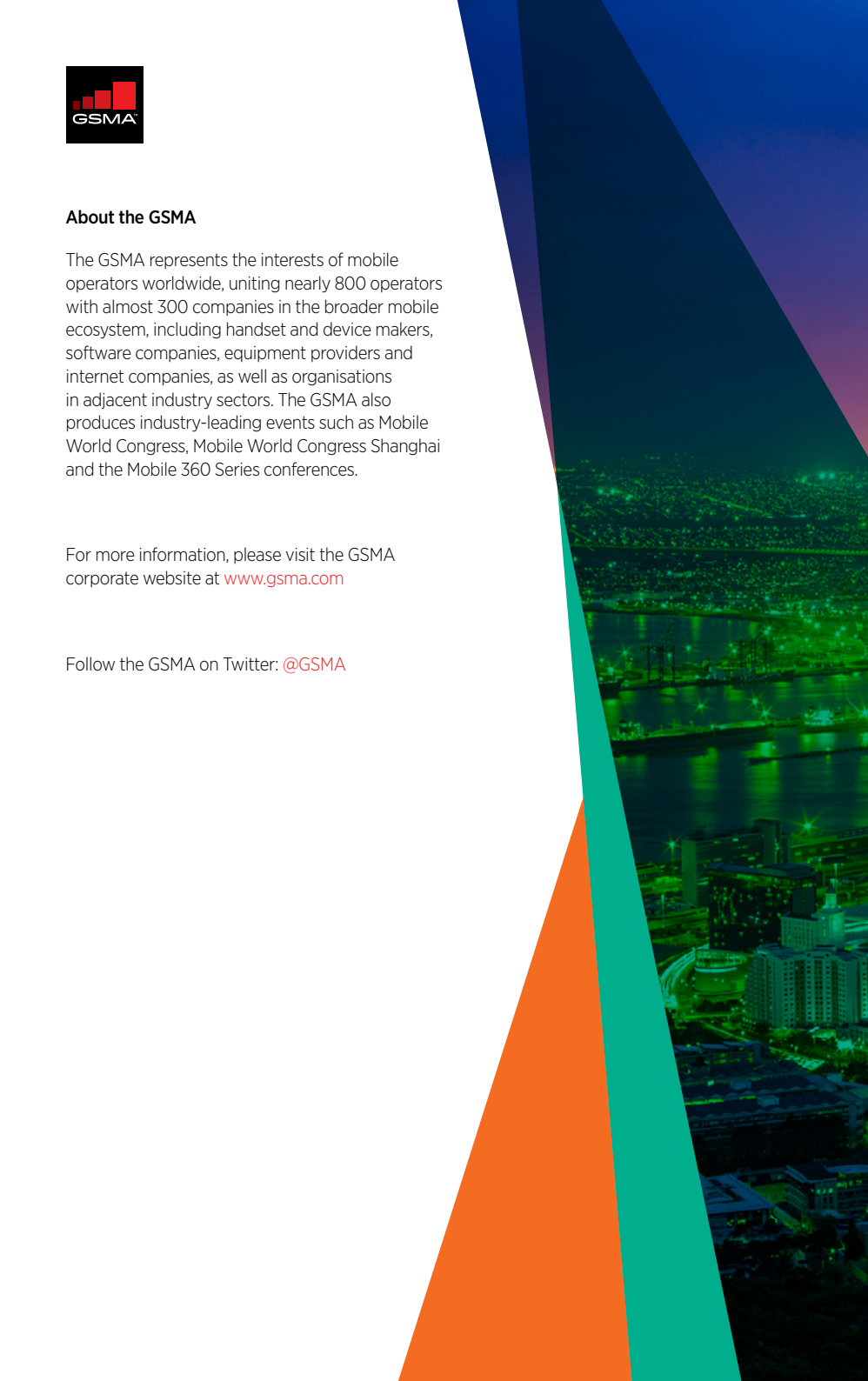
COMPETITION POLICY IN THE DIGITAL AGE

Case Studies from Asia and Sub-Saharan Africa

2016



About the GSMA

The GSMA represents the interests of mobile operators worldwide, uniting nearly 800 operators with almost 300 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces industry-leading events such as Mobile World Congress, Mobile World Congress Shanghai and the Mobile 360 Series conferences.

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About this booklet

This booklet is for you if you have an interest in competition policy in the digital communications sector. There are chapters on Sub-Saharan Africa and Asia, so this booklet is for you specifically, if you are considering aspects of competition law and regulation in these regions. You are:

- **A lawmaker.** There is a need to consider the balance between sectoral regulation and competition law. The evidence presented in this booklet points overwhelmingly to the benefits (for the economy as a whole) brought about by enactment of a modern competition law, properly enforced by a well-resourced competition authority. More resources should therefore be allocated to competition authorities, and the balance with the sectoral regulator(s) reconsidered. The demarcation of the jurisdiction between the two agencies should be better understood and clarified, if necessary. This should be done both at the national level and in supra-national organisations.
- **An enforcer of regulation**, with or without concurrent competition law powers, who wants to understand how to regulate the telecoms sector in the digital economy, taking into account what competition law enforcers can do.
- **An enforcer of competition law** who wants to consider more deeply the interplay with sectoral regulation and gain a better understanding of the dynamics in the digital economy, where, due to historical reasons, some players are regulated and others are not. Enforcers of regulation and competition law who want to understand and improve the coordination between their respective areas. Collaboration between the agencies is important, both at the national level and in the supra-national context.

Acknowledgments

This booklet could not have been drafted without the help and cooperation of many contributors both from operators and industry players and internally.

Within the GSMA, special thanks go to Kalvin Bahia, David Darwin, Arran Riddle, Serafino Abate and Brett Tarnutzer. In this booklet, care has been taken to be as accurate as possible but all information is taken from publicly available resources which may not be accurate in all cases. The GSMA intends to update this case studies booklet regularly. Please send all comments to comphandbook@gsma.com

PDF Navigation Instructions

This booklet is intended as a reference, and is a companion to the GSMA Competition Policy Handbook. Following the review of the case studies, we have identified five main features of best practice in competition policy that are fundamental to a proper consideration of the issues that arise in the digital economy. We look at Sub-Saharan Africa and Asia to see whether these features are present in the geographies considered. We develop recommendations for policymakers and agencies that are responsible for devising and applying competition policy in the digital age.

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There are examples of more converged regulators for telecommunications and media in Hong Kong, Malaysia and soon Singapore – no regulatory regime applies to the players of the digital age in their entirety. This focus on regulating the telecoms sector is historical. As an example, regulation is required due to the link between WTO trade agreements and telecoms liberalisation and regulation, as described above (see The International Dimension in the introductory chapters).

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Foreword

This booklet is intended as a companion resource to the GSMA Competition Policy Handbook. Existing regulators and competition authorities have the task of enforcing competition policy. They can do a lot to ensure that regulation is only imposed where necessary, recognising that the application of competition law is best suited to the converged digital economy. A careful market appraisal, taking into account all products and services that are substitutable, leads to a market assessment in which all competitive forces are properly considered and therefore in which operators may, in fact, not enjoy a position of market dominance (in competition law) or significant market power (in regulation). For example, if at the retail level consumers can switch to 'free' messaging apps in response to an increase in price of SMS, then no operator can increase the price of SMS and therefore operators do not have significant market power. So too, in the world of internet platforms, it is important to define a multi-sided market in order to arrive at a proper assessment of the competition dynamics in that market.

There is obvious overlap between regulation of operators with significant market power and competition law enforcement. Competition law enforcement applies to all sectors and is a powerful tool for boosting productivity, innovation, competitiveness, and growth. Indeed, a recent report by the World Bank Group estimates that a proper enforcement of competition law has the potential to lift a significant amount of people out of poverty. One aspect that is perhaps less understood concerns the very fabric of the legal, policy and operational framework. If there is no special regulator for an industry, only the competition authority will be able to intervene. This is why issues that may arise in the IT sector, or in the internet provider sector are considered by the competition authority. This is why the cases against Microsoft in the 1990s were investigated by competition authorities. In the digital economy, this is why the existing cases against Google and Apple are pursued by competition authorities. Indeed, this is why cases in the pharmaceutical sector, or against chip manufacturers, supermarket or airlines, are carried out by competition authorities.

Therefore, competition principles need to be integrated between the different agencies that have the task to enforce them, in close cooperation between competition authorities and sectoral regulators. Because of the real risk of over-regulation, it is especially important to rely on competition law whenever possible and to regulate ex ante only when there is a clear case to do so. Because the digital economy is global, cross-border cooperation between competition authorities and regulators is necessary.

This only works if the legal and policy framework is in place; that is, if there is a competition authority in the country, and if the authority is properly set up and has the resources and expertise to operate. In this booklet, we review the situation in Asia and in Sub-Saharan Africa. Although in Asia there is a competition authority in all of the countries surveyed, bar one, the effectiveness of the authority varies greatly from country to country. In Sub-Saharan Africa, out of 50 countries surveyed, only 14 have a fully established competition authority. In all countries surveyed, there is regulation imposed on a sector: telecommunications (in some cases, telecommunications, media and broadcasting). Indeed, it is often a WTO requirement that countries implement a system of regulation of the telecommunications sector in order to gain access to international trade. There is no similar requirement to adopt a system of competition law. Not all telecommunications regulators apply regulation on operators with market power, after an assessment of market failures that require intervention.

In both Sub-Saharan Africa and in Asia, cross-border cooperation has improved in recent times. Common Market for Eastern and Southern Africa (COMESA) in Southern Africa is active as a supra-national competition authority in merger-control cases and is expanding its remit. The Association of Southern Asian Nations (ASEAN) in Southeast Asia is in the process of setting up its own frameworks. This is to be welcomed, although if the jurisdiction of supra-national bodies is not properly codified, instead of leading to a much-needed one-stop shop, it can lead to extra layers of bureaucracy and the risk of businesses facing multiple agencies, at the supra-national level and nationally. However, cooperation spreads knowledge and best practice and minimises the risks of diverging decisions and practices among agencies, between countries, making it easier for the market players to operate with legal certainty across borders.

Emanuela Lecchi, Head of Competition (Legal), GSMA

14 December 2016

Sub-Saharan Africa

Summary

To foster the development of the digital economy, the system of sector-specific regulation should be flexible; regulation should only be applied after a proper market assessment, and only where competition law is not sufficient to deal with the issues. Competition authorities and regulators should cooperate in-country and across countries, giving rise to the need for coordination and cooperation. Across Sub-Saharan Africa, competition law has been enacted in only 14 of the 50 countries surveyed, although there is a discernible trend towards adoption of competition laws both at the national level and at the level of supranational organisations. Africa is home to two ambitious experiments about supra-national enforcement of competition law, by COMESA and WAEMU. There is increasing recognition about the benefits of adopting competition policy and allocating resources to a competition authority, for the economy as a whole.

