



# Competition Law and Policy in South Africa



An OECD Peer Review



MAY 2003



# **Competition Law and Policy in South Africa**

AN OECD PEER REVIEW



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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## *Foreword*

The OECD Centre for Co-operation with Non Members has promoted a mutually beneficial dialogue between OECD members and non-member economies. National competition authorities from around the world, and some countries that do not yet have competition authorities, meet at the OECD Global Forum on Competition (GFC), one of the Organisation's eight Global Forums. The GFC seeks to advance a range of objectives, including the promotion of global enforcement co-operation, effective law enforcement against international cartels, greater efficiency of merger review procedures, and the development of analysis and dissemination of its results.

An increasingly common way to structure and focus the dialogue is through a peer review exercise, in which probing questions are asked and the responses lead to in-depth exploration of shared experiences and evolving common standards, or perhaps a greater understanding of important differences. At the OECD, this process has become familiar, not only through the work of the Economic Development and Review Committee, but also, more recently, under the programme of regulatory reform reviews. The OECD's Competition Committee has held nearly 20 peer reviews that have examined competition law and enforcement institutions of member countries as well as the competition dimension of regulatory reform in sectors such as energy, transportation and telecommunications. Peer review processes also have attracted considerable interest in other contexts. For example, in 2002, a peer review mechanism was set up in connection with the New Partnership for Africa's Development (NEPAD) initiative, as an opportunity for leaders to "make a difference in governance" through sharing experience and encouraging each other to improve their performance.

Thus, it is particularly appropriate that the Republic of South Africa stepped forward to be the first country to undergo a peer review in the GFC. The following report was the basis for a three-hour peer-review discussion at the GFC meeting in Paris on 11 February 2003. Some of the themes developed in this discussion illustrated unique features of the South African experience. Notably, South Africa's constitutional transformation in

the 1990s gave high priority to the redressing of economic imbalances corresponding to racial divisions in this country, and a stronger competition policy was proposed as a tool to help in that process. Due to its history, South Africa has both a developing economy and a developed one. It was thus appropriate that South Africa be reviewed by peers from some 60 countries at all stages of economic development. In short, South Africa's experience provides lessons for all. This first venture in peer review in the Global Forum context thus underscores the basic goal that members and non-members have much to offer each other in this dialogue.

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## SUMMARY

*One of the elements of South Africa's peaceful revolution over the last decade was reform of its competition policy institutions. The previous system had supported the previous economic system, characterised by autarky, protection, government direction, and high concentration. The new system promised to use competition policy to correct the faults of the old system and to promote policy goals of employment and empowerment. South Africa aspires to a modern competition policy regime, to deal with the well-resourced sophistication of much of the South African economy. Its new institutions, whose novelty responds in large part to the post-1994 imperative for fundamental restructuring of government institutions, have shown a capacity to deal confidently with complex structural issues in deciding dozens of merger cases. A legalistic business and government culture has challenged these new bodies to prove their competence and tested their jurisdiction. Now that the merger review process has been established, more attention should be paid to non-merger matters and probably to advocacy as well. Resources are stretched, and there is a critical need to improve the depth and strengthen the capacity of the professional staff. Maintaining consistent competition policy in regulated sectors will require reinforcing the relationships with sectoral regulators.*





## **Competition policy foundations**

The setting for South Africa's historic economic policies, of state ownership, protection, and import substitution, differed from what is often found in transition and developing country situations. In South Africa, these policies were coupled with strong property rights and well-developed market institutions. The challenge for competition policy in South Africa was to "hit the ground running" when historical patterns were broken. New institutions have had to deal on equal terms with the established, sophisticated, well-resourced legal culture, while representing new ideas about the political economy and a new level of participation in public life.

### ***Context and history***

Economic policy in South Africa has been shaped by dependence on extractive industries and isolation from many world markets. Some of the economy's basic structures were set when diamonds and gold were discovered in the second half of the 19th century. Major, modern industries grew up around the extraction of natural resources for a world market. Policies about economic development in the 19th and 20th centuries protected the investors in these operations, many of them foreign. Recognising the risks of over-specialisation, though, governments also adopted policies that were intended to reduce reliance on the mining sector, by encouraging farming and local manufacturing. Monopoly concessions were granted to some industries around the turn of the 19th century. Manufacturers benefited from low costs of inputs such as steel and electricity, which were supplied by state monopolies, and from a protective tariff barrier. State-owned enterprises dominated manufacturing by the end of the 1930s. Another theme of policy in that era was racial discrimination, one effect of which was to keep labour costs down. Discrimination and protection were combined in policy measures that shielded white farmers and businesses against African competition, by reserving most of the land for white ownership and giving white farmers and white-owned firms preferences in subsidy and support programs. Black entrepreneurs were outside of the formal economy.

Policies of import substitution, market controls, and state ownership in key sectors persisted through the 20th century. The government's role in the economy did not decline in the post-war expansion. While the private sector diversified, as the mining-based investment conglomerates extended their operations, the government continued to extend its support and direct investment in agriculture and manufacturing, still pursuing the goal of reducing the economy's dependence on mining. Industries such as textiles

and pulp and paper owe their existence to support from the state-owned Industrial Development Corporation. Other state-owned firms produced steel, fertiliser, oil, chemicals, and arms. The value of manufacturing output exceeded that of mining by the 1970s. But the government owned or managed nearly 40 percent of the country's productive assets, and the economy remained vulnerable to the characteristic cyclicalities of the agriculture and resource sectors. And in the 1980s, policies of autarky and import substitution intensified in response to increased international economic sanctions against apartheid.

Product markets and capital ownership have been unusually concentrated. High market concentration has been characteristic not only of scale-dependent heavy industry but also of some consumer products. For example, there is a virtual monopoly in beer. Some of the high concentration is the legacy of the history of monopoly concessions, and some of it is due to scale factors. Although South Africa is the largest market in Africa, its local market is nonetheless relatively small. For many manufactured products, it could be served by a small number of firms operating at globally efficient scale. South Africa is distant from many other major markets and production centres, which makes it harder for international trade to compensate for these conditions, even though trade has expanded since 1994, particularly with the EU and the US. Tariff levels have declined, on average, but anti-dumping duties protect key industries such as steel, where the state has long had an interest and an exclusive export agent can prevent arbitrage between export and local markets. Would-be entrants are challenged by South Africa's history of import substitution and the attendant habits of business practice and government policy that favoured local insiders. The insiders were historically a closely confined group. At the time of the regime change in 1994, 5 investment conglomerates, with roots in the mining houses of the 19th century, accounted for 84% of the capitalisation of the stock exchange—and one of them accounted for 43% all by itself. The complex network of cross-holdings and other interlocks magnifies the phenomenon of insider influence, while simultaneously increasing the difficulty of pinning down who is in control.

