behaviour, strengthening of a dominant position and no 'concrete' benefits outweighing the perceived anti-competitive effects.

In terms of the proposed merger, West China Ltd (**West China**), a Chinese manufacturer and distributor of cement, sought to acquire the entire issued shares in Schwenk Namibia (Pty) Ltd, which



in turn operates Ohorongo Cement (Pty) Ltd, a local cement producer. West China also operates in the local market as a cement distributor.

During the course of its investigation, the Commission received concerns that the merger would, *inter alia*, result in foreign national employees being favoured over Namibian locals; the risk that the procurement of goods and/or services may be deflected away from Namibian locals in favour of foreign firms; transfer pricing manipulation; and concerns that West China had relationship links to a competitor in the cement market, Whale Rock Cement, trading in Namibia as Cheetah Cement. Following receipt of these concerns, the Commission considered it appropriate to hold a conference inviting stakeholders to submit oral and written comments on the merger. The conference was held early in July 2020 and on 30 July 2020, and the Commission decided to prohibit the merger.

### **13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

Yes, but only to the extent that an application is made to the Minister of Trade and Industry (**Minister**) to review a determination made by the Commission in relation to a proposed merger, as contemplated in section 49 of the Competition Act.

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

The Competition Act empowers the Commission to refer the particulars of a proposed merger to an inspector for investigation. Any person, including a person other than the notifying parties, may submit to such inspector (or the Commission) any document, affidavit or other information in respect of the proposed merger. The practice of the Commission is to make enquiries and contact customers, competitors and even other regulators, in the case of a regulated industry.

The Commission may, if it considers it appropriate and useful, hold a conference in relation to a proposed merger. The Commission may also invite parties other than the notifying parties to make representations at such a conference.

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

As noted above, any person, including employees, may be invited to make submissions to the Commission or provide information of their own volition. As part of the merger notification, parties are requested to state what effect the merger will have on employment.

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

The Commission may, if it considers it appropriate and useful, convene conferences between parties where they can make representations before a decision is issued by the Commission.

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

A party to a proposed merger may, within 30 days after notice is given by the Commission of its determination in relation to a proposed merger, make an application, in terms of section 49 of the Competition Act, to the Minister to review such determination. The Minister must, within four months after the date that an application for review was made, make a determination either (i) overturning the decision of the Commission; (ii) amending the decision of the Commission, by ordering restrictions or including conditions; or (iii) confirming the decision of the Commission.

Once the internal review appeal process has been exhausted, an application for review to the High Court, in terms of the principles of administrative law and procedure, is also available.

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

The Competition Act prohibits restrictive practices and, in particular, contemplates and includes in its ambit agreements concluded between parties in a horizontal relationship, being undertakings trading

in competition. Agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited. In particular, the Competition Act prohibits any agreement, decision or concerted practice which:

- directly or indirectly fixes purchase or selling prices or any other trading conditions;
- divides markets by allocating customers, suppliers, areas or specific types of goods or services;
- involves collusive tendering;
- involves a practice of minimum resale price maintenance;
- limits or controls production, market outlets or access, technical development or investment;
- applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject of the contracts.

In August 2016, after an investigation by the Commission, Sanlam Namibia and PPS Insurance Ltd agreed to pay NAD 15 million (approximately EUR 990 000) for allegedly dividing the market through a joint venture marketing agreement and admitted to contravening the Competition Act. This was the first penalty paid for a contravention and the first admission of guilt in terms of section 23 of the Competition Act. The settlement followed a series of negotiations between the Commission and the respondents and was therefore a negotiated outcome rather than a matter tested on its merits. The respondents subsequently filed an application for exemption with the Commission in relation to the particular conduct, which was denied.

During the second half of 2018, the Commission also launched an investigation into alleged anti-competitive practices in the short-term insurance industry. The alleged practices specifically concern price fixing; it is alleged that various short-term insurance companies collectively agreed on setting maximum mark-ups and rates that panel beaters should charge for repairs to insured vehicles. In

2019, some insurance companies settled with the Commission, with the Commission imposing fines of NAD 20.5 million, while the investigation involving others are ongoing.

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

The Commission has broad investigative powers and may, either on its own initiative or upon receipt of information or a complaint from any person, launch an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute a prohibited practice. An investigation must be instituted within three years from the date the alleged infringement has ceased. If the Commission decides that any of the prohibitions on restrictive practices have been infringed, it must give written notice of the proposed investigation to each undertaking which may be affected by that decision. The notice must, *inter alia*, inform each undertaking that it may submit written representations to the Commission. The notice must also request the undertaking to indicate whether it requires an opportunity to make oral representations to the Commission, in which case the Commission will convene a conference.

After consideration of any written representations and of any matters raised at a conference, the Commission may institute proceedings in the High Court against the undertaking or undertakings concerned for an order:

- declaring the conduct which is the subject matter of the Commission's investigation, to constitute an infringement of the prohibition on restrictive agreements, practices and decisions or abuse of dominant position;
- restraining the undertaking or undertakings from engaging in that conduct;
- directing any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;
- imposing a pecuniary penalty, which may not exceed 10% of the global turnover of the undertaking during its previous financial year; or
- granting any other appropriate relief.

The Competition Act provides the Commission with relatively wide powers of search and seizure,



and the taking of evidence. Inspectors (appointed by the Commission) are empowered under the Competition Act to:

- search any premises;
- search any person on the premises if there are reasonable grounds for believing that the person has personal possession of any document or article that has a bearing on the investigation;
- examine any document or article found on the premises that has a bearing on the investigation;
- request any information about any document or article found on the premises;
- take extracts from, or make copies of, any book or document found on the premises that has a bearing on the investigation;
- use any computer system on the premises to search any data contained in or available to that computer system, reproduce any record from that data and seize any output from that computer for examination and copying; and
- attach and remove from the premises for examination and safekeeping anything that has a bearing on the investigation.

An inspector may not enter upon and search any premises unless he or she obtains a warrant authorising such entry and search, unless the owner, or any other person in control of the premises consents to the entry and search of the premises, or the inspector on reasonable grounds believes that a warrant would be issued if applied for, and that the delay in obtaining a warrant would defeat the object of the entry and search.

The Commission may also receive in evidence any statement, document, information or matter that may, in its opinion, assist to deal effectively with an investigation conducted by it, whether or not such statement, document, information or matter would otherwise be admissible in a court of law.

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

The Commission may not by itself impose any penalties but has to approach the High Court to do so. The High Court may impose a pecuniary penalty for any amount which it considers appropriate but not exceeding 10% of the global turnover of the undertaking during its preceding financial year.

In determining an appropriate penalty, the High Court must have regard to all relevant matters concerning the contravention. The Commission may at any time, during or after an investigation into an alleged infringement pertaining to prohibited practices, enter into a settlement agreement with the undertaking(s) concerned, setting out the terms to be submitted by the Commission, by application to the High Court, for confirmation as an order of court. Such an agreement may include, with the consent of any person who submitted a complaint to the Commission in relation to the alleged infringement, an award of damages to the complainant and/or any amount proposed to be imposed as a pecuniary penalty.

A contravention or failure to comply with an interim or final order of the High Court given, in terms of the Competition Act, constitutes an offence. Upon conviction, the perpetrator is liable to a fine not exceeding NAD 500 000, or to imprisonment for a period not exceeding 10 years, or to both. In the case of any other contravention of the Competition Act, a convicted person is liable to a fine not exceeding NAD 20 000, or to imprisonment for a period not exceeding one year, or to both.

During the second half of 2018, the Commission introduced a corporate leniency programme, in terms of which businesses that have engaged in cartel conduct may report themselves to the Commission and hand over evidence regarding the cartel in return for lenient treatment from the Commission.

Where an application is made for leniency, the applicant must cooperate fully with the Commission in order to benefit from the leniency policy by providing the Commission with all information in respect of the cartel, including information about those involved. Once the Commission receives an application for leniency it will initiate an investigation and, in conducting its investigation, may subpoena any person for questioning.

The Competition Act does not provide for criminal sanctions for cartel conduct. Criminal sanctions are applicable only to offences incidental to an investigation or proceedings, or the administration of the Competition Act, as set out in Chapter 7 of the Competition Act.

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

The Competition Act allows any undertaking or association of undertakings to apply to the Commission to be exempt from the provisions relating to restrictive practices in respect of any agreement or category of agreements, any decision or category of decisions, or any concerted practice or category of concerted practices.

The Commission may, upon such application and on such conditions as the Commission may determine, grant an exemption in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trademarks, plant varieties or any other intellectual property rights.

If a professional association's rules contain a restriction that has the effect of preventing or substantially lessening competition in a market, the association may apply to the Commission for an exemption.

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

Yes, but recommended resale prices are allowed.

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

Agreements between undertakings, decisions by associations of undertakings, or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited, unless they are exempt in accordance with the provisions of the Competition Act.

Agreements and concerted practices, as contemplated above, include agreements concluded between parties in a horizontal relationship (being undertakings trading in competition) or parties in a vertical relationship (being an undertaking and its suppliers or customers), or both.

In particular, the Competition Act prohibits any agreement, decision or concerted practice which:

- directly or indirectly fixes purchase or selling prices or any other trading conditions;
- divides markets by allocating customers, suppliers, areas or specific types of goods or services;
- involves collusive tendering;
- involves a practice of minimum resale price maintenance;
- limits or controls production, market outlets or access, technical development or investment;
- applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions, which by their nature or according to commercial usage, have no connection with the subject of the contracts.

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

Section 26 of the Competition Act prohibits the abuse of a dominant position. An undertaking has, or two or more undertakings have, a dominant position in a market if (i) it has or they have at least 45% of that market; (ii) it has or they have at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or (iii) it has or they have less than 35% of that market, but has or have market power. Market power means the power of an undertaking or undertakings to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.

The Competition Act provides for per se prohibitions which prevent a dominant(s) undertaking from (i) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (ii) limiting or restricting production, market outlets or market access, investment, technical development or technological progress; (iii) applying dissimilar conditions to equivalent transactions with other trading parties; and (iv) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts.



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

In April 2016, the Commission initiated proceedings in the High Court against Namcars (Pty) Ltd (**Namcars**), a dominant, online advertising website, for an order declaring, among others, that Namcars has abused its dominant position in contravention of section 26 of the Competition Act. The allegation is that Namcars imposed a policy prohibiting automotive dealers who advertise with Namcars from advertising its used vehicles on competing websites. The Commission has recorded its willingness to engage with Namcars in an endeavour to settle this matter with the object of avoiding court proceedings.

In 2018, the Commission initiated proceedings in the High Court against Namib Mills (Pty) Ltd (**Namib Mills**) for an alleged abuse of dominance in the wheat flour market, requesting that Namib Mills should pay a penalty of NAD 51 million for contravening the Competition Act.

Namib Mills had concluded bakery loan agreements with 54 bakeries around Namibia for the purchase of bakery equipment. The agreement required these bakeries to only purchase wheaten flour from Namib Mills and in the event that the bakeries purchased wheaten flour from any other supplier, Namib Mills was entitled to require full settlement of the loan or to repossess the bakery equipment. The Commission alleged that the agreement is exclusionary in nature or purpose in that it compels the affected bakeries to only purchase their wheaten from Namib Mills to the exclusion of its rivals. The issue before the High Court was whether the relevant provisions of the Competition Act should be interpreted (i) to apply on a “per se”, by “object” or “presumptive” basis with the consequence that the Commission is not required to allege and prove that the agreements had an anti-competitive effect in order to be unlawful; or (ii) as requiring an effects-based assessment, whereby the agreements must be shown to have had an anti-competitive effect in order to be unlawful.

The High Court held in favour of the Commission in that section 26 embodies a prohibition of an abuse of dominance which does not require an analysis of the effect of the conduct on competition in the relevant market, and that it is a per se prohibition that allows courts to presume that certain types

of conduct have anti-competitive 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 from it. Namib Mills brought an application for leave to appeal to the Supreme Court of Namibia, which was set aside by the High Court due to a lack of compliance with the rules of the High Court.

Namib Mills subsequently acknowledged guilt and entered into a settlement agreement with the Commission, and agreed to pay a penalty of NAD 4.5 million for abusing its dominance in the wheat flour market.

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

Following an investigation into the conduct of one or more undertakings by the Commission, the Commission may institute proceedings in the High Court against the undertaking or undertakings concerned, for an order imposing a pecuniary penalty, among others.

The High Court may impose a pecuniary penalty for any amount which the High Court considers appropriate, but not exceeding 10% of the global turnover of the undertaking during its preceding financial year. In determining an appropriate penalty, the High Court must have regard to all relevant matters concerning the contravention.

The Commission may at any time, during or after an investigation into an alleged infringement, enter into an agreement of settlement with the undertaking(s) concerned setting out the terms to be submitted by the Commission by application to the High Court for confirmation as an order of court.

Such an agreement may include, with the consent of any person who submitted a complaint to the Commission in relation to the alleged infringement, an award of damages to the complainant and/or any amount proposed to be imposed as a pecuniary penalty.



An order imposing a pecuniary penalty has the effect of, and may be executed as if it were, a civil judgment granted by the High Court in favour of the Government of Namibia.

A pecuniary penalty payable in terms of the Competition Act is paid into the State Revenue Fund.

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

The Competition Act prohibits restrictive practices and the abuse of a dominant position. Such prohibited conduct may include, directly or indirectly, imposing unfair purchase or selling prices or other unfair trading conditions and applying dissimilar conditions to equivalent transactions with other trading parties.

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

The decisions of the Commission are published in the Government Gazette, which is not available without a subscription. As at the time of writing, the Commission had not published decisions on its website [www.nacc.com.na](http://www.nacc.com.na).

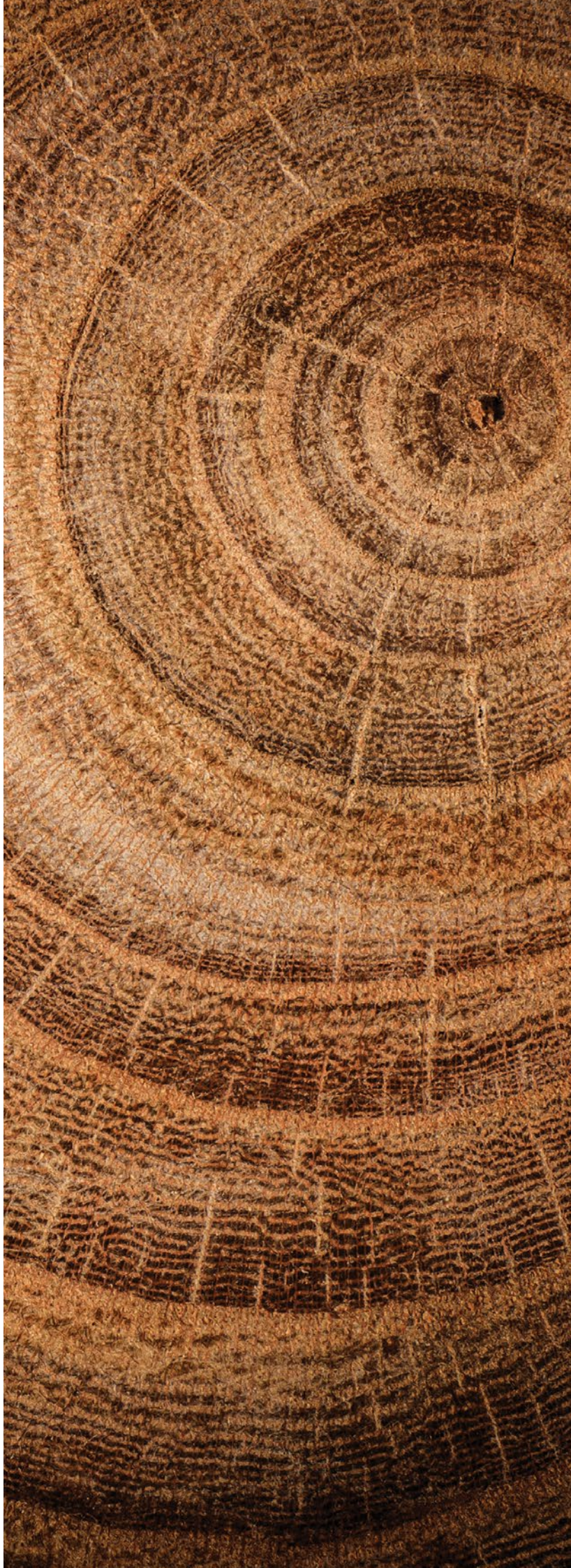
**KOEP & PARTNERS**

33 Schanzen Road, Windhoek  
PO Box 3516  
Windhoek  
Namibia

**T:** +264 61 382 800/+264 61 382 806

**F:** +264 61 382 888

**W:** [www.koep.com.na](http://www.koep.com.na)





# Nigeria



## UDO, UDOMA & BELO-OSAGIE

Yinka Edu  
Faridah Orimobi  
Itorobong Udom

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

The Federal Competition and Consumer Protection Act, 2018 (the **Act**) was enacted on 30 January 2019. The Act repealed the Consumer Protection Council Act Cap. C25, Laws of the Federation of Nigeria, 2004, and provisions of the Investments and Securities Act, 2007 (the **ISA**) that dealt with merger control. The Act was enacted to promote fair, efficient and competitive markets in Nigeria, and is applicable to all undertakings and all commercial activities within, or having effect within, Nigeria. Subject to the provisions of the Nigerian Constitution and notwithstanding the provisions of any other law, the provisions of the Act override the provisions of any other law relating to competition and consumer protection.

The Act also establishes the Federal Competition and Consumer Protection Commission (the **FCCPC**, or the **Commission**) which is responsible for, *inter alia*: merger control; the enforcement of prohibitions under the Act against anti-competitive business practices and consumer protection; and the Competition and Consumer Protection Tribunal (the **Tribunal**), which has the power to determine matters relating to conduct prohibited by the Act. Furthermore, appeals against the decisions of the FCCPC may be made to the Tribunal, and appeals against the decisions of the Tribunal may in turn be made to the Court of Appeal.

There are also certain sector-specific laws, guidelines and provisions that deal with competition-related issues.

Insofar as the Act applies to an industry or sector of an industry that is subject to the jurisdiction of another government agency whose mandate includes enforcement of competition and consumer protection laws or principles, the Act is construed as establishing concurrent jurisdiction between the FCCPC and the other relevant agency, with the FCCPC taking precedence over and above the relevant government agency. However, it is important to note that by virtue of the Banks and Other Financial Institutions Act 2020 (the **BOFIA 2020**), the provisions of the Act do not apply to banks and other financial institutions that are licensed by the Central Bank of Nigeria. Notwithstanding, BOFIA 2020 provides that sections 92(1), (2), and (3), 94 and 98 of the Act,

which relate to merger control, shall apply to a merger or acquisition or other form of business combination which involves a financial institution, provided that the reference to the FCCPC in these provisions shall be deemed and construed as a reference to the Central Bank of Nigeria.

## 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

The FCCPC issued a notice in the official Gazette of the Federal Republic of Nigeria (the **Notice**), which provides that a merger is notifiable where the combined annual turnover in Nigeria of the parties – in the year preceding the merger – was more than NGN 1 billion, or where the annual turnover of the target in Nigeria in the preceding year was more than NGN 500 million.

The Notice, which is dated 10 July 2019, states that members of the public are invited to submit proposals and comments on the thresholds within 60 days of the date stated in the Notice.

The FCCPC issued a further notice in the official Gazette of the Federal Republic of Nigeria, dated 9 September and titled Notice of Threshold for Merger Notification Pursuant to Section 93(4), which confirmed the threshold requirements for mergers stated in the Notice.

In light of the COVID-19 pandemic and its impact on the activities of the FCCPC, the FCCPC issued a guidance note on 28 April 2020, Guidance Regarding Federal Competition and Consumer Protection Commission's Merger Notification Process/ Interpretation of the Law on Other Competition Issues Under the Federal Competition and Consumer Protection Act (FCCPA) During COVID-19 Pandemic. The guidance note permits parties to send merger notifications to the Commission by email to [mergernotification@fccpc.gov.ng](mailto:mergernotification@fccpc.gov.ng) where any of the following circumstances apply:

- there is a possibility of imminent failure of the business of a merging party if the transaction is not urgently considered;
- there are time limitations in a host jurisdiction (other than Nigeria) and notification to, and determination by, the FCCPC is required prior to conclusion of the underlying transaction; and



- the application is otherwise time-sensitive: for instance, where other regulatory or similar approvals may expire or lapse, or such approvals are conditional on presenting a notification to the FCCPC within a specific period.

In these circumstances, the notification should be titled “Extenuating Circumstantial Notification (**ECN**)” and should include both an appropriate explanation and supporting evidence to demonstrate the extenuating circumstances. We understand that the ECN requirement is no longer in place; however, the FCCPC is yet to issue formal guidance on this point.

The FCCPC recently signed an updated Memorandum of Understanding with Nigeria’s Economic and Financial Crimes Commission and United States’ competition and consumer protection authority, the Federal Trade Commission, on 28 October 2020 (the **MoU**). The purpose of the MoU is to strengthen cooperation and collaboration by addressing mutual cross-border consumer protection/fraud concerns and problems. The MoU also establishes a Joint Implementation Committee to develop joint training programmes and provide assistance with regard to specific investigations.

On 20 November 2020, the FCCPC published the Federal Competition and Consumer Protection Act Merger Review Regulations, 2020 (the **Merger Review Regulations**) and the Merger Review Guidelines, 2020 (the **Merger Review Guidelines**). The Merger Review Regulations provide a regulatory framework for the review of mergers, while the Merger Review Guidelines outline the general principles and policies guiding the FCCPC’s merger review. The Merger Review Regulations and the Merger Review Guidelines apply both to domestic mergers and foreign-to-foreign mergers.

The Merger Review Regulations provide, *inter alia*, for pre-notification consultations, simplified and expedited procedure, and also stipulate the material influence test to be applied in relation to the acquisition of minority shareholding. The Merger Review Regulations have also introduced a new process called negative clearance, which is available to undertakings that are uncertain of whether a transaction is notifiable.

On 12 November 2020, the Banks and Other Financial Institutions Act, 2020 (the **BOFIA**), which repeals the previous version of the BOFIA,

was signed into law. The BOFIA provides that the provisions of the Act shall not apply to banks or other financial institutions licensed by the Central Bank of Nigeria (the **CBN**). The BOFIA adopts certain provisions from the Act in relation to merger control, however, it also states that reference to the FCCPC in those provisions shall be construed as reference to the CBN.

On 21 December 2020, the FCCPC issued the Administrative Penalties Regulations, 2020 (**Penalties Regulations**), which provide a regulatory framework for the administration and imposition of administrative penalties under the Act. The regulations, which were released to the public in March 2021, also clarify the methodology for calculating administrative penalties. The schedules to the regulations provide for the applicable base sums for the computation of administrative penalties and the steps and formula for calculation of administrative penalties. The formula is  $P = B + M \times [X\% \text{ of } (B+M)]$ . Where:

- P is the final penalty;
- B is the base sum;
- M is the factor of the number of months divided by 12 multiplied by the base sum;
- X% represents the net result of RAF and RMF represented as a discount or premium;
- RAF represents the ratio of aggravating factors; and
- RMF represents the ratio of mitigating factors.

On 2 August 2021, the FCCPC issued its Merger Review (**Amended**) Regulations, 2021 (**Amended Regulations**) revising Schedule 1 to the Merger Review Regulations dealing with the applicable processing fees for merger notifications (please see further the response to question 8 below).

The FCCPC has also issued the FCCPC Investigative Cooperation/Assistance Rules & Procedures, 2021 (the **Cooperation/Assistance Rules**) which sets out the policy of the Commission with respect to its cooperation/assistance procedure for targets and/or persons that are the subject of investigation for prohibited conduct or business practices. Under the Cooperation/Assistance Rules, such targets or persons who fully cooperate and/or assist the Commission’s investigations may in return receive, or be considered for, benefits such as reduced penalties, non-prosecutorial understandings, or immunity.

However, the Cooperation/Assistance Rules do not cover cartel investigations.

### Proposed Regulations

On 7 July 2021, the Commission published an invitation for comments and feedback on the following proposed regulations:

- (i) The Restrictive Agreements and Trade Practices Regulations, 2021 – the purpose of these regulations is to (a) provide the substantive and procedural requirements for the implementation of Part VIII (Restrictive Agreements) and some aspects of Part XIV (Specific Offences Against Competition Law) of the Act; (b) provide guidance on the regulatory review process for agreements or decisions; and (c) clarify the process for authorisation of exempted agreements and practices among undertakings;
- (ii) The Abuse of Dominance Regulations, 2021 – the purpose of these regulations is to (a) provide the substantive and procedural requirements for the implementation of Part IX of the Act; (b) provide guidance on the regulatory review process for assessing whether an undertaking is dominant and has abused its dominant position or whether two or more undertakings are collectively dominant and have abused their dominant position; and (c) clarify the process for an exception based on pro-competitive gains and efficiencies; and
- (iii) The Notice on Market Definition of 2021 – the notice explains the procedures which the Commission will follow to reach a conclusion on the relevant market, which provides a framework for competition analysis.

### 3. Is the law actively enforced?

The FCCPC has commenced full operations and the Act is being actively enforced, particularly in relation to the Commission's merger control, competition, and consumer protection mandates.

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

The FCCPC is focused on competition issues arising from mergers across all sectors, and has assumed the defunct Consumer Protection Council's role in protecting the interests of consumers in the Nigerian market. The FCCPC is also focused on investigating companies in connection with anti-competition violations across various sectors.

### 5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?

Previously, the Securities and Exchange Commission (the **SEC**), under the ISA and the SEC Rules, regulated merger control in Nigeria. However, the Act discontinued the role of the SEC in this regard.

Under the Act, a 'merger' occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking. The Act provides that a merger may be achieved through (i) the purchase or lease of shares, an interest or assets of the other undertaking in question; (ii) the amalgamation or other combination with the other undertaking in question; or (iii) a joint venture. The Act introduces joint ventures as a means of achieving a merger, and the Merger Review Regulations specify that any joint venture that operates on a regular or lasting basis with all the functions of an autonomous economic entity shall be considered a merger and is, therefore, notifiable. Conversely, any joint venture that is a transitory contractual arrangement with no lasting impact in the market shall not be considered a merger. Furthermore, the Merger Review Guidelines distinguish between full-function joint ventures and joint ventures that are auxiliary to the activities of their parent enterprises. Auxiliary joint ventures are exempt and do not need to be notified to the FCCPC.

