

Role of Civil Society in Cooperating with National Competition Authorities

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I am very grateful for the opportunity to participate in this conference. In the seven or so years that I have worked in the area of competition policy, my engagement with consumer groups has been extremely limited. I would like to be able to claim this is a consequence of my position in the Competition Tribunal which is the adjudicative wing of our competition authorities. However I would be surprised if the Commission, the prosecutorial and advocacy wing of the authority, is able to claim anything resembling an extensive interface with consumers. As I shall elaborate below, the truth is that consumers are very poorly organized in South Africa and the extent of engagement between consumer representatives and the competition authorities is, in consequence, extremely limited. When, some seven years ago, the Competition Bill made its way through the parliamentary process, it was accompanied by intense debate at public hearings convened by the parliamentary committee, debates that were widely reported in the media. Academics, regulators, trade unions and business associations all made submissions at these hearings but I cannot recall a single submission made on behalf of consumers.

I've been asked to speak on the **role of civil society in cooperating with national competition authorities**. I am going to approach this from the perspective of the competition authorities – I am going to ask how, starting from a very low base, we in the competition authorities may help build the kind of consumer awareness and organisation that, I believe, is necessary for ensuring the sustainability of the competition project. There is an unabashedly self-interested dimension to this concern. The introductory note prepared for this conference recognises, and I accept, that competition authorities are ultimately as strong as the backing that they receive from consumers when it reports that *'the 7-Up project revealed a crying need for building a network of stakeholders, especially civil society, so that the competition regimes at the national level could be strengthened'*. Nor, of course, is this a charitable exercise on the part of consumer activists but is, itself, rather recognition that consumer engagement with the work of competition authorities will underpin the strength, but also the character of the competition authorities. It will, in short, help build a competition authority conscious that its social roots lie in the consumer movement.

The South African experience is, as I have already intimated, a sobering one despite our recent history. South Africa has, as you all know, come out of a very recent history of intense and widespread political mobilisation. You are equally aware that this is an instance of political mobilisation that has a happy ending. The objective of the mobilisation was broadly realised – a thoroughly authoritarian, anti-democratic and racist state, was overthrown and replaced by a political order that has become something of a beacon for those who value broadly-based democracy established from the bottom up.

There are many unsung heroes in the South African liberation story. But few are less acknowledged, less appreciated, than consumers. Forests have been destroyed in the effort to describe and analyse the roles of workers, small business people, women, residential communities, guerrilla fighters and the international community in bringing down apartheid but, remarkably, I know of no book that has been written that has sought to record the role of consumers and consumer power in destroying apartheid and in building democracy in South Africa. And it is not as though the role of consumers was subtle or hidden from view. There are few anti-apartheid activists, and, more important, few ordinary South Africans who lived through

the anti-apartheid struggle who did not experience, at first hand, a consumer boycott. There were the focused trade union inspired boycotts – in the ‘fifties in one of the most celebrated battles in anti-apartheid history, consumers boycotted potatoes in protest at working conditions on the farms. In later years there were boycotts of pasta and of red meat. In fact, I and several comrades in the union for which I worked spent several months in prison for our role in organising a boycott of red meat in support of striking abattoir workers and, let me underline, it wasn’t the strike that unsettled the authorities as much as the consumer mobilisation that underpinned the boycott. Massive rent, bus and electricity payment boycotts were the order of the day from the ‘fifties through to the ‘nineties. And although most of these actions were inevitably driven by a set of broader political objectives, the basis of mobilisation was usually the high prices and poor quality of basic commodities.

And yet, with one significant exception – that being the mobilisation of aids sufferers against the price of anti-retroviral drugs – the demise of apartheid seems to have demobilised the very consumers who played such a central role in getting us to where we have come today. Other civil society groupings have managed to re-invent themselves in the new society – the unions retain a strong voice, women’s rights are institutionally recognised and promoted at the highest levels of the state; the youth have statutory commissions to promote their interests as do the disabled. But the consumers are largely forgotten. Consumer protection has a relatively low profile even in the responsible department of state where the big ticket programmes of trade, industrial and technology policy enjoy a much higher priority.

