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COMPETITION AND POVERTY REDUCTION

Contribution from Mr. David Lewis

-- Session I --

This contribution is submitted by Mr. David Lewis (Executive Director, Corruption Watch, South Africa) under Session I of the Global Forum on Competition to be held on 28 February and 1 March 2013.

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1. The Problem

1. While the unique ability of market processes to efficiently allocate goods and services to their most productive uses is now widely accepted, it is equally understood that markets fail generating massive intra- and inter-country inequality. Indeed, even when markets operate effectively, there are swathes of people and entire regions that are left behind. No-one who has read 'Behind the Beautiful Forevers', Katherine Boo's riveting account of life in a Mumbai slum, could claim that even sustained market-driven national growth at an unusually high level guarantees a path out of large scale and crippling poverty.[1] If those responsible for defending markets are concerned, as they must be, with the legitimacy and public acceptance of their actions, then they must be seen to be concerned about these shortcomings and to be doing all in their power to limit their impact on the most disadvantaged.

2. I will approach this session from the perspective of a competition enforcement agency attempting to identify particular approaches to competition law and policy that will contribute to reducing poverty and inequality. Included here are measures designed to ameliorate potential negative distributional impacts arising from enforcement and merger review decisions that are intended to promote competition. My starting point is that if there are strategic options available to competition policy makers and enforcement authorities that reduce poverty and inequality, then they should be selected.

3. When considering the relationship between competition, on the one hand, and poverty and inequality, on the other, it's important to remember where we come from. The origins of competition law are in opposition to the power, market power and 'public' power, represented by combinations of firms and monopolies or what we have come to term dominant firms. The negative impact that these firms and combinations were perceived to embody was in their ability to exploit consumers through their unrestrained capacity to effect a reduction in output and a consequent increase in prices. So devoid of restraint was this market power that it was perceived to threaten the capacity of the public authority to achieve a socially acceptable and sustainable balance between producers, on the one hand, and, on the other, consumers and would-be rivals.

4. The impact of this power on rivals was central. Rivalry was the mechanism which would restrain the capacity of dominant firms to raise prices, thus ease of market access was a principal objective of competition law and policy. Confronted by rivalry, or even the prospect of rivalry, firms would be restrained from reducing output in order to effect an increase in prices. Rivalry would then operate as a constant downward pressure on prices and thus profits. It's important to re-emphasise that competition law and policy was designed to promote rivalry (market mechanisms) in order to effect a distribution of

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[1] Katherine Boo - *Behind the Beautiful Forevers: life, death and hope in a Mumbai undercity* (Random House, 2012)

market power and thus surplus away from producers to consumers. If producers, in turn, were to restrain this downward pressure on their profits they would be compelled to increase their efficiency reflected either in lower costs of production or in the introduction of new, improved products. This underlines that restraining market power in favour of consumers though accessible markets expressed both the central objective and the principal instrument of competition law, with enhanced efficiency a second order outcome. The transmission belt is then from market access to increased rivalry to a distribution away from producers to consumers to strengthened incentives for producers to raise their game in order to restore their lost margins.

5. So this underlines the egalitarian ('access', 'opportunity', 'restraint of power') and redistributive imperatives (from producers to consumers) at the heart of competition law. In other words competition law and policy is not compelled to 'stretch' its objectives to take on distributive issues – both distribution of power and opportunity and the distribution of income are core objectives.

6. However, the above characterisation of competition law and policy also serves to emphasize competition law's central relationship to firm level efficiency. This in turn raises the thorny issue of the pitfalls of burdening particular instruments of economic policy with multiple and, in part and at times, conflicting objectives. If fiscal policy or labour market policy are better able to address inequality and poverty while competition and the various policy instruments (competition law and policy, industrial policy, trade policy) designed to promote it are better able to enhance efficiency, is it not preferable to use the 'first best' policy instruments to achieve those objectives which they are capable of addressing most directly? Indeed employing 'second best' instruments may well give rise to outcomes directly at odds with the objectives of the policy maker or the enforcement agency.

