In the Public Interest: Implementing South Africa's Competition Policy in the Broader South African Policy Context

1. Introduction

South Africa's competition policy and law are distinguished by the explicit inclusion of public interest objectives in addition to the efficiency objectives, which are most commonly the core focus of competition law and policy.

This paper attempts to place the discussion concerning this explicit inclusion of public interest objectives in a broader policy context. A broader debate about the role of the developmental state is important in South Africa, both at national and provincial levels. Key concerns in many dimensions of the policy debate, whether related to trade liberalization or small business development or even macro-economic policy matters, relate to distributional issues. South Africa is currently enjoying unprecedented economic growth; with the longest period of positive growth since the Second World War. Yet assessment of South Africa's growth performance raises concerns about employment creation or job losses, about income distribution and about black economic empowerment. The quality of growth or the developmental impact of growth is in other words a key concern.

This suggests that policy review in South Africa, and this includes review of the implementation of competition law and policy, needs to take cognizance of the broader socio-political-economy context of development in South Africa. A key question to ask is how and to what extent fundamental development matters are reflected in policy. A critical review of how best to address the development challenges needs to inform a coherent approach to policy making to that the most appropriate policy channels are used to achieve specific development objectives.

South Africa's competition policy and law were drafted soon after South Africa became a democracy in 1994. During the period immediately after the democratic transition South Africa embarked on a comprehensive policy review process[1] The aim was not only to transform South Africa's economy and society, but also to integrate South Africa into the

[1] Cassim, R and DE van Seventer, 2005. Reform of South Africa's Merchandise Trade since Democracy, An Overview, paper presented at Conference: South African Economic Policy Under Democracy: a 10 Year Review held at University of Stellenbosch, 28-29 October 2005 (paper available at: http://www.academic.sun.ac.za/econ/econconf/programme.htm)

global economy which itself was in many ways transforming after the demise of socialism in the late 1980s. South Africa had been effectively excluded from the global economy during the final years of apartheid, and substantive reform was necessary if South Africa to be able to compete in an increasingly competitive global economy.

Concerns about a competition policy focusing exclusively on efficiency considerations soon became apparent in policy debates. A strong development focus had to permeate all policy making endeavours, competition policy included. This would address the legacies of the apartheid era which had excluded the majority of South Africans (black South Africans) from the mainstream economy. What kind of competition policy was politically possible in the new South Africa? The answer was that besides a core focus on economic efficiency a strong emphasis on development was not negotiable.

In the end, the new competition law, even with the broad sweep of its objectives, does put economic efficiency centre-stage. In addition several broad and other very specific public interest objectives are articulated alongside the goal of economic efficiency. As the competition law jurisprudence develops the nature of the trade-offs within this nexus of objectives become clear, since the law does not specify the detail of the trade-offs that have to be made between efficiency and public interest objectives.

South Africa's new 1998 Competition Act ('Competition Act' or 'Act') makes a significant departure from the previous competition law, and in the development of effective market governance. However, much remains to be done to develop capacity, in particular the institutional capacity for effectively enforcing competition law and complementary regulatory frameworks that will support the broad competition policy objectives to reach beyond efficiency to encompass public interest objectives. And perhaps even more important, it would seem, especially from recent investigations into alleged restrictive practices and cases that have been heard, that there remains much to be done to change firm behaviour from mere manoevering around competition law to effective compliance.

2. A New Competition Law for a New South Africa

The South African economy has been characterized by high levels of concentration — both in terms of ownership and market share, [2] and previous competition law had not addressed this. Development concerns featured strongly in the debates on the role of competition policy in addressing both structural features of the economy, as well as corporate behavior, especially of the large conglomerates.[3] The challenges of addressing poverty and unemployment were as much a part of the policy discussion as was the promotion of competition and economic efficiency.[4]

The Competition Act of 1998 and its amendments regulate competition in all of South Africa's markets.[5] The latest amendment is the Competition Second Amendment Act of 2000, which came into effect in February 2001[6]. The Consolidated Act, incorporating all amendments, provides for the establishment of three agencies responsible for implementing and enforcing the regulations.[7] These are the Competition Commission, the Competition Tribunal and the Competition Appeal Court[8].

