



Do You Want to Trade in Africa?

A wake-up call!

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LEGAL PRACTITIONERS & ARBITRATORS

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If you are interested in trading in Africa, this is a wake-up call!

Enforcement of Competition law and policy has revved up several gears on the Continent, as delineated by the recent commencement of investigations by the Common Markets for Eastern and Southern Africa ("COMESA") Commission into a suspected violation of the COMESA Competition Regulations by Pay TV Companies and the conclusion of investigations into "misleading and unconscionable conduct" by Jumia Group.

Competition laws and policies essentially try to create a market where traders can compete freely on the quality of products and services they offer and the prices they charge rather than through the improper exercise of market power, whether acquired unilaterally or in concert with others. COMESA's approach in the examples cited indicates a very low tolerance level for market manipulations to distort fair Competition. Intrinsic and often included in Competition laws and regulations is the concept of consumer rights protection. This seriousness in the enforcement of Competition law and policy at the regional level is a foreseeable

consequence of the escalating prevalence of regional trade agreements aimed at dismantling tariff and non-tariff barriers, thereby facilitating the unimpeded flow of goods, services, and labour. The former Secretary General of COMESA underscored this point in 2004 when he opined that; 'as the regional economy integrates more deeply, the necessity for appropriate policy instruments and tools is becoming increasingly urgent and, in this regard, a Competition policy is important to ensure observance of good corporate governance and promoting equitable and harmonious economic development.'

In the context of trading under the African Continental Free Trade Area ("AfCFTA"), regulatory approaches in Regional Economic Communities ("RECs") like COMESA become even more instructive. Therefore, it is a safe bet to expect as strict a regulatory approach to the enforcement of the AfCFTA Protocol on Competition as the COMESA model and a fortiori even exactly the same approach. It would be remiss for Companies trading in Africa not to pay attention to these burgeoning rules against restrictive agreements and abuse of dominance.

Any experience from the RECs?

Competition has been addressed in one form or the other by the various RECs under the AfCFTA, with more traction in some regions than others. In the South, for instance, the Southern African Development Community ("SADC") has no binding Competition law in force, but a Declaration on Regional Cooperation in Competition and Consumer Policies was signed in September 2009. It was based on Article 25 of the SADC Protocol, which calls for member states to implement measures within the Community that prohibit unfair business practices and promote Competition. This Declaration sets out a cooperation framework on Competition policy for the SADC Free Trade Area to harmonise Competition policies in the region and ensure that State Parties to the SADC act within the spirit of the Declaration.

In the East, regulation of Competition is a little more complex. The East African Legislative Assembly enacted the East African Community Competition Act in 2006 (the "EAC Competition Act"), and the EAC Competition Regulations were adopted in 2010 by the Council of Ministers.

The EAC Competition Act gives the EAC Competition Authority exclusive original jurisdiction in determining violations of the EAC Competition Act, meaning that the jurisdiction of national Competition authorities is limited to enforcing their national laws. However, the enforcement authorities of Partner States are obliged to enforce the decisions made by the EAC Competition Authority under Section 44(6) of the EAC Act.

This creates a bespoke challenge of multiple rules applying to a single country and the consequential difficulty in implementation and enforcement. For instance, a trader in Kenya may fall within the ambit of three separate regimes, the EAC Competition law, Kenyan national Competition laws, and COMESA Competition Regulations. Without an appropriate mechanism to manage the interaction and application of these separate regimes, traders would be subjected to multiple levels of regulation, at least, if not conflicting rules in the worst-case scenario. One obvious consequence is the requirement to file notifications with all three regulators, resulting in increased transaction costs and possible delays in obtaining merger clearances, making these regions potentially less attractive to investments.

Being part of a REC affords so many benefits to State Parties that none will consider leaving the REC solely because of the multiplicity of Competition regulations. The onus then falls on the RECs to harmonise their Competition rules, particularly because most of them have similar objectives, and global precedents abound to support this theory. An apposite example is the European Competition Network ("ECN"), which was established to ensure harmonisation between the national Competition laws of the 27 EU member states and the EU Competition law. Its objectives include ensuring cooperation between the Competition authorities of the EU Member States and the EU Commission in their application of the EU Competition rules.

The urgency for the implementation of such a solution in Africa cannot be overemphasised as the dire consequences of separate Competition regimes will continue to compound in the absence of a holistic solution. For example, Kenya is also part of the AfCFTA, and its nationals are also expected to comply with any rules made in furtherance of the AfCFTA Protocol on Competition Policy. Until the recommended solution of a competition network is adopted however, traders should be well apprised of the fact that, the Competition rules of some countries may overlap due to the country's membership of multiple RECs. Traders should be prepared to take the different rules into consideration if they must trade in Africa.

In the west, the ECOWAS Regional Competition Rules were adopted in 2008 by the Summit of Heads of State and Government to '... promote, maintain and encourage Competition and enhance economic efficiency in production, trade and commerce at the regional level'. This birthed the ECOWAS Regional Competition Authority, which was launched in 2019 to implement the Regional Competition Rules adopted in 2008. Still, much work as to enforcement and implementation has not been seen from this body. As a matter of fact, COMESA is the only REC on the Continent with an operational regional Competition law and regional Competition body. The EAC, ECOWAS and other RECs have set up their respective regional authorities; however, enforcement activities have yet to commence.