7. We are then obliged to qualify the pro-poor and pro-equality objectives and mechanisms of competition law and policy by stipulating that measures to achieve these first order objectives do not undermine the incentives and capacities of incumbent firms to constantly strive for greater efficiency, not least because, in the absence of increased efficiency, it would not be possible to sustain competition's potential to achieve its promises for consumers and new entrants. In the best of circumstances the efficiency objectives and poverty alleviation objectives and outcomes of competition law enforcement will not be in conflict. But where they are, competition decision makers are obliged to effect a balance between conflicting objectives and to make the terms of the balance or trade-off explicit.

8. I want, without much further elaboration, to observe that the requirement to balance conflicting rights, objectives and interests is not alien to competition law. To the contrary it is part of the daily task of enforcement and the related functions of advocacy and policy formulation.

9. At the most fundamental level competition law is concerned with the exercise of property rights, and therefore with ensuring that the holders of these rights, 'producers', do not exercise them through conduct prejudicial to the rights of other participants in the process of consumption ('consumers') and production ('actual or potential rivals'). However, these socio-economic rights – which may be described as the right to basic necessities of life and the right to participate in the market economy - are significantly less well-established in statutory and case law than are property rights.

10. Certain practices of holders of property rights (that is, producers) are so clearly prejudicial to the interests of other of these participants – notably, the impact on consumers of price fixing and market allocation agreements – that they are proscribed outright. That is, property rights cannot be asserted so as to permit the holders of these rights to co-operate with each other in a manner which prevents other participants in the market economy from enjoying its fruits, in particular lower prices and improved products.

11. However, the consequences of other exercises of rights in property, notably mergers or unilateral conduct (even of a dominant firm to maintain or extend its dominance) are not nearly as clear cut as in the case of collusion. Either, as is more often than not the case with mergers, these may be, from the perspective of other participants in the economic process, perfectly benign acts and so any intervention on *competition* grounds would constitute an unwarranted intervention in the property rights of the producer.

12. Or they may reflect (as with unilateral conduct) or portend (as in a merger) greater efficiency while simultaneously representing a potential threat to competition. In these instances competition decision makers have to balance a number of conflicting outcomes and interests. They may be required to assess the (positive) effects of the greater cost savings arising from a merger relative to the (negative) effects of a greater increase in concentration, with both variables, especially the latter, near impossible to quantify; they may be required to make a call on the likelihood of the pass-through of the greater efficiencies to consumers, that is , on the redistributive consequences of a dominant firm's conduct or the merger; they will be concerned not to proscribe pro-competitive conduct, even that which supports or extends dominance, lest it chill such conduct on the part of the particular firm in question and other dominant firms; but they will also worry about the impact that the further entrenchment of dominance, even when effected through pro-competitive conduct, has on the future conduct of the dominant firm. That is to say, particular action by a dominant firm may redound to the immediate benefit of consumers, but, in the medium term may give rise to a market structure in which the incentives of the dominant firm to behave pro-competitively are significantly blunted.

13. For all these reasons requirements to balance a loss to competition with the computation of the pro-competitive efficiencies realised, or, worse, the repetition of mantras about 'protecting competition and not competitors' are either far more complex than the standard statutory or judicial phrasing suggests or are too glib and superficial to guide actual decision making. Competition relies on the presence of competitors and so, easy on the tongue though it may be, 'protecting competition and not competitors' is ultimately unhelpful to those concerned at the exclusionary conduct, so often evidenced, of dominant firms, even those who have achieved their dominance on the merits.

14. My point simply is that the most narrowly orthodox competition law is experienced in making difficult trade-offs and striking complex balances which suggests that to require that competition decision makers consider and balance considerations of efficiency, on the one hand, and, on the other, those of equity and poverty alleviation should not unduly tax the capacities of the competition law, the lawmakers or the enforcers and adjudicators.

15. But to return to where we started, the stark fact is that, however difficult, competition law and its enforcement has little choice but to be seen to be addressing inequality and poverty. The South African Competition Act has been much criticised for its inclusion of 'non-competition' objectives. These – including employment, the impact on small business and black economic empowerment and the 'competitiveness' of national firms - are not only embodied in the preamble to the Act and in its stated objectives, but in the prescribed criteria for merger assessment.