The economic situation of South Africa is difficult to classify. To a significant extent, it has a well-developed market economy. But the need to reform long-standing habits of central ownership and control in order to improve efficiency presents issues that are also found in transition situations. In addition, much of the population operates in a less developed economic environment. On average, South Africa ranks as a middle-income country.<sup>1</sup> The average masks a strongly bipolar distribution of wealth and income, though. At one end, a significant minority enjoys a standard of living comparable to OECD Member countries. The infrastructure of

financial, legal, communications, and transport services is well-developed and modern. The stock exchange is among the world's 10 largest. But at the other end, a substantial majority do not yet enjoy this wealth. Income disparity in South Africa, as measured by the Gini coefficient, is about twice as great as is typical of most OECD Member countries.<sup>2</sup> In the black townships, unemployment is much higher than the already high national rate of about 30%, and incomes are far below the national average. South Africa contains both a developing economy and a modern one.

The political system of minority government over most of the 20th century divided the population in order to preserve this inequality. Mounting determination to change that political system, which led to the country's profound constitutional rebirth in the 1990s, also produced changes in economic policies. Economic as well as political issues were on the agenda of the African National Congress (ANC) during its years in opposition. For those in the ANC who favoured state intervention and socialism, the concern was not the extent of state involvement, but its nature and the identity of the officials who were responsible for it. Some in the ANC resisted the government's privatisation efforts in the late 1980s, fearing that the assets would end up in private, white hands. Since 1994 and the transfer of power, though, calls for extensive national ownership have declined. One political-economy element of its platform for peaceful social revolution, discussed in more detail below, was a stronger competition law.

Law is important in South Africa. The country's well-developed legal culture combines elements of several traditions. Much of the law about property, sales, and contracts can be traced to the Dutch-Roman law that European settlers brought with them in the seventeenth century. Company, financial, and intellectual property law derives more from English sources, a connection with the 19th century development of large-scale undertakings related to mining. In the legal aspects of government organisation and administration, too, South Africa appears to draw on its experience in the British Commonwealth. The 1994 constitution launched an effort to rebuild the state and the law on a broad, democratic, local foundation. The central historical importance of this new constitution embodies a feature of South Africa that helps to explain its approach to competition policy. Basing policy on law and implementing policy according to proper legal procedures are important values.

Some principles about competition, and even some precursors for competition law, appear in these legal traditions. Monopoly had been a crime under the Dutch-Roman law, where an intention to prevent anti-competitive conditions that are contrary to the public interest can be traced all the way back to a sixteenth century edict of Charles V. But there is no record that anyone was ever tried for the offence of monopoly. By contrast,

other features of the early Dutch-Roman law, which supported the vigorous commerce of the Netherlands' golden age, may have tolerated anti-competitive practices. Notably, the law presumed the validity of contracts, even contracts that implemented anti-competitive restraints. In any event, the criminal aspects of the Dutch-Roman law were probably not taken up in South Africa's national law, and thus problems of monopoly had to be dealt with through statutes. Those statutes took a tolerant approach, perhaps influenced by the tolerant tradition of the law about contracts. Some particular competitive situations were addressed in specific laws beginning as early as 1907. Under legislation that was effective from 1923 to 1944, the Board of Trade and Industries could offer advice about competition policy problems. It was a report by that Board which led to South Africa's first general competition law, the Regulation of Monopolistic Conditions Act of 1955.

The 1955 competition law was cautious and permissive. It defined and controlled a number of "monopolistic conditions," that is, potentially anti-competitive practices. None of these practices was prohibited *per se*. Instead, the law provided for an administrative process to examine particular cases and recommend action. The standard of analysis was simply the "public interest." The Board of Trade and Industry was charged with investigating conduct, recommending remedies, and negotiating and supervising compliance. Its decisions could be appealed to a special court. But that Board had no independent powers, either of investigation or relief. Rather, the Minister of Trade and Industry decided what was to be investigated and what relief, if any, would be applied. The law's remedies and sanctions were prospective only, such as orders to withdraw from restrictive agreements and to correct their consequences. A violation of such an order might be subject to criminal prosecution. Perhaps recognising that a principal source of monopoly was protection from international competition, one of the law's potential remedies was a request to the Minister of Finance to suspend duties on imports of goods like those involved in the monopolistic condition. The law did not deal with mergers or dominance as such. In theory, the law probably applied to the activities of the state, but such an application would have been unlikely because enforcement depended on Ministerial action. One of the law's principal exemptions was in favour of the state-sanctioned agricultural control boards and co-operatives. In any event, the law was rarely invoked. Over 20 years, the Minister ordered only 18 investigations. The Board found some restraints that were contrary to the public interest, such as agreements fixing prices and trade discounts, resale price maintenance, exclusive dealing, and boycotts. Sectors where problems were found included groceries, sanitary-ware and hardware, motion pictures, cigarettes and processed tobacco, books, newspapers and periodicals, and building construction. Nearly all of

these findings resulted in negotiated settlements. The Minister took action only once. The most significant proceedings under this law, in 1969, prohibited resale price maintenance (except for books, periodicals, tyres, and petrol). Restraints in liquor, pharmaceuticals, tyres, and matches were upheld, as consistent with the public interest. No decision or action was ever brought to the special court. The Board's principal function seemed to be overseeing compliance with the handful of directives and orders that had been negotiated. There were a few actions against violators of those orders, but no significant penalties were imposed.

