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## **OECD Global Forum on Competition**

**CONTRIBUTION FROM DAVID LEWIS, COMPETITION TRIBUNAL (SOUTH AFRICA)**

*This note is submitted by David Lewis, Chairperson, Competition Tribunal (South Africa) as a background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.*

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It's not possible to speak about the response to our competition law without saying something about the background out of which the law emerged. Indeed, I hesitate to present a 'developing country perspective'. We all accept that the results of competition law enquiries are heavily driven by the facts relevant to a particular case; the same is true of the reception accorded to the introduction of a competition law – it too is a function of a set of pertinent facts specific to the time and place in question. It is possible to identify a number of general responses although I think that these will be boringly familiar to everyone here, whether from developed or developing country. These general responses are driven by predictable interests. These characteristically proclaim a strong commitment to enhanced competition in everyone else's backyard but usually find reasons for disputing its efficacy on their own turf.

South African has had a competition statute in place these past 30 odd years. However this underpinned a very weak regime of competition enforcement – the law was weak, the enforcement agency was starved of resources and the government of the day gave little political support to competition law and policy. Indeed among the many reasons for which the South Africa of the time was well known, high levels of market and ownership concentration, cronyism between government and a strong sector of the business elite and the powerful role of state owned enterprises rank high. In short competition law existed in an environment which would have defeated the most zealous enforcer.

In 1999 a new law was passed. But this didn't happen in a vacuum. You will all know that the passing of this new law followed a veritable revolution that ushered in a new dominant set of social values partly enshrined in a brand new constitutional dispensation. The newly dominant values represented a significantly improved environment for the robust enforcement of competition law. This does not, of course, mean that government's reasons for embracing competition were the same as those of the average economics professor. Hence, although, as reflected in the statute, the political champions of the new competition law appreciated and supported its role in promoting efficiency and consumer welfare, the new law was also embraced because of its potential contribution to broadening the ownership base of the economy, to affecting the racial composition of this ownership base, to easing access by SMEs and, in general, to disciplining a business elite that was widely perceived to have grown sloppy under the protective umbrella provided by their cronies of the old order. In other words, although it often meant different things to different people, competition law was received not as some esoteric contribution to economic policy but rather as a robust statement of where government and the society stood on a number of core social values.

Hence a new, much strengthened law was passed, the institutional base, including the budgets of the various agencies, was profoundly strengthened, and government, in its public stances and through other complementary economic policy initiatives, evinced strong support for the promotion of a competition-friendly environment.

This environment afforded little opportunity for outright opposition to the strengthening of competition law. Hence while the business establishment may not have liked the widespread notion that the law was aimed at long established business practices and structures, it was forced to acknowledge that it was an aspect of an approach consistent with privatisation and a general reduction in the role of the state

in the economy. In other words, though sceptical of the intentions of the new competition policy, business was happy to accept it because it in part represented an embracing by the new government of the market. Or, conversely, while the unions were sceptical of the embracing of the market that the competition law represented, they were cheered by the fact that big business was going to be subject to a new set of rules and institutionalised discipline.

This combination of enthusiasm and wariness has given rise to an elaborate statute. While all those involved in the process (which included lengthy formal negotiations between government, business and labour and an elaborate parliamentary process) paid lip service to the need to balance the twin requirement for judicial certainty with the flexibility that economic regulation demands, in fact all the stakeholders predictably wanted those aspects dear to their divergent interests enshrined in the law. Hence we have a law that in its elaboration is very far away from the terse treatment of the Sherman Act or of Articles 81 and 82. Interestingly, the active involvement of a range of stakeholders in the lawmaking process and their shared concern to prevent competing interest groups from dominating the decision making structures and processes of the competition authorities has also given rise to a family of competition institutions whose independence is strongly guaranteed in the new law.

This particular background to the competition law also accounts for a statute that incorporates a multiplicity of objectives, a mix of 'traditional' competition objectives and a range of social objectives, such as employment creation and retention, black economic empowerment and the promotion of SMEs. It's generally thought that this is a feature of developing countries and I'm happy to acknowledge that specific features of our country account for the particularly strong emphasis on 'non-competition' objectives in our law. I am not sure that the pressure to include these considerations is unique to South Africa or to developing countries generally. Racially or ethnically skewed access to the economy and high levels of unemployment – both fairly common features of many developing countries – may account for the unusually explicit incorporation of these objectives in our law and in those of other developing countries. But I'm pretty certain that these considerations influence prosecutorial and even judicial decisions everywhere. The difference is that pressing developing country circumstances force these out into the light of day where, because many are actually driven by narrow interest group pressure, they often disappear.

