HOW ENFORCEMENT AGAINST PRIVATE ANTI-COMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT – A BRIEF OVERVIEW OF THE SOUTH AFRICAN EXPERIENCE

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Jointly submitted by the Competition Tribunal of South Africa and the Competition Commission of South Africa

Introduction

South Africa established a new competition enforcement regime little over four years ago. This new order comprises a statute – the Competition Act – and three institutions, namely, the Competition Commission, the investigative and prosecutorial authority; the Competition Tribunal, an administrative Tribunal which is the decision making body in respect of all allegations of anti-competitive conduct and in respect of all mergers above a certain threshold; and the Competition Appeal Court, a special division of the High Court which hears appeals from the decisions of the Tribunal.

In common with many other competition regimes, the jurisdiction of the South African competition authorities extends over all mergers above a designated threshold and over anti-competitive conduct. Anti-competitive conduct consists of a range of horizontal and vertical agreements and abuses perpetrated by a dominant firm. The Commission is able, under highly specified circumstances, to exempt certain otherwise anti-competitive conduct although this decision may be appealed to the Tribunal.

The following sections will examine selected aspects of the South African experience in dealing first with mergers and secondly with anti-competitive practices.

Merger Regulation

It is sometimes argued that developing country competition authorities should, in the early years of their existence, shy away from merger regulation. It is argued that merger regulation is time consuming and involves the utilisation of scarce resources, particularly human resources, which may be better deployed in the more important task of preventing anti-competitive conduct. Another argument suggests that in relatively small markets merger regulation inhibits the growth of domestic firms capable of competing in international markets. However, our experience does not support these arguments.

All mergers above a designated threshold must be notified to the Competition Commission. The Commission is empowered to approve (conditionally or unconditionally) or prohibit all transactions below a second threshold. These decisions may be appealed to the Tribunal. In respect of all mergers above the second threshold – so-called 'large mergers' – the Commission submits a recommendation to the Tribunal which, after hearing the parties, the commission and other interested parties decides whether to approve or prohibit the transaction. A merger may not be implemented without the permission of the competition authorities.

Merger investigation and analysis has proved to be a powerful source of learning for the competition authorities. It has not only honed the general investigative skills of the commission staff but has also immersed both the commission staff as well as the Tribunal members and staff in cutting-edge competition analysis. Several merger decisions of the Tribunal have been appealed to the Competition Appeal Court and this experience has equally assisted the judges in their efforts to tackle this new and complex area of the law.

In addition, the role of the competition authorities in merger regulation has performed a powerful advocacy function. Merger hearings are held in public – with due regard to the need to protect confidential information – and interested parties are, in addition to the Commission and the merging parties, entitled to make submissions to the Tribunal. The Minister of Trade and Industry and the trades unions representative of employees of the merging parties are furnished with merger notifications and they, too, are entitled to make submissions to the Tribunal. Representatives of the media regularly attend and report on merger hearings and the outcomes of these decisions – all of which are fully reasoned and publicly available –are widely publicised and debated.

Obviously more important than its learning or advocacy function, merger regulation has made a major contribution to maintaining and improving the competitive structure of key markets. This is not to say that many mergers have been prohibited or have had conditions imposed on their approval. South Africa's ratio of approved to conditionally approved or prohibited transactions accords with other jurisdictions. But several transactions have been disallowed or conditionally approved and these have had important consequences.

For example:

The Tribunal prohibited a proposed merger between two of the country's largest retail furniture chain stores. These are key institutions in the South African economy not only because furniture is a major element in the basket of many low income consumers but because the furniture chains have long been the pre-eminent sources of credit to that large part of the South African community that have little access to the formal banking system. After an elaborate hearing which involved significant contestation over the boundaries of the relevant market, the Tribunal decided to prohibit the transaction. There is little doubt that, had the transaction been approved, low income South African consumers would be paying more for some basic elements of their consumption package. Interestingly, the period since the prohibition has seen something of a downturn in this sector. The upshot has been that several of the chains who were identified by the would-be merging parties as their key post-merger competitors, have found themselves in deep financial trouble due, in large part, to poor management of their debtors' books. We are now left with the situation that the two parties that were prevented from merging are, without doubt, the most significant competitors in this important market.

