

How 2016's big competition law developments in Africa will affect 2017

By [Xolani Nyali](#)

7 Feb 2017

Here is a look at some of the competition law issues that made headlines in Africa during 2016 and how they will impact competition law proceedings this year.



© bowie15 – [123RF.com](#)

Public interest in Africa

When South Africa published its public interest guidelines in 2016, it became clear that such guidelines were needed in all the major competition law jurisdictions in Africa. Guidance on public interest issues in mergers would create a degree of certainty for investors and allow merging parties to consider these issues proactively, rather than being met with a condition imposed unexpectedly or unnecessarily.

The most acute public interest factor in South Africa has been employment, where the protection of employment is paramount. Botswana, Kenya and Tanzania have focused on employment issues when considering public interest in mergers and various jurisdictions have focused on protecting local procurement. We can expect more countries in Africa to issue formal public interest guidelines in the coming years.

The East African Community Competition Law

With the East African Community (EAC) Competition Authority (Authority) having appointed five new commissioners in 2016, compliance with the regulations of this new regional Competition Authority will likely be required during 2017. In addition, the EAC member states that don't have competition laws in place must now draft them, meaning that we should see competition law being implemented in an additional three countries in the near future, namely Burundi, Rwanda and Uganda. As four of the five EAC member states are also COMESA Member States, it remains to be seen what mechanisms will be put in place between the Authority and COMESA to streamline the control of merger activity in East Africa, which has been a hub for private sector investment in recent years.

MoUs

The sharing of experiences and best practices between competition regulators across Africa is increasing, and appropriate information sharing is to be welcomed. Multi-jurisdictional investors want competition authorities to be aligned in terms of the decisions and remedies that they implement in a transaction, so that deals can proceed smoothly and efficiently.

Over the past 18 months, more than 10 memoranda of understanding (MoUs) have been signed by 25 competition regulators in Africa and BRICS, to facilitate the cooperation between competition regimes on issues of competition policy and enforcement. The test will be in the implementation of the MoUs and their philosophical outlook. In other words, whether they are used to facilitate business and the efficient regulation of market activity or to frustrate business on a regional scale.

We have no reason to believe that the latter will occur and we are optimistic that the investigative efficiency of competition regulators will be enhanced through better co-operation between regulators. The days of working in national borders have long been over for both business and the public, now regulators are finally catching on and this should be cautiously welcomed.

Private Equity Funds

Investment in East Africa is largely driven by private equity funds – so much so that there is a call by some practitioners in Kenya to treat these investments differently to normal investments in terms of how they are assessed from a competition law perspective. A different toolbox needs to be adopted by regulators when dealing with private equity funds in Africa, as they are usually new entrants in the market and their presence is also not permanent, as they will ultimately exit their investment depending on the investing funds' investment horizon. In such circumstances, one must therefore wonder to what extent the vast majority of private equity deals will negatively affect competition. We look forward to the most affected jurisdictions being trailblazers in this area and putting forward specific guidelines for private equity deals in the coming year.

Mozambique

Mozambique's Competition Authority was supposed to become operational in 2016 but it has been delayed. It is expected to begin functioning in 2017. They are the only major jurisdiction in Southern Africa that does not yet have dedicated competition law. The country is also the only Portuguese speaking jurisdiction in Southern Africa, so it is doubtful that it will look to South African competition law for interpretation. Due to language and history, the regulator may look to Portugal or the EU to interpret its law, which will introduce an interesting mix into competition jurisprudence in Southern Africa.

High Court of Kenya litigated its first competition case

The High Court of Kenya handed down judgment on the first competition case in Kenya, in the matter between Mea Limited and the Competition Authority of Kenya (CAK), this year. The ruling confirmed the principle that dawn raids, provided they are based on a reasonable suspicion which is supported by facts, are legal and no prior notice that a search warrant is being sought is required to be given to the company that is to be raided. This position is consistent with international best practice.

ABOUT THE AUTHOR

Xolani Nyali is a senior associate in the Competition Practice at Bowmans South Africa.

For more, visit: <https://www.bizcommunity.com>