16. However, the policy makers and the drafters and enforcers of the Act have consistently held that while the Competition Act is correctly construed as a major intervention in the rights of owners of productive assets, it is also a foundational piece of socio-economic legislation. As such its successful adoption and implementation necessitated that it achieve legitimacy not only with those who possess rights in property, but that it also be seen to be addressing the concerns of other classes and interest groups and the major economic problems which they confront, namely unemployment, poverty and inequality in wealth, income and opportunity.

17. Nor is South Africa alone in the requirement to establish legitimacy for its competition law and its enforcement. Take the two countries in which the legitimacy of competition law is arguably most strongly established, the USA and Germany. I'm convinced that US anti-trust owes its legitimacy to deep-seated public opposition to the constraints on opportunity and access represented by powerful monopolies – anti-trust is, or certainly used to be, perceived as a statutory guarantee of opportunity, in a country where unfettered opportunity to participate in the market economy is a core societal value. As such the legitimacy of US anti-trust is reproduced by periodic attacks by the antitrust enforcers on large firms from Standard Oil to Microsoft that are seen to be denying access to others. In Germany, the legitimacy of the market and competition law's robust defence of it, is contingent upon the continued commitment to the 'social market' which may precisely be viewed as a series of state actions to correct, in the form of a safety net, market outcomes that inevitably exclude sections of the population from its efficiency enhancing qualities.

18. I want now to identify elements of an approach to competition law enforcement that will strengthen the association between competition, on the one hand, and poverty alleviation and equality, on the other.

2. Some solutions

2.1 Prosecutorial discretion

19. The most frequently cited contribution that robust competition law enforcement that seeks to limit collusion and reduce entry barriers will make to poverty alleviation is to depress product prices. The extent to which this price effect alleviates poverty will be influenced by the market in which competition law is being enforced. This may then serve to guide the strategic choices of enforcement agencies. Those enforcers with a strong poverty reduction remit are then likely to allocate enforcement resources to defending competition in markets for basic consumer goods and the key intermediate inputs used in their manufacture.

20. Of course even this apparently self-evident insight is complicated by a range of strategic choices and possible unintended outcomes. So focusing on defending competition in, for example, the market for bread may seem like an obvious allocation of enforcement resources to promote both competition and poverty reduction. However, the impact of this prosecutorial choice may be limited if it appears that cartels in low-technology, easy-entry markets are, even with limited competition enforcement, likely to be unstable and difficult to sustain. In other words, the poverty reduction outcome will be limited if a cartel in bread does not have a significant impact on prices because of the instability of the cartel. On the other hand, cartels in technologically mature markets producing homogenous products – think cement and other building products or electronic components – are likely to be far more durable and so closely watched by competition authorities intent on holding down the prices of basic wage goods.

21. Or by way of another example, markets in which technology is rapidly evolving and in which there is not a dominant incumbent with exclusionary power, may not be priority candidates for focused enforcement action because the rapid introduction of new products may be sufficient to underpin robust competition. On the other hand, if, as has frequently been the case, these markets are dominated by incumbents capable of excluding or retarding the introduction of new technologies then they too will be prime candidates for the attention of antitrust authorities. ICT markets are most frequently cited examples here. While over time these have become veritable poster boys for the positive impact of competition, they are markets in which incumbents, often state-owned, have famously used their long-established dominance to retard the entry of new technologies. Although ICT products are not obvious basic goods when set against say basic foodstuffs, lower costs of communication will obviously have a far more diffuse impact. Through lowering the cost and ease of everything from job search to market entry by peasant farmers the

impact of robust competition law enforcement in ICT markets is likely to more profoundly impact poverty levels and inequality than interventions aimed at defending competition in more obvious basic wage goods markets. For this reason, antitrust authorities sensitive to poverty and inequality would be particularly intent on ensuring that a dominant incumbent in these markets does not undermine the competitive temperature.

