COMPETITION LAW COMMITTEE
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I have been asked to review our role in merger regulation in the four years of our existence. Let me say at once that I think that we have finally reached the stage of pragmatic acceptance that merger regulation is here to stay, that it is as much part of the business fabric as any other longstanding element of public regulation of business decisions. However, this does not mean that there is still not criticism directed at the process or that there are not issues to discuss. I would like to address some of the issues and certain of the criticisms that have arisen and, in the process, hopefully provide would-be merging parties with some advice about how best to approach the merger regulation process.

I should indicate, at the outset, which aspects of our functions I am not going to address in any detail. First, I am not going to defend the necessity for merger regulation except to say that I believe that the inclusion of merger regulation in our statutory functions has been thoroughly vindicated, that, in other words, absent merger regulation key parts of our industrial structure would have been significantly more anti-competitive and more hostile to new entry than they already are. It is a source of some pride that in the intense exchanges that take place between competition authorities across the world we are succeeding in persuading our peers, in both the developing and developed world and in the multilateral institutions, of the importance of merger regulation in developing countries and we are playing a leading role in the international discussions aimed at smoothing the process of merger regulation.

Secondly, I am not going to defend any of our actual decisions on the merits except to say that I am satisfied – and our peers concur – that our decisions reflect cutting edge anti-trust thinking appropriately transposed to the conditions particular to our economy and society. If we err on the side of robustness – and there is little evidence that this is indeed so - then it is because, as in, for example, the EU and opposed to the US, merger regulation is often our last line of defence. That is, until we can be more confident of our ability to constrain anti-competitive conduct on the part of merged entities we must ensure that attempts to establish anti-competitive structures through merger are vigorously resisted.

Thirdly, I am not going to have much to say about the Commission's role qua investigator though I may have something to say about its role in litigation before us. Again I should say that I think that the speed at which the Commission works and the quality of its investigation has improved dramatically and would improve even more if the parties and, more particularly, their legal advisers were more co-operative.

Who I will address are those critics who insist that, even if one accepts a role for merger review in limiting the entrenchment of anti-competitive market structures, the review process itself nevertheless constitutes an intolerable interference in business life – that, for example, merger regulation takes too long, that it exposes information that must remain confidential, that it enables competitors and other ill-intentioned parties to hold up legitimate business decisions and to gain access to competitive secrets, that it requires the making of complex legal judgment calls that foster uncertainty in business decision-making. These concerns are legitimate and it is our duty to address them. However I will insist that many of these shortcomings reside in the way that merging parties and their legal representatives approach merger adjudication before the Tribunal. Indeed so strongly do we feel about this that we have initiated a discussion in the International Competition Network aimed at developing, alongside the other ground-breaking

work on merger regulation, a project that will attempt to identify best practices for merging parties who value speed, certainty and confidentiality.

When I suggested to one of the organizers of this event that I would title my talk 'how best to have your merger heard painlessly and expeditiously by the Competition Tribunal', she said, only half-facetiously I suspect, that she hoped that I would not be saying that this objective was best realized by dispensing with legal representation. While I am not going to suggest that – I fear that contrary to my earlier idealism I do now accept that legal representation is generally necessary, even helpful – I do think that the character of a merger hearing is significantly influenced by the approach of the legal representatives and the role played by the clients, the merging parties themselves, in directing that legal representation. Using legal representatives in merger reviews is one thing; abdicating participation in an economic and commercial investigation to legal representatives is another thing altogether. I'll illustrate my remarks by reference to concrete experience.

