Competition Regulation: The South African Experience

Paper presented to: ISCCO Conference 2000 -Taipei: June 21, 2000

By: David Lewis, Chairperson
Competition Tribunal

I am grateful for the opportunity to attend this conference and to engage with anti-trust practitioners from other countries. I live in a country where much has changed, and, inevitable difficulties notwithstanding, all of it for the better. Anti-trust law reflects the intensity and direction of that change, the difference being that in this particular revolution we're not alone, we are not the pathfinders. We are part of a global resurgence in anti-trust and it is a decided advantage to be a follower rather than a leader. We are able to learn much from others who have gone before us. This is, I hope, reflected in our new law which has tried to tailor the best from other jurisdictions to our particular circumstances and which relied upon the collective wisdom of international colleagues in its formulation. This conference represents another point on our steep learning curve.

South Africa has, nominally at least, a fairly long experience of anti-trust enforcement. However, as of September 1999 a new law and a new institutional framework came into effect that represents a dramatic discontinuity with the past anti-trust regime. The changes are too vast to detail. But let me give you some indicators of the scale of them.

I think that the most significant change is that, whereas the previous competition law rested on an institutional framework that was effectively part of a government department and whose decisions were purely advisory, the new law has created a trio of powerful, independent bodies – the Competition Commission, the Competition Tribunal and the Competition Appeal Court. The Commission is the investigative and prosecutorial body and both its resources and its extended powers are evidence of the new regard that government has for anti-trust enforcement. The adjudicative bodies – the Tribunal and the Appeal Court – are particularly interesting indicators of the extent of the change. The Tribunal, effectively the court of first instance, is composed of 10 lay persons - lawyers, economists, accountants - appointed by the President. As with judges of the High Court, the members of the Tribunal can only be dismissed under the most exceptional of circumstances. The Tribunal adjudicates all matters – mergers and restrictive practices – regulated by the Competition Act. It has the power to issue compliance orders or interdicts, to prohibit mergers, to levy large fines and order divestiture. Its decisions can only be appealed to the Competition Appeal Court, a specialist division of the High Court staffed by judges with a special interest in competition law. In other words, the investigation and adjudication of all matters under the Competition Act is the province of specialist agencies. No decisions of the Commission, the Tribunal or the Appeal Court are subject to ministerial veto. Not even the Supreme Court of Appeals, the highest court in the land, has jurisdiction over competition matters.

We've only been up and running since September 1999. We've made considerable progress in that time, though we've learnt that a powerful law is not enough to ensure tough and sophisticated anti-trust enforcement. I want to share with you some of the challenges that we've faced in the few months of our existence. I suspect that in your own ways all those of you working in anti-trust in developing countries face these challenges. Here are five problems presented in no particular order of importance.

1. Multiple Objectives

Our act specifies a range of objectives to be served by competition law and to be promoted by the agencies responsible for its enforcement. And while the key competition objectives naturally feature in this list, so too do objectives like protection of SME's, promotion of employment and support for the growth of Black-owned enterprises. Some of these conflicting objectives are deeply embedded in the act. For example, the Tribunal must evaluate a merger on competition grounds but it is also required to examine the impact of the transaction on employment and on advancing the ownership stakes of black entrepreneurs – a pro-competitive merger may be stopped because of its employment consequences; an anti-competitive merger may be permitted because it advances black economic empowerment. The Act provides the Tribunal with no guidelines for weighting these criteria.

The Act has been criticized for this with anti-trust scholars and academics particularly vocal in their criticism. However, my own view is that this is inevitable particularly in a developing country where distributional and poverty problems loom large and where all social and economic policy, no less competition policy, is expected to contribute to the alleviation of these first order problems. Under these circumstances it is better to grapple transparently with society's demands for multiplicity in one's objectives, than to imagine that it is possible to occupy an ivory tower from which a purist view of competition policy is defended. It will take time for people to recognize that the best way for competition policy to contribute to job creation and access to the economy is through prioritising efficiency goals. To win this support for competition goals it is important that the competition authorities are seen to be grappling with employment problems and other major social questions. I'm pleased that responsibility for these public interest matters has not been given to a minister but rather to a competition agency that must show ordinary citizens the relationship between an effective competition policy and the realization of their social goals.

2. Weak consumer constituencies

An associated problem is the generally poor state of organization of the consumer constituency, precisely the constituency whose interests should be at the forefront of competition policy's objectives. Because of our recent past our civil society is unusually well organized – worker organizations, business associations, womens organizations, youth organizations abound. But, although consumer platforms and boycotts were powerful weapons in the struggle against apartheid, they were somehow always pursued in support of another struggle – say striking workers or homeless people – and autonomous consumer organization never took root. Hence, in our new Competition Act a range of interests – organized workers, small business interests, exporters and others – have managed to have their interests reflected. But while consumer interests are obviously explicit in the objectives of the act, the truth is that they were inserted by the government drafters rather than by an actively organized interest group. I firmly believe that if we do not, through the implementation of our act, gain the explicit support of consumers we will, regardless of the strength of our statute, remain vulnerable to having our powers and resources reduced.

