MERGER CONTROL IN SOUTH AFRICA:
Some thoughts from an overseas perspective
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My personal interest in competition law in South Africa can be traced to 2005. As a member of the team advising the merging parties, I observed at close quarters the Competition Tribunal’s (‘Tribunal’) review of the proposed merger of the liquid fuels businesses of Sasol and Engen. Since then, I have continued to observe developments with interest, albeit from a distance.

The purpose of this short contribution is to provide some thoughts, from the perspective of an English solicitor practising European Union (‘EU’) and English competition law in Brussels, on the enforcement of competition law in South Africa. To some extent it is coloured by my observations and experiences in Sasol/Engen. Whilst it focuses on merger proceedings before the Tribunal, one cannot ignore that there is a vibrant and broad array of competition enforcement in South Africa before multiple bodies and courts.

A young regime, but one maturing fast and internationally

Competition law in South Africa is undoubtedly a young discipline: the Competition Act (‘Act’) dates only from 1998. Nevertheless, substantial and rapid progress has been made and South Africa is a ‘player’ internationally, including in the International Competition Network. President Mbeki has reaffirmed his commitment to strengthening competition enforcement. It should not be forgotten that more developed economies and competition regimes are still also ‘finding their way’. In the United Kingdom, effective cartel enforcement only really started in the late 1990s, whilst the European Commission is still grappling with issues such as exclusionary and exploitative abuses (notably, rebates) and private sector enforcement.

The Tribunal handles extremely complex work: Sasol/Engen (merger) and Harmony/Mittal (excessive pricing) must be amongst the most difficult cases of their type reviewed anywhere in the world in recent times. As the Tribunal noted in Harmony/Mittal, South Africa is developing its own competition jurisprudence without the ‘slavish adoption’ of international precedents. Indeed, the Tribunal was not above criticising the approach of its European peers.1
Division of responsibility between the Commission and the Tribunal

The Act divides merger reviews between the Commission (which takes the final decision over small and intermediate mergers) and the Tribunal (which takes the final decision over large mergers). Does this institutional split make best use of investigative resources and does it promote efficient, accurate and timely decision-making?

Internationally, two stage merger reviews are not uncommon. What appears to distinguish South Africa is that all large mergers must be reviewed by the Tribunal, which cannot review small and intermediate mergers that raise competition concerns, despite probably having better procedures for examining them. The Tribunal has to review many mergers that are completely unproblematic from a competition or public interest point of view, causing delay and adding to its workload.

Might it not be better for the Tribunal to review only mergers that, after a first review, prima facie raise competition or public interest concerns? This does not mean that the Tribunal would not still receive mergers that then clears unconditionally or which are not significant to the economy as a whole - the UK Competition Commission recently complained that it was reviewing too many such mergers - but it would enable the Tribunal to focus on mergers that really matter.

Remedies before the Tribunal

Remedies are an important part of merger review. Indeed, the European Commission recently published a study on their effectiveness and is presently undertaking public consultation on the procedures for offering remedies.

An unsatisfactory element of the Tribunal's review of Sasoll/Engen was its treatment of the remedies offered by the merging parties. The procedure adopted by the Tribunal was not, with the greatest respect, fair to the merging parties. Ironically, one of the Tribunal's reasons for rejecting their remedies proposal was the need for procedural fairness to the Commission and the interveners!

In Sasoll/Engen, the Commission's proposed remedy was plainly inadequate and the merging parties were directed to propose remedies with their final Heads of Arguments. This they did, the main offer being to supply fuel to competitors in the inland area (the complaint being one of a danger of foreclosure), despite not then knowing what significant lessening of competition ('SLC'), if any, the Tribunal would, or was minded to, find in its assessment of the likely effects of the proposed merger on competition. In the UK and the EU, this would be considered a procedural irregularity sufficient to overturn a merger prohibition. The proposal was based very closely on a variety of international precedent from the UK, EU, Australia and Canada, amongst others.

