Competition News
The official newsletter of the competitioncommission
Edition 4 • June 2001
Towards a fair and efficient economy for all.

IN THIS EDITION

The impact of globalisation and new technology on competition – the role of a competition authority in a developing economy

Second Annual Conference

hosted by the Competition Commission and Competition Tribunal

Below, from left to right: Paul Dymock, Administrator, Directorate for Food, Agriculture and Fisheries, OECD; Merit E. Janow, Professor in the Practice of International Trade, Columbia University; Allan Asher, Global Campaigns Director, Consumers International; Merle Holden, Professor of Economics, Natal University; (standing) Nozipho Mxakato-Diseko, Chairperson: Board on Tariffs and Trade.

FULL ARTICLE ON PAGE 2

FROM PAGE 1

The Competition Commission and Competition Tribunal jointly hosted its second annual conference on competition in developing countries on 29 and 30 March 2001 in Johannesburg. The conference focused on the impact of technology and globalisation on competition and brought together 200 delegates from the private and public sectors.

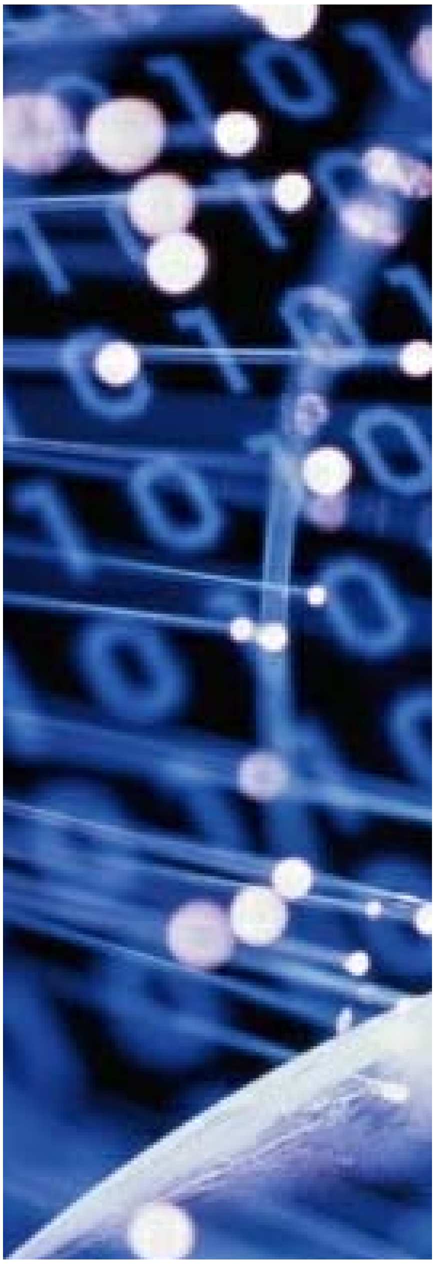
The Minister of Trade and Industry, Mr Alec Erwin, presented the opening address on third world access to international markets and emphasised the important role played by the competition authorities in the South African economy and investment process. Mr Erwin said that South Africa had an important role to play in negotiating with developed countries for trading, investment and other commercial rules that will not harm developing countries.

Mr Tito Mboweni, Governor of the Reserve Bank, addressed 100 delegates on the importance of competition and concurrent jurisdiction. He stated that the Reserve Bank and the competition authorities have more in common than just a regulatory function. Both are concerned with promoting growth and enhancing economic opportunity - the Reserve Bank as a guardian of macro-economic stability, and the competition authorities as regulators of micro-behaviour through investigating and adjudicating business practices, as well as ensuring that the structure of the economy promotes competition and facilitates access.

The conference had an international flavour, with plenary addresses by speakers such as Frédéric Jenny from the French competition authority and the World Trade Organisation (WTO); Pradeep Mehta, Secretary General of Consumer Unity and Trust Society in India; Robin Mann from the United States Department of Justice; Richard Whish, of King's College, London; and Dan Rubinfeld, consultant to the United States Department of Justice on the Microsoft case.

The first plenary address by Frédéric Jenny on "Competition Policy: A Multi-lateral Approach" provided an overview of progress made in multi-lateral discussions on the development of an international approach to enforcing competition policy. Pradeep Mehta further discussed this theme from a developing economy perspective.

The first panel reviewed the key instruments of trade policy (namely, domestic subsidies, anti-dumping, regional trade blocs and measures to promote market access), their compatibility with competition policy and the implications of their use on a global scale. Panelists included Paul Dymock from the OECD; Nozipho Mxakato-Diseko from the Board on Tariffs and Trade; Merit Janow from Columbia University; Allan Asher from Consumers International; and Hapenga Kabeta from the Zambian Competition Authority.



The second panel examined the regulation of international business practices. The panel discussed the desirability and possibility of regulating cross-border mergers from the perspectives of the regulator, business and the consumer. Panelists included Merit Janow, Michael Katz and Allan Asher.

The second day's proceedings focused on the impact of the new economy on old competition policy and questioned whether this policy should not be reviewed and adapted for the new economy/ technological developments.

Professor Richard Whish from King's College, London, is of the view that the new economy does not require new laws or policies. It is "...about intelligently applying the rules that we have to the new phenomena as and when they occur". He is of the opinion that there is nothing in the new economy that cannot be covered by the existing principles. Andrew Smith from Arthur Anderson, South Africa, did not share this view. In his opinion, economic theory may not make sense or be up to date with new concepts like increasing returns and co-operation in a networked space for the network to hold together. He argues for vigorous and timeously implemented competition policy that takes the pro-competitive nature of some historically anti-competitive practices into account. A lot of fundamental thinking needs to be done.

Dan Rubinfeld gave an in-depth presentation on the well-known Microsoft case and a panel discussion followed, debating whether regulating competition in the new economy stifles innovation. Panelists included Lawrence Reyburn, Yasmin Carrim, Myron Zlotnick, Andrew Smith and Allan Hirsch. Topics discussed included intellectual property, e-commerce, fast moving technologies and industry promotion versus regulation.

Planning has already started for the next conference, which will be scheduled for March 2002.

Transcripts of speeches and papers can be found at: www.compcom.co.za/WhatsNew/conferences.asp

Competition News

Regulatory authorities, concurrent jurisdiction and agreements:

A new dimension to competition policy

Section 3(1)(d) of the Competition Act, No. 89 of 1998 (hereafter referred to as the "Act") exempted from Competition Commission jurisdiction *"acts subjected to or authorized by public regulation"*.

This subsection was the subject of prolonged litigation. In *Standard Bank Corporation Ltd vs Competition Commission and Others* 2000(2) SA 797 (SCA) the Supreme Court of Appeal held that the bank regulator, and not the Competition Commission, has jurisdiction in respect of bank mergers.

The Competition Second Amendment Act, No. 39 of 2000, which took effect on the 1st of February 2001, deleted this subsection. Section 82 introduced a new policy with regards to competition and public regulators. The new policy gives the Competition Commission and regulatory authorities concurrent jurisdiction on competition issues.

It is important to note that the question as to concurrent jurisdiction only becomes relevant if the following factors are present:

1. There is a public regulator as defined, and
2. The public regulator has specific jurisdiction in respect of conduct regulated in terms of Chapter 2 (prohibited practices) and Chapter 3 (mergers & acquisitions).

In practice, the Competition Commission will follow the procedure adopted by the Supreme Court of Appeal in the unreported decision no 176/2000 of SA Raisins (Pty) Ltd and Another vs SAD Holdings and Another, delivered by Melunsky AJA in the latter half of 2000. The first step is to investigate whether or not such a public regulator has the authority to regulate competition law issues (in terms of Chapters 2 and 3) in its particular industry. If the answer is yes, then the second step will be to determine whether or not that public regulator did in fact regulate those competition issues. If the second answer is yes as well, the Competition Commission will accept that it shares concurrent jurisdiction with that public regulator.

The amendments with regard to regulatory authorities and concurrent jurisdiction clearly demonstrates Parliament's requirement that regulatory authorities work in conjunction with the Commission, such that competition philosophy, policy and law is factored into that authority's decision-making process. Also, the message is clear that in the newly liberalised South African marketplace, competition law and policy are of paramount importance. Regulatory authorities should conduct themselves in a manner consistent with this mandate.

The Competition Commission has started liaising with a number of regulatory authorities with the aim of concluding agreements with them, and has further identified others with whom contact will shortly be made. The amendments open up exciting avenues for the execution of competition policy, particularly where attempts to introduce competition into industries or sectors were frustrated by the regulatory authorities that gave priority to concerns other than competition.

The Commission is currently negotiating agreements with several regulatory authorities and will approach others in due course.

RELEVANT SECTIONS OF THE ACT

Section 82 – "Relationships with other agencies"

(1) A *regulatory authority* which, in terms of any *public regulation*, has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 within a particular sector -
  (a) must negotiate agreements with the Competition Commission, as anticipated in section 21(1)(h); and
  (b) in respect of a particular matter within its jurisdiction, may exercise its jurisdiction by way of such an agreement.

(2) Subsection (1)(a) and (b), read with the changes required by the context, applies to the Competition Commission.

(3) In addition to the matters contemplated in section 21(1)(h), an agreement in terms of subsection (1) must -
  (a) identify and establish procedures for the management of areas of concurrent jurisdiction;
  (b) promote co-operation between the *regulatory authority* and the Competition Commission;
  (c) provide for the exchange of information and the protection of *confidential information*; and
  (d) be published in the Gazette.

