



CRESSE 2014



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on “Advances in the Analysis of Competition Policy and Regulation”

“Competition Policy Developments and Challenges in the BRICS countries”

“Enforcing competition law in a developing Economy: Developments in South Africa”

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04 July 2014

the island of **Corfu, Greece**



Purpose of Competition Law in SA

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- Provide consumer choice – products and prices
- 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

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- Regulated by competition authorities, pre-merger notification system.
- In addition to the traditional merger 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, in a public hearing, 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

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- 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 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

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- 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



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- World's 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
- AND
- Government growth path sets employment targets



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

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- 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 process
- Accepted and confirmed merging party's offer to create a supplier development fund - will alleviate what ever 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.



Competition Appeal Court Ruling

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- The Competition Appeal Court accepted that the consumer benefits of the merger (lower prices) outweighed any concerns
- Complained of lack of evidence regarding impact of merger on SMMEs
- Set aside the conditions that were offered by the merging parties, ordered that a panel of three experts each appointed by the Government, Trade Unions and Wal-Mart must study and produce a report for the court on the impact of increase in imports on SMMEs in order to decide what conditions to impose

CASE 2: Update on SASOL Abuse of Dominance



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Competition Tribunal decision (Polymers 1)



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• Competition Tribunal decision and background to the case

- On 05 June 2014, the Competition Tribunal fined Sasol Chemical Industries Limited (“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 and plastic cups, and industrial plastic products like motor car parts and water tanks.
 - The Competition Commission received a request from the Department of Trade and Industries in August 2007 to investigate the pricing practices in the chemicals sector, particularly the polymers sector.
 - The Competition Commission then initiated a complaint against Sasol and at the conclusion of its investigation referred the case of excessive pricing (section 8(a)) against Sasol for propylene, and polypropylene in the period 2004-2007.
 - The Commission also referred a case for collusion (section 4(1)(b) in relation to polypropylene against Sasol and Safripol. Both Sasol and Safripol settled with the Commission.
 - In 2010, Safripol paid an administrative penalty of R16 474 573 representing 1.5% of its turnover derived from sales of polypropylene.
 - In 2011, Sasol paid an administrative penalty of R111 690 000, which represents 3% of Sasol Polymer’s turnover derived from sales of poly-propylene products.



Competition Tribunal decision

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• Key Competition Tribunal 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
 - An administrative penalty of R205.2 million which should be paid to the Commission in 90 days.
 - Sasol must not discriminate between the purified propylene charged internally within Sasol and the price charged to customers like Safripol.
 - Sasol and the Commission must within 90 days submit a proposed pricing remedy to the Tribunal
 - Polypropylene
 - An administrative penalty of R328.8 million which should be paid to the Commission in 90 days.
 - 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.
 - Relying on technical legal arguments.



Competition Commission vs Sasol

(On-going investigation , Polymers 2)

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- **Commission's ongoing investigation**

- A second case was initiated by the Commission, on 05 July 2012, following a complaint from Safripol against Sasol
 - This complaint relates to allegations of excessive pricing and exclusionary conduct in relation to propylene and ethylene
 - Safripol's products are used by plastic converters to manufacture industrial and consumer plastic components.
 - Safripol is a manufacturer of polypropylene and high-density polyethylene. It manufactures its products from propylene and ethylene supplied by SCI.

- **Final remarks**

- Sasol was established to benefit coal in order to balance trade pressures and to enhance fuel security in the context of the apartheid state constantly threatened by sanctions.
 - Sasol was supported, owned, and controlled by the state from its establishment to its privatization.
 - Through legislation and regulation, the State ensured that Sasol was sustainable, profitable, and would not fail.
- Sasol's significant rent seeking behaviour (largely through import parity) has undermined the competitiveness of the polymers value chain.
 - Domestic prices remain high to the detriment of downstream industries.
 - Perhaps what is needed are measures to address and discourage anticompetitive conduct, such as import-parity pricing of polymers to downstream industries.