Despite the Tribunal being an inquisitorial body, in its final decision it almost summarily rejected the proffered remedies. It criticised the merging parties for not offering evidence in support for offering remedies that were behavioural in nature. This was despite the fact that a supply obligation was the usual means of remedying a vertical foreclosure concern. Indeed, in a decision adopted after the Tribunal had heard evidence, but before it handed down its decision, the European Commission accepted long-term supply conditions to remedy an equally difficult vertical merger in the Hungarian energy sector. It did so again shortly after in another merger case raising vertical foreclosure concerns in the Danish energy sector.

It is not clear whether Sasoll/Engen reflected the Tribunal's normal practice in considering remedies. Nevertheless, it is respectfully submitted that - as in other jurisdictions - the Tribunal should consider remedies in depth, and after having communicated to the merging parties its concerns. This need not be after making a definitive finding of an SLC; in both the UK and the EU, remedies must be offered before a definitive substantive finding is made, but after the parties have received a clear statement of the agency's concerns. The Tribunal has itself on occasion adopted a 'two stage' approach, notably in Harmony/Mittal Steel.

Evidence before the Tribunal, particularly economic evidence

My introduction, as it were, to South African competition law was Sasoll/Engen. By any standard, this was a major merger, equivalent to a 'Phase II' case before the European Commission or a merger that the U.S. antitrust agencies would challenge in the Federal Courts.

David Lewis of the Tribunal recently, referring to Medi-Clinic/Afrox and Sasoll/Engen, mentioned that he would like to find ways of reducing the scale and duration of hearings in contested mergers. He also suggested a greater focus on the economics of competition investigation and adjudication, including the gathering of appropriate evidence. He also recognised the important role played by interveners (despite 'their inevitably complex motives') in uncovering invaluable evidence.

The following paragraphs offer some thoughts on these topics.

Have interveners taken charge of contested proceedings?

As demonstrated by Harmony/Mittal Steel, private action will always have a role to play in any system of competition enforcement, for example in the field of anti-competitive agreements and abusive behaviour by dominant undertakings. Indeed, in the United States, it is widely promoted, not least due to the prospect of treble damages.

Nevertheless, merger control is essentially a matter of public policy enforcement, even in the United States where to have standing, private parties must show that they would be injured by the anti-competitive effects of a merger. They also have no formal standing in proceedings brought by the agencies to challenge a merger. In Europe, competitors are involved in merger investigations by the European Commission - typically as 'complainants'. However, they do not 'drive' the investigation.

In South Africa, third parties would appear to have a very important role, beyond that of merely providing evidence for evaluation by the finders of fact and decision-makers.

In Sasoll/Engen, in addition to the merging parties and the Commission, five intervening parties were also present and represented by counsel: no fewer than 18 counsel (including six of South Africa’s leading silks) and six firms of attorneys were involved. Over two million pages of documentary evidence were disclosed. Some of those documents were to play an important role in the Tribunal’s decision. The key issue - of vertical foreclosure - was identified and framed by the interveners. One, Chevron, through its expert witness, identified a somewhat novel theory of horizontal effects that had not been identified by any other party.

In Sasoll/Engen, it was noticeable that - despite the best efforts of those representing the Commission and their supposedly inquisitorial nature - the proceedings had essentially become adversarial in nature,
with the merging parties on one side and the various interveners, collectively, on the other side. Telkom/Business Connexion may provide a further example of this.

It will no doubt be difficult for the Tribunal to achieve its goal of reducing the extent of contested merger hearings. For it to do so, it would seem to be necessary for the Tribunal to exercise substantial case management powers, for example to determine which issues it wishes to examine, what evidence it wishes to hear and what evidence must be given in writing, and in full. For example, in Sasol/Engen, much time was devoted to witnesses’ evidence in chief. Witness statements were often drafted as ‘X will say...’ and did not set out in full all evidence to be provided by the witness. In English civil litigation, it is now often the case that no oral evidence in chief is given at all, at least by witnesses of fact. It is all done in writing. This saves time and also allows the court to have read all the evidence in chief before the hearing starts, allowing the judge to focus immediately on the key points.

