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David LEWIS: A competition pioneer

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Chairman, International Competition Network
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2009

Chairman of the International
Competition Network

1995-2008

Member and Deputy Chairman
of the Board of Directors of
the South African Industrial
Development Corporation

1999-2002

Member of the South African
Board of the National Research
Foundation

1998-1999

Member and Chairman of the
South African Competition Board
advising the Minister of Trade
and Industry on the development
of competition and on the drafting
of Competition Act

1999

Chairman of the Competition
Tribunal of South Africa

1994-1996

Special Advisor to the South
African Minister of Labour
and co-Chair of the Presidential
Commission on Labour Market
Policy

David LEWIS: A competition pioneer

What was your inspiration to get involved in competition law and policy?

My training is in economics, with a particular interest in industrial economics and industrial policy. My work during the dark days of apartheid in South Africa in the 'seventies and the 'eighties was in the trade union movement and in political activism generally. So both my professional training and my union work have brought me into close contact with the world of business. I have come to greatly respect the creative power of business and entrepreneurship but also to recognise the requirement for business to be subject to discipline if it is to realize its great promise. After a long journey, I have recognized that a highly effective, efficient and democratic mechanism of disciplining business is the competitive process. It is this insight that has drawn me to work in the area of competition law and policy although I hope that my background will keep me alert to the ever present dangers of market failure and help me to avoid the dangers of a doctrinaire and fundamentalist approach to the market.

Could you describe the competition law and policy framework in South Africa? How do the Competition Commission and the Competition Tribunal interact?

While South Africa has had a competition law on the statute books for some time, it was a very weak regime with institutions that were essentially bodies responsible for advising government. In 1999, this was replaced by a new statute which set up a much stronger competition enforcement regime. Three institutions were established. These are the Competition Commission, which is the body responsible for investigation, prosecution and advocacy. Secondly, the Competition Tribunal, which is the decision making body. All restrictive practice allegations which the Commission or a private party decides to prosecute must be referred to the Tribunal. All mergers above a defined threshold must be referred to the Commission which investigates these and makes a recommendation to the Tribunal which may decide to prohibit it or approve it, with or without conditions.

...[The 3 NCAs are] “independent of executive control... but they are also independent of one another.”

The Competition Tribunal has exclusive jurisdiction over all competition matters. Finally, the Act established a Competition Appeal Court, which is a special appeal court of sitting judges of the High Court and which hears appeals from decisions of the Tribunal. It is important to recognize that not only are these bodies independent of executive control – that is, the executive cannot override any decision of the Competition Tribunal – but they are also independent of one another. That is, the Tribunal and the Commission are not divisions of a single organization. We are independently appointed, independently led and independently budgeted. The separation of investigation and adjudication is an important constitutional principle in South Africa and the structure of the Competition Act adheres strongly to that requirement.

This interview has been conducted by Mrs Stephanie Yon,
Adviser for International Affairs in the Staff of the
President, Autorité de la concurrence, Paris.

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Given the different degrees of competition development between the countries in Africa, are there any efficient local or regional fora to foster cooperation in the field of competition law and policy?

COMESA, an organization of several African states has recently established a multilateral competition authority which, I understand, assumes certain jurisdiction from the member countries. South Africa is not a member of COMESA. In addition there are currently efforts underway to include competition instruments in the agreements governing the Southern African Customs Union and the Southern African Development Community. South Africa is a member of both. We are shortly to hold a meeting of a group of Southern and East African competition authorities to discuss our relationship. Our intention is to utilise this body as an instrument for coordinating and providing technical assistance. But you are correct in implying that the different stages of development of countries in sub-Saharan Africa is an obstacle to cooperation but one that we hope to overcome by technical assistance and by greater efforts to understand each other's priorities and requirements.

The South African Competition Commission has selected the food sector as one of its priority and is currently investigating allegations of price fixing and collusion among more than 30 food companies. Does the South African Competition Tribunal have a role in the process?

As the adjudicative body we don't get involved in developing prosecutorial strategy. We get involved when the Commission places a matter before us and this may come in the form of an opposed application or it may come as a consent decree. We have been involved in several consent decrees in the food industry – in milling and baking for example – and we are involved in several contested matters, for example in the milk industry. Although we don't, as I have said, participate in the development of strategy development, I think that the Commission is to be congratulated for developing and publicizing a clear strategy in the way that it has done. It has chosen to focus on sectors – such as food and healthcare – which impact severely on the lives of the poor, and on bid rigging in sectors like construction thus aligning itself with government's flagship public infrastructure programme. I should add that when we hold hearings – even if only to approve a consent decree – our hearings are open and we encourage members of the public to participate in the hearings. This has had a very positive impact on the development of a competition culture.

In the light of the above food industry situation, it appears that South African National Assembly is considering criminalizing sanctions against cartelists by sending them to jail. What is your view on this? Can it bring an added-value? Under what conditions?

This is a very complicated question. It is, in fact, not only the food industry situation that has led to the amendment to our Act introducing criminal sanctions. In recent years the Commission has enjoyed huge success in apprehending and prosecuting some major cartels. The Tribunal has imposed some fines that are, by South African standards, very significant. This has received widespread publicity and has finally woken up the public and the government to what it is

that we do and why it is that we do what we do. This has generated intense anger directed at the people who have involved themselves in price fixing and bid rigging activities and it has underpinned a demand that penalties be imposed on the individuals rather than only on the companies. I am of course very pleased at the boost this has given to the competition culture in our country and I have no doubt that imprisonment is an appropriate response to those who fix the price of pharmaceuticals and food and other basic products.

“I have no doubt that imprisonment is an appropriate response to those who fix the price of pharmaceuticals and food and other basic products.”

But I do fear that it is going to create great legal and procedural complexities and it may even undermine our ability to catch cartels. The details of this are too complex to go into here. But to cut a very long story short, the Competition Tribunal cannot, as an administrative tribunal, impose prison sentences. Only a court of law can do this. The Commission cannot prosecute a criminal case. Only the national prosecutor can do this. The Commission cannot grant leniency to a whistleblower who faces potential criminal charges – only the national prosecutor can. This is going to introduce great complexity into our prosecutorial and adjudicative proceedings and is going to require very careful coordination with our already overstretched criminal justice system. So I am very nervous of the unintended practical consequences even though I agree wholeheartedly with the principle. It has taught me to be very careful of calls for a 'one size fits all' approach to competition enforcement. What has worked very well in the legal system and with the historical legacy of the USA may not work well in our system. I fear we may have a clear example of that in this instance.

I will now be directing my questions to you in your capacity as Chair of the Steering Group of the International Competition Network (ICN). Indeed, following Sheridan Scott's departure last January, you took over the Chairmanship of the ICN. Are there any specific goals that you wish to accomplish during your time as Chairman of the ICN?

My tenure in the ICN chair will be relatively brief and will largely take forward the good work of my predecessors. But it does coincide with a dramatic change in global economic conditions and the ICN must respond to these changes. I would like to see the ICN begin to acknowledge that competition law and policy are important branches of economic and social policy. We all know this to be the case but we continue to proclaim the slogan of 'all competition, all of the time' as the governing principle of the ICN. We have to interface with trade policy, with industrial policy, with social policy. We have to find a way of living comfortably with these realities rather than opposing them in a fundamentalist way or, even worse, pretending that they don't exist. In my short tenure I will lose no opportunity to make this point and hope that it reflects in the long term character of the ICN. I also think that the ICN has to become more than a body that promotes best practice as defined by the latest approaches to legal interpretation and

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