Our law deals with both merger regulation and anti-competitive practices. In merger regulation we are regularly confronted with the argument, from both government and the private sector, that developing countries should take a benign, even facilitative, position on 'national champions', or, expressed otherwise, that the operation of scale economies in small markets dictates a permissive approach to mergers in developing countries. This is a highly case specific question although our experience to date strongly suggests that the cases do not bear out the general proposition. The argument is most often couched in the form of a plea in favour of 'international competitiveness'. We have insisted, however, that, as a general proposition, firms that dominate their domestic markets are not incentivised to achieve international competitiveness, they are not successful exporters. Nor are we persuaded that, as a general proposition, firms are driven down their cost curves by scale rather than competition. In our limited experience, where scale considerations are overwhelming, markets tend to be truly international and, in those relatively rare circumstances, competition authorities, whether in developing or developed countries, should arrive at the same conclusions. So, in summary, I don't hold that there are special circumstances that dictate a more permissive merger regime in developing rather than developed countries.

Those who favour a robust competition policy sometimes suggest to us we should not be doing merger regulation at all, that our limited resources should be devoted to prosecuting anti-competitive restrictive practices. While often well intentioned, this is quite wrong. It both underestimates the harm done by anti-competitive mergers and it overestimates the ability of new competition agencies, especially in newly democratised developing countries, to launch successful restrictive practice prosecutions. Our

experience is that the first restrictive practice cases inevitably have to pass through a range of procedural and constitutional reviews partly because the law (both the competition statute and the constitution itself) is genuinely unsettled and requires judicial consideration. In the meantime the competition authority is seen to be doing nothing other than paying lawyers to argue obscure legal points in distant courts and its reputation suffers, and partly because defendants in restrictive practices, unlike merging parties, are incentivised to obstruct the prosecution of their case. Robust merger regulation, on the other hand, not only makes a substantive contribution to promoting competition, it enables the competition authority to rapidly establish credibility and reputation – in the nature of merger regulation, a reputation for standing up to the most powerful private interests in the country.

The domestic business response to restrictive practices enforcement is best characterised as utter bemusement. Suddenly long established practices are illegal; they are being raided; they are hauled before an administrative tribunal and potentially subject to what, in their view, are massive fines. Multinationals, on the other hand, are far more sophisticated in their response – I discern that they are less impressed by our punitive capacity, more cognisant, perhaps, that the returns from anti-competitive practices outweigh the fines that we are able to impose.

Those who support robust anti-trust enforcement often urge us to focus on selected, particularly egregious offences, with hard-core cartels generally singled out for attention. I'm not sure that hard-core cartels are the correct prioritisation for developing countries. Ubiquitous single firm dominance of important markets may bring other cases to the fore – for example vertical agreements whereby a monopolist ties up a source of supply or means of distribution may well pose a greater threat to competition than horizontal agreements. However, the argument for prioritisation is generally well taken, although difficult to achieve in a new competition regime and one that lacks the consumer protection capacity of developed countries – hence complainants frequently bring an array of unfair trading practice cases and contractual disputes to the competition authorities. The Commission has been courageous in turning these away, although many of them choose to bring these directly to the Tribunal.

We are also frequently told to focus on advocacy and the promotion of a 'competition culture' rather than enforcement and merger regulation. Though again well intentioned, I am sceptical. Respect for competition is more easily engendered by a successful prosecution than by a research paper or a press conference. But advocacy and winning the public debate is vitally important. Here I think focus is important – we should eschew general advocacy in favour of a focus on particular areas, like, for example, telephones. Not only does this kind of focus engage with areas of huge importance to the mass of the population, it also helps establish a reputation for independence from government.

Which leads to my final remark: I think that in our early days, our reputation has been significantly enhanced by the structure of our act which essentially provides for three independent bodies – a prosecutorial agency, the Commission; a quasi-judicial Tribunal; and a specialist Appeal Court. Not only is each agency independent of government – there is no ministerial override over any of our decisions - but they are independent of each other. We have, in our first years, undoubtedly made mistakes. But the fact that these are palpably our mistakes, rather than the product of a self-interested lobby or a ministerial instruction has earned us a grudging respect. In every way I think that this may well be the most important aspect that developing countries have to get right. A reputation for independence and integrity may be the most vital ingredient for successful competition enforcement - it is a feature not to be taken for granted, even in developed countries.

