

**Competition Policy and Enterprise Development: The Role of Public interest
objectives in South Africa's Competition Policy**

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Abstract

This paper reviews the development of South Africa's new competition policy and law during the latter half of the 1990s. Key focus falls on the public interest objectives explicitly included in the Competition Act, and decisions both in merger review and restrictive practices cases, where these public interest issues have materially impacted decisions by the Competition Authorities. The aim of the paper is to examine the link between competition policy and enterprise development, specifically as regards the consideration of public interest issues in these decisions, and to note that select inclusion of public interest issues in competition law and policy, and judicious implementation of the law, may be particularly important for enterprise development in developing countries.

1. Introduction¹

Competition policy reform was high on the agenda of South Africa's new government after the first democratic elections in 1994. The African National Congress (ANC) had espoused strong socialist principles during the years preceding South Africa's democratic transition. However by the time the ANC came to power, the winds of political and policy change had shifted substantively, internationally and in South Africa too. Instead of a policy of nationalisation of private enterprises, the ANC looked to competition policy as an instrument to regulate private enterprise, and to address the legacy effect of apartheid and economic isolation on domestic markets. South Africa's Competition Act, no 89 of 1998, that was drafted and promulgated after an extensive and inclusive policy making process of consultation and debate, reflects the political concerns of the ANC.

In addition to economic efficiency, the Competition Act explicitly includes equity and distributive goals. The preamble to the Act notes the high levels of concentration of ownership and control, ineffective checks on anti-competitive practices and restrictions on economic participation, especially by black South Africans due to apartheid laws and policies, and articulates a conviction that credible competition law and institutions to effectively implement the law are necessary for an efficiently functioning economy. Furthermore, the Act says that an economic environment balancing the interests of workers, owners and consumers will benefit all South Africans. A hallmark of the Act is thus its concern with public interest issues, equity and justice, balanced with the traditional economic efficiency concerns.

This paper focuses broadly on the role of competition policy in enterprise development in South Africa, and more specifically on South Africa's new

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Competition Act and particular public interest objectives such as the promotion of small and medium enterprise (SME) development and empowerment of previously disadvantaged individuals. The purpose of this exercise is to draw lessons for developing countries as regards the role of competition policy in enterprise development.

Although South Africa's history is in many respects unique, there are important lessons that can be drawn from the legacy effect on markets, enterprises and consumers, and the implications for the competitive process for other developing countries. High levels of concentration are common, for example not only in South Africa, but also in other southern and eastern African countries. Markets are small, consumers are not well informed of their rights, and capacity to effectively implement competition policy and law is scarce. Challenges of unemployment, low levels of domestic and foreign investment, as well as the history of excessive government regulation and the adverse effects on competition are also common to many developing countries.

2. Developing a competition policy for a new South Africa

South Africa's apartheid legacy and its consequent marginalisation from the global economy produced very specific market structural characteristics, and concomitant competition policy challenges. In addition to the insular nature of the South African economy resulting from global marginalisation, domestic policy stance further compounded the competition challenges. Import substitution industrial policy and capital controls, for example promoted local enterprise development through local content programmes, and limited outward investment opportunities.

High levels of concentration, both in ownership and control, and conglomerate organisation structures coupled with strong vertical integration were typical of many industries and markets. Many firms had diversified their activities, investing in a variety of unrelated economic activities, and focused, almost exclusively, on the domestic markets, as a result of economic sanctions.

The South African economy was characterised by a dual structure with a modern, almost-exclusively white formal economy, and a less-developed, almost exclusively black, predominantly informal economy. This dichotomous economic structure, and the apartheid laws which prevented black South Africans from participating in certain economic activities and geographic areas, meant that participation in the formal economy, and opportunities to develop formal and growing businesses were limited for black South Africans. By contrast the formal economy developed markets and industries that became in many cases highly concentrated with effective economic barriers to entry, in addition to the racial regulatory barriers of the apartheid regime.

It was recognised by the ANC that these challenges would have to be addressed by a range of economic and social policies, and in addition to substantive focus on trade and industrial policies for transformation of the economy, competition policy

became the policy option for the regulation and development of enterprise to enhance the economic opportunities and participation in the formal economy of black South Africans.

