The Public Competition Enforcement Review

Eleventh Edition

Editor

Aidan Synnott

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Editor
Aidan Synnott

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PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention. Indeed, there are several examples of cross-border engagement in the chapters that follow, including discussions of parallel investigations in multiple jurisdictions. We also read of bilateral and multilateral exchanges between and among various countries' competition officials, including a report from Turkey noting its entry into memorandums concerning international cooperation with several Balkan countries last year.

We continue to see the evolution and refinement of approaches to competition law enforcement in several jurisdictions. For example, our Argentine contributors provide an informative discussion of a new Antitrust Law, enacted following 'many years of effort by practitioners and authorities.' The authors note that this new law introduces 'significant changes to antitrust enforcement in Argentina.' Notably, in this edition we welcome for the first time in the *Review* a contribution from Indonesia, which provides an informative overview of competition enforcement there.

Cartel enforcement remains robust. In the pages that follow, we read that, late last year, the Italian Competition Authority levied 'its largest ever overall fine in a cartel case'. This case involved automotive companies' captive banks, which provide consumer financing. A record administrative penalty was also assessed by South African authorities in connection with allegations related to an alleged auto parts cartel. While the chapter from China notes that fines in 2018 were 'relatively low compared with . . . previous years,' it also points to a 'significant increase in the number of cartel cases'. Meanwhile, leniency applications have increased in both India and in France, where our contributors suggest the uptick 'could be explained by the increasing number of small and medium-sized companies applying for leniency'. In 2018, Canada revised its immunity and leniency programmes, and those revisions are discussed in that chapter.

Online platforms – and the 'digital economy' more generally – have been the subject of regulatory scrutiny by European Union, French, German, Japanese, Swedish, Taiwanese, and British authorities, among others. These chapters contain useful discussions of developments in those areas. In addition, the EU Overview provides a helpful primer on the record fine imposed by the European Commission on Google related to internet search and its Android operating system. Italian authorities released preliminary results of an investigation into 'big data' and called for regulation in that area. The chapters from France and Germany highlight a cooperative study being conducted by the Autorité de la Concurrence and the Bundeskartellamt concerning competitive effects of algorithms. Elsewhere in the areas of restrictive agreements and dominance, authorities in Greece issued fines in two cases that included allegations of resale price maintenance, a practice that was also met with scrutiny

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by authorities in Poland. Both Italian and Polish authorities focused on issues of dominance in the utilities sector.

Merger review and enforcement activity remains robust. The chapters that follow note activity in many diverse sectors. The United States chapter discusses the recent news of the government losing its appeal in the *AT&T/Time Warner* case: the appeals court there ruled that the lower court did not commit a clear error when it denied the government's request to block that deal. Several chapters – including the submissions from Argentina, Brazil, Canada, China, India, Mexico, and the United States – discuss investigations of the *Bayer/Monsanto* deal. China conditionally cleared the *Essilor/Luxottica* deal in the eyeglasses industry, while Italy cleared a different Luxottica deal with conditions. The *United Technologies/Rockwell Collins* deal is discussed in the China and United States chapters; and the *Praxair/Linde* deal is discussed in the Brazil, India, and United States chapters. Both Argentine and Colombian authorities issued updates to their merger review guidelines, which are discussed in the respective chapters. Similar to last year, the report from China notes several enforcement actions arising from reporting violations.

Particularly notable again this year is the chapter from the United Kingdom, as authorities there adapt to a post-Brexit enforcement regime. Readers will be quite interested in the informative discussion of the effect of Brexit on the future of competition enforcement. In that regard, the authors discuss recent guidance from the Competition and Markets Authority (CMA), potential consequences of various Brexit scenarios, and the expected increase in the CMA's workload. We will watch with interest to see how Brexit may affect competition enforcement in the United Kingdom and the European Union in the year to come.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
April 2019

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Chapter 22

SOUTH AFRICA

Candice Upfold[1]

I OVERVIEW

The 2017 and 2018 financial year saw some interesting developments in South Africa, not least of which are the significant amendments that have been proposed to the Competition Act, 1998 (Competition Act). The Competition Amendment Act of 2018 (Amendment Act) provides for, among others, scrutiny of market concentration and the racially skewed spread of ownership of the South African economy and the amendments seek to empower the Competition Authorities to create more opportunities to advance transformation of ownership. The changes will have a substantial impact on all businesses operating in South Africa and will increase the complexity associated with complying with the Competition Act.

Some of the amendments include, among others: (1) a new regime applicable to foreign investment mergers affecting the country's security interests; (2) amendments to the abuse of dominance provisions in the Competition Act primarily aimed at correcting the difficulties that the competition authorities have experienced in enforcing abuse of dominance complaints; and (3) amendments to the price discrimination provisions which require that special attention be given to the effect of anticompetitive price discrimination on small businesses and firms owned or controlled by historically disadvantaged persons.

The largest administrative penalty imposed on a single firm in 2017/2018 was imposed by means of a consent order on Autoliv, an automotive safety supplier. An administrative penalty of 149 million rand was imposed following an admission by Autoliv that it had divided the market and rigged bids in relation to occupational safety systems for BMW and VW vehicles. This cartel is part of the international automotive parts investigation in which Autoliv has also paid administrative penalties to competition authorities in the European Union, United States and Canada.[2]

In addition to the international investigation into automotive parts, the competition authorities are also continuing with their investigation into allegations of foreign exchange collusion by 23 local and international banks. Citibank was the first bank to enter into a consent order in which it agreed to pay an administrative penalty of 69 million rand and Barclays has been granted conditional leniency for its participation in the conduct.

1 Candice Upfold is a senior associate at Norton Rose Fulbright South Africa Inc.

2 See https://www.comptrib.co.za/publications/press-releases/autoliv-settlement-approved-the-multinational-has-now-reached-a-settlement-with-five-countries/.

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In addition, FR Waring and Willowton successfully challenged and set aside the Competition Commission's (Commission) warrant authorising a search and seizure operation on their premises. This is the first raid that has been set aside since the raid on Pretoria Portland cement in 2000.[3]

As will be demonstrated in this chapter, the competition authorities in South Africa are extremely active and have, over the review period, imposed innovative and creative remedies focusing on the public interest in a number of decisions.

i Prioritisation and resource allocation

For the 2017/2018 financial year (which is the most recent reported information available),[4] the Economic Development Department (EDD) allocated a grant of 30.04 million rand to the Competition Tribunal (Tribunal), which represents a 49.3 per cent increase on the grant allocated to the Tribunal by the EDD for the 2016/2017 financial year.[5] A significant portion of the Tribunal's total income consists of the EDD grant (63.71 per cent); however, the Tribunal also received 16.30 million rand in income from merger filing fees and a further 810,000 rand from other sources of income. As a whole, the Tribunal's revenue has increased by 34.87 per cent to 47.15 million rand in the 2017/2018 financial year.[6]

Similarly, for the 2017/2018 financial year, the EDD allocated 268 million rand to the Commission, which represents a 21.1 per cent increase on the previous financial year. In addition, the Commission received a further 16 million rand from interest on investments, 62 million rand on merger filing fees and 4,873,000 rand from other sources of income.[7] The Commission is accordingly a well-funded regulatory authority in South Africa. Notwithstanding the resources allocated to the Commission, in its annual performance plan for the 2018/2019 financial year,[8] the Commission stated that the 'current funding model and budget allocation are not adequate to support the high (and increasing) volume of cases which the Commission has, nor to support the complex investigations and litigation it undertakes.' It remains to be seen whether the Commission will receive increased funding for the upcoming financial year.

To date, a significant proportion of the Commission's efforts to enforce the Competition Act have been focused on detecting, prosecuting and eradicating hardcore cartels, particularly in South African industries that the Commission has identified as 'priority sectors' because of their impact on poor and disadvantaged consumers.[9] It has had notable success in doing so.

3 Following litigation to the Supreme Court of Appeal, the raid was set aside in May 2002.
4 1 April to 31 March.
5 The grant was increased for a number of reasons, which included increased costs associated with the relocation to larger space on the Department of Trade and Industry campus and the appointment of an additional full-time member in January 2017.
6 The Competition Tribunal's Annual Integrated Report for the 2017/2018 financial year.
7 The Competition Commission's Annual Integrated Report for the 2017/2018 financial year.
8 See http://www.compcom.co.za/wp-content/uploads/2018/01/APP-2018-Parliament-Presentation.pdf.
9 The sectors identified for prioritisation are food and agro-processing, intermediate industrial input products, infrastructure and construction, healthcare, energy, banking and financial services, and information and communication technology.