**THE POLITICAL ECONOMY OF ANTITRUST****FORDHAM CORPORATE LAW INSTITUTE  
28<sup>TH</sup> ANNUAL CONFERENCE INTERNATIONAL ANTITRUST LAW AND POLICY****October 25 and 26, 2001**

There are a number of prisms through which to view the political economy of anti-trust. I'll use the most common and pose the following question:

Accepting that a principal objective of anti-trust is allocative efficiency, how does it deal with a real world driven by distributional conflicts and whose order is effectively structured by the chosen mode of resolving these conflicts?

South Africa is an interesting site upon which to pose this question. It's trite that massive unresolved distributional conflicts are at the heart of its political transition - the new regime clearly seeks to distinguish itself by its promotion of greater equality in access to wealth and income earning opportunities; it wants interest groups marginalized by the previous order, essentially the new ruling party's electoral constituency, to be principal beneficiaries of the new order. However, government also recognises that these distributional goals can only be achieved through a significant improvement in economic performance, in economic efficiency.

South Africa's political leaders do not, in common with most of their kin in the rest of the world, view these objectives as mutually exclusive; they do not, in other words, easily accept or admit to an efficiency/equity trade-off - on the contrary the popular view in South African society is that poor economic performance is, in large part, a product of power relations that excluded the majority from access to the economy. Concretely these broad objectives translate into support for, *inter alia*, black economic empowerment (seen largely as broadening the ownership of economic assets), for small and medium sized enterprises and for job retention and creation. In order to achieve any credibility in the society every major piece of economic legislation would have to embody, in letter and spirit, this range of objectives.

This imperative to elevate distributional goals is particularly strong where antitrust legislation is concerned. This may appear ironic in a field, the practitioners of which are so anxious to immunise from political influence. However, it should not be surprising - it clearly derives from the very powerful distributional overtones present at the birth of antitrust and that still resonate through much of its current enforcement. *The historic role of antitrust is to constrain the behaviour of large concentrations of economic power, particularly private concentrations of economic power.* And so although competition professionals may have come to recognise the inordinate complexity of this task and the many unintended consequences that flow from it, it is not surprising that the contemporary political midwives of antitrust think little of including in its objectives the defence of those whose interests they believe, wrongly or rightly, are vulnerable to the exercise of big business power, like employees and small business. Accordingly these objectives are enshrined in the South African competition statute enacted two years ago.<sup>1</sup> They are to be found not only in the broad preamble and purposes of the act,<sup>2</sup> but they are also

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1 Competition Act, 89 of 1998 (as amended). The Act is available on the Competition Tribunal's website ([www.comptrib.co.za](http://www.comptrib.co.za)) as are all the decisions of the Tribunal.

2 Section 2.

written into, for example, the merger evaluation process<sup>3</sup> and the criteria for exemption.<sup>4</sup> These objectives – employment, small business, and Black economic empowerment are the ‘public interest’ objectives of the act. The act also allows for explicit efficiency defences – that is, an anti-competitive transaction or practice can be defended on the basis of the ‘efficiency’ gains that it realises. Although this defence also allows – in the name of ‘efficiency gains’ – for a departure from ‘pure’ competition norms and presents even more complex balancing decisions, I am going to confine my remarks to the public interest/competition trade off.<sup>5</sup>

I am quite comfortable with the requirement that we balance competition and public interest considerations. I recognise that it makes for complex decision making, however *real politiek*, at least, dictates that we do not insist on eliminating either the ‘political economy’ or distributional objectives or the ‘pure economy’ or allocative efficiency objectives. The trick is reconciling them in practice, and this, in turn, is tied up, first, with the process of building a new, broad-based constituency for antitrust and, second, with the mode of implementation of the policy and the legislation.

On building new constituencies, the point is that while one should, neither in the legislation nor in its implementation, ignore constituencies like small business and labour, nor should one rely on them to consolidate support for antitrust. Even on the most populist interpretation of the act, organised labour and small business are likely to prove fickle allies at best, precisely because of inevitable conflicts, at least between their narrow, short term interests and the broader interests of promoting competition. More reliable allies are, firstly, consumers and, secondly, and possibly more important, that broad inchoate mass of citizens who are comforted and empowered by the presence of institutions in their society tasked with checking the activities of powerful interest groups.