The ANC mapped out an extensive policy reform programme in the early 1990s, prior to the first democratic elections in 1994. The 1992 Policy Guidelines for a Democratic South Africa provided an overview of the policy revamp envisaged. As part of this process, an assessment of South Africa's competition challenges and the efficacy of the existing competition law, was undertaken. A complementary initiative was a review of South Africa's industrial strategy (Joffe *et al*: 1995). Key focus areas of the industrial strategy project were:

- Markets and ownership structures
- Small and medium enterprises, and the conglomerates
- Technological and institutional capacities
- Human resource development and workplace organisation

Although this investigation into the development of an industrial strategy for South Africa focused narrowly on the manufacturing sector, the issues identified were also relevant to agriculture, mining and the services sectors. Many of the findings of this project related to competition issues, and in 1995, the new Department of Trade and Industry (DTI) started a three-year programme of consultation with competition experts and a broad range of stakeholders in South Africa to develop a new competition policy. The product of this extensive exercise was put forward in 1997, as 'DTI's Guidelines for Competition Policy,' intended to stimulate discussion and debate on the role of competition policy in the restructuring of the economy.

Another complementary policy area that enjoyed much attention during the policy reform process was small business development. In 1993/4 an extensive empirical and theoretical study was conducted to identify key constraints to small business development in South Africa. A number of small business support initiatives were developed to actively promote small business development, with the expectation that small business would become an engine of growth and employment creation. These initiatives included financial schemes (loans or credit guarantees), skills support schemes and technology transfer schemes, among others (www.dti.gov.za) .

The 1997 DTI Competition Guidelines considered the existing competition law of 1979, and found it wanting in a number of respects to address the challenges at hand. The 1979 Maintenance and Promotion of Competition Act did not contain any provisions related to vertical or conglomerate configurations or concentration of ownership. There were no pre-merger notification requirements. The 1979 Act contained no explicit prohibitions, and the final yardstick for decisions was the 'public interest', which was not defined in the Act. The *ad hoc* and inconsistent decisions of the Competition Board were thus not unexpected. The Competition Board was appointed by the Minister of Trade and Industry, and a special court was to hear appeals; but never actually did hear any. A regulation issued by the Minister of Trade and Industry in 1984 declared some practices *per se* unlawful. These included resale price maintenance, horizontal collusion on price, terms or market share and bid rigging. There were, however, no prosecutions despite this regulation.

Effective implementation of a strong competition policy was viewed as an important tool to regulate private enterprise, given that the ANC's policy of nationalisation, which had been espoused prior to its election, had been abandoned, when the new government came to power.

Specific goals of competition policy included the dilution of the high level of concentration of economic power, on the grounds that this was detrimental to balanced economic development. In particular, competition law was to reduce the domination of the economy by a white minority, and to promote greater efficiency of the private sector.

After a comprehensive policy process, which included debates within the National Economic Development and Labour Council (NEDLAC), a new competition law, the Competition Act, no 89 of 1998 was promulgated and became effective in September 1999. The Act provides for the establishment of three specific institutions to implement the law; a Competition Commission, a Competition Tribunal and a Competition Appeal Court.

The Competition Act incorporates features which reflect the unique challenges facing South Africa's economic development. It permits and, in certain cases, requires consideration of equity issues such as empowerment, employment and impact on small and medium enterprises. Enterprise development is thus an important focus for South Africa's new competition policy and law. Although equity considerations are explicitly incorporated into South Africa's competition law, political channels as a means of appealing these issues, are not permitted. There is also no ministerial power to override the decisions of the competition agencies, as there had been previously.

The introduction of South Africa's new competition policy and law took place within the broader context of a new industrial policy, a liberalised trade policy and revamped labour legislation in the second half of the 1990s. This was a new era in policy making for economic transformation.

3. Key features of South Africa's Competition Act

The Competition Act no. 89 of 1998 covers all economic activity in South Africa, and has extra-territorial reach to the extent that the Act applies to 'all economic activity within, or having an effect within, the Republic.' The nature and extent of this extra-territorial reach has been tested in one case thus far; the Botash case dealing with the effect of an American export cartel, exporting soda ash to Botswana. (Competition Commission, 2003). Both Botswana and South Africa are members of the Southern African Customs Union (SACU); hence with a common external tariff, imports into Botswana can be expected to have an effect within South Africa.

South Africa is member of the Southern African Customs Union (SACU), and its members concluded a new customs union Agreement in 2002. This Agreement requires that all members of SACU have a competition policy and that they collaborate in the implementation of that policy.

This new SACU Agreement and its competition policy provisions are important in the context of regional integration developments in the southern Africa. The countries of the customs union have a long history of economic integration (SACU is the oldest customs union in the world), and South African enterprises have extensive interests and operations in all the member countries. Recently, enterprises in the smaller SACU member states have raised complaints about the behaviour of South African enterprises in their countries, with requests for assistance via trade remedies. It may well be that this option is being sought because these countries do not have competition policy and implementing agencies, and no regional competition policy or institutions exist either. This situation raises the issue of competition policy and enterprise development in the

southern African region, where only one member state currently has a competition law and implementing agencies. Without recourse to competition law remedies, enterprise development in the smaller countries could be adversely affected by the enterprises from South Africa.