The 1998 Competition Act 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."[9] The purpose of the Competition Act emphasises, in addition to the promotion of "efficiency, adaptability and development of the economy,"

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2 Department of Trade and Industry Pretoria, The Evolution of Policy in South Africa: Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development, § 3.3 (Nov. 27, 1997), http://www.compcom.co.za/aboutus/about_evolution.asp.

3 Lewis, D, 2003. The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency, presented at the OECD Global Forum on Competition, 10-11 February 2003, Paris, p.4.

4 Ibid, p.4.

5 Republic of South Africa, 1998.(*op cit*), Republic of South Africa, 2000. Competition Second Amendment Act, No. 39. Government Printers: Pretoria. (available at: http://www.compcom.co.za/ thelaw/thelaw_act_competition_acts.asp?level=1&child=1)

6 *Ibid*. See Preamble to the Act.

7 *Id*. Chapter 4.

8 Details available on the websites of the Competition Commission (http//www.compcom.co.za) and Competition Tribunal – which has details of the Competition Appeal Court too (http://www.comptrib.co.za)

9 Competition Act 89 of 1998 s. 3(1), *available at* http://www.compcom.co.za/thelaw/TheNewAct.doc.

[10] the promotion of small business development, greater participation in the economy, (especially by previously disadvantaged individuals), and the promotion of a greater spread of ownership.[11] The Act thus attempts to balance efficiency concerns and broader development priorities within the competition framework.

Small and medium-sized enterprise ("SME") development is important because of the structure of the South African economy. High levels of concentration, and the conglomerate structure of business in many sectors from mining, manufacturing and services, are important challenges for small business development in South Africa that are above and beyond 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.

Promoting a broader spread of ownership, especially among historically disadvantaged persons, reflects concerns about the skewed distribution of income and wealth in South Africa.[12] 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[13]. Black economic empowerment is now an important cross-cutting policy issue. [14] A more even spread of ownership and SME promotion are deemed to be important to ensure longer-term balanced and sustainable development.

The Competition Act provides for extensive jurisdictional coverage, which is important from a developmental perspective. Extra-territorial reach is also provided for, to the extent that the Act applies to "all economic activity within, or having an effect within, the

[10] *Id*. s. 2(a).
[11] Lewis, D. 2003 (*op cit*), p. 5. and Republic of South Africa, 1998. (*op cit*), section 2: Purpose of the Act.
[12] Roberts, B, 2005. 'Empty stomachs, empty pockets': poverty and inequality in post-apartheid South Africa, available at http//www.hsrcpress.ac.za.
[13] Whiteford A and MD McGrath, 1994. The distribution of income in South Africa, Human Sciences Research Council, Pretoria,

[14] Thabo Mbeki, 2005. Address of the President of South Africa, at the Joint Sitting of the third Democratic Parliament, Cape Town.

Republic."[15] The nature and scope of this extra-territorial reach was tested in a recent case., involving the export of soda ash from the United States to Botswana.[16] Both Botswana and South Africa are members of the Southern African Customs Union ("SACU") and share a common external tariff.[17] Hence, imports into Botswana can be expected to have an effect within South Africa. This case is important not only in terms of shedding some light on the extra-territorial jurisdiction, but further highlights challenges associated with competititon matters in the Southern African region.

To date only South Africa has a policy, law and a competition authority to enforce the law. The other members of the Southern African Customs Union (SACU) are at various stages of developing policy, drafting laws and regulations, and establishing authorities. Namibia is most advanced in this process, having appointed commissioners of the Namibian Competition Commission, and when funding becomes available the Commission will become operational, most likely 2007.

South Africa's Institutions for Competition Regulation

The Competition Act provides for three agencies to enforce and implement competition regulations. The Competition Commission, the Competition Tribunal and the Competition Appeal Court have exclusive jurisdiction over competition matters.