I have no easy solution to how one goes about strengthening consumer activism and I'm anxious to hear whether any are provided by this meeting. Our Department of Trade and Industry – responsible for drafting the competition legislation – is presently involved in the process of drawing up a consumer policy. One of the questions will be whether consumer protection should be combined with competition policy and I'm far from certain that we have the answer to even that basic question.

3. Powerful State Owned Enterprises

Most developing countries, though nowadays generally committed to strengthening the market and drawing back the boundaries of state involvement in the economy, must nevertheless grapple with the legacy of powerful SOEs. These are either existing state-owned monopolies or they are recently privatized SOEs, usually regulated private monopolies. Nor are they always

simply dinosaurs from the past - scale considerations in medium sized and small economies still underpin natural monopoly in key areas of economic life and distributional concerns still legitimize a powerful role for state intervention either in the form of ownership or through the imposition of public service mandates on private enterprises.

In South Africa the massive SOEs – notably in transport, telecommunications and broadcasting, energy, armaments – were nominally responsible to one or other government department although for the most part they were laws unto themselves. They have now either been privatized or part-privatized or are in the process of major restructuring that will preface privatization. In certain of the privatized SOEs the new shareholders have been granted specified periods of exclusivity in exchange for a contractual commitment to meet a specified public service mandate.

Sector regulators responsible for the range of economic and technical regulation that these activities require have been established. And an argument – both in the high court and in the public domain - has ensued regarding the appropriate location of jurisdiction for competition matters – should this lie with the sector regulator, or with the competition authorities, or both. The SOEs or regulated monopolies have been strident in insisting on 'their own regulators' and this has been supported by certain of the regulators themselves. The latter – that is the regulators – generally insist that the public interest is secure in their hands and that this will be sacrificed if left to the competition authorities with their single-minded focus on competition.

Suffice to say that for a variety of obvious reasons it seems to me that sector regulators are not effective bearers of competition policy. I won't bore you with the details of this argument. However, I fear that if large parts of the economy are excluded from the ambit of the Competition Act, particularly areas that have such a powerful influence on economic growth and consumer welfare, the competition regime will be severely discredited. By the same token however if the introduction of competition means that rural areas are denied telephone connections, this too will discredit competition policy. In taking on this issue we are confronting some of the best organized and best resourced institutions in the society and consequently it's an area where international comparative experience is particularly useful. Parliament is being called upon to resolve this question and when we appear before the legislative committees we are going to asked for comparative international data on say, telephone call charges, and the relationship to regulatory regimes in other parts of the world.

4. Skill Constraints

We are severely challenged by a shortage of formal analytical and technical skills and, particularly, by a lack of the experience that underpins the ability to provide strategic leadership in this field. I vividly recall on my first visit to the DOJ in Washington being at once inspired and discouraged by the profusion of highly trained talent in that institution. Inspired because the level of discussion and debate and reflection was so great; discouraged because our ability to emulate this is so severely limited. A skills shortage in fields like law, micro-economics and forensic auditing is immensely exacerbated by the growing gap between public and private sector salaries. Our staff members are highly exposed to the private sector and poaching of our best officials is rife. Labour market related constraints are, I believe, the greatest challenges facing us. I have little doubt that there is much that we could learn from each other here.

Let me make a pitch and encourage the multi-lateral and developed country agencies represented here to make it possible for developing country competition officials to attend conferences like these and to participate in the courses that you offer your own staff members. I say this not only because travel to some or other exotic capital is an attractive perk but because one benefit that we may be able to offer young professionals that the private sector is less well geared to offer is our ability to gain access to the network of public officials who undeniably represent the best and brightest in this field. Not only does this constitute fantastic labour market

currency when they decide to leave the competition authority but it is a stimulating experience one well worth staying in the public sector for.

5. Developing New Approaches

Finally, and a particular hobby horse of mine, our experience confirms that we in developing economies are challenged to develop new approaches to theories of competition and to the enforcement of competition law. Our approach draws heavily on the reflections and experience of practitioners and academics concerned principally with developed economies. We naturally have an enormous amount to learn from our colleagues in the developed world but we also need to be bold in developing approaches that take account of our own circumstances. This is dictated by, for example, the scale and structure of our economies, by the place of state owned enterprises and natural monopolies and by the particular character of our national policy objectives. I have touched on some of these questions here, but I'll raise some again: what is the position of the competition authorities when an anti-competitive regulation promotes much needed redistribution or poverty alleviation; how do we evaluate a merger between two local firms that, though anti-competitive in domestic markets, still leaves our biggest firms tiny when compared to the giant developed country multinationals with whom they compete; do we permit efficiency enhancing vertical arrangements that allow large producers to dominate vital distribution outlets. The answers to these basic question may differ as between developed and developing country and we will have to develop our own answers based on our own research and our own national policy objectives.

6. Conclusion

Those are some reflections drawn from the South African experience of competition regulation. I don't want to claim too much on the basis of our experience. It is of a relatively recent origin and each country is naturally faced with particular challenges and problems in the development and enforcement of competition law. However, in the limited opportunity that I have had to dialogue with colleagues from other national competition agencies I discern that many of our challenges are similar and overcoming them will be immensely facilitated through interactions such as these. I am grateful for having been given this opportunity.