22. This discretion on the part of the enforcement authorities may also apply to the approach taken to merger assessment. Merger assessment presupposes a predictive analysis and hence uncertainty regarding the actual impact of the merger. From the perspective of poverty alleviation and inequality, there are strong grounds for taking a more robust approach to mergers in some markets rather than others. Hence the South African Competition Tribunal endorsed the Competition Commission's decision to prohibit a merger because the transaction appeared to threaten the development of an embryonic product which would, if successful, have lowered the cost of private health insurance. It is conceivable that this merger would have been approved had it implicated a market of lesser social significance than that for health insurance. However the Tribunal concluded that the nature of the market and parlous state of public healthcare provision in South Africa justified a particularly cautious approach to a merger that may have had the effect of limiting the development of a product that would have promoted access to private healthcare.[2]

23. And then of course, competition law is confronted with the reality that, even in developed economies, a significant number of people survive on the activities of extremely low productivity enterprises, both trading and other services and basic manufacturing, which are frequently protected by some or other regulatory regime, for example regimes restricting foreign entrants. Competition law would not stand in the way of – would indeed welcome – more efficient enterprise that produced better quality and lower priced goods and services. It would advocate against protectionist regulation and would doubtless point out that the entry of more efficient, albeit frequently foreign owned, firms will alleviate the poverty of customers of these low productivity enterprises. But the price effect of greater efficiency may be accompanied by significant employment loss or a negative impact on entire communities whose cohesion may in no small part be due to the presence of these low productivity enterprises. This issue is most powerfully expressed in respect of the endless debate around the entry of global retail chains into India but it has been no less prevalent an issue in some of the most developed economies, ranging from regulations that protect, or used to protect, small inefficient German retailers to the protection accorded Japanese rice farmers.

24. An equally complex conundrum for an anti-poverty competition law is presented by the presence of a large informal sector. In least developed economies extremely poverty-stricken members of the society survive on the generally meagre earnings of these informal enterprises. An industrial strategy aimed at alleviating the poverty of informal sector operators would attempt to 'graduate' these to the formal sector. But how will these embryonic formal sector operators survive in the face of competition from those left behind in the informal sector who do not have to meet the regulatory demands imposed on the new formal sector entrants?[3]

25. So what to conclude from this, other than that there are no obvious answers to the question of how to ensure that competition law and policy supports poverty reduction?

26. Strategic selection of enforcement priorities could make a significant contribution. However the selection of these priorities should be undertaken with care, with the distinct prospect that the markets

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2 *Medicross Healthcare Group (Pty) Ltd/Prime Cure Holdings (Pty) Ltd (11/LM/Mar05)*

3 See the essay by Thulasoni Kaira on Zambia in Lewis, D. (ed.) (2013), *Building New Competition Law Regimes: Selected Essays*, Cheltenham, UK and Northampton, MA: Edward Elgar Publishing

earmarked may not be the obvious final end consumer products. And in the process of selection, it is perfectly possible and legitimate to take a more robust approach to defending competition in some markets rather than others of lesser socio-economic significance.

27. We will discuss the relationship of competition law and policy to small enterprises below. Suffice to say that the informal sector 'problem' just referred to is not resolved by attempting to restrict entry into the informal sector. It is rather to reduce the regulatory and tax burden imposed on new entrants to the formal sector, enabling them to compete more successfully with their erstwhile fellow informal sector firms and with their better established formal sector incumbents. It also ensures an easier graduation from informal to formal sector for those left behind.

2.2 The inclusion of 'public interest'

28. The commonly deployed instrument for ensuring that competition enforcement takes heed of distributional or, as they are often termed, 'non-competition' considerations is to require that the impact on 'public interest' of a particular act be factored into the final decision. An assessment of public interest is most commonly required in the evaluation of the impact of mergers. Where this is the case the competition authority is generally responsible for the evaluation of the impact on competition. The political authority is then empowered to override that decision if it is decided that the 'public interest' is prejudiced. Distributional considerations – for example the impact of a merger on employment or on economic activity in a particular region – would generally figure in a decision to override the approval (after a positive competition assessment) of a merger, while 'competitiveness' considerations – or, in the financial sector, 'stability' - may be invoked to overturn the prohibition of a merger on competition grounds.

29. As already noted, the South African Competition Act includes in the identification of its general purposes a range of 'non-competition' considerations. The 'purposes' clause of the Act stipulates that it is to promote and maintain competition in order to 'promote employment and advance the social and economic welfare of South Africans', to 'ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy' and to 'promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.' These 'non-competition' purposes are included alongside orthodox purposes associated with promoting competition such as promoting 'the efficiency, adaptability and development of the economy' as well as 'to provide consumers with competitive prices and product choices.'

