



# AFRICAN ANTITRUST & COMPETITION LAW NEWS & ANALYSIS

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

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The editors and authors at [AfricanAntitrust.com](http://AfricanAntitrust.com) welcome you to the second instalment of “*The WRAP.*” In this edition, we look at the most recent developments and updates in respect of competition law and enforcement which has taken place across the African continent in recent months.

### **South Africa**

#### **Abuse of Dominance and Civil Damages**

The Johannesburg High Court recently found in favour of Nationwide Airlines (now in liquidation) in its case against South African Airways (SAA) in what is a landmark decision in respect of follow on damages for loss of profit which Nationwide incurred as a result of the national airlines anticompetitive conduct.

The Competition Tribunal had, in 2006, found that SAA had abused its dominance by inducing travel agents to promote its flights at the expense of other airlines.

Nationwide, which was subsequently liquated, were awarded approximately R104 million of their R170 million damages claim, in what is the largest civil damages award to date in South Africa.

It should be noted that Comair is currently suing SAA for over R 1 billion in damages as a result of the same anticompetitive conduct.

SAA is not the only parastatal which is currently in the headlines in relation to abuse of dominance, as the South African Competition Commission has also recently initiated an investigation into Transnet, another state owned entity, in relation to alleged “excessive pricing” in respect of port charges.

### **Mergers**

Two highly publicised mergers, the South African Breweries (SAB)/ Coca-Cola bottlers merger as well as the SAB/AB-InBev merger were approved by the South African Competition Tribunal subject to ‘agreed conditions’, largely as a result of substantial ministerial intervention.

In the Coca-Cola merger, the merging parties undertook to commit to a R800 million development fund, while the merging parties in the AB In-Bev merger agreed to establish a R1 billion development fund to placate Minister Patel’s public interest concerns.

A proposed ‘sugar tax’ in South Africa as, however, resulted in the merging parties in the Coca-Cola merger revisiting the R800 million commitment indicating that it may not be feasible in light of the proposed increase in tax.

### **Investigations**

The Competition Commission has recently announced that it has referred six complaints, in respect of cartel conduct, to the Competition Tribunal. The latest string of referrals is thus clear affirmation that the Competition Commission is intensifying its efforts to combat cartel conduct and that the Commission will dedicate substantial resources to various sectors which are not necessarily considered ‘priority sectors’. The referrals involve respondents from the following industries:

- Newspaper publishing;
- Railroad machinery;
- Textiles (manufacturing uniforms);
- Gear pumps;
- Coffee capsules; and
- Security services.

- In July 2016, Sime Darby Hudson Knight (Pty) Ltd (Sime Darby) concluded a settlement agreement with the Competition Commission in relation to collusive conduct which Sime Darby had engaged in from 2004 to 2013 for market allocation in the edible fats and oils sector. In terms of the Settlement agreement, Sime Darby will pay a R35 million administrative penalty as well as commit to the investment of a further R135 million into a new packaging and warehouse facility. Sime Darby has also agreed to use a distributor owned by a previously disadvantaged person.

The investment would see Sime Darby enter into a market which they previously not competed in.

In 2014, the Commission raided the premises of Sime Darby and Unilever in what was, at the time, the first of a number of raids which the Commission has carried out since 2014.

- The Competition Commission has approached the Constitutional Court for an order compelling Group 5 (one of South Africa's largest construction companies) to submit its answering affidavit in relation to a complaint referral involving alleged collusive tendering.

Group 5 has to date refused to respond to the allegations and have requested access to the Commission's investigative report alleging that it is entitled to such a document in accordance with their right to access of public documents. The Constitutional Court will hopefully shed further light in terms of the information which is restricted in the hands of the Commission and what a respondent is entitled to prior to submitting its pleadings.

### **Market Inquiries**

The Commission is currently conducting three market inquiries' into the private healthcare, liquefied petroleum gas and grocery retail sector respectively.

In respect of the LPG inquiry, the Commission has published its preliminary findings and recommendations. In terms of the preliminary findings, the Commission has found that because the ownership of the gas pipelines does remains vested in the supplier of LPG, there is a high switching cost involved for a new supplier and accordingly, this is a feature which the Commission would like addressed by way of commercial contracts between customer and supplier. The Commission has proposed that commercial contracts should be drafted in way which allows for easier 'switching'.

The Commission has concluded its public hearings in respect of the private healthcare market inquiry. The preliminary findings have not yet been released, although the inquiry is due to be finalised in December 2016.

As to the grocery retail market enquiry, initial public submissions were due on August 2016.

### Other news

- The Competition Commission has published final guidelines for the assessment of public interest considerations in merger control. The guidelines provide further clarity as to how the Commission will evaluate the impact a proposed merger may have on one or more of the four listed grounds in Section 12A(3) of the Competition Act. Importantly, the Guidelines confirm that the Commission will only consider the impact of public interest considerations if they are merger specific. The guidelines are not, however, binding on the Commission.
- The Competition Commission has signed a Memorandum of Understanding with the European Commission which envisages, *inter alia*, greater cooperation between the two agencies in respect of common on-going investigations.

