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I. INTRODUCTION

When South Africa's modern competition regime came into effect, the country did not have much of a competition culture to speak of. The economy was lumbering under the legacy of highly concentrated markets, international isolation, and the exclusion of the majority of the population from meaningful participation. The passage of the Competition Act and the launch of new competition authorities in 1999 marked a departure from this history.

Though there had been a competition law on the statute books before 1998, legal and business professionals, as well as public officials, had not been trained and groomed in an environment that placed high value on merit-based competition. The public at large also did not think of competition matters in dealings with business. In this context, advocacy and outreach initiatives have played an important role in the development of a competition culture. This is on-going work but much has already been achieved in a short space of time, with the work of the competition authorities taking on the 'flavour of a social movement' as described by former Competition Tribunal Chairman David Lewis.[2]

Advocacy is recognized as an important function of the competition authorities in South Africa. According to the Competition Act, the Competition Commission is responsible for raising public awareness of competition law, collaborating with other regulators on competition-related matters to ensure the consistent application of the act, reviewing public regulations and legislation, and alerting the executive of any anti-competitive provisions contained therein.[3] The Competition Commission may also report to the relevant government minister on any matter relating to the application of the Competition Act and to enquire into and report to the minister on any matter concerning the purposes of the Act.[4] However, the execution of these responsibilities is not backed by powers to compel information and to summon witnesses. Thus the co-operation of other entities with the Commission in its advocacy is mostly voluntary.

The Competition Commission's organizational strategy incorporates advocacy as one of its three over-arching goals.[5] A dedicated division, Advocacy and Stakeholder Relations, leads

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[2] *David Lewis on Global Competition: Law, Markets, and Globalization*. Blog post: http://lawprofessors.typepad.com/antitrustprof_blog/2010/08/david-lewis-on-global-competition-law-markets-and-globalization.html Accessed 21/08/2012.

[3] Act No 89 of 1998, as amended. Section 21 (1).

[4] Act No 89 of 1998, as amended. Section 21 (2).

[5] According to this goal, the Commission strives to enhance the competitive environment for economic activity though strategic partnership, engagement, dialogue and advocacy

and co-ordinates the Commission's outreach activities. This division promotes voluntary compliance with the Competition Act, develops and maintains relationships with international and domestic stakeholders in the public and private spheres, and communicates the decisions and activities of the Commission. Though advocacy is housed in a specialist division, all of the Commission's work is imbued with advocacy and all staff members play an advocacy role as it relates to their enforcement duties.

II. BUILDING RELATIONSHIPS WITH KEY STAKEHOLDERS

From its inception, the Commission has sought to develop relationships with its key stakeholders through regular interaction. It interacts with organized business and organized labor through regular workshops and fora. These interactions present the Commission with an opportunity to educate these stakeholders on competition law and to encourage compliance with the competition law. They also allow these stakeholders to provide the Commission with feedback on the impact of its decisions and processes.

The Competition Act makes provision for the establishment of memoranda of understanding between the Commission and sector regulators with oversight over financial services, consumer affairs, telecommunications, energy etc. This is intended to ensure the consistent application of competition law principles across various sectors of the economy. It also minimizes the risk of forum-shopping by firms in instances where they may attempt to exploit concurrent jurisdiction between the competition authorities and sector-specific regulators to meet their anticompetitive ends.

Over the years, the Commission has implemented an array of outreach measures towards consumers. Consumers have been engaged through the media and also through presentations and workshops. Non-governmental organizations, acting in the interests of consumers, have also been brought into the competition discourse and have participated in the proceedings of competition authorities.

Relations with the media are crucial in embedding a competition culture in society. Publishing the proceedings of the competition authorities provides useful insight about the workings of key sectors of the economy to the media. The decisions and activities of the competition authorities have also become the subject of discussion and debate. In terms of media channels, online communication generated the most coverage (40 percent) for the Commission, followed by print (34 percent) and the broadcast media (27 percent).[6] Radio dominated the broadcast coverage by contributing 60 percent of the total coverage for this type of media. The Commission also issues a quarterly publication, *Competition News*, which explains the Commission's decisions and communicates other competition developments.

