South African Antitrust Developments:  
A WRAP from the *Comp-Corner*

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The editors and authors at [http://www.AfricanAntitrust.com](http://www.AfricanAntitrust.com) welcome you to our new semi-serial publication: “*The WRAP.*” In this first WRAP edition, we look back over recent months and provide an overview of the key recent developments which antitrust practitioners and businesses alike should take note of in respect of merger control and competition law enforcement.

### 1. Legislative Amendments – Introduction of Criminal Liability

The most significant development in South African competition enforcement was the introduction of criminal sanctions for directors or employees with management authority for ‘causing’ or ‘knowingly acquiesced’ in a firm to engage in cartel conduct.

Although the Section 73(a) of the Competition Amendment Act, was enacted in 2009, the introduction of criminal liability as been with met with some surprise by the antitrust community. Over the years, numerous submissions have been made regarding the constitutionality of the provision and in particular, how enforcing Section 73(A) will be executed in light of numerous practical considerations.

While the Competition Commissioner, Thembinkosi Bonakele has indicated that currently there is a Memorandum of Understanding (MoU) being drafted between the Competition Commission and the National Prosecuting Authority, no indication, however, has been provided as to when this MoU will be made public. There remains a considerable degree of uncertainty amongst antitrust practitioners and the Competition
Commission alike, regarding the precise scope and ambit of the criminal liability provisions and how this will play out in practice.

It seems that it may be a while, given the number of legal and practical hurdles which needs to be overcome, before the NPA is in a position to take on a test case. Directors of firms should, however, take particular note of the fact that cartel conduct in terms of the South African Competition Act is a *per se* violation and therefore (at least as the legislative provision is currently drafted), no rule of reason defence is available to a respondent who has been found to have engaged in ‘collusive’ conduct.

2. Market Inquiries

*Liquefied Petroleum Gas (LPG)*

The LPG market inquiry commenced in 15 September 2014. In May 2016, the Competition Commission published the preliminary findings and requested further submissions from stakeholders in relation to the proposed recommendations.

Although the Competition Commission is concerned that there are certain factors which appear to hinder competition in the market, the Commission also recognised that a number of these ‘barriers’ are due to commercial and practical realities.

Without being exhaustive, some of the key findings include the following:

- A major factor which influences the decision to use a particular supplier is due to consistency and reliability of supply. Furthermore, long-term supply contracts and automatic renewal clauses may be prohibitive in so far as new entrants to the market are concerned;

- Switching costs from an end-users perspective is an important factor in weighing up the costs of choosing an alternative supplier. In this regard, issues such as the capital require to install LPG bulk and cylinder manifolds and the fact that the end-user doesn’t become the owner of the installation equipment are major factors which contribute to the high switching costs.

- There appears to be a disconnect on certain issues in respect to how other agencies and governmental departments interpret and execute their functions.
To access the full report, please click [here](http://example.com).

**Grocery Retail Market Inquiry**

The Commission has called for a Stakeholders information session on 17 May 2016 in order to *inter alia* “provide information on the administrative guidelines of the inquiry. The guidelines will set out the administrative timeline for the inquiry and will guide stakeholders on the procedures for making submissions to the inquiry”.

For more information, please click [here](http://example.com).

**Healthcare Market Inquiry**

Public Hearings have been held since February 2016 and there is a further round of public hearings to take place between 17-19 May 2016 in Durban.

For more information, please click [here](http://example.com).

### 3. Mergers

Two multinational mergers have attracted significant attention in relation to the interpretation of certain aspects of merger control in South Africa.

Firstly, the *SABMiller/An-Heuser Busch Inbev* deal saw the merging parties agree to establish a development fund valued at R1 billion in order to address public interest concerns raised by Minister of Economic Development, Ebrahim Patel. Despite this undertaking, which was coupled with numerous other public related conditions, the Competition Commission has not yet finalised its recommendations to the Competition Tribunal. The Competition Tribunal is ultimately responsible for approving large mergers. It appears that the merging parties are still facing significant opposition by trade unions who have threatened to take the merger on appeal if it is approved without their concerns being adequately addressed.

On 12 May 2016, the Competition Commission was granted its sixth extension in order to conclude its investigation. An extension may not be granted for a period of more than 15 days at a time. There are no limits on the number of extensions which may be granted provided the merging parties do not oppose a request for an extension.
Secondly, the Coca-Cola bottler merger was approved, 15 months after it was filed. Although the deal did not raise substantial competition law concerns, the deal was approved subject to a condition that the merging parties establish a R850 million development fund to address public interest concerns. Like the AB In-Bev deal, the undertakings were formed part of an agreement struck with Minster Patel which followed on the heels of the R1 billion undertakings of the AB In-Bev deal.

For further information on these two deals, please click here.

4. Enforcement

Civil Damages

- During the first week of May 2016, the Competition Commission and a group of class action litigants withdrew their respective leave for appeal applications to the Constitutional Court. The applications for leave to appeal follow the Supreme Court of Appeals decision, in favour of Premier FMCG, that the Competition Tribunal may not issue a ‘Section 65’ certificate in respect of a party who was not formally cited before it in a complaint referral.

The matter was settled out of Court and in this regard the Competition Commission stated that it “welcomes the recently announced settlement agreement between Premier Foods (Pty) Limited (Premier Foods) and civil society organisations”.

To access the media summary of the Supreme Court of Appeal’s judgment, please click here.

- The South African National Roads Agency has instituted the largest civil law suit against multiple construction firms for damages it allegedly suffered as a result of the construction firms’ anti-competitive conduct.

The claim, which allegedly totals R760 million collectively, will be opposed by at least two of the construction firms namely, Murray and Roberts and Basil Read.

As always, thank you for reading the WRAP, and remember to visit http://www.AfricanAntitrust.com for up-to-date competition-law news from the African continent.

--Ed.