

Unclassified

CCNM/GF/COMP/WD(2003)35



Organisation de Coopération et de Développement Economiques  
Organisation for Economic Co-operation and Development

03-Feb-2003

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS  
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

CCNM/GF/COMP/WD(2003)35  
Unclassified

## **OECD Global Forum on Competition**

**THE OBJECTIVES OF COMPETITION LAW AND POLICY  
AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY**

**-- SOUTH AFRICA --**

*This note is submitted by Mr. David Lewis (Chairperson, Competition Tribunal, South Africa) in his capacity of Lead Discussant under Session I (Part 1) of the Global Forum on Competition, to be held on 10-11 February 2003.*

**JT00138605**

Document complet disponible sur OLIS dans son format d'origine  
Complete document available on OLIS in its original format

English text only

## **SOUTH AFRICA**

### **THE OBJECTIVES OF COMPETITION LAW AND POLICY**

*David Lewis, Chairperson*

*South African Competition Tribunal*

I thought that I should begin this contribution with the trite, but nevertheless important, observation that the objectives of national competition laws and policies are never set by economics professors and, while they are usually influenced by competition practitioners, they are rarely the determinant influence. Over time, certainly, the objectives of the competition statutes, or at least, their interpretation, are moulded by economists and other competition professionals and, critically, by judges. But in the beginning, and this is where many of us are in relative terms, the objectives of competition law and policy are principally shaped by the broad economic and social environment in which they are located, and, more prosaically, by legislators, the media, special interest groups and by the political interests that represent them. Competition is rarely viewed by those who draft the laws as an end, as a 'good' in itself; it is rather a large policy and legislative intervention perceived as one means towards the realisation of broader social and economic policy objectives.

This is true of every country in the first and formative years of its competition policy. It was as true of the developed country regimes in the inception of their policies and laws as it is of the developing countries today. By the way of an obvious example, take the role played by the imperative to create a single market in the development of European competition law. We can, and do, learn from what came before us, but we cannot, and should not, ignore our national circumstances.

So the way that I want to come at the subject matter of this session is to ask why it is that governments of developing countries have, in such remarkable numbers and with such extraordinary speed, adopted competition laws. What are their objectives in introducing competition law? Do they conflict with other national policy objectives and instruments? And, if so, how are these conflicts resolved? I'll illustrate my remarks with some reference to my own country, South Africa.

Developing countries want, above all, to develop – they want to achieve rapid economic growth and, given that most of these countries are simultaneously democratising, they want to achieve a reasonable social balance while pursuing economic growth. So I have attempted to identify a government perspective on the relationship between competition policy and law, on the one hand, and development, on the other hand, by asking, first, why so many developing country governments have passed competition laws in the past 10 or so years; and, second, by asking whether competition law is compatible with industrial policy, that ubiquitous package of policy interventions specifically designed to secure selected developmental and social objectives.

I recognise, of course, that each government driven to adopt a competition policy and law responds to a particular set of imperatives and these are reflected in the letter of the law and the character of its implementation. Hence, in South Africa competition law has strong populist roots – excessive concentrations of private economic power were viewed as a critical underpinning of the apartheid regime and competition law as a mechanism for changing this structure and constraining the conduct flowing from it. At the other end of the spectrum there are some countries whose competition laws have been introduced at the insistence of the IMF. However the extraordinary proliferation of developing country competition

laws suggests a common driver spanning the developing world. There are a number of minor, common imperatives but, in the main, and at the risk of stating the obvious, competition laws have been introduced in developing countries in response to the rapid penetration of markets that has inevitably followed the liberalisation of international trade and investment, and, particularly, through privatisation and deregulation, the liberalisation of domestic trade. Competition policy is a necessary adjunct to the spread of market relations.