I have always viewed a merger hearing as being in the nature of an enquiry rather than a trial. The judgments made and decisions taken in the course of merger hearings go, principally, to questions of economics and, as a very poor second, questions of commerce, rather than to questions of law. In fact I would go so far as to say that there is only one potentially complex legal judgment to be made in the context of merger analysis and that concerns the question of control, in other words, the very question of whether a merger has actually occurred or not and, consequently, the question of the competition authorities' jurisdiction to investigate and adjudicate the transaction in question. However, this question rears its head in a tiny minority of cases. Moreover, the approach of the Tribunal has already been decided and confirmed by the CAC in the Distell case and it is clearly a very inclusive approach, one that takes a very broad view of the question of control. I do not for one moment claim that these decisions dispose of all possible doubt surrounding the question of control. Ongoing, legitimate uncertainty is clearly evidenced by a recent case involving a private equity fund and a consortium of fast food chains. The important question is when you receive advice that holds that you do not have to notify a transaction, then presuming that the transacting parties agree with the opinion – and it is the one area of merger regulation in which I would probably defer to legal opinion – how should they go about acting upon it?

The merging parties could adopt a purely pragmatic standpoint and simply notify even when they are advised that the transaction does not amount to a change of control. I think that this happens from time to time. Parties, often on the advice of their lawyers, reason that their transaction is unlikely to fail on the substantive competition evaluation and to avoid delay and the legal cost incurred in a challenge on the question of control, they simply pay their merger fee, the better to get on with their transaction. While this is, of course, the parties' prerogative, I would hope that this does not prove necessary. I think that if two transacting parties believe in good faith that control has not changed as a result of their transaction then they should not feel obliged to notify and thereby subject themselves to the scrutiny of the competition authorities.

The parties will be told by their legal representatives that the danger in implementing the transaction without notifying it, is that, in the event that the legal opinion is tested and found wanting, a severe administrative penalty will be imposed by the Tribunal for not notifying and, in the merger evaluation that follows, you will risk having your merger reversed if it is found to substantially lessen competition.

In truth, however, the precise extent of the risk assumed is easily known in advance. If, in good faith, a transaction is not notified because the merging parties did not believe that it constituted a change in control, then there should be no reason to believe that you will be hit by an administrative penalty of any consequence. In a recent case involving Dorbyl's failure to notify a transaction, the Tribunal imposed an administrative penalty of R1. We were of the view that, although in technical breach, the merging parties had acted in good faith and, in setting the

penalty at R1, we tried to indicate to the Commission that we did not believe that the company should have been prosecuted at all. In the Edcon case, on the other hand, we believed that the parties, for commercial reasons, were not prepared to subject themselves to the regulatory process. In our view this was clearly a case of managers who considered their commercial requirements more pressing than the imperatives of the regulatory system and the law. Effectively, they then went to their lawyers and said to them 'we do not intend notifying, divine a legal rationale that will support this decision' and the lawyers complied. They were penalized to the extent of R250K Some commentators, the Commission included, thought that the penalty should have been a lot more severe.

The risk of having a consummated merger unwound is also well known. Very few mergers are turned down or even have conditions imposed on them. While clearly the parties legal advisers cannot predict the Tribunal's view with absolute certainty, there is by now sufficient jurisprudence in this field for them to know when a merger is marginal from a competition perspective or not. If, in addition, you accept – and I insist that you would have no reason for not accepting – that the Tribunal does not comprise a bunch of capricious, whimsical cowboys, then any lawyer, or, indeed, any businessperson, worthy of the name should be able to take an accurate view on the Tribunal's likely response to any given transaction. Frankly if you do have a marginal opinion on control as well as a marginal opinion on the merger's chances on the merits, then you'd be well advised to notify. In other words don't elect not to notify simply because you want to avoid competition scrutiny. That is a very high-risk strategy that may result in a substantial penalty for not notifying as well as an order unwinding the merger.

What you can't do – and we are frequently asked to do just this - is approach us for approval of the merger whilst simultaneously reserving your position on our jurisdiction. I repeat: If you do not believe that we have jurisdiction and are able to show that this belief was reasonable and constructed in good faith, then you should probably implement. If it later turns out that we don't share your opinion on notification, you will not be penalized unduly on the notification question. Above all though don't imagine that you can implement a clearly notifiable transaction and then, should the merger be found to be anti-competitive, plead to be cut some slack on the remedy because of the additional disruption that unwinding an anti-competitive merger causes. In that event a penalty will be imposed because of the failure to notify and the merger will be unscrambled. An alternative approach is to seek an advisory opinion on the notifiability of the transaction, and then, in the event that it is not to your liking, notify and then use the rule that allows an appeal against the Commission's assumption of jurisdiction to the Tribunal. However, this is unavoidably time consuming and fairly expensive.