## Namibia

### Investigations

- The Namibian Competition Commission (NaCC) has recently finalised a settlement with Sanlam and PPS in respect of a contravention of Section 23 of the Competition Act in relation to market allocation regarding insurance policies. In terms of the settlement agreement, the respondents will pay a N\$ 15 million administrative penalty.

While the respondents acknowledged that the conduct amounted to a contravention of the Competition Act, maintained that that they were pursuing a bona fide joint venture which was not designed to impede competition in the market. Sanlam have indicated that they will, post finalising of the consent order, apply for an exemption in respect of the conduct over which the settlement agreement was concluded.

This settlement is further affirmation of the NaCC's intention to combat anticompetitive practices.

### Other

- The NaCC has recently published Restrictive Practices Guidelines, which deal in particular with the NaCC's powers and in respect of search and seizure operations, including the handling of privileged documents. The Guidelines also contains further guidance on various issues and caters for a number of procedural aspects which must be adhered to (as well as the prescribed forms which should be utilised in certain circumstances) in relation to, *inter alia* the following:

- initiating complaint;
- applying for an exemption;
- requesting an advisory opinion;
- handling and the use of 'confidential information';

Please see here for [more](#) information in respect of the Guidelines.

## Zambia

The Zambian [Competition and Consumer Protection Commission](#) (CCPC) recently published Guidelines on the calculation of administrative penalties. The guidelines cater for substantial administrative and criminal liability for firms who contravene certain provisions of the Competition and Consumer Protection Act.

For further details and the AAT editors' comments in respect of the guidelines, please click [here](#).

## Kenya

The [Kenyan antitrust authority, CAK](#), recently closed its investigation into a **classic price-fixing cartel** involving the **Outdoor Advertisers Association**, resulting in a fine of Sh11.64 million (approx. \$120,000) imposed on domestic advertising firms for fixing minimum prices of billboard space, reports the Kenya Gazette. The affected companies include Magnate Ventures Limited (Sh5 million), A1 Outdoor Limited (Sh114,000), Live Ad Limited (Sh2.5 million) and Adsite Limited (Sh2.39 million), while four others had already settled with CAK previously (Consumer Link (Sh1.2 million), Look Media (Sh136,000), Firm Bridge Limited (Sh246,400) and Spellman Walkers Limited (Sh45,180)). The remaining four trade association members will be fined forthwith.

Please click here to see [more](#).

## Botswana

### Mergers

- The Botswana Competition Authority (CA) has decided to approve the acquisition of the entire issued shareholding of Warbler Holdings (Pty) Ltd by Bluehearts (Pty) Ltd, subject to conditions.

The CA did not identify any potential horizontal concerns in relation to branded consumer electronics, but concluded that there are potential vertical issues as the acquirer will be present in both the upstream and

downstream markets, and as such potentially have the ability and incentive to foreclose players in the downstream market, particularly in instances where the merged entity is a sole distributor of the branded products, and where it enjoys a dominant position.

Some of the conditions include undertakings to continue to supply on certain terms as well as to make certain divestitures within a specified time period.

### **Enforcement**

- The Botswana Competition Authority has also granted its first exemption in respect of the Choppies Buying Group. The exemption application was initially rejected by the Competition Authority and was appealed by the applicants to the Competition Commission. After a number of procedural issues were disputed, it was eventually agreed that the Competition Authority would reconsider the application. The Competition Authority eventually granted the exemption on public interest grounds and concluded that granted the exemption as it found that the benefits for the public in the form of maintaining employment in Payless Supermarket (Pty) Ltd and Woodblock (Pty) Ltd, had the effect of offsetting the negative effects the Choppies Buying Group would have on competition. Such benefits were seen by the Authority as being directly attributable to the Parties belonging to the Choppies Buying Group.

Although the decision was taken by the Competition Authority to grant the exemption in 2014, the exemption was only formally granted by way of Notice 1/2016 in July 2016, and will extend to 30 November 2017.

## **Malawi**

### **Advocacy**

- The Malawian Competition and Fair Trade Commission (Malawian Commission) is making significant strides in advocacy of competition law within its border as well as the COMESA region.

The Malawian Commission has signed a Memorandum of Understanding with the COMESA Competition Commission and has held numerous clinics across Malawi in an effort to inform and enlighten businesses of competition law in general and the consequences of failing to comply with the legislative provisions.

The above developments are part of the Malawian Commission's 2015-2016 Strategic Plan which was officially unveiled in March 2016. In terms of the Strategic Plan, the Malawian Commission has identified four main objectives, namely:

- to enhance competition advocacy and mass awareness at all times;
- to regulate and monitor markets at all times;
- to enforce competition and fair trading laws at all times; and
- to strengthen institutional capacity at all times

## COMESA

The COMESA Competition Commission (CCC) has been active in signing a number of memoranda of understanding with various member states as well as other regional bodies. The MoU's generally envisage a greater cooperation between the agencies in respect of information sharing and assisting in cross border investigations.

Most recently, the CCC has signed a cooperation framework agreement with the Egyptian Competition Authority regarding the application and enforcement of the COMESA Rules and Regulations.

In addition, COMESA has begun enforcing non-merger competition law, particularly in the restrictive practices arena.

Click here to see [more](#).

**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.**