Competition law enforcement and competition policy, in Africa and around the world are "effective tools for transforming product input markets and boosting productivity, innovation, competitiveness and inclusive growth. They also help the poorest population groups access a wider variety of competitively priced goods. Furthermore, competition in public procurement delivers savings for the government and increases the efficiency of infrastructure and social services provision. Competition authorities play an important role as champions, advocates and enforcers of competition policy across economies."[202] In particular:

- "Reducing the prices of main food staples by even a modest 10 percent (far below the average overcharge imposed by cartels around the globe) by tackling anticompetitive behaviour in these sectors or improving regulations that shield these markets from competition could lift 270,000 people in Kenya, 200,000 people in South Africa, and 20,000 people in Zambia above the poverty line."[203]
- Fundamental market reforms to increase competition in key input services would also boost economic growth: reforming professional services markets would deliver an additional 0.16–0.43 percent" of annual growth in gross domestic product.[204]

202. World Bank Report, *Breaking Down Barriers*, *Unlocking Africa's Potential through Vigorous Competition Policy*, (WBG African Competition Policy Report quoted, Foreword and Chapter A
203. WBG African Competition Policy Report, quoted, page 7
204. WBG African Competition Policy Report, quoted, Foreword

"Africa has a lot to gain from **removing policy and regulatory restrictions** and **strengthening the effectiveness of its competition law and policy framework**, including in terms of economic growth."[205]

In the WBG African Competition Policy Report, telecommunications is highlighted as a sector where more could be done to unlock Africa's potential. African countries have "the highest final prices for mobile broadband services in the world," and internet use is the second-lowest among the regions after South Asia,[206] These and other related figures need to be considered in context, however. Even if competition law has not been applicable across all African countries, regulation of telecommunications operators in Africa has been in force for as long as liberalisation itself. Something is not quite right with the current systems of regulation. Perhaps there is an issue with over-regulation, or regulation that does not follow principles of best practice: "... policies such as state aid and price controls affect the development of competition in markets, but only in a few cases is competition analysed in granting state aid or setting price controls."[207]

On the other hand, there are encouraging results to come out of those countries where the regulatory and competitive environment encourages investment. For example, 4G is gaining traction in countries such as **Mauritius**, **Namibia** and **South Africa**, early-adopter markets (and countries that have adopted a competition law alongside a regulatory framework).[208]

By all accounts, the continent is developing at a very rapid pace. Connectivity is allowing digital services to reach remote areas. The mobile industry in Sub-Saharan Africa continues to scale.[209] Investment by the operators across the region, in expanded network and mobile broadband networks,[210] is paying off: 367 million subscribers have been reached in mid-2015, although subscriber growth rates are set to slow sharply over the coming years. Migration to higher-speed networks and smartphones continues apace, mobile broadband connections are set to increase from just over 20% of the connection base today to almost 60% by the end of the decade. Falling device prices are encouraging the adoption of smartphones, with the region set to add more than 400 million new smartphone connections by 2020, by which time the smartphone installed base will total over half a billion. This is still just under half the population, against the global average of almost 60%.[211] This is not just due to costs and coverage, but also literacy, confidence, trust in the internet and availability of locally relevant content. It is often forgotten that the digital economy is about much more than connectivity and price.[212]

205. WBG African Competition Policy Report, page 7, and this is of course not just true for Africa.
206. WBG African Competition Policy Report, quoted, Executive Summary
207. WBG African Competition Policy Report, quoted, Executive Summary, page viii, emphasis added
208. GSMA report *The Mobile Economy*, Sub-Saharan Africa 2015, (GSMA (2015)) http://gsmamobileeconomy.com/ssafrica/
209. GSMA (2015), quoted.
210. Capital investment in 2014 totalled $9billion, and is set to reach $13.6 billion (24% of the total) by 2020
211. GSMA (2015) quoted, page 7
212. As seen above, Introduction.

Policymakers, regulators and competition authorities must work together towards implementation of a system of competition policy (law and regulation) capable of tackling the issues that arise, but to forebear from intervention whenever possible, applying instead competition law rules that are applicable to the economy as a whole. Policymakers and agencies should consider the recommendations highlighted in Figure 3. Following these recommendations will ensure that the five features of best practice in competition policy identified in Figure 2 are adopted. These are reproduced below.

Figure 2: (reproduced again below) Five Features of Best Practice in Competition Policy

1. A **properly functioning competition authority** and a **properly functioning regulator**, i.e., that are independent of government, properly staffed and resourced.
2. Economic regulation must address **market failures**, based on evidence from up-to-date market reviews. Regulators must be clear about the reasons for, and impact of, regulation in all cases.
3. Ideally, **competition law should be enforced by a competition authority**. If the regulator has **sectoral competition law powers**, the need for cooperation between agencies is greatest.
4. Both competition authority and regulator understand **the interplay** between their respective jurisdictions and **work together** to address the issues identified.
5. There is appropriate, **meaningful cooperation** between competition authorities and regulators at the supranational level too.

Feature 1: A properly functioning regulator and a properly functioning competition authority

Traditionally, countries across Sub-Saharan Africa have adopted a system of sectoral regulation, but no generally applicable competition law. In most countries, there exists a regulator, whereas even now competition rules are not universally adopted. This approach might have been suitable at a time before convergence. The changes brought about by the digital economy require more reliance on generic competition law.[213] Relying solely on sector-specific regulation brings a serious risk that the rules applied do not respect technology neutrality, leading to a playing field that disadvantages regulated sectors.

All countries reviewed have an active regulator with powers to regulate the telecommunications sector at least. This appears to be due to the same historical reasons that regulation of the sector has been traditionally imposed, including the link between WTO trade agreements and liberalisation and regulation of the sector.[214] In some countries where there is not generally applicable competition law (e.g., **Nigeria** and **Uganda**), the regulator is empowered to apply competition law to the sector, resulting in a lopsided system of extra scrutiny for the telecoms operators and no scrutiny in regulation or competition law for market players in other sectors, including in the digital economy. This has serious consequences for the competitiveness of the sector.

Sub-Saharan Africa is a relative newcomer to the adoption of generally applicable competition laws, although the pace of adoption has increased in recent years. Of 50 countries reviewed, only 14 have functioning competition laws. These are the countries shaded in green in Figure 35. The countries that belong to the West African Economic and Monetary Union (WAEMU, see Figure 43) have adopted a centralised, supra-national exclusive system of applying competition law, resulting in less wide-ranging enforcement at the national level, even in those countries that have a national competition law. The countries are **Burkina-Faso, Côte d'Ivoire, Mali, Senegal and Togo**[215] and are shaded in blue in Figure 35. The WAEMU countries shaded in yellow (**Burundi, Madagascar, Mozambique** and **Rwanda**) have adopted a competition law framework but do not have a properly functioning competition law. Generally speaking, funding and resourcing of the competition authorities is an issue across Sub-Saharan Africa, and the effectiveness of competition policy enforcement variable (see Figure 45). Even so, in those countries where competition law has been adopted, a number of recent cases involving the telecoms sector (see Figure 46), show that where competition law is available, it is capable of addressing issues identified. This should lead to a better understanding that *ex ante* regulation may not be needed in all cases, where competition law exists. Regulatory forbearance for a level playing field is a cornerstone for the development of a digital economy.

213. See Rachel Alemu, *Regulation of Competition in the Liberalised Telecommunications Sector in Sub- Saharan Africa: Uganda's Experience*, http://www.compcom.co.za/wp-content/uploads/2014/09/south-africa-conference-on-competition-law.pdf
214. As seen above, regulation of telecommunications is a requirement under WTO GATS rules and 82 countries have committed to the regulatory principles in the so-called "Reference Paper". There is no equivalent commitment to adopt a competition law framework.
215. **Angola, Guinea Bissau, Niger** are WAEMU countries without national competition laws.

Feature 2: Economic regulation addresses market failures and the regulators are clear about reasons to regulate and impact of regulation

Appendix 2 provides guidance on the system of SMP regulation, based on EU precedent, including flowcharts of two worked examples.

It appears that across Sub-Saharan Africa regulation is too often imposed in the absence of a clear understanding of the market dynamics. The effects that this has, particularly when regulation is imposed at the retail level, without a proper understanding of the competitive forces at play are exemplified in Figure 12.

There are countries where SMP or regulation based on the market power of the entity to be regulated is enshrined in the legislative and operational framework. These include South Africa, the country with the most comprehensive competition policy enforcement in the region; Burkina-Faso, a WAEMU country; and Nigeria and Uganda, the latter two of which have no generally applicable competition law, but the regulator has competition law powers in the sector. The dividing line between *ex post* competition law and *ex ante* regulation does not seem very clear. This is of special concern to the mobile industry, especially in spectrum policy and spectrum assignment, as more particularly detailed.

Feature 3: Ideally, competition law powers should be exercised by the competition authority

Policymakers considering a model where the regulator applies competition law to the sector it regulates should be aware of the potential for divergent application of the rules relative to the rest of the economy, and of the risk that resources may be diverted from funding the competition authority (with its remit across the economy), towards funding a regulator with jurisdiction limited to the sector. This could limit the gains of proper enforcement of the competition rules for the economy as a whole.

Policymakers considering changes to the system of competition policy overall, or the adoption of a new competition policy, may also consider a model where sectoral regulators could be integrated within competition authorities. This model has not yet been adopted in countries in Africa (it has been adopted in New Zealand, Estonia, The Netherlands and in Spain) but particularly where competition policy expertise may be scarce, the integrated model could achieve synergies that would harness the broad expertise of both regulation and competition specialists, enhancing the quality of decisions.

Figure 34: Existing models in competition policy — Africa

	Two agencies: Competition authority and separate sectoral regulator	Two agencies: Regulator with concurrent powers in competition law	Two agencies: Regulator with exclusive jurisdiction to apply to telcos competition law	One agency: Only the regulator, only regulation	One agency: Only the regulator, which has competition law and regulatory powers
EXAMPLES	14 countries with competition authorities	A number of WAEMU countries; Merger control in some countries	Dividing line not always clear between agencies' jurisdiction	Countries without competition law	Nigeria Uganda
POSITIVES	Ensures that competition law is applied equally to all sectors of the economy	Ensures that competition law should be applied with sector knowledge, but competition authority retains ability to consider issues too	Ensures that competition law should be applied with sector knowledge. No safeguard of competition authority's involvement.	Convenience. Country complies with WTO Reference Paper	Gives the regulator formidable powers
NEGATIVES	Need for the agencies to understand their roles and to cooperate	Risk of confusion about the jurisdiction of the agencies. Regulators tend to apply regulation more than competition law. The competition authority defers.	Risk of over-reliance on regulation of the sector. Risk that regulator applies regulatory categories when acting in competition law.	Especially with convergence in the digital economy, only telcos are subject to scrutiny. Non-level playing field.	Only the telcos are subject to two layers of scrutiny: competition law and regulation. Non-level playing field x2

Feature 4: The competition authority and the regulator understand the interplay between their respective jurisdictions and work together

The need for coordination between the competition authority and the telecoms regulator seems to be understood in Sub-Saharan Africa, where the two agencies have formal agreements (MoUs) to coordinate and decide on their respective jurisdiction in four countries out of the 14. In **Zambia** there is a more formal system of representation by the competition authority on the board of all regulators (and the regulators must consult with the competition authority when enacting measures in competition policy).

The need for proper coordination is at its most acute in the case of merger control for concentrations amongst the mobile operators. A number of case studies from South Africa to Tanzania and Nigeria show the potential costs of a lack of coordination in this field.

Feature 5: There is appropriate meaningful cooperation between competition authorities and regulators at the supra-national level too

Figure 35 provides an overview of the countries in Sub-Saharan Africa and the regional intergovernmental organisations to which these belong.[216] There are seven main regional organisations and three of them, namely COMESA, EAC and SADC have launched the Tripartite Free Trade Area initiative, which could potentially lead, if the Treaty is ratified, to a vast African free-trade area.

Sub-Saharan Africa is home to the two most ambitious experiments in centralised supra-national enforcement of the competition rules, by COMESA and WAEMU, and in a number of regional intergovernmental organisations, plans are afoot for closer supra-national adoption of competition frameworks. These experiments are useful. The experience gained so far shows the importance to ensure that the jurisdiction of the respective national and supra-national agencies is clearly thought through when setting out to create such frameworks. If this is done right, there is a great potential to align decisions of national agencies and to reduce transaction costs, and this would help with the creation of a predictable cross-border business environment.

If the rules are not very clear, however, centralised enforcement may lead to an undesirable creation of extra regulation and act as an impairment to competition.

216. The African Union, pan-African organisation, is considered below, at Figure 36.

Figure 35: Africa - membership of intergovernmental organisations and competition law[217]

COUNTRY	CEMAC†	COMESA	EAC†	ECOWAS†	SACU**	SADC**	WAEMU
Angola						✓	✓
Benin				✓			
Botswana					✓	✓	
Burkina-Faso				✓			
Burundi		✓	✓				✓
Cabo Verde				✓			
Cameroon	✓						
Central African Republic	✓						
Chad	✓						
Comoros		✓					
Congo (Brazzaville)	✓						
Congo (Democratic Republic of)		✓				✓	
Côte d'Ivoire				✓			✓
Djibouti		✓					
Equatorial Guinea	✓						
Eritrea		✓					
Ethiopia		✓					
Gabon	✓						
Gambia (The)				✓			
Ghana				✓			
Guinea				✓			
Guinea Bissau				✓			✓
Kenya		✓	✓				
Lesotho					✓	✓	
Liberia				✓			

GREEN denotes countries with a national competition law and a functional competition authority. BLUE denotes countries with a competition authority with limited mandate. YELLOW denotes countries with competition law but no functioning authority.
** **SACU** and **SADC** have established cooperation mechanisms on enforcement of competition laws but do not contain a supra-national competition law framework.
† **CEMAC**, **EAC** and **ECOWAS** have a competition law framework but no functioning competition authorities.

217. Note that **COMESA**, **EAC** and **SADC** have entered into a Treaty for the creation of the **Tripartite Free Trade Area**. When the Treaty is ratified, this trading block will cover about half of Africa, whether measured by membership or by economic or geographic size.