Under the Act, the concept of control is relevant to the definition of a merger; an undertaking has control over another undertaking where the first undertaking:

- a. beneficially owns more than one half of the issued share capital or assets of the undertaking;
- b. is entitled to cast a majority of the votes that may be cast at a general meeting of the undertaking or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;
- c. is able to appoint or to veto the appointment of a majority of the directors of the undertaking;
- d. is a holding company, and the undertaking is a subsidiary of that company as contemplated under the Companies and Allied Matters Act;
- e. in the case of an undertaking that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the



- votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust; or
- f. has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the paragraphs above.

The Merger Review Regulations provide further guidance on the concept of 'material influence'. Material influence is the ability to "exercise indirect control or exert influence on the policy, key decisions, and direction of the business." The relevant factors in the FCCPC's assessment of material influence include, among others: the distribution of the remaining shareholding, in particular whether the acquiring undertaking's shareholding makes it the largest shareholder; the existence of any special or preferential voting or veto rights associated with the shareholding under consideration; the status and expertise of the acquiring undertaking and its corresponding influence with other shareholders; the extent of information rights available to the acquiring undertaking, and the composition of the board. The Merger Review Regulations state that there is a rebuttable presumption that material influence exists where shareholdings or voting rights are in excess of 25%. On the other hand, the acquisition of, shareholding or voting rights of less than 15% are, in general, not presumed to give rise to material influence. The Merger Review Guidelines, however, clarify that there is no presumption of material influence for shareholdings below 25%, but that the FCCPC may nonetheless assess potential material influence of shareholdings of over 15%, and exceptionally, shareholdings of less than 15%.

The Act also provides that an undertaking will not be deemed to exercise control over the business of another undertaking in circumstances where (i) credit institutions or other financial institutions or insurance companies hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking, or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of those securities within one year of the date of acquisition; or (ii) control is acquired by an office-

holder according to the laws of the Federation relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings.

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

The approval of the FCCPC will be required if the acquisition of shares or other assets outside Nigeria will result in the change of control, whether direct or indirect, of a business, part of a business or any asset of a business in Nigeria. The Merger Review Regulations prescribe the process for obtaining the approval of the FCCPC in respect of mergers, which includes foreign-to-foreign mergers that have an impact in Nigeria.

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

The Act provides for small mergers, which are mergers valued below the threshold, and large mergers, which are mergers valued at, or above, the threshold. The FCCPC has the authority to stipulate thresholds for these mergers.

The Commission's approval is required before implementing large mergers. The Notice categorises a transaction as a large merger if, in the financial year preceding the merger:

- the combined annual turnover of the parties in, into or from Nigeria is NGN 1 billion or more; or
- the annual turnover of the target in the preceding year is NGN 500 million or more.

The Act provides that a party to a small merger is not required to notify the FCCPC of that merger and may implement without approval, unless the FCCPC requires notification. In this regard, the FCCPC may require the parties to notify it of a small merger, within six months after a small merger is implemented, if - in the opinion of the FCCPC - the small merger may substantially prevent or lessen competition. The FCCPC may compel notification of a small merger by itself or be prompted by complaints or information from competitors, consumers or suppliers of the parties to a merger.

### 8. What filing fees are payable?

A filing fee of NGN 50 000 per undertaking is payable for all applications.

In addition to the filing fee, processing fees are also payable for all mergers, including foreign-to-foreign mergers. The processing fee is computed on the basis of either the consideration for the transaction or the last annual turnover, whichever is higher, and has been amended by the Amended Regulations as follows:

	<b>THRESHOLD (based on combined turnover of merging parties)</b>	<b>FEES (considera- tion)</b>	<b>FEES (last annual turnover)</b>
1.	First NGN 500 million	0.45%	0.45%
2.	Next NGN 500 million	0.40%	0.40%
3.	Any sum thereafter	0.35%	0.35%

The parties may also pay an expedited procedure fee of NGN 10 million (although this is optional).

The applicable fee for the negative clearance procedure is NGN 2.5 million (please see further the response to question 2 above).

The Amended Regulations further provide that the relevant turnover for the purposes of calculating the applicable processing fees in respect of mergers involving foreign entities with a local component is the turnover based on, or attributable to, the business of or in the local components in Nigeria.

The Amended Regulations also provide that the relevant turnover for the purposes of calculating the applicable processing fees for transactions involving private investment entities is the combined turnover of the relevant fund (subject to fulfilling applicable conditions set out by the FCCPC) and the target.

### 9. What is the merger review period?

In the case of a small merger, the FCCPC has a 20 business-day period from the submission of a complete application to conclude the first phase of its review. The timeframe may be extended by 15 business days if the merger raises competition concerns and the parties propose acceptable

remedies. However, where the FCCPC commences the second phase of its review, the timeframe shall be extended by 40 business days to consider and approve the merger. If upon the expiry of the 20 business-day period, no notice has been given of an extension or on the conclusion of the extended period no determination has been given the merger is deemed to have been approved.

In the case of a large merger the FCCPC has a 60 business-day period from the submission of a complete application to conclude the first phase of its review. The timeframe may be extended by 30 business days if the merger raises competition concerns and the parties propose acceptable remedies. However, where the FCCPC commences the second phase of its review, the timeframe shall be extended by 60 business days for it to consider and approve the merger. If, upon the expiry of the 60 business-day period, no notice of an extension has been given or upon the conclusion of the extended period no determination has been made, the merger will be deemed to have been approved.

The parties may also request an expedited review of the application, which aims at reducing the relevant timeframe for phase one review by 40%. The expedited review procedure is applicable in any of the following circumstances:

- a. parties with no actual or potential overlapping business relationships;
- b. foreign entities whose subsidiaries in Nigeria only act as manufacturers or assemblers of products, at least 95% of which are exported;
- c. foreign-to-foreign mergers where parties have a global scale with limited presence in Nigeria; and
- d. joint ventures formed purely for the construction and development of residential and/or commercial real estate projects.

The FCCPC can also decide to pause the clock on the review period when it requests information from the parties to a merger. When the review period is paused, it is only resumed once the requested information is provided to the FCCPC.

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

Parties to a small merger may implement the merger without notification to or approval from the



FCCPC in the ordinary course of business. Where the FCCPC requests that parties to a small merger notify the FCCPC of the transaction, the parties are prohibited from taking any further steps to implement the merger until the merger has been approved by the Commission.

The parties to a large merger, however, are required to obtain the approval of the FCCPC prior to implementing the merger. Indeed, the Act expressly prohibits parties to a large merger from implementing the merger without the prior approval, with or without conditions, of the Commission. An undertaking that does not obtain the necessary approval of the FCCPC commits an offence and is liable on conviction to a fine not exceeding 10% of turnover of the undertaking in the business year preceding the date of the commission of the offence or such other percentage as the court may determine, having regard to the circumstances. Further, the Act provides that in the case of large mergers, any action undertaken to implement a transaction without the approval of the FCCPC is void.

The FCCPC is empowered to revoke a decision approving or conditionally approving a merger if (i) the decision was based on incorrect information for which a party to the merger is responsible; (ii) the approval was obtained by deceit; (iii) the parties fail to implement the merger within 12 months after the approval was granted; or (iv) an undertaking concerned has breached an obligation attached to the decision of the FCCPC approving the merger. In this regard, the FCCPC may prohibit the merger even though any relevant time period set in the Act may have lapsed.

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

Pre-notification contact with the FCCPC is permitted. The Merger Review Regulations encourage parties to request for pre-notification consultations with the FCCPC to assist with determining the course of a case, at least two weeks before the formal notification is made to the FCCPC, to clarify matters such as:

- a. whether or not a merger is required to be notified;
- b. the calculation of annual turnover, value of assets, market shares, the merger notification filing fee and other substantive matters;
- c. to inform the Commission where markets are novel or complex;
- d. whether a simplified or expedited procedure may be merited;
- e. the requirements of the relevant application documents and whether any draft notification form provided by the parties may be deemed complete;
- f. the required supporting documents, including any reasons from the parties why the need for certain documents may be dispensed with; and
- g. whether notifications have been made in other jurisdictions, including other member countries of ECOWAS or AFCFTA.

Pre-notification discussions are confidential, voluntary, and without prejudice to the handling of the case after notification.

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

The Act provides that when determining whether a merger or proposed merger can or cannot be justified on grounds of public interest, the FCCPC shall consider the effect that the proposed merger will have on (i) a particular industrial sector or region; (ii) employment; (iii) the ability of national industries to compete in international markets; and (iv) the ability of small- and medium-scale enterprises to become competitive.

The Merger Review Regulations also provide that the FCCPC will evaluate factors such as technological efficiencies and the existence and substantiality of any public interest grounds when evaluating the economic impact of a merger.

#### **13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

It does not appear that the government is overtly involved in merger transactions, other than through the Commission – either at the investigation stage or at the determination stage.



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

The Act provides that, in making a determination in respect of a merger notification, the FCCPC may hear any person who in the Commission's opinion would be able to assist in making a determination in respect of the notified merger. In doing so, the FCCPC may hold a public or a private hearing. Additionally, the Merger Review Regulations and the Merger Review Guidelines provide that, in the course of investigating a merger, the FCCPC may also request information from competitors, suppliers, customers and any other third parties they deem appropriate, in order to seek their views on the merger and provide key information. The information provided helps to inform the FCCPC's decision.

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

Please see our response in question 14 above. In addition, the Act provides that the Minister of Industry, Trade and Investments is entitled to make representations to the FCCPC with respect to any merger under its consideration, on the listed public interest grounds in the Act, being: (i) a particular industrial sector or region; (ii) employment; (iii) the ability of national industries to compete in international markets; and (iv) the ability of small- and medium-scale enterprises to become competitive.

The parties to a merger are also required to notify any registered trade union that represents employees of the acquiring and target undertakings, or the employees or representatives of the employees of the acquiring and target undertakings, if there are no such trade unions, of any merger notified to the FCCPC.

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

Where the FCCPC forms the view that the merger is likely to result in a substantial prevention or

lessening of competition, and issues an 'issues paper', the Merger Review Regulations provide that the merging parties shall have the opportunity to present a written response addressing the concerns raised in the "issues paper" and propose remedies. The FCCPC may also convene an "issues meeting" where the merging parties may elaborate on or clarify the arguments put forward in the written response to the issues paper.

If the FCCPC decides that the merger still raises competition concerns and decides to undertake a second detailed review, the merging parties will have the opportunity to present a written response to the FCCPC's statement of objections and propose remedies. The FCCPC may also conduct an oral hearing in relation to the statement of objections and the written response, and the merging parties will have the opportunity to present their case with the assistance of legal counsel, economic experts and any such other professionals as necessary.

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

A person aggrieved by a decision of the FCCPC may file an application for appeal or review before the Tribunal and, in respect of a decision of the Tribunal, to the Court of Appeal.

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

Under the Act, any agreement among undertakings, or a decision of an association of undertakings, that has the purpose of preventing, restricting or distorting competition is void and of no legal effect. The Act regulates prohibited practices and, specifically, prohibits acts including (except where authorised by the Commission) any agreement or concerted practice that purports to (i) directly or indirectly fix a purchase or selling price; (ii) divide markets by allocating customers, suppliers, territories or specific types of goods or services; (iii) limit or control production or distribution; (iv) foster collusive tendering; and (v) make the conclusion of an agreement subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreement.



Cartel conduct is also prohibited by various pieces of sector-specific legislation, such as the Nigerian Communications Act and the Civil Aviation Act.

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

The Act confers broad investigative powers on the Commission, including the power to summon any person to furnish the FCCPC with any information or document, or to appear before the FCCPC to give evidence orally or in writing. Failure to comply with a summons constitutes an offence, and a person is liable upon conviction to imprisonment for up to three years, or a fine of up to NGN 10 million (approx. USD 25 000), or both a fine and imprisonment. Also, under the Penalties Regulations, the Commission may impose administrative penalties for failure to appear before the Commission after being served a summons or failure to produce a document and the base sum for calculating the administrative penalty is NGN 5 million (approx. USD 13 000).

The FCCPC also has broad powers of search and seizure. Part VI of the Act empowers the FCCPC to enter and search any premises and to inspect and remove from the premises any article, document, or extract to ascertain whether any undertaking has engaged in or is likely to engage in conduct constituting a contravention of the Act.

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

The Act provides general penalties for prohibited conduct as well as penalties for specific offences against competition of (i) price fixing; (ii) conspiracy; and (iii) bid rigging.

The general penalty provided in Part VIII of the Act is that an undertaking engaging in prohibited conduct commits an offence, and is liable upon conviction to a fine not exceeding 10% of its turnover in the preceding year. Furthermore, each director of the body corporate, or in the case of a natural person, is liable upon conviction to imprisonment not exceeding five years, or to a fine not exceeding NGN 5 million, or both the fine and imprisonment.

With regards to price fixing, conspiracy and bid rigging, the Act provides for penalties, upon conviction, of up to 10% of an undertaking's turnover in the preceding business year. It also provides for liability on the part of directors. Directors may be liable for imprisonment for up to three years or for a fine of up to NGN 10 million (approx. USD 25 000) or to both a fine and imprisonment. Also, under the Penalties Regulations, the FCCPC may impose administrative penalties for the offences of price fixing, conspiracy and bid rigging and the base sum for calculating the administrative penalty is NGN 5 million (approx. USD 13 000) for individuals and 2% of the relevant annual turnover for corporate entities.

There is currently no leniency policy in place for cartel conduct.

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

The Act provides for an exemption for those agreements among undertakings, or a decision of an association of undertakings, where the FCCPC has authorised the agreement or decision being entered into. In this regard, the FCCPC will consider whether the agreement or decision (i) contributes to the improvement of production or distribution of goods, services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit; (ii) imposes on the undertakings concerned only such restrictions as are indispensable to the attainment of the objectives referred to in (i); and (iii) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the good or services concerned.

Insofar as the Act applies to an industry or a sector of an industry that is subject to the jurisdiction of another government agency whose mandate includes enforcement of competition and consumer protection Laws or principles, whenever it is alleged that a provision of the Act is contravened by an undertaking within a regulated industry, the undertaking must demonstrate that the conduct in question was ordered or required by a regulatory agency with jurisdiction. In such instances, the FCCPC may, subject to any agreement between the FCCPC and the other relevant government agency, issue a cease-and-desist order, prohibiting further violations of the Act.

## 22. Is minimum resale price maintenance prohibited?

The Act prohibits minimum resale price maintenance, and provides that agreements which establish minimum prices to be charged on the resale of goods and services are void. The Act, however, does not preclude an undertaking from notifying a dealer of, or publishing, a recommended price.

The Act further provides that an undertaking may not withhold the supply of any goods or services from a dealer on the grounds that the dealer either has sold the goods or services at a price below the recommended resale price, or is likely to sell them at a price below the recommended resale price.

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

Within the framework of the Act, exclusive agreements apply to agreements between parties in a vertical relationship (i.e. a firm and its customers, its suppliers, or both). The Act prohibits agreements between parties in a vertical relationship if the agreement has the effect of substantially preventing or lessening competition in a relevant market, unless the parties to the agreement can show technological, efficiency or other pro-competitive gains that outweigh the anti-competitive effect. Where an exclusive agreement has an anti-competitive effect, factors typically relevant in assessing the lawfulness of the agreement include the duration of the agreement, the degree of foreclosure resulting from the agreement and the levels of concentration in the market.

In addition, where one of the parties is dominant in the relevant product market, exclusive arrangements may also fall to be investigated under the abuse of dominance provisions of the Act, particularly if the exclusive arrangement constitutes an 'exclusionary act'. An exclusionary act is defined as an act that impedes or prevents a firm entering into, or expanding within, a market.

Sector-specific legislation may also be applicable. For example, Regulation 13(1) of the National Consumer Commission's (the **NCC**) Consumer Practice Regulations, 2007 (the **NCC Regulations**)

empowers the NCC to review all agreements and practices which constitute exclusive dealing agreements (in terms of which a licensee reaches and agrees with another party for the supply of products or services on an exclusive basis). The purpose of the review is to determine whether the exclusivity obligation has, or may have, the effect of substantially lessening competition in related communications markets.

Section 71(6) of the Electric Power Sector Reform Act, 2005 provides that, unless expressly granted, a licence granted by the Nigerian Electricity Regulatory Commission (the **NERC**) will not be exclusive. The NERC may allow a licensed activity to be exclusive for all or part of the period of the licence provided that such licence is for a specific purpose, for a geographical area or for some combination of both.

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

The Act prohibits certain conduct which constitutes the abuse of a dominant position. An undertaking is considered to be in a dominant position 'if it is able to act without taking account of the reaction of its customers, consumers or competitors'. The Act also provides that 'a dominant position in a relevant market exists where an undertaking enjoys a position of economic strength, enabling it to prevent effective competition being maintained on the relevant market, and having the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers'. Provision is also made for the FCCPC to publish the size of market shares that may constitute a dominant position in particular markets.

The Act specifically prohibits a dominant undertaking from (i) charging an excessive price to the detriment of consumers; (ii) refusing to give a competitor access to an essential facility when it is economically feasible to do so; or (iii) engaging in an exclusionary act if the anti-competitive effect of that act outweighs its technological efficiency and other pro-competitive gains. The Act also prohibits an undertaking from engaging in the following exclusionary acts, unless the undertaking can show technological, efficiency and other pro-competitive gains which outweigh the anti-competitive effect:



- requiring or inducing a supplier or customer not to deal with a competitor;
- refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
- selling goods or services on the condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
- selling goods or services below their marginal or average cost; or
- buying up a scarce supply of intermediate goods or resources required by a competitor.

An undertaking shall not be treated as abusing a dominant position if its conduct (i) contributes to the improvement of production or distribution of goods or services or the promotion of technological or economic progress; (ii) is indispensable to the attainment of the objectives referred to in (i); and (iii) does not afford the undertaking the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

Notably, the Act also addresses the regulation of monopolies. The Act provides that where it appears to the FCCPC that there are grounds for believing that a 'monopoly situation' may exist in relation to the 'production or distribution of goods or services of any description, or in relation to exports of goods or services of any description from Nigeria, the FCCPC shall investigate a particular sector to determine the extent of the situation in relation to the market'. The FCCPC is required to issue a report following its investigation and, where the FCCPC finds that a monopoly situation exists, the FCCPC is required to consider the action to be taken to remedy or prevent any adverse effects resulting from the monopoly situation. This is to be done as part of its investigation, and it may make recommendations in this regard to the Tribunal. Based on the Commission's findings, the Tribunal may exercise any of its powers under the Act, or make any orders it considers necessary to remedy or prevent the adverse effects specified by the Commission. The Act provides examples of orders that the Tribunal may make, including: (i) declaring an agreement to be unlawful; (ii) requiring any party to such agreement to terminate the agreement, either wholly or in part as may be specified, within the time specified; (iii) requiring a person supplying goods or services to publish a list of

prices, with or without such further information, as may be specified; (iv) prohibiting or restricting the acquisition by an undertaking of the whole or part of another undertaking; or (v) providing for the division of any undertaking by the sale of any part of its shares, assets or otherwise for which purpose all the activities carried on by way of business by any one undertaking or by any two or more interconnected undertakings.

Again, sector-specific legislation may also be relevant. With respect to the communications sector, a dominant position is described in Regulation 18 of the NCC Regulations as 'a position of economic strength in one or more specifically defined communications markets, such that, a licensee in that position has the ability to unilaterally restrict output, raise prices, reduce quality or otherwise act independently of competitors or consumers.' Subject to the various factors considered when determining whether a licensee holds a dominant position, Regulation 20 of the NCC Regulations establishes a presumption of dominance where a licensee's gross revenues in a specific communications market exceeds 40% of the total gross revenue of all licensees in that market.

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

On 1 September 2020, the FCCPA announced that it had opened an investigation into the conduct of dominant Pay TV service providers, in order to address the Commission's concerns and expressed consumer dissatisfaction. The scope of the inquiry included questions about unfair dealings, unreasonable and manifestly unjust contract terms, abuse of market power, and other otherwise obnoxious or illegal conduct. The FCCPC is yet to provide any further update about the progress of the inquiry.

In 2013, the NCC carried out a determination of dominant positions in various segments of the Nigerian communications market. This study resulted in the declaration of MTN Nigeria as the dominant operator in the mobile voice segment of the market. Subsequently, in 2014, the NCC carried out routine compliance checks on approved tariff plans of network operators. It found that MTN Nigeria was charging its subscribers on the MTN iPulse, a tariff of one kobo per second or 60 kobo per minute, which was below the Mobile Termination

Rate of NGN 6.40 per minute at the time. It was found that the MTN tariff offering had not received regulatory approval and that MTN was in breach of its obligation as a dominant operator in the voice segment of the Nigerian communications market. The NCC commenced an enforcement process against MTN.

The NCC placed certain obligations on MTN, including that MTN should not offer any differential pricing in its on-net and off-net mobile voice service. MTN was directed to collapse its on-net and off-net tariff.

Also in 2014, the NCC carried out compliance checks on regulatory obligations and found that MTN had breached its obligations. MTN was invited to provide explanations, which were found to be unacceptable to the NCC. The NCC issued a final warning to MTN and directed that:

- MTN should immediately collapse the on-net and off-net tariff on its network and strictly comply with all obligations placed on MTN under the 2013 Declaration of Dominance;
- MTN should notify the NCC of compliance with the Communications Act within 10 days of receipt of the directive; and
- MTN should discontinue and withdraw all unapproved promotions, including but not limited to 'MTN 100% Daily On-net Promo', 'MTN 200% recharge bonus', 'On-net Bonus SMS Promo', and 'MTN All day WOW Promo'.

In 2016, MTN acquired certain assets of Visafone Communications Limited (Visafone) (including the licences and the 800MHZ Spectrum). We understand that the acquisition was challenged in court by a competitor, on the basis that the offer for the sale of Visafone's assets was not made to all of the key telecoms players through a fair bidding process moderated by the NCC. However, the matter did not proceed to trial as the court struck it out on procedural grounds.

In June 2018, the NCC held a public enquiry on the acquisition, in which various interested stakeholders participated. However, as at the time of writing, the NCC is yet to decide on the matter.

## **26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

The Act provides that an undertaking that abuses its dominant position in a market commits an offence and is liable, on conviction, to a fine of up to 10% of its turnover in the preceding business year, or such higher percentage as the court may determine. Further, under the Penalties Regulations, the FCCPC may impose administrative penalties, and the base sum for calculating the administrative penalty for abuse of a dominant position is 1% of the relevant annual turnover.

Further, the Act provides that where an undertaking fails to cease an abusive practice after receiving an order from the FCCPC to that effect, each director commits an offence and is liable on conviction to imprisonment for up to three years, or to a fine of up to NGN 50 million (approx. USD 121 000) or to both a fine and imprisonment. Also, under the Penalties Regulations, the FCCPC may impose administrative penalties, and the base sum for calculating the administrative penalty is NGN 12.5 million (approx. USD 30 000) for individuals and 2% of the relevant annual turnover for corporate entities.

In the communications sector, the NCC may direct that a licensee in a dominant position discontinue an activity in the communications market if the activity has, or may have, the effect of substantially lessening competition. The NCC may also implement appropriate remedies. In addition, the Regulations provide that where the activities of a licensee constitute an abuse of its dominant position – or an anti-competitive practice – the NCC may issue an order that such licensee pay compensation to persons affected by such abuse, as well as publish an acknowledgement and apology for such actions. In terms of section 140 of the Nigerian Communications Act, where no specific penalty is prescribed for any offence, a person found guilty of the offence is liable for a fine of up to NGN 100 000 (approx. USD 250), or for imprisonment for a period of up to one year, or both. In the event of a subsequent conviction, persons guilty of an offence under the Nigerian Communications Act may be liable for a fine of up to NGN 500 000 (approx. USD 1 210), or imprisonment for a period of up to three years, or both.



## **27. Are there rules in relation to price discrimination?**

The Act gives the FCCPC the power to prohibit the discrimination or preferences in prices of other related matters. In this regard, section 88(1) of the Act requires supplemental regulations to be published setting out the goods and services to which the prohibition applies. The contemplated regulations have not been published as at the date of publication.

In the communications sector, the NCC Regulations prohibit the practice of deliberately reducing the profit margin that may be achieved by a competing licensee that requires wholesale communication services from the licensee in question, by increasing the prices for the wholesale communications services required by that competing licensee or by decreasing the prices of communications services in retail markets where they compete, or both.

The CBN POS Guidelines contain provisions to the effect that a merchant shall under no circumstances charge a different price, surcharge a cardholder or otherwise discriminate against any member of the public who chooses to pay with a card or by other electronic means. The Nigeria Inter-Bank Settlement System Operational Guidelines also provide that parties to switching services shall not abuse their dominant positions by directly or indirectly imposing unfair or discriminatory conditions and fees in the provision of their services.

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

The Act provides that in the case of a small merger, the FCCPC shall publish a notice of any decision it makes in the *Federal Government Gazette*. In the case of large mergers, the Act provides that the FCCPC shall publish its decision in at least two national newspapers.

### **UDO, UDOMA & BELO-OSAGIE**

St Nicholas House  
10th, 12th & 13th Floors  
Catholic Mission Street  
Lagos, Nigeria

**T:** +234 1 2774920, 2719811, 2719812  
+234 1 2774921, 2774922, 2719813

**E:** [uubo@uubo.org](mailto:uubo@uubo.org)

**W:** [www.uubo.org](http://www.uubo.org)

# Seychelles



**APPLEBY**

Malcolm Moller



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

The relevant legislation in Seychelles is the Fair Competition Act 2009 (**FCA**), the Fair Trading Commission Act 2009 (**FTCA**) and the Consumer Protection Act 2010 (**CPA**) (together, the **Laws**). The Fair Trading Commission (the **Commission**), established under the FTCA, is the relevant enforcement agency for the Laws.