Currently, South Africa is the only member of SACU that has an operational competition policy and law. Namibia passed a Competition Act in 2003, but has yet to establish the Namibian Competition Commission provided for in the Act. Both Swaziland and Botswana have draft competition law, and Lesotho has embarked on an economic mapping exercise and the development of an inventory of laws affecting competition.

The South African Competition Commission is an investigatory body, to which competition complaints may be addressed. It also conducts preliminary investigations in merger impact assessments, and makes recommendations to the Competition Tribunal. The Competition Tribunal is an adjudicatory body (or court of first instance) to which the Commission may refer complaints for further investigation and adjudication, and which considers large merger transactions. The third institution is the Competition Appeal Court, which hears appeals arising from Tribunal decisions. This is a court dedicated to competition matters.

The overall purpose of the Competition Act is to promote and maintain competition, in order

- ‘(a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;
- (c) to promote employment and advance the social and economic welfare of South Africans;

- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.'

Government of South Africa: Competition Act, no 89 of 1998

The Act's policy purpose thus focuses in the first instance on economic efficiency. South African competition law also explicitly includes public interest considerations, in the articulation of its purpose; it therefore attempts to balance efficiency concerns and the broader development priorities in the competition framework.

The focus on small and medium-sized enterprises is important against the background of the structure of the South African economy. High levels of concentration, and the conglomerate structure of business in many sectors from mining, to manufacturing and services, are important challenges for small business development in South Africa, besides the common challenges that SMEs face more generally. The conglomerate structure of business in South Africa and the strong vertical linkages that exist in many industries can prove to be effective barriers to entry for smaller enterprises.

The goal of promotion of a greater spread of ownership, especially as regards historically disadvantaged persons, reflects the concerns about the skewed distribution of income and wealth in South Africa. South Africa had for many decades one of the most unequal distributions of income in the world, with strong racial fault lines through the distribution. Greater spread of ownership and SME

promotion are deemed to be important to ensure longer-term balanced and sustainable development.

The Act's preamble reverts to the political motivations that provided the rationale for the policy reform process of the new government. The particular problems facing competition law and its effective enforcement, including practices, some of which were promoted and supported by apartheid policies and laws, led to high levels of concentration of ownership and control, inequitable constraints on economic participation by the majority of South Africans, and ineffective restraints on anti-competitive trade practices. This legacy is viewed through an equity lens, rather than an efficiency lens. In the 1979 competition legislation, public interest, although included in the Act, had not been defined. The new legislation articulates four pillars of the public interest. Perhaps the most distinctive pillar of the public interest in the South African competition legislation, is empowering historically disadvantaged persons. The Competition Act, in this respect, echoes the focus in South Africa's Constitution on full and equal enjoyment of all rights and freedoms, and enshrines the economic empowerment of black persons in South Africa in the Act.

Policy statements related to economic efficiency and consumer benefits provide for flexibility in application. References to adaptability and development of the economy, extend beyond an interpretation of economic efficiency in a static welfare sense, to incorporation of dynamic considerations including market entry, firm mobility and innovation.

Consumer interests are also included in a broad sense; not only price is important, but consumer choice matters too. Thus maintaining scope of choice may possibly be supported despite perhaps higher prices. A particular challenge emerges from the lack of consumer organisation in South Africa. Consumers in South Africa (and this

is also the case in many other developing countries) are generally not well informed of their rights and the potential to pursue complaints through the competition authorities, and South Africa does not have specific consumer protection legislation. Advocacy is thus a key challenge for the South African competition authorities.

The Competition Act's rules draw on international experience; the rules on restrictive practices derive from the EU Treaty and the merger regulation is similar to that of Canada. Besides select *per se* prohibitions, in general a violation of the Act is contingent upon demonstration of a net anti-competitive effect.

Exemptions which provide a counter to the prohibitions contained in the Act, also incorporate competition-plus issues. Exemptions, which should be time-bound, may be granted for reasons which include the promotion of exports, promotion of SMEs or firms controlled by historically disadvantaged persons. The scope for exemptions is broad; suggesting that even *per se* prohibited acts may be condoned if they contribute to the identified exemption factors.

