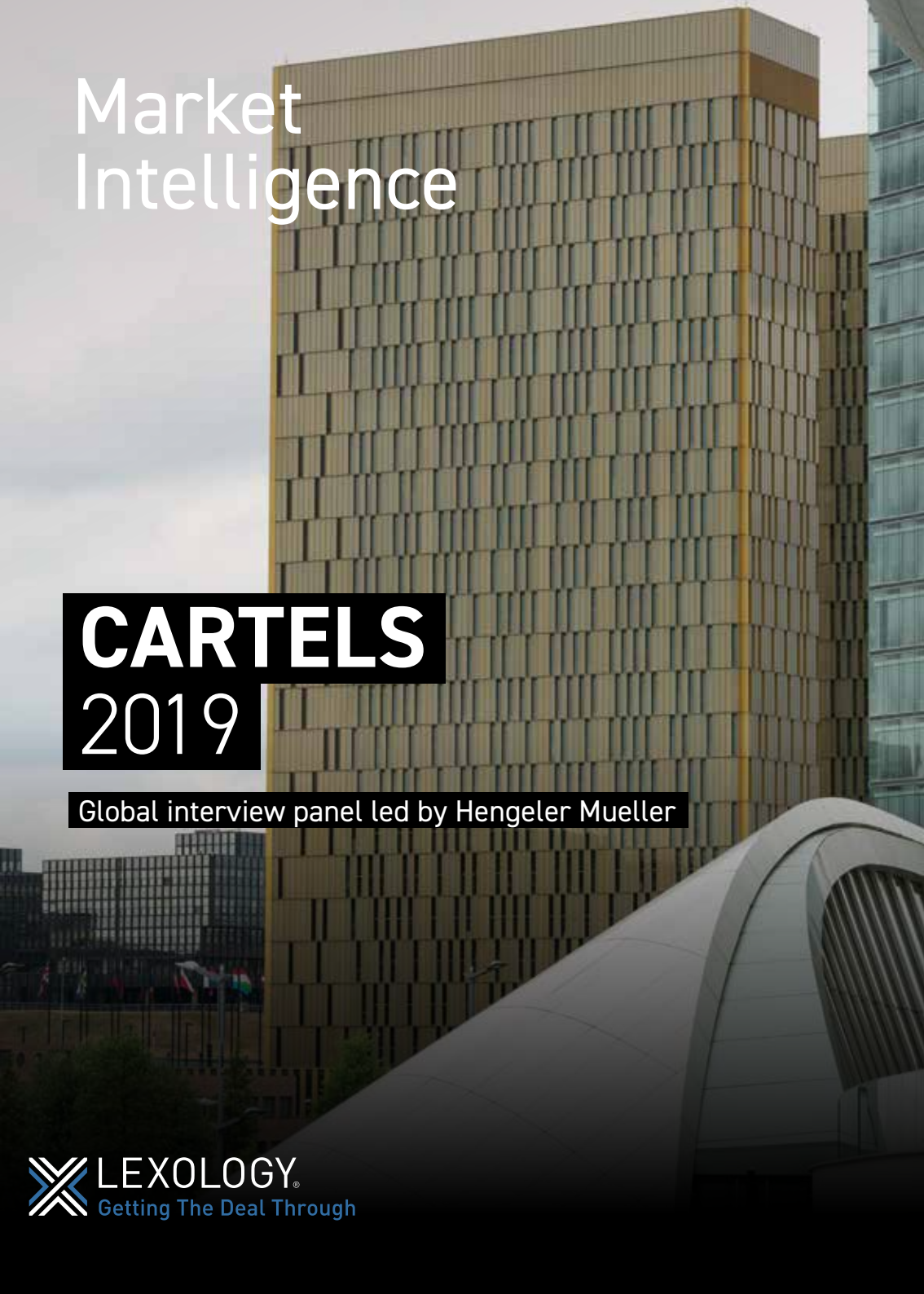

Market Intelligence

CARTELS 2019

Global interview panel led by Hengeler Mueller

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Cartels
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South Africa