A commission of inquiry, appointed in 1975, criticised the enforcement system of the 1955 law. Making investigations depend on the Minister's direction subjected enforcement to too much political influence. And the Board's roles were in conflict. Its chief role was to determine tariff levels to protect local business, which was hardly a strong position from which to challenge the conduct of those businesses. The commission of inquiry called for a new competition body with more resources, stronger penalties against violations of orders, and extension of the law to cover mergers. The commission of inquiry recommended a new institutional structure that would have followed the UK's "tripartite" system of a supervising ministry, a separate "enforcement" body, and a more independent decision-making tribunal. Not all of its recommendations were adopted, though. The new legislation, enacted in 1979, created a Competition Board, appointed by the Minister of Trade and Industry, which could investigate matters on its own initiative. The 1979 law authorised actions against anti-competitive mergers, and it created a new category of "monopoly situation," determined chiefly by industry structure. In most other respects, the new competition law resembled the old one. The statute contained no explicit prohibitions, its substantive standard was ultimately the undefined "public interest," a special court was to hear appeals (but never actually did), and actual decisions and orders were up to the Minister. Proceedings at the Competition Board were mostly informal. The Board did use its power to initiate investigations, and it produced some 75 formal reports. Few of these reports dealt with what was probably the most important single source of anti-competitive restraints, namely the role of the state. The Competition Board's membership tied it to the government. Six of its positions were designated by statute to be filled by officials or nominees of other ministries, notably those responsible for finance and agriculture. All members except the chairman served part time. The most important substantive action under the 1979 Act was a regulation, issued by the Minister after a Competition Board investigation begun in 1984, that declared some practices to be *per se* unlawful: resale price maintenance, horizontal collusion about price, terms, or market share, and bid rigging.<sup>3</sup> Violations of these prohibitions were to be treated as crimes; however, there were no prosecutions (except for one negotiated guilty plea).

These prohibitions have endured, because they were carried over into the overhaul of competition policy that followed the change of South Africa's government regime.

Reviewing competition policy was high on the agenda of the first broadly democratic government, which was elected in 1994. The African National Congress (ANC) had promoted socialist economic policies during its decades as a liberation movement, by calling for measures such as nationalising industry and breaking up the major investment houses. By the time the ANC was able to take part openly in South African politics, though, the context was changing. The prospect of becoming responsible for the government, coupled with the broad decline of doctrinaire socialism, led to moderation of those goals, in particular, to de-emphasising the nationalisation of private enterprises. Competition policy took its place as the preferred means of controlling private enterprise in the public interest. Five years of debate and formal consultations explored, developed, and refined the scope of this major reform.

An ambitious competition policy reform was part of the ANC's 1992 Policy Guidelines for a Democratic South Africa. One goal of this reform was to remedy concentration of "economic power," on the grounds that it had been detrimental to balanced economic development. The plan was not only to adopt a law that followed international norms and practices, but also to curb "continued domination of the economy by a minority within the white minority and to promote greater efficiency in the private sector." The policy vision in this document is all-inclusive:

2.4.11. The competition policy proposed here accepts the logic of free and active competition in markets, the importance of property rights, the need for greater economic efficiency, the objective of ensuring optimal allocation of resources, the principle of transparency, the need for greater international competitiveness, and the facilitation of entry into markets—all within a developmental context that consciously attempts to correct structural imbalances and past economic injustices.

2.4.12. Competition policy seeks to incorporate the interests of consumers, workers, emerging entrepreneurs, and other corporate competitors, and to protect the ability of our large corporations to penetrate international markets, just as we must allow foreign investors to do business in South Africa in the interests of enhancing overall efficiency and growth.

2.4.13. Competition policy has to assume that the resolution of competition law cases be conducted in a procedurally-fair, coherent, expeditious and decisive manner, and that new institutional

arrangements for pursuing the policy will entail an appropriate division of labour within the relevant agency and independence.

2.4.14. Finally competition policy seeks to be sufficiently flexible to incorporate existing policies and future modes of market regulation that extend in a coherent manner across the full spectrum of industrial and trade policy, foreign exchange policy, the attraction of foreign direct investment, the restructuring of state assets, tax reform, labour market policy, financial market regulation, consumer protection, research and development incentives, small business and affirmative action programmes, corporate governance instruments, and revised company law.

The general framework for policy during the post-1994 period was set out in the ANC's Reconstruction and Development Programme (RDP) and its macro-economic strategy for Growth, Employment and Redistribution (GEAR). The RDP promised to "introduce strict anti-trust legislation to create a more competitive and dynamic business environment." The listing of objectives began with reforming the structure of the political economy, "to systematically discourage the system of pyramids where they lead to over-concentration of economic power and interlocking directorships," followed by abolishing anticompetitive practices and preventing the exploitation of consumers. The RDP called for a commission "to review the structure of control and competition in the economy and develop efficient and democratic solutions." The 1994 RDP White Paper<sup>4</sup> expanded on these themes while also calling attention to the interests of small and medium sized enterprises and the problem of oligopoly:

3.8.2. A credible competition policy is crucial to the proper functioning of the economy. Objectives of this policy are to remove or reduce the distorting effects of excessive economic concentration and corporate conglomeration, collusive practices, and the abuse of economic power by firms in a dominant position. In addition, the policy will ensure that participation of efficient small- and medium-sized enterprises in the economy is not jeopardised by anti-competitive structures and conduct.

3.8.3. Government will also seek to increase the competitive nature of domestic markets and to influence the behaviour of the lead participants in highly-concentrated markets in a socially-desirable manner. Government will identify and eliminate practices that restrict entry of new businesses into certain industries, seek to eliminate illegal practices such as the maintenance of resale prices, collusion between firms in market distribution, and horizontal collusion in respect of supply and tendering.



In 1995 the Department of Trade and Industry (DTI) embarked on a three-year project of consultation with experts and stakeholders to develop a new competition policy framework. The result was released in November 1997, as DTI's Proposed Guidelines for Competition Policy, to stimulate public debate about how competition policy could contribute to restructuring the economy. The proposal described the goal as a more "effective" economy, requiring a better definition of the public interest with respect to firm structure and behaviour. With properly aligned policies, DTI believed that competitiveness and development would be mutually supporting, not contradictory. That mutual support would require achieving consistency of trade and industrial policy, restructuring state assets, and empowering emerging entrepreneurs—tasks and goals that were conceived as associated with competition policy. Dealing with the legacy of economic distortions would call for a unique approach in South Africa. Promoting competitiveness and efficiency would also have to ensure access to those who had been denied an equal opportunity to participate. The 1997 DTI Guidelines found the competition law of 1979 to be deficient, lacking adequate powers and proper political context. The then-current law did not deal with vertical or conglomerate combinations or ownership concentration, and it lacked both pre-merger notification and meaningful post-merger power of control. Its prohibitions against anti-competitive conduct were weak. DTI proposed a new competition law that would include familiar elements of competition policy, such as a stronger law and more independent and powerful administrative authority. Because one motivation was to deal with ownership concentration, DTI also called for stronger divestiture power. And recognising the larger context of competition policy, DTI called for review of securities laws and institutions overseeing corporate structure, of corporate governance, of the Harmful Business Practices Act concerning consumer interests, and of the competitive interface between public corporations and the private sector.

