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REPORT

Competition Policy Roundtable

Over 40 delegates drawn from academia, the legal profession and business, attended a three-hour roundtable on South Africa's competition policy, hosted by the Free Market Foundation (FMF) on Thursday, 30 June 2011 at the Sandton Sun Hotel, Johannesburg. The in-depth discussion focused on two aspects:

- is South Africa's competition policy constitutional?
- does it make economic sense?



The roundtable was facilitated by the FMF's Executive Director, **Leon Louw**.

Robert Vivian, Professor of Finance and Insurance, School of Economic and Business Sciences, University of the Witwatersrand, presented his paper (attached) on the *Constitutionality of South Africa's competition policy*.

Professor Vivian concurred with Justice Robert Bork, author of *The antitrust paradox – a policy at war with itself*, who said “the exclusive goal of antitrust adjudication [competition law] is the maximization of consumer welfare”. He pointed out that South Africa's competition policy – and its application – attempts to deal with more than simply “consumer welfare” and argued that for many reasons, the Act is probably unconstitutional.





Johann van Eeden, Senior Economist, Econex, presented his paper (attached), co-authored with Rachel Jafta, on the *Economics of competition policy*.

While Johann argued that there is a role for government in creating an environment conducive to competition, he also queried the multiple objectives of South Africa's policy, which places "the competition authorities in a position of having to weigh up and prioritise potentially conflicting objectives, leading to uncertainty and lobbying by well-organised pressure groups". He said that government laws, regulations and conduct have potentially anti-competitive effects at odds with the protection and coddling of domestic firms.

Comments & thoughts (in no particular order)

The Act

The Act governing competition policy states that the purpose of the Act is:

- To promote the efficiency, adaptability and development of the economy.
- To promote employment and advance the social welfare of South Africans.
- To expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic.
- To ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.
- To promote greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

Constitutionality

- Competition Policy must be sound and consistent with common law and/or the Constitution.
- The Constitution upholds the rule of law, which includes the law of general application, legal certainty and the separation of powers.
- Parliament on a daily basis passes laws that breach these three prerequisites of the rule of law.
- The Competition Commission's ability to apply rulings retroactively (also unconstitutional) further exacerbates uncertainty in the business arena.
- The Constitution is supposed to be supreme.
- If the Competition Commission is taken on appeal to the Constitutional Court, the court is unlikely to look at natural law; will take the letter of Constitution as their guide. Where in the letter of the Constitution are they being unconstitutional? Perhaps in the administrative justice provision? The Constitutional Court is government funded and is likely to support government policy.
- Current argument re constitutionality deals with general principles.
- Need a litigation trust to fund legislative challenges via NGOs rather than via companies that are vulnerable.

Scope of the Act

- Competition policy should focus exclusively on the consumer.
- Competition law effectively says: "compete but don't win".
- There is a disconnect between the policy objectives of government and the jurisdiction of the Competition Commission.
- Some government departments / legislation contradict others regarding competition policy. For example, government tries to promote competition, but in other cases promotes specific companies at the expense of others.
- The new consumer protection act has the same objectives ie to enhance consumer welfare, and an almost identical mandate. This may result in a turf war.

- Different spheres of government should know their responsibilities and objectives compared to other government departments.
- One rationale for competition policy is welfare. In writing ideals of fairness, assumption is that business is selfish. To be profitable in the longer term, businesses must act in a manner that is fair to consumers. Lofty laws are counterproductive.
- Post advertised by Competition Commission for its new division called on those with an LLB or policing degree, 10-15 yrs experience in commercial crime or organised crime, an information network, and some knowledge of competition law. In reality the Competition Commission is pursuing an objective of going after business and increasing its mandate. Will be more active in future to cut down “cartels”. Will be assisting in criminal prosecutions of cartels eg liability of managers, etc.
- Does Act allow Competition Commission to take on SOEs? This would be a good role as SOEs compete unfairly via subsidies and protection.
- South Africa law and mandate of competition authorities does not extend to subsidy question. Competition Commission does engage with other authorities and does deal with, for example, import duties. There are some aspects of competition law that are unclear. But much is perfectly clear.
- The state has certain interests in having, for example, a public broadcaster and a stable local airline. Just because the state treats SOEs differently, does not necessarily mean there is unfair discrimination.

