CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Background note prepared for the OECD Global Forum on Competition – February 2004

Submitted by the Competition Tribunal of South Africa

Introduction

This note will comment selectively on several of the aspects of this question that are raised in the discussion note prepared by the Secretariat for the Global Forum on Competition. In particular, the note will examine, ***from the perspective of the adjudicative/decision making body,*** South African experience pertinent to the large questions of competition culture and institutional adaptability.

Background

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.

Competition Culture

In 1994 South Africa's first democratic government inherited an economic structure characterised by high levels of market concentration and ownership centralisation. Although a competition statute had been in existence for several decades, the enforcement agency (a division of a government department) was poorly resourced and its formal powers were, for the most part, limited to advising government. Government had publicly ignored several important recommendations from the competition authority – for example, the decision by government to permit a merger that effectively divided the alcoholic products market between a beer monopoly and a wine and spirits monopoly – with consequences that continue to determine the structure of important markets. It was widely assumed that anti-competitive conduct was rife, although in the previous act's 25 years of existence there had not been a single successful prosecution of anti-competitive conduct.

The newly elected government was, for its part, determined to confront this state of affairs. It understood that generations of South African consumers had been fleeced by any number of private and public monopolies. It also clearly perceived robust competition laws to be a vital component of liberalisation. It also recognised that private concentrations of power did not augur well for democratic governance, the more so when these concentrations were composed of the members of a single ethnic minority. Hence, in order to deepen the fledgling democracy, the government was determined to ease entry into the private economy.

In summary, South African business was firmly inserted into an environment characterised by protection – from international competition by means of extensive trade barriers; from domestic competition by weak competition law and, more important, by the apartheid framework that, in a variety of ways, severely limited new entry. However, the newly elected South African government was, in the name of an efficient, accessible economy, prepared to challenge this and competition law was perceived to be an important element of this challenge.

This makes for a complex culture surrounding competition enforcement. The business sector, dominated by large, domestically-owned conglomerates and steeped in protectionism was intensely suspicious of the intentions underlying the introduction of robust competition enforcement although the less coherent small business sector, as with the broader South African public, welcomed it, albeit often with exaggerated and skewed expectations of its promise. Government, for its part, was an enthusiastic proponent of competition law although it, too, was careful to insert broader social goals (for example, employment creation and Black economic empowerment) into the objectives of the Competition Act.

It is the Competition Commission – the investigative and prosecutorial wing of the competition authorities – that is statutorily responsible for competition advocacy. As the independent adjudicative body, with decision-making (rather than appellate) responsibilities in respect of all large mergers and allegations of anti-competitive conduct, the Tribunal's engagement in public debate and advocacy is largely centred around its decision making process and, of course, the outcomes of that process. The Tribunal thus determined, at an early stage, that its principal role in improving the competition culture in South Africa resided in maximising transparency in the decision making process, the better to inculcate a realistic appreciation of the goals and instruments of competition law. In this way we hoped to earn the respect (if not necessarily the love) of a sceptical business community; and to inject a measure of realism into the expectations of the public. This naturally had to be achieved while adhering to the letter and spirit of the statute drafted by the executive and passed into law by the legislature.

Our approach is most clearly manifest on three fronts:

Firstly, the Competition Act enjoins the Tribunal to conduct itself ***informally***. It specifically frees the Tribunal from some of the more constraining elements of high court rules as regards the preparation of pleadings and the admissibility of evidence. In what is, without significant exception, a classically adversarial legal system, the Tribunal is accorded (undefined) '***inquisitorial'*** powers. The legislature clearly intended these procedural features to reduce the burden on poorly resourced complainants in part by enabling the Tribunal itself to actively intervene in its own proceedings. While this has undoubtedly lent a more 'human' and accessible style to Tribunal proceeding, the degree of informality and the extent of the inquisitorial powers that are exercised is, in reality, constrained by the provisions of the Constitution and general administrative law standards of fairness and due process. Certainly, informality and Tribunal intervention is effective in merger hearings but less so in restrictive practices hearings that ineluctably take on many of the features of a high court trial.

Secondly, the Tribunal has sought to encourage ***participation*** by interested stakeholders in its procedures. When merging parties file a notice with the Commission of their intention to merge, they are required simultaneously to notify the Minister of Trade and Industry and the trades unions representative of employees in the merging parties. These parties – the Minister and the unions – are entitled, as of right, to 'intervene', that is to submit evidence and argument, at any stage of the investigation and adjudication of the intended transaction.