Providing formally for broadly inclusive participation is an important political theme in post-1994 South Africa. Debate over the proposed competition policy framework was structured through NEDLAC, the National Economic Development and Labour Council. NEDLAC had been set up in 1994 as the vehicle for consensus-building among government, business, labour, and community NGOs. Its predecessors in the previous era, with more limited membership and scope, were the National Economic Forum and National Manpower Commission. NEDLAC's enabling legislation calls for NEDLAC to consider all significant changes to social and economic policy, and for an effort to seek consensus about them there, before they are implemented or introduced in Parliament. NEDLAC's trade and industry chamber considered the DTI competition policy proposals in early 1998. NEDLAC was consulted about the principles and the proposed

policy framework, but not about the detailed text of the law. Labour and business agreed about the principles and the design of the institutions, while recording differences of opinion about some matters of policy and institutional detail. The NEDLAC report was ratified at a meeting of the Trade and Industry Chamber convenors in May 1998. (NEDLAC, 1998)

The result of this extended process, which also included four days of hearings and dozens of written submissions to the Parliamentary Committee on Trade and Industry, was the Competition Act no. 89, which was adopted in 1998 and became effective as of 1 September 1999 (“Competition Act”). (The Competition Act was amended in 2000, in part to clarify the relationship between general competition law and other regulatory bodies). Experts and academics from 8 countries and from multi-lateral agencies and academic institutions also helped. South Africa’s Competition Act and the institutional structure draw heavily from developed country experience and practice. The Competition Act sets up three institutions, to be directly involved in its application. Each of these institutions—the Competition Commission (“Commission”), the Competition Tribunal (“Tribunal”), and the Competition Appeal Court (“CAC”)—is, to slightly different degrees, independent of the government. The Competition Act includes features that respond directly to the unique situation of South Africa. In some contexts, it permits consideration of equity issues such as empowerment, employment, and concern for small and medium sized enterprises. DTI believed that a competition law focused on economic efficiency and applied by politically independent bodies was appropriate for South Africa’s well-developed industrial and service sectors. Despite the prominence in the debate of equity and political economy concerns and issues, they are not principal drivers of its application, and appeals to them cannot be made through purely political channels. Decisions about other public policy issues are up to the independent enforcement bodies, and there is no ministerial power to override or direct their decisions.

### ***Policy goals***

The Competition Act’s policy purposes begin with economic efficiency, but they extend much further. The primary, general purpose, to “promote and maintain competition,” is supplemented by six particular sets of goals. The first of these is the efficiency, adaptability, and development of the economy. This goal corresponds to the DTI interest in a competition policy based on economic analysis. The second goal, competitive prices and choices for consumers, recognises the foundation of an economics-based policy in concerns about consumer welfare. The other 4 sets of policy goals represent other public interest issues that have been important to stakeholders in the debate: employment and social and economic welfare,

opportunities to participate in world markets (and to recognise foreign competition in South Africa), equitable opportunities for SMEs to participate in the economy, and increasing the ownership stakes of historically disadvantaged persons. (Sec. 2)

The law's preamble restates the law's political motivations. They include policies of equity and distribution as well as efficiency, and they clearly incorporate goals and ideals for competition law derived from the early ANC positions and the stakeholder debate.<sup>5</sup> The preamble characterises the problem that the law seeks to address, that past practices, including apartheid, led to excessive concentration of ownership and control, inadequate restraints on anti-competitive trade practices, and unjust restrictions on full and free participation in the economy. The preamble states that "the economy must be open to greater ownership by a greater number of South Africans." All of these are concerns about equity and justice. Consistently with a rhetoric focused on equity, the preamble describes restrictions on free competition as "unjust," rather than as "inefficient." The preamble does recognise the problem of inefficiency and waste, but connects these too with equity, in noting not only that a credible competition law and institutions to administer it are necessary for an efficient economy, but also that "an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans."

Achieving coherent results requires disciplined choice among multiple and potentially inconsistent goals. In the early debate, choice had been avoided. The many-faceted characterisation of the "public interest" in DTI's 1997 *Proposed Guidelines* makes no effort to assign priorities. Rather, DTI contended that the law would have to achieve both greater competition and promotion of the other objectives, and resisted any presumption that economic efficiency and the public interest would be in conflict. Including other objectives attracted a broader base of support for the principle of having a competition policy. Businesses feared that they would be invoked arbitrarily, to justify outcomes that were actually driven by unstated political considerations. Concerns about such abuse have been allayed as the law has been implemented, for the competition and efficiency aspects of the law have proven to be most important in practice. The Tribunal interprets the law as intended chiefly to promote and maintain competition. In only one decision<sup>6</sup> so far did the Tribunal's decision depend principally on the other public interest factors. Experience is confirming the wisdom of making the public interest factors explicit. Decisions can invoke these factors directly and transparently, rather than try disingenuously to justify actions on competition grounds when they really respond to other interests.

Interest groups have planted their flags in the competition law and process. Most interestingly, unions have a formal role in the merger review process, where they can directly raise their concerns about job losses. Small business interests are recognised not only in the potential for exemptions from statutory prohibitions, but also in some detailed provisions about abuse of dominance and price discrimination.

The issues of corporate structure and ownership that were prominent in the debate about the law have proven to be less prominent in practice. Corporate structures of holding companies and extensive networks of cross-ownership are found in many economies. This pattern of control over capital is often suspected of inhibiting economic competition or concentrating political power. A few countries, notably Korea, have tried to control and undo such corporate structures by using the tools of competition policy. Whether or not this would represent a coherent implementation of competition policy, intervention to force restructuring of South Africa's investment houses may prove to be unnecessary. As the market has opened, they have been restructuring themselves, often to prune extraneous branches and concentrate on fewer sectors. Consequences of this restructuring that might impair economic competition would of course remain subject to the merger control process.