### The Fair Competition Act

The FCA was enacted in November 2009 and came into operation on 5 April 2010. The FCA applies to all individuals and businesses, trade and professional associations, and the State and public bodies insofar as they are carrying on commercial activities. The FCA generally outlaws any agreements, business practices and conduct which have a damaging effect on competition in Seychelles. The FCA more indicatively prohibits arrangements between undertakings that impede competition, or are intended to do so, e.g. agreeing to fix prices or bid rigging; the abuse by one or more undertakings of a dominant position in a market; and certain mergers and acquisitions, unless prior approval is obtained from the Commission.

### The Consumer Protection Act

The CPA was enacted on 29 November 2010. The CPA is aimed at protecting consumers' rights by imposing certain duties on producers and suppliers of goods and services in Seychelles. The CPA applies to any goods and services promoted or supplied in Seychelles in the ordinary course of the supplier's business. The FCA provides for a system of enforcement through compliance notices. As such, the Commission may:

- initiate or receive complaints concerning alleged prohibited conduct;
- investigate and evaluate complaints or alleged contraventions of the FCA;
- conduct hearings and issue notices, give orders and directions; and
- impose remedies or financial penalties.

## 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

The Commission has finalised the Consolidated Fair Trading Draft Bill (**Bill**), which was approved

by the Cabinet on 26 June 2019. It is expected that the Bill will soon be tabled before the National Assembly. The Bill seeks to address gaps in the existing pieces of legislation by building on the existing laws and harmonising the Laws so that they are in line with international best practice and the latest developments in consumer protection and competition.

One of the new features of the Bill is the setting up of a tribunal to handle matters instead of the current system which comprises a board and an appeal tribunal. The establishment of a tribunal will serve to speed up the process allowing consumers and businesses to get redress or remedies under the law quicker.

The Bill will also align the functions and powers of FTC with international best practice and stakeholder departments and agencies in Seychelles to ensure that functions do not overlap, and to facilitate enforcement. To further adapt to the dynamic nature of competition laws, the new law seeks to facilitate mergers in Seychelles by proposing simplified definitions of the different types of mergers and includes provisions for the detection of cartels.

## 3. Is the law actively enforced?

The Laws are actively enforced by the Commission, which aims to safeguard the interests of consumers, promote competition and fair trade in Seychelles to benefit consumers, businesses and the economy. Consumer protection remains approximately 75% of the work of the Commission, with the remaining approximate 25% comprises competition law enforcement. During 2020, the Commission handled 16 competition law related matters, comprising 11 COMESA merger notifications; one local merger; and four restrictive practices complaints. The Commission also conducted inquiries in various sectors, including for example, freight forwarding; public procurement; and telecommunications.

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

The Commission's objective is to promote efficiency and competitiveness among business enterprises and service providers and to improve the standards of service, quality of goods distributed and services supplied by business enterprises and service providers over which it has jurisdiction.



## 5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?

A merger is the direct or indirect acquisition or establishment, by one or more enterprises, of control over the whole or part of the business of an immediate competitor, supplier, consumer or other enterprise, whether by purchase of shares or assets, lease of assets, amalgamation or combination or otherwise. Transactions which constitute a merger and meet the thresholds for mandatory notification are prohibited unless permitted by the Commission.

The Laws do not specifically refer to joint ventures. However, the FCA applies to 'enterprises' which are defined as 'any person, firm, partnership, corporation, company, association or other juridical person, engaged in commercial activities for gain or reward'. This includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them. As such, the legislation appears to apply to joint ventures. Moreover, the investigative powers of the Commission may extend to a joint venture to ensure that there is no existence of a dominant position. An example of this is the case of Zil Air (Pty) Ltd (**Zil Air**) and Helicopter Seychelles Ltd (**Helicopter Seychelles**). In 2010, and following speculation of a commercial joint venture between Zil Air and Helicopter Seychelles, the Commission made an enquiry to Zil Air regarding the nature of the venture in question and sought further information from Helicopter Seychelles. The Commission assessed that Helicopter Seychelles held a dominant position in the helicopter services market and therefore advised it that an application to effect the merger in question would have to be made to the Commission in accordance with section 22 of the FCA.

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

The FCA does not specifically cater for foreign-to-foreign mergers. However, the FCA provides that where an enterprise wishes to effect a merger, it shall apply to the Commission for permission. This provision of the FCA does not make a distinction between Seychelles-registered entities and foreign entities. Any practice or agreement, which is approved or required under an international agreement to which Seychelles is a party, is excluded from the provisions of the FCA.

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

Proposed mergers whereby the entity resulting from the merger is likely to control 40% of the market or such other amounts as the Minister of Trade may prescribe are prohibited unless permitted by the Commission. In this regard, it is mandatory for such proposed mergers to be notified to the Commission. The Commission may grant its permission in the following circumstances:

- the merger is likely to bring about gains in real (as distinct from pecuniary) efficiencies that are greater than, or are likely to offset, the effects of any limitations on competition that result or are likely to result from the merger; or
- one of the parties to the merger is faced with actual or imminent financial failure, and the merger represents the least anti-competitive of the known alternative uses for the assets of the failing business.

It should be noted that the Commission will take into consideration certain specific conditions while determining the granting of permission in any particular case such as the market structure likely to be affected by the proposed merger, the degree of control exercised by the involved enterprises especially their economic and financial power, the availability of alternatives to the services or goods being supplied, the likely effect on consumers and the economy as a whole of the proposed merger, and the actual and potential competition from other enterprises and the likelihood of detriment to competition.

## 8. What filing fees are payable?

A non-refundable fee of SCR 1 500 is payable on submission of a completed merger application form. Where the Commission accepts the merger, the parties are required to pay a fee (as set out hereafter) based on a percentage of their combined turnover for their preceding financial year. Where the merger involves a failing firm, the Commission will use its discretion to determine the appropriate fee payable.



THRESHOLDS	COMBINED TURNOVER/ASSET VALUE
Lower	0.1% of O-SCR 500 000
Higher	0.5% of SCR 501 000 and above.

If the combined turnover or asset value of the merging parties in the Seychelles is SCR 500 000 or less, the filing fee will be 0.1% of the combined turnover or asset value the merging parties. If the combined turnover or asset value of the merging parties in Seychelles is SCR 501 000 or more, the filing fee will be 0.5% of the combined turnover or asset value of the merging parties.

#### **9. What is the merger review period?**

Neither of the Laws prescribe a period in which a review of a merger should be completed. The Commission however endeavours to have a determination within 60 business days.

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

The FCA provides that where an enterprise wishes to establish a merger, it shall apply to the Commission for permission to effect the merger. The application is made through the prescribed application form which should contain the prescribed information. Where the Commission determines after investigation that enterprises have effected a merger (as defined in the FCA) without the Commission's permission, the Commission may by notice in writing direct the enterprises concerned so that the merger may be determined within such time specified in the direction. An enterprise seeking permission to effect a merger shall demonstrate that if the merger was not completed, it is not likely that the relevant efficiency gains would be realised by means which would limit competition to a lesser degree than the merger; or demonstrate that reasonable steps have been taken within the recent past to identify alternative purchasers for the assets of the failing business, and describe in detail the results of the search for alternative purchasers.

The FCA contains a general provision relating to the imposition of penalties. One of the powers of the Commission is to impose remedies or financial

penalties on an enterprise which conducts its business in breach of the FCA. It appears this provision applies to the implementation of mergers without the Commission's permission. Where the FTC imposes a financial penalty, the financial penalty shall not exceed 10% of the turnover of the enterprise in Seychelles during the period of the breach of the prohibition up to a maximum period of five years.

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

Pre-notification contacts prior to the submission of a merger application are not required in terms of the FCA and parties may simply submit a merger application form with the requisite information.

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

Under the FCA, the Commission shall assess the following before granting permission for a merger, namely:

- the structure of the market likely to be affected by the proposed merger;
- the degree of control exercised by the enterprises concerned in the market, and particularly the economic and financial power of the enterprises;
- the availability of alternatives to the services or goods supplied by the enterprises concerned in the merger;
- the likely effect of the proposed merger on consumers and the economy; and
- the actual or potential competition from other enterprises and the likelihood of detriment to competition.

#### **13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

As mentioned above, the Government may intervene in a merger through the use of the FTCA and CPA. These Acts allow the government, through the relevant regulators, to intervene in a merger outside of the Commission.

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

In order to understand the scope of the market in relation to the proposed merger, it is regarded as necessary for the Commission to contact the customers and competitors of the merging parties. As part of the review process, customers and competitors may be interviewed by the Commission in order to understand the effect of a merger on the relevant market. The Commission publishes a notice in the Gazette and in at least one daily newspaper informing the public of the application and advising that any person who has an interest in the matter may submit written objections to the grant of the authorisation within the time specified in the notice and the Commission will consider all objections received and satisfy itself that it is reasonable in the given circumstances to grant the authorisation.

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

The legislation does not specify whether employees may make submissions to the Commission. However, the FCA provides that every person aggrieved by an act of an enterprise may make a complaint to the Commission against that enterprise.

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

Where it appears during the Commission's investigation of a merger that some concerns have arisen, or are likely to arise due to the merger, the enterprise may offer a written undertaking to the Commission to address those concerns. The written undertaking may be submitted to the Commission before or during its investigation. If the undertaking addresses all the concerns (based on the lessening of competition, for example) satisfactorily, the Commission will accept the undertaking.

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

If an enterprise is dissatisfied with an order or decision made by the Commission, it may appeal to the Tribunal. If the enterprise is dissatisfied with the decision of the Tribunal, the enterprise may appeal to the Supreme Court.

On appeal, the Supreme Court may:

- affirm, reverse, amend or alter an order or direction of the Tribunal;
- remit the matter to be further determined by the Tribunal with its opinion on the matter; or
- make such order as it deems fit.

Note that the Commission emphasises mediation as a first step in providing redress to consumers.

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

The FCA prohibits cartel conduct in the form of agreements between enterprises, trade practices or decisions of enterprises, or undertakings or concerted practices of enterprises that have or are likely to have as their object or effect the prevention, restriction or distortion of competition when they:

- directly or indirectly fix purchase or selling prices, or determine any other trading conditions;
- limit or control production, markets, technical development or investment;
- provide for the artificial dividing up of markets or sources of supply;
- affect tenders to be submitted in response to a request for bids, for example:
  - a party agrees not to submit a bid in response to a call or request for bids or tenders; or
  - bidding parties submit, in response to a call or request, bids or tenders that are reached by agreement between or among themselves, unless the enterprises are not able to submit their bids individually;
- apply dissimilar conditions to equivalent transactions with other parties engaged in the same trade, thereby placing those other parties at a competitive disadvantage; or



- make the conclusion of an agreement subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such agreement.

An enterprise shall not conspire, combine, agree or arrange with another person to:

- limit the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supplying any service;
- prevent, limit or unduly lessen the manufacture or production of any goods to unreasonably enhance the price thereof;
- unduly lessen competition in the production, manufacture, purchase, sale, supply, rental or transportation of any goods;
- unduly lessen, limit or prevent competition in the provision of insurance on persons concerned in or property related to the production, storage, transportation or dealing in any goods or the provision of services; or
- otherwise unduly restrain or injure competition.

For example, the Commission through the Department investigated several cases for Retail Price Maintenance. As per the FCA, Resale Price Maintenance is prohibited. As such, businesses are prohibited from publishing, agreeing or dictating the price at which a product is to be resold. Retailers should be free to set the prices of the products they sell. The manufacturer, distributor, importer or wholesale should not influence such prices.

The Resale Price Maintenance cases usually relate to the following products:

- Sale of Cigarettes (one case);
- Sale of Bread (three cases);
- Sale of ice creams (one case); and
- Alcoholic beverages (two cases).

In 2018, the Commission investigated four cases for Retail Price Maintenance, which related to the following products:

- Sale of Meat Products (one case); and
- Alcoholic Beverages (three cases).

In two of the cases, a settlement was reached, whereby the relevant businesses made undertakings

to desist from such activities and to inform retailers to whom they supply their goods, that they are free to set their own prices for the resale of the products. The other cases are still under investigation and/or their respective undertakings are being finalised.

An example of the Commission's intervention in a situation of distortion of competition is the Dan Imports and Exports case. In the course of 2012, the Commission received a complaint regarding an advertisement for the sale of Sun Cool in the nation by Dan Imports and Exports. The advertisement read 'RS.6 in all shops on Mahe and Praslin'. It was alleged that the advertisement constituted or indicated price fixing (which constitutes a prohibited practice under the FCA) in the supply of Sun Cool to retailers and consumers. The Commission found that the advertisement constituted a contravention of the FCA.

The Commission acknowledged the cooperation of Dan Imports and Exports, which had accepted its breach of the FCA and had ceased to publish the advertisement and agreed that retailers were free to sell the product at the price at which they wished to sell it. The Commission recommended that the management of Dan Imports and Exports attend a two-hour advocacy session on the FCA in order to better understand the requirements of the FCA. The advocacy session was well received by the representative of Dan Imports and Exports.

A more recent example is with regard to the retail price of Heineken Beer in Seychelles. Upon reviewing the local newspapers to ensure that adverts published by businesses are in conformity with the CPA and/or the FCA, the Commission came across an advert published by ISPC Seychelles. This advert indicated the price at which Heineken Beer in 25cl bottles was to be sold. According to the FCA, it is unlawful for a supplier to impose or maintain a minimum price at which its supplies are to be sold by retailers.

Following the inspections conducted, the Commission has established that the majority of retailers whose shops were inspected were obliged to charge the retail price advertised by ISPC Seychelles. This clearly shows they had engaged in resale price maintenance thus maintaining that the price of the Heineken Beer will be the same across Mahe Island. Furthermore, during the meeting held with the representatives from ISPC Seychelles they did not

dispute the fact that the Commission perceived them to be in contravention of the FCA. On the contrary, they opted to give an undertaking to the Commission. It was therefore concluded that ISPC Seychelles has contravened the FCA.

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

The Commission has the ability to investigate whether enterprises are engaged in restrictive business practices. For this purpose, the Commission may:

- hold enquiries;
- administer oaths;
- summon and examine witnesses;
- compel the production of such books, records, papers and documents as it may consider necessary or proper for any proceeding, investigation or hearing held by it;
- examine any documents produced;
- require that any document submitted to the Commission be verified by affidavit;
- seize documents;
- adjourn investigations;
- make test purchases;
- inspect goods; and
- do all necessary and proper acts in the lawful exercise of its powers or the performance of its functions.

In addition, the Commission has the power to hear any person who may have information, which may assist an investigation.

Regarding seizures, if the Commission has reason to believe that the laws have been violated (whether in terms of consumer protection, fair competition or any other provisions of the FCA) and that any book, document or article relating to the offence is being kept or concealed in a building or place, the Commission may apply to a magistrate for a search warrant to search and seize that book, document or article.

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

Where the Commission determines that an enterprise has entered into an agreement that has the effect of preventing, restricting or distorting competition (cartel conduct), the Commission may instruct the enterprise as follows, in order to remedy, mitigate or prevent the adverse effects on competition:

- terminate or amend an agreement;
- cease or amend a practice or course of conduct in relation to prices;
- supply goods or services or grant access to facilities;
- separate or divest itself of any enterprise or assets; or
- provide the Commission with specified information on a continuing basis, within such time as may be specified by the Commission. The Commission may, on a case-by-case basis, instead of giving instructions, impose a financial penalty.

Alternatively, the Commission may provide both instructions and a financial penalty. Additionally, regarding sanctions, every enterprise that fails or refuses to obey an order of the Commission made under the FCA is liable on conviction to a fine not exceeding SCR 400 000 and, in the case of a continuing offence, to a further fine of SCR 10 000 for each day or part thereof during which the offence continues. Where it is proved that an enterprise has failed to obey an order of the Commission made under the FCA, every director and officer of the enterprise is liable on conviction to a fine not exceeding SCR 100 000, or to imprisonment for a term not exceeding two years, or to both, unless that individual proves that all necessary and proper means in his or her power were taken to obey and carry out the order of the Commission.

There is no corporate leniency policy in Seychelles. However, the law is currently under review and a corporate leniency policy is being considered. However, it should be noted that the reduction of a penalty or immunity from the imposition of a financial penalty is at the discretion of the Commission, which shall weigh up the relevance and impact of the facts provided.



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

The FCA provides for an enterprise to apply to the Commission for authorisation to enter into or carry out an agreement or to engage in a business practice, which in its opinion, is an agreement or practice affected or prohibited under the Act. The Commission is authorised to approve the application where it is satisfied that the agreement or practice is reasonable and is likely to result in a public benefit.

The Commission may approve the exemption subject to conditions and timeframes, which it considers appropriate in the circumstances. Before approving the exemption, the Commission must:

- publish a notice in the Gazette and in at least one newspaper that is published daily informing the public of the application; and
- advise interested persons that they may submit written representations within the prescribed time period.

The Commission must consider all written objections submitted and satisfy itself that it is reasonable in the circumstances to approve the exemption. Subsequent to granting the exemption, the Commission is empowered to revoke the exemption if:

- the Commission is satisfied that the exemption was granted on the basis of false or misleading information;
- the enterprise has breached the conditions upon which the exemption was granted;
- the circumstances that justified the grant of the exemption no longer exist; or
- amend the exemption if it is satisfied that the market conditions necessitate an amendment.

The Commission is required to notify the enterprise in writing of the proposed amendment or revocation prior to implementation thereof. Agreements or practices excluded from the FCA:

- any practice of employers or agreement to which employers are parties insofar as it relates to the remuneration, terms or conditions of employment of employees.
- any practice or agreement approved or required under an international agreement to which Seychelles is a party.

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

Yes. See question 17 for examples.

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

Subject to the FCA, any conduct on the part of an enterprise amounting to an abuse of a dominant position is prohibited. Exclusive agreements form part of the conduct, which gives rise to an abusive dominant position as defined by the FCA. For example, a dominant supplier might have a series of exclusive purchasing agreements with dealers in a particular geographical market. This might hinder other suppliers operating in and/or wishing to enter that market.

However, such an agreement would not be unlawful if the dominant enterprise is able to objectively justify its conduct and show that it has behaved in a proportionate manner in defending its legitimate commercial interest and show the benefits arising out of that dominant position.

However, if the primary purpose of the conduct is to curb competition, it shall be prohibited by the Commission.

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

It should be noted that the FCA makes the distinction between a dominant position and abuse of a dominant position. An enterprise is deemed to hold a dominant position if that enterprise occupies such a position of economic strength that enables it to operate in the market independently without effective competition from customers, competitors or potential competitors.

Conduct which amounts to an abuse of a dominant position is prohibited if it adversely or unfairly restricts trade within the jurisdiction. Conduct specifically listed as constituting an abuse of a dominant position consists of:

- restricting the entry of any enterprise into that or any other market that supplies, or is likely to supply, a substitute for the goods or services supplied in that market;
- preventing or deterring any enterprise from engaging in competitive conduct in that or any other market;
- eliminating or removing any enterprise from that or any other market;
- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions that are excessive, unreasonable, discriminatory or predatory;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of agreements subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements;
- or
- exclusive dealing, market restriction or tied selling.

However, the Commission will not treat the enterprise as abusing a dominant position if:

- it is shown that its behaviour was exclusively directed at improving the production or distribution of goods or promoting technical or economic progress, and consumers were allowed a fair share of the resulting benefit;
- the effect or likely effect of its behaviour in a market is the result of its superior competitive performance; or
- the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trademark except where the Commission is satisfied that the exercise of those rights:
  - has the effect of lessening competition substantially in a market; and
  - impedes the transfer and dissemination of technology.

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

Yes. For example, in 2010, the Commission received a complaint from Hunt Deltel Ltd (**HDL**) against Land Marine Ltd (**LML**) for an alleged abuse in the port sector by LML which enjoyed exclusive rights in the shore handling and stevedoring market at the Commercial Port of Victoria. HDL argued that apart from carrying out stevedoring and shore-handling activities, LML also engaged in inland transportation of cargo within Seychelles and was a direct competitor of HDL in that activity. HDL alleged that the exclusivity enjoyed by LML allowed it to distort fair competition among all enterprises providing cargo transportation services.

In particular, HDL complained that LML abused its position in the following manner:

- LML refused to allow other enterprises to perform their own loading and unloading activities, on the grounds that it had exclusivity in providing shore-handling services; and
- LML imposed severe and restrictive timeframes within which HDL had to operate at the port, unload cargo or complete its tasks. LML's conduct resulted in HDL's services to its customers being greatly constrained, resulting in a loss of clients for HDL.

After assessing HDL's complaint, the Commission found that LML held a dominant position in both the upstream and downstream markets. It concluded that LML enjoyed exclusivity in essential port services at the commercial port and that there was no competition in these markets.

The Commission then considered whether LML's conduct amounted to an abuse of dominance. The Commission found that LML had abused its dominant position by applying dissimilar conditions to equivalent transactions in favour of the downstream market. The Commission considered the fact that the commercial port is an essential facility, without access to which market operators operating in the downstream market could not provide services to their customers. By refusing to grant competitors access, or by granting access on less favourable terms than those of its own services, LML's conduct amounted to an abuse of dominance by imposing a competitive disadvantage on its competitor.



Following its investigation and analysis, the Commission concluded that LML infringed the FCA by adopting conduct that led to abuse of its dominant position.

LML provided an undertaking to the Commission addressing these concerns, which the Commission found satisfactory.

A more recent example is the 2014 case of *FTC v Ferox Abattoir (Pty) Ltd*, in which the Board of Commissioners received a complaint from one Mr Jean against Ferox Abattoir (Pty) Ltd to the effect that the complainant was refused the supply of broiler chicks at the hatchery facility when he came to buy some chicks to rear, due to an outstanding bill owed by the complainant to the abattoir facility.

Both facilities - the abattoir and the hatchery - were owned and managed by the respondent.

A formal investigation was launched and it was recorded through a telephone call documented by the Commission that the complainant had been categorically refused the supply of broiler chicks by the hatchery facility.

The complainant claimed that he had suffered loss of revenue due to the non-realisation of two potential broiler cycles and had to cease the broiler farming business, which caused a decrease in his farming business earnings as a whole.

Being unable to mediate the matter further, the Commission deemed it necessary to bring a case against Ferox Abattoir (Pty) Ltd (Hatchery Facility) before the Board of Commissioners for determination.

During its investigation, the Commission determined that the hatchery was an essential facility as there were no viable substitutes for the essential input being the supply of broiler chicks. The Commission argued that given that the respondent is the sole provider of broiler chicks in the country the respondent is considered the dominant service provider; hence in refusing to supply broiler chicks to the complainant (an essential input in broiler farming activities), the respondent is deemed to have abused and was still abusing its dominant position.

The respondent argued that the abattoir and the hatchery form part of one company, being Ferox Abattoir (Pty) Ltd. Hence, the debt owed by the complainant was attributable to both the hatchery and the abattoir, such that if the complainant paid his debt, the company would be willing to sell chicks to him. As such, denial of services by the hatchery for debts owed at the abattoir should be maintained and if that is allowed, then the breach of section 7(3)(b) of the FCA should fall.

The Board of Commissioners ultimately rejected the respondent's arguments and concluded that the respondent had abused its dominant position in contravention of section 7 of the FCA.

## **26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

The FCA empowers the Commission to provide remedies to competition issues following an investigation, and in some cases, the Commission is empowered to impose financial penalties. Where the Commission determines that any conduct has constituted an abuse it:

- shall notify the enterprise of its finding accompanied by a copy of the report;
- shall direct the enterprise to cease the abusive conduct within a specified period; and
- may require the enterprise to take such further action as in its opinion is necessary.

Where the Commission imposes a financial penalty, the financial penalty shall not exceed 10% of the turnover of the enterprise in Seychelles during the period of the breach of the prohibition, up to a maximum period of five years.

## **27. Are there rules in relation to price discrimination?**

Yes. Price discrimination may constitute an abuse of dominance. Price discrimination is regarded as abusive if after investigation by the Commission, it has been established that such conduct has harmed competition.



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

The Commission publishes its decisions on its website: [www.ftc.sc](http://www.ftc.sc). However, it is to be noted that not all decisions are immediately available.

**APPLEBY**

Suite 202  
2nd floor, Eden Plaza  
Eden Island  
Mahe, PO Box 1352  
Seychelles

**T:** +248 429 5281

**W:** [www.applebyglobal.com](http://www.applebyglobal.com)

**E:** [seychelles@applebyglobal.com](mailto:seychelles@applebyglobal.com)





# South Africa



## BOWMANS (SOUTH AFRICA)

Lital Avivi

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

The relevant competition legislation is the Competition Act, 89 of 1998, as amended (the **Act**) and the regulations promulgated in terms of the Act. The Act is enforced by the Competition Commission (the **Commission**), the Competition Tribunal (the **Tribunal**) and the Competition Appeal Court (the **CAC**).

## 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

The Competition Amendment Act, 1 of 2009 (the **2009 Amendment Act**) was passed into law in 2009 but has not come into effect with the exception of section 6, relating to market enquiries, and certain parts of section 12 and section 13, relating to the criminalisation of cartel conduct. The latter relate to criminal liability for individuals in relation to contraventions of the Act. In particular, they allow for directors and managers to be held criminally liable for causing a company to engage in, or 'knowingly acquiesce' to, a company's involvement in cartels. Individuals may face personal penalties of up to ZAR 500 000 and/or ten years' imprisonment. The Commission had anticipated that the provisions in the 2009 Amendment Act relating to complex monopolies and concurrent jurisdiction would be implemented by 2020, but at the time of writing, these provisions are not yet in force.

The Competition Amendment Act, 18 of 2018 was signed into law in February 2019 and certain parts dealing with merger control, abuse of dominance, administrative penalties, exemptions and market inquiries came into effect on 12 July 2019 (the **2019 Amendment Act**). Further sections relating to confidentiality and disclosure of information submitted to the competition authorities, and abuse of dominance, in particular price discrimination and buyer power, came into effect on 13 February 2020.

The 2019 Amendment Act is aimed at addressing two key structural challenges in the South African economy, namely (i) reducing concentration and the racially skewed spread of ownership of firms in the economy; and (ii) enhancing the policy and institutional framework, and procedural mechanisms for the administration of the Act.

The amendments address five priorities:

- strengthening the provisions of the Act relating to prohibited practices and mergers;
- emphasising the impact of anti-competitive conduct on small or medium-sized enterprises (**SMEs**) and firms owned by historically disadvantaged persons (**HDPs**);
- strengthening the provisions of the Act relating to market enquiries;
- the alignment of competition-related processes and decisions with other public policies, programmes and interests; and
- enhancing the administrative efficacy and processes of the competition regulatory authorities.

