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David Lewis: A competition pioneer

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- I Chairman, International Competition Network
- I Chairman, Competition Tribunal of South Africa





Interview

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Chairman, International Competition Network Chairman, Competition Tribunal of South Africa

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2009

Chairman of the International Competition Network

1995-2008

Member and Deputy Chairman of the Board of Directors of the South African Industrial Development Corporation

1999-2002

Member of the South African Board of the National Research Foundation

1998-1999

Member and Chairman of the South African Competition Board advising the Minister of Trade and Industry on the development of competition and on the drafting of Competition Act

1999

Chairman of the Competition Tribunal of South Africa

1994-1996

Special Advisor to the South African Minister of Labour and co-Chair of the Presidential Commission on Labour Market Policy

What was your inspiration to get involved in competition law and policy?

My training is in economics, with a particular interest in industrial economics and industrial policy. My work during the dark days of apartheid in South African in the 'seventies and the 'eighties was in the trade union movement and in political activism generally. So both my professional training and my union work have brought me into close contact with the world of business. I have come to greatly respect the creative power of business and entrepreneurship but also to recognise the requirement for business to be subject to discipline if it is to realize its great promise. After a long journey, I have recognized that a highly effective, efficient and democratic mechanism of disciplining business is the competitive process. It is this insight that has drawn me to work in the area of competition law and policy although I hope that my background will keep me alert to the ever present dangers of market failure and help me to avoid the dangers of a doctrinaire and fundamentalist approach to the market.

Could you describe the competition law and policy framework in South Africa? How do the Competition Commission and the Competition Tribunal interact?

While South Africa has had a competition law on the statute books for some time, it was a very weak regime with institutions that were essentially bodies responsible for advising government. In 1999, this was replaced by a new statute which set up a much stronger competition enforcement regime. Three institutions were established. These are the Competition Commission, which is the body responsible for investigation, prosecution and advocacy. Secondly, the Competition Tribunal, which is the decision making body. All restrictive practice allegations which the Commission or a private party decides to prosecute must be referred to the Tribunal. All mergers above a defined threshold must be referred to the Commission which investigates these and makes a recommendation to the Tribunal which may decide to prohibit it or approve it, with or without conditions.

...[The 3 NCAs are] "independent of executive control... but they are also independent of one another."

The Competition Tribunal has exclusive jurisdiction over all competition matters. Finally, the Act established a Competition Appeal Court, which is a special appeal court of sitting judges of the High Court and which hears appeals from decisions of the Tribunal. It is important to recognize that not only are these bodies independent of executive control – that is, the executive cannot override any decision of the Competition Tribunal – but they are also independent of one another. That is, the Tribunal and the Commission are not divisions of a single organization. We are independently appointed, independently led and independently budgeted. The separation of investigation and adjudication is an important constitutional principle in South Africa and the structure of the Competition Act adheres strongly to that requirement.

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This interview has been conducted by Mrs Stephanie Yon,
Adviser for International Affairs in the Staff of the
President, Autorité de la concurrence, Paris.

Given the different degrees of competition development between the countries in Africa, are there any efficient local or regional fora to foster cooperation in the field of competition law and policy?

COMESA, an organization of several African states has recently established a multilateral competition authority which, I understand, assumes certain jurisdiction from the member countries. South Africa is not a member of COMESA. In addition there are currently efforts underway to include competition instruments in the agreements governing the Southern African Customs Union and the Southern African Development Community. South Africa is a member of both. We are shortly to hold a meeting of a group of Southern and East African competition authorities to discuss our relationship. Our intention is to utilise this body as an instrument for coordinating and providing technical assistance. But you are correct in implying that the different stages of development of countries in sub-Saharan Africa is an obstacle to cooperation but one that we hope to overcome by technical assistance and by greater efforts to understand each other's priorities and requirements.

The South African Competition Commission has selected the food sector as one of its priority and is currently investigating allegations of price fixing and collusion among more than 30 food companies. Does the South African Competition Tribunal have a role in the process?

As the adjudicative body we don't get involved in developing prosecutorial strategy. We get involved when the Commission places a matter before us and this may come in the form of an opposed application or it may come as a consent decree. We have been involved in several consent decrees in the food industry – in milling and baking for example - and we are involved in several contested matters, for example in the milk industry. Although we don't, as I have said, participate in the development of strategy development, I think that the Commission is to be congratulated for developing and publicizing a clear strategy in the way that it has done. It has chosen to focus on sectors - such as food and healthcare - which impact severely on the lives of the poor, and on bid rigging in sectors like construction thus aligning itself with government's flagship public infrastructure programme. I should add that when we hold hearings - even if only to approve a consent decree - our hearings are open and we encourage members of the public to participate in the hearings. This has had a very positive impact on the development of a competition culture.

In the light of the above food industry situation, it appears that South African National Assembly is considering criminalizing sanctions against cartelists by sending them to jail. What is your view on this? Can it bring an added-value? Under what conditions?

This is a very complicated question. It is, in fact, not only the food industry situation that has led to the amendment to our Act introducing criminal sanctions. In recent years the Commission has enjoyed huge success in apprehending and prosecuting some major cartels. The Tribunal has imposed some fines that are, by South African standards, very significant. This has received widespread publicity and has finally woken up the public and the government to what it is

that we do and why it is that we do what we do. This has generated intense anger directed at the people who have involved themselves in price fixing and bid rigging activities and it has underpinned a demand that penalties be imposed on the individuals rather than only on the companies. I am of course very pleased at the boost this has given to the competition culture in our country and I have no doubt that imprisonment is an appropriate response to those who fix the price of pharmaceuticals and food and other basic products.