Figure 35 (continued): Africa - membership of intergovernmental organisations and competition law

COUNTRY	CEMAC†	COMESA	EAC†	ECOWAS†	SACU**	SADC**	WAEMU
Madagascar		✓				✓	
Malawi		✓				✓	
Mali				✓			✓
Mauritania							
Mauritius		✓				✓	
Mozambique						✓	
Namibia					✓	✓	
Niger				✓			
Nigeria[218]				✓			
Réunion							
Rwanda		✓	✓				
Sao Tomé and Principe							
Senegal				✓			✓
Seychelles		✓				✓	
Sierra Leone				✓			
Somalia							
South Africa					✓	✓	
Sudan		✓					
Swaziland		✓			✓	✓	
Tanzania			✓			✓	
Togo				✓			✓
Uganda		✓	✓				
Western Sahara							
Zambia			✓			✓	
Zimbabwe			✓			✓	

GREEN denotes countries with a national competition law and a functional competition authority. **BLUE** denotes countries with a competition authority with limited mandate. **YELLOW** denotes countries with competition law but no functioning authority.
** **SACU** and **SADC** have established cooperation mechanisms on enforcement of competition laws but do not contain a supra-national competition law framework.
† **CEMAC**, **EAC** and **ECOWAS** have a competition law framework but no functioning competition authorities.

218. Nigeria is periodically rumoured to be introducing a generally applicable competition law. In the meantime, the Communication Commission has powers to tackle anticompetitive practices, limited to the communications sector as defined. See for example: https://www.addleshawgoddard.com/globalassets/insights/africa-2016/could-nigeria-have-a-competition-law-regime-within-the-year.pdf

Intergovernmental organisations tend to operate in silos; there is no sustained coordination between the competition agenda and the telecoms regulatory agenda in the main intergovernmental organisations surveyed. However, cooperation among regulators and, separately, among the competition authorities is well established in Sub-Saharan Africa where, in the absence of formal jurisdictional bright lines, the agencies have entered into MoUs, nationally and internationally.

Regarding supra-national initiatives in the telecoms sector and in competition law:

- Specific initiatives are aimed at the telecommunications sector within the overarching framework of the African Union (see Figure 36). The East African Community (EAC) created a regional ICT organisation, EACO, which brings together regulators, telecoms operators, postal service providers and broadcasters, as well as academics and other stakeholders. This could be a good forum for extended participation by the competition authorities too. The EAC has also been active in seeking to promote infrastructure investment. It is also seeking to implement a framework for roaming charges. The Economic Community of West African States (ECOWAS) has been amongst the most active in the telecoms field, leading to initiatives for the development of broadband infrastructure and submarine cables. ECOWAS is also currently considering a supra-national initiative relating to roaming charges. The Common Market for Eastern and Southern Africa (COMESA) had ambitious plans to create a centralised telecoms regulatory body and a limited liability company to finance infrastructure projects (COMTEL) which, in the intention of the creators would have spearheaded telecoms projects of common interest across the COMESA countries. Underscoring the difficulties of international cooperation, these early plans appear to have been shelved.
- The regulators of the COMESA countries, the SADC countries and the ECOWAS countries are also formally organised into groups, ARICEA, CRASA and WATRA, respectively.
- Sub-Saharan Africa is home to two remarkable experiments in centralised enforcement of competition law, namely COMESA's and WAEMU's centralised enforcement. Both experiments have shortcomings but, after the initial teething issues have been addressed, COMESA seems to be on its way to becoming a fully-fledged supra-national competition authority, not only for merger control. The coordination with the competition authorities of the Member States within the COMESA countries has been partly tackled by MoUs between the COMESA authority and the competition authorities in the Member States.[219]

219. The competition authorities of nine of the members of SADC have also entered into MoUs, whilst there are also a number of bilateral agreements between competition authorities in different countries. The African Competition Forum which acts as a centre for repository and dissemination of best practice in competition law.

Regulation

A regulatory regime that supports change and innovation is a precondition for a level playing field in the digital economy. A system of regulation based on regulatory forbearance when competition law is sufficient to deal with the issues identified, and on the finding of a market failure as the basis for regulation, reduces the risks of over-regulation. In a number of countries across Sub-Saharan Africa there seems to be some confusion as to the respective roles of *ex ante* sectoral regulation based on market assessment and a finding of a market failure, and the enforcement of competition law. Coordination at the international level helps to ensure that operators that work across Sub-Saharan African countries are faced with similar substantive rules, and can be heard more easily by all regulators involved in any one issue.

National laws

It is difficult to find reliable sources to assess how many countries in Sub-Saharan Africa have adopted a regulatory approach based on an assessment of market power and remedies to be imposed based on a finding of market failure.

It appears that **Burkina-Faso**, **Nigeria, South Africa**[220] and **Uganda**[221] have a formal system based on SMP regulation. **Nigeria**,[222] and **Uganda** are countries where there is no generally applicable competition law, but there are sector-specific competition statutes and regulations.[223] The regulator can also apply competition law to the communications sector, and only to the sector. In countries when this happens, telecommunications operators, already subject to sector-specific regulation, experience an extra layer of scrutiny, to which other sectors (and their competitors in the digital sphere) are immune because there is no generally applicable competition law. The lack of generally applicable competition law has serious implications for the economic development of a country, as seen above (see Figure 7).

In **Ghana**, the regulator, NCA, has commissioned a market study and it is expected that the adoption of an SMP system will be supported by the findings in this report.

In countries where there is no generally applicable competition law and no formal system of SMP regulation, there is a risk that regulation will be applied without proper regard to the impact it

220. One of the far-reaching implications of the Electronic Communications Act 2005 ECA is the introduction of SMP as a basis on which to impose regulatory obligations ICASA may impose pro-competitive conditions on any operator that has SMP
221. http://www.ucc.co.ug/data/pubs/115/Market-Definition.html
222. Antitrust/competition bills are presently been considered by the National Assembly in Nigeria. In addition to the telecoms regulator's 'Competition Practices Regulation 2007', a Bill is currently being considered in parliament for the establishment of a Federal Competition Commission in Nigeria, as well as a separate bill to repeal the Act which sets up the Consumer Protection Council and give the Council the powers also to enforce competition within Nigeria. It is expected that the two Bills will be merged into one.
223. In Nigeria, the Competition Practice Regulations are applicable only in the telecoms sector. See Chukwuyere E. Izuogu, *Regulating Anti-Competitive Practices in Nigeria's Communications Sector, 2016, forthcoming publication (expected last quarter of 2016)*. The NCC enforces competition law in the sector. In Uganda, "In the pursuit and achievement of the functions highlighted, the UCC conducts and implements regulatory interventions in the retail and wholesale markets, defines and assesses the markets it regulates, and investigates abuses therein. In addition, the UCC evaluates mergers, acquisitions and license transfers for anti-competitive practices." (see http://www.ucc.co.ug/data/pubs/115/Market-Definition.html)

has on the competitive landscape, although in some countries, such as in **Angola** the regulator (INACOM)[224] must take into account the general principle of fair competition as well as the avoidance of concentration in the telecommunications market before making a decision.

One interesting observation can be made regarding the countries that belong to the West African Economic and Monetary Union (WAEMU). The adoption of a centralised WAEMU competition law framework has meant that in WAEMU states, pre-existing competition laws at the national level have been demoted, in favour of a centralised application by the WAEMU Commission, which has not been very active. Alongside the WAEMU centralised system, it seems that the countries have adopted **a sector-specific system of 'competition regulation', without a clear demarcation line between competition law and SMP regulation**. It appears that the differences between applicable competition law (which applies *ex post* to anticompetitive practice) and regulation based on the market power of the operators subject to it are not very well understood (see Figure 1 for a high level review of key differences). In a sense, this provides an example of a system where the national regulators have some powers of competition enforcement alongside the WAEMU competition authority whereas the existing competition authorities do not. This feature may explain why there could be encroachment of the national regulatory function, to be able to act in preference to a supra-national competition authority which does not appear to have been very active.

So for example in **Senegal** sectoral anticompetitive practices are explicitly dealt with in the Code of Telecommunication.[225] In **Togo**, the Law on Telecommunications refers to anticompetitive practices. Similarly in **Benin**, the Telecommunications Regulation also includes provisions on anticompetitive practices, and enforcement takes place before the competent courts. The same approach is adopted in **Niger**: anticompetitive practices are referred to in the Telecommunications Regulation; however, they are enforced before the competent courts. In the **Côte d'Ivoire**, on the other hand, the Law on Telecommunications does not specifically govern anticompetitive practices and its telecommunications agency does not have competence on antitrust issues.[226] In **Mali**, a similar approach is followed: anticompetitive practices in specific sectors fall under the scope of the general competition authority (or tribunal).

The potential confusion between economics regulation and competition law (explained briefly above, see Figure 13) appears to be present in other countries in Sub-Saharan Africa. In **Kenya**, an amendment to the Kenya Information and Communications Act (KICA), 1998, introduced in 2015, now provides that declarations on 'dominance' made by the Communications Authority of Kenya for regulatory purposes must involve consultations with the Competition Authority of Kenya and that due process must be followed before any such declarations are made. The differences between the two approaches have been highlighted above: the competition authority's role is to consider a market in a narrow sense, usually in response to a complaint or because it investigates a merger. The determination for regulatory purposes has a different purpose, mainly identifying market failures in an *ex ante* context. The two agencies could theoretically cooperate but the situation in Kenya is further complicated because dominance for the purposes of regulation

224. *Getting the Deal Through,* Telecoms and Media https://gettingthedealthrough.com/area/39/jurisdiction/151/telecoms-media-angola/
225. "The Regulation Agency of Telecommunications and Postal Services holds the competence to deal with anticompetitive practices in the telecommunications sector through the derogation of the Law of 1994 on prices, competition and economic litigation." See M. Bakhoum / J. Molestina: Institutional Coherence And Effectivity Of A Regional Competition Policy: The Case Of The West African Economic And Monetary Union (Waemu), Max Planck Institute for Intellectual Property and Competition Law, Research Paper No. 11-17, November 2011, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1965508 , page 9
226. Ibid., pages 9 and 10

and dominance for the purpose of competition law are considered taking into account different criteria.[227] This approach could conceivably lead to difficulty with enforcement. For a recent competition law case decided in Kenya, see Figure 46.

Intergovernmental organisations

The countries listed in Figure 35, together with a number of countries in North Africa, are members of the African Union, an ambitious pan-African organisation comprising both political and administrative bodies (see Figure 36).

In terms of competition policy, however, the main organisations active in Africa are the so-called Regional Economic Communities (or RECs). In Figure 35, the countries that makeup each of the main RECs are listed (and the countries that belong to more than one organisation). Overall, seven main intergovernmental organisations with a remit on trade and economic policy are active in Sub-Saharan Africa, and in some cases countries belong to several organisations. Whilst this is understandable in light of the differences among countries and the sheer vastness of the sub-continent, there may be a risk of fragmentation and dispersion of resources. One answer to the concerns with the proliferation of intergovernmental organisations is the so-called Tripartite Free Trade Area, which was officially launched in June 2015.[228] When ratified, the Treaty will cover three regional economic communities, COMESA, EAC and SADC, for a total of 26 countries and about "half of Africa, in terms of membership, economic and geographic size." Its aim is to achieve a single policy framework in specific regulatory areas (rules of origins; standards [health and technical] customs cooperation, trade facilitation, trade remedies, non-tariff barriers and dispute settlement) as well as general principles and rules on trade.

The African Union and each of the seven intergovernmental organisations will be considered below, putting the focus on their activities in the telecoms sector.

227. For the purposes of regulation, three criteria are considered: *"(a) the market share of the telecommunications service provider being at least **fifty percentum of the relevant gross market segment**; (b) significant market power enjoyed by the telecommunications service provider; and (c) any other consideration the Authority may determine.* The criteria to be considered by the competition authority for the determination of dominance suggest that the dominant firm must have at least 50% market or share of supply share in the relevant market. See the article in http://blog.cipit.org/2016/01/26/recent-amendments-on-dominant-position-blur-line-between-competition-law-and-kenya-information-and-communications-act/
228. http://www.comesa.int/zambia-signs-tripartite-free-trade-area-agreement/

Figure 36: The AU, African Union

Members: The AU comprises all the countries listed in Figure 35 and a number of countries in North Africa. The notable exception is Morocco, which opted to leave the predecessor organisation over the recognition of the Sahrawi Arab Democratic Republic (Western Sahara) as a Member State (in 2016 Morocco announced its intention to re-join).[229]

History:[230] The AU was launched in 2002, replacing the previous Organization of African Unity (OAU). On 9 July 2011, South Sudan became the 54th African Union (AU) member. Overall, the African Union has 12 main goals, including Economic Affairs, Trade and Industry and Infrastructure (and energy). It is made up of both political and administrative bodies. The Assembly, made up of Heads of State and Governments, is the highest decision-making body. The Pan African Parliament is elected by the Parliaments of the member states. Administratively, the AU Commission is the secretariat of the political institutions, headquartered in Addis Ababa, Ethiopia.