The number of website visits and number of visitors to the Commission's website have steadily increased over the years, suggesting increased awareness of competition law in the country. Visitors are most interested in the text of the Competition Act and information on mergers and acquisitions.

[6] In the 2011/2012 financial year.

The Commission is involved in regional and continental efforts to develop competition law and policy through organizations such as the recently formed African Competition Forum ("ACF") and the Southern African Development Community ("SADC").

III. LESSONS LEARNED

A. The Twin Pillars of Competition Policy

Competition has become a prominent feature of discussion and debate in South Africa. To compare it to a social movement is not a far-fetched notion. Key institutions in civil society, including the trade unions and consumer organizations, maintain an active interest in merger and enforcement hearings. The Commission's advocacy teams coordinate and nurture relationships with civil society organizations so that they are adequately informed and empowered to become effective champions of competition law and policy. This can be seen in the participation of organizations such as the Congress of South African Trade Unions, the human rights NGO Black Sash, the National Consumer Forum, and the South African Consumer Union in Competition Tribunal hearings dealing with the bread and fertilizer cartels.

The intertwined nature of advocacy and enforcement activities is most apparent when outreach initiatives spur enforcement action. As an outcome of training interventions on bid-rigging offered by the Commission to government departments, agents, and municipalities, officials were able to identify the features of such conduct and, as a consequence, lodge complaints with the enforcement divisions of the Commission. The Commission also made submissions to the National Treasury both to reform government procurement processes[7] so that those undertakings bidding for tenders will not engage in bid-rigging and also allow for additional penalties for such conduct by Treasury.

B. Advocating for Systemic Change

Competition advocacy serves an important role in highlighting systemic competition challenges and creating a platform for other state and regulatory actors to address those market failures and imperfections that are not amenable to traditional competition law remedies. A case in point is the Banking Enquiry, initiated in 2006 to examine specific aspects of competition in retail banking and the national payments system. The Enquiry was framed and coordinated by the Competition Commission but was heard by an independent panel.

The South African retail-banking sector is made up of four major banks and a host of small and niche banks. Studies commissioned by the National Treasury[8] and the Commission[9] identified competition concerns, including barriers to accessing the national payment system by second-tier banks and non-bank entrants, charges levied by banks for payment transactions, the setting of penalty fees, processing mechanisms, and the market structure in payments.[10] This

[7] Through introducing the Certificate of Independent Bid Determination.

[8] Task Group for the National Treasury and the South African Reserve Bank (Falkena III), April 2004, *Competition in the South African Banking*. Available: http://www.finforum.co.za/fininsts/ciball.pdf

[9] Feasibility (Pty) Ltd, January 2006, *Competition in Banking and the national payment system*, a report to the Competition Commission South Africa.

[10] Competition in South African Banking, cited in *Banking Enquiry: Report to the Competition Commissioner by the Enquiry panel* (June 2008).

body of research lent support to general public disgruntlement about bank charges. This gave impetus to the Enquiry, which was conducted under section 21(1) (*a*) of the Competition Act, which gives the Commission the responsibility to "implement measures to increase market transparency" and section 21(2) (*b*) which gives the Commission the power to enquire and report to the responsible Minister on any matter concerning the purposes of the Competition Act.

At the conclusion of the Enquiry—which heard submissions from a broad range of industry participants including banks, card associations, consumer and civil society groups, regulatory institutions, major retailers, other participants in the national payments system (including niche financial services companies), and the general public—the independent panel issued a set of recommendations. These were aimed at addressing consumer protection, access to the payment system, and inter-bank fees. The Enquiry did not lead to competition enforcement investigations.

