TALK FOR NEOTEL/MAIL AND GUARDIAN BREAKFAST – 15TH JULY 2009

I am in the last few weeks of the end of my second and last term as chairman of the Competition Tribunal. The ten year period of these two five year terms coincides with the coming into existence of the Competition Act of 1998 and of the institutions, notably the Competition Commission and the Competition Tribunal established by that piece of legislation. I have been asked to reflect on the experience of the past 10 years, to say something about the state of competition in South Africa, and to conclude with reflections on the state of competition in the telecommunications market in South Africa.

There can be little doubt that the institutions set up to administer the Competition Act are successfully carrying out their mandate. That is to say, we – and I mean the CC and the CT collectively – are conducting an effective merger review process; we are respectively investigating, prosecuting and adjudicating anti-competitive vertical agreements and abuses perpetrated by dominant firms; we are investigating, prosecuting and adjudicating cartels; and, possibly most important, we have become an effective voice, an advocate, for competition in both the public and private sectors. We have embedded a culture of competition in South Africa. Where the private sector is concerned this claim is borne out by the place that we have assumed in corporate life, in corporate decision making. While I think that we are not necessarily loved by the business community, both our resolve and professionalism are respected.

Where the public sector is concerned, possibly the strongest measure of the government's regard for us is its willingness to strengthen both our resource base and our powers, with the strong support of a broader public who appear to believe that those who contravene competition rules should be punished even more severely than the financial and reputational damage that our remedies already cause. Moreover the Commission is regularly consulted by government regarding the impact of planned policy or legislation on competition and when a government department or other public body is asked to appear before us it treats our proceedings with the same degree of respect and seriousness as would any private litigant or witness. It is a

matter of some considerable pride – in our government, in our corporate sector, in our competition authorities - that never once in the ten years of our existence have I had a phone call from a CEO or a government minister or anybody for that matter, who has attempted in any way to influence a decision of the tribunal outside of the formal proceedings of the Tribunal. For me this is the hallmark of a successful regulatory body. Only once – and interestingly it came from a player in the ICT industry – have we ever been accused of bias, but that frankly came from a source whose criticism only served to enhance our reputation for probity and even-handedness.

This is of course not to claim that we could not do better and I will try and indicate one important area where our performance needs to improve. And it is definitely not to claim that all of our decisions are correct. No prosecutorial agency or adjudicative agency could ever be right all of the time but I believe that the checks and balances provided by the two independent centres of decision making that are the Commission and the Tribunal ensure that we get it right as frequently as possible. What I do know for certain is that our peers in the very active international community of competition practitioners and scholars regard both institutions as leading world class competition authorities.

So with all this, how do I assess the state of competition in South Africa? The answer is nevertheless 'with some considerable concern'. We, the competition authorities, have inherited an economy that is not only characterised by high levels of market concentration, but, as is becoming clearer every day, by widespread anti-competitive conduct, specifically including collusion, the most egregious of all violations of competition rules. And our experience is that it takes a long time to rid ourselves of this legacy.

But we have made some considerable impact on the state of competition. Much of the first 5 years of our existence was spent focused on merger review. This was at a time when South Africa was opening up to the international market both as a result of the lifting of sanctions and of the liberalisation of both international and domestic trade policy. One important response of the private sector to this re-orientation of economic policy took the form of a rash mergers and acquisitions. I have little doubt that certain of our decisions forestalled even greater concentration of key domestic markets,

and as our presence began to make itself felt in the area of merger review, important mergers that, under a different regime would have gone through unhindered, were not even attempted. However nothing that we do in the area of merger review will turn the clock back. That is to say we are always going to have to grapple with an economy that is unusually concentrated because of a variety of historical factors, including a policy armoury that relied on high levels of state ownership, high levels of politically inspired intervention and a marked lack of interest in competition principles.

And so too with anti-competitive conduct. Abuse of dominance and vertical restrictive practices are always extremely difficult to prosecute but there have been a number of successful prosecutions covering important forms of anti-competitive conduct – loyalty discounts, forms of exclusive dealing, margin squeezes, resale price maintenance, key retail merchandising practices, excessive pricing have all come in for scrutiny and a jurisprudence has been developed which will provide a degree of certainty in a world in which each case is heavily influenced by its own factual matrix. Of course, the prevalence of abuse of dominance cases in South Africa is significantly exacerbated by state ownership and erstwhile state ownership, where SOE's were, through earlier episodes of privatisation, simply converted from public to private monopolies. It is no coincidence that companies like SAA, Sasol, Mittal and former agricultural co-operatives feature heavily in our abuse of dominance jurisprudence just as I do not doubt that companies like Telkom and Escom would have featured had jurisprudential issues been successfully clarified. For these reasons alone, the periodic prosecution of abuse of dominance cases will remain a regular feature of competition enforcement in our country.