Subsections (1), (2) and (3) were added by section 20 of The Competition Second Amendment Act, 2000

CONTINUED ON PAGE 4

FROM PAGE 3

THIS MUST BE READ WITH

Section 21(1)(h) – "Functions of Competition Commission"

(1) The Competition Commission is responsible to -

(h) negotiate *agreements* with any *regulatory authority* to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of *this Act*;"

SECTION 3(1A) IS ALSO IMPORTANT:

Section 3(1A) – "Application of Act"

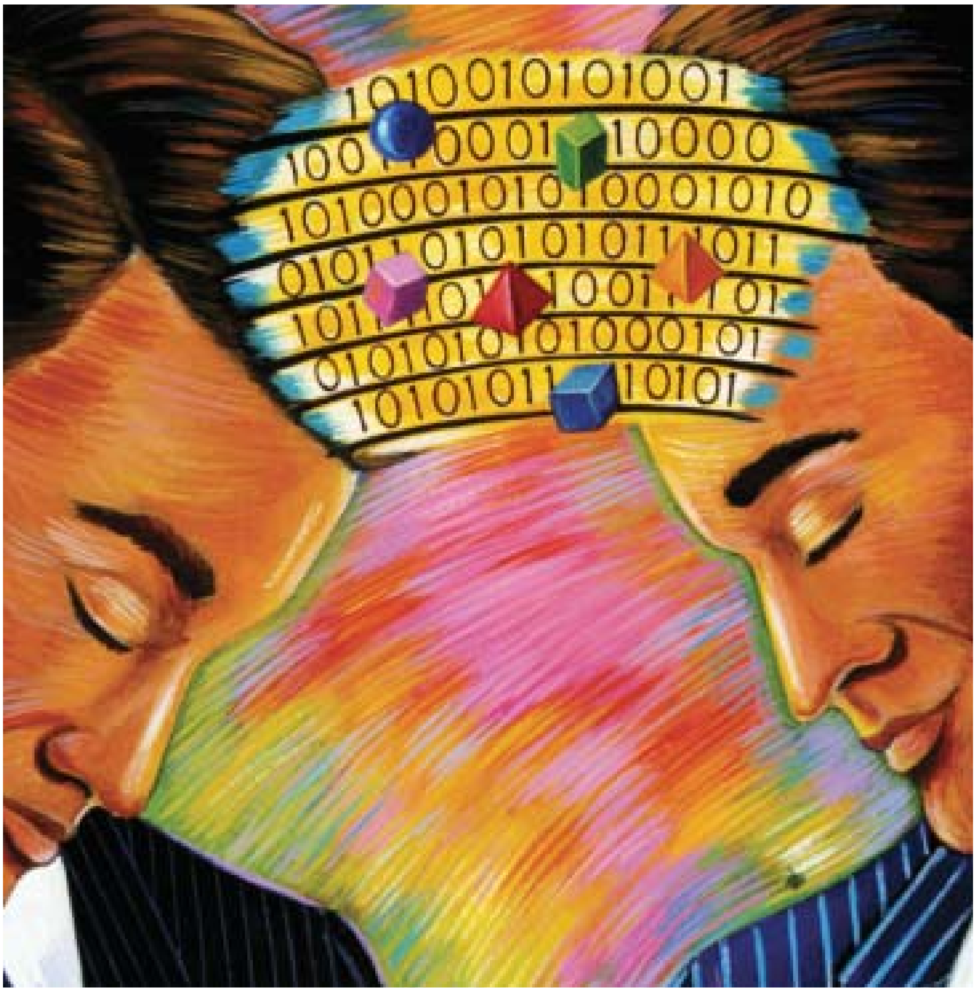
"(a) In so far as *this Act* applies to an industry, or sector of an industry, that is subject to the jurisdiction of another *regulatory authority*, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of *this Act, this Act* must be construed as establishing concurrent jurisdiction in respect of that conduct.

(b) The manner in which the concurrent jurisdiction is exercised in terms of *this Act* and any other *public regulation*, must be managed, to the extent possible, in accordance with any applicable *agreement* concluded in terms of sections 21(1)(h) and 82(1) and (2)."

Subsection (1A) was added by section 2 (b) of The Competition Second Amendment Act, 2000

Intellectual property

and competition law



Intellectual property refers to products of the mind. In earlier times, intellectual property was referred to as "immaterial property", i.e. intangible products of creativity. Intellectual property, although intangible, is not very different from any other physical property or financial asset that a person or company may own.

Intellectual property laws grant the holder or owner of the intellectual property the exclusive or monopoly right to exploit the property. The words exclusive or monopoly may create the impression that such a right could be anticompetitive and should therefore be scrutinised by competition authorities. It would thus, at first glance, seem as if intellectual property laws and competition laws are in direct conflict with each other. However, this may not necessarily be the case.

Intellectual property laws and competition law have much in common. Both laws have as their main aim the advancement of society and consumer choice, albeit through different channels. Intellectual property rights are granted to afford the owners the opportunity to recoup their innovation costs, and therefore have the pro-competitive benefit of keeping the market for innovation profitable and alive. Most competition authorities respect intellectual property rights and acknowledge the important role these rights play in technological and economic progress. Hence, competition authorities will usually approach cases where there is an interface between intellectual property rights and competition law with a distinct competitive bias in favour of the owner of the intellectual property right. This does not mean that the anticompetitive effect of the exercise of an intellectual property right may not be found to outweigh the pro-competitive gains from granting intellectual property rights. In such instances the competition authority should intervene.

However, it may be difficult to distinguish between situations where competition authorities should intervene and situations where intervention will, in the long-run, harm consumers and society.

Interfaces between intellectual property and competition law, to a large extent, take place within the scope of licensing agreements, where the owner of the intellectual property licenses the right to use the intellectual property to licensees under certain conditions. These conditions may include output restraints and market sharing, which would again at first glance raise the concern of competition authorities.

Licensing is, however, widely regarded as very pro-competitive. Intellectual property or technology is disseminated and further developments and innovation can then take place. Also, the owner of the intellectual property has exclusive rights to the use of the intellectual property and licensing allows for more players to use the property. In many instances, intellectual property owners do not have the financial backing to widely implement their technologies. Licensing allows for the extended application of intellectual property.

Competition analysis with regard to intellectual property

The Competition Commission has researched other jurisdictions' approaches to the interface between competition policy and intellectual property rights in order to establish a framework for consistent competition analysis in the case of such an interface. Two of the jurisdictions evaluated, the United States of America and Canada, have comprehensive guidelines on how to assess cases with the said interface and the gist of these guidelines is as follows:

The United States of America

The US Department of Justice: Antitrust Division and Federal Trade Commission (the US agencies) jointly issued guidelines with respect to the licensing of intellectual property. The guidelines are based on the following three principles:

1. Intellectual property is essentially comparable to any other form of property.
2. Intellectual property does not presumably create market power.
3. Intellectual property licensing is generally pro-competitive.

The US guidelines state that standard antitrust analysis applies to intellectual property. Intellectual property is no more or less subject to scrutiny from antitrust agencies than any other property. Standard antitrust analysis would first establish the nature of the concern, and secondly define the relevant market. In some instances, the competitive effects of licensing arrangements can be adequately assessed in the relevant market for the goods affected by the arrangement. Other instances may require the analysis of technology or innovation markets. Technology markets are the markets for the "licensed technology" or its substitutes and innovation markets consist of research and development directed to particular new or improved goods or processes and its substitutes.

The Canadian Competition Bureau

The Canadian Competition Bureau released their Intellectual Property Enforcement Guidelines in 2000. The guidelines stress that intellectual property and competition laws are both necessary for the efficient operation of the marketplace, as both wish to promote a competitive marketplace.

Under the general provisions of the Canadian Competition Act, the mere exercise of an intellectual property right is no cause for concern under the act, as the unilateral exercise of the intellectual property right to exclude does not violate the provisions of the Canadian Competition Act - no matter to what degree competition is affected. The Bureau does, however, apply the general provisions when intellectual property forms the basis of arrangements between otherwise independent entities, to use or enforce intellectual property rights when the alleged competitive harm stems from such an arrangement and not from the exercise of the intellectual property right.

Generally, though, the Bureau would follow the following five steps of analysis to determine whether competitive harm would result from a particular transaction or type of business conduct:

1. Identify the transaction or conduct.
2. Define the relevant market.
3. Establish whether the firm involved has market power.
4. Determine if the transaction would lessen competition in the relevant market.
5. Consider efficiency rationales.

The Bureau's approach is that the mere exercise of an intellectual property right is not an anticompetitive act, but it acknowledge that there is a possibility that under very rare circumstances (as set out in section 32) the mere exercise of an intellectual property right may raise competition concerns. Section 32 requires that certain circumstances be met and that, amongst others, the competitive harm should follow directly from the refusal to license. Should the requirements be met, the Federal Court is to balance the interest of the system of protection of intellectual property and the incentives created by it against the public interest in the market under consideration and competition in general. Only in very rare circumstances does the Bureau see that that will be the case. The Bureau will first have to determine that the holder of the intellectual property is dominant in the relevant market and that the intellectual property is an essential input, and that the refusal to license prevents competition in the relevant market; and secondly, that the refusal to license is stifling further innovation and that by invoking a special remedy against the intellectual property right holder will not adversely affect the incentive to invest in innovation markets.

In general, competition authorities take cognisance of the following principles

CONTINUED ON PAGE 6

FROM PAGE 5

when analysing cases with an intellectual property angle:

- intellectual property is expensive to produce but can be applied at a very low marginal cost;
- intellectual property can easily be misappropriated due to its non-rivalrous nature; and
- intellectual property must often be used in combination with other intellectual properties in horizontal and vertical arrangements (i.e. a bundle of intellectual property rights).