Interested parties are also entitled to apply to intervene in proceedings before the Tribunal. While there is no automatically granted right of intervention – the would be interveners must establish their interest and their application may be (and frequently is) opposed - the Tribunal has considerable discretion in deciding an application to intervene and it has tended to take a liberal

view in granting these applications. One high-profile application to intervene in a merger hearing by the Industrial Development Corporation, a state-owned industrial development finance institution, was strongly opposed by the Anglo-American Corporation, the acquiring party and South Africa's largest company. The Tribunal's decision to allow intervention was upheld on appeal to the Competition Appeal Court which also confirmed the Tribunal's use of its inquisitorial powers.

It is the Tribunal's view that permitting wide-ranging participation in its proceedings – which, of course, does not exclude denying vexatious or frivolous applications to intervene – serves the dual objective of improving the quality and breadth of evidence and argument placed before the Tribunal and assists in establishing a reputation for transparency and accessibility.

The Tribunal's commitment to ***transparency*** extends significantly beyond the question of intervention. All hearings are accessible to the public and regularly announced in the media. While due regard is given to the requirement for confidentiality in merger hearings, claims for confidentiality must meet the standards of the Act and are not granted as of right. All decisions of the Tribunal are fully reasoned and publicly available on its website. Considerable effort is made to ensure that decisions are clearly drafted with a minimum use of complex legal and economic jargon. Summaries are regularly prepared for media consumption.

The ***news media*** are an important part of the Tribunal's strategy for improving the competition culture. Representatives of the media are invited to each hearing of the Tribunal and attend regularly. Considerable effort is made to ensure that decisions are understood and widely publicised. It appears that the media has come to appreciate that, beyond the competition issues at stake, hearings before the Tribunal provide an opportunity for deepening understanding of a particular firm and of the dynamics of a sector of the economy. On occasion international competition experts who are brought in for the purpose of training Tribunal members and staff are made available to the media.

In our view, the Tribunal's decision to maximise transparency and accessibility has reaped handsome dividends. While it has certainly not immunised Tribunal decisions from criticism – this was never the intention – it has raised the level of understanding of competition matters and has contributed to a growing reputation for fairness and professionalism. As such it has improved the climate and culture surrounding competition enforcement.

Institutional Adaptability

The note prepared by the Secretariat makes much of institutional adaptability and refers particularly to the Judiciary which many national competition agencies find particularly inflexible and unhelpful in the enforcement of competition law. Common grievances are that generalist judges do not understand competition law – particularly its complex economic underpinnings – and that they set excessively high store on procedural rectitude.

As already briefly noted, the South African Competition Act established two adjudicative bodies. These are, firstly, the Competition Tribunal, which is an administrative tribunal composed of 'lay-persons' (effectively non-judges) comprising principally lawyers and economists. The Tribunal enjoys considerable powers of remedy, including the prohibition of mergers, the imposition of injunctive relief, the levying of administrative penalties and, in particular cases, the ordering of divestiture.

Secondly, there is the Competition Appeal Court, which is a specialist division of the high court, composed of sitting members of the various provincial benches. The judges of the Competition Appeal Court volunteer to serve on this court because of particular interest in competition law. In order to secure appointment to the Competition Appeal Court – on which they serve in addition to

their normal generalist duties on the provincial benches - they are required to submit to full hearings before the Judicial Services Commission, the body responsible for nominating judicial appointments to the President.

This structure has served the South African competition regime very well. In the Tribunal, we have an expert decision making body composed of representatives of the disciplines – notably law and economics but also potentially chartered accountants – that contribute to the make up of this unusual branch of law and economics. The strict separation between the Tribunal – the decision-making body – and the Commission – the investigative and prosecutorial body – helps shelter the system from administrative and constitutional challenge. As important it assures merging parties or targets of restrictive practices investigations of a fair, public hearing before an independent and expert body.

The presence of the Competition Appeal Court naturally contributes to this environment of fairness and due process. It is, we repeat, a fully-fledged court populated by serving high court judges. Unlike in many other jurisdictions, the specialist nature of the court means that the pool of judges are hearing a relatively large number of competition cases. They experience sufficient 'critical mass' in the practice of competition law and are able to develop a working familiarity with this unusual, dynamic field of the law. Moreover, the judges have a stake in the competition system. They want it to work well. They set high standards for the Tribunal and Commission below them and, simultaneously, are in sufficient touch with the peculiarities of competition law to develop discerning regard for the expertise of the lay bodies. They have become effective 'ambassadors' for competition law among the judiciary and the higher reaches of the legal profession generally. It is, in short, a system which has established the special nature of competition law, without attempting to deny the traditions and unique contributions of the judiciary and, to this extent, has engendered the required degree of institutional adaptability.