But it is the depth and breadth of cartel conduct that is most striking. Although the figures are not generally public and so impossible to verify with absolute accuracy, it is widely held that, at present, the South African competition authorities have on their files more leniency or immunity applications in respect of cartel conduct than any other competition regime in the world. There are a variety of reasons for this: firstly, there is a bill that has passed through all the parliamentary hurdles that will criminalise cartel conduct and even though we are not convinced that this will necessarily ease our cartel enforcement burden, the fear of being caught up in a criminal

prosecution has undoubtedly concentrated the minds of guilty executives. Secondly, the growing reputation of the commission has undoubtedly persuaded executives that the chances of an illegal conspiracy being busted are high and so their best bet is in 'fessing up. But thirdly, it has to be explained by the incontrovertible fact that the level of cartel activity is unusually high in South Africa. In the space of the last 12 months we have dealt with the full gamut of cartel conduct – price fixing, market allocation, bid rigging – in industries ranging from bread to scrap metal, from pharmaceuticals to pipes and culverts and a great many more proven and alleged cartels. The impact of these on the poor and on the tax payer is immense.

An excuse frequently offered is that many of these are occurring in markets in which this conduct was, in the relatively recent past, either legal or condoned. This is however no excuse. Each of them knew enough about cartel conduct to undertake it clandestinely. In other words they knew full well that their conduct was unlawful although I think that many thought that they would get away with it and all underestimated the amount of public fury and hence reputational damage that their conduct would generate. Moreover, the persistent attempts to represent the existence of decades long cartels as the work of a few lowly rotten apples is clearly and understandably not believed. For example, in the cartel involving the Aveng and Murray and Roberts pipes and culverts cartels, how do you have a cartel lasting nearly three decades of which top management was unaware. This was clearly part of the culture of the company into which successive teams of management have been inducted. The time will undoubtedly come when, thanks largely to the efforts of the competition authorities and the vigilance of the public, cartelisation may become the exception but many more cartels will be prosecuted before that happens. There is little doubt that fines will increase, I hope that we can persuade the DTI to ask parliament to increase the penalties for obstructing the commission's investigations and for lying to the tribunal, and executives will go to prison.

But while I think that our competition enforcement and advocacy regime has been an outstanding success, there have been disappointments and shortcomings. And principal among these has been our continuing inability to sort out, or to have sorted out, our jurisdictional responsibilities with

respect to the regulated sectors, most notably, though by no means exclusively, telecommunications. Without delving into the details of a very complex question, let me acknowledge at once that failure to sort this out is not entirely a function of turf battles, official ineptitude and the obvious interest that the large telcos have in ensuring that this problem is not sorted out, although all of this, and maybe most particularly the latter, bear a significant measure of responsibility. The fact is that the line between a regulatory or licensing matter, on the one hand, and a competition matter, on the other, is ineluctably blurred and so is a matter of some uncertainty and confusion in most regimes.

The jurisdictional uncertainties do not beset all elements of our work and that of the regulators. Hence our jurisdiction over competition matters in telecommunications mergers is clear. I think that our jurisdiction over cartel conduct in telecommunications markets would be difficult to challenge although because it almost always involves an issue that is subject to regulation – namely, pricing – I can envisage the scope for dilatory legal intervention. However it is in the area of abuse of dominance that jurisdictional uncertainties are most deeply unresolved. And markets characterised by former SOEs, high entry barriers, large network effects and massive sunk infrastructure are particularly susceptible to abuse by dominant incumbents, abuses which, in the lexicon of competition law and economics, may and do take the form of refusals to deal, denial of access to essential facilities, bundling and tying of products, exclusive dealing, price discrimination, excessive pricing – in short, the whole gamut of abusive conduct.