30. In addition to this framework provision, the merger assessment criteria require that after making its decision on competition grounds, the competition decision maker is to undertake an assessment of the impact of its decision on public interest grounds defined to cover the effect that the merger will have on a particular sector or region, on employment, on the ability of small businesses and businesses owned by 'historically disadvantaged person' to become competitive, and on the ability of national companies to compete in international markets. However, while the political authority is provided with notification of a proposed merger and is entitled to make submissions on the defined public interest grounds, it has no decision making powers. These belong entirely to the competition authority. The employment-reducing effects of a merger have generally been invoked to secure the prohibition of, or the imposition of conditions on, mergers that have passed muster on competition grounds; the inclusion of black shareholders ('black economic empowerment') has on occasion been invoked to secure approval of a merger that is threatened because of a perceived negative impact on competition.

31. Let's examine the public interest in limiting employment loss. With South African unemployment figures in excess of 30%, we are indisputably dealing with a major social and political issue and a major underlying cause of poverty. On the face of it then there is, in South African certainly, a

powerful prima facie argument in favour of prohibiting mergers that will result in significant employment loss, even if the transaction in question does not compromise competition.

32. On the other hand, in deciding to merge with another company we are dealing with a perfectly legitimate business decision for which at least part of the efficiency rationale may rest on the ability to rationalise the head count of the merged entity. We are then not only dealing with the sanctity of property rights. We are also confronting the imperative for firms to enhance their competitiveness, a significant aspect of which may be the productivity of their employees. By approving the merger but prohibiting employment reduction, tThe competition authorities are being asked to oblige the merged entity to carry employees in excess of their perceived needs. Taking a short term perspective, this may seem to be an acceptable trade-off but its long run consequence may be inefficient firms which not only pass through their inefficiencies to their customers, but which may ultimately fail under the weight of the inefficiencies imposed by the competition decision makers conditions, thus generating even greater employment loss than would have been the case had the merger been approved without the imposition of job-retention conditions.

33. The South African competition authorities have generally approached employment-related objections to otherwise unproblematic mergers by encouraging the merging parties and the employee representatives (in what is a highly unionised workforce) to arrive at an agreed solution by utilising the comprehensive statutory framework governing employment and labour relations (the pillar of which is self-regulation by agreement between employers and worker representatives). This agreed solution has then been imposed as a condition for the approval of the merger. This does amount to more than a mere rubber stamp insofar as contravention of the employment condition would not only violate labour law and contractual obligations, but will also threaten the merger itself.

34. However, agreement between employees and the merging parties has not always been achieved thus obliging the competition authorities to rule on employment. In a recent merger in which the merging parties estimated the loss of 1500 jobs post-merger, the Competition Tribunal attempted to lay down an administrable set of rules governing its approach to employment loss.[4] The Tribunal imposed an evidentiary burden on the merging parties to show that a rational process had been followed in order to arrive at the estimated job losses. The parties failed this test. What emerged was that the extent of job loss was determined, not by the employment requirements of the merged entity, but by an attempt to induce shareholders to agree to the transaction by estimating a level of savings that would be achieved by the merger.

35. The Tribunal also required the merging parties to demonstrate that the public interest in preventing job loss was balanced by an equally weighty, but countervailing public interest which justified the job loss and which was cognisable under the Act. Again the parties failed the test. They were not able to show that the job loss was necessary to save either of the merging parties - both were prosperous entities. In other words it was not established that it was necessary to countenance some immediate job loss, in order to prevent greater job loss in the longer term. Nor were they able to show that the savings which would accrue as a result of the job loss would be passed on to consumers. In short the parties were not able to show that either long term employment or consumers would benefit from the job loss. Accordingly, the Tribunal approved the merger with a condition imposing a two year moratorium on any merger related employment loss except where it applied to senior management positions.