[15] Competition Act 89 of 1998 s. 3(1), *available at* http://www.compcom.co.za/thelaw/TheNewAct.doc.
[16] Case 49/CR/Apr00 and 87/CR/Sep00, Competition Commission and Botswana Ash (Pty) Ltd, Competition Tribunal, Republic of South Africa (2001), *available at* http://www.comptrib.co.za/decidedcases/pdf/49CRAAPR00-2pdf.pdf (ruling on the effect of an American export cartel of soda ash to Botswana).
[17] For more detail of the Southern African Customs Union, see the 2002 Customs Union Agreement - available at http//www.tralac.org/scripts/content.php?id=3031

- **Competition Commission**

The Competition Commission ("Commission") is the investigatory agency. It is an autonomous statutory body which monitors competition and market transparency by investigating anti-competitive conduct.[18] It is empowered to investigate, control and evaluate restrictive practices, abuse of dominant position, as well as mergers and acquisitions.[19] The Commission is independent from the Department of Trade and Industry, and its decisions may be appealed to the Competition Tribunal and the Competition Appeal Court.[20] This is very different from the situation of the previous Competition Board. The Competition Board, which existed until 1999, functioning under the Maintenance and Promotion of Competition Act of 1979, was basically an administrative body, within the Department of Trade and Industry.[21] The Board could only make recommendations to the Minister of Trade, who would make the final decision on any competition matter.[22] The 1979 Act granted the Board extensive scope to investigate both mergers and restrictive practices.[23] However, with effective decision-making resting with the Minister, it was to be expected that political dictates would lead to challenges to credibility and consistency.

- **Competition Tribunal**

The Competition Tribunal is the adjudicatory body or decision-maker of first instance, adjudicating matters referred to it by the Commission and by the complainant who, under

[18] See Chapter 4: Competition Act: Republic of South Africa, 1998.(*op cit*)
[19] Competition Commission, Functions, http://www.compcom.co.za/aboutus/aboutus_competition_commission_function.asp?level=3&child=2&desc=9 (last visited Feb. 13, 2006).
[20] See Chapter 4: Competition Act: Republic of South Africa, 1998 (*op cit*)
[21] Republic of South Africa, 1979. Maintenance and Promotion of Competition Act 96 of 1979: Government Printer, Pretoria. (available at: http://www.compcom.co.za/thelaw/thelaw_act_maintenance.asp?level=1&child=3)
[22] *Ibid*.
[23] *Ibid*.

Section 51(3) and (4) of the Competition Act, can refer matters directly to the Tribunal, subject to the Tribunal's rules of procedure, after a decision of non-referral has been made by the Commission.[24]

The key functions of the Tribunal are to grant exemptions, authorize or prohibit large mergers[25] and adjudicate prohibited practices and mergers under Chapters 2 and 3 of the Act respectively.[26] The Tribunal also acts as an appeal body for decisions of the Commission and may grant orders for costs on matters presented to it by the Commission[27].

- **Competition Appeal Court**

The Competition Appeal Court may consider any appeal or review of a decision of the Tribunal. It may confirm, amend or set aside any decision or order and give any judgment or make any order that the circumstances require.

The new institutional architecture of South Africa's competition regime provides for much more robust implementation of competition law. This is very different from the previous Competition Board whose decisions were effectively subject to Ministerial over-ride. However these institutions, and the capacity especially within the Commission may not yet sufficient to ensure that competition law is effectively enforced.

[24] *See* Case 72/CR/Dec03, Nationwide Poles and Sasol (Oil) Pty Ltd, Competition Tribunal, Republic of South Africa (2005), *available at* http://www.comptrib.co.za/decidedcases/html/72CRDec03.htm (describing a case of alleged price discrimination referred by a complainant to the Tribunal after a non-referral decision by the Commission.) *See also* Case 49/CAC/Apr05, Sasol Oil (Pty) Ltd and Nationwide Poles CC, Competition Tribunal, Republic of South Africa, 38-41 (2005) at 38-41, *available at* http://www.comptrib.co.za/CAC/Sasol%20Nationwide%2049CACApr05.pdf (overturning the Competition Appeal Court).

[25] The Commission has first-instance jurisdiction over smaller mergers. See: Competition Act, 1998 chapter 4, sec. 21 (Republic of South Africa, 1998, *op cit*)

[26] Competition Act, 1998, chapter 2 (Prohibited Practices), chapter 3 (Merger Control) (Republic of South Africa, 1998, *op cit*)

[27] *Id* – chapter 4 (Part B).