The enthusiasm with which government has pursued competition policy is the apparent exception. Here is a pro-consumer policy enthusiastically endorsed by government both in the form of a powerful statute and fairly generous financial support for the agencies established by the statute. But although the establishment of a competition authority has, in its still short life-span, been a reasonably successful policy intervention, it has not succeeded in galvanising consumer activism, it has not become the centre-piece of consumer activism that some may have imagined. I guess that this is my first, rather banal, insight: the presence of a competition authority is no substitute for the usual ingredients of strong, mass-based organisation and these are critically the activist leadership who are prepared to accept the low salaries, the long hours and the hostility that, in any society, characterises the work of those who set about organising the poor and economically disenfranchised, be they workers or consumers. A strong, self-consciously consumer oriented competition authority may complement basic consumer organisation, but it will never, on its own, generate it. As in most societies, the basis for consumer activism exists in South Africa. There is articulated, consumer concern about everything from the price of steel to the price of school uniforms, from the price of motorcars to the price of basic pharmaceuticals, from bank charges to mobile phone tariffs. But, for the most part, there is not the consumer leadership able to cohere these inchoate grievances into the sort of articulate, focused expression that would force the competition authorities, among others, to put consumers at the centre of their concerns.

But this having been said, I think that the competition authorities may approach their work in a manner that generates and supports consumer organisation, even where existing organisation is, at best, nascent and embryonic. I want to deal briefly with three issues: prioritising consumers in case selection, engaging with consumers in the investigative process, and transparency in the decision-making process. You may be surprised that a focus on advocacy does not feature in this list of ‘do’s’ – frankly I think that competition authorities will not become successful advocates of competition in general and consumer interests in particular if they do not prosecute cases that are seen to promote competition and consumer interests and this is why I stress elements of case management and case handling rather than advocacy per se. But, I do naturally exercise the important role of advocacy as a complement to the case work of the competition authorities, and the importance of placing consumer interests at the centre of advocacy programmes.

First, prioritising consumers in case selection. The competition enforcement experience in South Africa suggests that in the first, critical years of competition enforcement most investigations are not initiated by the competition authorities but are rather complaint driven. There is nothing inherently wrong with this but, in the absence of strategically sophisticated consumer activism, the complainants tend to be well-resourced consumers of intermediate products. Hence while the price of soda ash, for example, may ultimately impact on the prices of basic consumer products like glass and detergent, a battle over soda ash is unlikely to generate much consumer interest. And the typical large complainants are not wont to engage in the sort of intense public agitation in support of their case that arouses consumer activism. There are exceptions. Hence a number of very large South African steel users have recently filed a complaint of excessive pricing against the country's dominant steel producer. The Competition Commission ultimately elected not to prosecute the case but through very skilful use of the media and other forms of public pressure there is very little doubt that the complainants have succeeded in focusing the sort of unwelcome attention on the producer that will manifest in a degree of voluntary price restraint.

Where the complaints are driven by well-resourced, sophisticated, mass based consumer organisations, the impact is considerably more dramatic and immediate. Hence, the Treatment Action Committee, an organisation focused on aids treatment, filed a competition complaint against several of the large pharmaceutical multinationals alleging excessive pricing of anti-retroviral drugs, and surrounded the investigation with all their finely honed agitational skills. In this instance the competition authorities, themselves responding to intense public interest, decided to refer the case to the Tribunal for adjudication and what would have been a very complex competition case was won by the complainants because, the companies, fearing a protracted legal battle with the attendant negative publicity, settled the case by agreeing to issue licenses to local producers thus relinquishing the monopoly achieved through their possession of patent protection. This enhanced the standing in the eyes of all consumers of both the TAC and the competition authorities and helped to establish the essential connection between consumer interests and competition enforcement.

It seems to me that the competition authorities need to have on their roll at any point in time a case that responds to spontaneous consumer dissatisfaction at the pricing of a basic commodity. The price of school uniforms seems to be a case in point. For two weeks every year there are loud complaints regarding the price of school uniforms. They have been particularly shrill this year in response to what consumers believe are unusually high increases over the previous year. The complaints inevitably subside after the beginning of the school year only to resurge in the following year. It seems to me that the competition enforcement agency has a year in which to investigate these complaints thus keeping the issue alive during the year as well as preparing for a sophisticated engagement with the suppliers of school uniforms when, at the beginning of the next school year, this issue rears its head again. This is not an argument for pursuing unwinnable cases by responding to every popular complaint about pricing – but on the basis that there is seldom smoke without fire, or, more specifically, that there is usually a link between unusual price movements and competition, the competition enforcers are generally well advised to examine the basis of popular perceptions.

