

LEGAL BUSINESS

AELEX NOTES

AfCFTA Protocol on Competition Policy must seek to harmonise REC policies (Part II)

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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.

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 the 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 merger cases initially dominate the workload of most Competition authorities 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.

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The Jumia case exemplifies Competition authorities’ ability to force businesses to comply and even to amend contract clauses