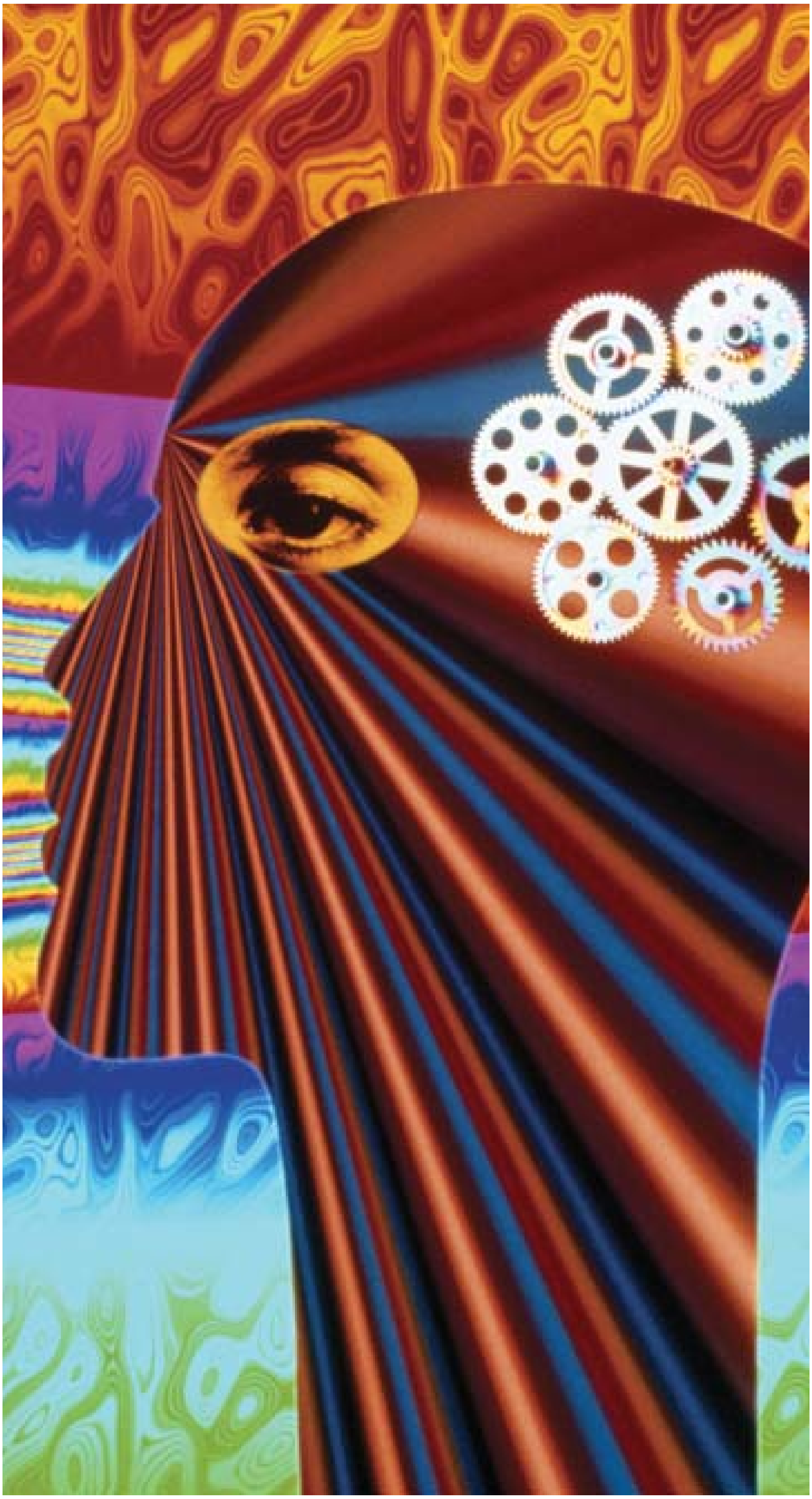
The South African case

The Competition Act (Act 89 of 1998) does not make provision for the “different” handling of the interface between intellectual property rights versus competition law to the same extent that the Canadian Competition Bureau does. The only specific reference to intellectual property falls in Section 10(4) of the Act that provides for an application for exemption from provisions of the Act.

The Competition Commission would consider the following principles when analysing a situation with an interface between intellectual property rights and competition law:

1. Competition law should recognise the basic rights granted under intellectual property law. The creation and maintenance of innovation markets are necessary for economic progress and development.
2. Intellectual property does not necessarily create market power.
3. A practice involving intellectual property should not be prohibited if the practice leads to a less anticompetitive situation than without the said practice.
4. The long-term pro-competitive benefits should outweigh the short-term “anticompetitive” effects of intellectual property rights.

The five-step approach followed by the Canadian Competition Bureau seems applicable to the South African legislative and economic circumstances. The methodology followed does not differ from the standard competition analysis implemented by the Competition Commission and thus the approach could be implemented with success in the South African situation.



Competition policy as an instrument of employment creation: can it work?

The South African Competition Act is distinctive from most other competition legislation in its consideration of public interest issues, particularly the promotion of employment. The Competition Commission has an obligation to evaluate, amongst other matters, the impact of mergers and acquisition activity on employment.

In light of the fact that studies indicate more competitive industries employ on average five times more workers than concentrated industries, it is crucial to monitor the impact of merger activity - which by nature increases concentration in a market - on employment. The Competition Commission analysed the relationship between concentration ratios (CR4)[1] and job losses/gains as a result of M&A activity in manufacturing industries for a sample of 125 cases notified with the Commission for the period September 1999 to September 2000.

The table below (Table 1: see graphic) reflects the following:

- In 125 cases evaluated a net loss of employment of 197 jobs occurred.
- 77% of the overall employment losses were within industries where the combined market share of the leading four firms in the industry was between 60% and 100% (33.6% of the cases in the sample).
- Merger activity in competitive industries with low levels of concentration (34.4% of the cases in the sample) contributed to only 18% of the overall job losses.
- An almost equal number of cases in concentrated industries (CR4 above 60%) and more competitive industries (CR4 below 40%) led to almost four times more job losses in the concentrated industries.
- 100% of the overall employment gains were within the low and medium concentrated industries (CR4s in the range of 20 to 60%).

There are different theoretical understandings of the relationship between product market structure and labour market outcomes. Traditional neo-classical theory recognises a possible link between product market structure and employment. It argues that non-competitive product and labour markets may lead to inefficient labour market outcomes and, in particular, lower levels of employment. In other words, this approach posits a negative impact of imperfect competition on employment. It further states that imperfections in the product market, as symbolised by the presence of a monopoly, predicts that there will be lower employment because of reduced output and pricing above marginal cost[2]. Other theories presented in literature have highlighted weaknesses of the neo-classical framework, particularly its neglect of social and institutional factors. However, with respect to the relationship between product market structures and labour market outcomes, some of these theories have suggested that there is a causal relationship between product market structure (e.g. concentration) and employment[3].

The literature explored indicates that there is a possible link between product market structures and employment and therefore that by influencing market structures employment may be influenced. The counter-argument is, however, that competitive and concentrated industries might have special features that have nothing to do with concentration.

From the discussion above, it is evident that there is a possible link between product market structures and labour market outcomes, particularly employment.

However, considering that not enough research has been done in this area, it would be premature for one to conclude that competition policy has the potential to influence job creation. Nevertheless, data from the table above shows that notified mergers within the highly concentrated industries account for more than 70% of total job losses, while 100% of the overall employment gains were within the less and moderately concentrated industries. Further research on the area is of vital importance.

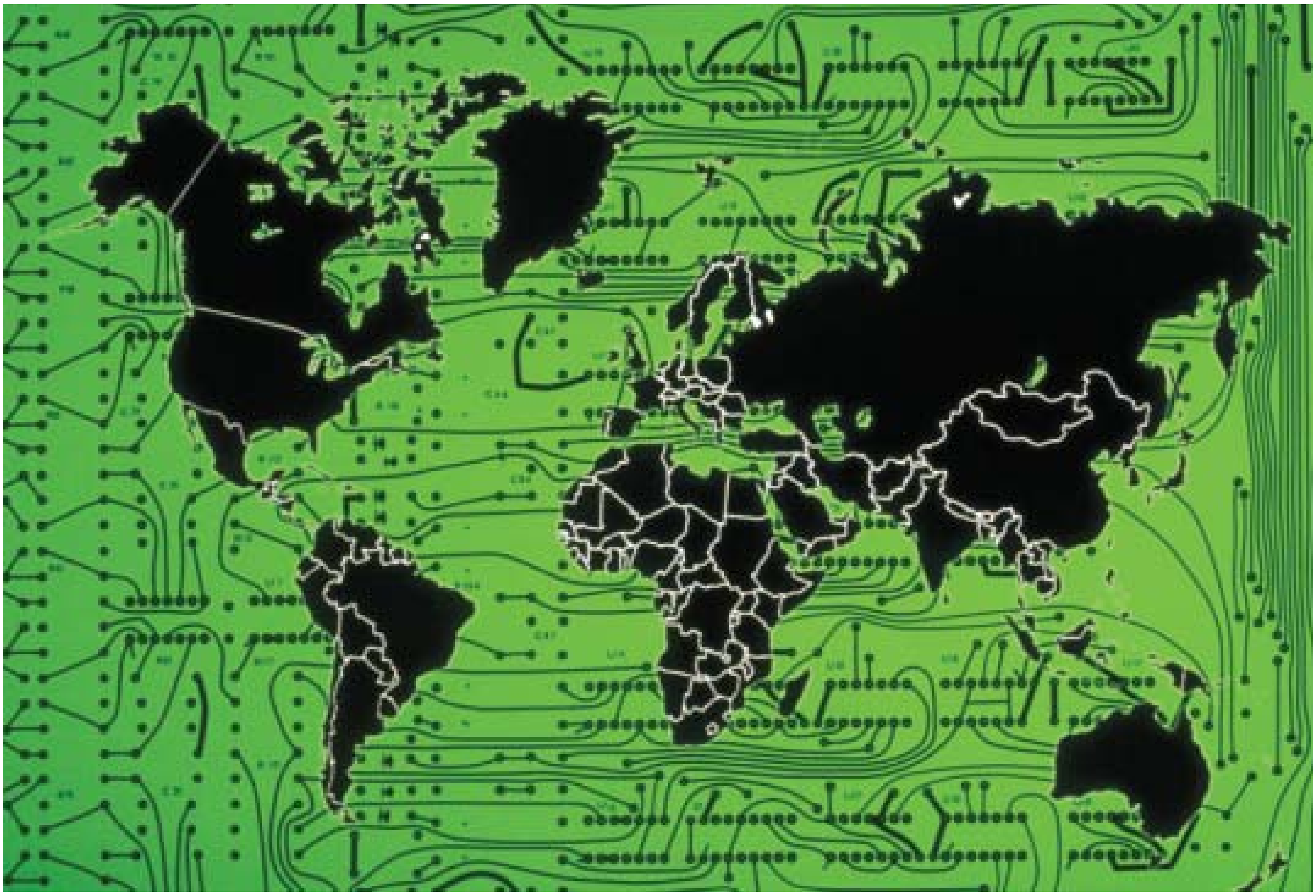
[1] Defined as the sum of the market shares of the top four firms in an industry, ranging from 0 to 1.
[2] See Berg, et al (1991). Economics and Carlton and Perloff (1994). Modern Industrial Organisation.
[3] Smit, M.R. (1995). Wages and the Structure of product markets.