Some key amendments include:

- the introduction of additional considerations in the assessment of a merger, including the extent of common ownership and common directorship in competing firms, and recent mergers undertaken by the merging parties;
- the expansion of public interest considerations relevant for merger assessment. Relevant considerations now include the ability of SMEs or HDPs "to effectively enter into, participate in or expand within the market" and "the promotion of a greater spread of ownership by, for example, increasing the levels of ownership by HDPs and workers in firms in the market";
- the inclusion of the allocation of market shares as a collusive activity under section 4(1)(b)(ii) of the Act;
- the inclusion of an administrative penalty of 25% of a firm's annual turnover for a second offence and the end of 'yellow card' offences (i.e. no penalty for first-time contravention) in terms of which all first-time offenders are now subject to a penalty on a first offence;
- the introduction of additional objectives and grounds of exemption;
- additional powers granted to the Commission and Minister of Trade, Industry and Competition (the **Minister**) in merger proceedings and to conduct market inquiries;
- provisions relating to confidentiality and disclosure of information submitted to the competition authorities;
- newly introduced buyer power provisions; and
- new provisions relating to price discrimination by dominant firms.



The provisions of the 2019 Competition Amendment Act that are not yet in force, and which will be brought into force by proclamation at a later date are:

- those relating to national security and acquisitions by foreign acquirers in terms of which the Commission and a government committee (yet to be constituted) must be notified of an acquisition of a South African firm by a foreign acquiring firm if the merger may impact national security interests of the Republic. The committee must decide whether the transaction may have an adverse effect on national security interests and the competition authorities may not make any decision where the merger has been prohibited on national security grounds;
- new powers of the Minister to make regulations regarding restrictive horizontal practices and restrictive vertical practices; and
- time limits for the Commission to decide on applications for an exemption.

Buyer Power Regulations were also published by the Minister on 13 February 2020. The Buyer Power Regulations designate specific business sectors in which dominant firms are prohibited to require or impose unfair prices or other trading conditions on SME and HDP suppliers. These sectors are the agro-processing; grocery retail and online intermediation services. The Buyer Power Regulations list the elements that must be established in order to sustain a contravention under the Competition Act and outlines the factors and benchmarks for determining the unfairness of price and trading conditions. In May 2020, the Commission published its Buyer Power Enforcement Guidelines which provides guidance on how the buyer power legislation will be enforced by the Commission.

The Minister also published Price Discrimination Regulations on 13 February 2020 amplifying the provisions of the Act insofar as they prohibit dominant firms from pricing discriminatorily. The Price Discrimination Regulations set out the elements which must be established in order to sustain a contravention under the Act and outlines the factors and benchmarks for determining whether price discrimination is likely to impede effective participation by HDPs.

On 19 March 2020, the Minister published the Consumer and Customer Protection and National Disaster Management Regulations and Directions (Consumer Protection Regulations), prohibiting dominant firms from charging excessive prices in respect of essential goods and services during the national state of disaster and lockdown (Emergency Regulations). The regulations aimed to address the anticipated increases in prices of essential products. Two key cases arose concerning prices for personal protective equipment and essential hygiene goods, however, were assessed under the “ordinary” excessive pricing provisions as the conduct in question pre-dated the Emergency Regulations (Competition Commission and Babelegi Workwear Overall Manufacturers and Industrial Supplies CC, Competition Commission and Dis-Chem Pharmacies Limited). In these cases, the Tribunal took into consideration the extraordinary circumstances arising as a result of the pandemic in coming to a conclusion in respect of the relevant market and the respondents’ position as dominant firms in such markets.

On 10 December 2020, the Commission published final Guidelines for Competition in the South African Automotive Aftermarket Industry. The guidelines provide practical guidance to firms in the automotive sector on conduct that may be anti-competitive, how to mitigate this, and to encourage competition through greater participation of SMEs and HDPs. The guidelines became effective on 1 July 2021.

On 13 December 2020, the Commission published its final report on the forestry sector impact assessment study. The report details the Commission’s final views on findings and recommendations regarding the impact of vertical integration and long-term contracting on security of supply and access to timber and the implications for the ability of SME and HDP firms to successfully participate and compete in the South African forestry industry.

On 19 February 2021, the Commission published Terms of Reference in relation to its Online Intermediation Platforms Market Inquiry for public comment. The inquiry was formally launched on 18 May 2021. On 19 May 2021, the Commission published its Statement of Issues and, on 17 August 2021, published its Further Statement of Issues for public comment. The focus of the market

inquiry is on online intermediation service platform markets which intermediate interactions between business users and consumers. Platforms include (i) eCommerce marketplaces, (ii) online classified market places, (iii) software application stores and intermediated services such as accommodation, travel, transport and food delivery. The market inquiry is broadly focused on (i) market features which hinder competition between the platforms, (ii) market features which give rise to discriminatory or exploitative treatment of business users, and (iii) market features which negatively impact on the participation of SMEs and/or HDP-owned firms. At the time of writing, the Commission was holding public hearings between 2 and 19 November 2021.

On 17 February 2021, the Department of Trade, Industry and Competition (**DTIC**) published the draft Code of Practice on Retail Leasing and the draft Grocery Retail Suppliers' Code of Conduct. The draft Code of Practice on Retail Leasing aims to prescribe the minimum standard of conduct between retail property owners and SME/HDP tenants to preserve a fair and transparent relationship between them. It contains provisions relating to good faith, lease negotiations and agreements, and rental rates. The aim of the draft Grocery Retail Suppliers' Code of Conduct is to (i) ensure fair and non-discriminatory trading terms with SMEs and HDP-owned grocery retailers, (ii) remove impediments to increased participation of SMEs and HDP-owned grocery retailers, and (iii) ensure compliance with the new price discrimination provisions in the Act in respect of SMEs and HDP-owned firms. It contains provisions relating to terms and conditions of supply, trade terms, and prices.

On 23 March 2021, the DTIC published the proposed Regulation on non-binding Advisory Opinions for public comment. The proposed regulations set out the (i) process for requesting a non-binding advisory opinion, (ii) legal status of a non-binding advisory opinion, and (iii) fees payable for a non-binding advisory opinion. In this regard, the proposed regulations indicate that an advisory opinion has no binding legal effect. In addition, the draft regulations provide that a ZAR 20 000 fee is payable for medium enterprises and ZAR 50 000 for other market participants. The following entities are exempt from paying the fee for an advisory opinion: (i) constitutional institutions, (ii) national and provincial departments, (iii) major public entities, (iv) micro enterprises, (v) non-profit organisations,

(vi) other public entities, and (viii) small enterprises. At the time of writing, the proposed regulations have not been finalised and promulgated.

On 23 March 2021, DTIC published amendments to the Commission's Forms, Rules and Regulations for public comment. The amendments seek to amend the following forms: (i) Form CC 3(1) – Application for Exemption, (ii) Form CC 3(2) – Application for Exemption, and (iii) Form CC 3(3) – Application for Exemption. The amendments seek to include Notice CC 23 – Notice of intention to make a determination. The amendments seek to amend Rules 35(1) and 35(4) of the Commission's Rules in respect of participation by the Minister in the Commission's merger proceedings. Lastly, the amendments seek to insert a new Rule 15A to the Commission's Rules – Access to Confidential Information submitted to the Commission. At the time of writing, the amendments have not been finalised and promulgated.

On 25 March 2021, the DTIC published further amendments to the Commission's Forms, Rules and Regulations for public comment. The amendments seek to amend the following forms in addition to those mentioned above: (i) Form CC4(1) – Merger Notice, and (ii) Form CC4(2) – Statement of Merger Information. At the time of writing, the amendments have not been finalised and promulgated.

On 25 April 2021, the Commission published its final report of the COVID-19 impact assessment study. The report details the Commission's findings regarding the impact of the COVID-19 Block Exemptions and the Commission's enforcement work during the pandemic. At the time of publication of the report, block exemptions had been granted to the following sectors: (i) healthcare, (ii) banking, (iii) retail property, and (iv) hotel. The block exemptions allowed firms to collaborate and coordinate their responses to the COVID-19 pandemic in order to mitigate the negative economic and social impact of the crisis.

On 18 May 2021, the Commission published the draft Guidelines on Small Merger Notifications for public comment. The draft guidelines aim to address the growing number of digital players and the acquisitions of new, innovative companies which escape regulatory scrutiny due to the acquisitions occurring at an early stage in the life of the target before it generates sufficient turnover that would



trigger a mandatory merger notification. In terms of the draft guidelines, the Commission will require notification of small mergers where: (i) at the time of entering into the transaction any of the firms, or firms within their group, are subject to an investigation by the Commission in terms of Chapter 2 of the Act (i.e. prohibited practices); and (ii) at the time of entering into the transaction any of the firms, or firms within their group, are respondents to pending proceedings referred by the Commission to the Competition Tribunal in terms of Chapter 2 of the Act. In addition, the draft guidelines require that the Commission be informed of small mergers involving a firm which operates in one or more digital market(s) where: (i) the consideration for the acquisition or investment exceeds R190 million provided the target firm has activities in South Africa, (ii) the consideration for the acquisition of a part of the target firm is less than R190 million but effectively values the target firm at R190 million (for example, the acquisition of a 25% stake at R47.5 million) provided the target firm has activities in South Africa and, as a result of the acquisition, the acquiring firm gains access to commercially sensitive information of the target firm or exerts material influence over the target firm within the meaning of section 12(2)(g) of the Act, (iii) at least one of the parties to the transaction has a market share of 35% or more in at least one digital market, or (iv) the proposed merger results in combined post-merger market share at which the merged entity gains or reinforces dominance over the market, as defined by the Act. At the time of writing, the guidelines have not yet been finalised and promulgated.

In response to the disruptions to the supply chains of essential goods in the country due to the COVID-19 pandemic, on 16 July 2021, the Commission granted a block exemption in respect of agreements and practices between firms in the supply chain for essential goods from the application of sections 4 and 5 of the Act (i.e. restrictive horizontal and vertical practices). The aim of the exemption is to (i) prevent critical shortages of essential goods, and (ii) promote the equitable distribution of scarce essential goods across the country to consumers, especially poorer households, and customers, including small businesses. The exemption schedule defines essential goods as basic food and consumer items, emergency products, medical and hygiene supplies (including

pharmaceutical products), refined petroleum products and emergency clean-up products.

On 16 July 2021, the Commission published the Guidelines on collaboration in the implementation of the South African Value Chain Sugarcane Master Plan to 2030. On 16 October 2020, the Commission granted an exemption to the South African Sugar Association to enable its members to collaborate in the implementation of the South African Sugarcane Value Chain Master Plan to 2030. The aim of the guidelines is to provide guidance to the sugar industry on collaboration in the implementation of industry commitments to increasing sourcing of local sugar.

On 17 August 2021, the Commission published draft Guidelines on collaboration between competitors on localisation initiatives for public comment. In response to the economic consequences of the COVID-19 pandemic, the South African Government developed the Economic Reconstruction and Recovery plan which maps out interventions to promote inclusive growth and employment in the domestic economy, one being increased localisation. The Commission recognises that competitors may be required to advance such localisation initiatives. The guidelines define a "localisation initiative" as any project or effort to achieve greater levels of local procurement or production. The draft guidelines provide guidance on how such collaboration between competitors may occur and be appropriately identified and implemented in a manner which does not raise any competition concerns in terms of section 4(1) of the Act (i.e. restrictive horizontal practices). At the time of writing, the guidelines have not yet been finalised and promulgated.

On 15 October 2021, the Commission rolled out a survey on Strategies Adopted by Women in Business to Overcome Barriers to Entry and Participation in Business. The survey is aimed at determining the most appropriate competition policy interventions required to alleviate barriers that women face in business and to reduce gender inequality in markets. The aim of the survey is to determine the intervention required to promote inclusivity and participation of women in the economy and business. The Commission is exploring the following 5 themes for the entry and participation of women in entrepreneurship; (i) access to business knowledge, education and

training programmes; (ii) access to finance for new business start-up or expansion, (iii) access to (profitable) markets; (iv) compliance requirements, bureaucracy and administration; and (v) access to women networks. The Commission will also be exploring to what extent social factors such as safety, security and domestic responsibilities affect women entrepreneurs.

### 3. Is the law actively enforced?

The law is actively enforced, both in respect of mergers and prohibited practices (including abuse of dominance).

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

The Commission's priority sectors are (i) food and agro-processing; (ii) healthcare; (iii) intermediate industrial inputs; (iv) construction and infrastructure; (v) banking and financial services; (vi) information and communication technology and (vii) energy. According to the Commission, these sectors were selected taking into account South Africa's economic policies, the volume of complaints received in the sector and market failures which the Commission has identified through past investigations and scoping exercises. Both mergers and prohibited practices in these sectors attract close scrutiny.

Another area of concern for the Commission has been the private healthcare sector, in which the Commission conducted its first formal market inquiry to determine the factors that restrict competition and underlie increases in private healthcare expenditure in South Africa.

The Commission conducted the inquiry through an inquisitorial process of public hearings and the review of secondary material obtained from information requests, consultations and summons. The inquiry was led by a panel comprising industry experts, under the leadership of panel chairperson, former Chief Justice Sandile Ngcobo. The inquiry began in January 2014, and the Commission released its Health Market Inquiry Final Findings and Recommendations Report in September 2019.

A separate market inquiry was conducted into the liquefied petroleum gas (**LPG**) market. LPG has been recognised as being of strategic importance

as an alternative source of energy for South Africa by various government policies. For example, the National Development Plan identified that increasing the proportion of LPG in South Africa's energy mix in order to meet the country's objective of a sustainable energy supply. The LPG market inquiry started in September 2014, and the inquiry was concluded and the final report was published on 24 April 2017.

A third market inquiry was conducted in relation to the grocery retail market. The inquiry was initiated on the back of concerns surrounding the disappearance of the small and informal retail sectors in townships. Given the relationship between the decrease in informal traders and the rise of shopping centres, the inquiry sought to address both the formal and informal sectors of the market. The inquiry has been concluded and the Commission published its final report on 25 November 2019.

A fourth market inquiry initiated by the Commission on 7 June 2017 relates to the public passenger transport sector and follows numerous complaints received by the Commission relating to public transport in the country. The inquiry was initiated given that transport is one of the priority sectors of the Commission and South Africans spend a significantly high proportion of disposable income on public transport as compared to other developing countries. The scope of the inquiry included price setting mechanisms, price regulation, transport planning, allocation of subsidies, route allocation, licensing requirements and transformation. The market inquiry was concluded on 31 March 2021, and the Commission published its final report on 7 April 2021.

A fifth market inquiry relates to the Data Services Market Inquiry. The inquiry was established in the context of concerns that perceived high data costs in South Africa are constraining the full potential of a data-driven economy, with an adverse impact on users of cellphones and laptops, as well as businesses that require high volumes of data. The inquiry commenced on 18 September 2017 and the Commission's provisional findings and recommendations was published on 24 April 2019. The Commission published its final report on 2 December 2019. The Commission has since concluded settlement agreements with Vodacom and MTN to reduce data prices and address the structure of data pricing.



The most recent inquiry announced to date is the Online Intermediation Platforms Market Inquiry, which is discussed above.

The Commission conducted an impact assessment on the forestry sector in terms of section 21A of the Act. The assessment was aimed at assessing the impact of vertical integration on security of supply and the ability for non-vertically integrated players and smaller vertically integrated players' ability to access logs. The impact assessment emanates from various concerns raised in merger proceedings relating to continuity of supply of timber from large vertically integrated firms, as well as challenges faced by small firms in accessing the supply of timber products. On 13 December 2020, the Commission issued its final report on the forestry impact study.

The Commission has written a paper in relation to Competition in the Digital Economy. The paper sets out the ways in which South Africa's competition laws can be implemented to achieve equitable outcomes in the digital economy and the Commission's intentions in this regard, including sound competition policy. The Commission has since published its second version of the publication following submissions received on the initial paper.

In light of the COVID-19 health crisis and corresponding economic crisis, in 2020 the Commission set up a dedicated team to prioritise complaints of excessive pricing by suppliers and retailers, in an effort to fast track the investigation and prosecution of such complaints. The Tribunal also heard a number of cases on an urgent basis and a number of consent agreements have been concluded. In addition, the Commission began monitoring essential food prices to ensure prices for essential food products do not escalate to the detriment of consumer welfare and particularly, low-income households.

## **5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?**

The Commission must be notified of a transaction in the following circumstances: if the transaction: (i) constitutes a merger (as defined in the Act); (ii) meets the relevant thresholds; and (iii) constitutes economic activity within, or having an effect within, South Africa. For purposes of the

Act, a 'merger' occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm, whether such control is achieved as a result of the purchase or lease of the shares, an interest or assets of the other firm, by amalgamation or any other means. There is no closed list of how control may be achieved. Broadly, a person controls another firm if that person, *inter alia*:

- beneficially owns more than one-half of the issued share capital of the firm;
- is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;
- is able to appoint or to veto the appointment of a majority of the directors of the firm;
- is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act; or
- has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the first four bullet points above.

These examples cited in the Act are not a closed list of what constitutes control. For example, the acquisition of control over a business, or the assets of a business, pursuant to a sale of business or sale of assets agreement, is not specifically enumerated as a class of control, but will always be accepted as the acquisition of control for the purposes of the Act.

The first four bullet points above set out what are referred to as instances of 'bright line' or 'legal' control. The last bullet point provides a catch-all to the effect that a person controls a firm if that person 'has the ability to materially influence the policy of the firm in a manner comparable to the person who, in ordinary commercial practice, can exercise an element of control', referred to in the first four bullet points. This covers instances in which a firm, without acquiring bright line control, may acquire '*de facto*' control by being able to materially influence the policy of another firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of bright line or legal control.



Joint ventures are not specifically dealt with under the merger control provisions of the Act, however joint ventures that meet the definition of a “merger” and meet the thresholds for mandatory notification fall to be notified to the Commission. Such agreements may in any event be notified voluntarily. The Commission has published a non-binding practitioners’ note to help determine whether a joint venture should be notified.

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

The Act applies to all economic activity within or having an effect within South Africa. However, insofar as the notification of mergers is concerned, the thresholds are calculated in relation to combined turnover or assets in relation to South Africa only and in practice, notification is required if a company’s South African assets or South African-derived turnover meets the thresholds. As such, the Act is applicable to foreign-to-foreign mergers only to the extent that the parties have assets in South Africa or turnover generated in, into or from South Africa. The Commission’s approach is that neither party requires a presence in South Africa and that it will suffice if the target alone has turnover in South Africa so as to meet the thresholds. Arguably this goes too far and is against the legal principle that statutes do not apply extraterritorially unless specifically set out in the statute. However, since the Act came into effect in 1999, the Tribunal has considered and approved many foreign-to-foreign transactions and, as a matter of general practice, foreign-to-foreign mergers, where the target has a subsidiary or business activities in South Africa must be notified to the authorities if the relevant thresholds are met.

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

In the ordinary course, only intermediate and large mergers require notification in South Africa. Intermediate mergers are those that meet the following thresholds:

- The combined annual turnover in, into or from South Africa of the acquiring firm(s) and the target firm(s) is valued at ZAR 600 million or more; or

- the combined assets in South Africa of the acquiring firm(s) and the target firm(s) is valued at ZAR 600 million or more; or
- the annual turnover in, into or from South Africa of the acquiring firm(s) plus the assets in South Africa of the target firm(s) is valued at ZAR 600 million or more; or
- the annual turnover in, into or from South Africa of the target firm(s) plus the asset(s) in South Africa of the acquiring firm(s) is valued at ZAR 600 million or more.

In addition, the annual turnover in, into or from South Africa or the asset value of the target firm(s) must be ZAR 100 million or more.

A large merger is one where one of the four calculations given above results in a figure that is equal to, or exceeds, ZAR 6.6 billion and the annual turnover or asset value of the target firm(s) equals or exceeds ZAR 190 million. The turnover and assets are calculated with reference to the previous financial year of the parties.

The Act defines an acquiring firm broadly, referring to the entire group to which the acquirer forms a part, while a target (or transferring) firm is defined narrowly, referring to the actual business being acquired.

### 8. What filing fees are payable?

Filing fees payable for a large merger are ZAR 550 000. Filing fees payable for an intermediate merger are ZAR 165 000. There are no filing fees payable for small mergers.

### 9. What is the merger review period?

The Commission is the decision-making body in intermediate mergers. The Commission has an initial period of 20 business days (commencing the day after which a complete merger notification is filed) to review an intermediate merger which may be extended once by a period not exceeding 40 business days. In terms of the Act, the Commission has a maximum of 60 business days to review an intermediate merger and approve, approve with conditions or prohibit the merger.



The Commission has an initial period of 40 business days (commencing the day after which a complete merger notification is filed) within which to assess a large merger and to make a written recommendation, with reasons, to the Tribunal on whether or not the merger should be approved, approved with conditions or prohibited. The Commission may apply to the Tribunal for an extension of no more than 15 business days at a time. In terms of the Act, the Commission does not have a maximum period within which to review and make a recommendation on a large merger.

Upon receipt of the Commission's recommendation, the Tribunal will set the matter down for a hearing within 10 business days. Upon completion of the hearing, the Tribunal must either approve, approve with conditions or prohibit the merger within 10 business days, and publish its reasons for decision within a further 20 business days.

The review period of a small merger is the same as an intermediate merger.

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

Parties to a notifiable merger may not implement the merger before obtaining the requisite approval. Implementing a notifiable merger prior to approval being obtained or failing to notify the Commission of a merger is a contravention of the Act, and exposes the parties to administrative penalties of up to 10% of annual turnover, as well as potential injunctions on implementation. Penalties have been applied by the authorities for prior implementation. The level of penalties applied has varied, depending on the circumstances.

On 2 April 2019, the Commission published its final guidelines for the determination of administrative penalties for failure to notify a merger and implementation of merger. These guidelines set out the Commission's approach to prosecuting parties for non-notification or the pre-approval implementation of mergers.

The Commission uses a filing fee-based methodology for penalties for failure to notify mergers, unlike the turnover-based methodology for determining administrative penalties in cartel cases.

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

The vast majority of mergers are notified without pre-notification contact. However, the Commission permits pre-notification meetings and a practitioner's notice issued by the Commission mentions that if merging parties wish to engage in a pre-notification meeting to discuss merger filing requirements for a specific proposed merger, the relevant contact person is the manager of the Mergers and Acquisitions Division. In practice, pre-notification contacts tend to be held in relation to contentious mergers only. Meetings can also be arranged with the Commission shortly after filing, when a case team has been set up.

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

The Act provides for public interest considerations to be taken into account, in addition to the business and economic efficiency criteria which are used to assess the effect that a merger will have on competition. Specifically, the Act requires the competition authorities to consider whether an otherwise anti-competitive merger could be approved on the basis of a substantial positive public interest impact as part of the assessment that the competition authorities are required to make in terms of the Act. Whereas under the Act, the competition authorities are required to consider whether an otherwise anti-competitive merger could be approved on the basis of a substantial positive public interest impact, the 2019 Amendment Act arguably elevates the public interest enquiry to be on equal footing with the competition enquiry.

The authorities must determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the effect that a merger will have on:

- a particular industrial sector or region;
- employment;
- the ability of SMEs, or firms controlled by HDPs, to effectively enter into, participate in or expand within the market;
- the ability of national industries to compete in international markets; and

- the promotion of a greater spread of ownership, in particular to increase the levels of ownership by HDPs and workers in firms in the market.

The Commission has shown concern for issues such as employment with regard to both mergers and complaints of prohibited practices. In some recent merger decisions, the Commission has been unwilling to accept merger-related job losses.

Further, the Commission has indicated that it requires certainty from merging parties as to whether job losses will occur as a result of a merger or not.

Notwithstanding the above, in the vast majority of cases, competition arguments are the Commission's focus and the basis on which decisions are made. However, public interest considerations remain significant, and the competition authorities have approved numerous mergers subject to public interest conditions

The Commission has recently shown concern for issues regarding levels of ownership by HDPs. On 1 June 2021, the Commission issued its first prohibition decision of a merger based on public interest grounds in the ECP Africa Fund, Burger King South Africa and Grand Foods merger. In particular, the Commission found that the merger would lead to a significant reduction in the shareholding of historically disadvantaged persons in the target firm, from more than 68% to 0% as a result of the merger. However, this decision was overturned by the Tribunal on consideration and the transaction was approved subject to conditions, including *inter alia* that the merged firm shall establish an employee share ownership program for an effective 5% interest in the target firm.

Lastly, the Minister (who previously only had rights of review), as well as the Commission, now have rights of appeal in merger proceedings. The Minister's right of appeal applies in respect of public interest grounds where there has been Ministerial participation before the competition authorities or with leave from the CAC.

### **13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

The Minister has the right to participate as a party in merger proceedings in order to make representations on any public interest ground.

In relation to certain banking and financial sector merger transactions which require permission or approval in terms of the Banks Act, 1990 or the Financial Markets Act, 2012, the competition authorities may not make a decision on such merger where the Minister of Finance has issued a notice certifying that it is in the public interest that the merger is subject to the jurisdiction of the Banks Act, 1990 or the Financial Markets Act, 2012 only.

Once the national security provisions in the 2019 Amendment Act are enacted, all merger transactions which involve the acquisition of a South African firm by a foreign acquiring firm in designated sectors, will require notification to a government committee (yet to be constituted) in order to determine the impact of the merger on national security interests of the Republic.

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

The Commission case handler appointed to investigate a merger contacts the largest customers and competitors of the merging parties during the course of the Commission's review. Generally, these parties will be asked if they have any concerns with the proposed merger and, if so, the basis for these concerns. Should they wish to do so, the customers and competitors may claim confidentiality in respect of their written submissions to the Commission. Their submissions are influential, although to the extent that their concerns are not relevant to the assessment that the Commission is required to make, the Commission will generally disregard such input. The submissions will nevertheless form part of the Commission's record and remain on file.



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

In terms of section 13A(2) of the Act, the parties to a merger must each provide a non-confidential version of the merger notification to any registered trade union that represents a substantial number of its employees, or the employees concerned or representatives of such employees, in the absence of a registered trade union.