The most distinctive public interest policy is empowering historically disadvantaged persons. South Africa's Constitution Sec. 9(2), authorises, if not requires, affirmative action programs, stating that "[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination, may be taken." The 1997 DTI proposals called for using competition policy to allow greater ownership participation by black persons in the economy, particularly in manufacturing. That goal is now in the statute, and decisions in a few merger cases have examined how best to achieve it.

The policy goal about participation in world markets might be understood as a response to business arguments about competitiveness, that is, to the claim that competition policy should permit the creation of large firms—even ones with local market power—in order to improve competitiveness in international markets. That is not how the industrial policy aspect of competition policy was conceived in South Africa, though. The discussion of industrial and trade policy in the 1997 DTI proposals shows an interest in using what were called "industrial strategies." But the purpose would be to overcome past distortions and to correct the results of market failures that were said to have compromised human and technological resource capacities and hindered capital market access. In

order to avoid distorting competition, DTI proposed that such “industrial strategy” interventions would target “clusters and collectivities” rather than single firms. Moreover, the 1997 DTI proposals denied that competition policy should be relaxed in order to create stronger international competitors, contending out that strong domestic competition is preparation for strong international competition. Liberalising trade and inviting foreign investment were recognised as important factors in promoting competition. Intervention strategies could be applied, though, for example to facilitate the entry of small and black-owned firms into international markets. DTI envisioned that the competition authorities would try to channel foreign investment into links with local partners to increase competition (as contrasted with financial acquisitions or mergers involving existing firms). The government also wanted to reserve the power to extend trade protections in some cases, which would make vigilant domestic competition policy even more important. (DTI, 1997, ch. 4)

The Competition Act’s policy statements about economic efficiency and consumer benefits leave room for flexibility in application. The term “efficiency” is not necessarily to be understood in the sense of static welfare analysis, although that reading is possible. Rather, coupling it with “adaptability” implies a greater concern for dynamic considerations about entry and mobility. The additional concept of promoting “development of the economy” also shows the breadth of the economic perspective. And the provision about consumer interests mentions both prices and choices, implying that preserving outlets or brands might be considered important, even if that meant a somewhat higher price level.

## Substantive issues: Content of the competition law

The Competition Act incorporates familiar elements that are found in the antitrust laws and concepts of many other jurisdictions. The law even encourages international comparisons. South Africa is jump-starting its competition jurisprudence by authorising the consideration of foreign and international law in the interpretation and application of its Competition Act. (Sec. 1(3)) The Competition Act's rules about restrictive agreements use some of the language found in the EU treaty, its merger standards are similar to those of Canada, and its rule about price discrimination looks like a revised, improved version of the US Robinson-Patman Act. A few practices are prohibited *per se*, but in general finding a violation of the Competition Act depends on a showing of net anticompetitive effect. The prohibitions of horizontal restraints and vertical restraints are set out separately. Single-firm issues are treated in terms of abuse of dominance, rather than monopolisation. Procedures for merger control are elaborate. But except for merger review, where the Commission and the Tribunal have been surprisingly active, so far there has been little enforcement action, producing only a few decisions.

The Competition Act's system of prohibitions is balanced by a scheme for exemptions that incorporates policy considerations other than competition. Few exemptions have been granted under this system, though. The Commission has the power to grant an exemption from the prohibitions against restrictive agreements or abuse of dominance. (Sec. 10) An exemption may be for a particular agreement or practice or for a general category of them. An exemption must be limited to a specified term. Grounds for exemption include maintenance or promotion of exports, promotion of small businesses or firms controlled by historically disadvantaged persons to become competitive, changing capacity to stop decline in an industry, and the "economic stability" of an industry designated by the Minister of Trade and Industry, after consultation with the minister responsible for that industry. (Sec. 10(3)(b)) The process for granting or revoking exemptions calls for investigation and an opportunity for public notice and comment. In concept, granting an exemption is not a matter of discretion. The Commission must grant an exemption if the conditions are met, and it must refuse if they are not (or if the conduct at issue would not have violated the Competition Act at all). The Commission's actions concerning exemptions may be appealed to the Tribunal.

These standards for exemption are extraordinarily broad, implying that even price fixing and market division could be excused if they promoted exports, propped up minority businesses, permitted mutual rationalisation to

maintain profits, or simply helped firms maintain their traditional competitive positions against each other. Even an otherwise *per se* violation might meet the terms for exemption. The scope of Sec. 10 does not foreclose that result, and the terms for a Sec. 10 exemption are independent of competitive effects.

Designation of an industry for exemption to ensure “economic stability” was intended as an avenue for ministerial input about matters of industrial policy or national interest. A minister’s designation does not confer exemption by itself, though. Designation authorises the Competition Commission to do so if the Commission decides that the statutory standard is met. This provision has only been used once, about liquid fuels, but requests for designation have also been submitted about shipping and motor vehicles. The Commission announced its opposition to the request for designation of motor vehicles in December 2002. DTI is working on a general framework for dealing with these demands. A general procedure would help avoid non-transparent, ad hoc responses to political pressure for special-interest deals and protection.

A prominent example of the use of the exemption power was the decision in 2001 to permit a code sharing agreement between South African Airlines and Qantas. South African Airlines claimed that the agreement would improve export earnings, and it also threatened that it might otherwise exit this service. But, it did not contend, and did not show, that it was actually losing money on the prior service. The exemption for this market division arrangement was granted for one year, subject to conditions. The conditions included regular reporting about fares and sales, no pooling of revenue, and independent pricing. Extension of the exemption beyond the 1 year grant would be contingent on demonstrating that the claims about promotion of exports were realised. The parties applied for, and eventually received, an extension, but only for another year.

### ***Horizontal agreements***

The Competition Act’s first rule about horizontal restraints is a prohibition based on the rule of reason. Restrictive horizontal practices - that is, agreements, concerted practices, or decisions by an association of competitors - are prohibited if they have the effect of substantially lessening or preventing competition in a market. The characterisation of the kinds of arrangements that are prohibited is modelled on terms used in EU competition law. The prohibition can be overcome by a showing that pro-competitive gains outweigh the anti-competitive effect. (Sec. 4(1)(a)) The range of interests that may be considered under Sec. 4(1)(a) is limited to technology, productive efficiency, or other factors related to the competitive

effect of the restraint. Consideration of other policies is a matter for the exemption process under Sec. 10.