Competition and Regulation: A Coherent Public Interest Approach

Accompanying the debate on competition policy during the early phase of South Africa's new democratic era, was a strong emphasis on other aspects of regulatory reform. Given the significant role of government in the economy, through for example state-owned enterprises during the apartheid era, this was not surprising. Sector regulation, sector regulators, and specific provisions reflecting development concerns such as access to telecommunications and energy services were very much on the regulatory reform agenda.

The 1998 Competition Act however (prior to the amendments of 1999, 2000 and 2001) excluded "acts subject to or authorized by other legislation."[28] A proposed merger between two large players in the financial services sector (Nedcor and Stanbic) brought to the fore the implications of this exclusion. The Supreme Court of Appeal (not the Competition Appeal Court) found that the Competition Act did not have jurisdiction over bank mergers. This decision[29], and a decision by a High Court Judge stating that an agricultural cooperative similarly would escape jurisdiction because it was subject to a marketing statute, prompted an amendment to the Act. Concurrent jurisdiction between the Competition Authorities and Sector Regulators is now provided for in the Competition Act.[30]

In the interest of consistent application of the Competition Act across all sectors, the functions of the Commission were also broadened by the Competition Second

[28] Competition Act No. 89 of 1998 s. 3(1)(d), *available at* http://www.compcom.co.za/thelaw/TheNewAct.doc.
[29] *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition and Others 2000 (2) SA 797 (SCA)* – the Court interpreted section 3(1)(d) of the Act to provide that all industries subject to public regulation fall outside the scope of the Act.
[30] Competition Act No. 89 (*op cit*) Chapter 1 sec. 3 (1) (e) and (1A) (a).

Amendment Act of 2000.[31] To promote interaction and cooperation between Sector Regulators and the Competition Authorities, the amendment requires that the Comission enter into agreements with the other sector regulators and make provision for the exercise of concurrent jurisdiction.[32] The exact jurisdictional boundaries are therefore not a matter of law but to be agreed between the two parties.

Only three sector regulators have thus far signed Memoranda of Understanding with the Competition Commission as required by the Act: the Independent Communications Authority of South Africa ("ICASA"), The National Electricity Regulator ("NER") and the Postal Regulator ("PR").

In addition to the Memoranda of Agreement, the sector regulators established a Regulators' Forum in March 2002, which they envisioned would deal with the fragmented and sometimes contradictory approaches to competition matters. The forum facilitates a process of information sharing and discussion of common issues to avoid overlaps, duplication or even contradicting activities. The forum got off to an enthusiastic start in 2002, however this momentum has not been maintained. In the 2003-2004 Annual Report of the Competition Commission, the Commissioner attributed this to the "fragmented nature of the regulatory framework" and called for "greater convergence in regulatory processes."[33]

[31] Competition Second Amendment Act 39 of 2000, *available at* http://www.info.gov.za/gazette/acts/2000/a39-00.pdf.
[32] Id. at Chapter 1, sec. 3(1A) (b).
[33] 2003/2004 COMPETITION COMMISSION OF SOUTH AFRICA ANN. REP. 8, *available at* http://www.compcom.co.za/resources/annual%20report%200304/word/annual%20report.doc.

3. Capacity for Effective Regulatory Enforcement

Effective regulatory enforcement requires very specific capacities, not only within the regulatory authorities, but also within the private sector, the legal and economics professions, and among consumers. Limited or weak capacity can lead to challenges of regulatory capture by a small collection of experts.

Capacity in the Legal Profession and Private Sector

The capacity that has developed in the legal profession, in particular, is worth noting. Roughly six years ago, very few law firms had any expertise in competition law, let alone had a competition law department. Now all major law firms and many smaller ones have expertise in this area, and some are even taking on economists as associates. Hopefully, it will soon become commonplace to find law degrees that specialize in competition law, including studies in relevant economics courses, and vice versa.