The Tribunal recently approved a merger in the wine and spirits industry on condition that the merged entity divest itself of certain key spirits brands. South Africa's liquor markets are unusually concentrated largely in consequence of a notorious market sharing arrangement concluded in the 'sixties and 'seventies between the country's monopoly brewer and the largest producers of wines and spirits. The conditions imposed on this merger will ensure that the merged entity terminates long-standing arrangements to distribute and market key brands belonging to competitor companies. The upshot is that the competitors – one a large South African wine and brandy producer, the other a large spirits multinational – will now enter the market with these successful brands thus laying the basis for robust competition into the future.

In summary then merger regulation has provided a key learning platform for our fledgling competition authorities. It has also served to introduce competition issues to the broader population who, partly as a result of the procedures employed, view the competition authorities as transparent institutions. Most important it has prevented further concentration of already concentrated market structures and, in certain instances – for example, the liquor industry – has enabled the authorities to facilitate new entry into important markets. There is, also, clear evidence of corporations factoring merger regulation into their business decisions – certain transactions are no longer entertained precisely because of the reality of competition review.

Anti-competitive practices

Regulation of anti-competitive conduct has proved more difficult than merger regulation. Many of the reasons for this are, with the benefit of hindsight, obvious. The competition authorities are charged with administering a powerful and far-reaching new statute, one that impacts significantly on fundamental property rights. In addition the constitutional and administrative law framework has changed dramatically. The upshot is that many of the procedures and powers of the competition authorities have inevitably been subject to rigorous constitutional and administrative scrutiny. While the competition authorities have frequently prevailed in the face of this scrutiny, in other instances important errors have been identified. Judgments handed down by the higher courts, including the Supreme Court of Appeal and the Constitutional Court, enable the competition authorities to proceed with greater certainty and confidence and will undoubtedly speed up the prosecution of anti-competitive practices.

However, these difficulties notwithstanding, important advances have been made. For example:

The South African agricultural sector has long been dominated by producer co-operatives and statutory single-channel marketing arrangements. With the lowering of international trade barriers and the introduction of market disciplines into the agricultural sector many of these co-operative and marketing boards were converted into privately owned corporations that sought nevertheless to maintain the exclusivity in the provision of key distribution and other services to their erstwhile members, the farmers and exporters of agricultural producers. This has inhibited the entry of new service providers into the agricultural sector. In two important cases involving, respectively, the markets for raisins and citrus fruit, the Tribunal has struck down anti-competitive arrangements in the articles of association governing the new corporate entities. This has assisted in developing a market for the provision of key services – for example, the provision of key agricultural inputs and export marketing services. This outcome has permitted new entry into a number of important markets to the considerable benefit of both these new entrants and the consumers of their services, namely the farmers previously denied the right to seek the best price and best quality service.

The Tribunal has recently levied its first significant administrative penalty in a case involving the practice of minimum resale price maintenance perpetrated by a large US multinational active in the market for automobile braking equipment. In another case, the Tribunal confirmed a settlement between the Commission and a grouping of attorneys accused of fixing the price of conveyancing services in Pretoria. A long standing investigation involving the US Webb-Pomerene association in the Soda Ash industry has resolved the question of the extra-territorial reach of the Competition Act and has confirmed the per se nature of the Act's proscription of hard core cartels.

There are several important cases in the pipe-line involving allegation of anti-competitive practices. These include alleged loyalty schemes in the air travel market, allegations of price fixing in important segments of the health care sector and allegations of excessive pricing in the pharmaceutical sector.

Again it seems reasonably clear that private parties have begun to factor the existence of competition regulation into their business conduct. However, there is little doubt that over the coming period the authorities will be increasingly measured by their ability to effectively identify and constrain anti-competitive conduct . While they will be helped in this task by closer attention to their procedures and the limits of their powers, greater focus on training and on attracting experienced litigators into the ranks of the authorities is a significant challenge.