Pieter Steyn has been a director of Werksmans since 1996. He heads the competition law practice group of LEX Africa, an alliance of independent African law firms in over 20 African countries formed by Werksmans in 1993. He has advised clients on mergers, cartels, other prohibited practices, compliance programmes and leniency applications including in the maize milling, wheat milling, lumber, vehicle, gas, steel, aviation fuel, airline, pharmaceutical, pet food, caravan and vehicle tracking industries. His clients have included Wyeth Corporation, Virgin Atlantic, ArcelorMittal, Leica, Ford Corporation, Tata, BASF, Cadbury/Kraft, Bollore and certain Japanese companies and airlines. He has written articles, spoken at conferences and seminars and been rated as a leading competition lawyer in *Global Competition Review*, *IFLR 1000*, *International Who's Who* and *The Legal 500*. He has also advised clients on competition law issues in several other African countries including Kenya, Namibia, Nigeria, Swaziland, Tanzania and Zambia. He and his team lodged the first-ever merger filing for Funai Corporation with the Competition Commission for the Common Market for Eastern and Southern Africa (COMESA) in 2013, and he has advised clients on several other COMESA-related cases.

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1 | What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

Collusive bidding and price fixing are the key cartel offences being prosecuted, followed by market division cases. In 2013, the South African Competition Commission settled with 15 construction companies for collusive tendering with agreed penalties of about US$140 million being paid. In 2016, the largest single cartel penalty ever of 1.5 billion rand was paid by ArcelorMittal South Africa for cartel conduct in the South African steel and scrap metal industries (penalties are capped at 10 per cent of the firm's total South African turnover and exports in the financial year before the year in which the penalty is imposed). The Commission has been investigating cartel complaints in sectors as diverse as automotive components (119 investigations were initiated in 2015–2016), foreign exchange traders (several major banks are being prosecuted), liquefied petroleum gas, furniture removal, bicycle retailers, scaffolding and thermal insulation, prison and army uniforms, media advertising, rail maintenance tenders, panel beaters, shipping of Toyota vehicles, maize milling, fire control and protection systems, fresh produce market agents, and bakery and cooking products.

2 | What do recent investigations in your jurisdiction teach us?

Although most successful cartel prosecutions have resulted from leniency applications, the use of dawn raids by the South African Commission is becoming more common and it is important that firms prepare and train their staff on how to deal with raids. An important recent development in other African countries has also been a shift of focus from merger control to cartel enforcement. An increase in dawn raids in other African countries (eg, in Kenya, Botswana, Zambia and Malawi) indicates the increasing confidence and experience of other African competition authorities. It is important that in-house lawyers and managers are aware of the extent and more importantly the limits of the powers of the competition authorities. For example, warrants are required to search the premises and restrict the scope of the raid. Access to legally privileged documents is not permitted.

Cartel enforcement remains a key strategic priority of the Commission. Conduct that may facilitate collusion (like membership of trade associations, information sharing and joint ventures between competitors) is likely to raise suspicion. The nature of the conduct required for a contravention has also been clarified by a recent Competition Appeal Court judgment involving Omnico and Cool Heat (both bicycle retailers). The Court upheld the Commission's argument that silence at a meeting of competitors where cartel conduct is proposed is not in itself a sufficient defence. A firm must distance itself and make clear that it disagrees and will not proceed


Pieter Steyn

with the proposed conduct. The Court, however, noted that Omnico and Cool Heat did not submit evidence that their subsequent conduct resulted from independent decision-making (this arguably implies that a silent firm may avoid liability if it can prove such independence). The case illustrates the robust zero-tolerance approach of both the Commission and the Court to cartels.

