

## INTERNATIONAL PERSPECTIVES ON ECONOMIC CRISIS

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In my earlier introductory remarks I mentioned the extraordinary proliferation of national competition authorities across the world. The figure often quoted is that whereas at the beginning of the decade of the 'nineties there were something like 14 functioning competition authorities in the world, by the end of that decade this had risen to something of the order of 100. It has continued growing and has touched every corner of the globe from the big and powerful to the small and relatively powerless. In the past year alone both India and China have adopted competition statutes. There are by now a handful of nation states that have not adopted competition policy and competition law as foundation stones of their economic policy. The US Supreme Court Justice Thurgood Marshall once famously described the Sherman Act as 'the Magna Carta of free enterprise' and it is indeed the case that competition law and competition policy have increasingly come to be viewed by most nations as their fundamental economic laws and policies.

And we have done well. National enforcement efforts have met with remarkable success. Indeed enforcement successes have transcended national boundaries manifest in the apprehension of international cartels. And competition considerations have trumped national economic policies. For example it has often seemed – and with good reason I am sure – that the successive European Competition Commissioners with their hands on the levers of both competition law and state aid, are the most important makers and enforcers of economic policy in Europe. As I outlined earlier, we have, in a very short time, established an international network that, I think, already stands as an example of the type of governance structures that will better serve the new world order that we are challenged to create. And one has only to look at the extraordinary quality of work that literally pours out of the OECD's competition section to realise, that the ICN is by no means the only international body contributing to the national and international development of competition law and policy and to the building of a solid and durable competition culture.

So we have much to be proud of. But we should avoid complacency because our success – like that of many other individuals and institutions - was as much the product of good times, of favourable circumstances, as it was of hard work and smart decisions. By this I mean that we were the product of the economic reforms of the 'eighties whose hallmark was the liberalisation of markets, both national and international.

There was good reason why the support for liberal economic policies swept the world to the extent that it did. These days one hears much – and rightly so - about market failure, but it is often forgotten that the underlying reasons for the widespread acceptance of liberal economic policies reside mostly in state failure. In both developed and developing countries state failure was evidenced in the shockingly poor service delivered by incompetent and often corrupt states and state owned enterprises. There is, of course, a significant body of opinion that understands liberalisation in developing countries as the product of the dominance of institutions like the IMF and the World Bank. There is undoubtedly a strong measure of truth

in this but it's equally true that the multilateral institutions were, in significant part, able to achieve policy influence in many developing countries precisely because the statism that characterised post-Second World War development economics and policy had run into the sand. This was particularly clear in the transition economies of the former Soviet bloc. Not only were the economic shortcomings of statism particularly evident in these countries, but the political underpinnings of centralised economic management were, largely in consequence of their economic failings, abruptly removed, leaving a vacuum into which market forces poured.

After a period of severe dislocation generated by big bang reform programmes competition policies were formulated and competition laws were put in place in order to promote and defend soundly operating markets. This is the environment in which competition law took off across the world. And for a significant time it worked producing unprecedented levels of global and national growth and drawing entire marginalised regions of the world into the centre of the global economy. With the benefit of hindsight it is now easy to point to many shortcomings, particularly in the regulation of the financial sector, but there can be little doubt that market liberalisation produced growth and prosperity, including lifting millions out of poverty. And we, in the competition authorities, were tasked with defending the market, we were responsible for ensuring that powerful private forces and government policies did not distort market forces in their favour.

But that was then. We have now entered a period of economic crisis, with full-blooded global depression a very real prospect. This is no longer a period where market forces are going to be celebrated but rather a period where resonant demands will be made by citizens and producers for protection from market forces, where, in other words, it will be demanded of policy-makers that they subordinate pro-market competition policies to state-centred social and industrial policies, demands that will be bolstered by dramatic evidence of deep-seated market failure. State failure will be forgotten; all that will be seen will be market failure and it will be the state that will be charged with overcoming them.

No-one, least of all those concerned to maintain the credibility of pro-market competition policies, should advocate ignoring these demands in the name of fundamentalist free market doctrines. However, now more than ever, competition policy advocates need to make their voices heard, precisely in order to ensure that pro-poor and pro-producer policies do not, as a result of the repression of market forces, inadvertently undermine consumer interests or make it more difficult to emerge from recession.

The direct and indirect demands on competition law and policy will – already are – taking two, often contradictory, forms. These are:

Firstly, there will be a simultaneous demand for more robust enforcement of anti-trust rules and for greater selectivity in the application of those rules. Hence every price shock will generate public and official suspicion of cartel conduct. Every market subject to single firm domination will be presumed to reflect exclusionary monopolistic conduct. We are, in short, going to be subject to unrealistic expectations, we are going to be expected to address problems that are not within our power to address.

