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The approach of the COMESA competition commission to distribution, exclusive dealing, supply and other vertical agreements

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By Pieter Steyn, Director

The Common Market for Eastern and Southern Africa (COMESA) covers 21 countries namely Burundi, the Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Swaziland, Seychelles, Somalia, Tunisia Uganda, Zambia and Zimbabwe. The COMESA Competition Commission ("**CCC**") has been operating since January 2013 and is one of the most important and active African regional competition authorities.

Like many new competition authorities, the CCC's workload was initially taken up mostly by merger cases. However, since 2016, it has increasingly focussed on prohibited restrictive business practices, which are defined in Article 16 of the COMESA Competition Regulations ("**Regulations**") as "agreements between undertakings, decisions by associations of undertakings and concerted practices which:

> may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the Common Market"; and

> are, or are intended to be, implemented within the Common Market.

Article 16 provides that such prohibited agreements and decisions are void and a maximum USD 300 000 penalty may be imposed for each contravention. The prohibition may however be declared inapplicable in the case of any decision, agreement or concerted practice (or any category of an agreement or concerted practice), which "contributes 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 does not:

> impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

> afford such undertakings the possibility of eliminating competition in respect of a substantial market for the goods or services in question".

No such declarations have however been made to date.

Article 20 of the Regulations allows an undertaking to apply to the CCC for an authorisation "to enter and/or give effect to contracts, arrangements or understandings even if they are anti-competitive, if the Commission determines that there are public benefits outweighing the anti-competitive detriment of the contract, arrangement or understanding". Since 2016, 12 such applications have been made of which 11 have been successful (six were authorised subject to undertakings given by the parties). An application for authorisation of a non-exclusive distribution, toll manufacturing and trademark licence agreement between Akzo Nobel South Africa and Regal Paints Uganda has not yet been decided. Eleven applications dealt with distribution and supply agreements and one dealt with the inclusion of Air France into an existing joint venture between KLM and Kenyan Airways (this was unconditionally authorised by the CCC).

Article 21 of the Regulations allows any person to request an investigation by the CCC where there is "reason to believe that activity by an undertaking located in a Member State has the effect, or is likely to have the effect, of restricting competition in the Common Market". The first such investigation by the CCC commenced in November 2019 following a complaint to the CCC about an agreement between Shoprite Uganda and GS1 Kenya, which requires that suppliers of products to Shoprite supermarkets in Uganda, must obtain their barcodes from GS1 Kenya. The investigation has not yet been finalised.

Article 22 of the Regulations allows the CCC to launch an investigation on its own initiative if it has "reason to believe that business conduct by an undertaking restrains competition in the Common Market". Since 2016, four such investigations have been launched of which 3 have been finalised. The CCC has not yet finalised its investigation into agreements between the Confédération Africaine de Football (CAF) and Lagardère Sports S.A.S for the exclusive commercialisation of marketing and media rights of CAF's football championships. No competition concerns were found in two of the investigations relating to Parmalat's distribution agreements and an exclusive dealing agreement between Eveready East Africa and Clorox Sub Saharan Africa. The third investigation related to Coca Cola Beverage's distribution agreements and was resolved on the basis of undertakings given to the CCC including the implementation of a competition law compliance program.

The concerns raised by the CCC in the above cases included:

> clauses stipulating the profit margins of distributors and commissions payable at different levels of the market. The CCC accepted undertakings to remove these restrictions. In its Guidelines on Restrictive Business Practices issued in April 2019 ("**Guidelines**"), the CCC notes that resale price maintenance may facilitate collusion, eliminate intra-brand competition and, depending on the market position of the supplier, result in "a uniform referral price for a substantial part of the market";

> restrictions on passive or unsolicited sales by exclusive distributors to customers outside their territories. The CCC granted authorisations on the basis that these restrictions were removed from the distribution agreements. In the Guidelines, the CCC notes that a restriction on passive sales "impedes the establishment of the Common Market by recreating contractually the national borders" of Member States;

> non-compete obligations continuing for 5 years after the termination of the distribution agreement. The CCC found this raised potential anti-competitive foreclosure concerns but accepted 2 or 3 year periods;

> clauses dealing with monitoring the retail prices of products sold through distributors. The CCC was concerned that (even though distributors were entitled to set their resale prices in their discretion) such price monitoring mechanisms could "soften competition in the relevant market by acting as a signal to the prices set by competitors".

The Guidelines contain useful indications of the CCC's approach to resale price maintenance, single branding, exclusive distribution and supply arrangements, selective distribution, franchise agreements and other vertical business practices between an undertaking and its suppliers or customers. Although each case will depend on its own facts and circumstances, the CCC's decisions in the cases to date are instructive.

The CCC has not yet investigated or decided a cartel case (a maximum USD 750 000 penalty may be imposed) and a leniency policy has not yet been issued (although a draft has been prepared). The CCC has also not yet investigated or decided an abuse of dominance case (a maximum USD 500 000 penalty may be imposed). Contraventions of the Regulations are not criminalised.

It is highly likely that the CCC (and other African regional and national regulators) will continue to focus on combatting anti-competitive practices (including cartels and the abuse of dominance). This will increase the risk for business of competition law contraventions and, due to the serious consequences of competition contraventions, business should adopt a "prevention is better than cure" approach including competition law training and compliance programs for senior executives and staff. Due diligence investigations of potential targets in M&A transactions must cover competition law compliance and appropriate protections for the buyer must be included in the transaction documents.

Contact the author

Director

Pieter Steyn
Johannesburg

T +27 11 535 8296
F +27 11 535 8696
E psteyn@werksmans.com

Click **here** for his profile

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