A major distinction between a restrictive practices trial and a merger evaluation, is that the parties to the merger – as opposed to the defendants in a restrictive practices case - never have an interest in delaying a final determination. On the contrary, speed is a major consideration for the parties in merger proceedings. Litigation is time consuming and so, in a merger proceeding, logic dictates that the merging parties will seek to avoid unnecessary litigation particularly where there is a credible likelihood of the result going against the merging party. This logic does not apply to a defendant in a restrictive practices proceeding. Here causing delay and raising the cost of litigation may precisely serve the interests of the defendants.

The recent Anglo/Kumba matter is a case study of a legal strategy that appeared to ignore the central logic embedded in merger review. I refer particularly, though not exclusively, to the approach taken by the merging parties to the IDC's application to intervene in the proceedings. It seems to me that would-be merging parties faced by an application for intervention, have the following strategic choice. Either to accept the intervention and proceed immediately to the merits. Or, to oppose the application thus ensuring lengthy delays and generating adverse publicity for the merging parties who ineluctably appear anxious to hide arguments and facts inconvenient to their own position.

From that perspective, look at the approach adopted in the Anglo-Kumba matter. The IDC applied to intervene. This was heard by a single member of the tribunal, the procedure employed up until then to determine all 'pre-hearing' matters, who granted the application to intervene. This in itself took a little time but this was compounded by Anglo's decision to appeal the tribunal's finding. In the appeal before the CAC the merging parties then exacerbated their difficulties by arguing that the first decision of the Tribunal to allow the IDC to intervene was improperly taken, that it should have been taken by a full three person panel – the panel set up for the purpose of hearing the matter on the merits – rather than by the single member appointed to conduct the pre-hearing, the manner in which these matters had up until then been determined. The CAC upheld the parties and, in the event, referred the matter back to a full three-person panel for fresh determination. I have no quibble with the CAC decision but it is puzzling that such a technical, time consuming review should have been triggered by the merging parties. This did result in significant delay but, I stress, it was delay occasioned by the strategic choice exercised by the merging parties. It also of course means that, thanks to the taking of this technical point, all pre-hearings have now to be conducted before a three person panel thus delaying the merger process for all future parties appearing before us.

The matter was heard by a fresh panel which supported the decision of the one person pre-hearing. The merging parties then appealed to the CAC which upheld the Tribunal's decision to permit IDC intervention. Without passing opinion on the merits of a Constitution and a Competition Act that sets great store by transparency and citizen participation and that, in the case of the Competition Act, mandates the adjudicator to establish the truth and to value participation by parties who may conceivably aid that truth-seeking function, it does not take rocket science to understand that those values would combine to ensure the liberal view on intervention taken by the Tribunal and the CAC. Indeed, this may well be a further consideration in electing your legal strategy – if you oppose intervention be reasonably certain that you are going to win because if you don't then you will find that the public and the adjudicators will be certain to pay particularly close attention to the contents of the intervention. The same applies to litigation in merger proceedings designed to quibble over discovery or to circumscribe the Tribunal's exercise of its inquisitorial powers. These are powers clearly provided for in the Act and, while this does not mean that there is not room for contesting their precise application, a party in a merger proceeding should know that litigating these matters will not only generate delay and proliferate costs, but that, given some of our democracy's founding principles, it is likely to lose.

'But' it might be argued, 'the very purpose of intervention and elaborate discovery is to cause delay and to legitimize fishing expeditions. Surely we must oppose this.' This may well be true. But, firstly, there is no reason to expect that rampant bad faith on the part of those who approach us for intervention or for information will be tolerated. And, secondly it is standard fare in litigation for defendants – and an intervenor in a merger proceeding is in a position akin to that of a defendant – to employ litigation strategically so as to generate delay, to galvanise publicity in favour of its cause, and to elicit information. One may regret this – particularly when one is on the receiving end of this sort of strategy – but it can't be wished away. The point is to design your strategy so as not to play into the hands of those who have an interest in using litigation in this way. And when you are a merging party interested in a speedy outcome that does not draw unwelcome attention to your transaction, then you want to avoid fancy point taking, particularly when the chances of prevailing are limited.