TABLE 1. EMPLOYMENT GAINS OR LOSSES AS A RESULT OF MERGERS AND ACQUISITION ACTIVITY IN SA MANUFACTURING

Distribution of CR4 (5-digit SIC)	Number of cases	% of total cases	Employment losses	% of total losses	Employment gains	% of total gain	Net losses/ gains
0.0-0.2	8	6.4	0	0	0	0	0
0.2-0.4	35	28	135	18	30	6	-105
0.4-0.6	40	32	34	5	500	94	+466
0.6-0.8	30	24	298	41	0	0	-298
0.8-1.0	12	9.6	260	36	0	0	-260
TOTAL	**125**	**100**	**727**	**100**	**530**	**100**	**-197**

* Note: Data compiled from a sample of 125 merger cases.

Competition in network industries



Certain industries are special in that they connect consumers of their products and services by means of a network of some sort. Examples include the telephone network, the electricity network, the road, rail and airline networks, and even the water supply network. These industries, although different, share several features that are reflected in the common occurrence of broadly similar competition issues.

The bigger the network, the more useful it is. A road network is more useful, the more places it reaches. The same applies to rail or airline networks. The telephone network is useful because it allows communication with virtually anyone around the globe. These are demand-side network effects.

Network industries typically have high sunk costs, meaning that supply-side economies of scale are not exhausted unless the firm has a large, and perhaps even a monopoly, share of the market. There are also supply-side economies of scope in many network industries: it's more efficient for a vertically-integrated firm to produce more than one product or service than it is for two firms to produce one service each. For example, a telecom company may provide a cellular and a fixed-line service, and there are cost savings in offering both rather than just one service. Therefore, there are supply-side network effects at work, too.

There are, however, also competition problems associated with dominant, integrated firms in network industries. Typically, a new entrant is initially able to compete by providing one service. The response by the incumbent, integrated firm might be to cross-subsidise its prices in respect of that service, by raising the prices of its other services where it faces no competition and thus has market power. Alternatively, the incumbent could refuse access to an essential facility, or raise switching costs between one service (offered by the new entrant) and another (offered only by the incumbent). For example, a dominant airline might schedule its feeder flights to arrive immediately before the departure of its connecting flights, whereas a new entrant might only secure a landing slot that feeds too late or too early into the incumbent's flight. There are numerous competitive concerns regarding network industries. This article will briefly discuss such concerns in the electricity and airline industries.

The electricity network

Unlike airline passengers or radio signals, electricity cannot be viably transmitted through thin air - although lightning is 'striking' evidence that it can be done! South Africa is criss-crossed by thousands of kilometres of costly cable that connects consumers to Eskom's national power grid. This transmission network - the 'wires' side of the business - has taken years to install and has cost taxpayers countless millions of rand. The demand-side economies of scale and scope are such that the provision of power and light is a very effective catalyst for economic development in an area. This provision brings with it an increased demand for power from new households and businesses alike - the demand for electricity feeds on itself.

Regarding electricity supply, a distinction must be made between electricity generation (mostly by coal-fired power stations in SA), its transmission (through the wires), and its distribution (more wires, but finer ones, leading to individual consumers). There are still economies of scale in the generation of power: coal-fired power stations, in particular, still have to be large enough to produce energy from coal efficiently - and they are costly.

Competition in the electricity supply industry

The demand for electricity in South Africa has grown tremendously. Although the transmission grid connects all centres, much work needs to be done to provide electricity to poor rural and urban areas. Eskom operates 24 power stations, which are able to accommodate demand growth for perhaps another seven years. Thereafter, more capacity will have to come on-stream. Competition between power stations is feasible, and to that end Eskom is now running its power stations in mock competition with each other, in order to prepare for future full competition, as discussed in the next section. By then, new capacity will be added, in competition with Eskom, as so-called independent power producers (IPPs) are commissioned and enter the market.

The transmission grid is still regarded as a 'natural monopoly', as duplication of the present infrastructure is not feasible. Therefore, unlike generation, there will be no introduction of competition with regard to transmission. This does not mean, however, that there are no competition concerns around transmission. The grid is an 'essential facility', and open access to the grid should be assured - ideally at both ends - with access to competing generating companies at one end, and, eventually, access to competing retailers of electricity at the other end.

Vertical restructuring by separating the different levels has the following competitive benefits:

- Elimination of anti-competitive cross-subsidies between regulated and unregulated activities where these were previously jointly operated (e.g. transmission and generation).
- Elimination of the ability of, and motive for, a vertically integrated enterprise (like Eskom) to use network control to stifle competition - e.g. by charging new generating firms discriminatory prices for access to the transmission network.

The National Department of Minerals and Energy Affairs (DMEA) has drawn up a suggested restructuring process for South Africa's electricity industry, based on the 1998 White Paper on Energy Policy. Progress, however, has not been urgent, as it is felt that South African electricity prices are already low and we should therefore proceed with caution on any form of restructuring.

Generation

- Eskom will restructure its generation assets by vertically separating them from the transmission and distribution stages of the ESI, and by horizontally separating them into perhaps three groups of power stations. These stations would compete with one another, as well as with new IPPs, to supply electricity into the grid. The grid would be a separate company.

Transmission

- Transmission will remain partially state-owned, but will be done through a separate and independent transmission company.

Distribution

- Eskom's distribution functions will be merged with the municipal distributors (there are over 360 distributors) into six regional electricity distributors (REDS).
- The numerous municipal tariffs will be simplified.
- At first, there will be a holding company embracing all distributors, which will initially control the REDS.
- There will be one (monopoly) RED for each broad geographical region.
- Only very large customers (>100GWh) would initially be able to choose between electricity suppliers.

The effects of the restructuring will see electricity available as follows:

- The REDS will be able to buy from competing generating companies
- The electricity purchased will be transmitted by the monopoly transmission company
- There will be open access to transmission lines
- There will not, however, be open access to distribution lines
- The REDS will also supply electricity to final consumers.

Regulatory implications

The Competition Commission is presently engaged in discussions with the National Electricity Regulator (NER) about joint regulation of the industry, and these negotiations will culminate in the signing of an agreement between the two bodies (See article on concurrent jurisdiction on page 3).

CONTINUED ON PAGE 10

FROM PAGE 9

The role of the Competition Commission

The Competition Commission should be involved in ensuring access to the monopoly parts of the ESI (the transmission and distribution wires). The generation and retail of electricity, and certain aspects of market and system operation, are potentially competitive and should therefore be subject to the Competition Act.

The introduction of competition into the electricity generation market will necessitate the active participation of the Competition Commission, as will the continuing monitoring of competition between the market participants. Therefore, the Commission will have to work together with the NER to regulate competition in the industry.

The Competition Commission may well have some role to perform concerning transmission, in conjunction with the NER. There are complex problems relating to access and transmission pricing, and its effect on promoting the correct levels of investment in transmission capacity.

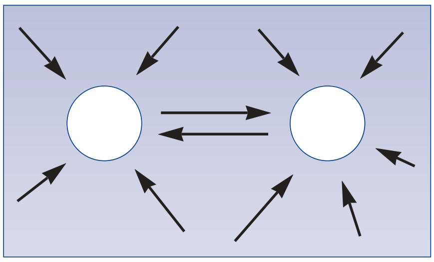
As to price/tariff regulation, the Commission will certainly have an interest in assisting the NER, where necessary, in its determinations on the method and formula to be used, the services to be regulated, rate reviews, and so on – particularly in the transition period leading up to competition in generation.

Airline networks

Unlike road or rail networks, airline routes do not require an initial excessive investment in infrastructure. Nevertheless, there are still economies of scale and scope associated with running an airline - creating certain advantages for existing, or incumbent, airlines. Economies of scale are afforded by operating jumbo-sized aeroplanes, which are too expensive for smaller airlines to purchase. Historically, the big airlines were often national carriers, and established themselves in a dominant position at so-called 'hub' airports located in large cities.

The analogy used in describing an airline's route network is that of a wheel with a central hub, surrounded by radiating spokes all leading to different points on the wheel's rim. Of course, some spokes join the wheel's hub to another wheel's hub (representing another city). Therefore, some routes might be characterised as 'hub-to-hub' rather than simply spoke or point-to-point routes. The hub-to-hub routes are usually referred to as joining city-pairs, and flights between them are often contested by the dominant airlines at the two respective hubs. (See figure 1 below, which shows two 'hub' airports, connected to other destinations and to each other by 'spokes'.)

FIGURE 1. THE HUB-AND-SPOKE SYSTEM



Established, 'incumbent' airlines often dominate landing and take-off rights (slots) and some associated services. Dominant airlines at such hub locations usually have a bank of slots built up for their feeder flights, and so benefit on the hub-to-hub routes by being able to offer seamless connections from the feeder traffic provided by point-to-point, or spoke routes.

These spoke routes feed into the hub-to-hub routes. The dominant, incumbent airlines based at the main (hub) airports will benefit from this feed of passengers. In the airline business, these advantages are the 'network effects' and represent supply, or cost-side, economies of scope. Here, the efficiencies are regarded as economies of scope rather than scale, because they relate to the offering of flights on connecting, but separate and therefore different, routes. (It is interesting to note that the equivalent in the telecom industry would be the economies of scope provided by international and national long-distance calls terminating at, and increasing the 'traffic' through, a local exchange.)

To extend the discussion briefly, the benefits of operating a hub-and-spoke airline network also include demand-side economies of scope, as defined briefly in the previous section. There is greater passenger demand for a seamless network offered by an airline and its associated frequent flyer programmes, whereas there are definite switching costs involved in changing airlines at a hub, brought about by slot constraints, baggage-handling delays, and of course the lost miles under frequent flyer programmes.

New domestic airlines will initially not have the resources to provide a full network of hub and spoke services, so they will not generate as much feeder traffic on hub-to-hub routes as incumbent airlines do. They may, however, be able to compete on point-to-point, spoke-to-hub routes by operating smaller aircraft on no-frills flights, possibly to different airports in the same city-pairs, and they may face lower costs if they do not offer frequent flyer programmes.

We see that the airline business is perhaps unusual when considered as a network industry, for it does not depend upon expensive, fixed infrastructure linking airports. Nevertheless, there are advantages to airlines, from operating big aeroplanes and offering extensive networks, to providing different services, such as feeder flights from spoke routes in addition to hub-to-hub routes, as well as frequent flyer programmes. Furthermore, there are other benefits to being an established or incumbent airline at an airport: these airlines may have some control or dominance over essential facilities such as gates and slots. These factors all make it very difficult for new entrants to gain a foothold in the airline industry.