Yet the Enquiry had a remarkable impact in raising awareness about competition in banking[11] and brought media scrutiny to the industry's practices. Banks began lowering their charges even as the Enquiry was in progress. More importantly, the recommendations made the case for regulatory changes that would produce more competitive outcomes in the sector. The stage has been set for the introduction of a new market conduct regulator under the auspices of the Financial Services Board. The central bank is also conducting further research into the regulation of inter-bank payments and access to the payment system. The relatively new Consumer Commission has also stated its intention to pursue the consumer protection issues raised by the Enquiry.

Since the conclusion of the Enquiry, the Commission has acted as a champion of the recommendations and engaged with the relevant regulators and government departments as they implement them. At times, this has been a challenging process but ultimately rewarding as reforms are gradually introduced. This experience highlights the role that competition authorities can play in bringing competition policy issues to the fore, through a combination of preliminary research, public hearings, media engagement, and inter-governmental engagement. This speaks to the "convening power" of a competition authority to bring together diverse constituents so as to resolve systemic competition policy challenges that cannot be tackled through enforcement.

C. The Public Interest

In the realm of merger control, the Commission naturally comes across a broad range of stakeholders that are affected by a transaction. In accordance with the law, merger assessment entails both a competition and a public interest inquiry. The public interest provisions stipulated in the Act not only present an analytical task, but advocacy skills are required to optimize and manage the participation of relevant stakeholders within the constraints of the law.

In conducting a public interest inquiry, the Commission is called on to determine whether or not a merger can be justified on substantial public interest grounds, taking into

[11] This continues. For example, drawing on the Enquiry's findings the trade union group Solidarity released a comparison of banking charges for personal transactions banking accounts at five banking institutions (Solidarity Research Institute, 2010).

account its impact on a particular region or industrial sector, employment, the ability of small business or firms controlled by historically disadvantaged persons to become competitive, and the ability of national industries to compete in international markets. High profile mergers such as that between Metropolitan Holdings and Momentum Group[12] and the entry of Wal-Mart into the South African economy through a merger with local retailer Massmart[13] have involved scrutiny of their impact on employment and local industries.

Until recently, the most active civil society participants in the authorities' merger proceedings have been trade unions. The Massmart/Wal-Mart merger saw the active participation of government departments and civil society groups in the merger process. The unions were joined in their intervention by a forum representing small-, medium-, and micro-enterprises and the ministers of three government departments—Economic Development; Trade and Industry; and Agriculture, Forestry and Fisheries.

This transaction raised concerns about employment losses as well as the potential displacement of local producers by imports in the merged entity's supply chain. The Tribunal approved the transaction with conditions dealing with supplier development and labor conditions. The interveners, including government departments, challenged this ruling and sought to have the Competition Appeal Court impose stricter and modified conditions. The Court upheld the appeal, in part, and directed the merging parties to commission a study to be conducted by a panel of experts to investigate mechanisms that would enable South African small- and medium-sized suppliers to participate in Wal-Mart's global value chain.[14]

Broadly speaking, in the public debate sparked by cases such as this, government and labor argue for the authorities to maximize the implementation of the public interest provisions in the Competition Act whereas the private sector favors a more restrictive approach to their interpretation. The challenge for the competition authorities is to develop an approach to cases that gives the proper expression to the spirit and the letter of the law while preserving the appropriate balance between public interest and traditional competition considerations. An appreciation for such an approach has to be nurtured across multiple constituencies with divergent interests.

In this environment, the Commission's advocacy tools have come under pressure. It might be argued that the nature and the quality of the dialogue could have been enhanced through more astute advocacy interventions. The clear lesson is that, in an increasingly contested terrain, competition authorities have to invest in the development of their advocacy tools so as to keep pace with complicated, multi-stakeholder processes that inform strategies pursued in the courtroom.

D. Competition in Regulated Spheres

The application of competition policy to regulated industries presents a challenge to many jurisdictions, especially in the context of liberalization and privatization, as can be seen by

[12] 41/LM/Jul10.