A particular reason for consideration of an exemption application is 'ensuring economic stability.' The rationale for including this potentially extensive consideration, was to facilitate ministerial input on industrial policy concerns or issues of national interest. Ministerial designation is not sufficient to ensure an exemption on such grounds; this has to be considered by the Competition Commission, and it will decide if the statutory standard is met.

Merger control provisions are very detailed, and public interest issues feature prominently in merger review. Specified merger thresholds will determine the process of notification and assessment. Large mergers are investigated by the Competition Commission, whose decision forms a recommendation to the

Competition Tribunal that may accept, reject or amend the Commission's decision. Small and intermediate mergers are investigated by the Commission and a decision is made, which may be appealed to the Tribunal. Decisions by the Tribunal in all cases may be appealed to the Appeal Court. And there is no ministerial override, as had been the case under the previous competition regime.

The merger evaluation process is clearly outlined in the Act. First, it has to be established whether the merger is likely to substantially prevent or lessen competition (SLC test). Second, if it has been decided that the merger will lessen competition, then it must be established whether the merger will result in 'technological, efficiency or other pro-competitive gains' that will outweigh the anti-competitive effects of the merger. Third, irrespective of the outcome of the evaluation of the competition impact of the merger, a public interest test has to be conducted. Thus, even though a merger may not have an adverse effect on competition, it still has to be reviewed on public interest grounds.

Explicit criteria to consider in the SLC test are included in the Act (section 12A (2)); with these however a measure of flexibility remains. These criteria serve to some extent the purpose of general guidelines for the conduct of a merger assessment. They include barriers to entry, import competition, history of collusion, vertical integration and the 'failing firm' argument.

If the authority decides that the merger is likely to substantially prevent or lessen competition it must then assess whether the merger transaction will result in any efficiency gains. The efficiency test is therefore included as a defence for an anti-competitive merger transaction. The nature of the balance between the SLC test and the efficiency test poses significant challenges to the authorities, in that a weigh-up of a competition compromise and efficiency benefits (both static and dynamic) has

to be considered. It has been conceded that perhaps following the United States in bringing the efficiency test into the competition assessment, alongside other factors already included in the Act, may make the task of the authorities more manageable.

The public interest test is mandatory in all merger assessments. Section 12A(3) of the Competition Act specifies the public interest test.:

'(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –

- (a) a particular industrial sector or region
- (b) employment
- (c) the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive; or
- (d) the ability of national industries to compete in international markets.'

Government of South Africa, Competition Act (*op cit*)

The public interest test in the South African Competition Act, is distinctive for a number of reasons. First, the public interest test is explicitly included in the Act, and also delineated very specifically in terms of the criteria above. This means that very select public interest concerns enjoy focus in the context of competition assessments. Second, the test empowers the competition authorities to prohibit or allow a merger that does or does not, respectively, pass muster on the SLC test. Third, the competence to allow or disallow a merger on the basis of a public interest consideration, is accorded to the competition authority, not any other Minister or stakeholder representative. The Act does however require that the Minister of Trade and Industry (or another Minister directly affected by the merger) be served a copy of

the merger notification, so that they can plead the case before the competition authorities.

In the case of intermediate or large mergers, the primary acquiring firm and the primary target firm must provide a copy of the merger notice to any registered trade union that represents a substantial number of its employees, or the employees or their representatives if there are no registered trade unions. Any person, whether or not a party to the merger transaction may submit any document, or relevant information for consideration by the competition authorities. And the Minister of Trade and Industry may participate in any intermediate or large merger as a participant to make representation on any public interest matter.

Although there has been criticism concerning the inclusion of public interest issues in the Competition Act, their inclusion has to be read in context. Major challenges to sustainable development in South Africa are employment creation and black economic empowerment. Explicit reference to these factors is thus to be expected in a significant area of policy and law such as competition, and in some sense provides a balance of considerations in the challenge to develop a set of complementary policies and laws to facilitate enterprise development and the achievement of broader socio-economic objectives.

Recognising the importance of the interface between sector regulation and competition law, the Competition Act (as amended, 2000) specifies that the Competition Authorities and Sector Regulators have joint jurisdiction in relevant sectors. A Regulators' Forum is being established to implement this provision of the Act and makes the Competition Commission responsible to 'negotiate agreements with regulatory authorities to co-ordinate and harmonise the exercise of jurisdiction over competition matters' within a specific sector or industry.

Thus far the Independent Communication Authority of South Africa (ICASA) and the Competition Commission have developed a memorandum of understanding, which delineates their respective jurisdictions, and the National Electricity Regulator (NER) and the Competition Commission have agreed to a workable collaboration arrangement.