An awareness of the advantages that incumbent airlines have is crucial when it comes to understanding the competitive problems that arise in the industry. Competition authorities can intervene, for example by ordering that gates and slots are made available to new entrants - in other words, by ensuring access to essential facilities. Or the authorities may insist that a new entrant be allowed to offer an incumbent's frequent flyer programme, thereby reducing the incumbent airline's ability to raise passengers' switching costs.

“Ramsey prices”

for sugar and pharmaceuticals in South Africa

A British economist named Ramsey worked out a rule of thumb for governments to apply in taxing certain goods and services. This rule became known as “Ramsey pricing”, or the inverse elasticity rule. A short explanation will be given, followed by an application of the reasoning to pricing conduct in two selected industries in South Africa: sugar and prescription pharmaceuticals.

Government advances arguably good moral reasons for taxing certain goods and services instead of others. However, at the heart of its concerns is that the imposition of an increased tax should not decrease the quantity demanded thereof to such an extent that the total tax collected on all units actually drops. Therefore, governments choose very carefully which goods to impose excise duties on. Excise duties on cigarettes and alcohol are known as ‘sin taxes’ because they are ostensibly levied as a gesture of righteous disapproval of the unhealthy habits of smoking and drinking. Of course, if these taxes really had the ‘desired’ effect, then consumption of cigarettes and alcohol would plummet and the total tax collected on those items would fall - leaving Government short of money. In fact, the Government has selected cigarettes and alcohol partly because they are addictive, and smokers and drinkers will carry on smoking and drinking even when these ‘vices’ are heavily taxed. In economic terminology, the demand for these goods is inelastic, or unresponsive to changes in price, whether caused by real demand/-supply factors, or by the taxation actions of Government.

Ramsey’s rule specifies that goods whose demand is inelastic should be taxed more heavily than those whose demand is elastic, or sensitive, to price changes. Hence the alternative name, the ‘inverse elasticity rule’: the lower the demand elasticity of the goods, the higher the tax should be - presuming that maximising tax revenue is the desired objective.

Ramsey pricing has also been applied to regulatory economics, which is partly concerned with the method of setting prices of different services produced jointly by regulated firms, for example by electricity and telecommunications utilities. The rule is applied as follows: charge high prices where the demand for a service is inelastic, and charge less for a service whose demand is more elastic. The only caveat is that the rule should not be applied where inelastic demand is associated with a service primarily consumed by low-income groups, for this will violate the ‘ability to pay’ canon of taxation.

Another ‘application’ of Ramsey pricing is purely spontaneous price discrimination, as implemented by a firm that can successfully insulate one market segment from another. Free market enthusiasts will insist that such price discrimination is usually economically efficient, as it almost always leads to output maximisation as compared with a single price to both segments.

There are two industries in South Africa (sugar and pharmaceuticals) in which it is not inconceivable that a form of Ramsey pricing, or alternatively spontaneous price discrimination, is being practised, with opposite effects on consumer welfare. A very simplified explanation will be used, but the results are quite interesting.

Sugar

Sugar is a very basic item on the grocery list, and actually accounts for a fair share of poor people’s expenditure. Often seen as unhealthy, sugar is in fact a vital source of energy and carbohydrates and so prices should be low enough to allow for sufficient consumption. But the South African sugar market is deliberately split into domestic and export quotas. Without government sanction in terms of the Sugar Act of 1978, the scheme would be unsustainable. Therefore, it might be argued that sugar is a ‘regulated’ industry.

The said ‘regulation’ has the effect of allowing sugar producers to carefully limit their supply of sugar onto the domestic market (which is insulated from imports by a tariff), so that demand is inelastic and,

CONTINUED ON PAGE 12

FROM PAGE 11

coupled with excess demand, causes high prices to be realised. The balance of the crop is disposed of on the export market, which is usually awash with sugar from similarly protected markets. Therefore demand is elastic and prices are low. This is nothing more than a revenue-maximising application of Ramsey pricing, and certainly benefits the sugar mills, as well as keeping employment levels up in the industry. Consumers, however, pay dearly, and among those consumers are the poor. In contrast, selling the balance at low prices on the export market is effectively subsidising foreign consumers. What is worse is that South African consumers pay for those subsidies.

The Department of Trade and Industry is currently reviewing the Sugar Act, and it is perhaps worth noting that what happens in the sugar industry amounts to regulated price discrimination, which favours foreign consumers at the expense of local consumers.

Pharmaceuticals

A second industry to consider is the market for ethical, or prescription, drugs in South Africa. Pharmaceutical manufacturers have come in for a lot of flak in recent months, and the reality is that patients on medical aids are paying high prices for medication. Again, there are two discernible market segments, which the pharmaceutical manufacturers have successfully managed to seal off from one another in order to apply profit-maximising price discrimination. The private segment of the market is characterised by inelastic demand, for patients are largely insured against hefty medicine costs by their medical aids, and are in any event prepared to pay dearly for medicines. Therefore, pharmaceuticals companies can charge these patients high prices, following the inverse elasticity rule.

To get business from state hospitals, however, pharmaceutical companies must tender on a yearly basis, supply in bulk, and engage in direct price competition with rival manufacturers. The competition between the drug companies, via the tender system, means that prices paid by the state sector of the market are far lower. Drug companies have applied Ramsey pricing in acknowledgement of the fact that effectively demand is more elastic if prices are set by tender. The large price differentials between the private and public market segments for ethical pharmaceuticals in South Africa clearly creates opportunities for arbitrage and theft - buying at low prices or stealing from state hospitals, and selling at far higher prices to wholesalers or pharmacies. The pharmaceutical companies have reacted by forming their own, exclusive distributors to ensure that the two markets (private and public) are sealed off from one another. Their own distributors would have no incentive to source products from state hospitals (or from dispensing doctors, who also seem to get preferential prices), for to do so would only hurt their parent companies.

The Medicines and Related Substances Act attempts to stipulate ‘single exit prices’ for drugs as they leave the manufacturers’ gates. If this also applied to purchases by the State, then it would mean that the manufacturers would no longer be able to apply Ramsey pricing to their products. But it seems that a single exit pricing system will not apply to State purchases.

To conclude by returning to the theory, the essential difference between the examples of sugar and pharmaceutical products is this: with pharmaceuticals, the application of Ramsey pricing/price discrimination does not violate the caveat that the rule should not be applied where it is to the detriment of low-income consumers. Clearly, the State-sanctioned segmentation of the market as between private and public buyers actually benefits low-income patients who cannot afford medical aids and who depend on state hospitals being able to source prescription drugs cheaply enough to fund them with taxpayers’ money.

If this rather unusual application of Ramsey pricing principles to sugar and pharmaceuticals in South Africa is accepted, then it seems that the effects are beneficial (in a second-best manner) to low-income patients requiring prescription pharmaceuticals, but detrimental to local consumers of sugar.

Overview of M&A Activity

The Commission examined a sample of 306 finalised cases covering the period April 2000 to March 2001. It found that most of these mergers were of a purely horizontal nature and thus involved the merging of firms that, prior to merging, competed in identical markets. Conglomerate-type mergers constituted 22% of the total. Such mergers are notifiable if they involve a change in ownership and therefore require investigation. As there is no product overlap or vertical integration in the case of a pure conglomerate merger, it is not always clear if this type of merger would raise competition concerns. However, conglomerates may have the potential to diminish competition through their various spheres of influence, while there is also the possibility that conglomerates might engage in cross-product subsidisation to gain an unfair competitive advantage.

It is often difficult to assess whether a

TABLE 1. MERGER ACQUISITION ACTIVITY: APRIL - DECEMBER 2000

	April – December 2000	
	Number of mergers	**Percentage**
Type of merger:		
Purely Horizontal	190	62
Purely Vertical	27	9
Conglomerate	68	22
Management buy-out	7	2
Horizontal/ Vertical mix	14	5
Total	306	100
Acquisition by foreign firm	65	21
Failing firm argument	13	5
Anticipated job losses	22	7

merger will bring foreign direct investment into South Africa. However, the most likely candidates would be those cases where the acquiring firm is a foreign firm. Of the cases reviewed, 65 of the mergers involved acquisitions by a foreign company. A recent KPMG survey noted that South Africa had recorded US$7.6bn of cross-border inward and outward mergers and acquisitions since June 2000. Comparing M&A activity in South Africa with the previous year, the report found that inward investment has declined, while outward investment has increased in value.

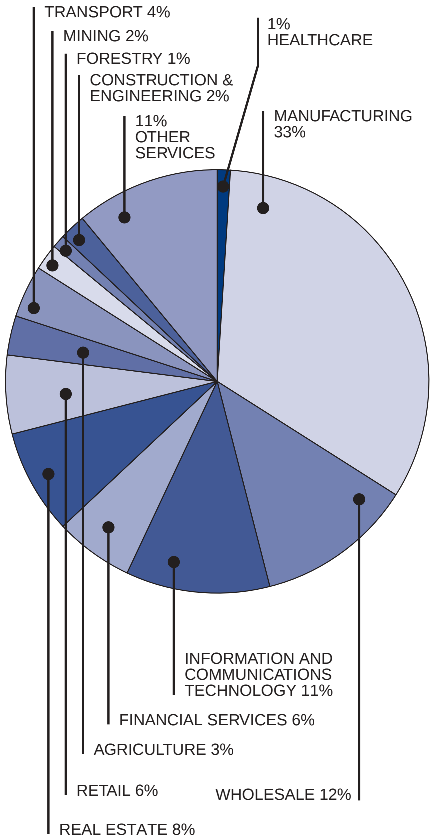
In 24 of the cases reviewed, the parties involved anticipated that jobs would be lost as a result of the merger. The total number of anticipated jobs lost as a result of these mergers has been estimated to be 3824, while it is expected that 450 jobs would be created as a result of merger activity. More than half of these jobs (2000) were expected to be lost as a result of the acquisition of Anglogold's Elandsrand and Deelkraal gold mines by Randfontein Estates. Most of the other job losses were expected in the manufacturing sector. The financial services sector and the health and recreational services sector also anticipated job losses. It was expected that jobs would be created mainly in the area of manufacturing of clothing and textiles. However, as these are labour-intensive industries, these amounts are not significant.

