Unlocking the Power of Collectivity to See the Future in a New Light

20 August 2013
THE COMPETITION ACT

Horizontal Restrictive Practices (competitors)

Vertical Restrictive Practices (customers & suppliers)

Abuse of Dominance

Merger Control
COMPETITOR INTERACTIONS

Prohibitions on restrictive horizontal practices are set out in section 4 of the Competition Act, which provides that:

“(1) An agreement between, or concerted practice by firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice or decision can prove that …

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods; or

(iii) Collusive tendering”
COMPETITOR INTERACTIONS (…CONT’)

Horizontal Restrictive Practices

- Per se prohibited (Hardcore)
  - Fixing of prices or trading conditions
  - Market allocation
  - Bid rigging

‘Rule of reason’
COMPETITOR INTERACTIONS: \textit{PER SE} CONTRAVENTIONS

- Sow what type of agreement/arrangement/conduct is \textit{per se} unlawful?
  
  - no plausible justification
  
  - always or almost always tend to restrict competition and decrease output \textit{[BMI U.S. 1979]}
  
  - remove incentive to compete
  
  - likely to be harmful to competition

  (price fixing, market allocation, bid rigging)

- Application of \textit{per se} standard not always clear
COMPETITOR INTERACTIONS: PRICE FIXING

- So what elements need to be established to prove a 4(1)(b)(i) contravention?
  - Proof of the existence of an agreement, concerted practice or decision by an association of firms in horizontal relationship [NETSTAR CAC 2011]
  - Proof that the agreement, concerted practice or decision by an association of firms involves the direct or indirect fixing of prices

Is that all?
APPLICATION OF SECTION 4

In ANSAC / BOTASH [2005], the Supreme Court of Appeal found that –

- you can only establish whether the form of conduct complained of falls within the ambit of section 4 by first construing the scope of the prohibition

- *characterisation* must feature in the adjudication of alleged cartel conduct
COMPETITION COMMISSION’S APPROACH TO COMPETITOR INTERACTIONS

BHF, HASA, SAMA [2004]

- Competition Commission found the associations to have engaged in price fixing, in contravention of section 4(1)(b)(i) as a consequence of having determined/recommending and publishing tariffs
COMMISSION’S APPROACH TO COMPETITOR INTERACTIONS (…CONT’)

*BHF, HASA, SAMA [2004]*

Arguments advanced by some of the respondents:

- only a recommended tariff, no obligation to comply
- “in keeping with business of provision of healthcare services in relation to ethical standards”
- facilitates development of new hospitals (by giving potential financiers basis for calculating risk)
- facilitates expeditious settlement of claims and complaints
APPLYING SECTION 4

- What does it mean to characterise conduct/arrangement/agreement?

- What methods of characterisation can be used in by SA having regard to structure of section 4?
PER SE V RULE OF REASON APPROACH

- Method proposed in *Massachusetts v Board of Optometry* U.S, 1988, 604
  - is the restraint “inherently suspect” (e.g. does the practice involve price fixing or market division? If no, apply rule of reason test
  - is there a plausible efficiency justification for the practice? If no, per se unlawful conduct
  - if yes, assess whether justification is really valid
  - if justification is valid, apply rule of reason test
PER SE V RULE OF REASON APPROACH (…CONT’)

- **Arizona v Maricopa County Medical Society [1982]**
  - by agreement with member doctors, foundation established maximum membership fees (set out in a fee schedule) that doctors could claim for health services provided to members of specified insurance plans
  - Supreme Court found foundation and members (i.e. the joint venture) guilty of price fixing
  - found per se rule is not rendered inapplicable on basis that there is a pro-competitive justification for arrangement
Respondents argued that:

- Schedule impose a meaningful limit of what the doctors charge

- Enable insurers to calculate the risk they underwrite – therefore serves as an effective cost-containment mechanism that has saved patients and insurers millions

- Not a naked restraint
COMPETITOR COLLABORATIONS : POTENTIAL PRO-COMPETITIVE BENEFITS

FTC Guidelines for Collaborations Among Competitors [2000]

- A competitor collaboration (including through a professional or trade association) may -
  - enable participants to offer goods and services that are cheaper, more valuable to consumers, or brought to market faster;
  - allow its participants to better use existing assets, or may provide incentives for them to make output-enhancing investments
COMMISSION’S APPROACH TO COMPETITOR INTERACTIONS (...CONT’)

South African Orthopedic and Prosthetic Association (SAOPA) [2007]

- Argued:
  - tariff facilitated expeditious settlement of complaints
  - some medical aid schemes refused to reimburse SAOPA members unless they complied with the rates prescribed in the tariff
  - Some members did not follow the tariff
COMMISSION’S APPROACH TO COMPETITOR INTERACTIONS (…CONT’)

South African Orthopedic and Prosthetic Association (SAOPA) [2007]

- Competition Commission agreed that:
  - reference price list should exist in relation to orthopedic and prosthetic services
  - reference to which medical schemes can individually negotiate and determine benefit levels and providers can individually determine fees charged to patients

- Reference price list to be set by independent third party
A DIFFERENT APPROACH TO COMPETITOR INTERACTIONS

- Bright line distinctions between *per se* and rule of reason offences no longer appropriate
- Assess facts of each case
- Consider only nature of restraint but also *nature of market*
A DIFFERENT APPROACH TO COMPETITOR INTERACTIONS

- EC Guidelines on Horizontal Cooperation Agreements [2010]
  - Companies can be encouraged by government authorities to enter into horizontal cooperation agreements to attain a public objective – competition rules continue to apply
  - Agreements do not restrict competition if legislation creates a legal framework which precludes scope for anti-competitive conduct
  - Undertakings are shielded from consequences of infringement if national legislation requires them to engage in anti-competitive conduct
A DIFFERENT APPROACH TO COMPETITOR INTERACTIONS

- What assessment is the Commission applying post ANSAC/BOTASH?

- What should we read into the initiation of a Market Inquiry?
THANK YOU
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