



competitiontribunal  
south africa

# Competition Policy in South Africa

Norman Manoim  
Competition Tribunal



competitiontribunal  
south africa

# Historical Background

## SA Economy

- High levels of concentration and conglomeration
- Inequality in distribution of economic power
- State ownership and policies of import substitution and market controls
- Isolation from world markets

# Maintenance and Promotion of Competition Act 1979

## Established the Competition Board

- Investigated restrictive practices, acquisitions and monopoly situations
- Advisory role - made recommendations to Minister

## Shortcomings of the Board

- Not independent from Government
- Inefficient and Ineffective
- Few results
- No prosecutions



competitiontribunal  
south africa

## Weaknesses of Old Act

- Technical flaws prevented effective application of Competition Law
- Lacked pre-merger notification
- Weak prohibitions against anti-competitive conduct
- No provisions dealing with vertical or conglomerate combinations
- Conferred inadequate powers on Competition Board



competitiontribunal  
south africa

## Developing new competition policy

- Need for Reform to remedy economic distortions and inadequacies of existing legislation
- Department of Trade and Industry
  - 3 year consultative process
  - *Proposed Guidelines for Competition Policy*
- NEDLAC commenced negotiations with Govt., Business and Labour
- A new Act was adopted in 1998 repealing the Maintenance and Promotion of Competition Act

# The Competition Act 1998

## Objectives:

- Economic efficiency, adaptability and development
- Competitive prices and product choices for consumers
- Promotion of Employment and advancement of Social and Economic welfare
- International competitiveness
- Equitable opportunities for Small and Medium Enterprises to participate in the economy
- Increasing the ownership stakes of historically disadvantaged persons



competitiontribunal  
south africa

# The Competition Authorities

Three institutions created to achieve objectives viz.

- The Competition Commission
- The Competition Tribunal
- The Competition Appeal Court

Institutional separation of investigative and adjudicative functions

Independent, Impartial and subject only to the Constitution and the Law

Independent of each other



competitiontribunal  
south africa

# The Competition Authorities

FIRMS / COMPLAINANTS

→  
**Appeal and review of  
Tribunal decisions**

- 
- Appeal of Commission decision on exemptions and intermediate mergers
  - Direct complaint when Commission has non-referred
  - Application of interim relief

→  
**Complaints  
Merger notifications  
Exemption applications**

**Appeal Court**

←  
**Appeal of  
Tribunal  
decisions**

**Tribunal**

←  
**Referral of  
complaints and  
large mergers**

**Commission**



competitiontribunal  
south africa

# The Competition Commission

Investigate:

- Proposed mergers and acquisitions
- Restrictive practices:
  - Horizontal and Vertical
  - Complaints
    - Initiated by Competition Commission itself and/or
    - Referred to by private complainants
- Applications for Exemption

Where applicable, make Recommendations to the Tribunal i.r.o above



competitiontribunal  
south africa

# The Competition Tribunal

Independent and impartial adjudication of:

- Large mergers
- Allegations of restrictive practices, referred by:
  - Competition Commission and/or
  - Complainants
- Appeals of decisions of the Competition Commission, w.r.t.
  - intermediate mergers
  - Exemptions



competitiontribunal  
south africa

# The Competition Tribunal

## LARGE MERGERS

1999 – March 2004

- Approved without conditions = 189
- Approved with conditions = 20
- Prohibitions = 4

Total = 213



competitiontribunal  
south africa

# The Competition Tribunal

## RESTRICTIVE PRACTICE CASES

- 27 Complaints referred by Commission – 16 decided
- 28 direct referrals from complainants – none decided
- 41 interim relief applications – 16 decided

Total cases = 96

Total decided = 32



competitiontribunal  
south africa

# The Competition Appeal Court

- Review any decision of the Tribunal
- Consider an appeal of any final or interlocutory decision of the Tribunal
- May confirm, or set aside any decision of Tribunal
- Remit any matter to Tribunal for further hearing



competitiontribunal  
south africa

# Prohibited Practices

## Restrictive Horizontal Practices

- Per Se and Rule of Reason prohibitions
- General prohibition
  - “substantial lessening or prevention of competition in a market”
  - Defence – technological efficiencies or other pro-competitive gains
- Price fixing, market allocation and collusive tendering



competitiontribunal  
south africa

# Prohibited Practices

## Restrictive Vertical Practices

- Per se and Rule of Reason prohibition
- General prohibition
- Minimum resale price maintenance prohibited



competitiontribunal  
south africa

# Prohibited Practices

## Abuse of a dominant position

- Presumption of dominance
- Exclusionary and Exploitative practices
- Price discrimination
- Per se and Rule of Reason prohibitions
- Defences



competitiontribunal  
south africa

# Merger control

- Compulsory notification of all Intermediate and Large Mergers
- Intermediate mergers decided by Commission but parties may appeal to Tribunal
- Commission refers all Large Mergers to Tribunal with recommendations
- Tribunal considers merger and must:
  - Unconditionally Approve the merger; or
  - Approve the merger subject to conditions; or
  - Prohibit the merger.



competitiontribunal  
south africa

# Evaluation of Mergers

“whether or not a merger is likely to substantially prevent or lessen competition in the market”

Consideration of:

- Substantive criteria
- Public interest factors
- Efficiency defence

# Consideration of mergers: Competition Factors

- Actual and potential level of import competition in the market
- Ease of entry incl. Tariff and regulatory barriers
- Levels of concentration and history of collusion in market
- Degree of countervailing power in market
- Dynamic characteristics such as growth, innovation and product differentiation in market
- Nature and extent of vertical integration in market
- Whether the business or part of the business of one of the merging firms has failed or is likely to fail
- Whether the merger will result in the removal of an effective competitor

# Consideration of Mergers: Public Interest factors

## Effect that the merger will have on:

- A particular industrial sector or region;
- Employment;
- The ability of small businesses or firms controlled by previously disadvantaged persons to become competitive; and
- The ability of national industries to compete in international markets.

# Consideration of Mergers: Efficiency Defence

- Pro-competitive gains offsetting Anti-competitive effects



competitiontribunal  
south africa

# Challenges

- Constitutional
- Political