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ii Enforcement agenda

The Commission is responsible for investigating and enforcing the Competition Act. Its core functions include:

a investigating and prosecuting restrictive horizontal and vertical practices;
b investigating and prosecuting an abuse of a dominant position;
c deciding on merger and acquisition approval applications;
d conducting formal inquiries into the general state of competition in a particular market;
e granting or refusing applications for exemption;
f conducting legislative reviews; and
g developing and communicating advocacy positions on specific competition law issues.

In its 2017/2018 annual report the Commission has identified three strategic goals that it aims to achieve to contribute to the attainment of a growing and inclusive economy. These include effective competition enforcement and merger regulation, strategic collaboration and advocacy, and a high performance agenda.[10]

II CARTELS

Since the inception of the Competition Act, a very broad interpretation of the prohibition of any form of direct or indirect price fixing, market allocation or collusive tendering by competitors in South Africa has been imposed.

The Commission has repeatedly emphasised that it regards hardcore cartel conduct as the most egregious violation of the Competition Act,[11] and the Tribunal has similarly observed that 'cartels are viewed as the most abhorrent antitrust practices' and 'a cancer to competition and harmful to consumers and economic development'.[12]

One reason for the Commission's success in prosecuting cartel conduct is its exceptionally effective Corporate Leniency Policy (CLP).[13] While the number of leniency applications is decreasing, it has supplied the Commission with substantial (and frequently damning) evidence with which to build strong complaints. This, together with the Commission's practice of seeking the maximum fine of up to 10 per cent of annual turnover in virtually all of the cases that it refers for adjudication by the Tribunal, has meant that the vast majority

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10 See footnote 7 at page 6.

11 'The investigation of cartels is at the core of competition regulation because it deals with the most egregious form of anticompetitive conduct, including price fixing, customer allocation, and bid rigging.' See the Competition Commission's Annual Report 2009/2010. Also see International Competition Network Anti-Cartel Enforcement Template, Competition Commission of South Africa (30 June 2015): 'Section 4(1)(b) deals with most egregious horizontal restrictive practices (namely price fixing, division of markets and collusive tendering) as *per se* prohibited.'

12 *Competition Commission v. Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9 (3 February 2010) Paragraph 31.

13 The CLP was introduced in 2004 and amended in 2008. In the 2017/2018 financial year the Commission received two applications for leniency. This is in comparison to six applications for the 2016/2017 financial year, 10 applications for the 2015/2016 financial year, 121 for the 2014/2015 financial year and five in the 2013/2014 financial year.

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of complaint respondents have elected to settle complaints about hardcore cartel conduct by way of the consent order procedure in Section 49D of the Act[14] rather than risk protracted, and uncertain, litigation.

i Significant cases

Penalties were imposed in 26 matters[15] during the 2017/2018 financial year and totalled approximately 354 million rand.[16] This was a decrease from the approximately 1.63 billion rand[17] imposed in the 2016/2017 financial year.[18] Of the penalties imposed in the 2017/2018 financial year, 70.33 per cent were imposed in the manufacturing sector, 19.61 per cent in the financial and insurance activities sector, 8.85 per cent in the professional scientific and technical activity sector and 10.06 per cent in the construction, information and communication, mining and quarrying and transportation and storage sectors.[19]

As mentioned above, a large proportion of cartel cases are settled by way of consent orders,[20] and as such, the merits of very few cases are finally adjudicated upon by the Tribunal, or the Competition Appeal Court, as the case may be.

Bicycles[21]

The *Bicycles* case involved an alleged cartel to fix prices and trading conditions of bicycles and cycling accessories. The case was referred by the Commission to the Tribunal against 20 respondents that are either wholesalers or retailers of bicycles or accessories. By the time the hearing proceeded in May 2015, 18 of the respondents had settled the matter with the Commission in terms of a consent order. The Tribunal referral hearing therefore proceeded only in respect of two respondents.

The Commission alleged that at meetings attended by both wholesalers and retailers, an agreement was reached to fix the selling price of bicycles and cycling accessories by using the recommended retail price (RRP) as a mechanism by which downstream prices could be increased from October 2008 onwards.[22] The recommended retail price was set by wholesalers

14 See Rules 23 and 24 of the Tribunal Rules. Section 49D permits the Commission and a firm against whom a complaint of a prohibited practice has been initiated in terms of the Act (the 'respondent') to agree on a proposed order in order to settle the matter 'during, on or after completion of the investigation of a complaint'. Section 49D affords the Commission a wide discretion in relation to these proceedings and does not expressly require the Commission to take into account the factors set out in Section 59 of the Act. However, the Commission's discretion in relation to such proceedings is limited insofar as Section 49D(1) expressly provides that the Tribunal 'may' confirm a consent order.

15 More than 95 per cent of the penalties imposed were for cartel conduct.

16 See footnote 7 at page 34.

17 Id. at page 34.

18 Ninety-two per cent of the total administrative penalties imposed was imposed on a single firm, ArcelorMittal, for its participation in a range of anticompetitive conduct.

19 See footnote 7 at page 33.

20 All 26 cases were settled by means of a consent order/settlement agreement in the 2017/2018 financial year.

21 *The Competition Commission and Fritz Pienaar Cycles (Pty) Ltd and Others* case No. CR049Jul12 (30 May 2016).

22 Ibid. at Paragraph 24.

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but was subject to a known uniform mark-up. At a meeting of 10 September 2008, a proposal was made that the recommended retail price for bicycles be increased from 35 to 40 or 50 per cent, and from 50 to 75 per cent for bicycle accessories.[23]

Interestingly, many wholesalers and retailers raised concerns that this would amount to price fixing, but they were reassured at the meeting by a representative from Fritz Cycles (one of the respondents) that the conduct was not illegal.[24]

While this decision is not new, it provides some important insights into the Tribunal's approach to analysing whether a firm has entered into an agreement or engaged in a concerted practice, in contravention of Section 4(1)(b). While this decision does not develop the law as the principles upon which it was based have been applied in a number of previous cases, this case is useful in summarising some of these principles:

The form of an agreement between competitors is not relevant

The Tribunal has confirmed that consensus is sufficient to constitute an agreement under the Competition Act. Furthermore, the Competition Act does not require monitoring or even implementation of an agreement to fall foul of Section 4(1)(b) of the Competition Act.[25] The Tribunal quoted *MacNeil*,[26] which states that 'consensus sufficient to constitute agreement under the Act need not amount to a contract at private law, need not be enforceable, punishable or even have a level of precision that the arrangement could defeat an argument that it is void for vagueness'.[27]

Firms that intend to deviate from a cartel agreement or have actually cheated on an agreement may contravene Section 4(1)(b)

A common feature of cartels is the intention to cheat on an agreement. The Tribunal in the *Bicycles* case confirmed the position that the intention to cheat on an agreement does not undermine the finding that an understanding or arrangement was reached.[28]

The implications of a parties' passive attendance at meetings where collusive arrangements were discussed has also been dealt with in *MacNeil* and *Videx*.[29] In this regard, the Competition Appeal Court stated that where a party does not wish to be bound by collusive activity, such party has a 'duty to distance himself from the proposals under discussion, either by leaving or by stating that he wants no part of them'.[30] The Competition Appeal Court in *Videx* went on to say that 'a loss of trust, even a significant breakdown in trust, is not sufficient if unaccompanied by other actions which clearly signal withdrawal from the cartel.'[31]

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23 Ibid. at Paragraph 25.

24 Ibid. at Paragraph 59.

25 Ibid. at Paragraph 174.

26 *MacNeil Agencies (Pty) Ltd v. Competition Commission* (121/CACJul12) [2013] ZACAC 3 (18 November 2013).

27 Ibid. at Paragraph 56.

28 See footnote 21 at Paragraph 127.

29 *Videx Wire Products (Pty) Ltd v. Competition Commission of South Africa* (124/CACOct12) [2014] ZACAC 1 (14 March 2014).