Small businesses are still not as aware as they should be of the importance of competition law to their business. Given the high levels of market concentration, the role of small businesses and their ability to compete with larger business is a serious concern of competition law. The case of *Nationwide Poles v. Sasol* is instructive.[34] This case received a decision of non-referral from the Commission. The managing director of Nationwide Poles then took the case to the Tribunal without legal assistance. The experience of this small business had raised a number of very important issues, including the cost of legal expertise to support a competition case, the specialized knowledge required to meet the high standards of the competition authorities with

[34] Case 72/CR/Dec03, Nationwide Poles and Sasol (Oil) Pty Ltd, Competition Tribunal, Republic of South Africa (2005), *available at* http://www.comptrib.co.za/decidedcases/html/72CRDec03.htm.

respect to submissions and participation in proceedings and the length of time it may take to get a case resolved. The managing director of Nationwide Poles has documented his experience and provided very useful information for small firms involved in competition litigation on a website.[35]

Skills Constraints

The Competition Commission faces the challenge of attracting and keeping good staff. Especially in the early years of enforcement by a new regulatory regime, qualified competition experts who worked at the Commission became very attractive to law firms, consulting firms and business more generally. While this is problematic for the Commission, which invests in training and on-the-job learning only to lose these experts, it is important to focus on broader, economy-wide scheme. Success stories are still too few, especially in restrictive practices related cases. Developing capacity to address difficult issues will substantially strengthen the Commission. The Commission needs more success stories, and judging by a number of recent investigations such as those in the automotive and airline industries, opportunities exist to achieve just that.

Competition expertise in law, economics, and business more generally can contribute to developing awareness of competition issues, compliance, and ultimately also better enforcement. The number of postgraduate level courses that now include competition law and policy has increased markedly during the last decade. Especially on the economic front, however, there are still not many that focus on the development of strong quantitative analytical skills.

[35] Nationwide Poles & Jim Foot, *Essays on Price Discrimination*, http://www.comphelp.family.nu (last visited Feb. 13, 2006).

Trade unions are taking more interest in competition matters, specifically mergers at this stage. Their interest in the employment impact of mergers is obvious, and therefore their participation in merger proceedings is most welcome. However, with their broad mandate to look after worker interests, taking interest in restrictive practices investigations could be even more important. This requires trade unions to have different analytical capabilities.

Consumer organization in South Africa is very weak and to date, the participation of a consumer constituency in competition matters is rare. Again, restrictive practices are of obvious interest to consumers.

Case Load for the Commission and the Tribunal

The staff turnover of the Tribunal has, in contrast to the Commission, been very low. This has helped build a strong institution that commands the respect of business, government, and international institutions.

Tables 1, 2 and 3 below summarize the case activity of the Commission and the Tribunal in recent years. It is true that resource application has been concentrated on regulatory review of merger transactions; however, more recently, restrictive practices cases have increased, as the data indicates. This reflects the increased capacity within the Commission, in particular, and also greater awareness in the private sector and the general public as to the role of competition law and policy and the ease with which complaints can be brought to the Commission and even directly referred to the Competition Tribunal, if the Commission decides not to do so. A very important recent case involving South African Airways ("SAA") demonstrated how the Commission and the Tribunal have now focused more seriously on restrictive practices. The SAA abuse

of dominance case considered an incentive scheme that the airline offered to travel agents. SAA's dominance was not contested, and the scheme effectively meant that other airlines were severely disadvantaged. A fine of 45 million South African Rands, which is approximately $7.5 million in U.S. dollars, was imposed. SAA has paid the fine without appeal.[36] This case reflects a more robust approach by the Commission to pursue restrictive practices in key markets.

Table 1. Merger decisions by the Commission (2001 – 2004)

Year	Total notifications	Total number prohibited	Total cases withdrawn/no jurisdiction	Approved without conditions	Approved with conditions
2001/2002	220	2	10	213	0
2002/2003	211	1	7	194	5
2003/2004	284	1	8	262	7

Source: Annual Reports: Competition Commission (available at www.compcom.co.za)

Table 2. Large merger decisions of the Competition Tribunal (1999 – 2004)

Year	Total decisions	Approved without conditions	Approved with conditions	Prohibited
1999-2000	14	14	0	0
2000-2001	35	29	4	2
2001-2002	42	38	3	1
2002-2003	62	57	4	1
2003-2004	60	51	9	0

Source: Annual Reports: Competition Tribunal (available at www.comptrib.co.za)

[36] Case 18/CR/Mar01, Competition Commission and South African Airways (Pty) Ltd, Competition Tribunal, Republic of South Africa (2003), *available at* http://www.comptrib.co.za/decidedcases/html/18CRMar01%20Interlocutory.htm.