In practice, a *per se* rule is likely to be more important enforcement tool. The horizontal agreements that threaten the most serious anti-competitive effects—price fixing, market division, and collusive tendering—are prohibited *per se*, without requiring a showing of actual harmful effect or permitting a showing of net efficiency. (Sec. 4(1)(b)) These prohibitions are carried over from the regulation that had been issued under the pre-1998 competition law. What appears to be a flexible catch-all in the *per se* rule, prohibiting agreements about “any other trading condition,” is read narrowly in context to apply only to factors that are intimately connected with price, quantity, and quality. It is not considered a basis for expanding the *per se* rule.

If firms engaged in a common practice have a common director or substantial shareholder, or significant ownership interests in each other, then they are presumed to have agreed, although that presumption can be rebutted by a showing that the practice was a normal response to prevailing market conditions. (Sec. 4(1)(b), Sec. 4(2)) The effect and intent of this presumption are obscure, particularly because the statute’s definition of “agreement” is already expansive. The presumption about agreement among related entities may have been intended as a means to apply stricter control over parties that are related through complex, loosely-connected investment structures, and thus to encourage them to dismantle those structures or make the control relationships in them more transparent. Agreements that are entirely among the members of a corporate group of wholly-owned subsidiaries or similar structure are not prohibited, either in the *per se* or the rule of reason categories. Sec. 4(5)

The exemption process under Sec. 10 permits consideration of the Competition Act’s other social or economic policies, notably the promotion of small business competitiveness. An example is an exemption that was granted to an association of individually owned pharmacies, which permits them to advertise and market jointly in order to compete with larger chains. Joint marketing supported the group’s growth from 10 members to 33, and its success persuaded the Commission to extend the exemption another 5 years.

There has been very little enforcement action against horizontal restraints, either under the previous prohibition based on regulation or the present one based on statute. Some investigations are underway now involving major domestic manufacturing industries. In one of the most interesting matters to date, the Commission declined to accept a proposed consent order and fine concerning an export cartel, because the cartel



intended to continue the sales practices by routing transactions through a third country. The only reported action against restraints in self-regulated service sectors involved the legal profession, and it failed in court. The Commission tried, but failed, to impose conditions on an exemption for the legal profession's rules about practices and fees.

### ***Vertical agreements***

Unlike most competition statutes, which typically group all restrictive practices into a single rule, South Africa's Competition Act separates the rule about restrictive practices between parties in a vertical relationship from the rule about horizontal restraints. The competitive effects of vertical agreements are more complex, and thus they are usually assessed under a rule of reason. In jurisdictions where the law prohibits restrictive agreements without distinction, differences in their likely effects must be recognised or developed through enforcement practice or guidelines. Under South Africa's statute, a vertical agreement is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party can prove that any technological, efficiency, or other pro-competitive gain resulting from that agreement outweighs the anti-competitive effect. (Sec. 5(1)) Thus finding a violation usually depends on showing an actual anti-competitive effect. The only practice that is prohibited *per se* is minimum resale price maintenance. A supplier may recommend resale prices as long as they are clearly not binding. If the resale price is indicated on the product, it must be labelled "recommended price." (Sec. 5(2), 5(3))

Here too, there has been very little enforcement action. There have been only one final Tribunal decision on the merits about a vertical restraint, although there have been interim proceedings and procedural rulings, most of them in a complex, long-running controversy about distribution arrangements for pharmaceutical products.

### ***Abuse of dominance***

South Africa's law about single-firm conduct is based on abuse of dominance, but it also includes a rule about price discrimination that resembles North American statutes. Dominance is defined in terms of market share and market power. (Sec. 7) Any firm that actually has market power is considered dominant, regardless of its market share. (Sec. 7(c)) The definition of market power includes concepts from the EU's definition of dominance: "the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers." (Sec. 1(1)(xiv)) A firm with a market share over 45% is conclusively considered dominant. A firm with a market share between 35% and 45% is presumed to be dominant, but the firm may rebut

that presumption by showing it does not have market power. If the firm's share is below 35%, the enforcer has the burden of showing that it has market power.

Abuse of dominance is dealt with mostly through a list of prohibited practices. The first of these is charging an "excessive price" that harms consumers. (Sec. 8(a)) This term is separately defined: an "excessive price" must have no reasonable relationship to economic value and be in excess of that value. (Sec. 1(1)(ix)) The second is refusing a competitor access to an essential facility (provided it is economically feasible to grant access). (Sec. 8(b)) This term too is specially defined, as an infrastructure or resource that cannot reasonably be duplicated and without access to which competitors cannot reasonably provide their customers. (Sec. 1(1)(vii)) These two practices are prohibited *per se*, without considering net competitive effects. As with other parts of the competition law, though, the forbidden practices might be permitted if the terms for exemption under Sec. 10 are met.

The Competition Act prohibits some other particular exclusionary acts by dominant firms: requiring or inducing exclusive dealing, refusing to supply scarce goods to a competitor, tying or forcing unrelated contract conditions, selling below marginal or average variable cost, and cornering the supply of intermediate goods needed by a competitor. (Sec. 8(d)) These acts are presumed to be harmful, but a rule of reason applies. A dominant firm could avoid liability for exclusive dealing, refusal to supply, tying, predation, or cornering by showing that the net effect of the conduct on competition in the relevant market is positive. In addition, there is a general, rule-of-reason prohibition against exclusionary acts by a dominant firm. Under this general rule, which applies to acts that are not specifically identified in the statute, the enforcer has the burden of showing that the anti-competitive effect outweighs the pro-competitive gains to technology or efficiency. (Sec. 8(c)) The distinction between these rule-of-reason matters and the *per se* prohibitions is carefully policed. The Competition Appeal Court has reversed the Tribunal's effort to interpret a refusal to deal as denial of access to an essential facility. The Tribunal contended that the two concepts were equivalent as a matter of economics, but the CAC was more concerned that different characterisations would lead to sharply different treatment as a matter of law.<sup>7</sup>

Dominance is defined in terms of particular, defined markets, not in terms of firm size alone. But there is a provision for general exemption based on firm size, evidently to ensure that small firms will not be considered dominant in small markets. The Minister has the power to define a threshold below which the abuse of dominance prohibitions do not apply. This can be based on turnover or assets, and it can be defined either in general or for specific industries. This is to be done in consultation with the Competition

Commission and pursuant to public notice and comment. (Sec. 6) Under this authority, a general *de minimis* threshold has been set, at R5 million in turnover or assets in South Africa. (Brassey et al., 2002, p. 181).