The Act requires proper service on the trade unions and/or employee representatives. Proof of service must be submitted as part of the notification, failing which the notification will not be regarded as complete. Notably, the time period for the Commission's review does not commence until service of the merger notification is complete.

Any person may voluntarily submit information to the Commission in relation to a merger. However, trade unions and/or employee representatives are afforded a more prominent role in the merger review process than other third parties and they are entitled by legislation to participate in merger proceedings. A trade union or employee representative, upon whom a non-confidential version of the merger filing is required to be served, may notify the Commission of its intention to participate in merger proceedings within five business days after receiving notice of the merger.

In addition to the rights of trade unions and employee representatives to intervene, any person who has a material interest in a merger may apply to intervene in Tribunal proceedings by filing a Notice of Motion. The Notice of Motion must include a concise statement of the nature of the person's interest in the proceedings. An application to intervene must be served on all parties to the proceedings and the Tribunal is required to determine whether or not the person asserting a material interest is permitted to intervene.

Although trade unions and/or employee representatives are afforded a more significant place in the merger review process, the Government and other interested parties have intervened in certain significant merger cases. In relation to the latter, the Commission is specifically required in terms of the Act to provide the Minister with a copy of a large

merger notification received by the Commission for the Minister to consider whether it wishes to make any representations on the public interest grounds mentioned above.

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

The Act does not require that the Commission grant merging parties an opportunity to make representations before a decision is issued where the authority intends to (i) prohibit a merger or impose conditions (in the case of intermediate mergers); or (ii) recommend a prohibition or conditional approval (in the case of large mergers). However, in the ordinary course, the Commission case handler appointed to investigate the merger will contact the legal representatives of the merging parties to discuss any preliminary concerns the Commission may have identified during its investigation. In the ordinary course, the Commission would invite the merging parties' legal representatives to make submissions on the concerns it has with the proposed merger and, if appropriate, to offer any behavioural or structural remedies to address the Commission's concerns.

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

The Commission's decisions may be appealed to the Tribunal. The Tribunal's decisions, whether at first instance or in appeals from decisions of the Commission, may be taken on review or appeal to the CAC.

The Act makes it clear that the parties to a merger, intervening government bodies, trade unions and third parties (as the case may be) who have established they have a material interest in the merger have a right to appeal the decisions of the Tribunal.

The Minister may participate, in the prescribed manner, in merger proceedings before the Commission, the Tribunal or the CAC, in order to make representations on any of the public interest grounds listed in the Act. A trade union or employee representative may appeal a decision of the Tribunal to the CAC, provided that the trade

union or employee representative was a participant in the Tribunal proceedings. Further, subject to the provisions of the Act and the Rules of the CAC, a person affected by a decision of the Tribunal may appeal against, or apply to the CAC to review the Tribunal's decision. This allows competitors, customers and other third parties to appeal decisions of the Tribunal.

The issue of whether or not the Commission can appeal a Tribunal decision has been raised and discussed by the courts. This was considered by the CAC for the first time in Commission/Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd. The merger had been approved by the Tribunal conditionally. The CAC referred to section 17 of the Act, which regulates who may appeal against merger proceedings, and provides that an appeal to the CAC may be made by (i) any party to the merger; or (ii) a person who, in terms of section 13A(2), is required to be given notice of the merger, provided the person had been a participant in the proceedings of the Tribunal. Section 13A(2) relates to the registered trade unions representing a substantial number of employees of the acquiring or target firms, or the employees concerned or a representative of the employees concerned, if there are no such registered trade unions. The CAC noted that it is clear from this wording that only two categories of persons are permitted in terms of the Act to appeal against decisions of the Tribunal in merger proceedings and that the Commission does not fall within either of these categories.

The Commission had relied on section 61(1) of the Act, read with section 37(1)(b)(i). The CAC stated that sections 61(1) and 37 of the Act should not be read as altering or derogating from the provisions of section 17 in respect of appeals against Tribunal merger decisions. It follows that the categories of persons which may appeal against Tribunal merger decisions are those limited categories specifically set out in section 17(1) and not the class of 'affected' persons referred to in section 61(1).

The parties who may participate in merger proceedings are (i) any party to the merger; (ii) the Commission; (iii) any person who was entitled to receive a notice in terms of section 13A(2) and who indicated to the Commission an intention to participate, in the prescribed manner; (iv) the Minister, if the Minister has indicated an intention to participate; and (v) any other person

whom the Tribunal has recognised as a participant. The CAC found that not all these participants may appeal against a decision of the Tribunal. Those who may appeal are specifically referred to in section 17(1) of the Act. The CAC held that the omission of the other participants is clearly indicative of the legislature's intention.

The 2019 Amendment Act provides that the Commission and the Minister now have an automatic right to appeal the decisions of the Tribunal. However, the Minister must have participated in the Commission or Tribunal's proceedings or, on application for leave to the CAC, to be entitled to appeal.

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

The Act regulates prohibited practices and specifically prohibits certain horizontal restrictive practices (unlawful conduct between competitors). The Act prohibits price-fixing (either direct or indirect, and which may relate to a purchase or selling price or any other trading condition); dividing markets (by allocating market shares, customers, suppliers, territories, or specific types of goods or services); and collusive tendering.

The Commission has prosecuted firms across a wide range of industries for engaging in cartel conduct, including the construction, cement, concrete, bread, milling, glass and airline industries.

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

Chapter 5: Part B of the Act confers broad investigative powers on the Commission, including the power to summon any person who is believed to be able to furnish information or to be in possession or control of any information, document or object that may assist the Commission in performing its functions. A person who is so summoned is required to answer each question truthfully and to the best of their ability except to the extent that answering any one question may be self-incriminating. In the ordinary course, the Commission requires that a person who has been requested to appear before it for questioning, or who has been summoned, provide his or her responses under oath.



The Commission also has broad powers of search and seizure. Sections 46 and 47 of the Act authorise the Commission to enter premises (with or without a warrant) for the purpose of conducting a search and seizure operation. The Commission is not required to notify the person in possession or control of the premises to be searched prior to obtaining a search warrant or prior to arriving at the premises. In the ordinary course, the Commission conducts search and seizure operations on a surprise basis and has conducted dawn raids on companies in various industries, including cement, furniture removal, scrap metal, tyres, LPG, vehicle glass, particleboard, fibreboard, packaging material, cargo shipping, edible oils and margarine.

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

Cartel conduct is outright or “per se” unlawful and a firm engaging in cartel conduct is exposed to a penalty for a first infringement. The Commission’s pursuit of cartels is vigilant. Administrative penalties of up to 10% of turnover may be imposed on the firm concerned for a first-time offence. The 2019 Amendment Act introduced a new provision in relation to administrative penalties, increasing the maximum administrative penalty to 25% of a firm’s annual turnover if a firm’s anti-competitive conduct is substantially a repeat by the same firm of conduct previously found to be a prohibited practice. In addition, the administrative penalty may be increased by the turnover of any firm which controls the firm that is found to have engaged in a prohibited practice and to make the controlling firm jointly and severally liable for the penalty.

Where an application is made for leniency, the leniency applicant must co-operate fully with the Commission in order to benefit from the leniency policy by providing the Commission with all information in respect of the cartel, including information about those involved. Once the Commission receives an application for leniency it will initiate an investigation and, in conducting its investigation, may subpoena any person for questioning.

The Act provides for criminal liability of directors and other employees having management authority where they have caused the company to engage in cartel conduct or where they have knowingly acquiesced to the conduct.

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

Yes. In terms of section 10 of the Act, and Schedule 1 Part A of the Act, a firm may apply to the Commission for exemption from the application of Chapter 2 of the Act, which deals with prohibited practices. The circumstances in which exemptions may be granted are limited. In terms of section 10 of the Act, the Commission may grant an exemption if the agreement or practice concerned contributes to (i) the maintenance or promotion of exports; (ii) the promotion of the effective entry into, participation in or expansion within a market by small and medium businesses, or firms controlled by historically disadvantaged persons; (iii) change in productive capacity necessary to stop decline in an industry; (iv) the economic development, growth, transformation or stability of an industry designated by the Minister after consulting the minister responsible for that industry; or competitiveness and efficiency gains that promote employment or industrial expansion. Further, any restriction imposed on the firms concerned by the agreement or practice must be required to attain the objective in question. In terms of Schedule 1 Part A of the Act, trade associations may apply to the Commission for exemption if, having regard to internationally applied norms, any restriction contained in the Rules of the associations is reasonably required to maintain professional standards or the ordinary function of the profession. Exemption applications are permitted for both agreements and conduct and may be granted conditionally or unconditionally.

The 2019 Amendment Act seeks to expedite the exemptions process by restricting the Commission to a period of one year in which to grant or refuse the exemption, unless the applicant and the Commission agree otherwise. The 2019 Amendment Act furthermore provides for the Minister to publish regulations in relation to exemptions, which may cater for the fast-tracking of exemptions for agreements or practices in certain key sectors and industries. At the time of writing, the provision restricting the Commission’s time period within which to make a determination on an exemption application is not yet in force. In addition, no regulations have been published.

## 22. Is minimum resale price maintenance prohibited?

Minimum resale price maintenance is per se unlawful. Section 5(2) of the Act specifically provides that the practice of minimum price maintenance is prohibited. Section 5(3) of the Act provides that despite section 5(2), a supplier or producer may recommend a minimum resale price to the re-seller of a good or service, provided that (i) the supplier or producer makes it clear to the re-seller that the recommendation is not binding; and (ii) if the product has its price stated on it, the words recommended price must appear next to the stated price.

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

Within the framework of the Act, exclusive agreements typically fall within the ambit of section 5, which applies to agreements between parties in a vertical relationship (i.e. a firm and its customers, its suppliers, or both). Section 5(1) prohibits agreements between parties in a vertical relationship if the agreement has the effect of substantially preventing or lessening competition in a relevant market, unless the parties to the agreement can show technological, efficiency or other pro-competitive gains outweigh the anti-competitive effect. Where an exclusive agreement has an anti-competitive effect, factors typically relevant in assessing the lawfulness of the agreement include the duration of the agreement, the degree of foreclosure resulting from the agreement and the levels of concentration in the market.

In addition, where one of the parties is dominant in the relevant product market, exclusive arrangements may also fall to be investigated under the abuse of dominance provisions of the Act, particularly if the exclusive arrangement constitutes an 'exclusionary act'. An exclusionary act is defined as an act that impedes or prevents a firm entering into, or expanding within, a market.

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

The Act prohibits the abuse of a dominant position. A firm is considered to be dominant in a market if (i) it has at least 45% of that market; (ii) it has less than 35% of that market, but has market power (as defined in the Act); or (iii) it has at least 35% but less than 45% of a particular market, unless it can show that it does not have market power. 'Market power' is defined in the Act as 'the power of a firm to control prices, or to exclude competition or to behave, to an appreciable extent, independently of its competitors, customers or suppliers'.

The Act includes per se prohibitions which prevent a dominant firm from (i) charging an excessive price (as defined in the Act) to the detriment of consumers; or (ii) refusing to give a competitor access to an essential facility (as defined in the Act) when it is economically feasible to do so.

With regard to prohibitions that are not per se unlawful, a dominant firm is prohibited from engaging in any exclusionary act (as defined in the Act) if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain.

Further, the Act prohibits a firm from engaging in the following exclusionary acts, unless the firm can show technological, efficiency or other pro-competitive gains that outweigh the anti-competitive effect:

- requiring or inducing a supplier or customer to not deal with a competitor;
- refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
- selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of the contract;
- selling goods or services below their marginal or average variable cost;
- buying-up a scarce supply of intermediate goods or resources required by a competitor; and



- discriminating between purchasers in relation to equivalent transactions of goods or services of like grade and quality.

The 2019 Amendment Act introduces significant amendments to the existing abuse of dominance provisions. A theme flowing through all the amendment provisions is the reduced onus on the Commission in the cases it wishes to pursue. It appears this is a reflection of the perspective that the current provisions of the Act, and the tests therein, read with questions of onus, are too high a threshold for the Commission to discharge especially insofar as they are required to show anti-competitive effect. In this regard, the 2019 Amendment Act provides for, *inter alia*, (i) changes to the definition of excessive pricing, (ii) prohibitions on refusal to supply, (iii) changes to the definition of predatory pricing, (iv) the introduction of margin squeeze as a specific offence and (v) the prohibition against abuse of buyer power.

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

A number of abuse of dominance cases have been adjudicated on by the South African competition authorities. More recent examples are included below.

In October 2019, the CAC, in *Computicket (Pty) Ltd v Competition Commission*, upheld a decision by the Tribunal which found that Computicket had contravened section 8(d)(i) (i.e. requiring or inducing a supplier or customer to not deal with a competitor) of the Act by abusing its dominance in the market for the provision of outsourced ticket distribution services to inventory providers for entertainment, from mid-2005 to 2010. The Tribunal found that Computicket had in excess of 90% market share in the outsourced distribution market during the complaint period, and that the agreements in question were at least “facially exclusive” as they prohibited the inventory providers from utilising the services of Computicket’s competitors without its permission.

In reaching its decision, the CAC emphasised that:

- There must be a causal relationship between the exclusionary conduct and the alleged anti-competitive harm; and

- Potential foreclosure is sufficient for proving that the exclusionary conduct had an ‘effect’ for the purposes of section 8(d).

Computicket was ordered to pay an administrative penalty of ZAR 20 million.

In June 2019, the issue of exclusive agreements was dealt with by the Tribunal in *Competition Commission v Uniplate Group (Pty) Ltd*. In this case the Tribunal found that the largest manufacturer and distributor of number plate blanks and embossing machines in South Africa, Uniplate, abused its dominance between 2010-2014, and ordered it to pay an administrative penalty of ZAR 16 192 315.

According to two complaints raised, Uniplate had been using long-term exclusive agreements to contractually oblige its customers, who do the embossing of number plates when purchasing a Uniplate embossing machine, to also purchase all their number plate blanks and embossing materials from Uniplate. The exclusive supply agreements tied up customers for a period of 10 years and prevented the customer from switching to alternative suppliers of number plate blanks. These exclusive agreements limited the ability of Uniplate’s rivals from accessing customers for number plate blanks in the market. Customers who were tied into these exclusive agreements were similarly unable to access competitor blanks, even when competitors’ prices were lower.

The Tribunal found that Uniplate strictly enforced its exclusive supply agreements, and often threatened customers with litigation if they purchased or attempted to purchase their requirements from Uniplate’s rivals. The Tribunal concluded that Uniplate had contravened section 8(d)(i) of the Act by foreclosing the market and was liable for an administrative penalty.

Uniplate appealed the Tribunal’s decision to the CAC, which upheld Uniplate’s appeal and dismissed the Commission’s complaint. In its reasons, the CAC reiterated the test that foreclosure may be actual or potential. The CAC, however, distinguished the type of foreclosure from the likelihood of these types of foreclosure occurring. This element of likelihood goes to sufficiency of proof for such foreclosure effects. Based on this test, the CAC found insufficient evidence to sustain the Tribunal’s findings of foreclosure.



The CAC held that there was insufficient evidence of actual foreclosure as Uniplate's main rival had grown during this time and competed effectively. The CAC also could not conclude, on the available evidence, whether other smaller competitors had been foreclosed by Uniplate's exclusionary conduct. With respect to potential foreclosure, the CAC found insufficient evidence of potential foreclosure of possible entrants. It held that the absence of entry is insufficient to sustain potential foreclosure, and that there was insufficient evidence to show that certain potential entrants would have entered and added significant competition to the market after entry.

#### **26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

Yes. Conduct which is unlawful attracts a penalty for a first infringement. The Tribunal may impose an administrative penalty on firms for the abuse of a dominant position which may not exceed 10% of the firm's annual turnover in South Africa and its exports from South Africa during the firm's preceding financial year for a first-time offence. In relation to repeat offences, the Tribunal may impose an administrative penalty not exceeding 25% of a firm's annual turnover if a firm's anti-competitive conduct is substantially a repeat by the same firm of conduct previously found to be a prohibited practice. In addition, the administrative penalty may be increased by the turnover of any firm which controls the firm that is found to have engaged in a prohibited practice and to make the controlling firm jointly and severally liable for the penalty.

#### **27. Are there rules in relation to price discrimination?**

Yes. However, price discrimination is prohibited only where a firm is dominant in a relevant market and only where specific criteria are established. Section 9 of the Act sets out the elements of prohibited price discrimination, as well as certain justifications that may be relied upon by a dominant firm, even where all the elements of prohibited price discrimination are present.

In order to establish that a dominant firm's actions constitute prohibited price discrimination, the Commission (or a complainant, as the case may be) is required to show that the conduct:

- is likely to have the effect of:
  - substantially preventing or lessening competition; or
  - impeding the ability of SMEs or HDPs, to participate effectively. In addition, it is prohibited for a dominant firm to avoid selling, or refuse to sell, goods or services to a purchaser that is a SME or a firm controlled or owned by a HDP in order to circumvent the operation of this section. Where a prima facie case of this contravention has been established, the onus shifts to the dominant firm to show that its action did not impede the ability of SMEs and HDPs to participate effectively;
- relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and
- involves discriminating between those purchasers in terms of:
  - the price charged for the goods or services;
  - any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services;
  - the provision of services in respect of the goods or services in question; or
  - the payment for services provided in respect of the goods or services.

Where these criteria are met, certain justifications may nevertheless be raised by the dominant firm as a defence to the allegation of unlawful price discrimination. Specifically, the dominant firm's conduct will not be unlawful if the firm can establish that the differential treatment:

- makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from:
  - the differing places to which goods or services are supplied to different purchasers;
  - methods by which goods or services are supplied to different purchasers; or
  - quantities in which goods or services are supplied to different purchasers (a dominant firm is precluded from using this justification to show that its action did not impede the ability of small and medium businesses and firms controlled or owned by historically disadvantaged persons to participate effectively);



- is a result of good faith attempts to meet a price or benefit offered by a competitor; or
- is in response to changing conditions affecting the market for the goods or services, including:
  - any action in response to actual or imminent deterioration of perishable goods;
  - any action in response to the obsolescence of goods;
  - a sale pursuant to a liquidation or sequestration; or
  - a sale in good faith in discontinuance of business in the goods or services concerned.

As mentioned in question 2 above, the Minister published the Regulations on price discrimination on 13 February 2020.

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

The Tribunal's decisions are available on its website ([www.comptrib.co.za](http://www.comptrib.co.za)). The Commission is the decision-maker in respect of intermediate mergers and is required by law to publish in the Government Gazette reasons for the prohibition or conditional approval of mergers. Information is made publicly available on the Commission's website in respect of mergers that have been notified to the Commission.

It also publishes media statements in respect of significant decisions and other developments on its website. The Commission's website is [www.compcom.co.za](http://www.compcom.co.za).

# Tanzania



## **BOWMANS (TANZANIA)**

Wilbert Kapinga  
Charles Mmasi



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

The relevant competition legislation includes the Fair Competition Act, 2003 (the **FCA**), the Fair Competition Procedure Rules, 2018 and the Fair Competition Tribunal Rules, 2012. The FCA deals with both competition law and consumer protection law, and is enforced by the Fair Competition Commission (the **FCC**). The decisions of the FCC may be taken on appeal or review to the Fair Competition Tribunal (**FCT**) established under the FCA (although certain decisions relating to telecommunication spectrum management and licensing may be taken on appeal to the High Court of Tanzania). Decisions by the FCT may be reviewed by the Court of Appeal of Tanzania (the **CAT**), while decisions of the High Court may be taken on appeal or review to the CAT. The CAT is the final appellate Court in Tanzania.

Competition and consumer protection in the energy and water sectors are regulated by the Energy and Water Utilities Regulatory Authority (**EWURA**) under the Energy and Water Utilities Regulatory Authority Act, 2001 (the **EWURA Act**). Decisions of the EWURA may also be taken on appeal to the FCT.

The Land Transport Regulatory Authority (**LATRA**) deals with competition and consumer protection in the land transport sector under the Land Transport Regulatory Authority Act, 2019 (the **LATRA Act**). Decisions of the LATRA may also be taken on appeal to the FCT.

Mergers and acquisitions in the banking sector are notifiable to the FCC. However, in terms of the Banking Financial Institutions Act, 2006 (the **Banking Financial Institutions Act**), the primary regulator and approving authority of mergers and acquisitions of banking and financial institutions is the Bank of Tanzania.

Decisions of other regulators, such as the Tanzania Civil Aviation Authority established under the Civil Aviation Act, 2006, may be taken on appeal to the FCT.

Mergers and acquisitions in the electronic and postal sector are notifiable to the FCC. However, the primary regulator of the electronic and postal communications sector is the Tanzania

Communications Regulatory Authority as established under the Electronic and Postal Communications Act, 2010.

## 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

In June 2020, the Parliament of the United Republic of Tanzania passed the Finance Act, 2020 (the **Finance Act**), which, *inter alia*, clarified the scope of the penalty provisions in the FCA. Prior to the Finance Act, and in terms of section 60 of the FCA, where a person committed, or was involved in, an offence in terms of the FCA, the FCC, 'could impose on that person a fine of not less than 5% of his annual turnover and not exceeding 10% of his annual turnover'. This section did not prescribe the geographic ambit to which the fine must be calculated, although section 6(1) of the FCA prescribes that the FCA applies to Mainland Tanzania, the FCC had scope to, potentially, impose a fine calculated on the basis of such persons' global annual turnover. In this regard, whilst the Finance Act did not make any changes to the range upon which a penalty would be payable, it clarified that the penalty calculated will be limited to annual turnover 'which has a source in Mainland Tanzania'. This would exclude turnover derived in Zanzibar for example, which has its own competition law and regulator, and as such, achieves alignment between section 6(1) and section 60 of the FCA. More significantly, this amendment clarifies that firms found by the FCC to have engaged in restrictive business practices or prior implementation of notifiable mergers, would be liable for a fine of between 5% and 10% of annual turnover, limited to turnover which has a source in Mainland Tanzania.

A draft amendment of the FCA is pending parliamentary process. If passed, the FCA will be renamed as the Fair Competition and Consumer Protection Act. The amendment is intended to address institutional weaknesses in the FCC, introduce agency effectiveness and strengthen anti-competitive trade clauses. It is expected that criminal sanctions for cartel behaviour will be included and references to intention and negligence in determining anti-competitive conduct will be removed.

### 3. Is the law actively enforced?

The FCC is an active regulator in relation to the control of transactions required to be notified to it under the FCA's merger control provisions. In recent years, the FCC has vigorously pursued investigations of potentially anti-competitive behaviour and consumer complaints, and has imposed various sanctions for violations of the law. During the 2018/2019 financial year:

- the FCC commenced investigation on four merger transactions alleged to be consummated without notification. The alleged non-notifications were in the hospitality sector, manufacturing, and financial services sectors. Two of the cases involving local firms, Akiba Commercial Bank and Bilila Lodge Investments, were finalized by way of settlement while the remaining two are still under investigation;
- the tobacco, steel, entertainment and hospitality, and fumigation industries were investigated by the FCC for suspected price fixing;
- the FCC continued with its investigation involving two complaints in the entertainment industry particularly on TV broadcasting. Both complaints were based on alleged anti-competitive agreements relating to broadcasting rights for the Tanzania Premier League; and
- the FCC dealt with abuse of market power in the tobacco sector, with final findings issued in two out of five alleged cases.

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

The current priorities of the competition authorities are to ensure a level playing field in the market and to showcase Tanzania as a viable investment environment with an efficient regulatory framework empowered to restrain counterfeit trade, cartels and monopolistic tendencies.

### 5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?

A merger is required to be notified to the FCC if it (i) constitutes a merger; and (ii) meets the relevant pecuniary thresholds. For the purposes of the FCA, a 'merger' is defined as an acquisition of shares, a business or other assets, whether inside or outside of Tanzania, resulting in the change of control of a business, part of a business or an asset of a business in Tanzania.

The FCA applies to joint ventures that are caught by the definition of a merger and meet the thresholds for mandatory notification to the FCC. The FCA prohibits giving effect to an agreement if the object, effect or likely effect of the agreement is to appreciably prevent, restrict or distort competition.

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

It is necessary to obtain approval for a foreign-to-foreign merger if such a merger (i) involves an acquisition of shares, a business, or other assets; (ii) results in the change of control of a business, part of a business or an asset of a business in Tanzania; and (iii) meets the applicable threshold.

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

According to the Fair Competition (Threshold for Notification of a Merger) (Amendment) Order, 2017 (GN No. 222), which came into effect on 2 June 2017, the current pecuniary thresholds are TZS 3.5 billion determined from the combined market value of assets or turnover of the merging parties. The turnover is based on the latest audited financial statements of the merging parties.

### 8. What filing fees are payable?

The fees payable to the FCC for filing merger notifications are calculated based on the combined market value of assets or turnover of the merging parties as set out in their latest audited accounts, whichever is higher. For merging parties with an annual turnover:

- of TZS 3.5 billion to TZS 25 billion, the fee is TZS 25 million;
- exceeding TZS 25 billion but less than TZS 100 billion, the fee is TZS 50 million; and
- of TZS 100 billion or above, the fee is TZS 100 million.

The fee for filing an application for exemption of an agreement is set at TZS 8 million plus an annual fee of TZS 2 million multiplied by the number of years requested for exemption. The fee payable to the FCC for reviewing an agreement is TZS 8 million. The fee for filing a complaint under the FCA is TZS 500 000.



However, no fee is chargeable to:

- a person submitting information concerning an alleged prohibited practice; or
- a consumer submitting a complaint against an alleged prohibited practice.

There is a fee of TZS 3 million for a withdrawal of a complaint. In cases where an application is refused, the filing fee paid for the application is non-refundable.

### **9. What is the merger review period?**

Within five working days of receipt of a complete merger application, the FCC will issue a Form FCC11, a Notice of Complete Filing. If the merger application is incomplete (e.g. due to the non-payment of the filing fee in full) the FCC will issue a Form FCC12, a Notice of Incomplete Filing. Only after a Notice of Complete Filing has been issued by the FCC, the merger investigation will commence.