Building new constituencies is an inordinately difficult task. It confronts the classic dilemma that every reformer confronts – those who stand to lose from the reform are well organised and coherent, while those who will benefit from the reform are dispersed and incoherent. This places an enormous burden on the advocacy and public relations functions of the enforcement agency. In the time consuming and resource sapping business of investigating complaints and mergers and in preparing and fighting lawsuits, the advocacy role is often relegated to the backburner. However, the requirement to build a powerful social base for antitrust may dictate that it comes to the fore – not only is it often easier to shame a monopolist in public than it is to get a court to agree to fine him, but it also may act as a more effective deterrent in societies where reputation is important and enforcement difficult. The importance of building more reliable constituencies may also be an argument for combining consumer protection with competition enforcement. It essentially allows the agency to develop a reputation for robust enforcement in the broad arena of fairness to consumers, leaving it free to take an appropriately more nuanced approach in the arena of competition enforcement.

But the reconciliation of the politics and economics of antitrust has also to take place in the law itself and in its implementation. Building a broadly based constituency for antitrust will act as a counterweight to the demands of narrow interest groups but it will not make them go away nor will it eliminate the substantive underlying societal concerns that put these diverse objectives on the antitrust

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3 Section 12A.

4 Section 10.

5 The Tribunal, in the two years of its existence, has only accepted an efficiency defence on one occasion. See: Trident Steel Pty Ltd and Dorbyl Ltd (Case no.: 89/LM/Oct00), where a merger which, in terms of Section 12A of the Act, was found to ‘substantially prevent or lessen competition’ was nevertheless approved because, in the words of the Act, the ‘technological, efficiency or other pro-competitive gains’ resulting from the merger were held to be ‘greater than, and offset, the effects of any prevention or lessening of competition’.

agenda in the first place. There are essentially three alternative mechanisms for resolving the trade offs between competition considerations, on the one hand, and, on the other, public interest or distributional concerns:

The first is to pretend that they don't exist and then, when society presses in on the enforcers and judges, to sneak them into the competition decision. There was an example of this approach at last year's Fordham conference – in the panel discussion on purchasing power one participant argued the pro-competitive merits of protecting mom and pop retailers in Germany from competition from large, efficient supermarkets. On 'pure' competition grounds the argument was thoroughly unpersuasive, of the same order as the arguments for protecting French farmers or US steel makers from international competition. What was apparent though was that this class of small retailers (like French farmers and US steel makers) was thought to play an important role in the cohesion of local communities. I would much rather have heard why the imperative to protect this public interest outweighed the gains derived from protecting competition, than to see the logic of competition law and economics tortured by an attempt to make all antitrust decisions conform to a narrow efficiency standard. Judicial officers decide interest disputes all the time – there is no reason why they should find it impossible to balance the conflict that sometimes arises between the promotion of competition, on the one hand, and the concerns of a particular interest group on the other.

The second, and, arguably most popular, approach to resolving this trade off is to give a public representative, a minister of state, a veto, on public interest grounds, over the decisions of the competition authority. I think that this is extremely undesirable. It often leads to the same results as that outlined above – namely, the competition authority, in order to avoid the indignity of a veto, second guesses the Minister's decision by shrouding a public interest finding in the cloak of a competition analysis. It also diminishes the stature of the competition authority and intensifies lobbying activity. But I object to this approach, above all, because it actually shies away from making the trade-off – it essentially allows the competition authority to blithely ignore the hard world outside there; and it allows the minister to simply weigh up the strength of the lobby while ignoring the competition consequences of his decision. Unifying the decision at least forces the ultimate decision maker to confront the real world consequences of the decision and, I am convinced, makes for better decisions.

This then is the third approach: put the public interest or distributional issues in the act and oblige the competition authority to make the trade off. This is the approach followed in the South African Competition Act. Hence mergers, for example, are first evaluated on standard competition criteria and then this decision has to be weighed up against the impact on the stated public interest criteria – employment, small business and Black economic empowerment. Is this ideal? No it isn't. Is it a price worth paying for the credibility of the authority? Yes, it certainly is.

However, it is imperative that the balancing not be capricious or whimsical. This is satisfied by two broad requirements: first, rules and guidelines for making the trade offs have to be developed. And, second, the independence of the investigative and, particularly, the adjudicative authority has to be beyond question.