[13] 73/LM/Nov10.

[14] 110/CAC/Jun11 and 111/CAC/Jun11. The court is currently studying the two studies that have been produced by the panel of experts.

the range of competition cases brought against state-owned incumbents in sectors such as energy and telecommunications. South Africa is no exception and a recent Tribunal ruling in the telecommunications sector highlights the ways in which a partially state-owned incumbent can exploit regulatory uncertainty to pursue anticompetitive strategies.[15] In this instance, the state played both the roles of sector policymaker and shareholder in the incumbent operator, Telkom. Sector oversight is provided by an independent sector-specific regulator that has been beset by resource constraints, weak institutional capacity, and litigious behavior by Telkom.[16]

The regulator clashed with Telkom on the interpretation of certain exclusivity provisions in its license, which gave the incumbent the exclusive right to offer certain services. Telkom interpreted its exclusivity provision to include market segments, such as internet services, which were not intended to be covered, arguing that private internet service providers were intruding on its monopoly rights.[17] The regulator ruled against Telkom, which took the matter on appeal. The high court ruled in favor of Telkom on procedural grounds.

Another case over exclusivity ensued over the private data networks offered by Value Added Network Service ("VANS") providers. VANS were required by law to lease backbone facilities from Telkom. However, Telkom went further than this and argued that the services it provided over these leased lines were also within the bounds of its exclusivity. This matter was brought to the Competition Commission in 2002 when a group of VANS lodged a complaint with the Competition against Telkom. They alleged that the manner in which the incumbent provided them with facilities contravened certain provisions of the Competition Act. During the period under consideration, the VANS were obliged by law to lease facilities from Telkom and also had to compete with Telkom in the downstream markets.

After much litigation, the matter was finally heard by the Tribunal in 2011 and 2012. The Tribunal found Telkom to have contravened the Competition Act in its dealings with its downstream competitors. The fine imposed on Telkom was discounted by 30 percent as the Tribunal pointed both to uncertainty in the telecommunications regulatory framework at the time, as well as to conflicting government objectives given the state acted both as policy-maker for the sector and a shareholder in Telkom.

The success of the competition authorities in challenging anticompetitive conduct by a partially state-owned entity is a triumph of competition law. However, this only serves to shine a spotlight on the under-development of competition policy in crucial segments of the economy.[18] Given the difficulties of prosecuting abuse of dominance cases, especially in technical industries where sector-specific expertise is required, effective regulation and a strong competition orientation across government hold the key to more competitive outcomes. Though market and

[15] Case Number 11/CR/Feb04

[16] R. Horwitz & W. Currie, *Another instance where privatisation trumped liberalisation: the politics of telecommunications reform in South Africa – a ten year perspective*, 31 TELECOMMUNICATIONS POL'Y 445 – 462 (2007).

[17] *Id.*

[18] Also *see* D. LEWIS, THIEVES AT THE DINNER TABLE: ENFORCING THE COMPETITION ACT (2012). The distinction between competition law and policy in South Africa is a theme explored by the book at pp. 280 – 283.

technological forces have allowed consumers to sometimes bypass the uncompetitive fixed line sector, the case for advocacy remains.

IV. CONCLUSION

For a middle-income country with a fairly sophisticated economy comprised of historically tight ownership networks and non-trivial state involvement, developing a modern competition regime that challenges vested interests is a task that requires the innovative deployment of advocacy tools to complement its emergent jurisprudence. Just over a decade into the new competition regime, the South African authorities have established a solid enforcement and merger control record. Advocacy and outreach efforts have sought to extend this early record into a sustainable competition culture supported by appropriate regulatory interventions and government policies.

Much remains to be done, in sectors ranging from telecommunications, healthcare, and agriculture, to inculcate competition policy. As the Commission hones its advocacy and outreach capabilities, more competitive outcomes are to be expected.