Cooperation in the telecoms sector: The main[231] project by the African Union in this area is the Programme for Infrastructure Development in Africa (PIDA). This was created by a the African Union Commission, in partnership with the United Nations Economic Commission for Africa, African Development Bank and the NEPAD Planning and Coordinating Agency. PIDA is based on regional projects and programmes, and aims to help address the infrastructure deficit in Africa.

In the ICT sector, the aim of the ICT PIDA programme is to establish an enabling environment for completing the land fibre-optic infrastructure and installing internet exchange points in countries without them. The intention is that, through PIDA, each country will be connected to two different submarine cables to take advantage of the expanded capacity. Three programmes have been identified, all continental in scope:

- ICT Enabling Environment: to improve the environment for the private sector to invest in high-speed broadband infrastructure;
- ICT Terrestrial (for Connectivity): with two main components, namely to secure each country connection by at least two broadband infrastructures and to ensure access to submarine cable to all landlocked countries; and
- Internet Exchange Point Programme: to provide Africa with adequate internet node exchange to maximise internal traffic.

During the 2nd Conference of African Ministers in charge of Communication and Information Technologies (CITMC-2), Member States of the African Union (AU) adopted the Reference Framework for Harmonization of the telecommunications and ICT Policies and Regulation in Africa (Cairo, 2008).

Harmonisation of policies and regulations in the ICT sector is the focus of the ITU/European Commission so-called HIPSSA (Harmonisation of ICT Policies in Sub-Saharan Africa) programme.[232]

229. See: http://www.bbc.co.uk/news/world-africa-36822240
230. See: http://www.au.int/en/history/oau-and-au
231. See: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/PIDA%20note%20English%20for%20web%200208.pdf
232. The programme has been instrumental in helping the RECs in Africa to develop their own guidelines, listed in Figures 36 – 42. See http://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Pages/default.aspx

Figure 37: CEMAC, the Economic and Monetary Community of Central Africa

Members: CEMAC comprises six member states: **Cameroon**, Central African Republic, Chad, Congo (Brazzaville); Equatorial Guinea; Gabon. Of these, only Cameroon (in bold) has enacted a domestic competition law.

History: CEMAC is the product of two different unions: the Economic Union of Central Africa and the Monetary Union of Central Africa. It was set up in 1994, against the backdrop of successive African economic crises. Its principal objective is to establish a closer union between its member states, including the creation of an internal market and the abolition of obstacles to trade.

Cooperation in the telecoms sector: Security issues and slow economic growth in Central Africa have impaired the ability of CEMAC to deliver on projects of common interest, although growth was recorded in 2014.[233]

233. International Monetary Fund, IMF country report 15/222, CEMAC, August 2015 https://www.imf.org/external/pubs/ft/scr/2015/cr15222.pdf

Figure 38: COMESA, Common Market for Eastern and Southern Africa (COMESA)

Members: In SSA: Burundi, Comoros, Congo (Democratic Republic of), Djibuti, Eritrea, **Ethiopia**, **Kenya**, Madagascar, **Malawi**, Mauritius, Rwanda, **Seychelles**, Sudan, **Swaziland**, Uganda, **Zambia, Zimbabwe** (countries in bold have domestic competition laws). COMESA also comprises Egypt and Lybia.

History: The treaty establishing the Common Market for Eastern and Southern Africa (COMESA) was signed on 5 November 1993 in Uganda and was ratified a year later in Malawi. Within the COMESA framework, Member States are tasked with the responsibility to provide the conditions for economic integration, which is understood in a "broader (European) sense as extending from creating a common legislative framework to the mutual recognition of standards and qualifications."[234] Competition law is an important aspect in this framework and COMESA has created the most wide-ranging multilateral system of competition law and enforcement among the countries surveyed.

COMESA covers other regional organisations, including the East African Community (EAC) and the Southern African Development Community (SADC). COMESA has very good working relations, formally and informally, with all the regional organisations on the continent. A Memorandum of Understanding was signed with the EAC. The EAC has agreed to adopt and implement the COMESA trade liberalisation programme.

Cooperation in the telecoms sector: COMESA was instrumental in setting up the forum for cooperation amongst regulators known as ARICEA. It created a Telecommunications Connectivity and Harmonisation programme with the objective to achieve telecoms interconnectivity and development. COMESA "initiated the establishment of a private, limited liability company, COMESA Telecommunications Company, COMTEL, set-up to finance infrastructure projects. COMTEL's main aim is to "build an asynchronous transmission mode (ATM) system that will link national systems together," while also recognising that "there is a need for all countries in COMESA to continue to develop and improve national infrastructures."[235] In telecoms, "The establishment of COMTEL and the harmonisation of telecoms regulatory policies are priority activities of COMESA."[236] However:

- COMTEL has not been able to raise the necessary funds to support its aim and the project seems to be effectively dead,[237] replaced by bilateral agreements for fibre link development; and
- concerning the harmonisation of telecoms regulatory policies, early plans to set up a Telecoms Regulatory Body appear to have been shelved.

234. Dubbah, page 416 abd following
235. http://www.comesa.int/comesa-strategy/
236. Ibid.
237. Balancing Act, *COMESA Chairman blasts Africa telecoms infrastructure investment*, 17 April 2009, http://www.balancingact-africa.com/news/en/issue-no-450/money/comesa-chairman-blas/en

Figure 39: EAC, East African Community

Members: Burundi, **Kenya**, Rwanda, **Tanzania** and Uganda. Kenya and Tanzania have a domestic competition law.

History: The Treaty for the Establishment of the East African Community (EAC) was signed in November 1999 and came into force in July 2000 and since then it has been revised on two occasions, once in 2006 and then again in 2007. In 2004, a Protocol on the Establishment of the East African Community Customs Union (the 'Protocol') was signed This builds upon the provisions of the treaty.[238]

Cooperation in the telecoms sector: is mandated by the treaty.[239] The EAC has had a pivotal role in Analog-to-Digital Broadcast Migration, resulting in all countries switching by January 2015. The EAC Secretariat worked with the International Telecommunication Union and the European Union to support a programme for harmonising ADBM among EAC Partner States. On roaming, in February 2015, the EAC Summit directed the Council to expedite implementation of the Framework for Harmonised EAC Roaming Charges for mobile communication services by July 2015. The Heads of States also directed the removal of surcharges for international telecommunications traffic originating and terminating within the East African Community by July 2015.

The EAC website[240] lists the following projects for harmonisation of policies and frameworks:

- Harmonization of ICT policies, laws and regulations: a Regional Framework for Harmonization of National ICT Policies and a Study on the EAC Communications Regime provide recommendations on harmonizing the ICT policies and regulations of Member States.
- East African Communications Organisation (EACO): regional ICT organization under a public private partnership arrangement that brings together national ICT regulators, telecommunications, broadcasting, and postal operators/service providers, academia and other associated stakeholders.
- EAC Legal Framework for Cyber Laws: Two frameworks have been developed by the EAC in collaboration with UNCTAD. These are EAC Framework for cyberlaws Phase 1 (Framework 1, addressing electronic transactions; electronic signatures authentications; cybercrime; consumer protection; and data protection and privacy) and cyberlaws Phase II (Framework II, addressing intellectual property; competition; e-taxation; and information security).

238. Maher M. Dabbah, quoted, page 245
239. Art 98 and 99
240. http://www.eac.int/infrastructure/index.php?option=com_content&view=article&id=128&Itemid=141

Figure 39: EAC, East African Community

Two ongoing infrastructure projects also have a component of harmonisation of regulatory and policy frameworks.

- East African Community Broadband ICT Infrastructure Network (EAC-BIN). A study on the detailed pre-investment analysis and technical design for this network and was commissioned in May 2009, and the final report finalised by the end of February 2010. The final report recommended a protocol on ICT networks was pre-requisite for the implementation of cross-border ICT networks.
- In 2012, The Council adopted the EAC Protocol on ICT Networks, which seeks to promote, among others, the "harmonization of ICT policies, laws and regulations".

Figure 40: ECOWAS, Economic Community of West African States (French: CEDEAO)[241]

Members: Benin, **Burkina-Faso**, Cabo Verde, Côte d'Ivoire, **Gambia (The)**, Ghana, Guinea, **Guinea-Bissau**, Liberia, **Mali,** Niger, Nigeria, **Senegal**, Sierra Leone and Togo. (Countries in bold have adopted national competition laws).

History: Founded on 28 May 1975, with the signing of the Treaty of Lagos, ECOWAS' mission is to promote economic integration across the region.

Cooperation in the telecoms sector:[242] ECOWAS was instrumental in setting up the forum for cooperation amongst regulators known as WATRA. WATRA has in turn been instrumental in making calls for supra-national regulation of roaming charges and ECOWAS is now considering this issue.[243]

Telecommunications priorities are: (i) the development of a reliable and modern regional telecoms broadband infrastructure (including the INTELCOM II programme); (ii) alternative broadband infrastructures and submarine cables; and (iii) the establishment of single liberalised telecoms market.

So far 11 coastal Member States have been connected to submarine cables with at least one new landing station. The three landlocked countries (**Burkina Faso**, **Mali** and **Niger**) have now at least two access routes to the submarine cables.

The Ministers also agreed to work with telecommunications operators in the region to implement a proposal for a 50% region-wide reduction in the cost of telecommunications services on the ECOWAS Day (May 28th) for the benefit of the citizens and for regional integration purpose.

241. French: Communauté économique des États de l'Afrique de l'Ouest, CEDEAO
242. See: http://ecoslate.github.io/ecowas-sectors/telecommunications/index.htm
243. See: http://www.balancingact-africa.com/news/telecoms_en/18674/ecowas-and-watra-see-regional-roaming-as-next-big-business-for-gsm-operators

Figure 41: SADC,[244] Southern Africa Development Committee

Members: Angola, **Botswana**, the **Democratic Republic of Congo**, Lesotho, Madagascar, **Malawi**, **Mauritius**, Mozambique, **Namibia**, **Seychelles**, **South Africa**, **Swaziland**, **Tanzania**, **Zambia** and **Zimbabwe**. (Countries in bold have adopted national competition laws).

History: The Southern African Development Coordinating Committee (SADCC) was established in 1980 but changed its name to the Southern Africa Development Committee (SADC) in 1992.

Cooperation in the telecoms sector: SADC was instrumental in setting up the forum for cooperation among regulators now known as CRASA, the first such forum, which was the blueprint for both ARICEA (set up by COMESA) and WATRA (the ECOWAS equivalent forum). SADC has been moving towards regional integration through the development and implementation of projects in telecommunications policy, legislative and regulatory framework harmonisation, internet and broadband infrastructure development, harmonisation of telecommunications infrastructure, and joint programme implementation, including:

e-SADC Strategy Framework: Launched in 2010, include, among others, the setting up of national and regional internet exchange points, harmonisation of Cyber Security Regulatory Frameworks and a regional project to improve interconnection;

SADC Protocol on Transport, Communications and Meteorology: Signed by SADC governments in August 1996, the SADC Protocol on Transport, Communication and Meteorology is the cornerstone of telecommunications development in the region. It calls for the setting up of autonomous regulators, and the creation of a regional association of regulators. This resulted in the creation of the regional regulatory body — the Telecommunications Regulatory Association of Southern Africa (TRASA) in late 1997, now the Communications Regulatory Authority of Southern Africa (CRASA).

244. Maxwell Chanakira, *Towards regional economic integration in telecommunications: the case of SADC* October 2011, http://www.dounia-risri.net/IMG/pdf/Dounia4_pp79-95.pdf

Figure 42: SACU,[245] Southern African Customs Union

Members: Botswana, Lesotho, Namibia, South Africa and Swaziland

History: The Southern African Customs Union (SACU) is the world's oldest customs union. It was established in 1889 as a Customs Union Convention between the British Colony of Cape of Good Hope and the Orange Free State Boer Republic. Together these countries form a single customs territory, which has a single tariff applicable throughout it and no customs duties between the member states. The current SACU Agreement was signed in 2002 and several independent bodies — including an independent administrative secretariat to oversee SACU — so as to ensure that member states participate equally.

Cooperation in the telecoms sector: SACU's remit does not include in-depth cooperation in the telecoms sector.

Figure 43: WAEMU, West African Economic and Monetary Union

Members: Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo. (Countries in bold have adopted national competition laws but in the light of the centralised system of competition law enforcement in WAEMU, these have a limited mandate).

History: The West African Economic and Monetary Union (WAEMU) was established in 1994 as a union between eight African countries.. It has general economic objectives, which include the elimination of all tariff barriers on intra-Community trade; this has been achieved through a series of reforms started in 1996.