30 See footnote 26 at Paragraph 64.

31 See footnote 29 at Paragraph 67.

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The Tribunal therefore confirmed the *MacNeil* decision, which states that a representative would be under a duty to distance itself from the proposals under discussion, either by leaving a meeting or by stating that he or she wants no part of the discussion.[32] Being silent and not distancing oneself is therefore not a defence.[33]

Agreements in contravention of Section 4(1)(b) need not be ratified by senior representatives of a company

As noted above, the Tribunal took the view that the term 'agreement' in the Competition Act does not have the same meaning as it does in a contract. The Tribunal noted that the 'Act has extended the ordinary definition of the term agreement when used in relation to a prohibited practice to include '. . . a contract, arrangement or understanding, whether or not legally enforceable".[34]

In the *Bicycles* case, the Tribunal confirmed that the lack of authority defence may have application in private contract law, but does not assist in the context of competition law. A lack of mandate can therefore not assist where competition harm to the public consumer is concerned.[35]

Two of the respondents, Omnico and Cool Heat Agencies, appealed the decision to the Competition Appeal Court on the narrow issue of whether the silent participation of firms at a meeting where cartel activity was discussed amounts to a contravention of Section 4(1)(b)(i) of the Competition Act.[36]

The Competition Appeal Court found that both Omnico and Cool Heat Agencies did contravene the Competition Act. It was found: 'The principle of passive attendance at meeting to listen to 'gossip' among companies cannot excuse an undertaking. Consistent with European competition jurisprudence, as it has now developed, there is a duty to speak or to report to authorities or publicly distance oneself from any anticompetitive behaviour.'[37]

In reaching its finding, the Competition Appeal Court stated that the Commission had provided sufficient evidence that:

a both appellants failed to distance themselves from the consensus reached at the meeting to increase the RRP from October 2008 so as to afford greater margins to the retailers;

b both appellants gave no indication – either at the September meeting or thereafter in any forum – that they disagreed with the increase and that they would not proceed on that basis; and

c neither appellant had placed evidence before the Tribunal that their pricing, and increased RRP in particular, following the September meeting was the result of independent decision making rather than a result of the unlawful agreement reached at the September meeting.[38]

32 See footnote 21 at Paragraph 112.

33 See footnote 21 at Paragraph 169.

34 See footnote 21 at Paragraph 77.

35 See footnote 21 at Paragraph 167.

36 *Omnico (Pty) Limited and Cool Heat Agencies (Pty) Limited v The Competition Commission and Others* Appeal case No. 142/CAC/June16 / 143/CAC/June16.

37 Ibid. at Paragraph 61.

38 Ibid. at Paragraph 67.

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While the Competition Appeal Court ultimately came to the same decision as the Tribunal, it did reduce the administrative penalties to be paid by both Omnico and Cool Heat Agencies on the basis of mitigating factors.

Tulisa Cables[39]

The *Cables* case is the first of its kind in South Africa demonstrating the difference (on the evidence) between a collusive agreement between competitors and lawful rational behaviour by a rival in an oligopolistic market.

In this decision, the Tribunal was only required to make a decision in respect of alleged conduct on the part of Tulisa Cables (Pty) Limited (Tulisa) as the first and second respondents, Alvern Cables (Pty) Limited (Alvern) and South Ocean Electric Wire Company (Pty) Limited (SOEWC), had entered into a settlement agreement with the Commission and the fourth respondent, Abedare Cables (Pty) Ltd (Abedare), had applied for and was granted leniency.

On the facts, the Commission was unable to establish that Tulisa had attended any meetings in which the parties had agreed to directly or indirectly fix the selling price of power cables, nor was there evidence that Tulisa had been informed of the price-fixing agreement by SOEWC, as alleged by the Commission. The Tribunal was therefore required to consider whether there was evidence of a concerted practice. In this regard, the Tribunal considered whether Tulisa conducted itself in a manner indicative of it being a member of a cartel by basing its prices (as the other respondents' did) on the price list circulated by Abedare on the first of each month notwithstanding that the price lists were not sent by Abedare to Tulisa.

Tulisa relied on evidence to argue that it never received the Aberdare price lists from any of the respondents and instead received its competitors' prices from customers. According to Tulisa, it would use the Aberdare price list (which it obtained independently) as a basis off which it would offer further discounts to customers.[40]

The Tribunal held that there was no evidence before it that Tulisa was in agreement with the other respondents. This is because Tulisa was not in attendance at meetings with the other respondents, nor did it receive the price lists directly from the respondents. On the facts, the Tribunal stated that 'Tulisa's actions appear to be consistent with those of a player in an oligopoly market acting rationally and independently of its competitors but well alive to the actions of the competitors (referred to in literature and case law as 'conscious parallel behaviour' or 'conscious parallelism')'.[41]

The Tribunal therefore found that on the facts, there was insufficient evidence of Tulisa acting in concert with the other respondents in furtherance of a cartel and the complaint against Tulisa was dismissed.

This case demonstrates that a firm will not automatically be found to have participated in a cartel simply by following a competitor's price lists if it can be shown on the facts that reference to the price lists is simply as a result of market structure and not concerted action to participate in a cartel.

39 *The Competition Commission of South Africa and Alvern Cables (Pty) Limited and Others* Case No. CR205Mar14.

40 Ibid. at Paragraph 49.

41 Ibid. at Paragraph 57.

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DSTV Media Sales[42]

This complaint involves allegations of price fixing against 33 respondents in the media industry. Thus far, four have paid (by way of consent orders) administrative penalties.[43]

The Commission alleged that through Media Credit Co-ordinators (MCC), a non-profit organisation, the respondents agreed to offer similar discounts and payment terms to advertising agencies that place adverts with MCC. For accredited agencies, the discount offered was 16.5 per cent for all payments made within 45 days of the date of the invoice statement, while for the most part the discount offered to non-accredited agencies was 15 per cent.[44]

The Commission also alleged that the respondents employ services of an intermediary to perform risk assessments on advertising agencies for purposes of imposing the above-mentioned discount structure.[45]

The Commission found that the above-mentioned conduct gave rise to a restriction of competition among competing media groups in that they did not independently determine an element of their pricing and trading terms. The Commission found that these practices amounted to price fixing and the fixing of trading conditions.

One of the respondents, DSTV Media Sales, entered into a consent agreement with the Commission, which was confirmed by the Tribunal in which it admitted that it had engaged in the conduct as alleged by the Commission in contravention of Section 4(1)(b)(i) of the Competition Act.

In reaching settlement, DSTV Media Sales agreed to pay not only an administrative penalty but to also be bound by a number of non-conventional remedies which resulted in an effective total of 180 million rand being levied as a penalty. Apart from the administrative penalty imposed (22 million rand), the following innovative remedies were also agreed to:

a DSTV Media Sales undertook to contribute 8 million rand to the Economic Development Fund over three years from the date of confirmation of the consent agreement to enable the development of black-owned small media or advertising agencies requiring assistance with start-up capital and to assist black students requiring bursaries to study media or advertising, among others.[46]

b DSTV Media Sales further agreed to provide 25 per cent in bonus airtime for every rand of airtime bought by qualifying small agencies. This is intended to help smaller agencies participate in the market. The bonus airtime would be provided for a period of three years with a total annual airtime cap of 50 million rand.[47]

ii Trends, developments and strategies

The competition authorities continue to regard cartel enforcement as a major priority, as indicated by the Commission's initiation of 28 new cases in the 2017/2018 financial year. The Commission has furthermore indicated its intention to clamp down on cartel conduct,

42 *The Competition Commission and DSTV Media Sales Proprietary Limited* Case No. CO061May17.

43 See footnote 6 at page 35.

44 See footnote 42 at Paragraph 2.3.1.

45 Ibid. at Paragraph 2.3.2.

46 Ibid. at Paraphraph 7.2.1.

47 Ibid. at Paragraph 7.1.2.

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having conducted four dawn raids[48] in the 2016/2017 financial year. This trend continued into the first half of the 2017/2018 financial year, with the Commission having conducted a further three dawn raids.[49] This trend has, however, slowed down as a result of the Commission's budgetary constraints.

Following a dawn raid conducted in the edible oil industry, FR Waring and Willowton applied for a reconsideration and setting aside of the *ex parte* order that the Pietermaritzburg High Court issued on 6 December 2016 on an urgent basis. The court found that the Commission had not made out a case for the issuing of the warrant. In particular, the court found that the Commission's allegations in the application for the *ex parte* warrant as to the alleged prohibited practice was based on double hearsay and accordingly could never ground 'reasonable belief' that there were collusive dealings in the market. The court therefore set aside the search warrant. The Commission applied for leave to appeal this decision but leave to appeal was denied by the High Court on 20 February 2019.

This is the first dawn raid to be set aside since the SCA ordered, in May 2002, the setting aside of the raid conducted on Pretoria Portland Cement.

The trend to impose substantial administrative penalties on parties who have been found to contravene the Competition Act is likely to increase, which is evident from the *ArcelorMittal* consent agreement reached on 16 November 2016, in which an administrative penalty of 1.5 billion rand was imposed. While the consent agreement was entered into to settle a number of complaints, the considerable penalty imposed is an indication that the competition authorities are seeking to impose substantial penalties on firms that collude.

The Minister of Economic Development, under whose department the Commission falls, also publicly stated in November 2016 that he is of the view that the administrative penalties have not been high enough to date, and that he would encourage the imposition of even steeper penalties.