4. Supporting enterprise development through competition policy

Substantively, the work loads of the Competition Commission and the Tribunal have overwhelmingly been concentrated on merger control. This distinguishes South Africa from developing and transition economies with new competition agencies, and highlights the political concerns in South Africa about high concentration of economic power. Through pre-notification and merger assessment, a demonstration effect, in the area of merger control, provides evidence of South Africa's new competition law's strong impact. While the explicit consideration of public interest concerns emphasises their pervasive policy importance, checks and balances in the Competition Act ensure that decisions are transparent and void of direct political control. It is useful to reflect on the experience of South Africa since the implementation of the new Competition Act. As regards merger control, competition law practitioners indicate that in the early days, merger notifications were mostly undertaken by lawyers (filling in required information in forms provided by the competition authorities). Now no merger filing would be complete without a detailed impact assessment. Lawyers and economists now work together in an interdisciplinary manner to assess the likely impact of the proposed transaction.

Competition law forms an important part of effective market governance. The rules of the market game, that include competition rules, can enhance market outcomes by promoting not only the achievement of efficiencies, but also greater equity. To this extent South Africa's competition law is progressive in its explicit incorporation of public interest considerations; whereas even mature jurisdictions shy away from such potentially contentious territory.

With South Africa's history, the inclusion of public interest concerns makes good policy sense. The nature of the South African economy, its grossly unequal

distribution of income and wealth, and hence too its inequality of economic opportunity have to be addressed by a coherent set of policy initiatives. Thus employment creation, black economic empowerment and small and medium-sized enterprise development are familiar objectives across a range of economic policies. A challenging question is to what extent different policies can impact on the promotion of small and medium sized enterprises – what specifically can be the contribution of competition policy in this regard.

It may be quite obvious that, especially in the short term, direct industry support policies, such as the provision of credit or marketing support, may be more visibly effective in supporting SMEs. However the contribution of competition policy, while in some cases being more indirect, can play an extremely important role in ensuring that SMEs, not only get access to specific market opportunities, but also do not fail because of anti-competitive practices.

Competition policy and the law which gives effect to this policy provide indispensable checks and balances to ensure that the market process works without being rigged by larger firms or firms that may have market power, which can be used to the disadvantage of other market participants. This does not mean that there should be no casualties of the market and the process of competition, but competition should be fair and without prejudice.

The following merger transactions and the decisions of the competition authorities will illustrate the impact of public interest considerations in merger impact assessments. Specifically the cases will highlight the consideration of SME and empowerment concerns.

Pioneer Foods – SAD Holdings

Pioneer Foods has diverse interests in milling, baking, poultry, animal feeds and branded consumer goods. The merger transaction involves the purchase by Pioneer of all shares in South African Dried Fruit Holdings (SAD) and all of its subsidiaries. SAD has business interests in nuts, vinegar, dried flowers, dried fruit, wine and salads. This is a large merger transaction, and hence it was first reviewed by the Competition Commission and then referred to the Competition Tribunal for further investigation and approval.

Assessment of the relevant markets of the two parties, indicated that there are only two markets with product overlap and hence relevance for the merger assessment. These are ready-to-eat (RTE) cereals, and jar vegetables (salads). The discussion here will focus on the former market., in which international brand leaders such as Kelloggs, as well as small home-based producers of RTE cereals for health conscious consumers, participate. There are thus various drivers of competition in the RTE market. And it may be argued that a finer delineation of more than one market is necessary to effectively assess the impact of the proposed merger transaction.

The geographic market for RTE cereals is defined as the South African national market, and there is limited import competition. This is because distribution and sales are primarily through supermarket chains which operate nationally.

Market definition proved an interesting exercise; breakfast cereals comprise hot cereals and muesli products. If the cereal market is taken as a single market, including both hot and muesli products, then Tiger Brands (which is not involved in the transaction) would be dominant. However if branded cereals is defined as the relevant market, then Kelloggs is dominant. In the muesli market, taking a narrow

market definition, then Nature's Source (which is a subsidiary of SAD, the primary target firm) is dominant.

The Competition Tribunal was persuaded that consumers display a high degree of substitutability especially among hot cereals and muesli products (the parties had submitted extensive price elasticity studies to indicate that the appropriate market definition was RTE cereals). Consumer demand was highly price elastic, and the cross price elasticities indicated high degrees of product substitution.

It was concluded that even if muesli was defined as a separate 'niche' market, this market demonstrated very low barriers to entry. This was an important consideration because on the one hand large-scale producers face significant barriers to entry, while the barriers to small-scale producers were very low (many produced from home, and sold their products from specialist health shops or other non-retail chain outlets).