A separate section prohibits price discrimination. It appears to be modelled on the US Robinson-Patman Act, but with variations that address the oddities and problems of the US law. The Competition Act prohibits discrimination in price, discounts, rebates, allowances, credits, services, or payment terms, for products or services. But market power is a prerequisite. Only a dominant firm acting as a seller can be liable. Liability is subject in all cases to a competitive effects test, that the discrimination is “likely to have the effect of substantially preventing or lessening competition.” This test is the same regardless of whether the effect is felt at the primary or secondary and further levels of competition. There is a requirement that the transactions be equivalent and involve products or services of like grade and quality. Differential treatment can nonetheless be defended based on cost justification or meeting competition. Cost justification can be based on quantity or other listed factors. Meeting competition is subject to a showing of good faith. Differential treatment can be a justified response to market conditions, such as imminent deterioration of perishable goods, obsolescence, liquidation, or going out of business. (Sec. 9) Providing an explicit rule about price discrimination may demonstrate to small businesses that the competition law is looking out for their interests. There have been few complaints so far under this section, perhaps because it is crafted to exclude competitively unimportant claims.

The first prohibited practice, charging excessive prices, makes the Competition Act a basis for price control. That possibility is now being tested with respect to the prices of medications for AIDS. In 2001, the Commission received a complaint from a Cape Town pharmaceutical company about allegedly excessive prices for retroviral drugs. The complaint, which names a number of international pharmaceutical firms, contends that the complainant could produce cheaper generic versions of the drugs and that the patentees had entered into exclusive licensing and other arrangements that prevented distribution or marketing of cheaper products. In September 2002, an NGO, the Treatment Action Campaign (“TAC”), submitted another complaint to the Commission. The TAC complaint, on behalf of patients and medical professionals, also alleges that the prices have been too high. The TAC submission includes dozens of expert and individual affidavits and other materials, and it demands that the Commission give it top priority and impose stiff penalties on the pharmaceutical companies. The Commission and the Tribunal may thus have to decide about how the Competition Act can be used to control prices in a case that presents two complicating factors: the relationship between

competition policy and intellectual property rights, including international recognition of those rights, and the public interest in dealing with the large-scale public health problem represented by AIDS. The “public interest” as such is not a basis for decision under the Competition Act, of course. A Commission or Tribunal decision about these complaints will have to be motivated by considerations of competition policy and the particular policies and goals that are identified in the Competition Act.

There have been few matters so far about access to network facilities, even though denial of access to an essential facility is defined in a way that could make it an easy rule to apply. The lack of cases is probably due in large part to uncertainty about jurisdiction. Until the Competition Act was amended in 2000, its application to regulated network industries was in doubt. The amended Competition Act now calls for establishing agreements about working relationships with sectoral regulators. Reform of monopolised network infrastructure is just getting underway in South Africa. The monopoly in telecoms ended in 2001, and the Commission is beginning to work on complaints from other service providers about network access, in conjunction with the sectoral regulator, the Independent Communications Authority of South Africa (ICASA).

The Competition Act’s presumptions about the effect of dominant firm conduct are strong. Despite the rule-of-reason language, for excessive pricing and access to an essential facility the law appears equivalent to the EU treatment of abuse of dominance, that is, prohibition without exemption. And additional requirements to make a case of denial of access might make that less of a *per se* rule in practice. But the strong language implies that South Africa’s law is suspicious of large-firm behaviour and aims to control and overcome the history of highly-concentrated industry. The absence of actual cases so far suggests that the tool is not being used for that purpose, though.

### ***Mergers***

The legal standards for merger control are general and evidently permissive. The competition policy standard, which must be assessed first, is whether the merger “is likely to substantially prevent or lessen competition.” That determination requires a multi-factor analysis, set out in the statute, to assess the probability that firms will compete or co-operate after the merger. Factors to consider include import competition, ease of entry, tariff and regulatory barriers, concentration, any history of collusion, countervailing power, dynamic characteristics such as growth, innovation, and product differentiation, vertical integration, business failure, and removal of an effective competitor. (Sec. 12A(1))

If the competition analysis indicates a problem, the next step is to determine whether technological, efficiency, or other pro-competitive gains would be likely to offset the anti-competitive effects—and would not likely be obtained absent the merger. (Sec. 12A(1)(a)(i)) Whether efficiencies must be passed on to, or demonstrably benefit, consumers depends upon the nature of the claimed efficiencies. The Tribunal distinguishes “real,” quantifiable efficiencies, for which a clear showing of consumer benefit is less necessary, from “less compelling” claims for which there should be a demonstration that the benefit is passed through to consumers.

#### Box 1 EFFICIENCIES AND CONSUMER BENEFITS

The language about efficiencies in Sec. 16 of South Africa’s Competition Act was modelled on the efficiency provision in Sec. 46 of Canada’s competition statute. In *Trident Steel (Pty) Ltd and Baldwins Steel*, the Tribunal examined closely how to deal with claims of efficiency, in the context of a merger to near monopoly in specialty steel. After an exhaustive review of how efficiencies have been treated in the US and Canada, the Tribunal panel decided on an inverse sliding scale. The stronger the showing of real efficiencies, the less need there would be to show how consumers would benefit directly. In this context, the Tribunal was willing to consider “dynamic efficiencies, production efficiencies ranging from plant economies of scope and scale to research and development efficiencies that might not be achieved short of merger.” But “[p]ecuniary efficiencies would not constitute real

economies nor would those that result in a mere redistribution of income from the customers, suppliers or employees to the merged entity.” And the Tribunal said it would be skeptical about administrative efficiencies, which can be claimed for most mergers.

A merger may also be approved, or disapproved, based on “substantial public interest grounds.” The public interest grounds are broad, but they are not unlimited: effect on a particular sector or region, employment, international competitiveness of South African industries, or the ability of small business or firms controlled by historically disadvantaged persons to become competitive. (Sec. 12A(1)(a)(ii)) These grounds are slightly different from the policy objectives that may be considered in granting an exemption from the Competition Act’s prohibitions.