However, the victory of the market in developing economies is incomplete, and this for two related reasons:

- First, the state remains a very important direct participant in developing country economies and this is particularly manifest in the continued existence of large state owned enterprises.
- Second, the most highly regarded contemporary development role models are still the ‘Asian tigers’, economies which stood out by virtue of, both, their stellar performance and by the central role of the state in accounting for their success. It was widely, if not universally, held that the Asian states’ success was that rather than displacing the market and the private sector, they had identified and managed incentives directed at securing effective private sector participation in the development process. But critically it was the state, not competition, that provided the key disciplines and, hence, little is heard about competition policy or law in the endless accounts of the triumph of the Asian tigers.

However, since the ‘eighties when developing countries began in earnest the process of political and economic reform, both sides of the ‘states v. markets’, or, for present purposes, ‘industrial policy v competition policy’, debate, have been forced to retreat some considerable distance, with each making concessions to the other.

Proponents of the ‘free market’ have been forced to recognise that the state – retreating in favour of liberalised markets - has not always been replaced by a benign invisible hand pointing in the direction of efficient and equitable outcomes. Instead public monopolies were frequently replaced by private monopolies with the attendant abuse and inefficiency. This experience, above all, accounts for the mushrooming of competition laws in developing countries as the realisation began to dawn on their policymakers and the multilateral institutions that advised them that efficient markets require effective rules. Indeed some of the questioning has gone even further with many orthodox development economists beginning to recognise again that there are a range of key goods and services that cannot yet be provided through markets alone.

At the same time, the image of industrial policy has, since the late ‘nineties, tarnished somewhat. In the wake of the Asian crises of the ‘nineties, the vaunted developmental states frequently emerged as instruments of cronyism and inefficiency. On the other hand, even diehard proponents of industrial policy have had to acknowledge that the effectiveness of a developmental state of the Asian variety depended on unusually, and for the most part unattainably, high levels of bureaucratic efficiency and discipline and, more uncomfortably, on authoritarian political regimes.

However while these varied insights and experiences injected a greater realism into discussions of the developmental state and tempered some of the enthusiasm for industrial policy, it is still widely held that a select band of countries had developed successfully and that industrial policy could claim some significant role in this all too rare achievement. In the last decade the dawning awareness that globalisation and liberalisation have not realised their earlier promises has also swung the pendulum back towards industrial policy. Though there is still no respectable voice for turning the clock back to the development strategies of the ‘fifties and ‘sixties, the respect for industrial policy remains strong.

The upshot is a typical developing country government that has turned its back on autarky and state domination of domestic markets in favour of liberalisation and its concomitant, private sector development. However, a combination of history, powerful interest groups and recent experience ensures that these markets will not be left entirely to their own devices – their free play will be constrained by two sets of interventions.

- First, competition law is intended to ensure that emerging private monopolists do not undermine the promise offered by markets.
- Second, industrial policy will be used to overcome continuing market failures and to promote projects and outcomes designed to secure some or other developmental or redistributive objective that is not assured by the operations of the market.

Are these policy instruments mutually exclusive? Can a single policy framework accommodate an instrument – competition policy - designed to strengthen market forces and an instrument – industrial policy - designed to intervene in market outcomes?

The co-existence of industrial policy and competition law is tense and generally provides a playing field tilted against competition the more so in developing countries where the regard for competition is thin at best, where old producer lobbies remain active, where new entrants to the business world are pressing for protection and are usually extremely close to the new democratic governments, and where the imperative for redistribution in favour of selected interest groups is overwhelming. Competition law – if not all of competition policy – is an idea in search of a social champion. It will inevitably spend much of its time choking in the dust of myriad producer lobbies or of some powerful firm mouthing the rhetoric of international competitiveness. None of this is unique to developing countries but the difficulties faced by competition advocates are immensely compounded in developing countries.