Although many of these interface closely with regulated matter, and so the precise location of jurisdictional responsibility will frequently have to be resolved by co-operation between the sector regulator and the competition regulator, I am convinced that we are far better set up to deal with abusive conduct than is ICASA. We have the necessary investigatory powers, we have experience of abuse of dominance and an established jurisprudence. The Commission's investigatory powers, our inquisitorial powers, the adversarial nature or our proceedings, the extensive use of discovery and the transparency of our proceedings allows us to reduce the gravity of the problem suffered by all sector regulators, and certainly ICASA, namely the

huge informational asymmetry between the regulated and the regulator. We also have an institutional structure – notably the strict separation of investigation from adjudication – that accords with some of our strict constitutional requirements of administrative fairness.

The recent amendment to the Competition Act which effectively restores our jurisdiction over competition matters in telecommunications may go a long way towards curing the problem although I vouch that it too will be the subject of legal challenge. However, it is imperative that these difficulties be sorted out once and for all. The fact is that if there is a proven case for the benefits of competition in any sector, then it is in telecommunications which has a pervasive impact on the competitiveness of all firms and sectors. And the fact is that in South Africa our telecommunications costs, fixed and mobile, remain amongst the highest in the world, our broadband penetration is pitiful and our service levels are unacceptable.

I am of course familiar with the argument that many of these problems have been solved or are about to be solved by the competition that will be introduced by new entry and particularly technological innovation. I don't accept this. Indeed I should point out that the most important abuse of dominance cases in the US and EU over the past several years have all been directed at technology innovators like Microsoft and Intel who, having enjoyed the rents of their innovation, soon devote most of their energy to excluding innovative new technologies precisely because they threaten the rents of the incumbents. In our own country we have seen the introduction of many of these new technologies but whether through collusion or abusive anti-competitive conduct or sheer disregard for inadequately protected consumers, the benefits have not filtered through to our economy and our consumers. We saw Telkom granted an exclusive monopoly in exchange for an extension of access – we saw them take full advantage of their monopoly and, predictably, fail to improve penetration; we have seen the failed introduction of number portability; we have now seen the changes in the regulatory environment that will allow self provision of network infrastructure, but, while this represents progress of a sort, I have no doubt that its benefits will be limited to a few large players and that the impact on entry barriers will be extremely limited.

What we need in the telecommunications and related markets is robust enforcement of competition rules and consumer protection. It will take a while before the amendments to the Competition Act allow the competition authorities to get stuck into the telecommunications industry even if there are no legal challenges to the new legislation. In the meantime I don't think that the Commission could be prevented from using its newly acquired market study powers to investigate the telecommunications and related markets. This provision in the new act allows the Commission to use its subpoena powers to enquire into a market thus elevating it significantly beyond the dozens of reports that have already been prepared. I think that telecommunications is ripe for such a study. There is no reason why the Commission should not incorporate ICASA and other telecommunications experts into the study. In our work I have found that sunlight is often the best disinfectant and a public market enquiry would, as in the case of the banking enquiry, at least open up the sector to scrutiny and it will guide the various authorities as to the action that is required from them, whether this be prosecution in terms of the Competition Act, regulatory interventions or consumer protection.

Of course little can be achieved without an effective sector regulator. I am loathe to criticise ICASA not least because I am aware that we do not always have to deal with the small number of concentrated gorillas with which it has to deal; the objects of our regulation are more dispersed and so less powerful in relation to us. But there is much that needs to be done to strengthen ICASA and not all of it is complex or requires massive legislative intervention. Take the recent fiasco involving the Vodacom/Vodaphone transaction. This could simply not happen with us. Our procedures and practices for deciding a merger are absolutely clear, as are the procedures and practices for appealing our decisions. We heard this merger and in this case, as in all cases, a panel of three heard the matter and decided it. There is absolutely no way that the panel, much less a single member of the panel, could have re-opened that enquiry or reversed that decision. And so no-one tried because our procedures and practices simply do not allow for this sort of thing to happen.

In addition to possible regulatory or legislative amendment, the kinds of changes that are necessary to prevent a recurrence of the Vodacom-type

debacle also, arguably more importantly, fall into the realm of institutional cultural changes. You need a body that makes its decisions transparently, that allows everyone to be heard in the making of the decision and that is culturally immune to the sort of pressure that is exercised in the proverbial smoke-filled rooms. In fact that never even agrees to enter a smoke filled room. These changes will not be easy to effect. They require, at the very least, strong, explicit ministerial support for effective, independent regulation. By now they probably require someone who is prepared to ruthlessly wield a hard bristled new broom. Come to think of it, this sounds like precisely the sort of task that should be entrusted to a retired general.