36. However, the application of these public interest provisions has been immensely complicated by the economic downturn (and the enhanced concern to staunch employment loss) and, particularly, by a crudely interventionist industrial policy that has demonstrated scant respect for the independence and

4 *Metropolitan Holdings Ltd/Momentum Group Ltd (41/LM/July10)*

remit of the competition authorities, and, indeed, for the necessity to balance the impact of a merger on competition with the impact on employment. This is best, if not uniquely, illustrated, in the controversy surrounding the competition authorities' approval of the acquisition of Massmart, a large South African grocery and general retailer, by the US giant, Walmart.[5]

37. It was common cause that there were no negative competition implications (Walmart was a new entrant). Indeed it was generally accepted that Walmart's presence would enhance competition in the retail grocery and household products sector. That Massmart had a weak presence in the retailing of fresh food and that Walmart viewed this as a major opportunity for the merged entity strengthened the view that the merger would impact positively on the low income consumers who are Walmart's traditional customer base. However the government elected to sublimate the interests of consumers to that of producers, with the Minister of Trade and Industry stating explicitly that 'we have taken the decision [to intervene] in favour of the production sector at the expense of other sectors such as the consumer sector.'[6]

38. The 'production sector' that government sought to protect were not rivals of the merged entity but rather suppliers to the retail sector. Government contended that Walmart's global supply chain would result in an increase in imported – read 'Chinese' – products to the detriment of South African producers. It was those producers – - not even necessarily small businesses - in the retail supply chain whose interests were invoked by government in pleading a 'public interest' in prohibiting, or imposing conditions upon the approval of, the transaction. The condition proposed by government was the imposition of a quota on the share of imports in the merged entity's product range.

39. Amidst great controversy and in the face of considerable public pressure, the competition authorities declined to impose this condition. They pointed out that this effectively amounted to a highly selective trade remedy. Not only would this be in conflict with WTO regulations but the imposition of such a remedy on one firm in a competitive market would significantly reduce the pro-competitive outcomes expected from the merger. Above all, the competition authorities were concerned at the proposed protectionist condition's failure to consider consumer interests. In the words of the Tribunal:

> *Further the conditions will contradict the major objective of competition regulation – to secure lower prices – (because) the procurement conditions would likely effect the merged entity's ability to provide customers with the lowest possible prices. Competition authorities do not lightly impose conditions that contradict their primary mandate, unless there is overwhelming justification for doing so. If we are not for competition then who is?*

40. Ultimately the transaction was approved with the imposition of a condition – originally proposed by the merging parties and refined and elaborated by the competition authorities – that required the merged entity to invest a specified amount in the strengthening of domestic suppliers and potential suppliers, directed in particular at small and medium sized enterprises in the supply chain. This condition not only meets the public interest objectives stipulated in the Act, but its impact will be pro-competitive.

41. *Walmart* notwithstanding, it is more difficult to balance competition and small business interests than it has been to achieve a balance between competition and employment. Paradoxically this is largely because small-business, unlike employment, involves cognisable competition considerations. As already elaborated, market access is a principle objective and instrument of competition law. While concentrated market structures and the conduct of dominant firms are by no means the only constraints on market entry by large firms, there can be little doubt that they do constitute significant entry barriers. Markets in which capital and technological barriers are low are conducive to entry by small firms. If these markets are

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5 *Walmart Stores Inc/Massmart Holdings Ltd*. (73/LM/Nov10).

6 *Business Report* 10th August 2011

concentrated then there are grounds for enquiring whether conduct by large firms – on the part of rivals, input suppliers or even customers – may account for the entry barriers encountered by small firms. Impugning conduct that creates these barriers will meet the public interest in supporting small firms. And it will also meet the core competition objective of lowering entry barriers thereby raising the competitive temperature.

42. The predictable – and generally persuasive – counter is one that questions why input suppliers or customers would rationally engage in conduct that impedes entry and competition. However there are clear cases where large input suppliers favour large customers with preferential supply conditions and prices. This discrimination may, and usually will, be explained by the lower cost entailed in supporting a large customer over a small customer. However in South Africa we have encountered one instance in which there appeared to be no such commercial rationale for the price discrimination practices by the monopoly supplier of a critical input. The firm discriminated in favour of its large customers for no reason other than that they were longstanding customers. Given this evidence and the Act's clear requirement to support small firms, the Competition Tribunal impugned the price discrimination in favour of larger firms in the market.