A possible justification for allowing a merger to go ahead is the failing firm argument and with it the implication that jobs can be saved. The failing firm argument was used in only 5% of the cases reviewed[1].

The pie chart in figure 1 shows a breakdown of the broad sectors in which M&A activity took place.

In the period September 1999 to March 2000 Information and Communications Technologies (ICT) and financial services combined contributed more to merger activity than any other sector, but have since fallen into second place with

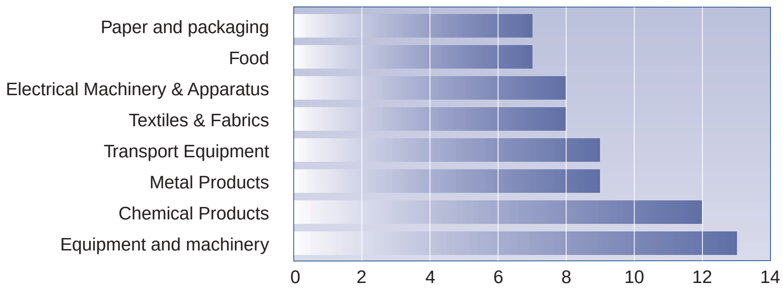
FIGURE 1. SECTORS IN WHICH M&A ACTIVITY OCCURRED



manufacturing now leading the way. This renewed interest in manufacturing could possibly be due to waning enthusiasm for information technology on a global level. Nevertheless, ICT and financial services remain an important component of merger activity in South Africa and further consolidation can be expected in future.

Within manufacturing, sub-sectors such as chemicals, electrical equipment, paper and packaging, and printing and publishing have featured. Figure 2 presents a breakdown of the manufacturing sector at a more detailed level.

FIGURE 2. BREAKDOWN OF MANUFACTURING – TOP EIGHT SECTORS



[1] There are a number of strict conditions that must be met if the failing firm argument is to be accepted as a defence. Parties to a merger may well use it as a defence but this does not mean that the Competition Commission will accept

An overview of

Chapter 2 investigations

The complaints dealt with by the Commission over the financial year 1 April 2000 to 31 March 2001 are summarized in Table 1 below. The Table shows that during this period, the Commission dealt with approximately 219 contraventions. 136 were resolved and 83 are still being investigated. Of those still under investigation, 14 of the contraventions are from seven cases that have been carried over from the previous financial year (April 1999 - March 2000).
The Commission received 172 cases, constituting 219 complaints of alleged contraventions of the Act.

TABLE 1. CONTRAVENTIONS DEALT WITH IN TERMS OF CHAPTER 2 OF THE ACT FOR THE PERIOD 1 APRIL 2000 TO 31 MARCH 2001

Provisions of the Act	No. of contraventions resolved	No. of contraventions under investigation	No. under investigation carried over	Total	% of total
Horizontal restrictive practices (section 4)	**26**	**17**	**6**	**49**	**22**
Substantial preventing or lessening of competition (s 4(1)(a))	13	8	4	25	11
Fixing prices and trading conditions (s 4(1)(b)(i))	12	5	1	18	8
Market sharing (s 4(1)(b)(ii))	1	4	1	6	3
Vertical restrictive practices (section 5)	**26**	**15**	**4**	**45**	**21**
General (s 5(1))	24	14	4	42	20
Resale price maintenance (s 5(2))	2	1	-	3	1
Abuse of Dominance (section 8)	**84**	**37**	**4**	**125**	**57**
Excessive prices (s 8(a))	2	5	-	7	3
Access to an essential facility (s 8(b))	1	0	-	1	0.5
General exclusionary acts (s 8(c))	60	21	2	83	38
Refusal to deal (s 8(d)(i))	4	4	-	8	3
Refusal to supply (s 8(d)(ii))	1	0	-	1	0.5
Tying of unrelated goods (s 8(d)(iii))	1	1	-	2	1
Predatory pricing (s 8(d)(iv))	6	0	-	6	3
Price discrimination (s 9)	9	6	2	17	8
Total	**136**	**69**	**14**	**219**	**100**

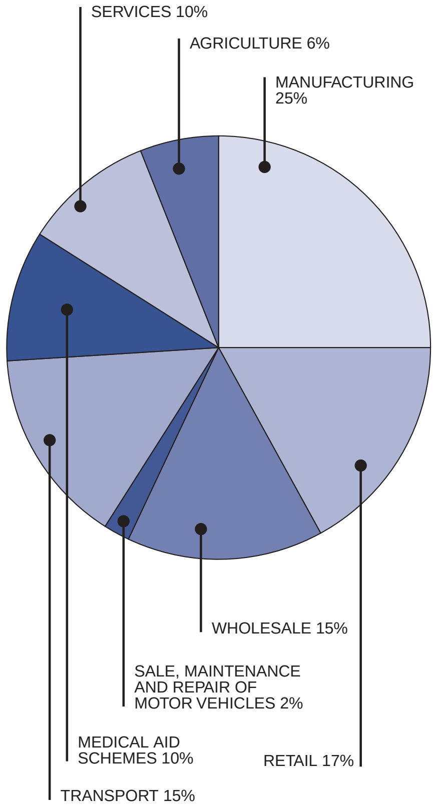
Sectoral Distribution of Cases Under Investigation

A sectoral breakdown of a sample of cases under investigation is presented in Figure 1 below. Drawing from a sample of 48 cases from the total number of cases under investigation reveals that most of these cases pertain to complaints of anti-competitive behaviour in the manufacturing sector, followed by retail (17 percent) and wholesale and transport, both with 15 percent. There are a number of complaints at different levels in the pharmaceutical industry regarding restrictive vertical practices as well as price discrimination. Abuse of dominance cases have also featured with regard to transport services.

Sectoral Distribution of Resolved Cases

A sectoral breakdown of a sample of the cases resolved is presented in Figure 2 on the following page. A sample of 94 cases was drawn from the total number of cases concluded (127 cases). This breakdown presents a similar picture to the sectoral breakdown of complaints under investigation, with the manufacturing sector again leading (24 percent) followed by retail (19 percent) and the sale, maintenance and repair of motor vehicles (9 percent).

FIGURE 1. SECTORAL BREAKDOWN: UNDER INVESTIGATION

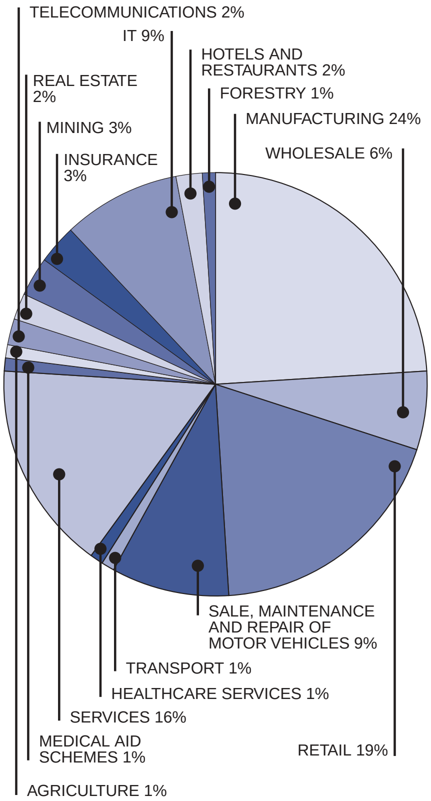


An overview of applications for exemptions

There are nine applications for exemption under consideration. Three of these pertain to activities by pharmaceutical manufacturers engaged in a restrictive horizontal practice. A further two are in healthcare services, also engaged in a restrictive horizontal practice, while the remaining four are players in the manufacturing of transport equipment, cement products, liquid fuels, and also shipping lines. Most of these are applications for exemptions from some prohibited practice under section 4 of the Act as they involve a restrictive horizontal practice.

Four exemption applications have been concluded. Two are in respect of restrictive horizontal practices in the legal profession. There is one involving motor vehicle parts manufacturers, another involving the Banking Council, and a high-profile case involving a code-sharing agreement between two major airlines. The cases concluded are also largely concerned with exemptions from section 4.

FIGURE 2. SECTORAL BREAKDOWN: RESOLVED CASES



Commission Cases

SAD abusing dominant position

The Competition Commission has investigated the complaint by South African Raisins (SAR) against South African Dried Fruit Holdings Limited (SAD) and has concluded that SAD is in contravention of the Competition Act 89 of 1998 in terms of the following:

- Abuse of dominant position
- Exclusive supply arrangement.

The decision has been submitted to the Competition Tribunal for trial and final decision.

Set out below is a brief background to the industry and the conclusions reached by the Commission.

SAR alleged that SAD is contravening the Competition Act because, amongst other reasons:

- there is a vertical agreement between grapes-for-raisins producers and SAD and its' subsidiaries that constitutes a prohibited restrictive vertical practice as contemplated in Section 5(1) of the Act; and
- SAD is abusing its dominant position in the market by engaging in exclusionary acts as contemplated in Section 8(d)(i) of the Act.

Background to the industry

The South African agricultural sector has been one dominated by co-operatives and regulatory boards, for example, SAD and the Dried Fruits Board, respectively. The main function of the co-operatives was to co-ordinate the farming and marketing activities of their members (that is, farmers). These activities included the provision of finance, storage, purchasing, processing, packaging, distribution, selling and export facilities. As a rule, members were required by law to sell their entire crops to the relevant co-operative, which, in turn, committed itself to purchase the crops of its members. This scenario did not allow for competition against the co-operatives. This system was dubbed 'single-marketing' with the Board performing a regulatory function, whereas the co-operative served as the single channel.

With the repeal, in 1996, of Act 59, state recognition of all single-marketing channels was formally withdrawn. In accordance with this, SAD in 1998 converted itself into a company and the shares in the new company were allocated amongst it members, that is, the farmers.

Following this development in the industry, SAR in 1997 took steps to enter the raisin market by engaging in the buying, processing, packaging and distribution of grapes-for-raisins.

Regulatory aspects

This complaint was lodged on 13 October 1999 by SAR against the SAD and SAVF wherein it was alleged that they were involved in practices in contravention of certain sections of Chapter 2 of the Competition Act, 1998 (Act No. 89 of 1998). The complaint mainly related to the Articles of Association of SAD, which were alleged to require its shareholders, or the producers of grapes-for-raisins, to deal exclusively with SAD. The complaint was accepted for further investigation on 13 January 2000.