Cooperation in the telecoms sector: although one of the objectives of WAEMU is to coordinate national policies and, possibly lead to common policies in infrastructure and, specifically, in telecommunications, the Union does not appear to have been active in sectoral regulation of telecommunications.

245. SACU has a fairly developed institutional structure under the 2002 Agreement with a Commission, Council of Ministers, a Tribunal and a Trade and Industry Liaison Committee. The Commission is made up of senior officials from the ministries of finance and trade from each member state. It is responsible for the implementation of the 2002 Agreement and facilitates the implementation of the Council's decisions. The Council of Ministers consists of ministers of finance and trade from each member state and it is the supreme decision-making authority in SACU matters. The Tribunal is intended to be ad hoc and reports directly to the Council. Its aim is to adjudicate on any issue concerning the application of the 2002 Agreement or any dispute arising under it, but only at the request of the Council. See Maher M. Dabbah, quoted, page 422

Competition Law

One of the important elements of a regulatory regime that supports change is that regulation should only be introduced when competition law is not sufficient to deal with the issues. For this to be a reality, it is important not only that there should be a competition authority properly functioning in a country but also that the relative jurisdiction of the competition authority and the regulator should be clear or, if not, that the authorities and the regulators should be able to cooperate. As with regulators, competition authorities should be able to exchange best practice across boundaries and to cooperate in cross-border investigations. Although recognition of the important role of competition law is increasing, only 14 out of 50 countries surveyed have properly functioning competition laws. COMESA and WAEMU have adopted systems of supra-national enforcement of the competition laws.

National laws

In Figure 44, granular information is provided about the competition laws that have been adopted in Africa and those African jurisdictions where there may be a competition law framework but not yet an operational authority.

Figure 44: Competition laws in Africa

	Year of enactment of current competition law (*)	Year of specific act/law creating the authority	Year when the authority started operations
Botswana	2009	2009	2011
Burkina Faso	1994, 2001	NA	1998
Burundi	2010	Law pending to be passed	Not functional yet
Cameroon	1998	1998	2008
Cote d'Ivoire[246]	1991	2003	Functional but with limited mandate
Ethiopia	2003 (initial), 2014 (current)	2010	2012
Gambia, The	2007	-	2009
Kenya	2010	2010	2011 (In its current form)
Malawi	1998	1998	2012
Mauritius	2007	2007	2009
Madagascar	2005	2014	Not functional yet
Mali	1992	1998	1999
Mozambique	2013	2014	Not functional yet
Namibia	2003	2003	2009
Rwanda	2012	2013	Not functional yet
Senegal	1994	1994	1996
Seychelles	2009	2009	2010
Swaziland	2008	2008 (Competition Law)	2008
South Africa	1998	1998	1999
Tanzania	2003	2003	2004
Togo	1999	1999	2006
Zambia	1994[2] and 2010[3]	1994[4] and 2010	1997

Source: WBG Antitrust Enforcement Database, Trade and Competition Unit – shading by the GSMA

246. The national Competition Commission in Côte d'Ivoire is an interesting example in this regard. Created in 1992 with the Law on Competition, the commission was operative until 2002. It was equipped with sufficient means and issued not less than 30 opinions. Due to a "socio-political crisis" its activity was "decelerated". See M. Bakhoum and J Molestinna, quoted, page 8
[2] Competition and Fair Trading Act
[3] Competition and Consumer Protection Act
[4] Competition and Fair Trading Act

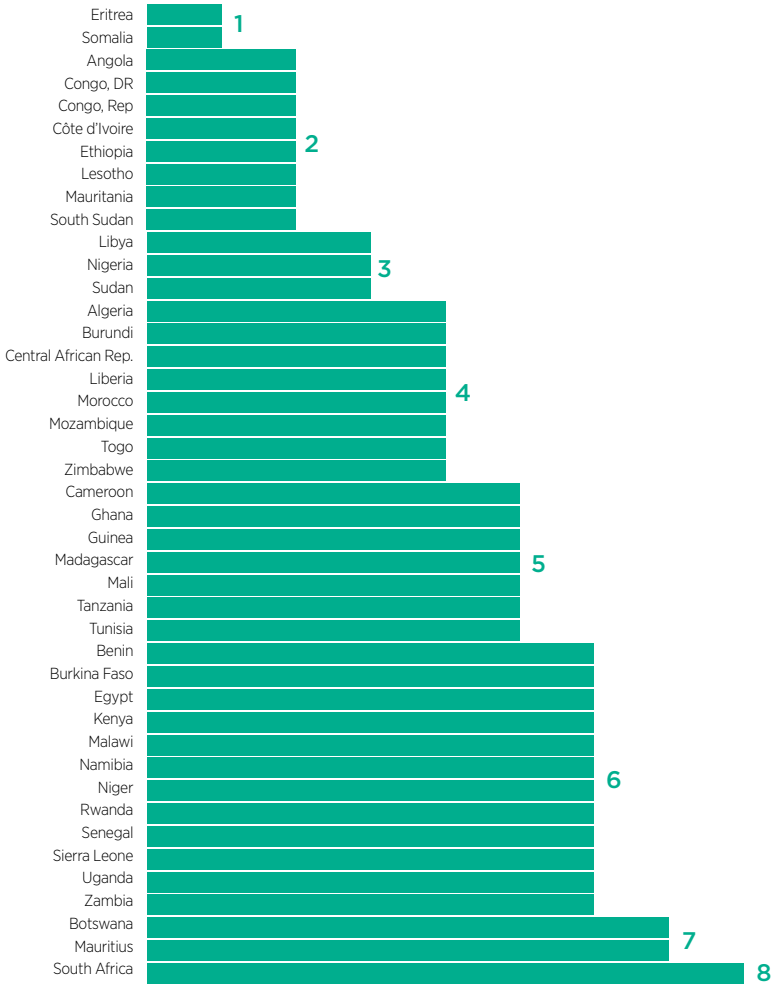
The GSMA has not independently verified whether in those countries where competition law has been adopted, the authority is sufficiently independent and has access to sufficient resources to perform its duties. The statistics provided in the WBG African Competition Policy Report,[247] based on answers by the competition authorities themselves, suggest that more could be done, but that the situation is improving across Africa.[248] In particular:

- In countries that have enacted competition laws, competition authorities have been operating for eight years, on average.
- On average, they employ 21 technical staff who work on competition, or approximately 32% of total staff (as compared to 68% in a sample of 35 established competition agencies around the world).
- Nine authorities have fewer than 10 technical staff handling competition matters.
- The average annual budget of these agencies has increased by 39 percent in four years, but resources remain limited. Excluding South Africa, the average annual budget is US$1.4 million.
- Seven authorities operate with an annual budget below US$0.5 million. The average annual budget allocation per technical staff in African authorities is one-third of that in a sample of 33 established competition authorities around the world.
- Despite these constraints, competition authorities complete, on average, 41 cases on merger control, 1.9 cases on abuse of dominance, 1.4 cases on horizontal agreements, 1.4 sector inquiries, and 6 advisory opinions on laws or regulations each year (but there is significant variation across authorities).

The above difficulties are shown in Figure 45, also provided in the WBG African Competition Policy Report.[249] By applying the Bertelsmann Stiftung's Transformation Index (BTI), [250] which is derived on the basis of expert assessments, the World Bank was able to determine that, on a scale of 1 to 10, only three countries have ratings above 6, namely **Botswana**, **Mauritius** and **South Africa**. Some of the countries listed do not have generally applicable competition law, so that the scoring is based on their frameworks across sectoral regulation, public procurement and competitive neutrality.

247. WBG African Competition Policy Report, quoted, page vii.
248. WBG African Competition Policy Report, Chapter B, *Towards a more effective competition policy framework*, pages 9-36
249. figure A-5, page 4
250. BTI 2016 *Codebook for Country Assessments,* http://www.bti-project.org/fileadmin/files/ BTI/Downloads/Zusaetzliche_Downloads/Codebook_BTI_2016.pdf (quoted in WBG Report, referred to as **"2016a"**, page 4, accessed April 8, 2016).

Figure 45: Competition policy enforcement in Africa by country: measured on a scale 1 to 10, where 10 denotes the existence of comprehensive competition laws strictly enforced.



Source: WBG African Competition Policy Report, Figure 5-A,
(based on Bertelsmann Stiftung's Transformation Index)

Even with these limitations, it is clear that competition law has the potential to address the issues that arise. Because competition law can do so in a less distortionary way than regulation, arguably policymakers should consider directing resources towards enforcement of the competition rules. Because competition law applies across sectors, putting resources into competition law enforcement is likely to have important beneficial effects across the economy, as seen above (see Figure 5). Finally, because competition law applies across sectors, it can be used to address issues in the digital economy. As explained in the Competition Policy Handbook, the earlier cases against Microsoft were brought under the competition rules (see Competition Policy Handbook, Figures 50 and 51), and the ongoing cases against Google and Apple, in Europe, Asia and elsewhere, for example, are all competition law cases.

The cases in Figure 46 are also taken from the WBG African Competition Policy Report Report, Table C3-2[251]

The GSMA does not express any views as to whether the outcome of the cases is justified. In order to reach a view, one would need to know the competitive situation in each market. The purpose of providing this table is to highlight that competition law truly has the potential to address issues of abuse of market power and anticompetitive agreements, meaning that more reliance should be put on a proper application of the rules of competition law. The cases identified are all in the telecommunications sector.

251. This table also includes details of a competition law case against the mobile operators in Egypt, outside the scope of this booklet.

Figure 46: Recent competition law cases in the telecoms sector in Sub-Saharan Africa

Country	Recent antitrust cases in the telecoms sector	Area of competition law
	Cases leading to sanctions	
Kenya 2013/14 [252]	Following a complaint from Airtel, alleging foreclosure from the 85,000 agents that Safaricom deals with for its mobile money transfer service, Safaricom agreed to: • grant access to their mobile money transfer network; • not to levy extra charges on competitors to use its network; • terminate exclusive agreements with agents. For the avoidance of doubt, the Competition Authority of Kenya did not issue a formal decision that Safaricom had abused its dominance or had committed any other infraction of the competition rules.	Abuse of dominance: no finding of abuse
Mauritius 2012 [253]	Mauritius Telecoms was found to have a monopoly in broadband, a 37 percent share in the market for the retail supply of pay-TV, and a 3 percent share in the market for the retail supply of premium content in pay-TV. Bundling broadband internet, international calling, and pay-TV products was found to be an instance of leveraging of market power, to gain share in the pay-TV market.	Abuse of dominance
Malawi 2013-2015 [254]	In May 2013, Airtel applied to the Commission for authorisation of its exclusive distribution arrangement for recharge vouchers and other products. This was approved subject to amendments. Airtel appealed at the High Court and objected to changes to its standard distribution agreements which meant that Airtel distributors should not be obliged to employ exclusive Airtel agents only. According to Airtel, the Commission could not reasonably expect Airtel distributors to appoint non-exclusive salesmen. The court ruled against Airtel. It found that Airtel was, through the clause in question, attempting to regulate the business affairs and conduct of its distributors, which are independent businesses, by leveraging its dominant market power.	Anticompetitive agreements

252. For a summary of the various stages in this case and the way in which a 'settlement' was finally reached, see the article http://blog.cipit.org/2016/01/26/recent-amendments-on-dominant-position-blur-line-between-competition-law-and-kenya-information-and-communications-act/, quoted above.
253. See: http://www.ccm.mu/English/Documents/News_2012/19.12.12_2.pdf
254. http://www.lexology.com/library/detail.aspx?g=6304a81c-f8da-49d1-a591-d41ce343da46

Figure 46 (continued): Recent competition law cases in the telecoms sector in Sub-Saharan Africa

Country	Recent antitrust cases in the telecoms sector	Area of competition law
	Cases leading to sanctions	
South Africa 2012 [255]	During 2002 the South African VANS Association and other ISPs lodged a complaint alleging that Telkom had abused its dominance upstream to create an unfair advantage for its downstream retail division in the value-added network service (VANS) market. In 2004, the Commission referred the case to the Tribunal, having determined that Telkom had unlawfully sought to extend its monopoly rights by refusing to supply essential facilities (in the form of its fixed-line network) to independent VANS providers, inducing VANS providers' customers not to deal with them (by approaching them with claims of the illegality of the VANS model), charging their customers excessive prices for access services, and discriminating in favour of its own customers by giving them a discount on distance-related charges that it did not advance to customers of the independent VANS providers. After years of litigation, the Competition Tribunal imposed a penalty of R449 million on Telkom for abusing its dominance in the telecommunications market in 2012.	Abuse of dominance
South Africa 2013 [256]	Between 2005 and 2007, five separate complaints against Telkom were submitted by the Internet Service Providers' Association and three other ISPs. In its investigation, the CCSA found that Telkom had engaged in margin squeeze against ISPs by charging excessive prices for inputs; had refused to lease essential facilities; and had engaged in anticompetitive conditional selling of managed network services and internet access services by bundling these products with access services that were priced lower than the equivalent access services that end customers would purchase when considering the purchase of managed network services and internet access from other operators. Telkom and the CCSA agreed to settle the case and, as part of the settlement, Telkom admitted to contravention of the Competition Act in regard to margin squeeze and anticompetitive bundling and tying of products.	Abuse of dominance