In addition, the Commission will need to increase its capabilities, such that (as with its U.S. counterparts) it leads cases and calls upon interveners simply to provide evidence in support. There is some evidence that this is happening.

The value of quasi-adversarial proceedings

Although nominally an inquisitorial body, the Tribunal hears and evaluates the evidence presented to it, much as a judge would do in civil or criminal proceedings. Contested mergers before the Tribunal appear to have been run very much like private litigation: the merging parties, the interveners and the Commission are represented by counsel. The parties are entitled to, and do, require their opponents to produce internal documents. (In Sasol/Engen, up to two million pages were apparently discovered and heavy reliance was placed by both the interveners and the Tribunal itself upon many of the merging parties’ internal documents.) Witnesses, whether expert or of fact, give oral evidence and are subject to cross-examination.

As David Lewis notes, third parties have complex motives. Competitors, in particular, may advocate that a merger be prohibited not because it is anti-competitive, but because they fear the merged entity will be a stronger and more effective competitor. They may thus present these concerns in the guise of an anti-competitive effects analysis, however contrived.

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One of the major failings of the E.U. system of merger control is its lack of scrutiny; in the words of former General Electric CEO Jack Welch, who was reflecting on the prohibition of GE’s proposed merger with Honeywell, ‘the case team and the Commissioner, after acting as investigator and prosecutor for several months, became the judge and the jury...[deciding] on their own proposal’. Only after the Commission takes it decision can the merging parties get their day in court, and even then that is not what the common law lawyer would recognise as a full retrial on the merits. However, if they (voluntarily) offer remedies to obtain a clearance decision, they cannot make a court challenge at all.

A related failure (also observed by Jack Welch) is the heavy reliance placed upon information provided by customers and competitors, which may not be either reliable or objective, and which cannot readily be challenged. As the US courts have observed, unsubstantiated customer apprehensions do not substitute for hard evidence; what customers do is more important than what they say and subjective customer testimony is the least reliable evidence.

Some of the more recent merger cases that the European Commission has lost before the EU courts have involved its heavy reliance on economic evidence provided by either the merging parties (Sony/BMG) or third parties, normally competitors (Airtours, Tetra Laval, General Electric) that were not adequately reviewed and challenged through the rigours of cross-examination. In Impala (an appeal against the clearance of the Sony/BMG merger), the Commission was taken to task by the Court of First Instance (CFI) for relying uncritically on economic evidence provided by the merging parties: it had failed to verify its accuracy, relevance, objectiveness and representativeness.

The hostile takeover of Peoplesoft by Oracle is a good example of the value of evidence being opened up to detailed scrutiny, ideally through cross-examination. Initially, relying heavily on data and analyses from Peoplesoft (in effect, a complainant), the Commission had had significant competition concerns. Subsequently, in the parallel US proceedings, the evidence of competitors and customers was scrutinised in great detail by the US District Court, and found to be wanting. Using the testimony in those – adversarial – proceedings, plus new and more detailed econometric analyses than those provided by Peoplesoft, the European Commission was able to resolve its earlier concerns and approve the merger unconditionally.

To return to South Africa: before the Tribunal, all evidence is tested through cross-examination of witnesses. Whilst time-consuming, does enable the decision-maker to come to an informed view on which witnesses are credible and whether their evidence is soundly based in fact and, if relevant, economic principle.

Sasol/Engen involved 19 (often long) days of hearings and two further days of legal argument. Seventeen witnesses gave oral testimony and some were subject to prolonged and sustained cross-examination. A further 15 gave written evidence. No fewer than eleven economists or statisticians gave evidence of one kind or another. From the cut and thrust of argument, debate and cross-examination, the evidence of these witnesses was tested often in minute detail. None of those present will forget the debates about how long it takes to drive a petrol tanker from Durban to Gauteng and back, about the expected rates of demand growth for petrol and diesel, and about the process of ‘swinging the spade’ (opening a pipeline valve).

