

ENSafrica | African competition law roundup

Nigeria

The Federal Competition and Consumer Protection Act, 2018 (“**FCCP Act**”) was enacted in February 2019, and codifies competition law in Nigeria for the first time. The provisions of the FCCP Act will be enforced by the Federal Competition and Consumer Protection Commission (“**FCCPC**”) and the Competition and Consumer Protection Tribunal.

The merger control regime, however, is in a state of flux. Draft Merger Review Regulations and Guidelines were recently published, but it is unclear as to whether the merger clearance regime under the FCCP Act is now fully operational and within the exclusive domain of the FCCPC, or whether the Securities Exchange Commission continues to play a role (as was previously the case).

Botswana

In accordance with the new Competition Act, 2018 (which came into effect on 2 December 2019), the Botswana Competition Authority, now the Competition and Consumer Authority, is responsible for enforcing the Competition and Consumer Protection Acts. In addition, a Competition and Consumer Tribunal has been established to adjudicate matters arising from non-compliance with the new Act.

Notable additions under the new Act include the imposition of criminal sanctions for directors, in their personal capacities, whose firms engage in anti-competitive conduct; and substantial penalties for gun-jumping.

COVID-19

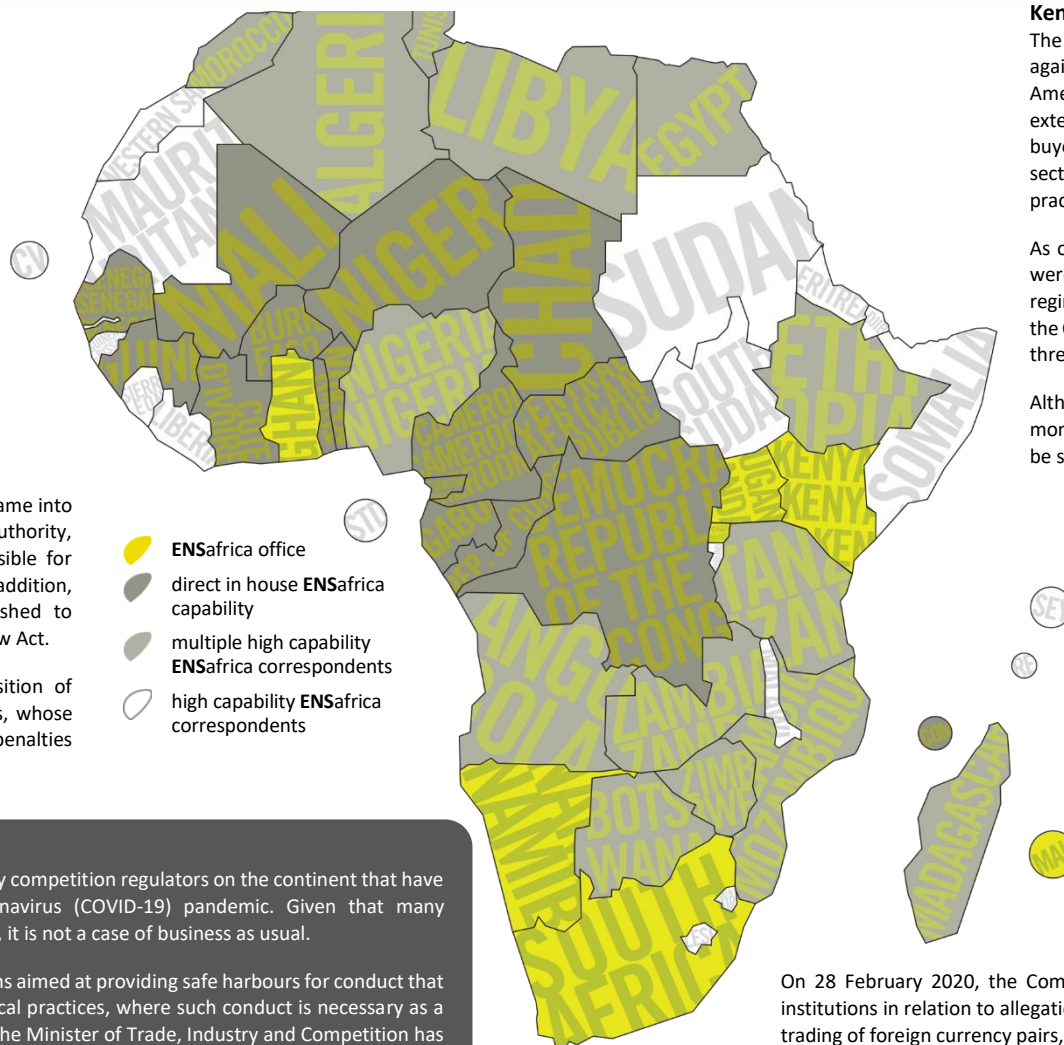
As at the end of March 2020, ENSafrica is not aware of any competition regulators on the continent that have suspended their operations in response to the coronavirus (COVID-19) pandemic. Given that many jurisdictions have adopted lockdown measures, however, it is not a case of business as usual.