255. http://www.mondaq.com/southafrica/x/200252/Antitrust+Competition/Competition+Breaking+News
256. https://www.scribd.com/document/147770310/Telkom-Media-Release-Final

Figure 46 (continued): Recent competition law cases in the telecoms sector in Sub-Saharan Africa

Country	Recent antitrust cases in the telecoms sector	Area of competition law
	On-going investigations	
Mauritius	The Competition Commission opened an investigation on the potentially exclusionary and exploitative pricing conduct of two mobile telephony operators, Emtel and Orange. The major concern is that on-net/off-net price discrimination could be anticompetitive. Mobile termination rates are not regulated in Mauritius.	Abuse of dominance
South Africa	Cell C lodged a complaint with the CCSA against Vodacom and MTN, alleging anticompetitive on-net/off-net price discrimination on voice calls. According to Cell C, the alleged conduct discourages consumers from switching to smaller networks by creating a so-called 'club-effect.' The ongoing investigation is being run in parallel with the review of mobile termination rates carried out by the Independent Communications Authority of South Africa upon the complaint of Cell C.	Abuse of dominance

Intergovernmental organisations

Africa is seeing the emergence of regional competition rules enforced by supra-national organisations that require economic players to use a pan-African approach to assessing risks and compliance to competition law. The emergence of a pan-African competition regime for COMESA; the 2006 EAC Competition Act; the signing of the South African Development Community (SADC) Declaration on Regional Cooperation in Competition and Consumer Policies in 2009; the entry into force of WAEMU competition enforcement in 2003; the CEMAC Community Competition Law of 1999; and the Economic Community of West African States' (ECOWAS) Community Competition Policy of 2008 and Competition Act of 2009 are indicative of the inclination toward the enforcement of regional competition law frameworks.

In Sub-Saharan Africa supra-national enforcement of competition law by intergovernmental organisations is already a reality for COMESA and WAEMU (see Figure 47). The development of the regional and operational frameworks of these two organisations shows the need for the regional framework and the domestic regimes to operate in harmony and support each other in a way that prevents possible conflicts, whether in terms of actual outcomes of cases or at the level of policy formulation as well as avoids having one regime undermining the other.

The role of supra-national organizations is becoming increasingly important, especially in dealing with cross-border business activities.

Figure 47: Intergovernmental organisations and competition law in Sub-Saharan Africa

	Year of enactment of current competition law	Year of specific act/law creating the authority	Year when the authority started operations
CEMAC[257]	1999	2005	Not fully functional yet
COMESA	2004	2008	2013
EAC[258]	2006	NA	Not functional yet
ECOWAS[259]	2008	2009	Not functional yet
WAEMU	2002	2002	2003

Source: WBG Antitrust Enforcement Database, Trade and Competition Unit – shading by the GSMA

COMESA

The COMESA competition law regime came into operation in 2013. It consists of:

- supra-national merger control; and
- business conduct and consumer protection rules.

The system is enforced by the COMESA Competition Commission ("CCC"), based in Malawi.

To date, the CCC has not been very active in enforcing anticompetitive conduct, although in June 2016 it issued a notice asking firms to notify them of agreements (both historic and forward looking) that may be anti-competitive, for the purpose of having such agreements 'authorised' or 'exempted'.[260] This signals a new phase in antitrust enforcement in COMESA countries, as the CCC grows in confidence and experience, through its continued enforcement of the merger control rules.

257. CEMAC contains a 'community' competition law mechanism. The rules include a prohibition against cartels, against abuse of dominance and merger control rules. The rules are 'enforced' by a Competition Monitoring Body (CMB), which includes the Executive Secretariat and the Regional Competition Council. "Essentially, the CMB monitors the implementation of the rules within the domestic regimes of member states whereas the Council is the decision-making body; it decides on infringements and its decisions are subject to appeal to the Arbitration Court. [...] the member states suffer from institutional weaknesses which directly impact on their capacity to implement the rules; indeed Cameroon is the only member state with a domestic competition law and authority in place." See Maher M Dabbah, quoted, pages 416-417
258. In February 2008, the EAC Competition Act was enacted. Section 37(1) of the Act established the EAC Competition Authority to enforce competition at a regional level; however, the authority is to only 'operate on an ad hoc basis' for a five-year initial and transitional period. Amongst other things, Part IX of the Act gives the Committee the competence to investigate and impose sanctions and remedies. Maher M Dabbah, quoted, page 425. When operational, the EAC will also include a system of mandatory merger control, similar to COMESA's (see WBG Report, page viii). Under the merger control rules, "the Council of Ministers may, upon appeal, approve a merger objected by the authority (WBG Report, page 13).
259. ECOWAS adopted a Community Competition Policy in 2007 and a Competition Act in 2008. See WBG report, quoted, page 34.
260. Michael-James Curry, *COMESA Competition Commission Expands Enforcement Ambit from Merger Control to Conduct*, African Antitrust, June 2016, https://africanantitrust.com/2016/06/22/growing-pains-from-one-trick-pony-to-full-fledged-enforcer/

In 2013-2014, over 50 mergers were notified to the CCC, and the CCC issued 'comfort letters' in other cases, exempting the parties from the need to file a notification.[261] The CCC recently announced[262] that it has received over US$3 million in merger filing fees since 2015.

The early history of merger control in COMESA countries and the subsequent steps taken to solve a number of issues are instructive. The history shows both the power of a competition authority to act in a pragmatic way when the rules are unclear, while waiting for the policymakers to amend the rules; and the difficulties with perceived sovereignty concerns on the part of member states. Specifically:

- **Merger filing requirements:** Originally, all mergers in which at least one of the parties operated in at least two COMESA Member States potentially had to be notified to the CCC, regardless of the value of the assets or turnover (revenue) of the companies involved. Recognising the difficulties that this requirement posed, pragmatically the CCC introduced the practice of issuing to requesting parties 'comfort letters', determining that the merger was not notifiable because it would not have an appreciable effect on trade between Member States or restrict competition in the region. In 2015, policymakers amended the rules. Mergers now have to be notified to the CCC when they meet certain thresholds.[263]
- **Fees for merger notifications:** Originally the parties that notified a transaction for COMESA's review had to pay a very high fee (a maximum of US$500,000) by any standard of merger enforcement, for the privilege. The maximum fee for merger notifications has been reduced to US$200,000.[264]
- **Mandatory nature of filings:** Parties must notify the CCC of any transactions within 30 days of the decision to merge (e.g., the signing a binding agreement or the announcement of a public bid). Any notifiable merger which has not been notified within the applicable deadline will be legally unenforceable in the COMESA region.
- **Penalties:** The CCC may impose penalties on the parties amounting to up to 10% of their revenues in the COMESA region (though so far the CCC has not imposed penalties).
- **Time limits:** The CCC must make a decision on a notified merger within 120 days after receiving the notification though extensions are possible.
- **Powers to block mergers or allow them with commitments:** the CCC has the power to block or allow mergers with commitments.

261. Gianni De Stefano, *Updated merger filing rules in COMESA*, Kluwer Competition Law Blog, 24 April 2015, http://kluwercompetitionlawblog.com/2015/04/24/updated-merger-filing-rules-in-comesa/
262. https://africanantitrust.files.wordpress.com/2016/10/wrap-3-19-october-2016-comesa.pdf
263. a filing is required if: (i) at least one of the parties operates in at least two COMESA Member States; and (ii) the higher of the combined revenues and the combined value of the assets of the parties in the COMESA region is US$ 50 million or more; and (iii) the higher of the revenues or the value of assets in the COMESA region of each of at least two parties are US$ 10 million or more (unless each of the parties achieves more than 2/3 of its revenues or assets in one and the same COMESA Member State).
264. The new merger filing fees are set at the lower of (i) US$ 200,000 and (ii) the higher of 0.1% of the parties' combined annual turnover or value of assets in the COMESA region.

- **One stop-shop?** One of the advantages of supra-national enforcement of merger control rules would be to provide for the merging parties a one-stop shop: if the merger meets the requirements, notification to COMESA should be sufficient, resolving the costs and complications of filings across multiple jurisdictions. However, this is not sufficiently clear: the CCC considers that it has exclusive jurisdiction for transactions which meet the thresholds but some national authorities, such as the Competition Authority of Kenya, have publicly stated that they consider that when local filing thresholds are met, a local filing is required, regardless of whether the transaction is also notified to the CCC. This effectively defies the purpose of supra-national enforcement, in that it increases the number of filings on the merging parties, rather than reducing transaction costs.

WAEMU (French UEMOA)

The WAEMU competition law came into force in 2003 and comprises the following elements:

- control of anticompetitive behaviour;
- rules and procedures relating to the control of cartels and abuse of dominant position;
- the control of state aid;
- transparency of the financial relationship between members states and public enterprises on the one hand, and between public enterprises and international or foreign organisations on the other; and
- cooperation between the WAEMU Commission and national authorities in the enforcement of the law.[265]

In addition, the WAEMU competition rules include a system of voluntary notification of mergers.[266] The WAEMU Commission has competence to apply the competition rules, subject to the control of the Court of Justice which has jurisdiction to rule on all decisions issued and fines imposed by the Commission.

The system of competition law enforcement is a centralised regime with the consequence that the national systems of enforcement should defer to the WAEMU system. The national authorities should monitor developments in their countries and defer to the WAEMU Commission. In practice, enforcement at the WAEMU level has been limited, leading to the criticism that the creation of WAEMU's competition laws has reduced the effectiveness of national competition enforcement (especially in **Senegal** and in the **Côte d'Ivoire** that used to have relatively established domestic competition law enforcement), while not leading to noticeably increased enforcement at the centralised level.[267]

265. Maher M. Dabbah, quoted, pages 421-422
266. WBG African Competition Policy Report, quoted, page 25.
267. See M. Bakhoum / J. Molestina, Institutional Coherence And Effectivity Of A Regional Competition Policy: The Case Of The West African Economic And Monetary Union (Waemu), Max Planck Institute for Intellectual Property and Competition Law, Research Paper No. 11-17, November 2011, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1965508

Notwithstanding the limited record of enforcement, it is interesting that at least two cases investigated by the WAEMU competition authority were in the wider communication sector. As it has been reported:[268]

- "In the case of Sotelma-Malitel v. Orange Mali, Sotelma-Malitel felt excluded from a cost-free reciprocal roaming service between Senegal and Mali (unified network) that some mobile phone companies offered. Sotelma-Malitel argued that its exclusion from the service was based on its not being a member of the network. The Commission was called in on the grounds of an illicit agreement.
- The case of CANAL Overseas concerns the abuse of dominant position in the audiovisual sector. In this legal affair, CANAL Overseas, a French film production and distribution enterprise, refused to place its bouquet of television channels at the disposal of its distribution clients, MMDS, in the region. The Commission was approached following the refusal to supply."

The Need for Coordination and Cooperation

Where national frameworks include both a competition authority to enforce the competition rules and a regulator to make and enforce sector regulation in the telecommunications sector there is a need for the two to coordinate. Coordination and cooperation are desirable both at the national level and at the supra-national level:

- Between agencies at the **national level** (i.e., between the national competition authority and the regulator)
- Between agencies at the **international level** (i.e., between supra-national groupings of regulators and competition authorities, and between the groups that, in each intergovernmental organisation, deal with regulation and competition law)
- Between regulators at the **international level**
- Between competition authorities at the **international level**

268. See See M. Bakhoum / J. Molestina, quoted, page 13

At the national level

When there are two different agencies involved, there is a need for cooperation in each country between the telecommunications regulator and the competition authority. This issue is recognised throughout Sub-Saharan Africa. Although a statutory demarcation between the jurisdiction of the regulator and the competition authority is often lacking, the two agencies themselves in some cases have signed a Memorandum of Understanding (MoU). An MoU has been signed between the two agencies in **Kenya**,[269] in **Malawi**,[270] in **Mauritius**[271] and in **Namibia**.[272] In **Zambia**, the competition authority is represented on the boards of regulators. All sector regulators are required to consult the competition authority.[273]

When the jurisdiction of the competition authority and the telecoms regulator is not clear-cut and there is no MoU between the authorities, conflicts of jurisdiction may have to be solved by the courts. The agencies in **Botswana**,[274] **South Africa** and **Tanzania**[275] do not appear to have signed an MoU.