These conflicting imperatives are present in South Africa's adoption of competition law. In significant part our competition law is the seal of statutory approval on the market, an acknowledgement that the state's direct role in the economy will reduce in favour of the market. But it also reflects an understanding – itself partly borne of the experience of very high levels of market concentration in South Africa – that, left entirely to their own devices, markets could not be relied upon to reproduce the conditions of their own existence. Hence, enter competition law, a pro-market strategy, but one that sought to defend the market not from its traditional opponents on the left of the political spectrum, but rather from monopolists and would-be monopolists in the private sector. During the lengthy negotiations leading to the enactment of the new competition statute, I recall the palpable discomfort of the trade unions and many of the parliamentarians at supporting a pro-market piece of legislation, their consciences only assuaged by the notion that they were defending the market from their old class enemies. By the same token I recall the palpable discomfort of the business lobbies, dominated by representatives of big business, at supporting a statute to which they would have to answer, their misgivings tempered only by the pro-market character of competition law.

Predictably each of these powerful interest groups, with the support of a new government understandably anxious to assume an activist developmental role, sought to defend their particular interests by incorporating social and industrial policy considerations – commonly referred to as 'public interest' considerations - into the working of the Act. Hence, in evaluating mergers the competition authorities are required to consider not only the impact on competition but also the impact on international competitiveness, employment, small business and black economic empowerment. Practices and agreements between firms that would otherwise fall foul of the Act may be exempted from prosecution if the competition authorities can be persuaded that the practice promotes exports, small business or black

economic empowerment or prevents the decline of an industry. The emphasis on small business and black economic empowerment in particular highlights a powerful popular conception of competition law as an instrument for promoting the market access of hitherto disadvantaged and excluded communities. Many of the other 'public interest' criteria reflect industrial policy's traditional pre-occupation with 'competitiveness' and export performance.

How are these various objectives - which most undergraduate economic students would tell as are in mortal conflict – satisfied? Do these insertions into our statute turn us into a mere instrument of industrial policy? Do they inhibit our ability to defend the market against anti-competitive practices and transactions? Or conversely, does competition law constrain the state's ability to pursue industrial policy, notwithstanding these alien insertions into the competition statute?

On balance I would answer each of these in the negative. Our act is structured to ensure that any decision regarding a merger or indeed an exemption is taken after consideration of the impact of the transaction or the practice on competition. It is, moreover, in each instance the competition authority that takes the decision, that balances competition, on the one hand, and social and industrial policy, on the other. I don't deny the difficulty in making the balance but given competition law's intrinsic vulnerability to industrial and social policy, I think that balance between competition and industrial policy is better secured by putting the competition authorities in charge of the balancing decision. This is not to say that the competition authorities can or do blithely ignore the industrial and social policy considerations written into our act. But in the decisions taken by the competition authorities it is clear that the promotion and maintenance of competition has primacy. This is due, in no small measure, to the unusual degree of independence that the competition authorities have – the investigative and adjudicative branches are independent of each other; they are both independent of government; the Tribunal, the court of first instance, is a specialist tribunal putatively composed of competition experts, both lawyers and economists, and with powers akin to that of a high court; the Competition Appeal Court is a specialist division of the High Court; the respective competition authorities have exclusive jurisdiction over all competition matters. In short, the competition authorities are well set up to defend their terrain and to interpret and carry out their mandate. In consequence, I can think of a number of decisions, particularly merger decisions, taken by the competition authorities that would certainly have been taken differently by the guardians of industrial policy.

Nor, on the other hand, has competition law sounded the death knell of industrial policy. In large part itself a result of the pro-market direction of economic policy, South African industrial policy has moved away from targeted support for selected sectors and firms to a focus on the provision of far-from-market general capabilities which do not generally offend competition law or policy.

