

Beefing up competition law

By [Lerisha Naidu](#), [Angelo Tzarevski](#) and [Sphesihle Nxumalo](#)

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The team at Baker McKenzie Johannesburg's Antitrust & Competition Practice review the developments and discuss the continuing trends in competition law.



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Increasing competition policy enforcement in Africa

As was detailed in Baker McKenzie's latest [Africa Competition Report 2022](#) (Africa Report), African competition regulators have actively engaged in efforts to address pandemic-related challenges, but there has also been a general upward trend in competition policy enforcement across the continent over the past few years.

African jurisdictions have strengthened their competition and antitrust regimes by way of amendments to existing legislation, the introduction of new laws and regulations, and renewed fervour and political will to enforce existing laws. The Africa Report outlined how 29 of the 32 surveyed African jurisdictions and regional bodies have national competition laws in place. Jurisdictions where competition laws exist include Kenya, South Africa, Tunisia, Cote d'Ivoire, Tanzania, Egypt, Nigeria, and Rwanda.

Only two of the jurisdictions surveyed had no national competition laws, but are members of a regional competition law body - Ghana and Uganda. There have been recent notable competition law developments in Algeria, Angola, Botswana, Cameroon, Cape Verde, COMESA, Egypt, Eswatini, Ethiopia, Gambia, Ghana, Kenya, Malawi, Mauritius, Morocco, Mozambique, Namibia, Nigeria, South Africa and Zimbabwe.

The growing convergence of competition and social policy

The cornerstone of competition policy is the notion that inclusive economies yield better outcomes for both producers and consumers. With social imperatives playing an increasingly significant role in the development of competition policy, renewed emphasis has been placed on the empowerment of small and medium-sized enterprises (SMEs) as a means of

fostering a healthy economic ecosystem. Similarly, in countries such as South Africa, the need to afford sufficient opportunities to historically disadvantaged persons (HDPs) has seen competition policy being utilised as a tool to offer the previously disadvantaged novel forms of economic protection.

What is clear from this is that governments in different parts of the world are shifting away from the purely economics-based origins of competition regulation, turning instead towards a model that acknowledges and, to an extent, caters to the broader needs of modern society.



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Addressing economic concentration and removing barriers to entry

Competition policy is poised to be a key driver of economic reform in South Africa. In March 2022, the Competition Commission of South Africa (Commission) briefed the South African Parliament on its Economic Concentration Report (Report).

The Report highlighted patterns of concentration and participation in the South African economy. It included details on the Commission's power to launch market inquiries into highly concentrated industries and its increased authority to impose structural remedies on businesses in these sectors. Such remedies are deemed necessary to remove barriers to entry for new participants, primarily for SMEs and firms owned or controlled by HDPs. The economic inclusion of SMEs and HDPs highlights one of the primary objectives of the Competition Act, which is to provide an opportunity for all South Africans to participate fairly in the national economy.

The Report highlighted the shift in emphasis from simply protecting competition and market participation to more actively promoting improvements in competition, reducing concentration in the economy and actively promoting broader participation and a spread of ownership. It has always been the case that the Commission's remit transcends pure competition issues into the realm of the public interest, which includes economic transformation. It is in this context that amendments were effected into the Competition Act in 2019.

The amendments seek to ensure the achievement of economic transformation through addressing high levels of concentration, enhancing small business development and tackling the "racially-skewed" spread of ownership through merger control, the imposition of structural remedies, the prosecution of abuses of dominance, as well as market inquiries. The amendments empower the authority to "de-concentrate" what it considers to be otherwise highly concentrated markets.

The Commission also enjoys more power to launch market inquiries into sectors it considers to be highly concentrated, with increased authority to impose structural remedies on businesses in these sectors if they are found to create barriers to

entry for new participants. Moreover, the Commission's findings following a market inquiry will be binding unless they are challenged before the Competition Tribunal.

Digital market consolidation

African competition regulators are increasing their focus on market concentration issues, which could limit further consolidation in the technology space. With digital innovation opening up the economy to many individuals and businesses that were, until recently, excluded from meaningful economic participation, it is likely that public interest imperatives will play a crucial role in the development and implementation of competition law in the digital space.

In September 2022, the Commission published revised, final guidelines on small merger notifications to assist it in identifying small mergers and acquisitions involving digital markets. The guidelines came into effect on 1 December 2022 and have been revised due to an increased concern by the Commission regarding potential anti-competitive acquisitions in the digital or technology markets, which are potentially able to escape regulatory scrutiny.

In the context of digital markets, the Commission identified a recurring trend of acquisitions taking place at the start of the life of the target, when it has not generated sufficient turnover to trigger a mandatory merger notification in terms of the merger thresholds. According to the Commission, such conduct has the potential to substantially lessen future competition by increasing the portfolio of dominant companies, regardless of whether the acquiring company operates in the digital market. The revised guidelines will assist the Commission in identifying small mergers in the digital market space that may require notification.



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The price of essential food items

Competition authorities in Africa are increasingly acknowledging their role as guardians of fair practice and consumer protection, and have expressed their intention to enforce these principles going forward. The price volatility of essential food items is an increasing concern across the continent. At the same time, businesses that operate in the Consumer Goods and Retail sector are having to contend with serious supply chain disruption caused by geopolitical, environmental and infrastructure challenges.

The issue of price volatility with regard to essential food items was addressed in the Commission's Essential Food Pricing Monitoring report, where certain fruits, meat and cooking oil were listed as items that have been subject to recent volatile price increases. It was noted that such price increases had the most detrimental impact on poorer communities. Not all essential food price increases have been due to the pandemic. Changing weather conditions (from drought to heavy rain), oil price fluctuations, serious supply chain blockages and massive geopolitical challenges, have all led to a decrease in supply and a subsequent increase in prices.

The Commission stated that it would be keeping a close watch on the price of essential food items going forward, including the price of imported food items, to ensure that anti-competitive conduct does not occur and that the increase in prices of essential food items can be justified.

Dawn raids

After a brief hiatus in dawn raids in South Africa, the Commission launched dawn raids in August 2022 at the offices of eight major long-term insurance companies. The Commission had not conducted a dawn raid in over three years until these raids. In terms of the Competition Act, the Commission is empowered to conduct dawn raids merely if it has a "reasonable

suspicion" that anticompetitive conduct may be taking place.

In this case, the Commission had a reasonable suspicion that there is an agreement among the raided insurance companies to fix prices and/or trading terms in respect of fees for investment products in contravention of the Competition Act. Interestingly, most of these long-term insurance companies had been identified by the Commission in its Economic Concentration Report of 2021 as having the "highest share" of individual policies and had been involved in merger activity between 2011-2020.

These dawn raids send a clear message that the Commission is re-employing them as an effective tool to gather evidence where it has a reasonable suspicion of anticompetitive conduct. This is particularly the case in a post-Covid dispensation, where collaboration had been, to an extent, necessary even amongst competitors to minimise the undoubtedly crippling effects of Covid-19 and to ensure swift and effective responses to its impact.

That aside, the Commission has noted in its annual reports for the last three years that its ability to conduct dawn raids was hampered largely by Covid-19 and limited financial resources. With conditions having returned to "business as usual", the Commission may be empowered to make up for lost time.

ABOUT THE AUTHOR

Lerisha Naidu, Partner, Angelo Tzarevski, Director Designate and Sphesihle Nkumalo, Senior Associate, Antitrust & Competition Practice, Baker McKenzie Johannesburg

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