On 1 December 2017, the Minister of Economic Development published the Competition Amendment Bill for public comment. It is noted in the Competition Amendment Bill's preamble that the Competition Amendment Bill 'focuses on creating and enhancing the substantive provisions of the Act aimed at addressing two key structural challenges in the South African economy: concentration and the racially skewed spread of ownership of firms in the economy'.

For purposes of the amendments to the Competition Act, five priority areas were identified:

a the provisions of the Competition Act relating to prohibited practices and mergers must be strengthened;

b special attention must be given to the impact of anticompetitive conduct on small businesses and firms owned by historically disadvantaged persons;

c the provisions relating to market inquiries must be strengthened so that their remedial actions effectively address market features and conduct that prevents, restricts or distorts competition in the relevant markets;

d it is necessary to promote the alignment of competition-related processes and decisions with other public policies, programmes and interests; and

48 The Commission conducted dawn raids on cargo shipping companies, suppliers of packaging paper, manufacturers of margarine, edible oils and baking fats, and the fresh produce market.

49 These dawn raids were conducted on fire sprinkler installers, beef companies and suppliers of set-top boxes and accessories.

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e the administrative efficacy of the competition regulatory authorities and their processes must be enhanced.

Following rounds of public comment in 2018, the Competition Amendment Bill was passed by Parliament on 5 December 2018 and was signed by the President of South Africa on 13 February 2018. The Amendment Act will come into operation on a date to be proclaimed by the President.

iii Outlook

The introduction of criminal liability creates some uncertainty for individuals who may have participated in collusive conduct that was ongoing after 1 May 2016. The introduction of criminal liability seemingly will have a negative impact on the Commission's CLP if individuals are no longer willing to blow the whistle, as leniency is currently only provided for in the CLP for firms that confess to cartel conduct in certain circumstances. The introduction of criminal liability seems to have had an impact on the number of leniency applications received as there has been a decrease in the number of leniency applications received over the past few years. In the 2017/2018 financial year, the Commission received a total of two leniency applications, which is down from the six applications for leniency received in 2016/2017 and a decrease from the 10 applications received in the 2015/2016 financial year.[50]

While the Competition Amendment Act 2009 (2009 Amendment Act) does make provision for the Commission to certify a person as being 'deserving of leniency', it is unclear how this certification would operate in practice, since the National Prosecuting Authority, which is tasked with prosecuting individual criminal conduct, could pursue individuals despite their having obtained the Commission's leniency certification.

There has been no prosecution of an individual for his or her participation in collusive conduct to date. The Commissioner has, however, on 29 June 2018, called for criminal liability following an order by the Tribunal confirming the consent agreement with three vessel owners who ferry passengers between the Robben Island Museum and the V&A Waterfront in Cape Town for charges of price fixing and collusive tendering. The Commissioner stated that:

> *Robben Island is an iconic site that represents the saddest and richest history of this country dating back centuries. The museum deserves to be treated with great pride and respect as it symbolises the peak of courage and triumph of human spirit. The actions of these vessel owners exhibited distain for this country's history and utter disrespect for the people. Those who show neither remorse nor shame must be considered for criminal prosecution.*

It remains to be seen how the provisions will be implemented.

50 See footnote 7 at page 40.

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III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

In addition to imposing an outright prohibition on cartel conduct, the Competition Act also prohibits a range of restrictive agreements that may result in a substantial prevention or lessening of competition, unless it can be shown that the agreement gives rise to technological, efficiency or other pro-competitive gains that outweigh the anticompetitive effect.[51]

The Competition Act also prohibits various forms of unilateral conduct by dominant firms.[52]

i Significant cases

There have been very few cases in South Africa in which contraventions of these kinds of restrictive practices have been prosecuted; however, on 8 September 2015, the Tribunal made a finding on a predatory pricing case, the first of its kind for South Africa.

Media24[53]

The *Media24* case, which involved a complaint against Media24 for engaging in predatory pricing through its community newspaper (*Goudveld Forum*) by, *inter alia*, pricing its advertising below cost, demonstrates the complexities arising from the prosecution of an abuse of dominance case. This case is one of the lengthiest and most complex cases that the Tribunal has heard to date.[54] The complaint was first lodged with the Commission in January 2009, with the hearing only taking place some five years later in November 2014. Final submissions were made on 27 March 2015, and on 8 September 2015 the Tribunal made its finding.

This case demonstrates the complexities, from an economic perspective, of establishing that a firm has engaged in predatory pricing. Ultimately, the Tribunal found that the Commission did not prove, on a balance of probabilities, that Media24 had priced below the relevant cost measures. As such, the predatory pricing case was dismissed.[55] Having said that, the Commission was able to demonstrate that Media24's strategy of using one of its titles as a below-cost 'fighting brand' (namely Forum) to drive out smaller rivals was exclusionary in nature, and as such a contravention of Section 8(c) of the Competition Act.

Section 8(c) of the Competition Act is a general 'catch-all' exclusion provision[56] and is a lesser offence to that of predatory pricing. In reaching its decision, the Tribunal referred to the *Nationwide* case,[57] which stated that as far as Section 8(c) was concerned, proof of pricing below an appropriate measure of cost, plus additional evidence, would suffice to prove exclusion.[58] In *Nationwide*, however, the Tribunal did not decide what the appropriate

51 See Section 4(1)(a) and Section 5(1) of the Competition Act.
52 See Section 8 of the Competition Act.
53 *The Competition Commission of South Africa and Media24 Limited* case No. 013938 / CR154Oct11 (8 September 2015).
54 The Competition Tribunal's Annual Integrated Report for the 2016/2017 financial year at page 5.
55 See footnote 53 at Paragraph 620.
56 Id. at Paragraph 125.
57 *Nationwide Airlines (Pty) Ltd v. SAA (Pty) Ltd and others* [1999–2000] CPLR 230 (CT).
58 Id. at page 10.

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measure or 'standard' should be.[59] While there was debate on which mechanism was the correct one to use in *Media24*, the Tribunal was of the view that average total cost (ATC) was the correct standard, particularly in an economy characterised by high barriers to entry.[60]

Ultimately the Tribunal found that Media24 priced its publication Forum below its ATC, and that, together with other evidence of direct and indirect intent to predate its competitor, and its subsequent ability to recoup the revenue that it lost during the predation period, constituted an exclusionary act. This exclusionary act furthermore had an anticompetitive effect (the exit of a competitor), and there was no evidence of any pro-competitive gain that outweighed the anticompetitive effect.[61]

The Tribunal did not deal with the issue of remedies in this decision, but on 6 September 2016 handed down a decision in which behavioural remedies were imposed on Media24 for its involvement in exclusionary conduct.[62] The remedy imposed included an obligation on Media24 to provide new entrants with credit terms as specified in the condition.

Media24 lodged an appeal with the Competition Appeal Court against the finding that it contravened Section 8(c) of the Competition Act. This was cross-appealed by the Commission, who sought an order that the Competition Appeal Court replace the Tribunal's finding with one that Media24 has contravened the more serious contravention contained in Section 8(d)(iv) (the predatory pricing provision). On appeal, the Competition Appeal Court confirmed that ATC is not the appropriate cost standard in a predation case brought under Section 8(d)(iv) of the Competition Act. In the Tribunal, since the Section 8(d)(iv) case could not be proven, the Tribunal had instead found that Media 24 contravened Section 8(c) (the general exclusionary provision). In reaching this conclusion, it used ATC as the appropriate cost benchmark together with a predatory intention. The Competition Appeal Court found that the attempt to rely on ATC with the dominant firm's predatory intention is incongruent with the structure of Section 8 of the Competition Act, which emphasises conduct rather than intention.[63] The Competition Appeal Court went on to say that:

> *ATC plus intention has no place in the scheme of s 8 (c) of the Act. It follows that the benchmark of AAC [average avoidable cost] must be employed when seeking to apply Section 8 (c) to a case of predatory pricing as opposed to the hybrid test which the Tribunal sought to apply in the present case without any attempt to reconcile its test with the manner in which s 8 promotes an objective test.*[64]

In applying its conclusions to the Section 8(c) case, the Competition Appeal Court set out to determine whether the Commission established that Forum's AAC exceeded its revenue during the complaint period. Ultimately, the Commission did not prove that Forum's AAC exceeded its revenue, and as such, the Section 8(c) complaint failed. Similarly, in considering the complaint in terms of Section 8(d)(iv), the Competition Appeal Court noted that the Competition Act is drafted in precise terms. To successfully prosecute a Section 8(d)(iv) case

59 See footnote 53 at Paragraph 215.

60 Id. at Paragraph 221.

61 Id. at Paragraph 621.

62 There is no administrative penalty imposed for a first time contravention of Section 8(c) of the Competition Act.

63 *Media 24 Proprietary Limited and the Competition Commission of South Africa*, case No. 146/CAC/Sep16 (19 March 2018).

