

INTRODUCTION TO SPECIAL SECTION ON COMPETITION LAW AND ECONOMICS

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The new competition policy regime ushered in by the Competition Act of 1998 has stimulated a great deal of intellectual activity. We are pleased to present here selected articles reflecting on questions that have been subject to the rigorous analysis and argument that this new regime requires. The separation of the investigation role undertaken by the Competition Commission and the adjudicative one assigned to the Tribunal, coupled with inquisitorial nature of the Tribunal's hearings, means extensive interrogation of the analysis and arguments in competition cases in public sessions.

This issue draws on papers prepared for and presented at the First Annual Conference on Competition Law, Economics and Policy. Held on 21 May 2007, this conference was organised and sponsored by the Competition Commission, the Competition Tribunal and the Mandela Institute, located at the School of Law, University of the Witwatersrand, Johannesburg. The selected papers span the legal and the economic disciplines, reflecting the fact that an important factor in the dynamism of this area of scholarship is the confluence of law and economics. The papers collectively examine a number of the legal tests of economic concepts that are at the heart of the application of competition law, and relate to its main areas: merger evaluation, coordinated conduct (collusion), and abuse of a dominant position.

Mergers

The very essence of a merger, as captured in the Competition Act, is a change in control. However, the application of this concept to a multitude of possible types of transactions raises important questions. Ngcongo, Dingley, Farlam and Marwell examine a situation where a firm extends finance in return for non-voting preference shares amounting to a majority ownership stake. As they note, the position taken by the Tribunal that non-voting preference

shares can confer control under the Competition Act has serious ramifications (and may be out of step with the Commission). It may jeopardise the ability of companies to raise funding by issuing non-voting preference shares, potentially chilling certain other types of transactions and business activity in addition to non-voting preference shares. They ask how – keeping within the Competition Act – regulation can minimise any potential costs of adopting a broad interpretation of the jurisdictional and threshold tests for review of notifiable mergers while avoiding establishing such a stringent framework that too few transactions are reviewed.

Charter addresses the related issue of how to treat cross-holdings and cross-directorships in a merger context. An acquisition of a minority equity stake by one firm in a competitor potentially has unilateral effects in that it can reduce the incentives of the firms to compete. The incentive for a firm to increase prices is greater if some of the customers lost through the price increase move to the competitor firm in which there is a cross-holding. To the extent that some of the value of the business is regained through the cross-holding the incentives to increase prices are greater. Common directors across competing firms raises questions of coordinated effects in that collusion requires an agreement or understanding, monitoring of firm behaviour and the ability to punish where there is deviation or 'cheating' by a market player from the collusive agreement. These issues have been highlighted by the Tribunal in several decisions. Nonetheless, in a given merger the analysis must still be undertaken to assess whether the merger strengthens the likelihood of coordination. Charter reviews these questions with reference to several key cases, including the recent Primedia – NAIL transaction through which Primedia acquired a stake in Kaya FM.

Vertical mergers, by definition, mean an extension of control across different levels of a chain of products or services rather than an

increase in the control by a company of the supply to any single market. The standards by which such mergers should be evaluated have been one of the areas of greatest contestation in South Africa, as internationally. Saggers reviews the balance between pro- and anti-competitive effects required in the evaluation of vertical mergers with reference to both a key ruling of the Competition Tribunal and the European Commission's guidelines on non-horizontal mergers issued in November 2007. He argues that the framework to be used is relatively clear, and that the South African authorities have followed it but that it requires detailed and in-depth analysis which means these cases pose major challenges to the authorities.

Theron highlights the importance of economic evidence through a case study of the demand forecasts for liquid fuel presented in the Sasol-Engen merger which was prohibited by the Competition Tribunal. This provides an important reality check, where the data used for the application of economic tests determine the outcomes, yet there maybe a high level of uncertainty and disagreement about the data, especially in mergers where by its nature the evaluation has a forward-looking dimension.

Coordination

Moodaliyar and Weeks examine the South African Supreme Court of Appeal's decision on price fixing and its directive to the Competition Tribunal to characterise price fixing before determining whether the particular conduct complained of falls within the price fixing provisions of the Competition Act. Moodaliyar and Weeks explore the legal and economic rationale for characterisation, drawing from a number of cases in the United States which transformed the approach to applying a strict *per se* rule to price fixing cases. They analyse various methods and frameworks of characterisation which appear to closely match the directive given by the Supreme Court ruling. They argue that the preferred interpretation of 4(1)(b) of the Act - as well of the business of characterisation that the Tribunal must now do - should tend as much as possible towards a *per se* rule and thus

towards limiting the information to be brought forward.

Abuse of dominance

Unilateral anti-competitive conduct can be distinguished as exclusionary or exploitative, with practices such as price discrimination and refusal to supply being exclusionary while excessive pricing is exploitative. Hawthorne examines the different provisions dealing with possible exclusionary behaviour, along with provisions such as the prohibition on resale price maintenance which applies to all firms whether dominant or not. He argues that the Tribunal's rulings, and the tests set out in the Act itself, do not adopt a consistent standard to the possible exclusion of competitors. Specifically he argues that, where the provisions appear to be *per se* in nature, such as prohibiting a dominant firm from refusing to supply a customer, the Tribunal has adopted an approach which requires demonstrating a protection or extension of market power on the part of the dominant firm. However, in cases where there is a rule of reason test specified in the Act, such as price discrimination, the Tribunal has, in practice, been harsher on the dominant firm and more favourable to small firms in not requiring anti-competitive harm to be demonstrated (although the main ruling on price discrimination was over-turned).

Interestingly, the Tribunal's excessive pricing ruling in *Harmony vs Mittal Steel* also illustrates where exclusionary practices may reinforce the exploitative abuse. The Tribunal identified the arrangements for the exclusive export channel as at the heart of the charging of monopoly prices in the local market in the presence of large net exports. As discussed by Das Nair, the excessive pricing charged by Mittal was part of a complex set of pricing practices, based on segmenting the local market. This, together with Mittal's costs and the large net exports of steel products, formed the basis of the tests that Das Nair argues should be used for excessive pricing. While profits may in theory be an important part of the tests, in practice there are many pitfalls in using this as the basis for the evaluation.