However, competition *policy*, insofar as it refers to the introduction of competition into areas dominated by the state has proved a far more difficult task than has the introduction of competition *law* into those areas in which the market already reigns. The introduction of competition *law* has had a fairly significant impact on the conduct of state owned enterprises insofar as it has limited their ability to leverage their monopolies into ancillary markets in which they do not enjoy the protection of their license. But competition *policy* has not much extended the reach of competition law and even where privatisation has actually occurred, the resultant market structure has remained highly anti-competitive and the conduct of the erstwhile state owned enterprises very difficult to regulate in favour of competition. Although a stated objective of privatisation is the introduction of competition, in truth the institutions and their managers are sufficiently powerful to blunt competition, and there are too many other major non-competition objectives linked to privatisation. Fiscal considerations – the desire to maximise the price of the asset – imparts an anti-competitive bias to privatisation. And the understandable temptation to use privatisation as an instrument of social engineering, as a source of privilege for one or other interest group, is well nigh irresistible. In short, whatever other benefits may have flowed from the experience of

competition *policy* or privatisation, enhanced competition is, in the short run at any rate, the least significant of these benefits.

So what's the scorecard? The South African government has, through the medium of the Competition Act and the competition authorities, made a serious attempt to enforce competition law for the past 3 years and a wider competition policy the past decade. Have the varying objectives of competition law and policy, on the one hand, and industrial and social policy, on the other hand, been realised? Has competition actually been promoted? Has it co-existed peacefully with industrial policy? This is a big question at any time, and probably unanswerable given the short time frame, but we can draw on some indicative outcomes.

On balance, in those areas subject to jurisdiction of the competition authorities – and this comprises a very large portion of the South African economy at least - I think that we have constrained certain behaviour and, particularly through merger regulation, we have, from a competition perspective, positively influenced the structure of certain important markets. The most confident claim that I could make is that we have introduced some law and order into the mining camp that is the South African market, some notion that market conduct is subject to rules and principles that, though often galling for those who proclaim the virtues of the 'free market' most loudly, are nevertheless conditions for the reproduction of a market economy. My sense is that this does make for an improved investment climate, it makes for a market easier to penetrate both by small domestic investors and large international investors though I can only point to a few instances in which the new competition law was decisive in securing an actual investment. It has co-existed with industrial policy, partly because of the flexibility built into the act through the public interest provisions, partly because industrial policy has accommodated itself to a liberalised market.

However, the *reach* of competition *law* is constrained by the limits of competition *policy*. Indeed, it is in the application of competition *policy* – that is, in the extent and nature of privatisation rather than in the application of the public interest provisions of the Competition Act - where industrial and social policy considerations are asserted most strongly. As already indicated, the application of competition policy has proceeded cautiously and, even where government has successfully withdrawn in favour of private investors, the anti-competitive bias built into actual privatisation projects has ensured that the resultant market structure frequently remains highly concentrated and conduct within these markets highly anti-competitive. The competition law and the competition authorities have had limited impact in these markets – in, for example, telecommunications, in air transport, in the ports – although this is starting to increase markedly. I can think of several instances in which the limited reach of competition law in these areas may have inhibited investment, but equally I can think of instances where universal-service type provisions imposed on state-owned enterprises or licensed monopolies have ensured access on the part of consumers who would otherwise have been passed over by the market.

The easy answer is that the competition authority should use its advocacy powers in order to expand the reach of competition policy. However, successful advocacy presupposes that the advocate has credibility and the competition authorities will only earn this through successful utilisation of its powers in the areas where it has jurisdiction. Moreover, it must use its advocacy power powers judiciously – there are clearly certain areas where the market or 'competition' should be introduced cautiously at best, the more so if the introduction of private investors effectively equates to the rise of private monopoly.

In summary then, developing countries will insist on seeking a balance between competition law and policy, on the one hand, and industrial policy, on the other. They will insist, in other words, on attempting to meet *both* sets of objectives. The overall micro-economic policy framework will be provided by an active competition policy and competition law directed at imposing market disciplines on both public and private concentrations of economic power and by an active industrial policy which will continue to be

deployed as the preferred mechanism for achieving selective economic and social policy goals. Just as European farmers and US steelworkers will in occasional, though important, instances, tilt the scales against competition policy in those jurisdictions, so will pressing economic and social problems in developing countries, ensure similar compromises. The textbooks will continue to find this inelegant, but the real world demands it.