Secondly, the enforcement agency should make a point of engaging with consumers in the investigative process. This not only helps intensify the interface between competition authorities and consumer organisation, it also, without doubt, improves the quality and raises the credibility of the evidence that the competition authorities inevitably have to place before the decision makers, be they courts or, as in our case, specialist tribunals. Hence, in all cases involving consumer products, use should be made of consumer surveys, preferably of consumer focus groups. These are neither technically demanding nor do they consume massive resources – but they will significantly improve the quality and credibility of the evidence garnered by the authority in support of their case. To cite the aids drugs case again, the close relationship between the complainants and their base of aids sufferers would have not only improved the quantum and quality of the Competition Commission's evidence, but it also served to introduce a powerful

human dimension into a case that, had it ultimately been prosecuted, may otherwise have been dominated by arcane and complex legal and economic issues. I should add that utility of consumer intelligence is not restricted to complaints of anti-competitive conduct but may also be effectively deployed in merger investigations.

Thirdly, there is the issue of transparency in the decision-making process. South African competition law provides for a very strict separation between the investigative and prosecutorial process, on the one hand, and, on the other, the adjudicative or decision making process. Once the Commission has decided to investigate a particular instance of conduct or once it has concluded its investigation of a large merger of which it has been notified, it refers the results of its investigations to the decision-maker, the Competition Tribunal. The Tribunal then holds public hearings, which although similar to the format of a court hearing, are more informal and accessible. The rights of intervention accorded interested parties – and these would certainly include consumer representatives – are very permissive. The media inevitably attend these hearings, which are widely reported. Written reasons have to be provided in respect of every decision reached and these are published on the Tribunal's website. Again, while, on its own, a transparent decision-making process is insufficient to galvanise consumer organisation, I have no doubt that it would be a very effective weapons in the hands of any consumer activist, even in the hands of a very fledgling consumer organisation. It amounts to a readymade, organised public platform.

I want finally to turn briefly to the interface between an organisation such as this and international consumer initiatives. I'm particularly concerned about the potential for interface with the **International Competition Network**. I want to stress the following features of the ICN. Firstly, it is an organisation controlled by national competition authorities and its various programmes and projects are pre-occupied with the kind of practical issues that concerns those type of bodies. Secondly, it has substantial developing and transitional economy membership. Thirdly, it is unusually open to participation of what are termed 'non-governmental advisers' in its projects and this would certainly embrace an institution like INCSOC.

To date international business interests have largely grasped the opportunities for civil society or non-governmental participation in the ICN. They have played a very influential role in ICN work and thinking on merger regulation, but, for obvious reasons, their interests tend to be quite narrow. They are, for example, not closely involved in thinking about the interplay between competition issues and broader social issues, be these defined as development broadly or consumer interests more narrowly. But the membership of the ICN is concerned about these issues and you should assist in furthering this interest and in placing consumers at the centre of ICN concerns.

One of the projects of the ICN is conducted through a working group dedicated to examining the variety of issues related to capacity building and policy implementation. In the Working Group report presented to the 2003 conference of the ICN it is argued that the key implementation challenges confronting the fledgling competition authorities in the developing and transitional economies centre around efforts to enhance the standing of the authorities among key stakeholders. Consumers are one of the five stakeholder groups identified. At this year's conference in Seoul, the working group will propose that the ICN deepen this work by undertaking a detailed examination of the interface between national competition authorities and consumer organisation, it will examine mechanisms and institutional arrangements to strengthen this interface as part of the ICNs continuing effort to enhance the standing of competition authorities. The three areas proposed for study are:

1. The appropriate interface between competition enforcement and consumer protection.

2. Ensuring that the institutional design and procedures of the enforcement and adjudicative agencies are transparent and structured in a way that facilitates appropriate consideration of consumer interests

3. Strategies for reaching out to the consumer community and building its capacity to support the competition agency's mission.

Discussion of the proposal will be preceded by a panel discussion that will, in part, focus on this issue. I'm reasonably confident that the proposal will be approved by the conference although the precise areas for investigation may be refined and supplemented. It will be an exciting and important project and will be much strengthened by the engagement of consumer activists in this work.