3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

The Commission's approach to leniency has not changed in recent years. The leniency policy was last amended in 2008 and has been very successful (most cartel prosecutions by the Commission have flowed from a leniency application). The principal benefit is that the first applicant to qualify does not pay any administrative penalties (although in a recent case immunity was granted to a second applicant who was able to provide evidence that the first applicant could not supply). A marker system is available. However, no exemption or immunity is given with regard to possible civil damages claims by a third party.

"In terms of the South African Competition Act, the Competition Tribunal (and not the Commission) is empowered to impose (and determine the amount of) penalties for competition contraventions."

The criminalisation of cartel conduct from 1 May 2016 introduced an important complicating factor that may have an unintended 'chilling effect' on the leniency policy. The Commission's 2016–2017 annual report stated that fewer leniency applications had been received when compared to previous years. The Commission is not able to give immunity from criminal prosecution to current and former directors and managers of a successful leniency applicant. That decision vests in another body, the National Prosecuting Authority (NPA). The Commission may, however, certify that a person is 'deserving of leniency' and make submissions to the NPA in support of leniency if that person is prosecuted criminally for involvement in a cartel offence. The NPA is not bound by the Commission's certification or submissions, and unfortunately there is no memorandum of understanding or other binding arrangement between the two authorities on this issue.

The risk of individual criminal prosecution is now an important factor to be taken into consideration (especially regarding the decision of whether or not to apply for leniency) and is likely to affect an immunity applicant's ability to comply with its obligation under the leniency policy to fully cooperate with the Commission (including by making witnesses available). Directors and managers are likely to

appoint their own legal advisers to protect their rights. Firms must carefully assess the evidence of a cartel contravention so that a fully informed decision may be taken on whether to apply for leniency.

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making, and what are your experiences in this regard?

It is important to note that in terms of the South African Competition Act, the Competition Tribunal (and not the Commission) is empowered to impose (and determine the amount of) penalties for competition contraventions. If the Commission cannot agree on the amount of the penalty in terms of a settlement agreement, it will have to allocate resources to prosecute the firm before the Tribunal. Although there is no formal settlement procedure, the Commission generally prefers to settle cases in practice. Settlement agreements must, however, be confirmed by the Tribunal (although in practice the Tribunal generally accepts settlements). In the construction cartel, an innovative 'fast-track' settlement process was used to incentivise firms to settle in return for reduced penalties. The Commission's penalty guidelines provide that the Commission may at its discretion offer discounts of 10 per cent to 50 per cent off the penalty to firms that settle and cooperate with the Commission (including by disclosing other competition contraventions).

In deciding whether or not to settle, it is important to assess the strength of the evidence of a contravention as well as any possible defences and the risk of a significant penalty and third-party damages claims. The Commission's penalty guidelines are helpful as they set out its general approach (which is based on case law to date) towards calculating penalties. The starting point is calculating the 'affected turnover' (being the annual turnover of the firm in South Africa and its exports from South Africa based on sales of products or services affected by the contravention). The base amount will then be calculated on a scale from zero to 30 per cent of the affected turnover and the base amount is then multiplied by the number of years of participation in the contravention. The penalty can be adjusted upwards or downwards having regard to various aggravating and mitigating factors but is always subject to the statutory 10 per cent cap based on the firm's total annual turnover (ie, not just affected turnover) in the financial year preceding that in which the penalty is imposed.

5 Tell us about the authority's most important decisions over the year. What made them so significant?

The purposes of the South African Competition Act include promoting the efficiency, adaptability and development of the economy; providing consumers with