What became apparent to the Tribunal was that the small producers compete vigorously among themselves, and very few grow to the extent that they can attempt to compete with the likes of Kelloggs or Pioneer Foods. An important issue in this case was the nature of interaction between large-scale producers and the supermarket chains. The retail food market in South Africa is an oligopolistic one, with a few large chains of retail supermarkets competing actively with one another. They provide a strong source of countervailing power to the power of large-scale producers of consumer food products, including breakfast foods. One of their strong bargaining chips is allocation of shelf space in supermarkets. The market leader is accorded prime space, followed by the house brand, then the number two player follows and other players after that. Competition is thus intense as retail chains and suppliers bargain on price, and shelf space, for example.

Taking into account these dynamic drivers of competition in the RTE market, the parties to the transaction argued that it was reasonable to conclude that far from reducing competition in the RTE market, the proposed merger may be expected to increase the level of competition in the RTE market as Pioneer Foods' bargaining power vis à vis the retail chains is likely to be strengthened, and that Kelloggs, the market leader, is likely to face more substantial competition.

The conclusion of the Tribunal was that the merger would not harm small business prospects, and the contestability of the RTE market would not be adversely affected by the merger. The merger was approved unconditionally. 'It is possible for small scale players to continue to enter the market by developing niche brands. The merger is not likely to adversely affect the potential of small scale or niche entrants to the market,' was the conclusion of the Tribunal.

This decision highlighted the fact that in some cases it may be possible to define the market not only in terms of product and geography, but it may be necessary to consider size of firms. In this case the large firms (competitors of Kelloggs) can be said to operate in a market delineated from the market where small, niche (home) producers compete intensively with one another. It is quite unusual for small, niche producers to grow to that extent to where they migrate to the large-firm market.

Bernina-Saskor Case

The *Bernina-Saskor* case (Competition Commission, 2002) arose from a complaint by an independent service provider alleging that Bernina-Saskor, the sole importer and supplier of Bernina sewing machine parts in South Africa, had instructed its franchisees not to provide the complainant with Bernina machine parts. The Commission concluded, and the respondent concurred that the respondent had

contravened the provisions of the Act (section 8(d)(1)) in that he had required a supplier not to deal with a competitor, and a Consent Order was concluded. In terms of the consent order, the instruction to franchisees was withdrawn immediately, and parts would be supplied to any customers. The machine parts would be used, typically by small (often independent) enterprises repairing sewing machines. The restrictive practice was thus adversely affecting a niche market of small (even micro) service providers.

Ring Pharmacies case

A group of 33 individually-owned pharmacies (which had formed an association called Ring Pharmacies), are all small and medium-sized enterprises. Ring Pharmacies had been engaging in joint marketing initiatives to assist them to compete with pharmacy chains. They applied for an exemption so that they could continue to conduct joint marketing initiatives to enable them to compete with established chains of pharmacies.

In recent years, in South Africa, pharmacy chains have proliferated, and the small individually-owned pharmacy has become a rarity. The exemption was granted for 5 years to enable these SMEs to compete with the large chains. This decision recognises the benefits of small, individually-owned pharmacies, some of which may not have been targeted by the pharmacy chains as a result of their location or performance. The decision is thus pro-active support for small enterprises to compete in a market which has experienced a new reconfiguration as the chains have become commonplace.

Economic empowerment of historically disadvantaged persons is a key policy objective. Empowerment is achieved through many initiatives including employment equity requirements. The role of competition policy in empowerment is illustrated in a

case that highlighted very different interpretations of this public interest consideration by the Competition Commission and the Competition Tribunal.

Shell-Tepco Merger

The Shell-Tepco merger took place in the oil industry. This industry is a high volume, low margin, capital intensive industry, and in South Africa also highly regulated.

Price control, especially retail price maintenance, and import control are key features of the regulatory dispensation. Maximum prices are set for petrol (gas), diesel and paraffin, from which dealers may discount. Stakeholders in the industry and the Department of Minerals and Energy have set goals to achieve Black Economic Empowerment (BEE) in the industry. At the time of the merger, BEE in the oil industry was in its infancy with BP being the leader in this regard. Shell was therefore very interested in this merger which would provide it with an empowerment partner.

Shell South Africa (SA) manufactures and markets petroleum and petroleum products directly and indirectly through subsidiaries and franchise outlets in South Africa. A distinction is made between the retail and commercial markets. The retail market is business-to-business which buys in bulk either on tender or contract or at negotiated prices. In the retail market products are sold to consumers through retail franchise networks such as petrol stations. The geographic market for the commercial segment is national because of 'hospitality' agreements among oil companies in terms of which they swap product (with regulated specifications) at different locations determined by the location of the refineries and customers. This means that a commercial customer can go to any depot with which the contracting oil company has a hospitality agreement.