Out of this process, the Tribunal reached its decision that the Sasol/Engen merger would be anti-competitive. The point is not whether it correctly concluded that a vertical merger would lead to a nationwide horizontal ‘cartel’, upon which this author has his own views. Rather, the fundamental point is that the process was well suited to testing all of the evidence and allowing its assessment. For that, the South African process is to be commended.
Expert evidence, especially by economists

Competition law is, by definition, applied in the context of the market economy. It is, therefore, economic law. In Europe, and beyond, we have seen an increasing use of economic analysis in the field of merger control, and indeed in competition law generally. This includes South Africa, where nearly every merger case of some significance – whether before the Commission and/or the Tribunal – will include a presentation by, or evidence from, one or several economists. Initially, these economists were often from overseas; perhaps this reflected a lack of South African antitrust economists? That has now, I believe, changed, with growing domestic expertise in the agencies (David Lewis himself being an economist), the consultancies and the universities.

In turn, this development has obliged lawyers active in the competition field to become at least conversant with the basic principles of competition economics. (In the not-so-distant past, competition law was applied mainly by lawyers with more emphasis on the ‘law’ than the ‘economic’ part of the concept of ‘economic law’.)

Merger control is essentially forward looking: as the European Court of Justice has held, it involves a prospective analysis, not the examination of past events, and a prediction of future events which are more or less likely and ascertaining which various chains of cause and effect is the most likely. That evidence can include economic studies or internal documents, but must be convincing: it must also be cogent, in that it reflects both economic theory and reality in the market place.

Evidence from economic experts is an essential part of this inquiry. Using principles of economic and econometric theory and empirical data, they analyse past events and model future events. They can then provide evidence on the likely impact of a merger. Nevertheless, as explained above, it must be capable of scrutiny and challenge, as it was in Sasol/Engen and Harmony/Mittal Steel. Economic analysis is however only one part of the overall analytical process, as the Tribunal itself stated in both cases. The facts remain important, even predominant. That said, even in this, economic thinking has a role to play, for example in developing the following key questions: Are the parties close competitors? What would happen in the market as a whole if only one competitor were to be foreclosed? What alternatives do customers have if prices were to rise? What alternative sources of supply do customers have? How would competitors react if the merged entity put up prices or refused to supply them?

Conclusions

South African competition law is young. It is growing up in a time of rapid change, as can be seen particularly from the increased reliance upon economic analysis and evidence. Nevertheless, in a very short space of time – eight years or so – South Africa has built a competition law structure that, in time, has the capability to stand scrutiny with the best. In the merger field, it has dealt with many complex cases and its jurisprudence is developing in a way that will surely have influence internationally.

The great advantage of the Tribunal is that it is constituted much like a court, and not simply an administrative agency that is at once investigator, prosecutor, judge and jury. This has much to commend, particularly as compared to the civil law-inspired administrative system used in the EU and many of its Member States, including both its main common law jurisdictions. This is also its weakness, particularly if the Commission were to continue to suffer from under-funding and under-staffing, and thus continue to need to ‘out-source’ its prosecutorial role to third parties, particularly competitors that might have an axe to grind or a commercial gain to exploit.

Endnotes

1. Harmony/Mittal Steel (27 March 2007) at paras 137 and 192, Tribunal.
2. European Commission, Merger Remedies Study (October 2005).
4. Interbrew v Competition Commission (23 May 2001), High Court.
5. Case T-310/01 Schneider Electric v European Commission (No. 1) (22 October 2002), CFI.
6. Sasol/Engen (23 February 2006), at paras 551 to 574.
9. Harmony/Mittal Steel, at paras 213 et seq.
12. Case T-282/02 Cementbouw (23 February 2006), CFI.
15. Case COMP/M.3216 Oracle/Peoplesoft (26 October 2004), European Commission.
17. Sasol/Engen, supra, note 7, paras 477 et seq.
19. Case C-12/03 Commission v Tetra Laval (15 February 2005), ECJ.
20. Case T-210/01 General Electric (14 December 2005), CFI.