However, this complaint has been one marred with a series of legal actions in the Competition Tribunal, the High Court

CONTINUED ON PAGE 16

FROM PAGE 15

and the Supreme Court of Appeal of South Africa.

On the same day that the complaint was lodged, SAR filed an application for interim relief to stop SAD from requiring or inducing their shareholders to not deal with SAR. The Tribunal granted an order in favor of SAR on 24 November 2000. Following this order, SAD filed a "Notice of Appeal and Review" with the Competition Appeal Court. In response to this application, SAR again approached the Tribunal requesting it to declare the "Notice of Appeal and Review" invalid and of no force and effect. The Tribunal agreed with SAR's application and issued an order to that effect on 24 December 1999.

In the light of the abovementioned orders, SAD approached the High Court (Transvaal Provincial Division) requesting that the orders made by the Tribunal be declared null and void. Ngoepe JP, held that the Act does not apply to the raisin industry and therefore found that the Tribunal did not have the jurisdiction to make the abovementioned orders. As a result, he declared the orders to be null and void and of no force and effect. Essentially, SAD's argument and the subsequent decision of the Court relied upon section 3(1)(d) of the Act. Against this order, SAR appealed to the Supreme Court of Appeal to have this judgement set aside. On 29 September 2000, a judgement was delivered in favour of SAR. The judgement found that Act 47 of 1996 does not exclude the jurisdiction of the Act, and that the Tribunal had jurisdiction to consider the matter.

Evaluation of the Complaint

SAD has a market share of approximately 90 percent, which implies that it is dominant.

The question the Commission had to answer was whether SAD had engaged in exclusionary acts by virtue of its position in the market.

SAD has until recently (November 2000) employed Article 88.2, but still utilises Articles 88.3, as well as 88.5 of its Articles of Association, to force its members to exclusively supply grapes-for-raisins to SAD. Article 88.2 provides that a producer who is a shareholder of the First Respondent, and who delivers agricultural products of a specific type to the SAD group, is obliged to deliver all its agricultural products of that type to SAD, failing which certain penalties would apply at the discretion of the board of directors of SAD.

Article 88.3 entrenches the power of the board of directors of SAD to impose a fine and provides that a shareholder that transgresses is also liable for any loss or damage that the First Respondent may suffer as a result.

Article 88.5 was introduced in September 1999 at a Special General Meeting so that all monies owed (and due and payable) to SAD by a particular shareholder, would immediately become due and payable in the instance where a shareholder does not comply with its obligations or undertakings towards the First Respondent.

It is the Commission's submission that the aforementioned Articles have the effect of excluding other players from entering the market for grapes-for-raisins.

Firstly, the farmers are required to sell all their crops to SAD and if they fail to comply, the directors of SAD have the discretion to penalise them. Given that the SAD shareholders account for about 90 percent of all farmers who produce grapes-for-raisins, the act of requiring them to not freely deal with any other player in the market creates a barrier to enter the market and amounts to an abuse of a dominant position by SAD.

Article 88.5 places an exit barrier on the shareholders/farmers who contemplate leaving SAD in that they would be faced with the burden of an instant paying up of debts which have been accumulated over a period of time.[1]

Vertical agreements

The agreement between the farmers and SAD is vertical in that SAD purchases the grapes-for-raisins from the farmers (sellers or producers of grapes-for-raisins) in terms of the Articles of Association and then processes, packages, distributes and sells the product.

The Articles of Association of SAD requires the farmers to sell all their crops to SAD and if they fail to comply, the directors of SAD have the discretion to penalise them. Given that SAD accounts for up to 90 percent of all farmers that produce grapes for raisins, the act of requiring them to not freely deal with any other player, creates a barrier to enter the market and amounts to an exercise of their dominant position in the market. This exclusive dealing arrangement forecloses up to 90 percent of the market from competition.

Barriers to Entry

Specifically, SAD has utilised the provisions of Articles 88.2 (and subsequently the Newsletter of 29 November 2000), 88.3, and 88.5 as presented above to acquire the sole use of the input used in the manufacture of raisins. It has done so by "locking in" the farmers (or producers of grapes-for-raisins, the main input in the production of raisins) in an exclusive supply agreement with SAD. This arrangement makes it difficult and almost impossible for the farmers to supply their crops to SAR or any other potential entrant in the market and hardly serves any purpose beyond the suppression of competition.

Conclusion

The Commission concluded that SAD has entered into a vertical agreement which substantially prevents or lessens competition in the purchasing, processing, and packaging of grapes-for-raisins market and without showing any efficiency, technological or pro-competitive gains that outweigh its conduct. As such, SAD is in contravention of the Competition Act.

Commission Cases continued...

Complaint lodged by Nationwide Airlines (Pty) Limited against South African Airways Limited

During 2000, Nationwide Airlines Limited filed a complaint with the Competition Commission against certain practices of South African Airways (Pty) Limited.

The Competition Commission has finalised its investigation into some, but not all, of the practices complained of and has decided to refer the complaints to the Competition Tribunal for a decision.

In particular, the Commission has dealt with:
- Travel agent overriding incentives; and
- Travel agent employee (consultant) travel incentives.

There is overwhelming evidence to suggest that travel agent overriding incentives, when practised by a dominant firm, should not be permitted. In particular the European Union, individual countries within the EU, and Canada have attempted to address this. It is noted that travel agents are responsible for upwards of 70 percent of all airline bookings.

The Commission has satisfied itself that SAA is dominant on the routes that it competes directly with Nationwide, these being Johannesburg-Durban-Johannesburg, Johannesburg-Cape Town-Johannesburg, and Johannesburg-George-Johannesburg.

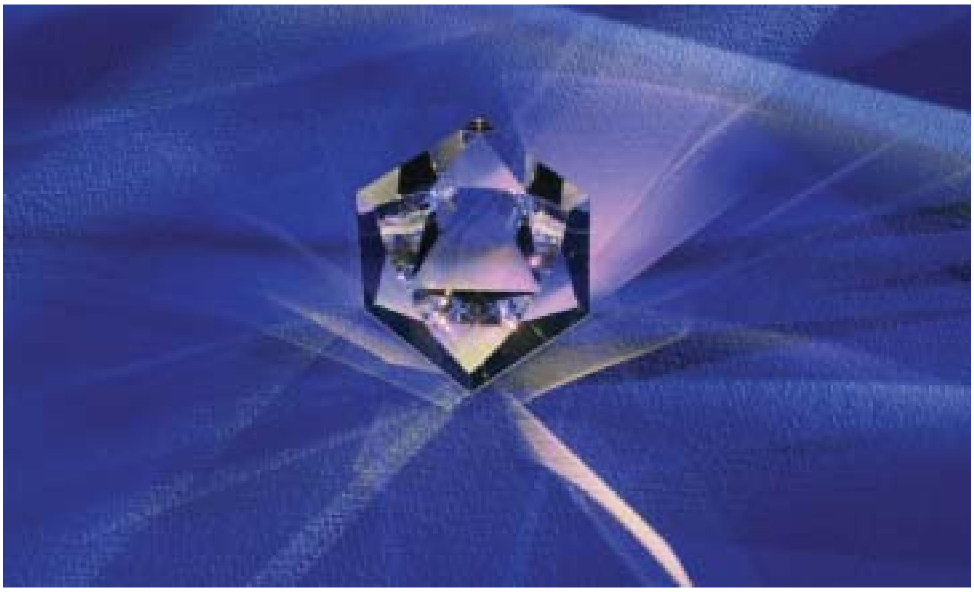
On the basis of the above, the Competition Commission has concluded that the practice does constitute a prohibited practice, in terms of both sections 8(c) and 8(d)(i) of the Competition Act 1998.

With regards to travel agent employee travel incentives, the Commission is satisfied that the perverse incentive scheme(s) created by the above, especially involving a firm in a dominant position as defined, could not be justified on the grounds that any efficiency, technological, or other pro-competitive gains outweigh the anti-competitive effects thereof.

This is now a matter for the Competition Tribunal to rule on.

Nationwide has lodged a further complaint against SAA in that it alleges SAA's Frequent Flyer programme to be anti-competitive. The Commission is investigating the complaint.

Commission and Tribunal clears De Beers deal



The Commission, and subsequently the Tribunal, found that the deal does not pose competition concerns. The deal has allowed DB Investments, a consortium consisting of Anglo American, the Oppenheimer family and the Botswana government, to purchase De Beers for more than $18bn. The deal is expected to result in a $3,5bn capital inflow into the country.

Commission Cases continued...

Exemption application by the general council of the bar of South Africa

The General Council of the Bar (GCB) filed an application with the Competition Commission in terms of Schedule 1 of the Competition Act 89 of 1998 to have its rules and those of its constituent members exempted from the provisions of Part A of Chapter 2 of the Act.

During its evaluation of the exemption application, the Commission took cognisance of anti-trust experience in other jurisdictions, which indicated that practices which are claimed as being necessary to maintain standards in a profession, have often in fact been found to be:

- anti-competitive;
- serving the interests of the profession concerned first and foremost; and
- detrimental to the consumer.

The Commission's approach in evaluating applications in terms of Schedule 1 is not simply to exempt an application based on only the fact that the practices might be normal practice in certain countries, or are deemed necessary by the applicant to maintain standards. It is incumbent on the Commission to consider the effects of the restraint of competition on those who rely on the services being rendered.

The Commission's original findings included proposed changes to the following:

- Prohibition on advocates accepting briefs directly from clients.
- Prohibition on advertising
- Group boycott of attorneys who have not paid their accounts
- Requirement that all advocates be located at certain premises
- The "two-counsel" rule
- Prohibition of association within the profession
- Prohibition of association with non-member advocates.

The GCB took the Commission's decision on review in a number of respects:

1. That the Competition Commission did not comply or adhere to the rules of natural justice in that it failed to give the GCB comments for the Minister of Justice and Constitutional Development, and
2. That the Commission utilised incorrect procedure for the exemption.