On the other hand, there will be pressure to permit mergers that are manifestly anti-competitive in order to save troubled firms or create 'national champions' just as there will be pressure to permit 'export cartels' or even 'recession cartels' again in order to bail-out troubled domestic firms or to provide them with an advantage in the export market. One need look no further than the response in Europe and the USA to the turmoil in financial markets. The range of mergers facilitated by the US and UK governments and central banks will leave these important financial centres with highly concentrated financial markets. While the dangers of systemic failure are always said to single out the banking sector for special treatment, there is, in truth, no reason to expect a different reaction to the second rounds effects of the financial crisis. We already hear talk of the need for greater consolidation in a range of markets. I was recently asked in a television interview whether we should still be fining firms for cartel conduct when they so desperately needed to improve their margins.

Secondly, there will be a general demand for more activist state intervention directed at supporting beleaguered businesses and tax payers, that is, for interventionist industrial and social policies. Evidence abounds already: European competition regulators are coming under intense pressure from political leaders to relax EU imposed limitations on national state aid. We see the demands made by the auto industry for massive state subsidies. I was particularly struck by a recent article in the Financial Times which identified massive subsidies provided by a wide range of individual US states anxious to attract new investment as the primary reason why the US was increasingly viewed by prospective international investors as a low cost manufacturing centre! We have also seen many examples of national governments which have imposed price controls on various food products or which have prohibited or taxed exports of food products.

How should competition authorities and regulators respond to these demands?

While competition enforcers must resist the view that every price increase is the product of anti-competitive conduct, we have to demonstrate our willingness to use our considerable powers to robustly enforce our rules. These include, particularly in an economy like South Africa whose markets are strongly susceptible to single firm dominance, rules against abuse of that dominance.

However as important as robust enforcement in general, competition enforcers have to develop strategic responses that enable them to utilise their constrained resources to attack anti-competitive conduct that is most injurious to the poor and to critical pillars of growth strategy. Hence the South African Competition Commission has publicised its enforcement strategy which includes a focus on food markets and on bid rigging, the latter a scourge on public sector procurement everywhere. The South African competition authorities have already apprehended a bid rigging cartel in the provision of certain critical pharmaceutical products purchased by public hospitals. Given the emphasis in South Africa's growth strategy on public investment in infrastructure provision, vigilance in guarding against bid rigging in large public tenders is particularly important.

But the competition authorities will have to be equally vigilant in their scrutiny of well-intentioned government initiatives that may give rise to adverse unintended consequences. For example, the South African government is proposing greater regulation of private

healthcare in order to control prices so that more people will be able to access private health care facilities. However from the considerable contact between the competition authorities and the private healthcare providers, its clear that this objective will be more easily realised through the imposition of more vigorous competitive disciplines rather than through greater regulation and we are duty bound to point this out to government.

Industrial policy is going to provide competition authorities everywhere with some of their greatest challenges, the more so given the power of producer and union lobbies. The correct approach here is for the competition authorities to take the initiative in identifying the elements of a competition-friendly industrial strategy rather than to emphasise the in-built tensions between these important branches of economic policy. Hence government support for industrial development directed at providing generic capabilities rather than privileging specific firms will not undermine market mechanisms. Support for human resource development or physical infrastructure or R&D – all critical constraints confronting South African industry – will rarely, if ever, conflict with competition law and policy.

By the same token, the competition authorities should identify and advocate against those elements of an industrial strategy that are most likely to engender severe market distortions. This will generally be the case were particular firms are singled out for support although it will be less damaging if support excludes the dominant firm in the market in question and focuses rather on supporting those firms whose ability to enter and thrive in a market is undermined by high entry barriers. Certainly government procurement programmes – though potentially highly distorting if selectively deployed – are less likely to harm competition if they are directed at supporting new entrants. But on one score there can be little doubt and that is for an economy like South Africa to get involved in an escalating subsidy race with the US and the EU, not to mention the Koreas, Brazils, Indias and Chinas, is not a smart way of approaching industrial policy – market distortions aside, it will amount to nothing more than an extremely expensive gesture to producer lobbies.

Finally, we competition authorities have to start talking to each other about these critical issues. I began with the ICN so let me end with it. Since its inception the ICN has loudly declared that it will focus on competition, all of the time. This has led the ICN to focus on the nuts and bolts of competition law with occasional projects on broader economic policy issues. I think the origin of this narrow focus was a feeling that the interface of competition law and policy with trade, industrial and social policies was sufficiently controversial on a national basis and so was best left alone by an international body that was intent on developing a unity of purpose and having a maximum impact on its own field of work.

I think much has changed. For one thing – as I tried to suggest in my opening remarks – the ICN members have, I believe, developed the levels of trust in one another that allow us to tackle these admittedly controversial issues. Indeed we have taken on many extremely controversial issues in anti-trust itself, had robust debates and have occasionally had to agree to disagree but we have emerged stronger from it.

More important the world has changed. The role of markets, the very fundamentals of our work and *raison d'être*, are being called into question and this will be done by the introduction of interventionist social and industrial policies, and protectionist trade policies. If we do not

share our experiences on the burning issues that we all face, not only will we condemn ourselves to irrelevance but the possibility of recovering from this crisis will be set back just as it was in the Great Depression when anti-trust laws were actually suspended. Seventy years later we have the organisational basis to contribute to a sensible discussion about the current and future role of markets. We must use it.