64 Id. at Paragraph 57.

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the Commission would need to prove that the dominant firm is selling goods or services below their marginal or average variable costs. It was common cause in this case that Forum's revenue exceeded average variable cost, and as such, the Section 8(d)(iv) complaint also failed.

As a result, the Competition Appeal Court ordered that the Tribunal's decision is set aside and the complaint referral dismissed. The Commission was also ordered to pay the costs on appeal.[65]

The Competition Appeal Court decision demonstrates the difficulties that the Commission faces in successfully prosecuting abuse of dominance cases.

The Commission has appealed this decision to the Constitutional Court. A date for the hearing of the matter has not yet been set.

Computicket[66]

In this case the Tribunal was asked to determine whether a dominant firm in the market for the provision of outsourced ticket distribution services to inventory providers for entertainment events had abused its dominant position by securing exclusive agreements with clients.

Computicket is an outsourced ticket distributor (OTD) that sells tickets on behalf of providers of entertainment to members of the public. The providers range from theatres and concert promoters to sports stadia. Computicket was accused of using exclusivity in its agreements with inventory providers to exclude more innovative competitors from gaining a foothold in the OTD market.

The exclusivity agreements developed over time from an exclusivity period of approximately four months and in respect of a particular event in the initial contracts (in the late 1990s) to exclusivity in respect of all events for the duration of the contract (from 2005).

The 2005 agreements were for a minimum period of three years (as opposed to four months) and contained an annual renewal clause. The effect of the annual renewal clause was that if neither party cancelled three months prior to the expiry of the existing agreement, it would be renewed for a further year by default.[67] Furthermore, the difference between the two contracts was that the initial agreements referred to a single event, while in the later agreements, exclusivity pertained to all events by the client.

It is also noteworthy that a feature of both agreements was that unless the client agreed to exclusivity, there would be no agreement. It was therefore an 'all or nothing' policy adopted by Computicket.[68]

The Commission's main case was that Computicket contravened Section 8(d)(i) of the Competition Act, which prohibits a dominant firm from engaging in an exclusionary act that requires or induces a supplier or customer not to deal with a competitor. The Commission also relied on Section 8(c) (general 'catch-all' exclusion provision) and Section 5(1) (restrictive vertical agreement), however, since the burden of proof for the Commission to prove a contravention of either Section 8(c) of Section 5(1) is greater than for a contravention of Section 8(d)(i), as a first port of call, the Tribunal considered whether a contravention of Section 8(d)(i) could be sustained.

It was common cause that for the duration of the complaint period, Computicket was a dominant firm. In assessing whether the agreements constituted an exclusionary act, the

65 Id. at Paragraph 113.

66 *The Competition Commission and Computicket (Pty) Ltd* Case No. CR008Apr10.

67 Id. at Paragraph 69.

68 Id. at Paragraph 71.

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Tribunal stated that the agreements are at least facially exclusive: 'They prohibit inventory providers who are Computicket's customers from utilising the services of a competitor for the duration of the contract without the written consent of Computicket.'[69]

In proving a contravention of Section 8(d)(i) of the Competition Act, the Commission has to discharge its evidential onus of establishing an anticompetitive effect. Once the onus has been discharged, the Tribunal then has to consider whether the conduct complained of nevertheless results in any 'technological, efficiency or other pro-competitive gains that outweigh the anticompetitive effect'. The onus is on the dominant firm to prove the 'efficiency defence'.

The primary anticompetitive effect that the Commission argued for was that the agreements had a substantial exclusionary effect on rivals by foreclosing the market to them throughout the complaint period because they were not able to compete for sufficient inventory to reach the scale needed to compete effectively in the market.[70]

On the evidence, it was shown that there was limited and ineffectual entry into the market. The Commission contended that this was as a result of the exclusionary nature of the agreements. No other theory for why entry was limited was offered to rebut this conclusion.

The Tribunal followed the approach adopted in *South African Airways*[71] in order to establish whether the exclusionary act had an anticompetitive effect. In doing so, the Tribunal considered whether there was evidence of actual harm to consumer welfare. While some evidence was inconclusive, the Tribunal found that:

> *there is sufficient evidence to suggest that the exclusive agreements had resulted in anticompetitive effects. The strongest evidence was that of foreclosure of the market to effective competition during the complaint period. Evidence concerning supra-competitive pricing effects, a decrease in supply by inventory providers, a reluctance by Computicket to timeously make use of available advances in technology and innovation and a lack of choices for end customers, was consistent with the Commission's theory of harm. The cumulative effect of all these factors suggest that the Commission has established a case of anticompetitive effect on a balance of probabilities.*[72]

Computicket relied on evidence that its expert had identified from literature that could justify the existence of exclusive agreements on efficiency grounds. They are:

a client-specific investment;

b free-rider risk;

c reduction in costs associated with splitting of inventory; and

d lower transaction costs for consumers.[73]

While these arguments were raised, the Tribunal ultimately concluded that Computicket had not done enough to discharge the onus to show that the exclusionary conduct was justifiable.

The conduct was therefore found to be exclusionary and a contravention of Section 8(d)(i) of the Competition Act and an administrative penalty of 20 million rand was imposed.

69 Id. at Paragraph 89.

70 Id. at Paragraph 91.

71 *Competition Commission and South African Airways (Pty) Ltd* Case No. 18/CR/Mar01,

72 See footnote 66 at Paragraph 230.

73 See footnote 66 at Paragraph 233.

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Computicket has indicated its intention to appeal this decision to the Competition Appeal Court. It bears mention that at all junctures the economic expert witness of the Commission and Computicket disagreed on the approach to be adopted. While the approach adopted by the Commission's expert ultimately found favour in this decision, these arguments demonstrate that abuse of dominance cases are increasingly tricky to successfully prosecute.

ii Trends, developments and strategies

In the 2017/2018 financial year, there was not a large number of enforcement decisions in relation to abuse of dominance, restrictive vertical practices or restrictive horizontal practices (that do not amount to cartel conduct). What remains clear from the abuse of dominance cases that have made their way before the competition authorities is that these kinds of cases are extremely complicated, which means that dominant firms are often able to successfully defend these cases on appeal. The amendments to the abuse of dominance provisions are primarily aimed at correcting the difficulties that the competition authorities have experienced in enforcing abuse of dominance complaints. These amendments include, but are not limited to:

a Requiring the dominant firm to show that its price is reasonable if there is a *prima facie* case of abuse of dominance because a dominant firm charged excessive prices.

b A prohibition on a dominant firm from imposing unfair prices or trading terms on a supplier that is a small or medium-sized business or a firm controlled or owned by historically disadvantaged persons.

c A prohibition on a dominant firm from avoiding or circumventing the provisions of (b) above.

d A lower burden of proof applicable to price discrimination if it involves differential pricing to small and medium-sized businesses or firms controlled or owned by historically disadvantaged individuals. According to the new test an action by a dominant firm is prohibited price discrimination if it is likely to have the effect of 'impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively'. For all other firms, the test remains that the conduct is likely to have the effect of 'substantially preventing or lessening competition'.

e Where there is a *prima facie* contravention of price discrimination (insofar as it involves small and medium-sized businesses or firms owned or controlled by historically disadvantaged provisions), it is not permissible to discriminate based solely on volumes.

Despite the fact that there have been few decisions relating to restrictive practices and abuse of dominance in the past, the Commission is increasing its focus on these matters. In the 2017/2018 financial year, a number of complaints against firms for alleged abuses of dominance were initiated and adjudicated upon. This includes:

a a complaint against Rooibos Limited, the largest producer of rooibos tea in South Africa for inducing rooibos tea farmers not to deal with rival rooibos team processors;

b a complaint against SA Airlink, a privately controlled regional feeder airline for allegations of excessive and predatory pricing;

c a complaint against Rand Refinery for exclusionary conduct that made it a requirement for dealers of Kruger rands, existing or prospective, to be members of the South African Association of Numismatic Dealers (this complaint was settled); and

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d a complaint against Blurock Quarries and Procon Precast for conduct amounting to margin squeeze and price discrimination (this complaint has been settled).

The Competition Commissioner has publicly indicated his intent to clamp down on abuse of dominance conduct. Given the success rate in these cases thus far, with Tribunal decisions forming the subject of appeal, more robust and detailed economic analysis will be required to ensure that these contraventions can be proven by the authority.