At the international level

If coordination between the agencies tasked with application of the competition rules and those tasked with application of sectoral regulation is desirable at the national level, it is also desirable at the supra-national level, within the various regional organisations that have a remit for the digital ecosystem. However, often these organisations tend to operate in silos. The silo approach extends to the way competition law and regulatory efforts are viewed, even within the same regional intergovernmental organisations.

Indeed, international cooperation is easier among regulators that meet at a supra-national level; and (separately) among competition authorities equally organised in supra-national groups. Whereas there are supra-national bodies that coordinate the activities of each type of agency, there does not seem to be much coordination between competition authorities and regulators at the supra-national level. Efforts have been made at the supra-national level to bring together different stakeholders (e.g., by EAC with the creation of EACO) and these fora may be a good starting point for exchanges of views on competition policy.

269. In Kenya, the regulator, the CA, has also a mandate in competition law, giving rise to jurisdictional issues. It must "develop, maintain, promote and enforce effective competition," with broad powers: it may investigate, on its own initiative, any licensee whom it has reason to believe has engaged in 'unfair competition'. See Maher M. Dabbah, quoted, page 385. On 6 May 2015 the Communications Authority and the Competition Authority signed an MoU. Source: http://www.ca.go.ke/index.php/what-we-do/94-news/295-ca-and-cak-sign-pact-on-competition-regulation
270. The competition authority, CFTC and the regulator, MACRS, signed an MoU in 2013, according to the CFTC Annual Report 2013: https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwilpPOqzcjOAhWDL8AKHfvFDvoQFggtMAE&url=http%3A%2F%2Fwww.cftc.mw%2Findex.php%2F2013-12-16-13-35-12%2Freports%2Fannual-reports%2F30-20122013-annual-report.html&usg=AFQjCNHuMF4PATbjdtAzRULEBDnlKsxTMg&sig2=O14tq_tdVM62NNGbC10zTA&cad=rja
271. The competition authority (CCM) and the regulator (ICTA) have an MoU. https://www.icta.mu/documents/laws/mou_ccm.pdf
272. The competition authority (NaCC) and the regulator (CRAN) have an MoU: http://www.nacc.com.na/technical_overview/memoranda_of_understanding.php
273. http://www.cci.gov.in/sites/default/files/presentation_document/autho_peter_200902131111014.pdf
274. Section 73 Competition Act mandates the Competition Authority to establish cooperation mechanisms with other sector regulators. MoUs have been signed with some authorities but not in the telecoms sector. MoUs have been signed with the Public Procurement and Asset Disposal Board (PPADB), the Directorate on Corruption and Economic Crime (DCEC), the Civil Aviation of Botswana (CAAB), the Non-Bank Financial Institutions Regulatory Authority (NBFIRA) and the Bank of Botswana. Source: http://www.competitionauthority.co.bw/faq-s
275. Although there is generally applicable competition law, the sector regulator has main jurisdiction to consider competition in the sector. The Competition Commission can report to the Minister instances where it believes that regulatory action would be in breach of Competition Act. See WBG African Competition Policy Report, quoted, page 31

At both regional and national levels, considerable work has been done in recent years to establish basic rules, institutions and procedures for competition law enforcement across Sub-Saharan African countries. The result, however, is a patchwork of national and regional laws and enforcement.

COMESA[276] and WAEMU have functioning competition laws and authorities, operating at the supra-national level, giving rise to a need to coordinate activity with the national competition authorities, as seen above.

In an effort to ensure coordination with the national competition authorities in the member states, COMESA for the first time signed an MOU in September 2015 with the competition authority of **Malawi**. On 5 June 2016, it was announced that COMESA has further concluded MoUs with the **Swaziland** Competition Commission and the Fair Trade Commission of the **Seychelles.**[277]

Swaziland, Seychelles and **Malawi** are also members of the Southern African Development Community (SADC). This does not have formal powers of enforcement of competition law, but on 7 May 2016, it was announced that nine members of SADC have also signed MoUs. These are **South Africa, Malawi, Botswana, Swaziland, Seychelles, Mozambique, Namibia, Tanzania** and **Zambia**. The SADC MoU was based on the 2009 SADC Declaration on Regional Cooperation and Consumer Policies and envisages information exchanges and cooperation in cross-border investigations among the authorities. As it has been remarked,[278] "it will be interesting to see, *first*, whether there may be conflicts that arise out of the divergent patchwork of cooperation MoUs, and *second*, to what extent the South African Competition Authorities, for example, could indirectly benefit from the broader cooperation among the various jurisdiction and regional authorities."

Cooperation between national regulators

The main regional organisations that group national telecommunications regulators in Sub-Saharan Africa are:

- **CRASA:** CRASA members are regulatory authorities from the following SADC Countries: Angola, Botswana, DRC, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. As seen above, CRASA (Communications Regulatory Authority of Southern Africa) is the modern embodiment of the original TRASA (Telecommunications Regulatory Association of Southern Africa), set up under the terms of the SADC Protocol on Transport, Communications and Meteorology in late 1997.
- **ARICEA:** The Association of Regulators for Information and Communications for Eastern and Southern Africa was set up under the auspices of COMESA, following the blueprint of TRASA (now CRASA) as set up by SADC.
- **WATRA:** The SADC blueprint was also followed by ECOWAS. WATRA, the West Africa Telecommunications Regulators Assembly was established in November 2004.[279] WATRA currently consists of 15 independent national regulatory authorities (NRAs), and departments

276. http://www.comesacompetition.org/?p=1020
277. *Michael-James Currie, Significant Strides made to Promote Harmonisation across African Competition Agencies*, **African Antitrust 7 June 2016,** https://africanantitrust.com/tag/mou/
278. By Andreas Stargard, quoted
279. According to the ITU

for regulation of telecommunications services established by governments of member states in the Economic Community of West African States (ECOWAS) sub-region and Mauritania. The Member States are: Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, Ghana, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo and Mauritania, which is not a Member State of ECOWAS. The Guinea Bissau is a member of ECOWAS, but it does not appear to have an independent telecommunications regulator. WATRA's role in the region has traditionally been as a facilitator for information exchange between regulators, and to offer non-binding advice on procedural issues (such as dispute resolution). WATRA also makes substantive recommendations on policy matters (such as standardisation, interconnection and methods for estimating costs and setting prices). In April 2016, the organisation formalised an agreement to have its headquarters in Nigeria, as a precursor to WATRA "adopting a comprehensive framework for the regulation of telecommunications activities".[280] According to the sources available,[281] the members of WATRA, through ECOWAS, have retained the services of a consultant to consider roaming charges among the members.

Cooperation between competition authorities

A number of competition authorities from different jurisdictions have entered into MoUs for bilateral cooperation in tackling competition law investigations and enforcement. These include the authorities of **South Africa** and **Namibia,**[282] and of **Tanzania** and **Malawi**.[283]

South Africa is also a member of BRICS (which also includes Brazil, the Russian Federation, China, and India) and the BRICS countries entered into an MoU on cooperation in competition law matters in 2016.[284]

The African Competition Forum[285] is a network of competition authorities in Africa established in 2011 with the aim to promote the adoption of competition laws, help with capacity building of the authorities and assist in advocacy efforts for the implementation of competition reforms. It involves 41 out of 54 African countries.[286] It has already published a number of papers on concentrated sectors of the African economy (e.g., cement and poultry) that have posed challenges for national competition authorities. This facilitates the sharing of expertise by more established competition authorities, like those in South Africa and Namibia, who have intensively investigated complaints about cartels and abuses of dominance in those sectors of the African economy.

280. http://www.vanguardngr.com/2016/04/fg-telecommunication-regulators-sign-agreement-telecommunications-regulation/
281. http://extensia-ltd.com/ecowas-considering-abolition-roaming-charges-member-states/
282. https://africanantitrust.com/tag/mou/
283. http://allafrica.com/stories/201412150302.html
284. http://www.compcom.co.za/wp-content/uploads/2016/05/MoU-BRICS.pdf
285. Ibid WBG, page ii
286. Norton Rose Fullbright, *The Future of African Antitrust Enforcement,* at http://www.nortonrosefulbright.com/knowledge/publications/132127/the-future-of-african-antitrust-enforcement

As noted in the WBG African Competition Policy Report,[287] the ACF support "could be particularly useful" in:

- efficient merger control to reduce any undue administrative burden and refocus resources on transactions that are more likely to raise competition concerns, including adequate merger notification thresholds, two-phase procedures, transparent and clear guidelines on public interest considerations where mandated, and mechanisms for coordination between national and regional bodies; and
- effective anti-cartel enforcement to deter harmful practices through coordination and regional analysis of detected practices that might affect more than one country, rationalisation of the use of exemptions for anticompetitive practices, improvements in the fining system and maximum fine values, and adoption of policies to facilitate prioritization of case work and increase the efficiency of enforcement.

Merger control in the mobile sector

Nowhere is the need for coordination greater than in merger control cases in the mobile sector.

In Sub-Saharan Africa, where a competition law exists, in most countries it includes merger control carried out by the competition authority, although the independence of the competition authority is not guaranteed in all countries to the same extent.[288] There are good reasons why its independence should be assured. If the regulator has the task of applying (competition law) tools to mergers, there is a real risk of diverging outcomes:

> *"the culture and analytical approach required to regulate an industry differ from those typically characteristic of a competition law enforcement agency. There is also a risk that an industry regulator's views about the structure of a particular market could influence a merger decision."* Australian Harper Report.[289]

Nevertheless, some countries with no competition law have included sector-specific merger provisions in their telecommunications laws (e.g., in **Nigeria,** where only telecoms operators are subject to merger control scrutiny). The merger between MTN and Visafone in Nigeria is an example of the issues that can arise.[290] Areas for consideration include the need for a proper demarcation between the powers of the Securities and Exchange Commission and the powers of the NCC in the 'communication sector'. But an overarching consideration is that there cannot be a level playing field if only the operators in the telecoms sector are subject to competition laws and specifically merger control.

287. page xvi
288. For example, in Namibia, the Competition Act allows the minister of trade and industry to review commission decisions on mergers. See WBG African Competition Policy Report, quoted, page 13
289. Harper Report, http://competitionpolicyreview.gov.au/final-report/, referred to in more detail in the Asia Chapter, Figure 27.
290. The MTN/Visafone merger was approved by the Nigerian Communications Commission in December 2015. In February 2016 Etisalat, Nigeria's fourth largest operator by market share, filed an objection with the Federal High Court against MTN's intended use of Visafone's 800 MHz licence, arguing that the deal would entrench MTN as the dominant data service provider and stifle competition. At the time of writing (November 2016), the parties are engaged in litigation. *See* Ariori Babajide, "Federal High Court's ruling ends Etisalat vs MTN fight," TechIslet, 29 Feb. 2016, *available at* http://www.techislet.com/federal-high-courts-ruling-ends-etisalat-vs-mtn-fight/

In the case of mergers in the mobile sectors, concentrations are often motivated (among others) by a wish on the part of the merging companies to acquire the spectrum held by the acquisition target. Spectrum assignment is however the prerogative of regulators and governments:

- On the one hand, the competition authority should consider the effects of the merger on the market as defined, to determine whether after the merger there will be a "substantial lessening of competition", as described in the Competition Policy Handbook.[291] The competition authority should consider, as part of this review, whether there could be barriers to entry post-merger. In conducting this analysis, the competition authority should consider all potential barriers, including spectrum scarcity; and
- On the other hand, regulators and governments are often nervous about spectrum assignment. They have the technical know-how to assess the consequences of a merger on spectrum availability, perhaps better than the competition authority.

There is therefore a need for cooperation between the competition authority and the regulator, to achieve a decision that would take into account all aspects capable of affecting the market. In cases throughout Sub-Saharan Africa, however, it is often the case that the competition authority and the regulator or the government conduct parallel investigations, leading to the possibility of divergent decisions, involvement of the courts and suboptimal results.

In **Tanzania**, the case of Tigo/Zantel resulted in approval by both the regulator and the competition authority, against the background of a crowded mobile communications sector and a set of very interventionist measures by the government.

Figure 48: Tanzania: Tigo/Zantel

Tanzania: Tigo-Zantel

- June 2015: Millicom (the parent company of Tigo) signs an agreement to purchase 85% of Zantel from Etisalat for $1, plus $74 million in debt and up to $32 million in net current liabilities. The Zanzibar government retains 15% stake.
- October 2015: The deal is approved by Tanzanian Communications Regulatory Authority and Fair Competition Commission with the condition that Millicom shall operate the two businesses in Tanzania (Tigo and Zantel) as separate businesses and at arm's length.
- The deal was attractive due to Zantel's spectrum holdings. Zantel had 850 MHz, 900 MHz, 1800 MHz and 2100 MHz spectrum for Zanzibar and mainland Tanzania.