"I have no doubt that imprisonment is an appropriate response to those who fix the price of pharmaceuticals and food and other basic products."

But I do fear that it is going to create great legal and procedural complexities and it may even undermine our ability to catch cartels. The details of this are too complex to go into here. But to cut a very long story short, the Competition Tribunal cannot, as an administrative tribunal, impose prison sentences. Only a court of law can do this. The Commission cannot prosecute a criminal case. Only the national prosecutor can do this. The Commission cannot grant leniency to a whistleblower who faces potential criminal charges - only the national prosecutor can. This is going to introduce great complexity into our prosecutorial and adjudicative proceedings and is going to require very careful coordination with our already overstretched criminal justice system. So I am very nervous of the unintended practical consequences even though I agree wholeheartedly with the principle. It has taught me to be very careful of calls for a 'one size fits all' approach to competition enforcement. What has worked very well in the legal system and with the historical legacy of the USA may not work well in our system. I fear we may have a clear example of that in this instance.

I will now be directing my questions to you in your capacity as Chair of the Steering Group of the International Competition Network (ICN). Indeed, following Sheridan Scott's departure last January, you took over the Chairmanship of the ICN. Are there any specific goals that you wish to accomplish during your time as Chairman of the ICN?

My tenure in the ICN chair will be relatively brief and will largely take forward the good work of my predecessors. But it does coincide with a dramatic change in global economic conditions and the ICN must respond to these changes. I would like to see the ICN begin to acknowledge that competition law and policy are important branches of economic and social policy. We all know this to be the case but we continue to proclaim the slogan of 'all competition, all of the time' as the governing principle of the ICN. We have to interface with trade policy, with industrial policy, with social policy. We have to find a way of living comfortably with these realities rather than opposing them in a fundamentalist way or, even worse, pretending that they don't exist. In my short tenure I will lose no opportunity to make this point and hope that it reflects in the long term character of the ICN. I also think that the ICN has to become more than a body that promotes best practice as defined by the latest approaches to legal interpretation and

economic analysis. We also have to share our experiences in institution building, our positive and negative experiences, in order to help others build effective agencies. This has already started and I would want to see this continue.

You were one of the pioneers in the creation of the ICN in 2001 and you played a crucial role in its development. Can you speak of the evolution of this organization and in which direction do you see it going in the future?

The ICN is a truly remarkable organization. One of the real eye-openers in taking over the chair has been the view that it has given me of the extraordinary amount of activity in which the ICN is engaged. And we do this without a budget, without smart headquarters, and with a part-time, though very dedicated, secretariat.

"I would like the ICN to stand as an example of a new form of global governance"

I would like the ICN to stand as an example of a new form of global governance where networks of practitioners based on professional respect and trust promote greater understanding and appreciation of differing national needs and imperatives and, through this greater understanding, greater harmonization. That may sound very grandiose and ambitious but that may well turn out to be our greatest achievement.

Like many similar organizations, the ICN has always focused on a consensus-building system in which competition authorities are bound only by mutual respect towards one another. Do you think that the increased adoption of best practices or recommended practices within the ICN is moving it towards a more binding process?

I think that our development of best practices in a range of fields has been valuable and should continue. However note what I said above about criminalization. Most competition enforcers would agree that cartelists should be imprisoned. However even though that may be the best practice, it may not always be the most feasible and most effective practice for all countries, all of the time. That's why I am more inclined to focus on robust debate that enables us to better understand our differences and then to construct our best practices out of a better appreciation of these differences. So, I don't think that we should aim to bind. We should rather aim to understand and to persuade and out of that process we will see a gradual harmonization of approaches or, at least, appreciation of our differences.

How does the ICN engage developing countries?

Certain developing and middle income countries have been very active in the ICN and this, combined with the goodwill of the developed country members, has meant that the ICN has always been very accommodating to developing countries. I would like to see it going even further in this direction. The

world is beginning to recognize that the old modes of governing international bodies where leadership and influence was simply parceled out by agreement between the USA and Europe can't deliver the necessary solutions.

National champions and industrial policy: "I think that we mustn't reject this in doctrinaire, fundamentalist fashion. Rather we have to work together with those who make industrial and social policy and guide them"

I want the ICN to lead the way in truly accommodating the voice and aspirations of developing countries. I am extremely proud of the fact that a representative of an African country is chairing a body in a field of economic policy that was hardly practiced in the developing world a mere two decades ago. This tells you something about how the world has changed. But it also tells you something about the ICN and its members.

Does the global crisis impact the role and the function of the ICN, and in which way?

We cannot underestimate the impact that the global economic crisis will have on our work. The lifespan of the ICN has coincided with something of a golden age for competition law. Markets were seen to be delivering economic and social progress and so we, as the agencies that defended and promoted the market economy, were respected. This has changed. Now all the talk is of market failure, of the need for safety nets, of the need for government bail outs, of the need for national champions and industrial policy. I think that we mustn't reject this in doctrinaire, fundamentalist fashion. Rather we have to work together with those who make industrial and social policy and guide them in developing policies that most easily accommodate effective functioning markets. If we don't do that we will condemn ourselves to irrelevance.

The ICN conducts nearly all of its business on the telephone and via the internet. Given the current economic situation, do you think other organizations will follow suit in order to liberate funds linked to maintenance of an organizational headquarters?

I have said above that I think that the new mode of international governance will increasingly feature voluntary networks like the ICN. This will be partly for budgetary reasons but it will also be because the making of great binding treaties is too cumbersome and too burdened by the weight of narrow political considerations. The ICN will be a role model in this new mode of governance.

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