43. An argument presented by the respondent – and on which basis the Competition Appeal Court overturned, incorrectly in my view, the Tribunal decision – was that small firms, such as the complainant, did not constitute significant competition and hence their exclusion from the market did not impact negatively on competition. However, the Tribunal rejected this, holding that the usual requirement to show anti-competitive effects is relaxed by the public interest and by the competition interest in promoting the entry of small firms. In short, the Tribunal interpreted the Act's explicit proscription of price discrimination as a hybrid of its competition and public interest concerns.[7]

44. Clearly though the most direct market access-related mechanism for supporting small firms is through public procurement provisions that favour this class of firms. These are likely to compromise competition. However at least the terms of the trade-off, the short term cost of supporting small business, will be clear (and should be expressly calculated) and by nurturing them competition is likely to be enhanced in the longer run. It would seem that the Walmart condition – where supply side support for small business is provided but demand side support ultimately depends on their ability to supply the competitive good or service- is the most competition-friendly mechanism for supporting small business.

45. As noted, the presence of a large informal sector poses particular problems for competition law's relationship to small business. A primary industrial and economic policy objective is to graduate these firms from the informal to the formal sector. However, the prospects for achieving this are constrained by the continued presence of informal sector operators whose informal status effectively exempts them from a range of regulatory requirements (including the requirement to pay tax) thus giving the informal operators a competitive advantage vis a vis their newly formalised rivals. Here the competition-friendly approach would not be to restrain the entry of informal entrepreneurs but rather to ease access to the formal sector by reducing the regulatory burdens imposed by formalisation.

46. The primary lessons to be drawn from South Africa's experience with the incorporation of public interest objectives, objectives which are designed to support employment creation (and limit job loss) and small enterprises, into the decisions of the competition authorities is that it is wholly possible to balance non-competition and competition considerations. Moreover, it is clear that the trade-offs and balances that are required to satisfy this range of competition and non-competition objectives are better made by the competition authority rather than by the more common division between the competition decision maker and the public interest decision maker. The South African system predisposes to the sensible balance

7 *Nationwide Poles and Sasol (Oil) Pty Ltd* (72/CR/Dec03)

achieved in the Warmart case. Certainly in that case if the Minister had been empowered to take the public interest decision he would have simply ignored competition considerations, to the detriment of low income consumers. The question posed by the Competition Tribunal that is cited above – '*If we are not for competition then who is?'* – is more than mere rhetoric: producer interests, even small business, are, almost without exception, better organised and therefore politically more powerful than consumers. While this does not mean that competition law should never be called on to support classes of producers – in the South African case, employees and small business owners – it does mean that the 'representative' of consumer interests, the competition authority, is best positioned achieve a reasoned balance between producers and consumers.

2.3 Competition policy

47. Entry barriers – and particularly barriers to entry that confront small firms – are more likely the product of poorly conceived and administered public regulations than a consequence of private conduct. Competition law enforcement agencies are generally restricted to using their advocacy powers and capacities to overcome these. There are statutes that give competition enforcement authorities formal powers in relation to the introduction and administration of business regulations. Powers of this sort may be the most effective instruments for achieving anti-poverty objectives, particularly to the extent that these are equated with small business entry.

48. Products and services subject to price regulation – characteristically in areas like telecommunications, transport and energy – are important direct and indirect components of consumption baskets. Low income consumers will be significantly more dependent on public provision of these basic goods and services than their high income counterparts who increasingly are able to turn to private providers. Competition enforcers are generally not involved in regulatory decision making (although there are exceptions). For a variety of reasons – their mandate to promote the sector; the power of the firms that they regulate; their susceptibility to political influence - sectoral regulators are more likely to be captured by producer interests than are their counterparts in the competition authorities. While competition authorities do not generally enjoy jurisdiction over licensing and pricing decisions or even formal mechanisms for influencing these decisions, they are able to use their advocacy powers to keep consumer interests alive in the regulators' decision making.

49. Competition authorities enjoy jurisdiction over certain of the conduct of firms in regulated sectors (for example, where they leverage their power in 'their' regulated market in order to exclude rivals in related, but unregulated, markets). Just prior to the passing of the Competition Act, the Competition Board, the predecessor to the Competition Commission, received a complaint to the effect that the South African Broadcasting Corporation, the dominant state-owned television broadcaster, required that all film production houses whose product was to be screened on the SABC channels would be required to use the production facilities of the SABC in the making of the filmed material thus excluding independent facilities providers from the market. This practice is not only anti-competitive but profoundly anti-small business and was halted.

