Enforcing Competition Law in a Developing Economy: Developments in South Africa

TEMBINKOSI BONAKELE
Commissioner, Competition Commission South Africa

05 July 2014
the island of Corfu, Greece
Purpose of Competition Law in SA

• Provide consumer choice – products and prices
• Efficiency, growth and dynamism of the economy
• Ensure spread of ownership of the economy
• Promote employment and advance social welfare
• Expand opportunities for SA participation in global markets and recognise the role of foreign competition in the Republic
• Ensure that SMMEs have equitable opportunity to participate in the economy
Merger Regulation

• Regulated by competition authorities, pre-merger notification system.

• In addition to SLC analysis, mergers may be justified, or condemned on specific public interest grounds:
  - Effect on particular sector or region
  - Employment
  - Competitiveness of SMME
  - Ability of local firms to compete globally

• Minister may make representations, on the public record, to the authorities regarding public interest issues emanating from a merger.

• Competition authorities, subject to judicial oversight, have final decision on mergers, including public interest issues.
Public Interest and Competition Law

• Public interest is a worldwide phenomenon of competition regulation
• However, a very few countries have explicit provisions on it
• General lack of transparency on how it gets considered
• Some countries: public interest considered by government, esp. in international transactions or sensitive sectors
• SA has a clear process allowing for government participation but decision making by competition authorities
• The two school of thoughts:
  - Public interest does not seat well with competition law
  - Competition law regulation should inherently be in the public interest
Application of Public Interest Provisions

- No extensive jurisprudence on assessing public interest
- One merger ever approved on public interest grounds
- No merger ever prohibited on public interest grounds
- Provisions have been used to manage retrenchments following a merger by:
  - Limiting retrenchments of blue collar workers for a period of time after the merger
  - Providing for retraining in the event of unavoidable retrenchments
- Government hardly ever intervened
CASE 1: Entry of Wal-Mart into SA – The unique set of facts

- Worlds largest corporation, revenue larger than SA GDP
- About three times bigger than the closest retail rival
- History of a bad relationship with trade unions
- Controversy over its effect on local communities
- Entry preceded by retrenchments at the target firm
- Poor engagement with stakeholders upon entry
The Market

- Merger marked Wal-Mart’s first entry into Africa
- Formal market – four supermarkets groups with 65% of market
- Most with global expansion ambitions, especially into Africa
- Most local icons, but target more than 75% shares held by international investors
- Target smallest of the four but growing fast especially in food retail
- Business model most similar to Wal-Mart and one of the most profitable.
Government Response

• Government concerned that Wal-Mart will use its global reach to source products globally, displacing local manufacturers and jobs

• Set up a panel to assess the impact

• Tried to negotiate a ‘Social Accord’ with Wal-Mart covering local procurement and labour issues

• Wal-Mart objected to being subjected to local procurement requirements on discriminatory basis

• When negotiations failed, government belatedly intervened in the proceedings before the Competition Tribunal, joining trade unions
Wal-Mart Response

• Argued that its entry will bring prices down
• Denied that it had a global sourcing strategy – argued that its strength lied in leveraging on its logistics efficiencies
• Argued that conditions on local supplies will offend WTO commitments and stifle competition
• Offered to create a local supplier development fund of about $10 million
The Tribunal Ruling

• Competition Tribunal accepted that imports were likely to increase, but whatever losses will would be outweighed by consumer benefits of lower prices

• Accepted and confirmed merging party's offer to create a supplier development fund - will alleviate whatever concerns might be there.

• Government and trade unions appealed/reviewed the decision on procedural grounds – wanted more documents discovered and time to cross examine witnesses.
Case 11: Abuse of Dominance

• The SA competition Act list types of exclusionary and exploitative abuse
• Although excessive pricing is defined, the test is not.
• Case involved SASOL
• Former state owned enterprise created by the apartheid government to beneficiate coal to liquid fuels during sanctions against SA
• Grown and protected through direct state capitalisation, direct taxation for infrastructure, off-take agreements and subsidies.
• Was a leader in SAs industrial complex at the time of its privatisation, dominant in various downstream industries.
Competition Tribunal Decision

– On 05 June 2014, the Competition Tribunal fined Sasol R534million for excessively pricing purified propylene and polypropylene to domestic customers.

• Purified propylene is used as a key input in the production of polypropylene.

• Polypropylene is a polymer which is a key input for converters who manufacture household products like lunch boxes, plastic chairs, plastic cups, and industrial plastic products like motor car parts and water tanks.

• The Commission received a complaint from the Department of Trade and Industry in August 2007

• The Commission investigated the case and decided to prosecute Sasol for excessive pricing
Key Findings

Relying on price costs tests conducted by the Competition Commission and Sasol:

• The Tribunal concluded that Sasol’s mark ups of purified propylene prices over actual costs for the period 2004-2007 were on average 31.5 – 33 %.

• The Tribunal found that on a conservative basis, Sasol’s mark up of its polypropylene prices over actual costs in the period 2004 - 2007 was 17.6 - 25.4%.
  – On a more realistic basis the Tribunal concluded that the markups were in the range of 26.9 - 36.5%.
  – the Tribunal found Sasol’s markup margins to be on average 23% higher than average deep sea exports.
  – The Tribunal found that Sasol’s markups were 41% and 47% higher compared to the discounted prices in Western Europe computed on the basis of feedstock costs comparable to Sasol.

• Therefore, Sasol’s pricing does not bear any reasonable relation to costs particularly in the context of the South African economy given:
  – The importance of the intermediate inputs in industrial development
  – Market characteristics and circumstances, and the history of Sasol
  – How it acquired its dominant position in the market. In considering the history of State support that Sasol has enjoyed.
Competition Tribunal decision

• Remedies
  – The Commission asked for 10% of Sasol’s turnover (R1.094 billion for propylene and for polypropylene R1.754 billion)
    • The Tribunal imposed a reduced administrative penalty of R534million, together with the imposition of “forward looking” behavioural remedy in relation to propylene and polypropylene.
    • Propylene
      – Sasol must not discriminate between the purified propylene charged internally within Sasol and the price charged to customers
      – Sasol and the Commission must within 90 days submit a proposed pricing remedy to the Tribunal
    • Polypropylene
      – Sasol must sell polypropylene on an ex-works basis without discriminating in price between any of its customers no matter where they are located.

• Sasol’s appeal application
  – On Friday 27 June 2014, Sasol made an application to the Competition Appeal Court.
  – Main argument on appeal is effectively that SASOL, a low cost producer, should be allowed to keep a large portion of the benefit.
Conclusion

- The Walmart case grapples with the social and economic implications of the entry of a multinational, and the role of competition law in such circumstances.
- The Sasol case suggests that competition law must be interpreted in the context of a particular economy.
- Should these matters be kept completely out of competition authorities, if so, what is the value of competition in a developing country context.