The FCC has 14 working days to determine whether a merger must be investigated in full. If an investigation is necessary, the FCC will prohibit the merger for a period of 90 calendar days in order to investigate the merger. The investigation period may be extended in terms of two provisions: first, by a 30-calendar-day period (computed from the next working day following the issuance of the extension certificate); and secondly, by an unidentified number of days computed with reference to the delays caused by the merging parties during any of the investigation periods. The FCC is required to inform the parties if it intends to extend the review period by issuing an extension certificate as per the Form FCC14 before the expiry of the 90-calendar-day review period.

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

The merger regime in Tanzania is suspensory. A notifiable merger is prohibited unless at least 14 days have lapsed after a certificate of complete filing has been given by the FCC following the filing. The FCC has to decide within the 14 days whether the proposed merger should be investigated. If it is determined that the merger should be examined, such merger or acquisition is not permitted to take place for a period of 90 days to allow the FCC

to conduct and complete its examination of the proposed merger. The FCC may extend the period of investigation for a further 30 days after the first 90 days. It is an offence to give effect to a notifiable merger that has not been notified to the FCC at least 14 days prior to its implementation.

The failure to notify a notifiable merger, or the prior implementation of a notifiable merger, constitutes an offence in terms of the FCA. The FCA grants the FCC power to impose a fine of between 5% and 10% of an entity's annual turnover which has a source in Mainland Tanzania for failure to notify a merger. The FCC Rules of Procedure, 2018 create an obligation on the acquiring firm to notify a notifiable merger. The FCC may impose a penalty 'where a person commits an offence against the Act...' or is ...'involved in such an offence'.

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

The Tanzanian fair competition legal regime does not provide for pre-notification contacts with the competition authorities, however, the FCC may be approached for guidance and consultation in circumstances where the merger is considered complex.

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

Non-competition factors such as market and labour efficiencies of a transaction may be taken into account by the FCC in the assessment of a merger. Such considerations may lead the FCC to approve mergers subject to conditions relating to these factors. In a recent merger filing, for example, the FCC approved the merger with a condition that the acquiring firm consents to issue a binding written undertaking to the FCC, within 14 days, that it shall, upon issuance of the merger clearance certificate in respect of the target firm, assume the place of the target firm in a labour complaint filed against the target firm before the Commission for Mediation and Arbitration and consequently assume without fail all legal obligations (if any) that may be awarded to the complainants in the final determination of the complaint.

### **13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

There is scope for government intervention in merger transactions under the different sector legislation which give government authorities or regulators, apart from the competition authorities, the function to deal with competition and consumer protection. In such instances, the FCC would seek to receive a letter of no objection from the relevant government authority or regulator when undertaking the merger review.

Competition and consumer protection in the energy and water sectors are regulated by the EWURA under the EWURA Act. Decisions of the EWURA may also be taken on appeal to the FCT.

The LATRA deals with competition and consumer protection in the land transport sector under the LATRA Act. Decisions of the LATRA may also be taken on appeal to the FCT.

Mergers and acquisitions in the banking sector are notifiable to the FCC. However, in terms of the Banking Financial Institutions Act, the primary regulator and approving authority of mergers and acquisitions of banking and financial institutions is the Bank of Tanzania.

Decisions of other regulators, such as the Tanzania Civil Aviation Authority established under the Civil Aviation Act, 2006, may be taken on appeal to the FCT.

Mergers and acquisitions in the electronic and postal sector are notifiable to the FCC. However, the primary regulator of the electronic and postal communications sector is the Tanzania Communications Regulatory Authority (TCRA) as established under the Electronic and Postal Communications Act, 2010. In this regard, section 65(5) of the FCA requires the FCC, when considering an electronic or postal communications related matters, to request written advice of the TCRA on such matters and upon receiving such request, the TCRA has the power to provide the FCC with such advice.

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

The competition authorities procure submissions from the public and industry and consumer organisations which the authorities may consider to have an interest in the proposed transaction. The interventions of interested persons and other stakeholders are taken into consideration in the authorities' decision-making process.

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

Any other person, including competitors, consumers, employees and suppliers who demonstrates sufficient interest in the merger may make submissions to the competition authorities.

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

In practice the FCC, of its own volition or upon request, gives merging parties an opportunity to make submissions in support of the merger notification prior to prohibiting or approving a merger with or without conditions.

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

Any party aggrieved by the decision of the FCC may lodge an appeal with the FCT.

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

The FCA regulates prohibited practices and specifically prohibits certain horizontal restrictive practices (unlawful conduct between competitors). The FCA prohibits any agreement (an arrangement or understanding, formal or informal and written or unwritten) that has the object, effect or likely effect



of appreciably preventing, restricting or distorting competition, including:

- price fixing between competitors;
- collective boycott by competitors;
- restricting output between competitors; and
- collusive bidding or tendering.

Kindly refer to question 3 above for examples of proceedings before the FCC pursuing firms for alleged cartel conduct.

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

Section 71 of the FCA empowers the FCC to summon any person who it believes is able to provide information, produce a document or give evidence that will assist in an investigation and will require the person(s):

- to furnish the information in writing signed by him or her, or, in the case of a body corporate, signed by a competent authorised officer or a legal officer of the body corporate;
- to produce the document to the FCC; or
- to appear before the FCC to give evidence orally.

Searches and seizures may be conducted by the authorities upon obtaining a warrant from the FCT. Upon granting of the warrant, the police and members of the FCC are entitled to enter the relevant premises, conduct a search and make copies, or take extracts of documents therein.

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

Any person who commits an offence under the FCA is liable to a fine ranging from 5% to 10% of the offender's annual turnover which has a source in Mainland Tanzania. The FCA also empowers the FCC to issue compliance and compensatory orders. In addition, if the FCC is satisfied that a monetary value can reasonably be placed on the damage, including loss of income suffered by a person as a result of an offence under the FCA, the convicted person may be liable to a fine of twice such monetary value, which the FCC may order to be paid to the person suffering the damage. Where

a person charged with an offence under the FCA is a corporate entity, every person who, at the time of the commission of the offence, was a director, manager or officer of the corporate entity, may be charged jointly in the same proceedings with such corporate entity; and where the corporate entity is convicted of the offence, every such director, manager or officer shall be deemed to be guilty of that offence unless he or she proves that the offence was committed without his or her knowledge or that he or she exercised all due diligence to prevent the commission of the offence.

There is no leniency policy in place in Tanzania.

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

There is a mechanism under the FCA to apply to the FCC for an exemption of an agreement or merger. On application by a party to agreements affecting competition, or application by a party to a merger, the FCC may, upon satisfaction that the agreement or merger results or is likely to result in benefits to the public, grant a conditional or unconditional exemption. In the case of an exemption for an agreement, the exemption shall not exceed a period of five years. As for applications for a merger exemption, the period of exemptions is not to exceed one year from the date the exemption is granted.

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

The FCA does not refer to minimum resale price maintenance specifically. However, minimum resale price maintenance may amount to price fixing, price restricting, the control of prices, tariffs, surcharges or other charges which constitute contraventions in terms of the FCA.

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

Exclusive agreements whose object, effect or likely effect is to appreciably prevent, restrict or distort competition are unlawful. However, such agreements would not be unlawful if (i) none of the



parties to the agreement has a dominant position in a market affected by the agreement; and (ii) either the combined market shares of the parties to the agreement of each market affected by the agreement is less than 35% or none of the parties to the agreement are competitors. In circumstances where an exclusive agreement is unlawful on account of violating the FCA, the agreement will still be legally enforceable if the clauses of the agreement creating exclusivity are severable from the rest of the agreement.

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

The FCA prohibits the abuse of a dominant position. A person is regarded as dominant in a market if (i) acting alone, that person can profitably and materially restrain or reduce competition in that market for a significant period of time; and (ii) that person's share of the relevant market exceeds 35%.

In determining whether a person holds a dominant position in a market, the following factors are taken into account:

- competition from imported goods or services supplied by persons not resident or carrying on business in Tanzania; and
- the economic circumstances of the relevant market, including:
  - the market shares of persons supplying or acquiring goods or services in the market;
  - the ability of those persons to expand their market shares; and
  - the potential for new entries into the market.

A dominant person in a market is prohibited from using that position of dominance if the object, effect or likely effect of the conduct is to appreciably prevent, restrict or distort competition.

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

There are no publicly reported cases of the FCC pursuing any firms for alleged abuse of a dominant position.

**26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

The FCA imposes fines upon persons who commit an offence under the FCA. The fine levied under the FCA is between 5% and 10% of that person's annual turnover which has a source in Mainland Tanzania. Where a person charged with an offence under the FCA is a corporate entity every person who, at the time of the commission of the offence, was a director, manager or officer of the corporate entity, may be charged jointly in the same proceedings with such corporate entity; and where the corporate entity is convicted of the offence, every such director, manager or officer shall be deemed to be guilty of that offence unless he/she proves that the offence was committed without his/her knowledge or that he/she exercised all due diligence to prevent the commission of the offence.

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

There are no rules in the legislation relating to price discrimination.

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

The FCC website publishes selected decisions under the public register section. Further, any person interested in a decision of the FCC may request a copy of the decision from the director general of the FCC.

The FCC's webpage is [www.competition.or.tz](http://www.competition.or.tz)



# Uganda



## **BOWMANS (UGANDA)**

David Mpanga

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

To date, no legal regime has been put in place governing competition law in Uganda. It is however intended that Uganda adopt dedicated competition legislation, in the form of the Competition Bill, 2004 (**Bill**). The Bill, which is yet to be tabled before Parliament, was proposed to:

- foster and sustain competition in the Ugandan market in an attempt to protect consumer interest;

- safeguard the freedom of economic action of various market participants;
- prevent practices which limit access to markets or otherwise unduly restrain competition, affecting domestic or international trade or economic development; and
- establish a Uganda Competition Commission.

Despite the lack of dedicated competition legislation, competition is regulated in particular sectors, including for example:

SECTOR	LAW	REGULATOR
Banking	Financial Institutions Act, 2004 (FIA)	Central Bank of Uganda (Central Bank)
Capital markets	Capital Markets (Takeover and Mergers) Regulations, 2012	Capital Markets Authority
Communications	Communications Act, 2013, and the Communications (Fair Competition) Regulations, 2005 (collectively, the Communications Act)	Uganda Communications Commission
Energy/electricity	Electricity Act, 1999 (Cap. 145) (Electricity Act)	Electricity Regulatory Authority (ERA)
Insurance	Insurance Act No. 6 of 2017	Insurance Regulatory Authority
Petroleum	Petroleum Supply Act, 2003 (PSA)	Ministry of Energy and Mineral Development
Pharmaceuticals	National Drug Policy and Authority Act Cap. 206	National Drug Authority
Other products	The Uganda National Bureau of Standards Act Cap. 327	The Uganda National Bureau of Standards

In addition to sector-specific legislation, two regional treaties are relevant to competition law in Uganda:

- the East African Community Competition Act, 2006 which has the force of law in Uganda by virtue of the East African Community Act, 2002 (including the East African Community Competition Regulations, 2010); and
- the COMESA Competition Regulations, 2004 and the COMESA Competition Rules, 2004.

The East African Community Competition Authority (**ECCA**) became operational in April 2018 and is mandated to investigate competition law within

its five Member States (Burundi, Kenya, Rwanda, Tanzania and Uganda). The ECCA has thus far focused only on restrictive practice matters and as at the date of writing was not yet accepting merger notifications. Towards the end of 2020, the ECCA approached certain stakeholders to provide comments on the East African Community Competition Amendment Bill 2020, which bill proposes significant changes to the current competition regime. The East African Community Competition Amendment Bill 2020, as at the date of writing, is not yet in effect.

See the separate section dealing with COMESA.



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

There are no proposed amendments or new regulations that have come into force.

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

There is no dedicated domestic competition law regime in place. Uganda's application of anti-trust law is restricted to sector-specific laws and regulators like the Uganda Communications Commission under the communications industry.

At the sectoral level, the law is enforced and consumers as well as actors are gradually becoming aware of competition regulation and applying it.

Uganda is also a Member State of the Common Market for Eastern and Southern Africa (**COMESA**), which has an active competition law regime (please refer to the COMESA chapter).

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

Uganda hasn't developed a uniform domestic competition legal regime and as such, there is no regulatory body in place. The anti-trust regulation falls back to sector specific regulators which focus on any area that triggers unfair competition in their relevant industries.

For instance, the Uganda Communications Commission focuses on:

- anti-competitive agreements, decisions or concerted practices;
- abuse of a dominant position;
- anti-competitive mergers, takeovers, consolidations, acquisitions or such anti-competitive changes in the market structure resulting from changes in ownership, control, composition and structure of operators; and
- all other practices and acts with an effect on fair competition including unfair methods of competition, unfair or deceptive acts or practices, the purpose or effect of which is to distort competition in the communications market.

## **5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?**

Generally, most of the sector-specific laws establish what constitutes a merger without prejudice to the common legal understanding or hallmarks of a merger, but do not focus on establishing what constitutes a notifiable merger. Joint ventures are also treated as mergers to the extent that there is a change in control.

The Communications sector provides a blanket or wide description of what constitutes a transfer. It includes change in control which is described to include so many types of transactions. For clarity, read section 42 (1), (2), (3) and (5).

- (1) A licence issued by the Commission shall not be transferred without the written consent of the Commission.
- (2) An operator may apply to the Commission in the prescribed manner for consent to transfer a licence.
- (3) An application under subsection (2) shall be accompanied by an application for grant of a licence by the person to whom the operator intends to transfer the licence.
- (5) For the purposes of this section –
  - (a) 'transfer of licence' includes the acquisition of control of the licence holder;
  - (b) 'control' as used with respect to any person shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management of that person, whether through the ownership of shares, voting, securities, partnership or other ownership interests, agreement or otherwise.

The clause requires an operator to notify the Commission if any transaction proposed to be undertaken will result in a change of control as widely described in section 42(5)(b) which creates a wide interpretation of what would constitute a notifiable merger. The law does not specifically set out which transactions constitute a notifiable merger. Most legislation stipulates activities and transactions that will require scrutiny for anti-trust elements but hardly set out what constitutes a notifiable merger.

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

This depends on the regulatory framework of the sector. Where the operations of parties or ownership of a locally operating company are affected by a foreign-to-foreign merger, notification will be required. For as long as the merger will affect the ownership, structure and management of a company operating in Uganda, approval is required. By operation, we focus on licensed sectors such as insurance, communication, etc. For instance, a substantial foreign shareholder merging with a foreign entity will trigger notification requirements, since that foreign party is a controlling member of the locally licensed entity. For instance, the Uganda Communications Act specifically gives a wide consideration as to what constitutes a transfer of licence to include the acquisition of control of the licence holder with 'control interpreted as the possession, directly or indirectly, of the power to direct or cause the direction of the management of that person, whether through the ownership of shares, voting, securities, partnership or other ownership interests, agreement or otherwise.

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

There is no general law that currently prescribes the thresholds for mandatory merger notification in Uganda. However, certain sector specific legislation regulates this.

The Capital Markets (Takeovers and Mergers) Regulations of 2012 prescribe the threshold for a merger by prohibiting a person from exercising effective control in the listed company they intend to takeover. These Regulations prohibit a person from acquiring voting rights of a listed company which together with voting rights already held by that person would entitle that person to exercise effective control in the listed company without complying with the takeover procedure.

Effective control is exercised where a person:

- holds more than 15% but less than 50% of the voting rights of a listed company, and who acquires in any one year more than 5% of the voting rights of such company;

- holds 50% or more of the voting rights of a listed company and acquires additional voting rights in the listed company;
- acquires a company that holds effective control in the listed company or together with the voting rights already held by an associated person or related company, resulting in acquiring effective control; or
- acquires a shareholding of 20% or more in a subsidiary of a listed company that has contributed 50% or more to the average annual turnover in the last three financial years of the listed company preceding the acquisition.

This is enhanced by the Capital Markets Authority (Amendment) Act of 2016, according to which the Capital Markets Authority may monitor takeovers and mergers in respect of listed companies in Uganda and adopt measures for the supervision and regulation of takeovers and mergers in order to protect the interests of investors and provide for orderly and well-informed capital markets. The same authority may make regulations providing for takeovers, mergers and acquisitions of securities in listed companies.

Additionally, regional laws provide specific rules in relation to thresholds for mandatory merger notification (please refer to the COMESA chapter).

## 8. What filing fees are payable?

There is no general law in Uganda that provides for the payment of filing fees (please refer to the COMESA chapter for a discussion on filing fees for mergers notified to the COMESA Competition Commission).

## 9. What is the merger review period?

Not applicable.

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

Except as required by particular sector legislation, there is no general law in Uganda that prohibits the pre-implementation of a merger. For instance;

- Insurance Regulatory Authority – sections 75 and 100 of the Insurance Act of 2017 require notification to the authority and its approval before any change in control – this includes mergers.



- Bank of Uganda – section 19(1) of the Financial Institutions Act restricts or limits a group of related persons from collectively owning more than 5% in the shareholding of a financial institution without express approval from BOU in writing.
- Uganda Communications Commission – Operators are not allowed to engage in activities that may lead to unfair competition like mergers. Regulation 6(6) of the Fair Competition Regulation prohibits pre-implementation of mergers prior to authorisation by the Commission.

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

The various sector-specific laws do not provide for pre-notification meetings. However, subject to confidentiality agreements that may relate to the proposed transaction, it is possible to approach authorities to hold a pre-notification meeting in respect of a proposed transaction.

It is noteworthy that some sector regulators allow sector players to contact the regulator for guidance on a potential or proposed transaction that is likely to create completion or raise concerns. For instance, in the communications sector, the Communications (Fair Competition) Regulations allow for an operator to notify the Commission for guidance on whether the operator's agreement and conduct comply with the provisions of fair competition under the Act or the rules of fair competition under these Regulations.

The guidance by the Commission may identify whether the agreement or conduct is likely to infringe any relevant provisions of fair competition under the Act or these Regulations; or whether the conduct or agreement would be likely to be granted an exemption if an application in that regard, was made.

However, seeking guidance may limit an organisation's options to the view of the Regulator. That is, where guidance is given, the Commission does not re-open a case unless:

- there are reasonable grounds for believing that there has been a material change of circumstances since the guidance was given; or

- there is reasonable suspicion that materially incomplete, misleading or false information was given; or
- a complaint is received from a third party.

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

Given that no general law has been enacted, non-competition factors for the assessment of a merger are largely dependent on established sector-specific laws or policies. In certain sectors, non-competition factors are relevant to the assessment of a merger while other sectors are silent on same. For instance, under the Uganda Communications Act, section 54 provides for exceptions to fair competition considerations where the Commission is satisfied that the competition act or omission:

- contributes to the improvement of any goods or services;
- contributes to the promotion of communications services in Uganda in accordance with sector laws and laws of Uganda;
- does not impose on the parties restrictions which are not indispensable to attaining the objective specified in (i) and (ii) above; and
- gives the parties the ability to substantially reduce competition in respect of the goods or services in question.

It is on a case-by-case basis for each sector and at the discretion of the regulator.

#### **13. Is there scope for government intervention in merger transactions (separate from the competition regulator)?**

Not applicable.

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

There is no competition authority in place in Uganda as there is no general law applicable to competition. However, some established sector regulations provide for the engagement of the public which includes both customers and competitors. In some cases, the option is at the discretion of

the Regulator to exercise that consultation as it deems fit. For instance, in the Communications (Fair Competition) Regulation, regulation 8 (3)-(5) where an exemption application is filed with the Commission, the commission has the discretion to consult the public and invite comments on the effect of the application. The Insurance Act, 2017 also requires the applicants for a merger to notify the public by publishing notice of the merger/ amalgamation through the Uganda Gazette. This notice requires affected persons in the public to submit their concerns to the Insurance Regulatory Authority in writing within 30 days.

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

As previously mentioned, there is no competition authority in place in Uganda as there is no general law applicable to competition. This will therefore depend on the sector regulation available. For instance, in the communications sector, the commission can consult the general public which includes employees. In the insurance sector, members of the public concerned or aggrieved by a merger/amalgamation can submit their concerns in writing. Furthermore, the Employment regime, on its own, provides for protection of employees during such transitions. Section 28 of the Employment Act, 2006 requires consent of employees to be sought before transfer of their contracts from one employer to another in cases of a merger or acquisition.

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

This will depend on established specific sector regulation. In the communications sector, there are no express provisions accommodating an opportunity for the merging party to make representations before a decision is made. Regulation 5 of the Uganda Communications (Fair Competition) Regulations 2005 provides merging parties the opportunity to make representations before the Communications Commission. Such parties may appear before the Communications Commission either in person or through an advocate.

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

Where a merger has been prohibited in terms of a sector-specific law, an aggrieved party can challenge the decision of the relevant authority by way of appeal to the High Court of Uganda.

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

Uganda does not have specific legislation defining what constitutes a cartel and setting out restrictions on cartels. However, some sector-specific legislation restricts industry operators from engaging in practices that may amount to, or create, cartel practices.

For instance, while the Petroleum Supply Act (PSA) regulates prohibited practices and specifically prohibits certain horizontal restrictive practices (unlawful conduct between competitors), the Communications Act and Electricity Act each contain umbrella provisions within which horizontal restrictive practices may fall.

The PSA is more expressive as it stipulates that participants in the petroleum supply chain shall not form cartels or attempt to control prices or create artificial shortages of products or services, or engage in any other restrictive practices or any other acts or omissions which are contrary to the principles of fair competition or are intended to impede the functioning of the free market for petroleum products in Uganda.

The Communications Act provides that an operator shall not engage in any activities, whether by act or omission, which have, or are intended to or likely to have, the effect of unfairly preventing, restricting or distorting competition in relation to any business activity relating to communication services, including entering into any agreement or engaging in any concerted practice with any other party, which unfairly prevents, restricts or distorts competition. This wording is inclusive of all business conduct deemed to undermine the sector and would logically, include cartels.



The Electricity Act provides for a breach of fair competition. A licensee is in breach of fair competition if the licensee conducts any activity, alone or together with others which, in the opinion of the Electricity Regulatory Authority (ERA), is intended to or is likely to have the effect of restricting, distorting or otherwise preventing competition in connection with any activity licensed under the Electricity Act or is prejudicial to the interests of consumers. This provision does not expressly identify cartels but highlights that any business practices/conduct that has the same effect creates unfair competition and is prohibited.

We are not aware of any instances in Uganda where the authorities in a given sector have pursued firms for engaging in cartel conduct. Further, we are also not aware of any specific complaints that have been made to authorities in respect of cartel conduct by operators in regulated industries.

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

There is no general law that specifically confers investigative powers on any authority to investigate cartels. However, sector-specific legislation confers some powers of investigation on officials with regard to business conduct which includes anti-competitive conduct in general. Although most legislation does not outrightly mention cartels, the description of prohibited business conduct can be construed to include the operations of cartel.

In terms of the Electricity Act, the ERA may investigate any licensee or systems operator who commits any act or omission in breach of fair competition. Under section 74(2) of the Electricity Act, any person with a complaint of breach of fair competition against a licensee shall lodge a complaint to the ERA and the ERA shall, if it appears that a breach of competition has been committed, investigate the act or omission and, where appropriate, issue an order to remedy the breach.

The ERA may appoint inspectors for the purposes of verifying compliance by a licensee with the Electricity Act. An inspector may, *inter alia*, enter and inspect at any reasonable time any premises owned by or under the control of a licensee in which the inspector believes, on reasonable grounds, there

to be a document or information relevant to the enforcement of the Electricity Act and examine the document or information or remove the document or information for examination or reproduction, as the case may be.

Under section 8 of the FIA, the Central Bank may, if it has reason to believe that a person is transacting or carrying out a prohibited practice, authorise an officer of the Central Bank to:

- enter into any premises which the Central Bank has reason to believe are occupied or used by any person for an unauthorised purpose;
- search any book, record statement, document or other item used;
- seize or make a copy of any book, record or statement;
- question any person who is present on the premises, auditors, directors, members or partners of any person conducting business on the premises;
- examine any book, record, statement, document; or
- require any person to produce the book, record, statement, document to the officer of the Central Bank issuing the notice.

The Communications Act empowers the Communications Commission to appoint inspectors who are furnished with powers of search and seizure for the purposes of verifying compliance with the provisions of the Communications Act. An inspector may, *inter alia*, enter and inspect at any reasonable time any place owned by or under the control of an operator in which the inspector believes on reasonable grounds there to be any document, information, or apparatus relevant to the enforcement of the Communications Act and an inspector may examine the document, information or apparatus or remove it from examination or reproduction, as the case may be.

The Insurance Regulatory Authority also has the mandate to appoint a special investigator under section 123 to investigate control of an insurance company or what may be deemed as prohibited business, among several other things.



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

There are no established general laws against cartels. We rely on reference to prohibited types of business conduct in sector regulations. For instance, the PSA imposes criminal sanctions against any person who breaches its fair competition provisions (see question 17). The PSA prescribes a fine not exceeding UGX 2.4 million, or imprisonment not exceeding five years, or both, upon conviction for a contravention. The legislation also provides that where a person charged with any offence under the PSA is a body corporate (although the definition of a body corporate is unclear), every person who, at the time the offence was committed, was a director, manager, secretary or similar officer or agent of that body corporate, may be charged jointly or severally in the same proceedings with the body corporate and on conviction, is liable to the penalty prescribed for the offence. In addition, any partner in an unincorporated enterprise, firm or joint venture shall be jointly and severally liable for the acts or omissions of any other partner insofar as the acts concern the enterprise, firm or joint venture.

Notwithstanding the above, a director, manager, secretary or similar officer, partner or agent, will not be liable if he or she proves to the satisfaction of the Court that the act in question was committed without his/her knowledge, consent or connivance, and that he/she took all necessary steps to prevent the commission of that act, having regard to all the circumstances.

An employer who employs in or for his/her operation or place of business any agent, clerk, servant or other person, is answerable and liable for any act or omission of an employee that constitutes a contravention of the PSA, insofar as it concerns the business of the employer. Any holder of a permit or licence, any consumer of a petroleum product, or any recognised consumer organisation may initiate civil legal proceedings before a Court of competent jurisdiction.

**Capital Markets (Takeover and Merger) Regulations 2012**

Although not specifically penalising cartel conduct, in terms of Regulation 35 of the Capital Markets (Takeover & Merger) Regulations 2012, where a person refuses or fails to furnish any

document, paper or information required under the Regulations, the Capital Markets Authority may, if it is satisfied after giving the person an opportunity to be heard that the refusal or contravention was wilful, impose a civil penalty or sum of money not exceeding 200 currency points as may be specified in the order. A currency point is worth UGX 20 000.