competitive prices and product choices, to promote employment and advance the social and economic welfare of South Africans; ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and promoting a greater spread of ownership and increasing the ownership stakes of historically disadvantaged persons (ie, non-white South Africans). In 2016, two settlements of cartel cases included behavioural conditions that fall within the scope of these public interest considerations. The settlement with Sime Darby Hudson & Knight (relating to an agreement with its competitor Unilever to divide markets by allocating customers between them) included, in addition to a penalty of 35 million rand, a requirement to invest 135 million rand in a new packaging and warehousing facility, to use the services of a Black Economic Empowerment distributor for some of its distribution requirements (with a specified minimum fee for the first year) and to assist such distributor to become a viable business. The settlement with ArcelorMittal South Africa (relating to collusion in the steel and scrap metal industries) included, in addition to a penalty of 1.5 billion rand, an undertaking to cap its earnings before interest and tax on flat steel (which is an important input in downstream industries) to 10 per cent (with a tolerance of up to 15 per cent depending on market circumstances) and to incur capital expenditure of 4.64 billion rand for the next five years. The use of behavioural remedies (as opposed to simply relying on penalties as a retributive and deterrent enforcement mechanism) gives scope for creative settlements that redress the harm caused by the conduct to competition.

This trend continued in 2017 in the settlement agreement involving DSTV Media Sales for collusion with other media groups on advertising pricing discounts and payment terms for advertising space. A penalty of 22,262,599 rand was paid. In addition, 8 million rand will be contributed to the Economic Development Fund over three years to assist small black-owned media and advertising agencies and 25 per cent bonus airtime for every rand of airtime bought would be provided to qualifying small agencies for three years (capped annually at 50 million rand). In a recent territorial market division case involving locksmiths, the Tribunal granted a 50 per cent discount off the penalty if each firm placed weekly advertisements of their businesses in newspapers circulating in the other firm's territory.

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

The South African Competition Act creates three bodies: the Commission, the Tribunal and the Competition Appeal Court. Each of them is independent. The Commission decides on certain mergers, and investigates and prosecutes

competition contraventions. The Tribunal is an administrative body that decides competition contraventions and larger mergers, and hears appeals and reviews against Commission decisions. The Appeal Court hears appeals and reviews against Tribunal decisions and consists of High Court judges. It has the same status as a High Court. The level of judicial review is accordingly high and there have been several past cases where Tribunal decisions have been overturned by the Appeal Court, including in dominance cases and with regard to the methodology for calculating penalties for a cartel contravention. The Tribunal in turn has been active in assessing cartel cases referred to it and requiring the Commission to prove its case on the facts. In the recent *Ster-Kinekor/Nu Metro* and *Global Sustainable Risk Control Management/Real Tree Trading* cases, the Tribunal found that the Commission had not shown sufficient evidence of the alleged cartel contravention. In the latter case, this decision was made notwithstanding that Global had concluded a settlement with the Commission admitting to a contravention and paid a 393,626 rand penalty (5 per cent of its 2013 turnover).

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"The South African Competition Act creates three bodies: the Commission, the Tribunal and the Competition Appeal Court. Each of them is independent."

7 | How is private cartel enforcement developing in your jurisdiction?

Private cartel enforcement is permitted by the South African Competition Act. If the Commission decides not to prosecute a complaint, the original complainant may at its cost do so before the Tribunal. A Tribunal finding that a competition contravention occurred is binding on the High Courts in civil damages claims and the Commission cannot exempt or grant a firm immunity from third-party damages claims. Class actions are permitted. In practice, there have been few private enforcement actions. A class action in the bread cartel case did not proceed and was settled. However, two significant damages claims have been brought against South African Airways (SAA) for abuse of its dominance by paying commissions to travel agents in order to incentivise them to divert customers to SAA flights. In February 2017, SAA was ordered by the High Court to pay Comair 554 million rand plus interest (a total of 1.16 billion rand). Most damages claims had previously been settled out of court (SAA had previously settled a claim by Nationwide Airlines (since liquidated) for 325 million rand) and the Comair case was the first time a High Court decided a damages case flowing from a competition contravention. Other cases are in the

pipeline (eg, the city of Cape Town has instituted damages claims against certain construction firms that colluded with regard to the Cape Town stadium built for the 2010 Fifa World Cup). In early 2018, BMW announced that it had instituted damages claims against various international vehicle shipping companies (including Mitsui OSK Lines and Kawasaki Kisen Kaisha's local subsidiary) as well as other suppliers who contravened the Competition Act. It is likely that private damages claims will become more common in future although plaintiffs are more likely to be corporates rather than class actions or individuals.