The geographic market for retail is sub-national. Data was only however available at the magisterial district (local council) level, and hence this influenced the geographic market definition of the retail segment.

Shell is one of several oil majors operating in South Africa. At the time of the merger transaction, Shell SA was the second largest national player in the retail diesel and commercial paraffin markets, the third largest player in the retail petrol market and the fourth largest national player in the commercial petrol market.

Tepco by contrast was one of the smallest players in all relevant markets.

Tepco is a wholly-owned subsidiary of Thebe Investment Corporation. It markets and distributes petroleum and petroleum products as its main business.

An important consideration in this case was the role of government-induced regulation in the oil industry. Although the Department of Minerals and Energy has embarked on a process of managed liberalisation, regulation still accounts for much of the distortion in the various markets in the industry. Another important consideration was that product specifications, specifically, are regulated. The relative product homogeneity facilitates substitution by consumers and thus enhances competition among suppliers. In the commercial market segment, where prices are not regulated, customers interviewed by the Tribunal indicated that they can negotiate prices with suppliers, and this prevents the abuse of even a dominant position in a narrowly defined geographic market.

The merger passed the SLC test – no lessening of competition was anticipated in the relevant markets, which were defined as the marketing and distribution of petroleum products nationally in South Africa.

However the Commission conditionally recommended that the merger be approved , on the grounds that the merger would remove Tepco as an independent player in the petroleum industry, and would inhibit the ability of a firm owned or controlled by historically disadvantaged individuals to become competitive. The conditions for approval were:

- Tepco should remain an independent company jointly controlled by Thebe and Shell, and
- Tepco's brand should be maintained to ensure its independence.

The first condition would require a restructuring of the deal that the parties had put together, and neither wanted. Tepco indicated that it was experiencing structural difficulties and hence it wanted to be taken over by Shell – after the deal it would be owned and controlled by Shell.

The Tribunal criticised the Commission's recommendation as patronising, indicating that empowerment is not 'further obliging firms controlled by historically disadvantaged persons to continue to exist on a life-support machine.'

The second condition was viewed as linked to the first by the Tribunal and subjected to the same criticism – there was no reason to prolong the existence of a non-viable brand. Tepco's locations were in high-risk markets that other suppliers were not prepared to supply. Thus its exit from the market did not remove an effective competitor.

The Tribunal emphasised that the parties are free to make whatever deal they chose – provided they meet the approval of the competition authorities.

The Tribunal overruled the Commission's recommendation, and approved the merger unconditionally. One of the reasons for the Tribunal's decision was that Tepco could drain the financial resources of its parent company if it were forced to remain independent in the market. The conclusion to the Tribunal's decision is instructive:

'The role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory and regulatory instruments - in this case the Employment Equity Act, the Skills Development Act, and the (Empowerment) Charter itself spring to mind. The competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an over-zealous manner lest they damage precisely those interests that they ostensibly seek to protect.' (www.comptrib.co.za)

This case raises very important considerations in the interpretation of the public interest in the context of a merger assessment. While public interest concerns are explicitly incorporated into the merger assessment process, it is recognised that they should be interpreted very cautiously, and that the role of other policy initiatives in promoting those public interest objectives may be far more important than that of competition policy and law.

5. Conclusions

South Africa's experience in the development of its competition policy and law in the 1990s offers important lessons for other developing countries. First, the development of competition policy took place during a comprehensive policy reform programme. While this may not be feasible in other countries, it is important to note from this experience that due consideration for the policy synergies, perhaps among

the collection of microeconomic policies such as trade, industrial, competition and labour market policies, is important.

Second, a very important aspect of the development of competition policy and law is the building of a competition culture. In some developing countries economies are still in a transition from socialist-type or highly controlled economic systems. The private sector is an emerging one, and the benefits of competition may not be appreciated or be obvious to all stakeholders in the economy. An inclusive process of discussion and education around competition issues may assist to develop a competition culture that will enhance the benefits of enforcement.

Even in South Africa, where a comprehensive policy process involved a broad spectrum of stakeholders, competition law practitioners indicate that it is sometimes difficult to obtain information from, even large enterprises, for merger filings or investigation of competition complaints. The perception seems still to be that competition law implementation is a bureaucratic process, a hassle factor for business. The collaboration of competition champions (perhaps larger businesses) to extol the virtues of effective implementation of competition can play a role in this regard. In South Africa, for example, South African Breweries, now a multinational beer producer, has a well-publicised compliance programme for managers, and this has assisted to raise the profile of competition policy in the private sector.