While the amendments are aimed at alleviating some of challenges the competition authorities have faced in successfully prosecuting cases of this nature, it is unclear whether it will achieve that aim. In particular, the amendments are likely to make it more challenging for dominant firms to ensure compliance with the Competition Act.

iii Outlook

While the Commission has focused its attention on cartels and abuse of dominance, since this behaviour results in high prices to the disadvantage of citizens and economic efficiency,[74] more will be required to successfully prosecute abuse of dominance cases. Given the complicated economic analysis that is required to effectively prosecute these cases, additional guidance on the interpretation of the provisions of the legislation, or alternatively legislative reform, may be required. Such legislative reform is in the pipeline but has not yet been promulgated into law, although these amendments are likely to be implemented in the near future.

It also remains to be seen whether the competition authorities will continue to use their platform to impose creative remedies on parties who have been found to contravene the Competition Act. While innovative conditions have been at the forefront of merger decisions in South Africa, the *Media24* decision is novel in relation to abuse of dominance cases. Furthermore, while administrative penalties were not imposed by the Tribunal in this case (as the conduct the Tribunal found to have contravened the Competition Act involved a section that does not attract a penalty for a first time offence), the remedy imposed is arguably tantamount to the imposition of an administrative penalty. On appeal this remedy was overturned.

The amendments to the Competition Act will result in substantial changes to the way in which companies do business in South Africa.

The increased protection on small and medium-sized businesses and firms owned or controlled by historically disadvantaged persons creates increased obligations on dominant firms and may require substantial changes to pricing practices in order to ensure compliance.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The Commission has extensive powers to conduct a formal inquiry in respect of the general state of competition in a market without necessarily referring to the conduct or activities of a particular firm.[75]

74 The Competition Commission's Integrated Report for the 2016/2017 financial year at page 19.

75 Section 43A of the Competition Act.

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Upon completing a market inquiry, the Commission must publish its report to the Minister of Economic Development with or without recommendations, which may include recommendations for new or amended policy, legislation or regulations; and recommendations to other regulatory authorities in respect of competition matters.[76]

In addition to making recommendations, the Commission may also, among others, initiate a complaint against a firm for contraventions of the Competition Act.[77] One of the amendments to the Competition Act is for the Commission to make findings and impose remedies that will be binding. In the background note to the Competition Amendment Bill it is stated that:

> *As with the merger control regime, the Commission's potential findings and actions following a market inquiry will be binding, unless challenged in the Tribunal. The amendments envisage a range of creative, flexible and bespoke actions that the competition authorities will undertake where an adverse effect on competition due to the features of a market is established. These are only required to be reasonable and practicable, and designed to remedy, mitigate or prevent the adverse effect on competition established by the market inquiry. The exception to this approach is divestiture, which is only competently imposed by the Tribunal on the recommendation of the Commission.*

i Significant cases

Liquefied petroleum gas

In September 2014, the Commission initiated a market inquiry to determine whether there are anticompetitive features in the South African liquefied petroleum gas (LPG) market and how they can be remedied. The Commission's Terms of Reference were published on 15 August 2014 and focused on high switching costs for bulk consumers, regulatory impediments to effective competition and limited growth of LPG usage by households.[78]

The Commission completed its analysis and published its preliminary findings for comment on 10 May 2016, in which it identified that there were structural impediments and regulatory bottlenecks that negatively affect competition and that may hinder growth of the market. On 28 September 2016, the Commission extended the date of completion of the inquiry to 20 December 2016. The Commission released the final report of the inquiry on 22 March 2017.

Retail sector inquiry

In the 2015/2016 financial year, the Commission initiated a market inquiry into the grocery retail sector (retail inquiry).[79] As part of the retail inquiry, the Commission is considering all traders that predominantly sell fast-moving consumer goods, whether as a wholesaler, retailer, or both. The scope of the retail inquiry, as set out in the Commission's Terms of Reference,[80] covers six major areas, including:

a the impact of the expansion, diversification and consolidation of national supermarket chains on small and independent retailers;

76 Section 43C(1) of the Competition Act.
77 Section 43C(3) of the Competition Act.
78 Published under Government Gazette No. 37903 on 15 August 2014.
79 The inquiry commenced on 27 November 2015.
80 On 30 October 2015, the Commission published the final Terms of Reference for the grocery retail sector in Government Gazette No. 39347 (Volume 604 pp. 73–82).

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b the impact of long-term exclusive leases on competition in the sector;
c the dynamics of competition between local and foreign-owned small and independent retailers;
d the impact of regulations, including municipal town planning and by-laws, on small and independent retailers;
e the impact of buyer groups on small and independent retailers; and
f the impact of certain identified value chains on the operations of small and independent retailers.

The inquiry is still ongoing but, according to the amended terms of reference,[81] was due to be completed by 28 September 2018. This deadline was, however, not met and it is unclear when the inquiry will be finalised.

There have, however, been reports that the Commission has cut back on its investigations as a result of budgetary constraints.[82]

Healthcare inquiry

The Commission is also conducting a market inquiry to determine whether there are anticompetitive features in the healthcare market with a particular focus on private rather than state-funded healthcare. As part of the inquiry, information has been gathered from eight key stakeholder groups, including hospital groups, pathology providers, radiology providers, registered medical schemes, administrators of medical schemes, managed care organisations, health insurance product providers and the government.[83]

The healthcare inquiry began in May 2014, but given its complexity and the number of participants at various levels of the market, the inquiry is still ongoing. Public hearings conducted during the course of 2016 included discussions on:

a understanding the nature of the private healthcare market;
b how stakeholders interact with each other;
c how consumers access, evaluate and use information about the sector;
d how healthcare services are provided and funded; and
e the regulatory regime for the private healthcare market.

The Commission published its provisional report and recommendations on 5 July 2018 and requested stakeholder comment on the provisional findings and recommendations by 7 September 2018.

Subsequent to the call for submissions, the Commission received a number of requests for an extension of the submission period and, based on individual motivations, the Commission granted certain stakeholders extensions to complete and file their submissions. The final date of extension allowed by the Commission for all outstanding submissions was 15 October 2018.

The Commission's provisional report and recommendations are extensive. The Commission has highlighted that the South African private healthcare sector is characterised by high and rising costs of healthcare and medical scheme cover, highly concentrated funders'

81 Published in Government Gazette No. 41512 on 23 March 2017.
82 https://www.businesslive.co.za/bd/national/2019-01-24-competition-commission-cuts-back-probes-due-to-lack-of-funds/.
83 Terms of reference published in Government Gazette No. 37062 on 29 November 2013.

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and facilities' markets, disempowered and uninformed consumers, a general absence of value-based purchasing, ineffective constraints on rising volumes of care, practitioners that are subject to little regulation and failures of accountability at many levels.

As a result of the complexity of the private healthcare market, the Commission has indicated that the market requires several interrelated interventions. The recommendations aim at improving transparency, accountability and the alignment of interests of consumers and funders. Some of the recommendations include changes to the way scheme options are structured to increase comparability between schemes and increase competition in that market, a system to increase transparency on health outcomes to allow for value purchasing and a set of interventions to improve competition in the market through a supply side regulator.

According to the amended terms of reference, the final inquiry report and recommendations was expected to be completed by 29 March 2019.[84]

Other inquiries

In May 2017, the Commission initiated a market inquiry into the general state of competition in the land-based public passenger transport industry. In particular, the Commission set out to consider price setting mechanisms, price regulation, route allocation, licensing and entry regulations, allocation of operational subsidies, transport planning and transformation in the land based public transport industry.[85] In addition, in August 2017, the Commission initiated a market inquiry in order to understand what factors or features of the markets and value chain may lead to high prices for data services.[86] Both inquiries are still at the initial stages, with a call for submissions having being made. As at the time of writing no date has been set for the publication of the provisional report in the public passenger transport inquiry, but the Commission has announced that it intends to release its provisional report for the data market inquiry by 30 April 2019.

ii Trends, developments and strategies

The Commission's appetite for market inquiries has increased over the period in review. However, it has become apparent that these inquiries require significant resources and have, in all instances, required extensions of time periods.

The process is furthermore burdensome on firms participating in an inquiry given the scope of the information gathered and the time periods within which submissions are required. The Commission's budgetary constraints have also had an impact on the finalisation of its inquiries.

