Recent developments in competition law in Africa

By Nick Altini

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Roughly half of the African continent already has competition legislation in place, although some of these systems are not yet functional, but there are new systems coming into force all the time.

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The head office of the regional competition authority, the East African Competition Commission opened in Tanzania late last year and the first commissioners were appointed, and the Nigerian parliamentary lower house recently passed what will be Nigeria's first proper antitrust regime. Although this regime still has two stages of approval to go, it looks set to be a reality soon.

In addition, there are competition law cooperation agreements being signed between national and regional regulators in Africa, and with their counterparts abroad. These agreements will facilitate regulator cooperation, which will manifest as parallel investigations in co-operating countries.

For functioning regimes in Africa, the focus thus far has been on merger control rather than prohibited practices. This is normal in the evolution of a jurisdiction's antitrust policy. We are seeing signs of development in these regimes as they build experience and expertise. Part of this is the increasing sophistication in merger analysis, the publication of additional filing requirements, attempts to prosecute failures to notify (in Kenya and Zimbabwe), and burgeoning activity in prohibited practice enforcement.

COMESA launches prohibitive practice investigation

The Common Market for Eastern and Southern Africa (COMESA) just launched its first prohibited practice investigation in relation to exclusive CAF football marketing and broadcast rights (and Egypt is investigating the same matter) and dawn raids have recently taken place in Botswana, Zambia, Kenya and Namibia.

The various competition bodies are also becoming more aggressive in terms of punishing anti-competitive conduct. The Tanzania Fair Competition Commission (FCC) is showing itself to be both active and aggressive as a regulator of prohibited conduct. Kenya has launched a market enquiry into bleach and certain grocery products and has recently closed a cartel investigation into outdoor advertising price fixing and issued penalties.

The Namibian regulator made an adverse finding last year in relation to exclusive contracts by a dominant wheaten flour producer and is in a full-blown investigation into predatory pricing in the airline market. Zambia has published penalty guidelines but has imposed significant penalties, for example in a vehicle repair cartel.

Prosecutions on 'failure to notify' mergers

On the merger front, it is reasonable to predict that we will see more prosecution for failures to notify. As lawyers, we are aware, and so too are the regulators, that for reasons of apparent pragmatism, merging entities often choose not to notify in African jurisdictions if they feel that detection risks and prosecution likelihoods are low. This will change.

As far as prohibited practices go, I expect this will erupt just as it has in every other jurisdiction with a functioning completion law regime. In South Africa, after a sluggish start to prohibited practices, the big catalyst was the publication of a corporate leniency policy, which began to expose cartels and soon wrongdoers in many industries caught on. At the same time, the South African Competition Commission realised just how damaging dominant firms rampantly wielding market power could be, and the subsequent prosecutions spurred private complaints, which are now a regular occurrence. In addition, Mauritius has just launched a corporate leniency policy and COMESA is working on one. It has also urged its 19 member states to create their own. Further, the Southern African Development Community (SADC) nations have signed a cooperation agreement between themselves with regard to anti-competitive conduct. Because cartelism is a very natural, economically rational behavior in any market that does not outlaw it, you can bet that it is prevalent and that African regulators will soon be on to it.

Beware of competition laws

Businesses should thus ensure that they are not the test case or the subject of a new precedent in competition law. This will only lead to years of bad publicity and make them a target for complaints and scrutiny - often the case for early offenders. It is important that businesses respect the laws of sovereign nations and observe merger filing requirements. They must ensure that internal compliance programmes are rolled out and adhered to as much in their African businesses as elsewhere in the world. Competition regulation is very similar the world around - if a business can be compliant in Europe or South America, there is no reason for it not to be compliant in Africa.

We are at the dawn of an era of effective competition law enforcement in major African economies and in smaller ones too (even tiny Swaziland has a functioning Competition Commission). If they have not already done so, businesses should roll out and enforce internal training, as well as confession, compliance and remediation measures. In addition, if a business feels it is being oppressed by the anti-competitive behaviour of other market players, it should not be shy to call on the national regulators that do exist and are functioning in Africa.

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