

ENSafrica | African competition law Roundup

Kenya

The Competition Tribunal of Kenya handed down its first decision in May 2020 in a matter that entailed the review of various conditions imposed by the Competition Authority of Kenya (CAK) in its approval of the merger between Airtel Networks Kenya Limited (“Airtel”) and Telkom Kenya Limited (“Telkom”).

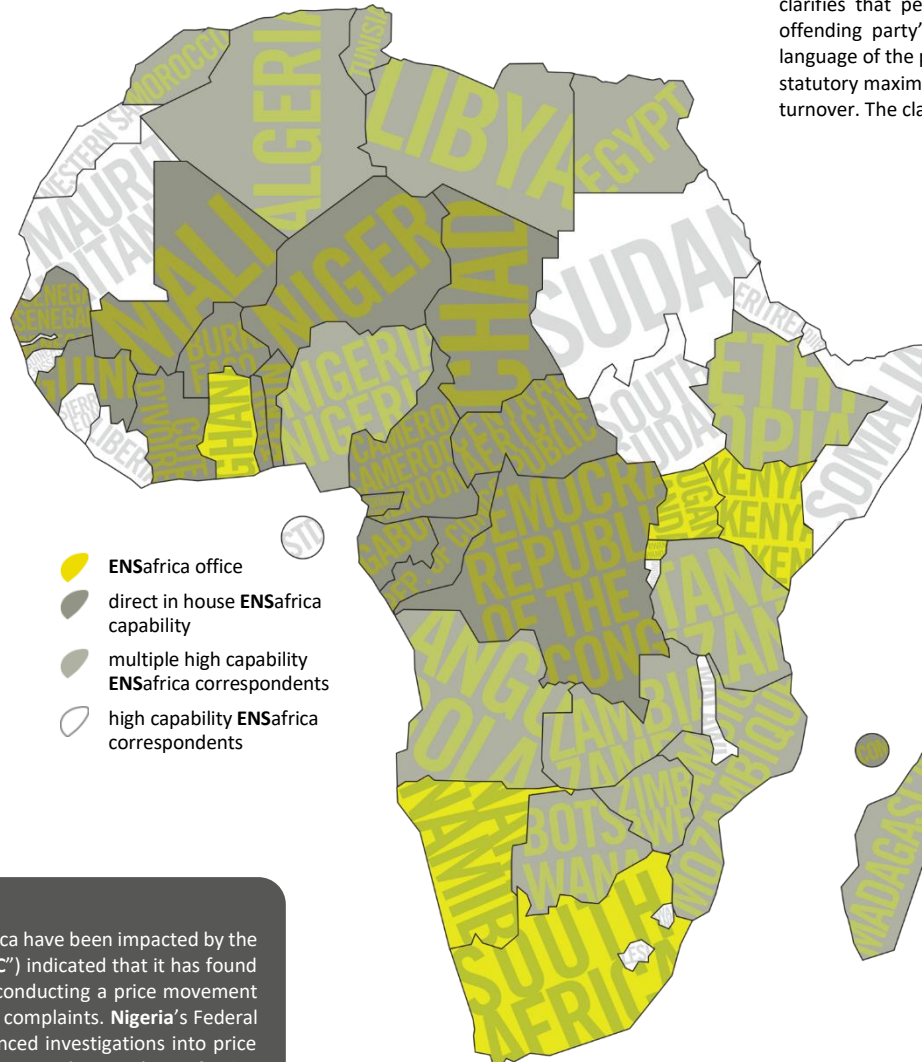
The CAK had imposed a total of eight conditions when it approve the merger in 2019. The merging parties contended that the conditions did not address any substantive competition issues, but significantly affected the merged entity’s rights and would weaken the merged entity’s ability to compete with the dominant telecommunications provider in Kenya.

The Competition Tribunal of Kenya set aside certain conditions, while upholding others. The conditions relating to a restriction of the transfer of the merging parties’ spectrum licenses were set aside on the basis that these encroached on the authority of the Communications Authority of Kenya. The Tribunal found that the conditions relating to the merged entity’s access to the fibre network managed by Telkom on behalf of the Government of Kenya did not fetter the merged entity’s ability or right to negotiate contract terms.