The large proportion of mergers approved without conditions raises important questions. If the majority of mergers are in fact unconditionally approved, is the current allocation of resources to the oversight of mergers justified? The focus on merger control provides some insight into the relative importance of the public interest objectives within the ambit of competition policy in South Africa. Although the above record indicates that public interest concerns are unlikely to trounce economic efficiency in a merger evaluation, the growing participation of trade unions, as well as the increasing analysis given to assess the impact of a merger on employment, for example, indicates that for competition law and policy to be seen as aligned with the country's broader development policy.

Investigating the impact of restrictive practices in a selection of sectors may very well bring large efficiency gains, as well as address key public interest concerns such as employment and small business development. The number of complaint referrals to the Tribunal, as seen in Table 3 below, is dwarfed by the number of mergers.

Table 3. Competition complaint referrals to and decisions by the Tribunal in restrictive practices cases (1999 – 2004)

Year	**Referrals**		
	Competition Commission	Complainant	Decisions, including consent orders
1999-2000	0	1	5
2000-2001	11	8	11
2001-2002	6	3	5
2002-2003	5	6	6
2003-2004	4	11	5

Source: Annual Reports: Competition Tribunal (available at www.comptrib.co.za)

Enforcement Challenges of the Regulatory Interface

Jurisdictional conflicts could pose problems for effective enforcement too. As indicated, only three Memoranda of Understanding have been concluded between the Commission and the relevant sector regulators. Much work remains to develop capacity within the sector regulators. Such capacity would also assist to develop a workable interface with the Competition Authorities, which does not yet exist. In key sectors such as telecommunications and energy, the promotion of a competitive environment through effective enforcement of both sector-specific and competition-related regulation is important. The impact of competitive outcomes in terms of pricing, and access to quality service and consumer choice on the overall performance of the economy is likely to be significant, especially perhaps on small business development. Of course, for both sectors the issue of privatization is still a weighty one. In the case of telecommunications, the process has been slow and fraught with bureaucratic complications. In short, privatization has not been focused on the development of a more competitive industry but rather on the imperative that asset values be increased in preparation for privatization. The energy sector is a particularly interesting example. "Following the first democratic revolution in 1994, emphasis was given to electrification, improvements in electricity distribution, the creation of an independent regulator and the corporatization of Eskom"(which is the South African Electricity Supply Company).[37] Work on the development and design of a competitive electricity market has continued during the past decade.

[37] Anton Eberhard, *The Political Economy of Power Sector Reform in South Africa* 1-39 (Programme on Energy and Sustainable Development, Stanford University, Working Paper WP-06, 2004), *available at* http://www.gsb.uct.ac.za/gsbwebb/mir/documents/StanfordPSREberhardSep2004final.pdf.

Power outages during the last few years has raised concerns about both generation and distribution capacity. The massive investments that are necessary to expand, especially generation capacity and related concerns, may also delay the structuring of a more competitive distribution sub-sector. Specific concerns were raised about the proposed model of power sector reform, by the Congress of South African Trade Unions ("Cosatu''), which broadly follows international models. Cosatu opposed the privatization of Eskom, preferring that it remain a vertically-integrated, publicly owned utility to be used by the government to provide low-cost energy to all, especially to the poor. With regard to distribution, Cosatu supports a single national distributor.

Challenges of Structural and Behavioral Legacies

South Africa does not have, in many of its industries and sectors, a competitive environment that can support economic decisions by firms, investors and consumers that will aggregate to produce robust and sustainable economic growth. Anti-competitive practices are, arguably, far more prevalent than the record of cases coming before the Competition Authorities thus far indicates. This is part of the legacy of the apartheid era on South Africa's development where the state played a significant role both as producer and regulator. The effects of strong state intervention and participation in markets were magnified by economic sanctions that limited the participation of South African firms in the international economy. Import substitution industrialization was the dominant paradigm both by design and the result of economic sanctions. Consumer choice was constrained by virtual autarky.