Guilty!

- The Competition Commissioner has told business that if they “co-operate” when under investigation ie if they confess guilt, they will be fined 6% of turnover; if they do not ie if they defend themselves, they will be penalised by being fined 10% of turnover.
- If companies confess to uncompetitive behaviour, no due process, no accuser, no evidence required.
- Can be equated with plea bargains in the US where the innocent often plead guilty to protect themselves from harsh punishment.
- Companies make practical decision re fines, levies and penalties, ie re loss and decide on lesser evil.
- Guilt versus non-guilt is not always clearcut.

The role of business

- Business is partly to blame for excesses of institutions. Institutions justify their existence by expanding their jurisdiction as much as possible. Business does not stand up and say they are going beyond their jurisdiction. Now businesses are finally standing up. In the past few months there have been judgements against excesses of the competition tribunal.
- Since 1994 the business community has allowed other interest groups to dominate resulting in inflexible labour legislation, nationalised mineral rights, and quasi legal courts, etc.
- Business was unable to intervene post 1994, but things have changed – “cometh the hour, cometh the man”.
- How can the private sector engage government and influence policy?
- Competition proceedings are a good forum for interaction, for example, Walmart interacted with interested parties, unions and government. Walmart and private sector input forced process to focus on competition policy. Broadened the debate.
- Business was muzzled on, for example, mineral rights as they feared not getting their licenses renewed. These kinds of concerns will continue to muzzle business.
- Business is beginning to speak against, for example, Julius Malema’s nationalisation proposals. So business will speak out against obvious problems. However, with competition policy, business is made to feel guilty and to some extent agrees with the policy and therefore the guilt. Has anyone done a cost-benefit analysis on competition policy? Are prices in fact reduced? If one can show that competition policy is in fact not working, perhaps business will have the intellectual ammunition

necessary to fight the policy. A CBA should take into account the costs of lawyers, compliance, etc, vs. any benefits.

- The Competition Commission is being used by companies to fight their competitors.
- Political context is important. Come 2014 there will be a new political scenario with new leaders. The private sector / business have become bystanders; they do not engage enough with policy / the political environment. For example, Postbank will be a major threat to commercial banking. It will drive deposits from government. Little robust engagement is taking place re the Postbank Bill. If the Bill becomes law, the market will change and the competitive nature of the banking system will be led by the state not the market.

Economic growth & competitiveness

- South Africa is falling on ALL indices including competitiveness. Were slipping up to 1994, then rose impressively, plateaued in 2007, now collapsing. Direction in which moving more important than ranking.
- South Africa's fall in rankings re competitiveness is frightening. How much is related to competition policy? How much is compounded by excess regulation?
- Government focus has been on protecting certain industries rather than promoting competitiveness. Need more focus on being competitive, especially internationally. Government is beginning to see this. They need to focus on private sector and jobs versus decent jobs. Some positive trends.
- Don't need government to tell business to be competitive; business is naturally competitive.
- If environment punishes dysfunctional companies and rewards good companies, would have good companies. If environment encourages abuse or monopolies, companies will maximise their welfare and act accordingly ie to requirements of environment.

Is competition policy necessary?

