Defining the interface between sectoral regulation & competition enforcement in regulated sectors

The South African experience

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Keith Weeks
Manager: Enforcement & Exemptions
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Overview

- Concurrent jurisdiction – a brief history
- MOAs with sector regulators
- The experience with telecommunications
  - Cases against the fixed line incumbent
  - Dispute regarding jurisdiction
  - The Introduction of the Electronic Communications Act
- Recent amendments to the Competition Act
- Defining the interface in future
Concurrent Jurisdiction – a brief history

• Issue of jurisdiction tested early on – within a year of the Act coming into effect

• Competition authority’s jurisdiction over bank mergers (Nedbank/Standard Bank merger).

    Section 3(1) of the Competition Act which provided that:
    “This Act applies to all economic activity within, or having effect within, the Republic, except – (d) acts subject to or authorised by public regulation”

• Supreme Court found that the competition authorities would have no jurisdiction where other legislation existed to govern conduct and conditions pertaining to competition in those sectors.

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Concurrent Jurisdiction – a brief history

• To avert possible future jurisdictional disputes the Competition Act was amended and the Competition Second Amendment Act, 2000 introduced.

• S3(1)(d) was deleted and s(3)(1A) introduced:
  
  – “(a) in so far as this Act applies to an industry, or sector of an industry that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.
  
  – (b) The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of section 21(1)(h) and 82(1) and (2)”
MOA’s with other regulators

- S 21(1)(h) provides that:

  “the Commission is responsible to negotiate agreements with any regulatory authority to coordinate and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of this Act”.

- The Commission subsequently concluded MOAs with a number of sector regulators including:
  - The Independent Communications Authority of South Africa (“Icasa”)
  - The National Energy Regulator of South Africa (“Nersa”)
  - National Liquor Authority (“NLA”)

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The experience with Telecommunications: Complaints against the fixed line operators

- 2002 complaints against Telkom by Value Added Network Service Providers and Internet Service Providers regarding abusive conduct by Telkom around provision of its facilities to VANS and ISPs.

- Commission found that Telkom had contravened the Competition Act and, in February 2004, referred the matter to the Competition Tribunal for adjudication.

- Telkom took the matter on review to the High Court seeking an order declaring that:
  - The Commission did not have the power to refer the matters to the Competition Tribunal;
  - And the Competition Tribunal lacked any power to adjudicate on the matter.

- Telkom argued that the conduct that formed the subject of the complaint fell within the exclusive jurisdiction of ICASA as it was authorized in terms of the Telecommunications Act or in terms of their license.
The experience with Telecommunications

• The Commission opposed Telkom’s review, arguing that:
  – The alleged contraventions were not authorized by the Telecommunications Act, ICASA, or Telkom’s license;
  – Decision to refer not an administrative act therefore not reviewable under PAJA;
  – The Commission and Tribunal are specialist bodies and, as such, the high court should not deprive the Tribunal of the authority to hear the matter on the merits; and
  – S3(1A) required the exercise of jurisdiction to be managed “to the extent possible” in terms of an agreement and so it was not completely mandatory to follow MOA procedures.

• The Court found that although the Commission’s functions are not reviewable under PAJA the referral was declared invalid on the basis of a reasonable apprehension of bias on the part of the Commission and because the referral had been brought outside the one year period specified in the Act without the consent of all parties.
Dispute over jurisdiction

• Unfortunately the Court did not rule on the issue of whether or not ICASA had exclusive jurisdiction.

• The Commission has taken this matter on Appeal.

• The matter was last heard on 2 November 2009 and a decision is still pending

– more than seven years since the complaint was first filed with the Competition Commission!
The Electronic Communications Act (ECA)

- The coming into effect of the ECA in 2006 appeared to give ICASA more explicit powers to deal with competition matters.

- In particular s67(9) of the ECA appeared to contradict (in fact override) the principle of concurrent jurisdiction:

  “Subject to the provisions of this Act and of related legislation the Competition Act, 1998 (Act No 89 of 1998) applies to competition matters in the communications industry”

- This legal inconsistency will continue until the Competition Amendment Act No.1 of 2009 comes into effect resulting in 67(9) being amended.

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The Electronic Communications Act (ECA)

- The inconsistency in 67(9) notwithstanding, the ECA is a significant improvement on the Telecommunications Act in that it brings in an explicit framework for ex ante regulation that is based on competition principles.

- The implication is that appropriate ex ante remedies can be applied in markets where competition is not likely to be effective and ex post interventions ineffective.

- The recent amendments to the Competition Act attempt to reinforce this ex ante/ex post distinction by introducing “primary authority” with respect to the regulators respective roles.
Recent Amendments to the Competition Act

• Concurrent Jurisdiction reinforced:
  • the sector regulator is empowered to exercise primary authority to establish conditions within the industry or sector it regulates as required to give effect to its legislation
  • The Commission shall exercise primary authority to detect and investigate alleged prohibited practices and review mergers.

• The “Jury is still out” on whether this does indeed provide the intended clarity. Future litigation can be expected….

• Complex monopoly
• Market Enquiries
• MOAs to be reviewed…..
Defining the interface in future: Lessons from the recent parliamentary process on mobile termination rates

• Competition authorities have ex-post powers – intervention after the fact, eg. determination of penalties after finding of collusion

• Sector regulator has ex-ante powers – intervention before the fact, eg. price control and access conditions

• Commission is not mandated to set rates – this is an ex-ante remedy

• Chapter 10 of the ECA gives ICASA these powers

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Defining the interface in future

• Tools of competition policy are insufficient to deal with certain forms of market failure prevalent in infrastructure based network industries (e.g., network externalities in interconnection, natural monopoly elements in the local loop, access issues).

• Icasa should conduct thorough market studies, consistent with the requirements of section 67(4) of the ECA, in order to ensure that the appropriate regulatory intervention is applied.

• Commission will participate in Icasa‘s regulatory processes.

• Revised MOA to facilitate interaction, clarify roles.

• Need to reinforce complementary roles through advocacy, information exchange between regulators, sharing resources etc.
Thank you!

email: keithw@compcom.co.za