The Anglo strategists will be quick to point out that they ultimately won. But that is not the point – they won on the merits even after the intervenor had had its day in court and after all the information sought and opposed was revealed. Had they permitted this in the first place, they would have prevailed a year earlier. In the event all that the fancy legal footwork resulted in was massive delay, a significant proliferation in costs and an unwelcome degree of public attention for the client.

My point is that I don't think that this is the kind of strategy that would be adopted when the commercial imperatives that drive the transaction are to the fore. . It may on the other hand be the sort of strategy to which litigation experts incline - after all, their expertise is in the law and in litigation and little blame can attach to them for optimizing their use of those skills and that experience when they are called in. It is the attorneys and clients who must take responsibility for ensuring that those litigation talents are employed to support the merging parties commercial ends and that these commercial imperatives are not put to one side while arcane points of law are debated.

Which brings me to my largest and, I guess, least technical sounding point. A merger decision is not made on tight points of law. It is an economic judgment beset with many of the doubts and qualifications that characterize applied economics. And, as if that were not enough, no matter how much evidence is brought to bear, it is ineluctably predictive, a judgment of likely future conduct. But it is a decision with legal weight and consequence, often devastating consequence. As a result it has raised the standards of economic theory and research. It has had a major role in huge advances in micro-economic theory and econometric and other quanititative research; it has given birth to entire new sub-disciplines in economics. These are theories and pieces of evidence that have been argued and upheld in some very experienced and exacting courts of law. But it will always involve a judgment call and an economic judgment call at that.

For this reason, if you believe that you are going to get a fair hearing, that, in other words, the adjudicators are not, for reasons of intellectual flavour or ideology, predisposed to find against you – and I insist that nobody can believe that about the Tribunal or Commission – then maximum candour is your best approach to the competition authorities. If necessary swamp us with information, above all do not attempt to inhibit our access to sources of information that we believe may enlighten us, ensure that we have access to the managers who possess intimate knowledge of the workings of the market. Credit the investigators and the adjudicators with some ability to distinguish self interested cant from important, substantive argument and information. Trust at least in the ability of your litigation specialists to expose this class of information and argument at the hearing stage. So strongly do we feel about this that we are proposing that the ICN include a 'duty of candour' in a possible schedule of best practices for merging parties, a duty to provide all information that the parties believe pertinent to the merger enquiry regardless of whether or not a particular piece of information is formally required. The inevitable alternative is an adversarial, litigious, argumentative approach to mergers, one that attempts to limit access to information, to records and to people and to alternative viewpoints. This approach confuses rather than clarifies. It's focus in on the law, when the problem, the evidence and the solutions are all firmly in the realm of applied economics and no matter how much law is thrown at the problem, the decision must remain an attempt at a resolution of an applied economic problem. Sowing confusion or doubt may assist the cause of a defendant in adversarial proceedings. In merger proceedings, I repeat, it simply causes delay, it escalates fees, and it generates demands for more and better information.

This does not mean that there is no role for high-level legal expertise in merger proceedings. There is, to be sure, a very important place for legal experts in ensuring that we uphold the standards of fairness appropriate to the exercise of the sort of powers assigned to us. But even this, the most basic element of legal oversight, is only appropriately handled if the legal representatives are able to place themselves in the realm of predictive, economic reasoning which, in turn, lends itself to procedures and practices that are uncommon in the ordinary practice of the law – for example, the inquisitorial powers extended to us by the Act and, thanks to Anglo/Kumba, decisively confirmed by the CAC, are a function of the peculiar realm of law and economics in which we operate. They are not a distortion or diminution of our standards of fairness – they are an application of those standards to a particular problem.

