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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Roundtable on the Extraterritorial Reach of Competition Remedies - Note by South Africa****4-5 December 2017**

This document reproduces a written contribution from South Africa submitted for Item 5 at the 126th Meeting of the Working Party No 3 on Co-operation and Enforcement on 4-5 December 2017.

More documentation related to this discussion can be found at

[www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm](http://www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm)

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## South Africa

### 1. INTRODUCTION

1. The Organisation for Economic Co-operation and Development (“OECD”) has invited the Competition Commission of South Africa to contribute to its Roundtable on “*The Extraterritorial Reach of Domestic Antitrust Law*” that will be held on Tuesday 5 December 2017.

2. In South Africa, the extra-territorial application of competition law is enshrined in the Competition Act 89 of 1998, as amended (the Competition Act). The extra-territorial application of the competition law has also been confirmed by the South African courts. These submissions will focus on the provisions that enshrine extra-territorial application of competition law in South Africa, how they have been interpreted by the courts and some examples of the cases which have been brought by the Competition Commission using the principle of extra-territorial application of the Competition Act. The submissions will also discuss remedies and how they may be implemented in South Africa in the context of extra-territorial application of the Competition Act.

### 2. Extra – Territorial Application of the Competition Act

3. Section 3(1) of the Competition Act states that

*“This Act applies to all economic activity within, or having an effect within, the Republic...”*

4. Section 3(1) of the Competition Act embodies the concept of “*effect within*” South Africa, regardless of the country of origin of the conduct, as a touchstone for the application of the Competition Act. This doctrine is based on the principle that the criterion for applying competition law to a particular situation is not the geographic origin of the anticompetitive action, but the location of its anticompetitive effects.<sup>1</sup>

5. In terms of section 3(1) of the Competition Act, the competition law of South Africa applies firstly to conduct that occurs within the country; and secondly, conduct that occurs outside the country but has an effect within South Africa, regardless of whether the entities responsible for local effects are even located in South Africa.<sup>2</sup>

### 3. The Courts and Extra-Territorial Application of the Competition Act

6. The courts have pronounced on the issue of the extra-territorial application of the Competition Act in the ANSAC cases.<sup>3</sup> The Competition Tribunal, the Competition

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<sup>1</sup> L Zahn *The Extra Territorial Application of South African Competition Law: Lessons from the European Union and the United States*, 1999 at page 17.

<sup>2</sup> L Kelly et al *The Principles of Competition Law in South Africa*, Oxford University Press, 2017 at page 43.

<sup>3</sup> In the Competition Tribunal it is reported as *American Natural Soda Ash Corporation and Another vs Competition Commission of South Africa* Case Number 49/CR/00; the Competition

Appeal Court and the Supreme Court have all pronounced on section 3(1) of the Competition Act in the ANSAC cases.

7. On 14 April 2000, the Competition Commission referred a complaint to the Competition Tribunal against the American Natural Soda Ash Corporation (ANSAC). ANSAC is an association of American soda ash producers that markets natural soda ash outside the United States of America. ANSAC was incorporated in terms of the United States Export Trade Act 1918, which is commonly referred to as the Webb-Pomerene Act. This 1918 Act is meant to exclude the application of Sherman Antitrust Act to US associations engaged solely in export trade and whose conduct do not affect or restrain trade within the US. Thus the 1918 Act enables US firms to engage in cartel conduct in respect of markets outside of the US. Initially ANSAC engaged a South African company called CHC Global as its agent and then later as an independent contractor.

8. The conduct for which ANSAC was alleged to have engaged in occurred outside South Africa. The Competition Commission alleged that ANSAC engaged in cartel behaviour in the form of price fixing and market allocation in contravention of section 4(1)(b)(i) and (ii). The Competition Tribunal held that section 3(1) of the Competition Act introduces the application of the Competition Act to conduct that may not have occurred in South Africa but has an effect on economic activity in South Africa and section 3(1) does not require the competition authorities to demonstrate that the conduct that is complained of has “adverse” effect in order to assert jurisdiction.<sup>4</sup> This position was endorsed by the Competition Appeal Court<sup>5</sup> and the Supreme Court of Appeal.<sup>6</sup>

9. The Competition Tribunal also discussed the application of the principle of comity.<sup>7</sup> In terms of that principle, courts may show deference to the legislative acts of a foreign government. Thus the courts may refuse to assume jurisdiction if it will undermine the acts of another country though this has not been applied in competition law in South Africa. The principle of comity or any other international limitation are not specifically referred to in the Competition Act.<sup>8</sup> This aspect was not applicable in the ANSAC cases as the application of the US Sherman Antitrust Act was ousted by the United States Export Trade Act 1918.<sup>9</sup>

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Appeal Court as *American Natural Soda Ash and Another vs Botswana Ash (Pty) Ltd and Others* Case Number 64/CAC/Aug06; and the Supreme Court of Appeal as *American Natural Soda Ash Corporation and Another vs Competition Commission of South Africa* [2005] 3 AllSA 1 (SCA)(13 May 2005).

<sup>4</sup> *Competition Commission vs American Natural Soda Ash Corporation and Another* – CT Case Number 49/CR/00 (30 November 2001) at page 29.

<sup>5</sup> *American Natural Soda Ash and Another vs Botswana Ash (Pty) Ltd and Others* - Case Number: 64/CAC/Aug06.

<sup>6</sup> *American Natural Soda Ash Corporation and Another vs Competition Commission of South Africa* [2005] 3 AllSA 1 (SCA)(13 May 2005) at paragraph 29.