Investment options were severely limited, and led to investment patterns by firms which supported the development of a conglomerate structure of ownership in the South African economy. The pervasive role of the government in productive economic

activities and recent experience with privatization testifies to the government's important role in the economy. In particular, the protectionist policies, such as import substitution and industrialization supported exchange controls, compounded by the effects of isolation during the height of apartheid, meant that South African businesses faced very little competition from imports, while also having limited investment opportunities outside the country.

Firms in many sectors, including agriculture, mining, manufacturing and services, invested in sectors and industries far removed from their core business because they could not take advantage of investment opportunities abroad. Corporate concentration grew, and the conglomerate structure of South African business was consolidated with the cross-holdings that characterized ownership structures. The structure of holding companies, which grants effective control over subsidiaries with extremely low ownership stakes, is specific to South Africa and poses interesting challenges when assessing the impact of a proposed merger. [38]

Developing a competition culture takes time and requires input from many different sources. The competition authorities themselves can expand their advocacy and education role. There is also a role for greater focus on competition issues in the various government departments. For example, those departments that have been involved in domestic regulatory reform, such as the Communications, Minerals and Energy, and Health Departments, need to bolster their expertise in the field of competition. Then, those departments can support the development of a competitive environment in their specific industries. The role of competition and a competitive

[38] WHO OWNS WHOM IN SOUTH AFRICA (McGregor's Publishers ed., 17th ed. 1997).

environment in key industries, such as telecommunications and transportation, is also important to enhancing competition and competitiveness in other industries and attracting investment.

Consumers are both promoters and beneficiaries of competition, so their role in competition enforcement cannot be underestimated. Consumer awareness and their capacity to play a role in effective enforcement needs to be supported by government, business and civil society organization initiatives. Consumer organizations are weak in South Africa, and consumers generally are not aware of competition law and policy, and the ease of bringing complaints to the Commission, and even the Tribunal.

4. How does the Public Interest Feature Competition Law Enforcement: Focus on Merger Control

Public interest matters have to be considered in all merger transactions. Section 12A (3) of the Act provides as follows:

'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 particular industrial sector or region;

- employment;

- the ability of *small businesses*, or *firms* controlled or owned by historically disadvantaged persons, to become competitive; and

- the ability of national industries to compete in international markets.[39]'

[39] Competition Act (op cit)

Merger regulation requires an assessment of whether the proposed merger transaction will lead to a substantial lessening of competition. If there is no substantial lessening of competition, then the next step in the merger review is to look at the public interest impact of the proposed transaction.

If there is a substantial lessening of competition, this may be countered by reference to efficiency gains that are specifically merger-related. And a third step in this case is then a consideration of the public interest considerations. Consideration of the public interest impact of a proposed merger transaction is required in all cases.[40]

A scan through all large merger transactions that have been assessed by the Competition Commission and Competition Tribunal indicates that positive public interest effects are generally unlikely to prove an effective counterweight in the case of a merger considered to have a strong anti-competitive effect. There are a few cases however where in fact negative public interest effect has proved sufficient to persuade the Tribunal to prohibit the merger. The case precedents so far indicate that

The proposed Stanbic-Nedcor merger [41] is a key example indicating that strong public interest considerations may trump the substantial lessening of competition conclusion. In this case it was the employment impact, a projected loss of 4000 jobs, that persuaded the Tribunal to prohibit the merger.

A proposed merger in the sugar industry, a proposed merger between Tongaat Hulett and Transvaal Sugar[42] The parties to this merger indicated that 3000 additional jobs

[40] Although when the Act was first implemented, there was discussion among legal professionals on whether the public interest test was required in all merger reviews (the language was carefully anlysed); it has become clear that the intent of the Act is to as a matter of course, include the public interest test.
[41] Competition Commission (2000a). Competition Commission Report to the South African Reserve Bank – the Proposed Merger between NEDCOR and STANBIC, Pretoria.
[42] Competition Tribunal (2000b), In the large merger between the Tongaat-Hulett Group Ltd and Transvaal Suiker Bpk. Case no. 83?LM/Jul00.

would be created as a result of the merger, and that the merged entity would be able to compete in the international market. The Tribunal's conclusion was still that these merger-related public interest outcomes were no sufficient to counter the substantial lessening of competition that would result from the merger.