Regulations have been promulgated in various jurisdictions aimed at providing safe harbours for conduct that would ordinarily constitute restrictive horizontal or vertical practices, where such conduct is necessary as a response to the pandemic. In South Africa, for instance, the Minister of Trade, Industry and Competition has published regulations exempting the healthcare, banking and retail property sectors from certain provisions of the Competition Act. Similar measures have been adopted by the eSwatini Competition Commission.

Enforcement capacity has also been freed up to protect consumers from unlawful pricing behaviour in respect of products and services that are critical in countering the COVID-19 pandemic.

In terms of procedure, the electronic submission of merger filings is being encouraged and the conducting of merger hearings, where necessary, will take place remotely (via teleconference). Under the circumstances, delays are inevitable.

For country specific advice, local counsel should be sought.



Kenya

The first quarter of 2020 saw the introduction of a prohibition against the abuse of buyer power, under the Kenyan Competition Amendment Act. The Competition Authority of Kenya has extensive powers to conduct investigations into alleged abuses of buyer power, including the authority to monitor the activities of a sector and require an industry/sector to develop a binding code of practice.

As of 25 November 2019, the Kenyan Competition General Rules were operationalised. A notable change to the merger clearance regime is that parties are no longer required to seek clearance from the Competition Authority of Kenya where the COMESA notification thresholds have been met.

Although this approach has gained some traction over recent months, procedural complications remain and local counsel should be sought on this topic.

South Africa

The final report prepared in relation to the long-running Data Services Market Inquiry (initiated by the Competition Commission on 18 August 2017 in response to concerns about high levels of data prices), recommended that two mobile network operators, Vodacom and MTN, reach agreement with the Competition Commission to reduce data prices, address the structure of data pricing, and introduce other pro-poor measures.

On 26 March 2020, a consent agreement reached between Vodacom and the Competition Commission in full and final settlement of the concerns identified in the Inquiry, was confirmed by the Competition Tribunal.

South Africa (cont.)

On 28 February 2020, the Competition Appeal Court dismissed an appeal by various banking institutions in relation to allegations of collusion involving price fixing and market allocation in the trading of foreign currency pairs, including the ZAR. The central tenet in this case was the question of jurisdiction, specifically whether the Competition Authorities have the power to enforce the provisions of the South African Competition Act, over parties that are not physically present in South Africa but which carry on economic activities that have an effect in the country. The Competition Commission has now been granted a second opportunity to refine its case with a view to establishing the jurisdiction of the Competition Tribunal.

On 6 March 2020, the Competition Tribunal approved the ZAR24-billion PepsiCo-Pioneer takeover. Of significance to this transaction, is that ownership by workers and historically disadvantaged persons became a principal determinant for transaction approval. Clearance was therefore granted alongside the imposition of numerous conditions, including those relating to Broad-based Black Economic Empowerment, employment, provision of a development fund and continuation of downstream agreements with companies controlled by historically disadvantaged persons and small and medium enterprises (SMMEs).