50. The conduct of regulated firms should be rigorously monitored. Their power is so great, their products and the pricing of them so widely diffused throughout the economy, their impact on low income consumers who rely on public provision so profound, that their conduct and that of their regulators and relevant policy makers will significantly influence the distributional impact of competition policy.

51. Indeed this will be true of public expenditure in general. Pro-poor competition enforcement will be especially alert to the rigging of public sector tenders whether in large scale public infrastructure or in the procurement of pharmaceuticals and medical equipment. Those responsible for competition policy will, if they are concerned about the distributional impact of their policies, ensure that public sector tender

procedures are designed and managed to generate competitive bids and the competition authorities will use their advocacy powers and channels to pressurise for effective bidding processes. Inflated costs in these areas are easily passed through to the poorest consumers. However it is essential that the public sector support the competition authorities' enforcement action. In one instance where the competition authorities uncovered a cartel of the providers of important medical equipment to public health care hospitals and clinics and levied a large firm on the cartellists, the state (the customer) simply neglected to file a damages claim against the producers concerned.

52. The ability of competition authorities to influence competition policy, including its distributional outcomes, is significantly enhanced by the increasing use of market enquiries. The South African competition authorities (who do not yet have formal powers to conduct market enquiries although these are contained in an amendment to the Act that the President has yet to promulgate) have conducted a public enquiry into the retail banking market. Again prices in this sector are widely diffused across the economy and competitive conditions influence the willingness of these institutions to provide banking facilities and credit to low income consumers and small businesses.

53. The Minister of Health has recently publicly requested the competition authorities to undertake an enquiry into the market for private health care services. He is particularly concerned that the high cost of private health care service and the extent of medical inflation severely constrain the prospect of developing health care insurance products for low income employees who are thus obliged to rely on already over-extended public health care providers.

54. For a variety of reasons, competition enforcement agencies are going to be obliged to extend their remit – at least as far as advocacy is concerned – beyond private conduct enforcement into the broader area of competition policy. One of these reasons is that competition policy - including business regulation, sectoral regulation, state ownership and the conduct of state enterprises, trade policy – may impact more directly on poverty and inequality than enforcement action by competition law authorities. Moreover, the voice of a respected competition law enforcement authority is likely to be heard on any competition-related issue and, in many countries, will be the loudest and most articulate consumer voice.

2.4 Transparency

55. Although there are exceptional instances, its generally true that consumers are disorganised and disempowered, the more so in the case of low income consumers. To a significant extent, consumer interests are 'represented' in government by competition authorities. Competition authorities are not only required to impact positively on addressing core socio-economic problems – with poverty and inequality high on the list of those problems – they have to be seen to be doing so. Moreover, because consumer interests cut across social classes and interest groups, robust competition enforcement has the capacity to bring together the middle class and the poor, thus significantly enhancing the political power of pro-poor policies and strategies.

56. The South African Competition Commission has publicised its enforcement strategies and priorities which are expressly directed at supporting government's anti-poverty strategies and its large infrastructure spend programme.

57. Most enforcement action takes place in the exceptionally transparent setting of public tribunal hearing where, even in consent order hearings, NGOs representing and working among low-income marginalised communities are invited to present their views, and have done so to great effect, including securing the dismissal of the CEO of the country's largest food producer for his failure to prevent widespread cartel conduct on the part of his firm.

58. The merit of transparency is frequently underestimated. Not only does it serve to inform the public about the way in which competition law and policy works, it demonstrates that powerful interests are being held accountable for their conduct and are punished for conduct that offends against the interests of consumers and, on occasion, small businesses. While it is difficult to quantify the impact of competition on poverty and inequality, holding powerful interest publicly accountable, holding them to be equal before the law, is an important step forward in the direction of a more equal society. Afflicting the comfortable undoubtedly does bring comfort to the afflicted and is an important signal of a society's concerns for the twin scourges of poverty and inequality.