- There is still a place for competition policy even if its application is imperfect. Competition policy should focus on price and product offering, and leave other issues to other sectors of government. It should focus on consumers and increasing the size of the pie, not on who gets what slice.
- No need for competition policy especially given globalisation. Unless wish to prevent competition from outside. Competition Commission is always reactive not proactive. For example, government should abolish exchange controls and encourage lower prices by external competition.
- Import controls and taxes are not the responsibility of the competition authorities. More a focus of DTI and others. Cannot view all industries as equal re legacy of apartheid. Some industries were protected in the past, particularly government industries. Competition Commission has a role to play in ensuring competition here. Institutional aspects of legacy make competition difficult. Also in industries where a lot of investment is needed.
- There is a strong case to abolish competition policy in toto. Dominic Armenian wrote about this in US. Laws reduce rather than increase competition. No one person / body can determine what is competitive and what prices should be. Cheap bread should be applauded, not punished. We are creating poverty through good intentions. People in parliament believe it is their role to produce legislation. Boast about number of laws passed. If trying to discover what law should be, should review existing legislation. What is causing harm. Review, rewrite, abolish existing legislation. South Africa is overregulated, one reason we are falling on indices. Labour laws prevent people from getting jobs. Businessmen afraid to do business because don't know when might be thought to be doing something wrong. Cartels usually institute higher prices. Open competition will take care of them. Competition policy should be reviewed / abolished.
- Multinational company: Is South Africa's competition policy linked to declining rates of competitiveness? Are South Africa's policies aligned to international policies? If yes, are we applying them correctly? Don't abolish competition policy. Rather regulate the Competition Commission and ombud to respect the law and apply the law.
- Government can best serve business and the economy by getting out of the way. Excessive regulation makes business difficult. People are spending money and time on compliance rather than

projects that will generate growth and jobs. The Competition Commission should look into the labour laws which make business uncompetitive.

Other

- Why is the Competition Commission interested in bread? Everyone bakes bread. Don't need competition policy for bread. Entry is easy, competition conspicuous, multiple providers. In the Premier Foods case, they were accused of charging too little, the same and too much.
- An anomaly: Cartels result in lower prices, for example, cement and eggs.

Closing remarks

- Johan van Eeden: There is a place for competition policy and its practice. The main question is the weightings given to concerns. The policy should increase competitiveness of industries, focus on price, etc. Government must align different arms of government and focus on objectives.
- Robert Vivian: Competition Policy should have a single goal: consumer welfare.



Delegates

Vivian Atud	Free Market Foundation
Riedwaan Bassadien	Microsoft South Africa
Brian Benfield	Free Market Foundation
Richard Caldeira	Brooke Patrick Publications
Derushka Chetty	Edward Nathan Sonnenbergs
Paul Coetser	Werksmans Attorneys
Eustace Davie	Free Market Foundation
Gail Day	Free Market Foundation
Paul Dent	Area Blue Capital
Carolyn Easton	Nedbank Limited
John Endres	Friedrich Naumann Foundation
Greta Engelbrecht	Group One Sandown Village
Joan Evans	Free Market Foundation
Marie Girard	Steinhoff International Group Services
Wade Graaff	Edward Nathan Sonnenbergs Inc
Wiri Gumbie	Absa Bank Limited
Ian Huntly	Rifle Shot Performance Holdings
Layla Jeevanantham	The South African Breweries Limited
Paul Joubert	Solidarity
Andre Landman	Competex
Andries le Grange	Cliffe Dekker Hofmeyr Inc
Pierre le Roux	Nelson Mandela Metropolitan University
Piet le Roux	Solidarity
Bryan Lever	Bryan Lever Studios
Leon Louw	Free Market Foundation
Terry Markman	Free Market Foundation
Dante Mashile	ABSA Group
Aziza Mdee	Edward Nathan Sonnenbergs
Nancy Moloto	Constitutional Court
Zenith Moloto	Step Confidants Clothing Shop
Malebo Moloto	University of Johannesburg
Lesley Morphet	Webber Webtzel
Hamlet Morule	Microsoft South Africa
Rashika Panday	Nedbank Ltd
Fundiswa Pukwana	General Motors South Africa
Rick Raubenheimer	Megaplex cc
Tebogo Sewapa	Law Review Project
Bongane Siabnyoni	Edward Nathan Sonnenbergs Inc
Amy van Buuren	Edward Nathan Sonnenbergs Inc
Kirsty van den Bergh	Edward Nathan Sonnenbergs Inc
Johann van Eeden	Econex
Robert Vivian	University of the Witwatersrand
Devon Windvogel	University KwaZulu-Natal