One of the choices facing a client, and on which you are no doubt expected to advise, is whether legal representation in merger matters should be biased in favour of litigation specialists or

commercial expertise. Obviously this is a matter in which we have no business to offer advice. But to those of you in the audience today who might be reticent about appearing personally I would say that we have had several cases recently where attorneys, who are not otherwise litigation specialists, have appeared in complex matters, where the outcome was by no means certain, and they have performed highly competently - precisely because they knew the ins and outs of the transaction since they had worked on them from day one. But also because many years of working with the company on the full range of its legal matters had given the attorneys access to their clients history, its strategy, its long term vision, precisely the sort of matters that have bearing on the ultimate outcome of a merger evaluation. For us in a merger hearing a smart legal mind, one that understands the Act, combined with commercial savvy and an intimate knowledge of the merging parties and their activities, represents the best of all possible worlds.

On the other hand, we have also had cases where the parties have been represented by the most effective and high level legal firepower that clients can buy, but where somehow the legal teams have immediately appreciated and understood that the legal milieu of merger adjudication in the Competition Tribunal is not that of the High court on motion day. It is not, in short, a milieu conducive to the taking of narrow technical points of law. Not because we will not listen to you or not grant your points where valid, but because, win or lose, it is not an approach that is generally in the interests of your clients. In the milieu of merger proceedings, simply getting on with it is the best legal advice that you can give to your client but this doesn't seem to be advise that flows easily from the polished tongue of a litigation expert. In my first weeks in the Tribunal, one eminent silk introduced me to the adage that 'a case well managed can take forever'. This, I have come to learn, is all too true but it is not an approach that avails clients in merger proceedings.

I should add that the merger reviews referred to included interventions by unions, competitors and customers and they included a wide ranging exercise by the tribunal of its inquisitorial powers. Yet I cannot recall having to take or even debate a single application on our procedures. This is not to say that there were not major differences presented to us, or that all was sweetness and light. Or, indeed, that there were not points for the taking. It is simply to say that the parties wanted to get on with it, and hence the differences focused on substance, on the merits, to the benefit of everyone concerned.

In short, my advice to merging parties is that while competition regulation will inevitably consume some resources and take some time and this for good reason, it is, nevertheless eminently possible to contemplate a relatively painless passage through the Tribunal and one that enhances, if not guarantees, your chances of success in the most complex cases. Just bear in mind that in contrast to common approaches to litigation and investigation, parties to merger investigations are not availed by technical point-taking because of the time that it takes; they are not availed by complex legal argument because there are not many complex legal questions at stake and so a legalistic approach is almost inevitably diversionary and time consuming and unlikely to succeed; little is achieved by attempting to withhold information and by attempting to prevent the Tribunal from digging deep and traversing wide for the information that it requires if an informed, considered decision is to be made because the Tribunal has the power to seek out that information and has shown that it will exercise those powers if necessary. On the other hand, much is achieved by engaging co-operatively with the process and by adopting an approach characterized by maximum candour. In the case of merger review it really is up to the parties themselves to ensure that their engagement with the competition authorities is an efficient and productive one.

I hope that you will give serious consideration to these views. I say this partly because I would like us – and I mean us – to pre-empt some problems that I see coming down the pike. Take the important issue of confidentiality, for example. I think that both the Commission and the Tribunal, anxious to minimize delay, have not taken on the many far-fetched claims for confidentiality in merger filings. But these claims are getting out of hand. We are having trouble granting

reasonable public access to our proceedings and we are having trouble writing intelligible, clear decisions. These are important principles and they cannot be compromised by spurious claims of confidentiality. This sweeping approach to confidentiality must also change because it is responsible for a 'cry wolf' attitude on our part, an attitude that conflates serious, legitimate claims for confidentiality with the blanket, ill-considered series of claims and leads us to treat the former with the same impatience and disdain that we should reserve for the latter. There are two choices – you can seriously utilize the confidentiality provisions in order to protect bona fide business secrets. Or you can spend many hours and days before the panel – a three person panel of course – and the CAC arguing about confidentiality. The choice, as I have just said, is yours. I just want to assure you that if you want to get on with it, then you will find willing accomplices in us.