In merger regulation for example, trade unions are explicitly involved in the merger notification process. Thus, competition policy becomes not only an issue for management but also for employees.

Third, South Africa's experience in implementing competition has highlighted the importance of capacity building. In South Africa, as in many other developing

countries, there is not a long tradition of collaboration between lawyers and economists. Lawyers seldom study economics and economists are not likely to study law either. Competition policy and law requires an inter-disciplinary approach, bringing lawyers and economists together. This is also a new area of study in South Africa, especially in the legal field, and this is probably similar in many developing countries.

A particular challenge as a result of the skills shortage has been the high rate of staff turnover at the Competition Commission. Commissioners with little more than a year's experience have become very sought after in legal firms and in the private sector. Capacity building should therefore be an ongoing exercise.

Fourth, the specific challenges faced in the South African case at the end of the apartheid era also hold important lessons for developing countries. Distortions by government regulation, high levels of concentration in ownership and control, and vertically integrated conglomerate organisations were not conditions supportive of a strong competition culture and robust competition processes. This meant that the usual objective of competition policy to promote competition and economic efficiency was important, but at the same time, broader public interest objectives were also important. Public interest objectives mattered in the context of competition policy even though they were also to be pursued through other policy channels.

While public interest objectives are important, their introduction into competition policy and law has to be handled very carefully. South Africa's experience with its 1979 Maintenance and Promotion of Competition Act, offered clear lessons in this regard.

The 1979 Act put the public interest as the final criterion against which competition decisions would be tested, but did not define the public interest. This led to *ad hoc* and conflicting case law, and this was compounded by the political influence that could influence or override decisions by the Competition Board.

In the new Competition Act, the public interest is explicitly articulated. Specifically four public interest pillars are identified, and bounds are placed on the permissible recourse to public interest issues in competition cases.

While it may be desirable to include public interest considerations explicitly to limit the scope of interpretation, care has to be taken both in the drafting of the law and in the implementation of that law. Caution must be exercised to ensure that decisions are credible and a consistent body of case law amplifies the letter of the law.

Effective and consistent implementation of competition law is perhaps the most important advocacy tool in a developing country. There may be occasions where the promotion of public interest objectives will be better served by other policy interventions than competition policy, and the competition authorities should be bold enough to hold back on such decisions (as was the case in the Shell-Tepco merger discussed earlier).

The unique South African history led to the delineation of four pillars of public interest: small and medium enterprise development and black economic empowerment, employment, impact on a particular industry or region, and the ability of national industries to compete in international markets. In the implementation of competition law thus far, it is in the case of merger control, that employment, economic empowerment and small enterprise development have featured most prominently. The ability of national industries to compete in international markets has not yet been considered positively key in any merger assessment.

In general, and specifically for developing countries, it is important not to overload the competition policy agenda. There are objectives (including in particular, public interest objectives) that can be more effectively achieved through other policy channels. Policy coordination and inter-policy consistency is critical, especially for developing countries that are face the challenges of market development, with in some cases an emerging , rather than a robust, private sector, especially a small business sector. The number of public interest issues included in the competition policy agenda should therefore be strictly limited, and through effective implementation of the competition law synergies, with other policy initiatives supporting these public interest objectives, should be developed.

Although the public interest test in merger review is clearly specified, the Competition Tribunal has been cautious in its consideration of this test. This is singular lesson for developing countries. If the credibility of the competition authority is to be built in the application of a public interest test then cautious application is recommended.

The South African experience has also showed that competition policy and law, despite resistance at the multilateral level to engage in negotiations to determine competition rules, it is not possible to avoid competition issues in bilateral negotiations. South Africa (and SACU) is currently negotiating a free trade agreement with the United States and competition policy is definitely on the agenda, as it is too in the negotiations with the European Free Trade Area (EFTA) to conclude a free trade agreement. It seems fair to say that such trade negotiations highlight the potential impact on domestic markets if competition policy does not exist.

The new generation trade agreements include trade-plus issues such as investment, and the entry of new firms, perhaps large ones, may have serious effects on the

nature and intensity of competition in developing country markets. The absence of competition policy and law could mean that domestic firms do not have any armour should the newcomers engage in anti-competitive practices. So while developing countries welcome and actively compete for foreign direct investment, they should ensure that competition policy and law is in place to ensure that competition is fair and enterprise development is facilitated not frustrated.

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