Introduction

• To some practitioners, competition regulation has come to slow down the implementation of transactions
• Competition legislation in much of Africa is a thing of the recent past
• The explosion that occurred in the 1990s marked a new era
• Mainly sponsored by international lending institutions such as the World Bank and the International Monetary Fund
• Has also seen the involvement of Unctad and other agencies
Competition Legislation in the 1990s

- Kenya appears to have been the first in this era to come up with competition legislation in 1990
- This was soon followed by Zambia and Tanzania in 1994
- Zimbabwe followed suit in 1996
- Malawi and South Africa joined the band wagon in 1998
- South Africa, like Tanzania, has had competition legislation since 1955
Review of competition legislation

- 2001 saw the review of the Zimbabwean legislation with a view to clarifying the merger provisions of their legislation.

- South Africa fine-tuned its own merger review programme in respect of thresholds and the issue of concurrent jurisdiction.

- Tanzania completely revamped its own legislation in 2003.
More competition legislation

• Namibia enacted its legislation in 2003
• Swaziland followed suit in 2005, although the bill approved by parliament is apparently awaiting royal assent by the King
• Botswana and Lesotho may have started the drafting process
• Angola, the Democratic Republic of Congo and Mozambique had at various times expressed an interest in formulating competition legislation
Challenges facing the legal practitioner

- The trigger to notification varies from country to country
- South Africa, Zimbabwe and Namibia employ essentially the same trigger
  - This is the acquisition of control and a definition of control is actually offered in respect of Namibia and South Africa.
  - The parties must satisfy pre-determined financial thresholds. This is also applicable to Tanzania.
The trigger in Kenya, Zambia and Swaziland

- Kenya, Zambia and Swaziland employ a different notification regime
- Notification is dependent on the substitutability of the products
  - There are no financial thresholds required, which means that everything that satisfies the preceding test is notifiable
  - What about the geographic aspect of the market?
  - Who determines substitutability between the parties and the Competition authorities?
  - If the parties take the view in good faith that their products are not substitutable, are they obliged to notify?
Others have a second trigger

- Tanzania has a notification regime as well as an exemption regime for mergers
- There are mergers that are prohibited per se
- Apparently you may apply for exemption for these
- Main problem is that the exemption is for a fixed time period which may not exceed one year
- Not clear if the exemption is renewable
- Zambia has a catch all provision in Section 7 of its Act
Differences in analytical framework

- South African employs the substantial lessening of competition test
- Others employ the dominance test
- Some seek to employ both tests
- In small markets, the dominance test is likely to catch many players
- Where it is based on market share, the absence of investment by similar entities may work against those already in the market as they are presumed to be dominant
- It is unclear what others employ in the assessment of a merger. For instance, Tanzania has a dominance test but it is unclear whether the test is applicable to the assessment of a merger in terms of section 11 of the Fair Competition Act
Competition Assessment and public interest inquiry

- South Africa sets out a clear public interest test in addition to the competition test

- Namibia seems to embrace the public interest inquiry within the competition assessment

- Some recognise the role of efficiencies and the failing firm defence whilst others don’t
Time frame for investigations

- Some legislation impose time lines within which investigations should be finalised
- Many say nothing about the time lines but prohibit the prior implementation of a transaction
- Where specific time lines are imposed, in many instances they are very flexible
Consequences of non compliance

- Most jurisdictions prescribe a fine linked to turnover

- Some specify not only a ceiling but also a floor

- Criminal penalties are also prescribed for directors and officers

- In some jurisdictions a merger agreement is regarded as unenforceable
Guidance on legislation

- Absence of guidelines, with the exception of Zambia
- Few authorities publish detailed reasons for their decisions
- In the absence of guidelines and detailed reasons for decisions, practitioners have very little to rely on
- In many instances, practitioners are left with no choice but to call the officers for guidance
- Many authorities do not offer written advisory opinions
Jurisdictional issues

- Many authorities do not appreciate arguments on jurisdiction

- A competition agency advised recently in respect of a proposed transaction that the parties should file although there were no published thresholds

- In the jurisdictions that rely on substitutability, parties are invariably asked to notify in order to enable the authorities to determine whether the parties are in a horizontal relationship
Soft Issues

- Electronic communication
- Websites
- Some officers inaccessible
- Some reluctant to speak on the record on what some provisions in their law actually mean
Way Forward

- Many of the issues are being tackled under the ICN
- Unclear whether African authorities are willing to accept and implement the ICN initiatives
- There is room for an African Competition Network
- Harmonisation of the substantive provisions of the law and investigation procedures may be called for