In the oil industry a proposed merger between three large oil companies; BP, Shell and Caltex[43], was rejected by the Competition Commission. These three companies wanted to merge their distribution networks, which they argued would bring substantial efficiency gains as a result of the economies of scale gained. Despite the gains to the final consumer that the parties put forward the merger was rejected on grounds that it would lead to a substantial lessening of competition.

Issues that are most often raised in the section of the merger analysis on public interest issues relate to employment effects and skills development. Especially large mergers do often have employment effects. It has become the norm that Trade Unions are consulted in the preparatory merger process. This is as much a result of the Merger Regulation, as it is of Labour Regulation. The latter requires that as soon as any restructuring is contemplated, that employees who are likely to be affected by the restructuring should be informed. And a merger certainly qualifies as a restructuring exercise.

Black economic empowerment (BEE) is a cross-cutting policy imperative featuring not only in competition law and policy, but also in industrial policy, government procurement

[43] Competition Commission (2000c), Commission's recommendations and reasons in the large merger between Shell, BP and Caltex and Trident. Case no. 2000 Aug 10.

and in labour regulation. As regards competition cases, considerations of BEE have not swung any merger decisions by the Commission or Tribunal.

As with BEE, small business development again is an important policy concern, and from industrial policy through fiscal policy and also competition policy are mindful of the challenges and the importance of small business development. In the competition policy and law arena however it has not yet featured as a key consideration in blocking any merger transactions.

The ability of the firm to compete in international markets has again not featured significantly in decision by the Competition Authorities. By contrast it is a argument that is frequently made by merging parties. An interesting example is the merger between Stellenbsoch Farmers Winery Group Ltd and Distillers Corporation (South Africa) Ltd, this argument was simply not entertained by the Tribunal.

Weighing public interest considerations against the substantial lessening of competition and perhaps also against the purported efficiency gains that parties to a merger may present to the competition authorities is no easy task. What is clear is that the public interest considerations are explicitly considered by the merging parties in their filings to the Competition Authorities, and furthermore that the Competition Authorities consider the submissions in their assessments. However to date it is clear that the number of cases where public interest considerations have made a material difference to the outcome of a merger assessment, is small. Put this into the broader context taking into account the very small percentage of mergers that have been prohibited, and the impact of the public interest issues explicitly included in merger control, specifically, in South Africa is indeed even smaller.

A key issue from a broader policy perspective is what is the most appropriate channel to use to address public interest concerns. For example it may well be that there are other more direct policy channels to address specific public interest issues than competition policy, This could very well apply to small business development or black economic empowerment. However what is perhaps the most important issue in this regard is that the explicit inclusion of public interest objectives raises the profile of these policy imperatives, and can ensure that there is policy coherence across diverse policy areas. In addition their inclusion puts these issues on the agendas of firms, and it is at the firm level that the incorporation of public interest considerations can make a significant difference.

5. Conclusion

South Africa's historically high levels of concentration in both its markets and in corporate ownership, as well as other features of the business environment, have important implications for the competition environment, investment, growth and development prospects of the country.

High levels of market concentration in many industries across the manufacturing sector, as well as in the service sector and even in agriculture, require a strong focus on the structural features of markets. It may well be that this has played a role in the allocation of resources to merger regulation since the implementation of the 1998 Competition Act. Merger control is arguably relatively easier to enforce than restrictive practices prohibitions, and in these early years of the new Competition Authorities, it has been argued that this enhances the credibility and reputation of these authorities.

While this may be true, it is also evident that not many merger transactions have been denied. However, it must be acknowledged that the process of merger control has focused the attention of business on competition matters and the powers of the Competition Authorities, and the explicit inclusion of public interest concerns in the process has got business thinking (at least!) about these issues when they develop strategies to enhance their profitability. An important message hopefully is that addressing public interest concerns can find synergy with the profit motive., This is important in building the depth of a culture of compliance and social responsibility in South Africa.

South Africa's competition law and policy includes a unique focus on specific dimensions of public interest, and this makes it possible to take into account matters such as employment, specific industry development or small business development, as well as black economic empowerment, which can play a very significant role in the long term process of developing the nation's markets. Making markets work better, not by themselves, but with appropriate intervention to guide market forces to support broader development priorities, is absolutely essential to developing countries in general, and to South Africa in particular in light of its particular legacy of economic development.