This conclusion is why we must look towards COMESA's regulatory approach to Competition rule-making and enforcement to foreshadow the regulation of Competition by the AfCFTA, and the two examples of the COMESA Competition Commission (the "Commission") baring its teeth cited at the beginning of this article are a good place to start the analysis. The Regulations allow the Commission to impose up to 10% of turnover as a fine for contravention of some provisions, and we have seen the Commission utilise this power to impose significant fines for tardiness in making merger notifications within the timeline stipulated in Article 24 of the Regulations.

So, what exactly woke the sleeping dogs?

In the first incident, the Commission launched investigations into the conduct of Jumia Group ("Jumia"), on 10 September 2021, following a review of its platforms in different countries along with its terms and conditions, to determine if they complied with the COMESA Competition Regulations (the "Regulations"). The Commission found that Jumia's platform and its terms and conditions appeared to amount to false and misleading representation, prohibited by Article 27(1)(d) and (f) of the Regulations in the following terms:

27(1) "A person shall not in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services..(d) falsely represent that a particular person has agreed to acquire goods or services and (f) represent that the person has a sponsorship, approval or affiliation it does not have".

Further, Jumia's conduct was possibly unconscionable, which the Regulations prohibit. In this regard, the Commission engaged Jumia on the incompatibility of their terms and conditions with the Regulations and required them to make necessary amendments such as:

1. Jumia should introduce more dedicated channels of communication for complaints, and these include:
 - a. Phone numbers dedicated to resolving complaints.
 - b. Email address dedicated to resolving complaints.
2. Jumia should also consider having a transparent dispute resolution provision that is known to consumers and users of the website.
3. Jumia should guarantee the authenticity of information provided by traders, to the extent that where the seller cannot be traced in the case of a dispute, Jumia takes on the liability as there is a legitimate expectation by consumers that Jumia's terms and conditions for engaging the sellers includes verifying addresses and other information.

Jumia was cooperative and reviewed its terms and conditions to comply with the Commission's recommendations.

In the second incident, the Commission issued a notice pursuant to Article 8 of the Regulations to signal the commencement of investigations into possible violations of Articles 27 and 28 of the Regulations by various Pay TV service providers. The affected service providers were Multichoice Africa Holdings, Azam Media Limited, and StarTimes Group. The genesis of the investigation was the discovery by the Commission that these service providers had, through their subsidiaries, blocked certain regional television channels from airing in Kenya, Uganda and Rwanda during the 2022 World Cup period. Contrary to the applicable rules, no compensation was provided to affected consumers for the inconvenience caused. The Commission observed that consumers may have subscribed for the bouquets to have access to all the TV channels listed in the bouquet, including regional programs and news. It is also possible that some consumers may have purchased the bouquets specifically to watch the World Cup through the affected channels. In this case, the consumers may have been misled by the Pay TV service providers to expect a selection of channels to be included in the bouquet, which breaches Article 27 (1)(a) of the Regulations.

Further, when the Pay TV providers blocked certain channels, consumers may have been inconvenienced and denied access to the content they had pre-paid for. Switching off the already paid channels may have disenfranchised the consumers, especially where they were not compensated for the loss. This may be considered unfair and unconscionable conduct towards the consumers and a possible breach of Article 28(1) of the Regulations. The Commission's concern is that the Pay TV service providers, to whom consumers had paid their subscriptions, did not offer redress or compensation to the affected customers.

This investigation is still ongoing, and the Commission is yet to make a determination on the culpability or otherwise of these service providers; therefore, the threat of imposition of hefty fines or direction to pay compensation to the consumers still hangs over their collective heads. It should be noted that the commencement of investigations neither confirms that the conduct being investigated is an unfair business practice nor that the Pay TV companies have violated the Regulations. In accordance with the provisions of Part 5 of the Regulations, the Commission is still obliged to conduct an investigation into the alleged conduct. However, businesses that have been the subject of these types of investigations in the past are acutely aware of how disruptive and expensive they can be if the erosion of market confidence and goodwill is considered.

COMESA is a good example of how the workload of most Competition authorities is initially dominated by merger cases but eventually expands to include challenging prohibited restrictive business practices, abuse of dominance and consumer rights protection. With the experiential growth of the regulator and the maturity of the market, the prognosis is that investigations and enforcement measures will become more frequent and sterner.

Take away?

It is evident from these two cases that the Commission favours hard enforcement through screening, detection, investigation and punishment of offenders in the implementation of Competition and Consumer rights laws and policies. The AfCFTA Competition Authority will not reinvent the wheel in its own enforcement measures; therefore, it is prudent to expect the same approach or similitude of the COMESA model.

For the traders who wish to trade in Africa, especially under the AfCFTA, due attention should be paid to the increased risk of Competition law contraventions for their businesses. The Jumia case study exemplifies the ability of Competition authorities to force businesses to comply with the applicable rules and even to amend clauses in their contracts.

More importantly, it should be noted that instead of mere lip service or a slap on the wrist, contraventions of Competition and Consumer rights laws under the AfCFTA will attract stiff penalties, which may include fines and, in some cases, criminal sanctions. Prudent traders are therefore admonished to adopt a “prevention is better than cure” approach by endeavouring to understand and train their people on Competition law and compliance. Also, due diligence checklists for potential targets in mergers must include competition law compliance. The buyer should also include appropriate protections in the transaction documents.

In precis, traders in Africa must ensure that they pay attention to the provisions of the Competition rules that would be formulated under the AfCFTA as it would be enforced in the same or almost the same manner as the rules of COMESA and other RECs in Africa.

This is the wake-up call.

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