291. Quoted. See in particular Assessing Market Power in the Digital Age, Key Concept 3, Mergers.

Not so, the intended acquisition of Neotel by Vodacom in South Africa. The confusion surrounding the jurisdiction of the regulator and the competition authority, and the difficulty with spectrum assignment, meant that Vodacom abandoned the intended merger.

Figure 49: South Africa: Vodacom/Neotel

South Africa: Vodacom-Neotel

- South Africa — May 2015: Vodacom agrees to buy Neotel for 7 billion rand ($676 million at the time), including a fixed fibre network and spectrum licences.
- Competition Commission: intends to attach conditions to the merger, including barring Vodacom from using Neotel's spectrum for more than two years.
- The companies announce a modified deal: Vodacom will acquire all of Neotel's assets related to its fixed line business, but not its spectrum licences.
- The High Court in Pretoria rules that Vodacom would not be able to take control of licences owned by Neotel as part of the merger.
- March 2016: The companies announce that, due to regulatory complexities and non-fulfilment of certain conditions, they will abandon their plans.

In Nigeria, the situation is further complicated by the fact that merger control does not apply to all sectors of the economy. The litigation between MTN and Etisalat further to the approval by the Nigerian Communications Commission of the merger between MTN and Visafone, mentioned above[292] shows the difficulties in the sector. While there is obviously no question of overlap between the jurisdictions of the competition authority and the telecoms regulator, nevertheless, it is unclear where the jurisdiction of the regulator ends and that of the Stock Exchange Commission begins.[293]

292. See footnote 290
293. The Communications Act 2003 grants exclusive authority to apply competition rules to the communication sector to the NCC but the Act does not define the boundaries of the 'communication sector'. The Investment and Securities Act 2007 establishes the Stock Exchange Commission, to oversee all mergers that meet certain revenue thresholds. No MoU appears to have been signed between the authorities. Nevertheless, the SEC seems to interpret its authority as largely procedural whereas the Nigerian Communications Commission appeared to be the ultimate regulator to deal with the merger which is now subject to litigation.

Spectrum Issues in Sub-Saharan Africa

Five issues will be considered.

First, spectrum harmonisation is an obvious area where supra-national organisations can make a difference.

Second, as seen above, and as the **Côte d'Ivoire** case (Figure 52) demonstrates, there is an obvious area of overlap between spectrum assignment and merger control. If too many mobile network operators are licensed, then the possibility of merging could offer a solution for those operators that find themselves struggling. However, it can be difficult for mobile operators to merge as the relevant law and the jurisdiction of different authorities are often unclear: merger control is an area where regulators and governments want to retain control over spectrum allocation, and the competition authorities are often required to approve mergers under merger control rules.

Third, as considered more particularly in Appendix 1, it is important that spectrum assignment takes place in a way that incentivises efficient use of the spectrum, through competitive selection methods. One such method is through the use of auction mechanisms, designed to maximise auction efficiency. Through an appropriate design of the rules, and an understanding of the competition implications of the assignment, auctions can deliver not only an efficient market-based pricing of a scarce resource (auction efficiency) and a non-distortionary public financing goal (public finance efficiency) but importantly, output efficiency. This means that a proper auction design can help with achieving the intended goals, from universal access through roll out of networks in rural areas, to increasing competition by new entry when the market assessment shows that there is a market failure to be addressed.

Throughout Sub-Saharan Africa the use of auctions has not been widespread. It would be important for regulators and governments to dispel any notion that an 'auction' would necessarily lead to spectrum assignment to the highest bidder. The WBG African Competition Policy Report[294] notes the following:

- In **South Africa**, attempts by the regulator ICASA to launch a spectrum auction for 4G spectrum are currently on hold.
- **Kenya**, **Mauritius**, **Namibia**, **Rwanda** and **Tanzania** allocate spectrum on a first-come, first served basis.
- In **Rwanda**, the government assigned the 4G spectrum to a joint venture with government participation and declared it to be the sole mobile broadband wholesaler. There may be good reasons for creating a monopoly at the wholesale level, but there are costs in terms of dynamic and allocative efficiency. **Nigeria** is the only country in Sub-Saharan Africa to have carried out spectrum auctions (although this statement from the report does not seem entirely correct, as at least in **Mozambique** auctions have taken place. Figure 50 considers the 2010 assignment of spectrum there).

294. Quoted, pages 106-107

Figure 50: Movitel new entrant in Mozambique[295]

In November 2010, Movitel (a unit of Viettel Group) was selected to become the third mobile operator in Mozambique, notwithstanding that another bidder had offered a higher price.[296] It received a total of 67.8 MHz of spectrum in 900 MHz, 1800 MHz and 2100 MHz bands to match the spectrum holdings of existing players. At the time, looking to raise more revenue, incumbent mCell agreed to share its existing cell towers with the new entrant. Movitel invested heavily in its infrastructure and at launch its network covered 105 of the 128 districts in the country, accounting for over 40% of the population. Its market share of connections is estimated to have increased from 5.9% at launch in Q2 2012 to 26.6% in Q3 2014, when its network was reported to cover around 80% of the population.

Fourth, and following from the above point, when assigning spectrum through the use of auction mechanisms, these should be designed to maximise auction efficiency. When the criteria are not properly thought through, or the reserve price is too high, the aims of the auction may not be met.

Fifth, if a country is considering the introduction of a new entrant, it should do so only after a proper market assessment to determine whether there is a need to affect the market structure in such a fundamental way, as with reserving spectrum for new entrants. The following example illustrates the issue in relation to **South Africa**.

Failure to conduct a proper market investigation when reserving spectrum for new entrants may also result in overcrowded mobile markets. For example, in **Tanzania**, a sixth mobile network operator, Smart Telecom,[297] entered the market in 2014 (prior to the merger between Tigo and Zantel), while Viettel launched as a further mobile operator in October 2015, under the brand name Halotel.[298]

Figure 51 considers the case of **Côte d'Ivoire,** where seven mobile operators were licensed, resulting in four not being able to compete, and the withdrawal of their licences. Further to this, in September 2016, the Government of Côte d'Ivoire decided to grant the fourth global telecoms licence to the Lybian Post, Telecommunications and Information Technology Company (LPTIC), the parent company of Green N, one of the mobile operators whose licence was withdrawn in April.[299] LPTIC said that they will invest US$154 million to upgrade their network and be able to compete in the Ivorian telecoms market but, in the absence of a clear understanding of the reasons why Green N and the other mobile operators could not compete previously, there is a real risk that the current plan may also lead to suboptimal results.

295. Ibid, page 9
296. https://www.telegeography.com/products/commsupdate/articles/2013/03/18/incm-to-offer-800mhz-frequencies-in-jun
297. Telegeography, *Smart Telecoms enters Crowded Tanzanian Mobile Market*, 14 April 2014: https://www.telegeography.com/products/commsupdate/articles/2014/04/14/smart-telecom-enters-crowded-tanzanian-mobile-market/
298. https://www.telegeography.com/products/commsupdate/articles/2015/10/15/viettel-launches-tanzanian-operations-under-halotel-brand/index.htm
299. it seems that there were some agreements on hiring old employees of Green N and also on taking on the liabilities of Green N: http://news.abidjan.net/h/599221.html

Figure 51: Côte d'Ivoire – seven operators; unsuccessful forced consolidation and licence withdrawal

Côte d'Ivoire : Unsuccessful Forced Consolidation led to License Withdrawals
Years: 2014-16
Authority: Autorité de Régulation des Télécommunications/TIC de Côte d'Ivoire (ARTCI)

Legislative and Regulatory Framework:

- Telecommunications and Information and Communication Technologies Ordinance, ordinance No. 2012-293 of March 21 2012. Generally establishing the authority of the ARTCI and regulations for the telecommunications sector, the postal sector and in data protection.

Chronology:

- May 2014. The Communications Minister recommends that the three smallest mobile operators merge. A fourth operator, Warid, was licensed but had not yet started operations.
- March 2015. The ICT Minister directed the four mobile operators Koz (Comium), GreenN, Café Mobile and Warid to merge within three months.
- June 2015. The ARTCI announced its intention to withdraw the operators' licences and to merge the firms into one company to be partnered with a new operator as a majority stakeholder.
- September 2015. ARTCI invited expressions of interest for a new licensee to compete alongside operators Orange, MTN and Moov.
- March 2016. After failed merger talks, ARTCI formally revoked the licences held by Comium, GreenN, Café Mobile and Warid, giving operators 30 days to deactivate their networks.
- April 2016. ARTCI announced its consideration of offers from Monaco Telecom, Vietnam's Viettel and the Libyan Post Telecommunications and Information Technology Company (LPTIC), parent of defunct GreenN, for licensing as the nation's fourth telecommunications service provider.

Background:

Facing seven mobile operators in the market, the Ministry of Communications began calling for consolidation in the mobile market in early 2014, proposing a merger of the three smallest operators, Comium, GreenN and Café Mobile, with a combined 4.2 percent market share, according to ARTCI. The move would be an attempt to create a viable competitor to dominant players MTN, Orange and Moov.[300] Following a surge in adoption driven initially by a number of market participants, spectrum allocations and other difficulties in the launch of and upkeep of services by smaller operators caused the government to set its sights on a more reasonable four-player market.

300. "Ministry urges three smaller players to unite to increase competition," TeleGeography, 27 May 2014, *available at* https://www.telegeography.com/products/commsupdate/articles/2014/05/27/ministry-urges-three-smaller-players-to-unite-to-increase-competition/.

Figure 51: Côte d'Ivoire – seven operators; unsuccessful forced consolidation and licence withdrawal

In March 2015, the ARTCI demanded that the three firms—as well as Warid Telecom's local operator, which acquired a licence in 2006 but failed to launch services—merge within three months in order to improve service coverage and quality and to ensure fulfilment of unpaid taxes and fees, reportedly amounting to $150 million.[301] Subsequently, in June 2015, the ARTCI announced its intention to withdraw the licences of the four smaller operators, asserting failure to pay taxes and fees and that they missed the deadline set by the government to merge. The government also announced its intention to force the merger of those companies and to seek a new majority stakeholder to take control.

Later in 2015, while these efforts to mould a fourth competitor out of the smaller operators were on-going, the ARTCI also began fielding expressions of interest for a new telecommunications service provider concession in an attempt to "revitalise the market."[302]

In March 2016, the ARTCI finally processed the revocation of the licenses of the four smaller operators, apparently abandoning any plans for their merger, despite assuring the defunct operators that "[t]hey would be privileged by the state with the guarantee to take back the former agents of these companies" should they manage to agree to a merger.[303]

The regulator assures that a decision is imminent and, at the time of publication, an announcement is expected soon.

Analysis

- Jurisdiction
    - The Telecommunications and Information and Communication Technologies Ordinance (the "Ordinance"), under Article 117, grants the ARTCI the authority to impose penalties, up to "final withdrawal of the license." The Ordinance provides the regulator with general directives such as that "to create a favourable environment for the diffusion and sustainable development of Telecommunications/ICT," per Article 70, and "to protect the interests of consumers, the operators and service providers by taking all the measures likely to guarantee the practice of an effective, honest and durable competition," per Article 72.
- Transparency
    - As evidenced by the confusion surrounding the nature of the June 2015 attempted reorganisation of the smaller operators, unclear information throughout the process seems to have left a great amount of uncertainty for consumers, although the four operators affected were consulted throughout the process.

301. "Cote d'Ivoire operators owe treasury USD 150 mln — Artci," Telecompaper, 27 April 2015, *available at* http://www.telecompaper.com/news/cote-divoire-operators-owe-treasury-usd-150-mln-artci--1079113.
302. "Cote d'Ivoire watchdog gauges interest in new telecoms licence," Telegeography, 17 Sept. 2015, *available at* https://www.telegeography.com/products/commsupdate/articles/2015/09/17/cote-divoire-watchdog-gauges-interest-in-new-telecoms-licence/.
303. "Press Release on Failing Operators Licenses Withdrawal," ARTCI, Press Release, *available at* http://www.artci.ci/images/stories/pdf-english/autre_documents/dossier_de_presse_retrait_licence_english.pdf.

Figure 51: Côte d'Ivoire – seven operators; unsuccessful forced consolidation and licence withdrawal

Areas for consideration:

- Seven mobile network operators, each with roll-out obligations and assigned spectrum, are likely to be too many. Yet, they were introduced. The subsequent history of four being forced to end operations should be a cautionary tale. Before issuing a new licence for a fourth operator now, the ARTCI should conduct a proper market assessment to understand if the market in Côte d'Ivoire can support four operators.