This judgment has provided some insight into the Competition Tribunal of Kenya’s temperament on mergers as well as the functioning of the CAK, which does not publish detailed reasons for its decisions.

COVID-19

As economies reel the work of competition authorities across Africa have been impacted by the global pandemic. The **Namibian** Competition Commission (“NaCC”) indicated that it has found clear evidence of price exploitation on essential products after conducting a price movement analysis. It has formed a dedicated task team to investigate such complaints. **Nigeria’s** Federal Competition and Consumer Protection Commission has commenced investigations into price gouging, most recently investigating the flour industry for price manipulation. The **Malawian** Competition and Fair Trading Commission has also expressed concern over excessive pricing, reporting that in the transport industry, bus fares have seen a substantial increase with bus and minibus operators allegedly establishing margins of between 40% and 200%, despite two consecutive downward adjustments on fuel prices. The **Botswana** Competition Authority (“BCA”) has cautioned the general public against “unscrupulous traders” and businesses taking advantage of consumers amid the pandemic and further reported receiving numerous complaints regarding price increases on basic food products and healthcare and hygiene products. The **South African** Competition Commission (the “SACC”) continues to prioritise COVID-19 matters and plans to refer several more cases to the Tribunal for prosecution. The SACC has emphasised that competition policy should be prioritised as a key tool towards economic recovery, post-pandemic.



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Tanzania

The Tanzanian Parliament passed the Finance Act, 2020 in June 2020. This amendment clarifies that penalties in respect of competition offences may not exceed 10% of an offending party’s turnover “which has a source in Mainland Tanzania”. Previously the language of the provision of the Fair Competition Act allowed for an interpretation that the statutory maximum is to be calculated with reference to an offending party’s annual global turnover. The clarification is thus most welcome.

Mozambique

Julio João Pio was appointed as the chairman of the board of directors of the Autoridade Reguladora da Concorrência (the “CRA”) in April 2020. Mozambique’s Competition Law 10 of 2013, has been effective since February 2015 but the CRA has remained inoperative. There now appears to be progress towards commencing the operation of the authority.

Nigeria

The Federal Competition and Consumer Protection Commission has announced that it is open for business to receive and review merger notifications based on the FCCP Act and its published draft Regulations. Mergers will be deemed notifiable where the merging parties have a combined turnover NGN1 billion (approximately USD2,59 million) or where the target has an annual turnover NGN500 million (approximately USD1,29 million).

The Merger Review Regulations and Guidelines in terms of the FCCP Act are imminent.

South Africa

The Competition Tribunal has issued ground breaking decisions in two COVID-19 related excessive pricing complaints. It found Babelegi Workwear and Industrial Supplies CC and Dis-Chem Pharmacies Limited guilty of excessive pricing and imposed penalties of ZAR76 000 and ZAR1,2million respectively on the two entities.

The Tribunal found that the ability of these entities to increase prices of face masks during the disruptions caused by the Covid 19 pandemic was indicative of their market power, and price increases by dominant firms without commensurate cost increases comprised excessive pricing. Both entities have lodged appeals before the Competition Appeal Court.

The Constitutional Court in South Africa has clarified that cartelists are not automatically immune to prosecution three years after the effects of their cartel conduct has ceased. In a seminal judgment it concluded that it is rational to interpret the Competition Act such that non-compliance with the procedural time-bar on the initiation of complaints can be condoned by the Tribunal on good cause shown.

Zimbabwe

In May 2020 the Zimbabwean Competition and Tariff Commission (the “CTC”) imposed a record penalty of ZWL40,5 million (approximately USD111 800) on Innscor Africa Limited (“Innscor”) for failing to notify the CTC of its acquisition of a 49% stake of Profeeds (Pvt) Limited (“Profeeds”) and Produtrade (Pvt) Limited. The CTC found that the transaction had substantially lessened competition in the stock feeds and day old chicks markets in Zimbabwe. In addition to the penalty, the CTC prohibited the merger and ordered the divestiture of Profeeds.

The Competition (Notification of Mergers) Regulations of 2020 have significantly lowered the threshold for mandatory notification in Zimbabwe and filing fees have been adjusted.