Any outcome, particularly in the healthcare inquiry, will be welcome, as the Commission's approach to all complaints that have been lodged with it recently relating to issues being addressed in the healthcare inquiry is not to refer such complaint to the Tribunal. This approach of not referring complaints in the healthcare industry was adopted by the Commission on the basis that it has embarked on the healthcare inquiry and, as such, the conduct will be considered in that forum.[87] This outcome is, of course, not satisfactory for

84 Terms of Reference published in Government Gazette No. 42068 on 30 November 2018.

85 Terms of Reference published in Government Gazette No. 40837 on 10 May 2017.

86 Terms of Reference published in Government Gazette No. 41054 on 18 August 2017.

87 *Council for Medical Schemes and Another v. South African Medical Association and Others* [2015] ZACAC 6 (11 December 2015).

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complainants, given that the Commission's inquiry will not automatically result in a finding of a contravention and will only result in recommendations being made, or alternatively a new complaint being initiated.[88] However, complainants can privately refer their complaints to the Tribunal for adjudication in instances where the Commission elects not to do so.

Amendments to the Competition Act will significantly increase the Commission's powers to conduct market inquiries. Of significance is that the scope for an inquiry has been expanded from 'the general state of competition' in a market to also include an inquiry into levels of concentration and structure of a market. Furthermore, the Commission will be entitled to impose binding remedies, as well as recommend divestiture. Since divestiture is an extreme remedy (particularly if there has been no finding of anticompetitive conduct) such remedy will need to be ordered by the Tribunal.

In addition, the Minister of Economic Development will have the power to prompt the Commission to conduct a market inquiry, as well as the power to appoint deputy commissioners to chair market inquiries. As regards confidential information, the Minister of Economic Development will be permitted access to confidential information, and the Commission is empowered to determine whether information is confidential (which is currently under the remit of the Tribunal).

A positive in the amendments is that a time limit of 18 months is provided within which to conclude a market inquiry. This will assist in ensuring that these matters do not run over a number of years as has been the case in the majority of the market inquiries thus far. It must, however, be noted that the Commission can apply for an extension from the Minister of Economic Development.

iii Outlook

The year 2019 will bring greater certainty in relation to the outcome of many of the inquiries currently under investigation.

Notably, the Commission will not be limited to make only non-binding recommendations, but will be permitted to impose remedies that are reasonable and practicable.

V MERGER REVIEW

During the 2017/2018 financial year, the Commission received 377 merger notifications. This demonstrates a 9 per cent decrease from the 418 mergers received in the 2016/2017 financial year. While the Commission received fewer merger notifications in the 2017/2018 financial year than in the previous year, it finalised 388 mergers, which represents a slight increase from the 385 mergers finalised in the previous financial year. Of the finalised mergers, 120 were large, 260 were intermediate and eight were small mergers. During this period, 325 mergers were approved without conditions, while 52 were approved with conditions. This is a substantial increase from the 31 mergers approved with conditions in the 2016/2017 financial year, the 37 mergers approved with conditions in the 2015/2016 financial year and the 43 conditional approvals in the 2014/2015 financial year.[89]

88 Initiating a complaint only after the inquiry may have unintended consequences of anticompetitive conduct being time-barred and as such incapable of prosecution.

89 See footnote 7 at page 51.

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The Commission also prohibited 12 merger transactions in the 2017/2018 financial year, which is more than double the five prohibited mergers in 2016/2017.

In March 2019, the Commission published final Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers contrary to the Competition Act (Guidelines). The Guidelines present the general methodology that the Commission will follow in determining administrative penalties when concluding consent or settlement agreements and when seeking an administrative penalty where there has been a failure to notify or prior implementation referral before the Tribunal.

For purposes of determining the administrative penalty that a firm will be liable to pay in instances of failure to notify and prior implementation, the Commission has proposed the following methodology:

a Step 1: determination of the nature or type of contravention – since failure to notify and prior implementation can take place in many forms, the Commission will consider how the failure to notify or prior implementation occurred. To the extent that the parties are competitors and the conduct amounts to a contravention of Section 4(1)(b) for example if the merging parties agree on prices, the conduct will be assessed under Section 4(1)(b) of the Competition Act and not as prior implementation. Furthermore, if the Commission determines that the conduct is wilful or deliberate, the Guidelines will not apply and the Commission will seek the maximum allowable penalty.

b Step 2: determining the base amount – the base amount will be double the applicable filing fee. The filing fees increased with effect from 1 January 2019 and are now 165,000 rand for an intermediate merger and 550,000 rand for a large merger.

c Step 3: duration of the contravention – in this step, the Commission will add to the base amount an amount calculated in terms of a formula. For contraventions not exceeding one year, the additional amount (to be added to the base amount) is 50 per cent of the base amount multiplied by the number of months of the contravention. For contraventions exceeding one year but less than two years, the additional amount is 75 per cent of the base amount multiplied by the number of months of the contravention and for contraventions exceeding two years, the additional amount is 100 per cent of the base amount multiplied by the number of months of the contravention.

d Step 4: considering factors that might mitigate or aggravate the amount reached in step 3.

e Step 5: rounding off this amount if it exceeds the cap provided for in Section 59(2) of the Act – the administrative penalty cannot exceed 10 per cent of the turnover of the firm in the Republic and its exports from the Republic for the preceding financial year.

Since these guidelines have only recently been published, they have not yet been used for purposes of imposing an administrative penalty in any failure to notify or prior implementation case.

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i Significant cases

HCI[90]

In this landmark decision, the Constitutional Court confirmed that merger approval is a 'once-off affair'. As such, once *de facto* control has been acquired, a party does not need to notify and seek approval from the Commission for a transaction when control is subsequently acquired in a different way.

In 2017, Hosken Consolidated Investments Limited (HCI) proposed to increase its shareholding in Tsogo Sun Holdings Limited (Tsogo) to more than 50 per cent. HCI already exerted *de facto* control over Tsogo pursuant to an unconditional prior merger approval issued by the Tribunal in 2014. In 2014, HCI sought approval for the acquisition of sole control of Tsogo. While HCI did not acquire control by virtue of Section 12(2)(a) of the Competition Act at the time as it did not acquire more than 50 per cent of the shares of Tsogo, it was common cause that HCI exerted *de facto* control within the meaning of Section 12(2)(g) of the Competition Act.[91]

The Commission was of the view that the acquisition of more than 50 per cent of the shares crossed 'a bright line' by acquiring control in terms of Section 12(2)(a) of the Competition Act. HCI and Tsogo did not agree with the Commission's analysis and approached the Tribunal for an order declaring that the proposed transaction does not require approval. The Tribunal declined to grant the order on the basis that it did not have jurisdiction.

On appeal to the Competition Appeal Court, the Competition Appeal Court disposed of the jurisdictional issue, finding that it and the Tribunal did have jurisdiction to hear and make a decision on the matter.

The Competition Appeal Court stated that Section 12(2) of the Competition Act does not list different kinds of control, each of which must be separately notified. Instead, it illustrates the different ways in which control may be acquired.[92] The Competition Appeal Court went on to say that:

> *Merger approval is thus a 'once-off' affair. We find that the proposed transaction does not constitute a notifiable merger because the competition authorities have previously approved the acquisition of sole control of Tsogo in 2014 by HCI, and because HCI already exerts sole control of Tsogo pursuant to the 2014 merger approval.*[93]

The Competition Appeal Court therefore concluded that the Commission could not require the notification based on the reason that it wished to assess the implications of the 2017 transaction.

90 *Competition Commission of South Africa v Hosken Consolidated Investments Limited and Another* [2019] ZACC 2.

91 Section 12(2)(g) of the Competition Act provides for the acquisition of control by a firm if they have the ability to materially influence the policy of the firm.

92 *Hosken Consolidated Investments Limited and Another v. Competition Commission CAC* Case No. 154/CAC/Sept17 at Paragraph 53.

93 Id.

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On appeal, the Constitutional Court stated that there is no indication in Section 12(2) of the Competition Act that one form of control (notably *de jure* control) is more significant than any other form of control. Each of the instances of control listed in Section 12(2) of the Competition Act are freestanding and each, on its own, constitutes a 'bright line'.[94]

The questions that the Constitutional Court considered in making its decision included (1) is the transaction notifiable simply because HCI now acquired *de jure* control in distinction to a different form of control (*de facto* control); and (2) can the respondents rely on the once-off principle to avoid having to notify the 2017 transaction?

The Constitutional Court confirmed the once-off principle but stated that the competition authorities retain their power to revoke approval if a firm has breached an obligation attached to the approval. Accordingly, the Commission retains its wide powers in terms of the Competition Act to investigate the assurances given by the parties in 2014.[95] The Constitutional Court agreed with the Competition Appeal Court that HCI and Tsogo were not obliged to notify the 2017 transaction to the Competition Authorities. However, the appeal only succeeded partially because it is within the power of the Commission to investigate assurances given during the 2014 merger approval proceedings in terms of Sections 15 and 16(3) of the Competition Act (the sections permitting revocation).

