

CPI's Africa Column Presents:

Highlights of the South African Competition Commission's 10th Annual Conference

By Kathryn Lloyd (KPMG, Johannesburg)

October 2016



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On October 5-7 2016, the Competition Commission of South Africa (Commission) hosted its 10th annual Competition Law, Economics and Policy Conference in Cape Town, South Africa, which drew prominent local and international experts from the academic, business and policy communities. While the theme of the conference was “Competition Policy and Economic Growth”, discussions touched on a wide range of topics. This article highlights some of the key issues that participants raised during the lively panel discussions, most notably surrounding cartel criminalisation, the effectiveness of competition enforcement and co-operation between agencies in the context of globalisation.

Introduction: Trends in South African competition policy

The diversity of topics that participants addressed during the Commission’s 10th annual Competition Law, Economics and Policy Conference is reflective of an unprecedented level of enforcement action arising from “traditional” anti-cartel and abuse of dominance laws. Simultaneously, the South African legislature has introduced a range of new provisions in the Competition Act, 89 of 1998, empowering the Commission to conduct market inquiries and criminalising cartel conduct, with debate on a further round of amendments advancing rapidly. Merger control in South Africa has taken on a unique and powerful role, with the authorities approving a number of international mega-mergers subject to creative and far-reaching conditions aimed at achieving positive contributions for local industry, despite a lack of “classical” competition concerns. All this has taken place against the background of increasingly fierce international export competition, low domestic economic growth and political imperatives to boost co-operation and trade with South Africa’s neighbours and BRICS partners. This range of legal, economic and political issues was reflected in the subject matter of discussions at the conference.

Changes in cartel penalties and enforcement

On a number of occasions, participants highlighted the repercussions of some of the recently-enacted cartel criminalisation provisions.¹ The Judge President of the Competition Appeal Court, Dennis Davis, raised a concern that the criminalisation provisions could have negative implications for South Africa’s cartel leniency programme. This concern stems from a dual investigation process—while the National Prosecuting Authority (NPA) is entitled to take into account the Commission’s submissions regarding leniency when prosecuting cartelists, it is not required to do so, creating a disincentive for employees to report cartels to the Commission or to co-operate during a cartel investigation. Various conference participants raised the additional concern that the NPA lacks the institutional capacity to investigate cartel matters. Further, Senior Council David Unterhalter called attention to the risk that criminalisation provisions could be over-inclusive given that the South African Competition Act does not distinguish between hard-core cartel activity and other, less egregious, forms of collaboration. Unterhalter noted that legislative amendment would be necessary to minimise the number of challenges that could flow from the misalignment.

Notably, the cartel criminalisation provisions have come into force during a particularly active period of cartel enforcement—the Commission announced that it had initiated 133 investigations into cartels in South Africa in the past year alone. This heightened activity raises questions for the optimal timing of cartel criminalisation in countries with relatively young competition regimes, taking into account the trade-off between the uncovering of cartels on the one hand and ongoing deterrence on the other. David Lewis, the Former Chairperson of the Competition Tribunal of South Africa, touched on the need to consider the relative benefits of alternative penalties such as blacklisting, which carries lower administrative costs than

¹ Already the subject of extensive debate in South Africa, section 73A(1) of the South Africa’s Competition Act, 89 of 1998, as amended, imposes penalties of ZAR 500 000 (approximately USD36 000) or up to 10 years in prison for any “director” or person with “management authority” who engaged in or “knowingly acquiesced” in cartel conduct.

criminalisation.²

Simon Roberts, Former Chief Economist and Manager of the Policy and Research Division at the Competition Commission, proposed a novel remedy following the uncovering of a cartel that could have positive outcomes for economic growth—the use of cartel fines to fund entry where this is likely to be beneficial for competition. He noted, however, that like any start-up funding programme, one should bear in mind that not all entrants would necessarily be successful, but that the consumer benefits from successful entry could potentially be large.

The effectiveness of competition enforcement in South Africa

On the whole, conference participants seemed to agree that competition enforcement has been effective in South Africa, with some caveats. For example, Advocate David Unterhalter pointed out that the relevant institutions should be cognisant of the relationship between trade and competition policy in the context of slowing economic growth in South Africa, which is a small, open economy. In particular, he noted that there is a risk that an inward-looking merger control regime that is overly focussed on national industrial policy concerns could promote atomised competition in a shrinking economy. This risk is particularly pertinent to South Africa and other African jurisdictions, where public interest considerations, such as the effect of mergers on employment, often become the primary focus of merger assessments to the exclusion of an assessment of dynamic efficiencies. Unterhalter noted that if left unchecked, this “somewhat parochial” approach is at risk of influencing nascent competition regimes on the continent, which look to South Africa for guidance. Unterhalter cautioned that this could ultimately have a detrimental effect on international and regional trade in light of the growing competitiveness of large global competitors.

The high number of cartel investigations in South Africa, even some 18 years after the Competition Act, 89 of 1998 was first enacted, points to an ongoing challenge for the South African competition authorities—how to transform a “sticky” business culture that has historically regarded competition infringements as an acceptable part of doing business. David Lewis noted that beyond enforcement measures, there is an important role for advocacy to extend the competition authorities’ remit. Within this context, Lewis emphasised that market inquiries are one of the Commission’s most powerful tools for creating awareness of competition laws. Lewis also noted that there is scope for the Commission to research and publish evidence of the effectiveness of its activities to promote the Commission’s institutional legitimacy.

Co-operation (although not necessarily convergence)

The conference included a dialogue regarding the importance of cooperation between agencies. However, Frédéric Jenny, Chairman, Competition Committee, OECD commented that there is some tolerance of differences in approach across agencies internationally and that cooperation does not necessarily imply convergence. He gave the example of the international business community’s general acceptance of developing countries’ public interest considerations in merger assessments. Keeping with the theme of cooperation, the conference provided a forum for the signing of memoranda of understanding (MoUs) on bi-lateral cooperation between the Commission and the Competition Authority of Kenya and the Federal Antimonopoly Service of the Russian Federation. The MoUs aim to promote the sharing of information and the coordination of investigations.

Overall, the forum provided a useful opportunity for academics, practitioners and policymakers to debate

² Section 28 of the Prevention and Combatting of Corrupt Activities Act, 12 of 2004, (PCCA) empowers National Treasury to blacklist companies convicted of having engaged in corrupt activities, including collusive tendering. Blacklisted firms are restricted from supplying goods or services to the State.

and reflect on developments and current challenges in competition policy both domestically and abroad. It provides a reference point for tracking legislative changes and trends in enforcement in the year ahead.