Where the Commission declines to refer a private complaint to the Tribunal, the private complainant is entitled to do so. Private referrals are not common in practice and the recent Tribunal case by retailer Massmart against Shoprite and Pick n Pay (involving alleged vertical contraventions) was unsuccessful.

8 | What developments do you see in antitrust compliance?

In South Africa cartel conduct has been criminalised since 1 May 2016 and it is only a matter of time before a criminal prosecution for a cartel offence is instituted. Directors and managers now face jail terms of up to 10 years or fines of up to 500,000 rand. This is a very significant development and is also likely to occur in other African countries. However, criminalisation does not apply retrospectively and the Commission may not initiate an investigation after the expiry of three years from the date on which the conduct ceased (there remains a debate about whether cessation only occurs once the 'effect' of the conduct ceases). Where a defence to a cartel offence exists, a criminal prosecution may still be possible under South Africa's wide-ranging anti-corruption laws (although there have been no such cases to date). Criminalisation has had the effect of moving the risk of cartel contraventions to the top of business' agenda. Firms need to review how robust their compliance procedures are and ensure that staff members are fully informed of the dire consequences of cartel conduct.

The Commission's penalty guidelines controversially provide that the Commission may 'impute' a penalty to the holding company of a cartel member and calculate the penalty, having regard to the South African turnover of the holding company (as opposed to that of the cartel member only). Imputing liability to the holding company also has implications for the directors and managers of the holding company, especially given the criminalisation of cartel conduct. The Commission's approach is open to challenge as parental liability is not provided for in the Competition Act and there has not yet been a case on this point. Proposed amendments to the Competition Act would allow a penalty to be extended to firms within the same single economic entity as the contravening firm but these

amendments are not yet finalised or in force and in South Africa it is unusual for legislation to have retrospective effect.

There is also an increased focus by the Commission on regional as well as international cooperation (10 southern African authorities signed a cooperation agreement in 2016 and the South African Commission has recently signed bilateral cooperation agreements with the Kenyan, Russian, Mauritian, Brazilian, BRICS and European authorities) and regional authorities (eg, COMESA and in East Africa).

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

The South African Competition Act was amended in February 2019. With regard to cartel enforcement, a new per se prohibition on the allocation of market shares between competitors has been added. Other amendments tighten and widen the restrictions on dominant firm conduct and strengthen the Commission's powers with regard to market inquiries, scrapping the unwieldy 'complex monopoly conduct' provisions in the 2009 amendments (which never came into force). There have also been various adjustments to the merger control, procedural and enforcement provisions (including the extension of penalties to firms within the same single economic entity). The amendments are very important and show the government's commitment to competition enforcement. Clients will have to carefully assess the implications of the finally approved amendments for their businesses.

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The Inside Track

What was the most interesting case you worked on recently?

In October 2014, the Commission issued a press release announcing an investigation into 82 automotive component manufacturers involving 121 automotive components. This involved multiple investigations and complaints into alleged collusive and other conduct and led to several cartel leniency applications. These cases are starting to be finalised, with Autoliv settling certain complaints in late 2017 and Takata being referred to the Tribunal in early 2018. I have been involved in several cases, sometimes acting for the leniency applicant, a firm wishing to settle and other firms disputing liability.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

Urgent steps need to be taken to mitigate the risk of a chilling effect on the Commission's leniency policy as a result of the criminalisation of cartel conduct. Directors and managers of the leniency applicant need to be assured that they will receive immunity from criminal prosecution. A memorandum of understanding or other binding arrangement between the Commission and the National Prosecuting Authority is vital to bring certainty to this issue.

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Leniency systems
Enforcement priorities
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