Other

As mentioned above, the Commission is increasingly approving mergers subject to conditions. Of the 52 mergers approved subject to conditions, public interest conditions were imposed on 32 mergers. Apart from a moratorium on retrenchments – which remains relatively commonplace in mergers and seems to be increasing in frequency – other public interest remedies imposed by the Commission in the 2017/2018 financial year include, among others, an obligation to maintain procurement from local suppliers;[96] an obligation to continue procuring from small suppliers;[97] an obligation to conclude a broad-based black economic empowerment (BEE) transaction within a certain period;[98] an obligation to invest, maintain or increase the current level of local procurement of goods and services, use reasonable endeavours to promote the export and sale of manufactured products for sale to China, give preference to black-owned businesses and small businesses for independently owned service stations and set up a development fund to develop small businesses and black-owned businesses;[99] an obligation to increase BEE shareholding within a certain period and set up a development fund to develop black enterprises;[100]and an obligation to continue with internship programmes offered by the target firm in South Africa.[101]

In terms of behavioural remedies, the competition authorities predominantly concerned themselves with cross-directorship. Remedies aimed at limiting the extent to which directors

94 See footnote 90 at Paragraph 48.

95 Id. at Paragraph 71.

96 *Denel SOC Limited and Turbomeca Africa (Proprietary) Limited* Case No. 2017Feb0002.

97 *Schmitz Cargobull AG and GRW Holdings Proprietary Limited and GRW Sales Proprietary Limited* Case No. 2017Jul0016.

98 *The Coca-Cola Company and Coca-Cola Beverages Africa (Pty) Ltd* Case No. 2017Apr0003.

99 *SOIHL Hong King Holding Limited and Chevron South Africa Proprietary Limited* Case No. 2017Apr0046.

100 *K2017235138 and Old Mutual plc*. Case No. 2017Sep0008.

101 *Dimension Data Protocol BV and Hatch Investments (Mauritius) Limited* Case No. 2017Aug0075.

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sit on the boards of competing companies and limiting the exchange of commercially sensitive information between competitors with common shareholders and directors were imposed in several transactions. Another remedy that was imposed in two mergers was divestiture.[102]

ii Trends, developments and strategies

The focus on public interest considerations has markedly increased. Only four public interest conditions were imposed in the 2010/2011 financial year, which increased to 22 and 28 in the 2011/2012 financial year and the 2012/2013 financial year, respectively. There was decrease in the 2013/2014 financial year, with only 10 transactions being approved subject to public interest conditions, but this number increased substantially to 39 in the 2014/2015 financial year and 28 in the 2016/2017 financial year. During the period under review, the number has increased to 32.

From the above cases, it is clear that large international transactions garner significant interest from ministers and trade unions, and, where appropriate, significant creative conditions are imposed. Employment considerations have in earlier years been of significant concern, and continue to play a big role. However, in addition to maintaining employment levels, the competition authorities have now started to impose far more onerous conditions on merging parties to ensure local procurement, continued promotion of historically disadvantaged individuals through equity shareholding and the creation of large funds. These funds in particular have significantly increased over the years, from a 200 million rand fund in the *Walmart/Massmart* merger in 2012 to a 1 billion rand fund in 2016 in the *AB InBev/SABMiller* merger.

The conditions imposed, while aimed at protecting local industry, place a significant burden on international companies seeking to invest in South Africa. For example, in the *Bayer* decision, conditions to offer discounts to small emerging farmers as well as an obligation to continue with various social initiatives was imposed.

In addition to the trend to impose extensive public interest conditions, the Commission is also taking a more interventionist approach by prohibiting mergers between competitors that give rise, or have the potential to give rise, to a high market share accretion or monopoly position. However, the Tribunal does seem to more readily impose conditions aimed at addressing these concerns,[103] as opposed to prohibiting these transactions.

A notable amendment to the Competition Act is the introduction of a new executive approval regime applicable to foreign investment. It is intended that the President of South Africa will constitute a Committee responsible for considering whether the implementation of a merger involving a foreign acquiring firm will have an adverse effect on the national security interests of the Republic. The President will be required to publish a list of national security interests (which has not yet been done). Some of the factors that will be considered in compiling the list include the impact of a merger transaction on the Republic's defence capabilities and interest, the supply of critical goods or services to citizens and the economic and social stability of the Republic.

102 *Bayer Aktiengesellschaft and Monsanto Corporation* Case No. 2017Feb0004 and *Vitas South Africa (Pty) Ltd and certain operations and certain assets of a group of companies and subsidiaries within Profert Holdings (Pty) Ltd* Case No. 2017Jul0026.

103 *Request for Consideration between Clover SA (Pty) Ltd and Nkunzi Milkway (Pty) Ltd and the Competition Commission* case No. IM175Dec14 (020461) and *Hollard Holdings (Pty) Ltd and Regent Insurance Company Limited and Regent Life Assurance Company Limited* case No. LM253Mar16, Case No. IM193Oct17.

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Where a merger requires approval by the Committee, the Commission or the Tribunal (as the case may be) cannot make a decision on the merger if the merger has been prohibited on national security grounds. As such, approval before the competition authorities will be delayed until a finding has been made by the Committee that is likely to have an impact on the timing of approval of a transaction.

iii Outlook

In light of the trends over the past few years, this interventionist trend is likely to continue. The competition authorities are carefully scrutinising mergers that have an impact on the public interest, and in light of the implementation of the Public Interest Guidelines on 2 June 2016,[104] which give a clear indication of the Commission's approach in merger transactions, we are likely to see additional focus on these issues, particularly in light of the amendments to the Competition Act.

For example, public interest has been elevated to the same status as the competition analysis in a merger transaction. Furthermore, public interest grounds have been expanded to include 'increasing the spread of ownership by workers'.

Given the level of scrutiny being applied to public interest factors lately and which will be centre stage going forward, merging parties will need to build in sufficient time for these issues to be properly ventilated, as well as allocate potentially required resources, when setting an implementation timeline. Considering the current economic climate, the competition authorities are likely to focus on ensuring the protection of local industry and employment.

VI CONCLUSIONS

The year in review has given rise to a number of novel decisions both in the merger and abuse of dominance areas. The competition authorities continue to review and finalise a large number of mergers and have shown increased focus on prosecuting collusive conduct as demonstrated by the number of complaints initiated and the number of dawn raids conducted. However, the extension of time periods on all the market inquiries means that significant resources will continue to be allocated to these investigations. The challenge will be to ensure that these inquiries can be finalised as expeditiously as possible and deliver suitable recommendations aimed at addressing the harm identified.

The substantial amendments to the Competition Act are likely to significantly affect the way in which companies do business in South Africa. While there is currently some uncertainty on how the proposed amendments will be interpreted and enforced by the competition authorities, we are likely to see a new body of case law being established to assist in the interpretation.

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Appendix 1

ABOUT THE AUTHORS

CANDICE UPFOLD

Norton Rose Fulbright South Africa Inc

Candice Upfold is a senior associate in the antitrust and competition team in Johannesburg, South Africa. She has extensive experience providing competition law opinions and obtaining merger clearances from the competition authorities within South Africa, other sub-Saharan African jurisdictions and COMESA. She has assisted with several large mergers in the industrial and manufacturing, insurance and mining sectors.

Candice also has experience in cartel investigations, including applications for corporate leniency, dawn raids and settlement negotiations.

Candice also advises clients in proceedings before sectoral regulators such as the National Energy Regulator of South Africa and the International Trade Administration Commission.

Candice has provided a comparative analysis of the European Merger Regulation in an exclusive chapter in the 2014 *International Economic Law and African Development* guide. The chapter deals with the jurisdiction of the COMESA Competition Commission for merger transactions.

She also presented a paper at the Seventh Annual Conference on Competition Law, Economics & Policy comparing the approach taken by COMESA and the European Union to jurisdiction over mergers and thresholds, and is a contributor of articles on competition law and related issues to legal journals, including the Competition Policy International's *Antitrust Chronicle*, the *Global Antitrust Compliance Handbook* and *The Merger Control Review*.

Candice joined the practice as a candidate attorney in January 2010 and holds both an LLB and LLM degree in business law from the University of KwaZulu-Natal. She also holds an LLM degree in international law with a focus on international trade law from the University of the Witwatersrand, Johannesburg.

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NORTON ROSE FULBRIGHT SOUTH AFRICA INC

15 Alice Lane
Sandton
Johannesburg
Gauteng 2196
South Africa
Tel: +27 11 685 8870
Fax +27 11 301 3503
candice.upfold@nortonrosefulbright.com
www.nortonrosefulbright.com

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