**Communications Act**

The Communications Act does not impose specific penalties on firms for their participation in cartel activities; however, it imposes a general sanction of a fine not exceeding UGX 600 000 upon conviction for a contravention. In addition, a person who sustains loss or damage as a result of any act or omission that is contrary to the Communications Act may, in a Court of competent jurisdiction, sue for and recover the loss or damage suffered from any person who engaged in, directed, authorised, consented to and/or participated in the act or omission.

**Electricity Act**

The Electricity Act provides that a licensee found to be in breach of fair competition by the ERA shall pay such amount of compensation as the ERA may determine to the consumer for any loss caused to him/her.

There is currently no leniency policy in place for cartel conduct in Uganda.

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

There is currently no specific legislation in this regard. However, sector-specific legislation makes provision for exemptions in limited circumstances:

- The PSA provides for exemption from its provisions in the case of a declaration of a petroleum supply emergency. Save for this, prices for petroleum products through the supply chain are governed by forces of supply and demand in a free and competitive market.
- The Communication Act under section 23 and regulation 8 of the Communications (Fair Competition) Regulation provides for an exemption to carry out certain prohibited acts to the extent that the Communications Commission is satisfied that the Act contributes to the improvement of goods and



services in Uganda and generally promotes communications services as stipulated in the Communications Act.

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

There is currently no specific legislation providing for the prohibition of minimum resale price maintenance.

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

The Contracts Act, 2012, and common law principals provide and protect the concept of freedom of contract, but this is subject to lawfulness of the purpose of the contract. Where the purpose is established as prohibited conduct in any legislation, it will be deemed an illegal contract which cannot be enforced. The legality largely depends on the provisions of sector laws and the interpretation of 'exclusive agreement'. It is more likely to be considered under blanket provisions which may be all inclusive in nature like the Uganda Communications Act, which has an umbrella provision restricting practices and agreements that may lead to a distortion of the industry. That is, under section 53 any abuse by an operator, independently or with others, of a dominant position which unfairly excludes or limits competition between the operator and any other party; or entering into an agreement or engaging in any concerted practice with any other party, which unfairly prevents, restricts or distorts competition; or effecting anti-competitive changes in the market structure and, in particular, anti-competitive mergers and acquisitions in the communications sector. Even without express mention, it can be read into the blanket provision if it results in the effect the law is created to fight. Exclusive contracts may be perceived as agreements that distort the market unfairly.

In the decided High Court case of *EzeeMoney (Uganda) Ltd v MTN Uganda Ltd* High Court Civil Suit No. 330 of 2013, MTN was considered to have abused its dominant position by 'forcing' mobile money agents not to take on EzeeMoney services. This is a vivid example of how exclusive agreements

can become the subject of legal scrutiny and be considered illegal as a result of contravening considerations of fair business practices established by sector regulation.

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

There is no general law in place to address competition but developed sector-specific laws do regulate abuses of a dominant position. Examples of such sectors include:

- In the communications sector, the Communications Act prohibits the abuse of a dominant position. The Communications Act stipulates that an operator shall not engage in any activities, whether by act or omission, which have, or are intended to or are likely to have, the effect of unfairly preventing, restricting or distorting competition in relation to any business activity relating to communication services. Prohibited activities include any abuse of a dominant position by an operator, either independently or with others, which unfairly excludes or limits competition between such operator and any other party. However, the Act does not provide a threshold used to determine what amounts to dominance.
- Although not an express reference to the abuse of a dominant position, the PSA provides that participants in the petroleum supply chain shall not, *inter alia*, attempt to control prices or create artificial shortages of products or services, or engage in any other restrictive practices or any other acts or omissions which are contrary to the principles of fair competition or are intended to impede the functioning of the free market for petroleum products in Uganda.
- Similarly, without expressly referring to the abuse of a dominant position, the Electricity Act stipulates that a licensee is in breach of fair competition if they conduct any activity, alone or together with others, which in the opinion of the ERA is intended to have or is likely to have the effect of restricting, distorting or otherwise preventing competition in connection with any activity licensed under the Electricity Act.

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

We are not aware of any instance in this jurisdiction where sector regulators have pursued firms for abusing a dominant position. However, we are aware of industry operators challenging other operators for abuse of a dominant position. Some are through regulatory bodies like the Fair Competition Commission in the communications sector or cases filed in the Commercial Division of the High Court of Uganda. For instance, in *EzeeMoney (Uganda) Ltd v MTN Uganda Ltd* High Court Civil Suit No. 330 of 2013, the plaintiff has instituted a suit against the defendant, alleging that the defendant had:

- engaged in activities intended to have the effect of restricting or distorting competition in relation to the business activity of communication services contrary to section 53(1) of the Uganda Communications Act, 2013; and
- breached the statutory duty not to deny customers services unfairly contrary to section 56 of the Uganda Communications Act, 2013.

In this case, the plaintiff's case was premised on, amongst other things, the fact that MTN forced mobile money agents to sign exclusivity agreements prohibiting them from offering EzeeMoney services, it punished those who breached these agreements by confiscating their implements, and it also influenced an aggregator to decline offering aggregation services to EzeeMoney. EzeeMoney claimed that these breached several provisions under the Communications Act that prohibited abuse of dominant position and unfair competition. The gist of which was whether or not a mobile telecommunications firm with a dominant position in the telecommunications market in Uganda was abusing that dominant position. The Court found in favour of EzeeMoney and awarded it damages of UGX 2.3 billion.

This is a good example of 'exclusive agreements' that would be found unfair with the effect of distorting the market.

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

This largely depends on sector-specific legislation. For instance, under the Communications Act and the Petroleum Act (described in question 19) the Regulator has general penalties for unauthorised or illegal conduct and this can be interpreted to include the conduct of abuse of a dominant position.

### **27. Are there rules in relation to price discrimination?**

There are no general laws on price discrimination; however, certain sectors have addressed their markets on the issue. For instance:

- The Electricity Act provides that a licensee shall not, in fixing tariffs and terms of supply, show undue preference or discrimination amongst customers similarly situated or in similar circumstances.
- The PSA also provides that participants in the supply chain shall sell their products to all persons without any form of deliberate discrimination by means of quality, quantity and price.
- The Communications industry restricts price discrimination through the Fair Competition Regulations which show what changes to price are unacceptable and constitute unfair conduct. This is set out in the Schedule to the Regulation.

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

We are not aware of any specific website hosted by any of the various sector regulators that may contain their decisions.



# WAEMU



**BENNANI & ASSOCIÉS LLP**

Assemian Faustin Kouakou

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

The relevant competition legislation in the West African Monetary and Economic Union (WAEMU, also known under the French acronym, UEMOA) is Regulation No. 02/2002/CM/UEMOA relating to anti-competitive practices in the WAEMU; Regulation No. 3/2002/CM/UEMOA on Procedures Applicable to Anti-competitive Agreements and Abuses of Dominant Position in the WAEMU; Regulation No. 04/2002/CM/UEMOA relating to state aid in the WAMEU and the modalities for the application of article 88 of the WAEMU Treaty (**Regulations**); Directive No. 01/2002/CM/UEMOA relating to the transparency of financial relations between Member States and public companies on one hand, and between Member States and national or foreign organisations on the other hand; Directive No. 02/2002/CM/UEMOA on Cooperation between the Commission and the National Competition Structures of Member States for the Application of Articles 88, 89 and 90 of the WAEMU Treaty (**Directive**).

The WAEMU Competition Commission (**WAEMU Commission**) is responsible for enforcing the legislation.

WAEMU comprises eight Member States: Benin, Burkina Faso, Ivory Coast, Guinea-Bissau, Mali, Niger, Senegal, and Togo. At the time of writing, only one Member State, namely Guinea-Bissau, has no national competition legislation (**Member States**).

## 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

We are not aware of any recent developments or planned changes relating to the competition laws.

## 3. Is the law actively enforced?

Yes, the law is effectively enforced throughout the WAEMU area.

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

Agribusiness, telecommunications, banking and insurance are sectors that are the subject of special attention by the WAEMU Commission.

## 5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?

The following transactions constitute a merger:

- a merger between two or more previously independent companies;
- an operation whereby one or more persons already holding control of at least one company, or one or more companies, acquire directly or indirectly, whether by acquisition of equity interests or purchase of assets, by contract or by any other means, control of the whole or parts of one or more other companies; and
- the creation of a joint venture, performing on a lasting basis, all the functions of an autonomous economic entity.

Notification of mergers to the WAEMU Commission is not compulsory, but its rules provide that if a proposed merger could result in an abuse of a dominant position, the WAEMU Commission may order the merging parties (i) not to implement the transaction (if it has not been executed/closed) or to re-adopt the status they had before the transaction, (ii) to modify the transaction, or (iii) to take any necessary measure to ensure or re-establish sufficient competition.

However, it is possible for parties that may hold, severally or jointly, a dominant position on all or part of the WAEMU zone, to apply for negative clearance from the WAEMU Commission before, or even after, a transaction is implemented. When merging companies apply for negative clearance, the WAEMU Commission is required to issue its opinion within six months. If it fails to do so, negative clearance is deemed to have been granted to the applicants. Therefore, while it is not necessary to obtain approval for foreign-to-foreign mergers, the merging parties can apply for negative clearance to avoid the WAEMU Commission ordering the non-implementation of the transaction.

The WAEMU Commission also retains the right to call for merger notification. In practice, the WAEMU Commission calls for an agreement that has not been voluntarily notified as soon as it receives information of the existence of the agreement, generally through reports transmitted to it by the National Commissions of its member countries or in the case of investigations that the WAEMU Commission carries out of its own initiative.



The legislation does not provide for a time limit within which the WAEMU Commission must request notification of an operation after it has closed. However, since the WAEMU Commission is periodically informed of the competitive situation on the market of each member country either by the National Commissions through quarterly and annual reports or during the investigations it carries out, it could therefore be inferred that the WAEMU Commission may request notification of a closed transaction at any time as soon as it becomes aware of it.

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

See answer to question 5.

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

The legislation refers to transactions 'creating or strengthening' a dominant position and therefore it is arguable that both parties must be present (i.e. have activities or generate revenue) in the WAEMU zone.

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

No filing fee is payable.

**9. What is the merger review period?**

The legislation is silent on merger review periods, and the review of a merger operation can be carried out by the Commission before or after its completion.

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

The regime is non-suspensory and voluntary.

As notifications of mergers to the WAEMU Commission are not compulsory, there is no prohibition on the pre-implementation of a merger.

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

No. However, in practice it is possible to have telephone contact with the WAEMU Commission to get their opinion on specific points before notification.

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

In practice, non-competition factors are not relevant to the assessment of a merger case by the WAEMU Commission.

**13. Is there scope for government intervention in merger transactions (separate from the competition regulator)?**

Not applicable.

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

The WAEMU Commission may, during its investigation, contact any natural or legal persons, customers and competitors, to gather all necessary information. Observations from customers and competitors do not have a significant influence on the WAEMU Commission, since it is the only authority competent to take the final and discretionary decision.

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

The Regulations do not mention that employees can be contacted. However, in practice the WAEMU Commission can contact any person or entity for its opinion during the investigation.

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

Yes. Parties to a merger may be invited to make submissions during the merger review process:

- either in writing; or
- verbally at a hearing, if the parties have requested in their written submissions the opportunity to develop their point of view orally if they have shown a sufficient interest to do so or if the WAEMU Commission proposes to impose a fine or periodic penalty payment on them.

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

The parties may refer the matter to the WAEMU Court of Justice for the purpose of amending or revoking the decisions taken or reducing or increasing the quantum of fines and penalty payments.

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

Yes, the Regulations prohibit all agreements between enterprises, decisions of associations of enterprises, and concerted practices between enterprises that have the object or effect of restricting or distorting competition within the union.

These include:

- agreements restricting market access or the free competition of other companies;
- agreements which directly or indirectly fix the price, control the selling price and, in general, constitute an obstacle to price fixing by the free play of the market by artificially favouring their increase or decrease; in particular, agreements between companies at different levels of production or distribution aimed at fixing the resale price;
- the sharing of markets or sources of supply, agreements between production or distribution companies concerning absolute territorial protection;
- limitations or controls on production, markets, technical development or investment;
- discrimination between trading partners through unequal conditions for equivalent services; and

- making the conclusion of contracts subject to the acceptance by the partners of additional services which, by their nature or according to commercial practice, have no connection with the subject matter of the contracts.

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

The competition authorities have broad powers (summarised below) to investigate cartels and other prohibited practices:

- In terms of requests for information: the authorities can collect all necessary information from governments, the competent authorities of Member States, companies and associations of companies as well as from any natural or legal person;
- Regarding investigations into economic sectors: the WAEMU Commission may decide to carry out a general investigation and, within the framework of the latter, request all the necessary information from undertakings in that economic sector;
- Concerning verifications by the authorities of the Member States: the authorities shall, at the request of the WAEMU Commission, carry out the verifications it deems necessary; and
- Concerning the Commission's powers to verify the application of the competition rules prescribed by the Regulations in force: the WAEMU Commission may carry out all necessary verifications with companies and associations of companies.

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

In case of violation of the rules relating to competition, the WAEMU Commission may impose the following sanctions:

- Fines: in particular, fines of up to 500 000 CFA francs, when, deliberately or negligently, companies and associations of companies give inaccurate or misleading information, provide inaccurate information in response to a request or fail to provide information within the time limit set in a decision taken against them, or present incomplete books or other professional



documents during verifications carried out, or fail to submit to verifications ordered by a decision of the WAEMU Commission. Likewise, the WAEMU Commission may, by means of a Decision, impose on enterprises and associations of enterprises fines of between 500 000 F CFA and 100 000 000 F CFA, the latter amount being increased to 10% of the turnover realised during the previous fiscal year by each of the enterprises having participated in the infringement or 10% of the assets of these enterprises, when, intentionally or negligently, they commit an infringement of the rules applicable to competition, they contravene a charge imposed in relation to the period of validity and revocation of the exemption decisions; or

- Penalties are imposed on companies and associations of companies at the rate of 50 000 F CFA to 1 000 000 F CFA per day of delay from the date it makes its decision, to compel them to put an end to an infringement of the rules of competition, to stop any prohibited action, to provide complete and accurate information requested by it by means of a decision, to submit to an audit ordered by it by means of a decision.

We are not aware of any leniency policy in place.

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

Yes, individual and block exemptions are provided for. Thus, the WAEMU Commission may declare inapplicable the provisions on competition to agreements or categories of agreements, decisions by associations of undertakings, and concerted practices or categories of concerted practices which contribute to improving the production or distribution of products or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and without imposing on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, nor affording the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

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

Yes, agreements aimed at directly or indirectly fixing the price, controlling the selling price and, in general, hindering the fixing of prices through the free play of the market by artificially favouring their increase or decrease are prohibited; in particular, agreements between companies at different levels of production or distribution aimed at fixing the resale price.

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

Exclusivity agreements are illegal if they have the object or effect of restricting or distorting competition or if they amount to an abuse of a dominant position.

The relevant factors are the object and effect of such agreements on competition.

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

Yes, current legislation prohibits abuse of a dominant position. The legislation does not provide for a threshold to determine dominance.

Abusive practices may, in particular, consist in directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions, limiting production, markets or technical development to the prejudice of consumers, applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or making the conclusion of contracts subject to acceptance by the other parties of additional services which, by their nature or according to commercial usage, have no connection with the subject matter of such contracts.



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

Yes, for example, the WAEMU Commission has, by decision n°08/2019/COM/UEMOA of 5 November 2019, imposed a financial penalty of 50 000 000 F CFA to the Société Nationale Burkinabè d'Hydrocarbures for practices of abuse of dominant position.

**26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

Yes, the WAEMU Commission may, by means of a decision, impose on enterprises and associations of enterprises fines from 500 000 F CFA to 100 000 000 F CFA, the latter amount being increased to 10% of the revenues realised during the previous fiscal year by each of the enterprises having participated in the infringement or 10% of the assets of these enterprises, when, either deliberately or negligently, they abuse their dominant position.

Similarly, the WAEMU Commission may, by decision, impose on enterprises and associations of enterprises periodic penalty payments of 50 000 F CFA to 1 000 000 F CFA per day of delay from the date it makes its decision, in order to compel them to put an end to an abuse of a dominant position.

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

Yes, discriminatory pricing constitutes anti-competitive practices. They are therefore incompatible with competition and are prohibited.

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

Yes, the WAEMU Commission publishes its decisions. These decisions are available at the following address:  
[www.uemoa.int/fr/document-type/decision](http://www.uemoa.int/fr/document-type/decision)

**BENNANI & ASSOCIÉS LLP**

Abidjan Cocody-Vallon  
Immeuble SAYEGH  
Third floor - Suite N°2  
22 BP 455 Abidjan 22

**T:** +225 27 22 59 80 51

**M:** +225 05 05 08 99 73

**E:** [akouakou@bennaniassociés.com](mailto:akouakou@bennaniassociés.com)

**W:** [www.bennaniassociés.com](http://www.bennaniassociés.com)



# Zambia



## **BOWMANS (ZAMBIA)**

Bwalya Chilufya-Musonda

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

The relevant legislation is the Competition and Consumer Protection Act No. 24 of 2010 (the **Act**) which is enforced by the Competition and Consumer Protection Commission (the **CCPC**) and the Competition and Consumer Protection Tribunal (the **Tribunal**), which, generally, has jurisdiction to hear appeals from a person who, or an enterprise which, is aggrieved, with an order, decision or direction of the CCPC.

### 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

A draft Competition and Consumer Protection Amendment Bill (the **Bill**) has been under consideration by the Zambian Ministry of Justice since 2017. The Bill is expected to be published for public comment once it is approved by the Zambian Cabinet. There is no indication as to when the Bill will be submitted to cabinet for approval.

### 3. Is the law actively enforced?

Yes, the CCPC actively enforces the Act in relation to mergers, restrictive business practices and abuse of dominance.

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

The current focus areas of the CCPC are restrictive business practices, particularly cartel conduct, and abuse of dominance.

### 5. What kind of transaction constitutes a notifiable merger and how are joint ventures treated?

A merger occurs where an enterprise directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses.

A merger, as contemplated under the Act, occurs in the following instances:

- (a) where an enterprise purchases shares or leases assets in, or acquires an interest in, any shares or assets belonging to another enterprise;
- (b) where an enterprise amalgamates or combines with another enterprise; or
- (c) where a joint venture occurs between two or more independent enterprises.

A person or entity will be considered to have control over an enterprise if that person:

- (a) beneficially owns more than half of the issued share capital of the enterprise;
- (b) is entitled to vote most of the votes that may be cast at a general meeting of the enterprise, or can control the voting of most of those votes either directly or through a controlled entity of that enterprise;
- (c) can appoint or veto the appointment of a majority of the directors of the enterprise;
- (d) is a holding company and the enterprise is a subsidiary of that company;
- (e) can materially influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise the element of control referred to in the first four bullet points; or
- (f) can veto strategic decisions of the enterprise, such as the appointment of directors and other strategic decisions which may affect the operations of the enterprise.

Where a transaction is a merger as described above, such transaction will only be notifiable if it meets the merger notification threshold as provided under the Competition and Consumer Protection (**General**) Regulations, 2011 (the **Regulations**), that is, the merging parties must have a combined turnover or assets amounting to ZMW 15 000 000 (approximately USD 877 781.08).

#### Joint Ventures

Joint ventures require merger notification and approval in certain circumstances. The Competition and Consumer Protection Commission Guidelines for Merger Regulations distinguish between “full-function” joint ventures, which require merger approval if they meet the prescribed threshold, and “auxiliary” joint ventures, which do not require merger approval. A full-function joint venture is a joint venture which performs on a lasting basis all the functions of an autonomous economic entity, competing with other enterprises in a relevant



market, and has sufficient resources and staff to operate independently on the relevant market.

Auxiliary joint ventures, on the other hand, fulfil a specific purpose for their parent enterprises, for example, in sales, production, or research and development. Although auxiliary joint ventures do not require merger approval, parties to such joint ventures may have to apply to the commission for authorisation under Part III of the Act, which prohibits certain kinds of arrangements and agreements.

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

Foreign-to-foreign mergers that have an indirect or direct effect on the structure of local markets are notifiable. The CCPC focuses on foreign-to-foreign mergers where the merging foreign entities have a subsidiary or interest in an undertaking operating or located in Zambia. An enterprise in Zambia that comes within the control of a foreign enterprise will be subject to notification and review as far as the operation has an effect on competition in Zambia. In such a case, the turnover or assets that will be assessed will be those of the enterprise present in Zambia (i.e. the enterprise is duly registered in accordance with Zambian law and generates turnover within Zambia) or with a presence in Zambia (i.e. the enterprise is not duly registered in accordance with Zambian law but has sales in Zambia). If the control of a Zambian enterprise comes about purely as a result of a merger or acquisition involving enterprises wholly domiciled outside Zambia, the CCPC will nonetheless assess the merger if it has a local nexus. The CCPC will assert jurisdiction over such transactions only if the foreign enterprise has a local nexus of sufficient materiality, such as having made 10% of its sales in Zambia over the preceding three financial years.

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

The notification threshold is the merging parties having a combined turnover or assets (whichever is higher) of at least ZMW 15 million (approximately USD 877 781.08) as per the merging parties' most recent financial year for which figures are available.

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

According to the Regulations, the prescribed fee for notification is 0.1% of the turnover/assets of the merging parties (whichever is higher) with a maximum cap of ZMW 5 million (approximately USD 292 593.69). According to the CCPC Guidelines on Calculating Merger Fees 2018, sets of assets and turnover of the merging parties will be considered and the highest value among the figures reflected in the sets will be considered for the calculation of the notification fee.

#### **9. What is the merger review period?**

The CCPC is required to review a merger within a period of 90 days from the date on which all the documents have been submitted to it, failing which the merger is deemed approved. The CCPC may increase this period by an additional 30 days, in such a case notice must have been given to the parties at least 14 days prior to the expiration of the initial 90-day period.

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

A merger may not be implemented without the prior approval of the CCPC. Where a merger is pre-implemented, the merger is void and the enterprise commits an offence and is liable to a fine not exceeding 10% of its annual turnover.

#### **11. Is pre-notification contact with the authorities permitted and are pre-notification meetings normal practice?**

Although the Act does not provide for pre-notification contact with the CCPC, the CCPC does, in practice, encourage pre-notification meetings especially where the merging parties require advice on dealing with peculiar aspects of their transactions.

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

The CCPC applies the public interest test (weighing both public benefit and public detriment) in almost all merger evaluations. However, there is no definition in the Act nor in the Regulations of what 'public interest' is. There is no exhaustive list

of factors that fall under the public interest test but fundamentally, issues such as employment, existing agreements with local suppliers and the effect of the proposed merger on the economy in the relevant market or region affected by the merger are of paramount consideration.

**13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

There is currently no legislation that permits the government to intervene in a merger transaction separate from the CCPC. However, there is sector-specific legislation which might apply to parties intending to undertake a merger.

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

As part of its assessment process, the CCPC typically conducts consultations by seeking comments from relevant industry players and other stakeholders with respect to proposed mergers. To the extent that competitors and customers may be consulted, competitors and customers play a role in the review process. The Act does not define the meaning of 'public' and therefore both customers and competitors are considered to fall within the ambit of 'public' as contained in the Act. The submissions of customers and competitors are influential and are considered within the context of the CCPC's mandate.

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

As indicated above, as part of its assessment process, the CCPC typically consults stakeholders, such as competitors, customers and regulators relevant to the merger. Employees are rarely consulted but their concerns are considered as the CCPC is carrying out a public interest assessment.

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

In practice, a technical committee of the CCPC issues an interim decision approving the merger without conditions, approving the merger with conditions, or rejecting the merger. The interim decision is then presented before the board of the CCPC which issues a final decision. When the interim decision is made, the parties are given an opportunity to make representations before a final decision is issued by the CCPC. In some instances, at the discretion of the CCPC, parties may be requested to make representations or clarify certain aspects of the merger prior to an interim decision being made.

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

The Act provides for appeals to the Tribunal. Therefore, any person or enterprise that is aggrieved by an order or direction of the CCPC may appeal to the Tribunal within 30 days of the order or direction. Any person wishing to appeal against a decision of the Tribunal may appeal to the High Court within 30 days of the Tribunal's determination.

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

The Act prohibits, and views as anti-competitive, any category of agreement, decision or concerted practice which has as its object or effect, the prevention, restriction or distortion of competition to an appreciable extent in Zambia. The Act specifically prohibits horizontal agreements between enterprises which:

- (a) fix (directly or indirectly), a purchase or selling price, or any other trading condition;
- (b) divide markets by allocating customers, suppliers or territories;
- (c) involve bid rigging;
- (d) set production quotas; or
- (e) provide for collective refusal to deal in, or supply, goods or services.



In view of the foregoing, cartel conduct is prohibited.

In 2018, the CCPC pursued four hatcheries, namely, Hybrid Poultry Farm Zambia Limited, Ross Breeders Zambia Limited, Quantum Foods Zambia Limited and TIGER Chicks for engaging in collusive practices contrary to the provisions of the Act. After a long-running cartel case, the four hatcheries were fined 7% of their annual turnover for fixing trade conditions and setting production quotas. Further, the Board ordered the four hatcheries to terminate the agreement and to independently set a time requirement for pre-booking that is viable and auditable.

In 2017, the CCPC, pursued seven stockbrokers, namely, Equity Capital Resources Plc, Stock Brokers Zambia Limited, Madison Assets Management Company Limited, African Alliance Securities Zambia Limited, Finance Securities Limited, Pangaea Securities Limited and Intermarket Securities Zambia Limited for engaging in an anti-competitive agreement that involved withdrawing bids and fixing prices for brokerage services contrary to the provisions of the Act. The seven stockbrokers were fined 3% of their respective annual turnovers. On 19 August 2021, the Competition and Consumer Protection Tribunal upheld the decision of the CCPC following an appeal by Pangaea Securities Limited.

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

The Act permits the CCPC to conduct investigations, either at its own instance or upon receipt of a complaint, where there are reasonable grounds to believe that there is, or is likely to be, a contravention of any provision of the Act. Upon commencing the investigation, the CCPC gives written notice to the person under investigation and may also carry out public consultations during the investigation.