In its response to the GCB's review application, the Commission conceded that the exemption application, erroneously, was granted with conditions. While the forms for section 10 exemptions, which are published in the Government Gazette, in general made provision for conditions to be attached, the Competition Act itself does not provide for conditional exemptions of Professional Bodies in terms of Schedule 1. However, the consideration of the exemption application and the Commission's reasons for not granting the exemption was made clear. The defective form has since been amended.

The position adopted by the GCB is that the procedural error requires a wholesale review of the exemption application by the High Court. The GCB requested that the Court make a ruling in respect of the substantive nature of the Exemption application. It is for this reason that the GCB stated that the Commission is not qualified to review an exemption application from the Competition Act and demanded the names of individuals involved in making the decision at the Commission. Essentially, therefore, the GCB attempted to obtain an exemption from the Competition Act through the High Court.

The Commission wishes to clarify that in evaluating the exemption application, all Rules of the GCB were reviewed in respect of their impact on competition. Furthermore, the Commission had to evaluate whether any of these rules were required to maintain professional standards, considering internationally applied norms. In making its decision, the Commission therefore needed to examine international jurisprudence. The decision, which was issued to the GCB, was therefore in line with international standards. Contrary to media reports, no single group of rules was targeted in its evaluation of the GCB rules. The Commission indicated to the GCB that they addressed competition concerns.

In a scathing ruling, Judge Roos found in favour of the GCB.

The Commission will appeal the decision, as it is the considered view of the Commission that the High Court cannot make a ruling on substantive competition issues. Rather, it would be the role of the Competition Tribunal to review a decision by the Competition Commission on competition matters.

International News

Initiative for a Global Competition Forum

In February this year, 43 senior competition law officials and professionals from 23 countries, 20 competition authorities and nine other international institutions gathered in their individual capacities to set the stage for the Global Competition Forum (GCF) or Global Competition Initiative (GCI).

The idea of a forum was born from a report by the International Competition Policy Advisory Committee (ICPAC) to the US Attorney General and the head of the Antitrust Division of the US Department of Justice. The idea gained impetus when both the then Assistant Attorney General, Joel Klein, and EC Commissioner, Mario Monti, endorsed such an initiative at various conference proceedings during 2000. Competition policy is at the cutting edge of economic globalisation and competition policy issues have grown increasingly complex.

Participants discussed three sets of issues: competition policy and competition advocacy in developing countries; merger control in the 21st century; and structural and process issues facing a global competition initiative. The following is a brief summary of each of these sets of issues as discussed at the meeting.

Competition policy and competition advocacy in developing countries

Economic globalisation necessitates the improved co-operation between competition authorities worldwide. Although there are existing organisations where representatives from developed economie meet, developing countries need to be drawn into discussions. The GCI could be a venue where participants from developed and developing countries could consider further competition law and policy issues that transcend national boundaries.

Merger control in the 21st century

The proliferation of merger laws and practices leads to additional costs for corporations and challenges to competition authorities. Increased international co-operation and convergence in processes and methods could prove helpful to both multinational firms and competition authorities.

A multijurisdictional merger review could facilitate such co-operation and convergence.

Although some work has been done to this end, participants expressed the view that existing forums such as the OECD, UNCTAD and the WTO each had their limitations and other primary areas of focus. Therefore, they did not consider the full procedural and substantive aspects of multijurisdictional merger review, taking the developed and developing country viewpoints and other professional needs into consideration.

In the long run, the GCI should identify working groups to address relevant issues.

Structural process issues facing a global competition initiative and next steps

Participants agreed to the following principles for the structure of the GCI and the processes to be followed:

- The GCI must add value to the work of existing organizations and not just duplicate activities
- It should be a competition authority forum drawing together all interested parties
- The exact topics that the forum should address will not be decided until discussions have matured
- The initiative must attract broad participation from countries with new and developing competition regimes
- Further work is needed before the GCI can be officially launched.

The participants concluded that a steering committee would ultimately need to be put in place. In the interim, a number of participants formed a planning group to assist with interim planning and to identify candidates for the steering committee. The International Bar Association will facilitate further meetings and provide infrastructure services and support during the interim period.

J William Rowley QC, Chairman of the International Bar Association Global Forum for Competition and Trade Policy, was chosen to chair the planning committee. David Lewis, Chairman of the Competition Tribunal, was present at the meeting held in February.

Further information on the GCI can be found on the International Bar Association's website www.ibanet.org.

Worldwide Anti-trust Merger Notification Requirements – the White & Case Survey

White & Case LLP - a global anti-trust practice - recently released a comprehensive survey of merger control rules around the world. The 256-page survey, covering 130 jurisdictions, found that 67 countries now have merger control laws in place, as opposed to 58 countries in the previous year's survey. In addition, the survey found that 25 countries had substantially revised their codes since 1999.

According to White and Case, the increase in merger notification requirements has businesses with multinational operations facing a growing burden of filing requirements, the threat of delays, increased transaction costs, and fines for non-compliance. "Although few deals are actually cancelled as a result of the burden of multiple reviews, they are often delayed for months, and parties can be subject to significant penalties for non-compliance," said Robert D. Paul, head of White & Case's competition law practice group. All this might affect consumers, as they might have to foot the bill for increased transaction costs.

Trends in M&A activity

The year 2001 is seen as a record-setting year in global mergers and acquisitions. According to Thompson Financial Securities Data, the value of M&A deals exceeded $3.5 trillion in 2000, up from $3.3 trillion in 1999.

This trend comes with its problems as deals grow in size and complexity; this may result in an overwhelmingly large number of notifications that can impair the capacity of some national authorities to enforce their anti-trust laws effectively.

A call for harmonisation

Policymakers acknowledge that there is a need to harmonise merger control rules. However, there is no consensus on the extent of harmonisation or the method to attain it. Some policymakers call for harmonisation to be started "on an exploratory basis". Others advocate that the World Trade Organisation (WTO) take a leading role in this initiative. Diplomatic and political challenges are some of the major obstacles facing the international harmonisation machine.

Findings of the Survey

Other findings of the new edition of the merger control survey are the following:

- In the EU, many of the countries revising their laws are bringing them into conformity with internal Union regulations and standards. While this trend helps to harmonise standards within Europe, it, somewhat paradoxically, can add to the burden on transactions too small to meet the EU filing thresholds (Euro5 billion worldwide combined turnover of all parties to the transaction, or Euro250 million turnover within the EU member countries where the deal may have a national impact).
- In the absence of an international consensus on how mergers should be reviewed, there is an increasing trend towards bilateral agreements to co-operate on competition matters. The United States for example, has signed co-operation agreements with Australia, Brazil, Canada, Israel, Japan, Mexico, and the EU.
- Since the start of 1999, countries that have enacted merger control laws for the first time include Argentina, Indonesia, Macedonia, Slovenia and Thailand. The survey found many of these regimes are not fully developed, resulting in the need for transacting parties to work closely with national enforcement authorities in order for a deal to be held in compliance with those regulators.
- Africa will likely become the next region where the adoption of new merger controls is widespread. Several African countries are studying the possibility of legislation, including Angola, Congo, Egypt, Eritrea, Ethiopia, Madagascar and Mauritius. Currently only a handful of African states (including South Africa, Kenya, Zambia and Zimbabwe) have national regimes. Those states moving towards legislation are members of regional trading blocs that have called upon their membership to enact merger control rules.
- The United States enacted a sweeping revision of its notification requirements in 2000. Amendments to the Hart-Scott-Rodino (HSR) Act increase the filing threshold to transactions exceeding $50 million in value, and institute a new procedure for contesting government second request challenging a deal. The net effect of the HSR amendment on deals with multi-national implications is that while filing requirements are increasing in many jurisdictions around the world, the United States has lessened the burden somewhat for deals that do not reach the new filing thresholds.
- Overall, the survey found that the most common merger notification system is a mandatory pre-merger notice, which is required by 45 jurisdictions. By contrast, five countries require both pre- and post-merger notice, three require post-merger notice only, and one (Brazil) allows notice to be filed either pre- or post-merger. Eleven countries call for voluntary notice, and two (Malta and Pakistan) have a required registration procedure.

South Africa

It is quite pleasing to see the South African Competition Commission mentioned in this survey as one of the front-runners in Africa, with a fully established national Competition regulatory body. This confirms that South Africa falls well in line with international expectations as far as merger control rules are concerned.

Information Resource Centre developments

Investigators at the Competition Commission now have the world of antitrust experience at their fingertips. With the click of a mouse they can tap into the full text of US antitrust cases, as well as Australian and European Competition Law. In addition, the Index to Legal Periodicals offers them access to the contents of renowned journals, some of which are stocked in the Information Resource Centre (IRC). With these tools, end-users can now conduct their own research independently from their desktops. The Competition Commission's collection has developed to the extent that it does not merely rival, but rather surpasses, collections of competition authorities in countries similarly situated.

Major treatises (in book form for those who still prefer the hard copy), which form the theoretical underpinnings to the above cases, now included in the IRC are:

- Competition Law of Canada by Davies, Ward and Beck. The treatise is published in three volumes. Key competition law topics include enforcement, price discrimination, distribution, and intellectual property. One volume is dedicated to case law arranged by subject matter.
- Encyclopedia of Competition Law published by Sweet & Maxwell. This treatise collates and consolidates all the diverse sources of both primary and secondary competition law in the UK and the EC.
- Antitrust Law: An analysis of antitrust principles and their application by Philip Areeda and Herbert Hovenkamp. Considered the "locus classicus" of antitrust law, this work is published in 20 volumes, all of which explore every aspect of antitrust law at great length.

Upcoming developments include:

- The rollout of the IRC Database. This state-of-the-art library software enables the IRC to draw various file formats together, providing the user with a single point of entry to various sources of information. In order to add more value to the database we also envisage the addition of scanned contents pages to the catalog entries of the above treatises.

* The acquisition of a number of new competition law titles.

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Where to get hold of us

Visit the Competition Commission online at www.compcom.co.za for more information about the Commission and the Act, as well as rules and amendments to the Act. The Competition Commission website has been revised and relaunched during November 2000 and includes new features such as downloadable forms and electronic forms lodgement. You may also forward enquiries, comments and letters to:

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Erratum

The Competition Commission apologises for the following errors in Competition News March 2001: The company named KWV Limited does not exist. KWV Investments Ltd is also not a subsidiary of Rembrandt Limited.

Towards a free and fair economy for all