Our act provides nothing by way of rules and guidelines for balancing public interest and competition considerations and so these have to be developed in the investigative practice and in the Tribunal's decisions. On employment the Tribunal has started to develop some rules of thumb. For example, we recently prohibited an anti-competitive vertical transaction between the country's monopoly supplier of candle wax and the dominant candle manufacturer, a transaction that we found to be anti-competitive. However, for reasons that I will not go into, the prohibition was likely to lead to fairly significant unskilled employment loss in a depressed area of the country. We were accordingly asked to approve an anti-competitive merger because of the employment loss that would allegedly flow from a

prohibition. However, when we thought about the product in question – candles used for household lighting in a country where a large swathe of the poorest members of the society have no access to electricity - the socio-economic consequences of the anti-competitive transaction were held to dwarf the negative impact on employment and so the transaction was prohibited. On the other hand, were there to be significant employment loss in a merger between the monopoly producer of silk cloth and the largest producer of silk scarves, the employment consequences may weigh more heavily because the interests of the consumers in question are less pressing even though in the economics laboratory an allocative inefficiency is an allocative inefficiency regardless of whether it originates in the market for candles or the market for silk scarves.<sup>6</sup>

Note also that the Act requires a definite sequencing of the analyses – first the impact on competition is analysed; secondly, an anti-competitive transaction is examined for evidence of countervailing efficiency gain; third, the transaction is examined for its impact on specified public interest factors. In short, the balance is always struck through the filter of a competition analysis. The upshot is that the outcome of the competition analysis will tend to lead the decision to prohibit or approve with the impact on public interest influencing the imposition of conditions. In the two years of our existence we have never made a decision to approve or prohibit a transaction on public interest grounds – all our decisions have been made on competition grounds with the exception of one occasion on which an anti-competitive transaction was approved on efficiency grounds.<sup>7</sup>

Institutional design also influences the balancing of public interest. When the competition agencies – prosecutorial and adjudicative – are required to balance competition and public interest it is particularly imperative that the agencies be independent, transparent and accessible. It is also essential that there be a clear separation between the investigative and prosecutorial function, on the one hand, and the adjudicative function on the other. These institutional features are imperative because where public interest issues are considered it is essential that the decision making body, at least, is seen to be beyond the influence of any one interest group. It is not good enough that only the court of final appeal should embody these features – we all know that, in anti-trust matters, particularly in mergers, timing issues effectively limit the disciplining function of distant appeal courts.

This has worked well for us. Our competition authority is made up of three autonomous agencies: the Competition Commission, the prosecutorial division; the Competition Tribunal, the court of first instance to which all mergers and restrictive practices must be referred after investigation by the Commission; the Competition Appeal Court, composed of three High Court judges and which enjoys the status of a High Court and which hears appeals from decisions of the Tribunal. The Tribunal is composed of lay persons – essentially economists and lawyers rather than judges – appointed for a fixed term by the President. While in office the degree of protection and independence accorded to Tribunal members is functionally equivalent to that accorded a high court judge – notably, they may not be dismissed except for serious misconduct. Note that all restrictive practices complaints have to be referred to the Tribunal as do all mergers over a specified threshold. That is the Commission, the investigative authority, has no power to approve or prohibit a large merger or determine a restrictive practice – it is only empowered to recommend a course of action to the Tribunal which then ventilates this recommendation at a full hearing in which the Commission, the merging or respondent parties, and all other interested parties are entitled to participate. Although there naturally are procedures for protecting confidential information, as a general rule all procedures before the Tribunal are open to the public and all its decisions, including naturally the reasons for the decision, have to be published. Although the Tribunal, in its area of jurisdiction, has the powers of a normal court, it is permitted, indeed enjoined, to conduct itself with relative informality hopefully

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6 Schumann Sasol (SA) (Pty) Ltd and Price's Daelite (Pty) Ltd - Case no: 23/LM/May01.

7 See footnote 5 above.

improving its accessibility. Once a matter is referred to the Tribunal, that is after the conclusion of the Commission's investigation, the Tribunal may, in contrast with much of the rest of our judicial system, assume inquisitorial powers that would allow it to call witnesses and order further investigation.

That in short is my view: antitrust has its origins as an instrument to constrain the exercise of political and economic power by big business and by government when it acts in support of those centres of power. This accounts for its enduring political and popular support. To ignore this, is to cut the ground from underneath antitrust. As with all equity/efficiency trade offs, the conflicts must be managed; they cannot be eliminated. They are also usually significantly exaggerated. The two pillars in the management of this trade-off are, first, building a broad based constituency in support of antitrust, something that is best achieved by stressing its historic and continuing role in supporting the powerless against the powerful. Second, ensuring that an independent and accessible antitrust authority with a clear demarcation between the investigative and adjudicative functions develops clear criteria for performing the balancing act that characterises all important legislative and judicial activity in the real world.