The Act provides that the authority's powers are to:

- (a) enter and search any premises occupied by an enterprise or any other premises, including a private dwelling, where information or documents which may be relevant to an investigation may be kept;

- (b) search any person on the premises if there are reasonable grounds for believing the person has personal possession of any document or article that has a bearing on the investigation;
- (c) examine any document or article found on the premises that has a bearing on the investigation;
- (d) require information to be given about any document or article by:
  - the owner of the premises;
  - the person in control of the premises;
  - any person who has control of the document or article; or
  - any other person who may have the information;
- (e) take extracts from or make copies of any book or document found on the premises that has a bearing on the investigation; and
- (f) use any computer system on the premises, or require assistance of any person on the premises to use the computer system, to:
  - search any data contained in, or available to the computer system;
  - reproduce any record from the data;
  - seize any output from the computer for examination and copying; and
  - attach and, if necessary, remove from the premises for examination and safeguarding any document or article that appears to have a bearing on the investigation.

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

An enterprise which is found to have engaged in cartel activities is liable for a fine not exceeding 10% of its annual turnover. The Act also provides for criminal sanctions for cartel conduct. The CCPC may impose a fine not exceeding ZMW 150 000 (approximately USD 8 779.00) or imprisonment for a period not exceeding five years, or both, on any director or manager of an enterprise that is found to have engaged in cartel activities. According to the CCPC Guidelines for the Administration of Fines, the base fine for cartel conduct is 7% of an enterprise's annual turnover. The base fine is adjusted upwards or downwards by a consideration of aggravating and mitigating circumstances relating to the conduct.

The CCPC has a leniency programme policy in place. The leniency programme allows for partial or total exemption from any prescribed penalties that would otherwise be applicable to a participant of a prohibited agreement (i.e. any agreements deemed as anti-competitive or restrictive of competition under the Act) which confirms the existence of the prohibited agreement and self-reports its participation therein to the CCPC.

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

The Act contains a provision for a mechanism to apply for exemption from certain parts of the Act. In particular, an enterprise may apply to be exempted from the application of section 12, which relates to the prohibition of horizontal agreements. The CCPC may grant an exemption to an agreement that contributes to, or is likely to contribute to, or results in:

- (a) maintaining or promoting exports from Zambia;
- (b) promoting or maintaining the efficient production, distribution or provision of goods and services;
- (c) promoting technical or economic progress in the production, distribution or provision of goods and services;
- (d) maintaining lower prices, higher quality or greater choice of goods and services for consumers;
- (e) promoting the competitiveness of micro and small business enterprises in Zambia;
- (f) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or is likely to result, from the agreement.

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

The Act prohibits minimum resale price maintenance. However, a supplier or producer may recommend a minimum resale price to the re-seller of a good or service if:

- (a) the supplier or producer makes it clear to the re-seller that the recommendation is not binding; and
- (b) the product has a price stated on it and the words 'recommended price' appear next to the stated price.

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

There is no specific prohibition of exclusive agreements under the Act unless the agreement violates one of the prohibitions under restrictive business agreements. However, exclusive agreements are permissible if the parties have a business justification for the exclusivity.

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

Yes, the Act prohibits any act or conduct by an enterprise if, through abuse or acquisition of a dominant position of market power, the act or conduct of that enterprise limits access to markets or otherwise unduly restrains competition, or has or is likely to have an adverse effect on trade or the economy in general. The Act defines dominant position as a situation where an enterprise or a group of enterprises possesses such economic strength in a market as to make it possible for it to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors.

The threshold for dominance relates to the supply of goods or services if 30% or more of those goods or services are supplied or acquired by one enterprise or 60% or more of those goods or services are supplied or acquired by not more than three enterprises.

Abuse of dominance includes:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting or restricting production, market outlets or market access, investment, technical development or technological progress in a manner that affects competition;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties;
- (d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts;



- (e) denying any person access to an essential facility;
- (f) charging an excessive price to the detriment of consumers; or
- (g) selling goods below their marginal or variable cost.

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

In September 2017, the CCPC fined Zambia Sugar Plc ZMW 76 728 650 (approximately USD 4 489 413.26) (equivalent to 5% of its annual turnover) for abuse of dominance, in particular, for price discrimination and unfair pricing in the sale of industrial sugar and household sugar.

In December 2017, the CCPC fined Lafarge Cement Zambia Plc ZMW 99 235 400 (approximately USD 5 806 289.06) (equivalent to 10% of annual turnover) for abuse of dominance, in particular, for applying abusive loyalty discount schemes, price discrimination and excessive pricing.

We understand that in both cases appeals were made to the Tribunal and await determination.

**26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

Yes, the CCPC may impose a fine on an enterprise for the abuse of a dominant position. The fine imposed may not exceed 10% of the enterprise's annual turnover.

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

There are no specific rules relating to price discrimination, however, the CCPC passed Guidelines on Abuse of Dominance in 2019 and these guidelines expound on the abuse of dominance provisions under the Act.

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

Board decisions relating to merger reviews issued by the CCPC are typically made available only to the parties involved and are not published on the CCPC's website. However, the CCPC has published certain merger decisions on its website. Members of the public may submit written requests for copies of Board decisions to the CCPC's executive director.



# Zimbabwe



**SCANLEN & HOLDERNESS**

Nellie Tiyago



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

The Competition Act (Chapter 14:28) (the Act) of Zimbabwe was adopted in 1996 and only came into force two years later on the 9th of February 1998. The Act applies to all economic activities within or having an effect within Zimbabwe (including the activities of the Government and other statutory bodies or parastatal organisations).

Regulations that are currently in place are:

- Competition (Notification of Mergers) Regulations, 2020 (Statutory Instrument 126 of 2020 read together with Statutory Instrument 55 of 2022);
- Competition (Fees for Application for Authorisation of Mergers and Restrictive Practices) Statutory Instrument 97 of 2001;
- Competition (Anti-dumping and Countervailing Duties) (Investigation) Regulations (Statutory Instrument 266 of 2002);
- Competition (Fees for Inspection and Copying of Documents) Regulations, (Statutory Instrument 32 of 2001);
- Competition (Safeguards) (Investigation) Regulations (Statutory Instrument 217 of 2006); and
- Competition (Advisory Opinion) Regulations, 2020 (Statutory Instrument 125 of 2020 read together with Statutory Instrument 56 of 2022).

Enforcement of the competition laws is through the Competition and Tariff Commission (the Commission), a body corporate established by the Act whose role is to be the regulatory and advisory authority. The present mandate of the Commission is to implement and enforce the competition laws and policy in Zimbabwe as well as to provide advisory services on the trade tariff to the Government of Zimbabwe. To a certain extent it is also through the Consumer Protection Commission which has the duty to refer any competition law issue to the Commission.

## 2. Have there been any recent developments in the law? Are there any proposed amendments or new regulations expected to come into force?

Zimbabwe is a COMESA member state and as such, is bound by the COMESA Treaty and the Regulations published thereunder. A new Competition Act is before Parliament, which will *inter alia*, incorporate the COMESA Competition Regulations, 2004

(COMESA Regulations) into domestic law. Whilst the new Act is being considered, the Commission currently applies the COMESA Regulations and has even issued Guidelines on Horizontal Agreements 2021, which incorporate the COMESA regulations.

Some of the highlights in the proposed Competition Act are:

- The definition of merger is to be restricted to purchasing of shares or a controlling interest in an entity with joint ventures specifically defined. The current definition is wide and implies that all transactions particularly those that involve a supplier and customer, or even just where control of the activities or assets is transferred or acquired (indirectly or directly) by any means qualify to be mergers provided that the threshold is met.
- The new act seeks to reduce the timeline for assessment of notifiable mergers from 90 to 60 days.
- The provision of more detailed and separation of the factors to be considered by the Commission with respect to mergers from the factors that deal with restrictive practices.
- Introduction of actions in relation to abandoned mergers with the parties being required to notify the Commission with no refund of the filing fee to be paid to the parties.
- Inclusion under the definitions section of the following terms: acquire; assets; concerted practice; enterprise; horizontal and vertical agreements (these definitions are already in use as evidenced in the approvals that are coming out of the Commission); market power; and relevant market.
- With respect to the Commission, the proposals are: extending the powers of the Commission; creation of a Competition and Tariff Commission Board to which the committees of the Commission will report; laws relating to appointment of investigating officers; requirement for the Commission to cooperate with other national regional and international competition authorities.
- The grievance procedure and issuance of interim and final orders by the Commission has been revised in manner that makes them clearer and simpler to follow. The Commission under this procedure is able to exercise corporate leniency for an entity that acts in good faith and cooperates with the Commission.

Additional changes to note are:

- On the 10th of December 2019, the Consumer Protection Act [Chapter 14:37] came into effect. In terms of this Act, a Consumer Protection Commission is established. One of the members of the Consumer Protection Commission must be qualified or experienced in competition matter. The functions of the Consumer Protection Commission shall be to enforce and protect consumer rights. Section 6(n) specifically provides that the Consumer Protection Commission has the power to refer to the Competition Commission any concerns regarding market share, anti-competitive behaviour or conduct that may be prohibited in terms of the Competition Act.
- As alluded to above, in 2021 the Commission issued Guidelines on Horizontal Agreement, 2021. The objective of the guidelines is to provide and explain the broad conceptual legal framework within which horizontal agreements are evaluated; explain the process for enforcement of the competition rules; provide the criteria used by the Commission when analysing the effects of an agreement and assist businesses to determine whether their cooperative initiatives violate the Act. Notably, the Guidelines on Horizontal Agreement, 2021 introduce the concept of a “safe harbour”, in horizontal arrangements which is where the aggregated domestic market share of the parties is less than 10% and where the agreement does not constitute unfair business practice (measurement of market concentration by the Commission is based on the Herfindahl-Hirschman Index).

### 3. Is the law actively enforced?

The law is being actively enforced with activity being noted despite the COVID-19 lockdowns of 2020 and 2021. Enforcement by the Commission in 2021 included ordering the unbundling of a merger and the imposition of a fine equivalent to 6.43% of the domestic annual turnover of the merged entity with respect to a merger involving Proffeeds (Private) Limited, Produtrade (Private) Limited and Ashrma Investments (Private) Limited.

Moreover, in September 2021, the Commission approved the merger between Dairibord Zimbabwe (Private) Limited (Dairibord) and Tavistock Estate but fined Dairibord for consummating the merger without the Commission’s approval.

The Commission also investigated the allegations of schools engaging in anticompetitive exclusive arrangement in selling uniforms in Zimbabwe following complaints that parents were not permitted to purchase uniforms from anywhere else other than directed by the schools.

In 2021, even with COVID-19 being a pandemic that caused businesses to operate restrictively, meetings of the Commission were more regular than in the preceding year.

Below is a summary of the matters that have been attended by the Commission. This list does not include the numerous requests for preliminary advice that were made to the Commission:

MATTERS HANDLED IN 2021				
	MARCH 2021	JUNE 2021	SEPT 2021	Total for 2021
MERGERS APPROVED	7	1	7	15
MERGERS APPROVED WITHOUT CONDITIONS	6	1	5	-
MERGERS APPROVED CONDITIONALLY	1	-	2	-
Q1, Q2 and Q3 Merger activity under COMESA	Commission provided information to the COMESA Competition Commission for 15 transactions			



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

At the end of 2020, the Commission set up an independent division called the Restrictive Practice Division, a standalone division to enhance enforcement. Market concentration has also been scrutinised in more detail so that the authorities do not approve mergers that may be detrimental to the economic landscape of Zimbabwe where COVID-19 restrictions may create an environment conducive for such practices.

A key focus of the Commission is on restrictive practices impacting the supply of PPE and school uniforms.

The Commission continues to undertake public advocacy efforts to educate the public on issues relating to exploitative practices. This has seen an increase in complaints by members of the public to the Commission.

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

Mergers are defined as the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of the purchase or lease of the shares or assets of a competitor, supplier, customer or other person; the amalgamation or combination with a competitor, supplier, customer or other person; or any other means. This definition is very broad but in order for a merger to be notifiable, the transaction envisaged must meet the prescribed threshold of controlling interest to be vested in the acquiring firm. A controlling interest at present includes the ability to influence decisions that require a special majority or to have the casting vote.

As the definition expressly states that a notifiable merger includes amalgamation or combination with a competitor, supplier, customer or other person, a party to a joint venture that meets the threshold also falls into the category of notifiable merger.

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

The merger threshold applies to the combined annual turnover or assets in or from Zimbabwe with

no qualification with regard to the origin of the participants. If two foreign companies which are merging have a combined annual turnover or assets in or from Zimbabwe above the threshold, then such a merger requires the approval of the Commission.

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

A merger is notifiable if the combined annual turnover in or from Zimbabwe or combined asset value in Zimbabwe is valued at or more than USD 1.2 million in the immediate previous financial year, calculated in accordance with International Accounting Standards or International Financial Reporting Standards.

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

The merger filing fee is 0.5% of the combined annual turnover or combined value of assets in Zimbabwe of the merging parties, whichever is higher, provided that the maximum and minimum fee payable is USD 10 000 and USD 40 000 respectively. Where the acquiring firm is a subsidiary company, the combined turnover of the group of companies in which the acquiring firm is a subsidiary shall be included. Where the target firm controls any other firm or business, the combined turnover of such firm shall be included. Payment of the filing fee may be in any convertible currency with the official exchange rate prevailing at the time of payment being applied.

#### **9. What is the merger review period?**

The review period is currently 90 days.

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

Zimbabwe has a pre-merger notification regime. Therefore a party to a notifiable merger is required to notify the Commission in writing of the proposed merger within 30 days of either the conclusion of the merger agreement between the merging parties or the acquisition by any one of the parties to that merger of a controlling interest in another. Implementation of a merger without the approval of the Commission may result in a penalty of 10% which may be imposed on either or both of the

merging parties' annual turnover in Zimbabwe as reflected in the accounts of any party concerned for the preceding financial year. The Commission may recover this penalty through civil proceedings.

**11. Are pre-notification contacts with the authorities permitted? Are pre-notification meetings normal practice?**

The Commission welcomes pre-notification contact upon application and payment of the relevant fee. In the ordinary course, these pre-notification contacts will take the form of an Advisory opinion as prescribed by the Competition (Advisory Opinion) Regulations. The current application fee for this is USD 1 500.

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

The Commission will take a holistic view of the effect of a proposed merger. The information sought from the parties focuses on matters directly or indirectly related to competition. Factors such as the impact of a merger on employment, equity, trade policy, quality of products and services, brand development, consumer welfare, impact on stakeholders, education, reduction in barriers to entry, and price control are also considered. The Commission prohibited the post-merger acquisition of Profeeds (Private) Limited by Ashram Investments (Private) Limited on the grounds that the merged entity acquired market power and substantially lessened competition. This case emphasised that the object of fundraising to pay off creditors is not sufficient reason to allow an anti-competitive merger.

**13. Is there scope for government intervention in merger transactions (separate from the competition authority)?**

The Competition Commission is the only body authorised to deal with merger or competition issues. However, the Minister of Industry and Commerce or any other Minister the President may assign may intervene in merger transactions. The Minister is usually consulted and involved during merger investigations or upon receiving reports from the Commission. The Minister can also request for any such information they may deem fit.

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

The Commission conducts extensive investigations and consultations with the relevant stakeholders. Without disclosing confidential business facts, the Commission may call for written submissions and may hold an enquiry with any stakeholder. In the course of such an investigation, customer surveys may be conducted, and competitors may be interviewed. The extent to which these comments and submissions will be influential is within the discretion of the Commission.

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

Any person whom the Commission deems necessary can be interviewed. Additionally, unless the merger will be prejudiced or where it is unlikely that information that will materially assist the Commission will be obtained, the Commission is required to publish a notice in the Government Gazette and in such newspaper as the Commission considers appropriate calling upon any interested person who wishes to do so to submit written representations to the Commission with regard to the authorisation sought.

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

Yes, this is part of the stakeholder engagement process. Merging parties may also be required to provide additional information which could be useful for a successful application.

- 1 An apt example of this is the Customs and Excise (Tariff) Notice, 2017 (Statutory Instrument 53 of 2017)



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

An appeal against the decision of the Commission may be filed by any person aggrieved by the decision. The appeal is filed with the Administrative Court at which point the Administrative Court Rules apply with respect to the form of the notice of appeal and the manner in which the proceedings will continue thereafter.

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

Certain practices that are akin to cartels within the following broadly defined categories of unfair business practice and restrictive practice are prohibited: an 'unfair business practice' which includes cartel-like activity such as bid rigging and collusive arrangements between competitors; a 'restrictive practice' which is defined in broad terms and is taken to mean any of the following that restricts competition directly or indirectly to a material degree: (i) agreement, arrangement or understanding whether enforceable or not between two or more persons; (ii) any business practice or method of trading; (iii) any deliberate act or omission on the part of any person, whether acting independently or in concert with any other person; or (iv) any situation arising out of the activities of any person or class of persons.

Collusive arrangements between competitors leading to price fixing and/or market division and anti-competitive practices have not been tolerated. After the Government of Zimbabwe announced the re-opening of schools on the 14th of September 2020 for Cambridge examinations classes; and on the 28th of September 2020 for ZIMSEC examination classes, the Commission warned all stakeholders – including schools, parents, guardians and scholars – that the practice of imposing a supplier of face masks and sanitisers on schools, pupils, parents, guardians, is an anti competitive practice prohibited in terms of section 2 of the Act. The practice negatively impacts on consumer welfare as it limits guardians and parents' choice of buying masks and sanitisers from alternative cheaper or quality suppliers. In their message the Commission was clear that it would not hesitate to

undertake enforcement actions against any school found to contravene the Act, pre- and post- the opening of schools.

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

The Commission has the power to investigate any restrictive practice, business agreement, arrangement, understanding or method of trading which creates or maintains a restrictive practice. A preliminary investigation may be conducted by the Commission's investigating officers who may arrive at the premises of the parties without notice. Investigating officers and the Commission itself are permitted to, at reasonable times, enter any premises where there is a reasonable suspicion that there is a book, record or document relating to any restrictive practice or unfair trade-practice or any actual or potential merger or monopoly situation. Any person who does not co-operate, or hinders, an investigation, commits an offence for which a fine and/or imprisonment of six months may be imposed.

The Commission may require that during the process of investigation, the restrictive practice in question ceases and that persons make written submission to assist with the investigation. Notice of this will be published in the Government Gazette and a local newspaper. The notice remains valid until completion of the investigation or six months, whichever is the shorter.

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

Administrative penalties of up to 10% of the annual turnover of either or both of the acquiring and target undertakings in Zimbabwe, in the preceding year, may be imposed.

Further, any individual who enters into, engages in, or otherwise gives effect to an unfair trade practice shall be guilty of an offence and liable to a fine not exceeding level 12 (ZWL \$36 000) or to imprisonment for a period not exceeding two years, or to both; or in any other case, to a fine not exceeding level 14 (ZWL \$120 000).

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

There is no provision providing for exemption from parts of the Act. However, the Act does contain provisions that speak to the authorisation of restrictive practices. The draft Act includes the provision for applications for exemptions that may be made with respect to any agreements, decisions, practices or concerted practices before the implementation of these.

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

Yes, this is resale price maintenance and is an unfair business practice.

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

These are unlawful where they include giving or allowing, or offering to give or allow, a discount, allowance, rebate or credit on the condition that the other person agrees not to acquire goods or services from a competitor of the supplier, or not to re-supply specified persons or places.

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

Abuse of a dominant position or the abuse of substantial market control is prohibited unless it is proved that there exist pro-competitive features. Pro-competitive features include the fact that the practice does not in any way restrict or discourage competition to a material degree in any business, trade or industry and is unlikely to do so; or the practice is reasonably necessary to protect consumers against injury or harm; or that the termination of the practice would deny consumers other specific and substantial benefits or advantages enjoyed by them.

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

It came to the attention of the Commission in 2018 that a major distributor of day-old chicks made their sales conditional upon the purchasing of a particular number of stock feed bags. This matter was investigated on the grounds that the conditional selling constituted a restrictive practice due to the tie-in nature of the sale arrangement. During 2020 and 2021, the Commission also pursued schools, including Government schools, who imposed an obligation on parents to purchase uniforms from the school to avoid exclusion of pupils from the schools.

### **26. Does the legislation provide for penalties to be imposed on firms for the abuse of a dominant position?**

Abuse of dominance is akin to creation of a monopoly (defined as a situation in which a single person exercises, or two or more persons with a substantial economic connection exercise, substantial market control over any commodity or service) and is a practice that is prohibited. The Commission may declare the monopoly to be unlawful; require the person exercising control over the business or economic activity concerned to take steps to terminate the monopoly within a specified period; prohibit or restrict the acquisition by the person of any undertaking or assets which in the Commission's opinion will lead to a monopoly or merger; require the person to secure dissolution of any organisation or termination of any association; and generally make such provision that is, in the opinion of the Commission, reasonably necessary to terminate or prevent a monopoly situation or alleviate its effects.

The penalty for an abuse of dominance is a level 12 fine (ZWL 800 000) and/or imprisonment for a period not exceeding 2 years. However, it should be noted that in certain prescribed circumstances, a level 14 fine (ZWL 600 000) may be imposed.

### **27. Are there rules in relation to price discrimination?**

There are no specific rules relating to price discrimination in the present Act. However, such rules are provided for in the draft Act.



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

Orders that are made by the Commission may be published in the *Government Gazette* of Zimbabwe and on their website [www.competition.co.zw](http://www.competition.co.zw)

**SCANLEN & HOLDERNESS**

13th Floor, CABS Centre  
74 Jason Moyo Avenue  
Harare  
Zimbabwe

**T:** +263 242 799 636 | +263 242 702 561









# Key Contacts



**DEREK LÖTTER**  
Co-Head of Competition  
Johannesburg, South Africa

**T:** +27 11 669 9357  
**E:** derek.lotter@bowmanslaw.com



**CLAIRE REIDY**  
Partner  
Johannesburg, South Africa

**T:** +27 11 669 9547  
**E:** claire.reidy@bowmanslaw.com



**TAMARA DINI**  
Co-Head of Competition  
Cape Town, South Africa

**T:** +27 21 480 7910  
**E:** tamara.dini@bowmanslaw.com



**HEATHER IRVINE**  
Partner  
Johannesburg, South Africa

**T:** +27 11 669 9693  
**E:** heather.irvine@bowmanslaw.com



**JOYCE KARANJA**  
Head of Competition  
Nairobi, Kenya

**T:** +254 20 289 9000  
**E:** joyce.karanja@bowmanslaw.com



**WILBERT KAPINGA**  
Managing Partner, Tanzania  
Dar es Salaam, Tanzania

**T:** +255 76 898 8642  
**E:** wilbert.kapinga@bowmanslaw.com



**JUDD LURIE**  
Partner  
Johannesburg, South Africa

**T:** +27 11 669 9651  
**E:** judd.lurie@bowmanslaw.com



**SHIANEE CALCUTTEA**  
Partner  
Moka, Mauritius

**T:** +230 52 98 0102  
**E:** shianee.calcuttea@bowmanslaw.com

**LEBOHANG MABIDIKANE**

Partner  
Johannesburg, South Africa

**T:** +27 11 669 9656  
**E:** lebohlang.mabidikane@bowmanslaw.com

**RUDOLPH LABUSCHAGNE**

Partner  
Cape Town, South Africa

**T:** +27 21 480 7908  
**E:** rudolph.labuschagne@bowmanslaw.com

**LITAL AVIVI**

Partner  
Johannesburg, South Africa

**T:** +27 11 669 9359  
**E:** lital.avivi@bowmanslaw.com

**XOLANI NYALI**

Partner  
Cape Town, South Africa

**T:** +27 21 480 7904  
**E:** xolani.nyali@bowmanslaw.com

**BWALYA CHILUFYA-MUSONDA**

Partner  
Lusaka, Zambia: B&M Legal Practitioners

**T:** +260 97 4900059  
**E:** bwalya.musonda@bowmanslaw.com

**DAVID F.K. MPANGA**

Deputy Chairman  
Kampala, Uganda

**T:** +256 31 226 3757  
**E:** david.mpanga@bowmanslaw.com

**MARYANNE ANGUMUTHOO**

Partner  
Johannesburg, South Africa

**T:** +27 11 669 9395  
**E:** maryanne.angumuthoo@bowmanslaw.com



# BOWMANS

THE VALUE OF KNOWING

**Cape Town, South Africa**

**T:** +27 21 480 7800

**E:** [info-cpt@bowmanslaw.com](mailto:info-cpt@bowmanslaw.com)

**Dar es Salaam, Tanzania**

**T:** +255 76 898 8640

**E:** [info-tz@bowmanslaw.com](mailto:info-tz@bowmanslaw.com)

**Durban, South Africa**

**T:** +27 31 109 1150

**E:** [info-dbn@bowmanslaw.com](mailto:info-dbn@bowmanslaw.com)

**Johannesburg, South Africa**

**T:** +27 11 669 9000

**E:** [info-jhb@bowmanslaw.com](mailto:info-jhb@bowmanslaw.com)

**Kampala, Uganda**

**T:** +256 41 425 4540

**E:** [info-ug@bowmanslaw.com](mailto:info-ug@bowmanslaw.com)

**Lusaka, Zambia**

**T:** +260 96 227 5329

**E:** [info-zb@bowmanslaw.com](mailto:info-zb@bowmanslaw.com)

**Moka, Mauritius**

**T:** +230 460 5959

**E:** [info-ma@bowmanslaw.com](mailto:info-ma@bowmanslaw.com)

**Nairobi, Kenya**

**T:** +254 20 289 9000

**E:** [info-ke@bowmanslaw.com](mailto:info-ke@bowmanslaw.com)



**Follow us on Twitter:**

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[www.bowmanslaw.com](http://www.bowmanslaw.com)

**Alliance Firms:**

**Aman Assefa & Associates Law Office, Addis Ababa, Ethiopia**

**T:** +251 11 470 2868

**E:** [info@aaclo.com](mailto:info@aaclo.com)

**Udo Udoma & Belo-Osagie, Lagos, Nigeria**

**T:** +234 1 2774920-2, +234 1 2719811-3

**E:** [uubo@uubo.org](mailto:uubo@uubo.org)