<sup>7</sup> *Competition Commission vs American Natural Soda Ash Corporation and Another* – CT Case Number 49/CR/00 (30 November 2001) at page 12.

<sup>8</sup> L Zahn Ibid at p11.

<sup>9</sup> See L Kelly et al Supra at p

#### 4. Examples of Extra-Territorial Application in South Africa

10. South Africa has had a number of cartel cases which were concluded in foreign jurisdictions but had an impact in South Africa. For instance, the foreign exchange cartel<sup>10</sup> some of the respondents do not have a presence in South Africa, but they colluded with firms in South Africa to fix the exchange rate of the Rand. In the automotive sector<sup>11</sup>, some of the respondents do not have a presence in South Africa but their conduct had a direct impact in the markets in South Africa. These cases are still to be adjudicated upon by the Competition Tribunal.

#### 5. Mergers and Extra-Territorial Application in South Africa

11. Mergers in South Africa are notifiable if they involve a change in control, meet the threshold and have an effect in South Africa. Insofar as the notification of mergers is concerned, the thresholds are calculated in relation to combined turnover or assets in relation to South Africa only and it appears that notification is only necessary if a company's South African assets or South African-derived turnover meet the thresholds.<sup>12</sup> Accordingly, the Act is applicable to foreign-to-foreign mergers to the extent that the parties have assets in South Africa or turnover generated in, into or from South Africa.<sup>13</sup>

12. It is possible that firms that do not have a presence in South Africa but sell goods into South Africa may have to notify their mergers to be evaluated by the Competition Commission of South Africa based on their turnovers derived from the Republic. However, most of the international mergers that the Competition Commission has considered are for international firms that acquire local companies<sup>14</sup>, or have a presence in South Africa through distribution, or subsidiaries.<sup>15</sup>

#### 6. How do South African Competition Authorities deal with risks of double jeopardy when parallel remedies are imposed by different jurisdictions for the same conduct?

13. In South Africa, firms found to have contravened the Competition Act may be fined an administrative penalty in terms of section 59(1) of the Act. As enunciated in section 59(2) of the Competition Act, an administrative penalty imposed in terms of subsection (1) may not exceed 10% of the firm's annual turnover in the Republic during

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<sup>10</sup> Competition Commission vs Bank of America Meryll Lynch International Limited and Others - CT Case Number: CR212Feb17.

<sup>11</sup> See for instance Competition Commission vs Mitsui O.S.K LTD and Others – CT Case Number: CR227Mar17.

<sup>12</sup> Section 11 of the Competition Act.

<sup>13</sup> R Legh and T Dini Merger Control, September 2017 accessed at <https://gettingthedealthrough.com/area/20/jurisdiction/2/merger-control-south-africa/>

<sup>14</sup> Cf Walmart/Massmart merger: Competition Tribunal Case Number: 73/LM/Dec10.

<sup>15</sup> Cf Bayer Aktiengesellschaft/Monsanto Corporation - CT Case Number: 44/AM/Jun02, and Nestle/Pfizer - CT Case Number: 65/LM/Jun12 (015248).

the firm's preceding financial year. The Competition Act is silent about how to deal with the firm(s) that contravenes the Competition Act for the same conduct that they have already been penalised by a different jurisdiction. However, where the firms have been penalised by a foreign or different jurisdiction for the same conduct that the firms are found to have contravened the Competition Act, there is nothing that inhibit the South African Competition Authorities to impose an administrative penalty against those firms.

14. These parallel remedies would not amount to double jeopardy within the context of the South African competition law parlance. This is due to the fact that the only double jeopardy recognised by the South African competition law is avoided by virtue of section 67(2) of the Competition Act. In terms of this section, a complaint may not be referred to the Competition Tribunal against any firm that has been a respondent in completed proceedings before the Tribunal under the same or another section of this Act relating substantially to the same conduct. This does not apply to the completed proceedings relating to the same conduct by a different or foreign jurisdiction as such conduct was not referred to the Competition Tribunal against the firm that were the respondents in a completed proceedings before the Competition Tribunal.

15. As already alluded above, the South African Competition Commission referred a complaint against a number of banks for engaging in a cartel activities and sought relief from the Competition Tribunal to impose administrative penalty not exceeding 10% of each respondents' annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year. Certain of these banks had already been penalised by U.S and EU.

16. Citi Bank N.A concluded settlement agreement with the Commission wherein it has agreed to pay an administrative penalty in the amount of R69 500 860.00 (Sixty Nine Million Five Hundred Thousand Eight Hundred and Sixty Rand).<sup>16</sup> This penalty does not exceed 10% of Citi Bank N.A's annual turnover in the Republic of South Africa for its financial year 2015. The settlement agreement was entered in full and final settlement of all conduct engaged by Citi Bank N.A and all its subsidiaries and affiliates.

## 7. Conclusion

17. The Competition Act indeed applies to conduct that occurs outside of but has an effect in South Africa. The courts in South Africa have affirmed this position. The Competition Commission is currently prosecuting many cartels, in forex and automotive sectors, where the conduct was committed outside of South Africa and the effect was felt in the Republic. The jurisprudence on extra-territorial application of the South African Competition Act will be developed when the Competition Tribunal and the courts hand down decisions in those cases. The principle of double jeopardy will also come into focus in those cases as some of the firms being prosecuted have been fined in foreign jurisdictions for the same conduct.

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<sup>16</sup> Competition Commission vs Citi Bank N.A – CT Case Number: SA220Feb17.