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CRISIS CARTELS

Contribution from South Africa

-- Session III --

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CRISIS CARTELS

-- South Africa --

1. The recent economic crisis has not significantly altered the manner in which the South African Competition Authorities analyse cartel cases. Many of the cartels that exist in the South African economy today have a long history often rooted in regulatory policies from a previous era where following deregulation firms in some sectors, particularly food and agro processing, continued to associate with each other outside of a regulatory framework.

2. One of the overall economic aims of the South African Competition Act No 89 of 1998 (“the Act”) is the safeguarding of competition whilst maximising social welfare gains. In order to give effect to this, public interest objectives¹ are considered in merger review and exemption applications. These provisions could be emphasised during times of economic recession.

3. An example of this is section 10 of the Act which allows for the exemption of an agreement or practice or a category of such agreements or practices constituting a prohibited practice in terms of Chapter 2 of the Act² provided that the conduct contributes to one or more of the following objectives:

- the maintenance and promotion of exports,
- promoting small businesses or firms controlled or owned by historically disadvantaged people to become competitive,
- change in productive capacity to stop decline in an industry and,
- the economic stability of any industry designated by the Minister.

4. Therefore it would not be difficult for firms, in times of economic downturn, to justify an exemption from application of the provisions of the Act based on the above grounds. The pertinent provisions in this regard are those relating to change in productive capacity to stop decline in an industry or those dealing with the economic stability of any industry designated by the Minister.

5. In the past the liquid fuels sector, shipping sector and motor vehicles industry³ invoked the provision relating to economic stability but these were not pursued. Currently the Commission is considering exemption applications in the milk industry⁴, in the healthcare sector and on behalf of maize farmers⁵.

¹ Sections 4(1)(a), 10(3), 12A(3).

² Relating to vertical and horizontal agreements and abuses of dominance.

³ South Africa’s Competition Regime: OECD Peer Review, May 2003.

⁴ Clover South Africa.

⁵ Grain SA.

6. The designation of an industry for exemption to ensure economic stability was intended as an avenue for ministerial input for coordination with industrial policy in the national interest. A minister's designation does not confer exemption by itself. The Commission will factor the Minister's designation in its determination together with other statutory standards which need to be met. The Commission must specify exactly what behaviour is exempted. As policies and circumstances regarding these sectors may change over time an exemption must be limited to a specific term⁶ in order to allow the commission to review the state of that sector.

7. Change in productive capacity to stop decline was invoked recently in the case of Grain SA.⁷ This provision is rarely invoked. The case gripped national interest as it involved the country's maize farmers who have claimed that they are under threat of exiting the market as a result of the surplus maize produced over the last two years in South Africa resulting in supply exceeding demand and declining producer prices. In addition the maize farmers also invoked the provisions relating to the promotion of exports and designation of an industry by the Minister in an attempt to deal with the crisis. Their intention is to create an export pool to export the surplus maize to overseas markets thereby limiting supply in the domestic market to prevent prices from falling. The rationale provided for the creation of this export cartel was that the current surplus coupled with the international financial crisis threatened the future of maize farmers in the country, which would ultimately impact on food security in the long term as maize is a staple food. The matter is currently still under consideration.

8. The provisions of the Act, as described above, are sufficiently clear for the Commission to make a fair and objective assessment of the issues - provided that the parties concerned apply for an exemption. There has not been an increase of exemption applications during the recent economic crisis. Although firms may no doubt make use of section 10 during these times.

9. The process of granting these exemptions⁸ requires an in depth investigation into the issues, the issuing of a public notice in the Government Gazette and the consideration of submissions by any interested parties. Granting an exemption is not done arbitrarily and the Commission has to grant the exemption if the conditions are met and must refuse if they are not.⁹ The Commission will take into account whether there is a history of collusion in an industry and seeks guidance from international experiences¹⁰ in granting exemptions.

10. The Commission has also encountered cases where firms in an industry are required to associate with each other as a consequence of government regulation. An example of this is section 17 of the Marketing of Agricultural Products Act 47 of 1996 ("the MAP") which empowers the Minister of Agriculture to authorise the creation of an export cartel for the purposes of efficiently marketing agricultural products. In cases like these the Commission adopts an advocacy role.

11. In conclusion, South Africa's Competition Act enables the Commission to take into consideration the change in capacity and decline as well as the economic stability of an industry when considering exemption applications. However exemptions that have been granted on these criteria are few and far between. Indeed of a total of 43 exemption applications received by the Commission since its inception, only three have invoked the abovementioned provisions thusfar and only one of these¹¹ exemption applications were brought during the recent recession.

⁶ Section 10(4A).

⁷ Case no 2010Jul5262.

⁸ Section 10(6).

⁹ Section 10(2)(b).

¹⁰ Section 1(3): "Any person interpreting or applying this Act may consider appropriate foreign and international law".

¹¹ Grain SA.