The thorough approach to merger analysis, the relevance of the public interest factors, and some of the jurisdictional problems are illustrated by the *Nedcor-Stanbic* case, one of the first major cases to come up under the Competition Act. In reviewing a proposed merger of 2 major banks, the Commission performed a standard analysis, defining service markets, finding high concentration, and focusing on likely actual competitive effects. The Commission identified 8 out of 12 product markets in corporate,

investment, and merchant banking as worrisomely concentrated and thus problematic, despite the likelihood of significant foreign competition. In retail and small business services, there was even greater concern because entry of foreign banks was less likely to be a constraint on market power over these services. Efficiencies were considered, but the claims were rejected because they were unlikely to benefit consumers. The employment impact was also important, because the consolidation would eliminate 4000 jobs. (Competition Commission, 2000) In the end, these conclusions had to be submitted as advice to the banking regulator rather than implemented through a decision under the Competition Act, because the court ruled that the Competition Act did not apply if an industry was subject to regulation. The Competition Act has been amended to narrow that reading substantially.

Whether a transaction amounts to a merger that is subject to notification and review depends upon the acquisition or establishment of control, either direct or indirect. "Control" is a matter of fact, which the statute characterises in two ways. In formal terms, it is beneficial ownership of a majority of the capital or the power to control a majority of shares or to appoint (or veto) a majority of the directors or equivalent officers. In functional terms, it is the ability to materially influence firm policy in a way comparable to a person who can exercise "control" as understood in ordinary commercial practice. (Sec. 12(2)) The Commission has declined to issue guidelines defining control in even more precise terms. Its unwillingness has been criticised, as adding uncertainty and hence costs to business decisions. On the other hand, the Byzantine complexity of cross investments in South Africa may make it unusually necessary to preserve a flexible conception of control. The same concerns arose under the pre-1998 law, and the Competition Board then also tried to avoid a formalistic conception of "control" in order to preserve its options.

The lack of greater certainty may frustrate devices that are designed to facilitate transfers of firms in liquidation or to ease reporting obligations about international transactions. One advantage of a formal, explicit rule, at least from the business perspective, is that clear boundaries make it easier to design deals to be inside or outside of them. Businesses would often prefer not to notify multi-jurisdictional transactions in South Africa and other smaller countries until after it is clear whether they will be approved or subject to conditions in major markets. Attorneys have proposed clever constructions about what constitutes control in order to rationalise failure to notify in South Africa. For example, noting that the Competition Act says that parties may not "implement" a merger until it is approved (Sec. 13A(3)), some have contended that acquisition of corporate control does not actually implement the transaction, so notification or approval can be postponed until the latter event, that is, until those who possess the power of control actually

take some action that effects the combination. More credibly, parties may offer to “ring-fence” the South African operations that are affected, by making some commitment to hold operations separate, in South Africa or even elsewhere, until completion of the review and approval process. The Commission would prefer enforceable commitments within South Africa. Moreover, the Commission doubts that managers in an entity that is supposedly held separate pending approval will actually behave independently of the interests of the prospective future owners.

Deadlines and procedures differ depending on the magnitude of the transaction. Mergers are classified as small, intermediate, or large, according to thresholds of turnover or assets that are determined by a regulation issued by DTI, after notice and comment and in consultation with the Commission. (Sec. 11) The threshold has been increased significantly since 1998 to reduce the number of transactions that are subject to mandatory notification and review. “Large” means over R3.5 billion in combined turnover or assets (and over R100 million for the acquired firm), and “small” means below R200 million in combined turnover or assets (and below R30 million for the acquired firm). Filing fees have been cut in half, to R250,000 for larger mergers and R75,000 for intermediate ones.

Small mergers ordinarily need not be notified to the Commission. The Commission may require notification of a small merger if it believes the merger might have an anticompetitive effect or might not be in the public interest. The Commission must take this action within to 6 months after the transaction, and the parties must suspend implementation until the review is completed. Intermediate and large mergers must be notified in advance to the Competition Commission, and notice must be given to the union (or the employees) of the primary acquiring firm and the primary target.

The notification package must include a number of documents along with the required forms: the merger agreement, “a document assessing the transaction with respect to competitive conditions,” documents about the transaction prepared for the board of directors, recent annual reports, business plans, and reports to the securities regulator. The parties typically use the document describing the transaction and competitive conditions to present their case for approval. Pre-existing documents prepared for the firm’s board are also supposed to be provided, but they rarely are. In some cases, parties have withheld documents and information that the Commission has requested, only to bring them forward at the Tribunal when that appears necessary to bolster their case. The Commission has found that information submissions with merger filings are often incomplete, and increasingly the Commission has been moved to “stop the clock” because the information in the filing is inadequate. When the notification process was new, the Commission wanted to encourage firms to comply, and so it

had accepted incomplete filings. Compliance with notification and other formal requirements is enforced by administrative penalties, which may be imposed by the Tribunal. The penalty for proceeding with a merger without the required approval can be up to 10% of the parties' turnover.

For small and intermediate mergers, the Commission is the principal decision-maker. The Commission must reach its decision within 20 business days after the notification is completed. That period may be extended once, up to 40 business days. If the Commission does not act within the deadline, the merger is approved. The Commission must publish the reasons for its action if it prohibits a merger or imposes conditions—or if the parties request that it do so, even if the Commission approves it. (Sec. 13) For large mergers, the Commission must refer the notice to the Tribunal and the Minister of Trade and Industry. Within 40 business days after the notification is completed, the Commission must forward its recommendation. The Tribunal may extend that deadline, 15 business days at a time. If the Commission misses the deadline, the parties may petition the Tribunal to proceed without a Commission recommendation. For a large merger, the Commission's failure to act does not mean that the merger is approved. (Sec. 14A)

The Tribunal is the decision maker about large mergers. The Tribunal may also be asked to decide about small and intermediate mergers in some circumstances. If the Commission prohibits a small or intermediate merger or imposes conditions on it, the parties may ask the Tribunal to consider the conditions or the merger. If the Commission approves an intermediate merger or imposes conditions, the union or employees who were given notice may ask the Tribunal to consider the approval or conditions (but only if they had participated in the Commission's proceedings). (Sec. 16(1)) In all merger cases, the Tribunal must reach a decision by a deadline, which is set by regulation, and it must publish its reasons. For large mergers, there is no "silence is consent" rule.

Decisions about public interest issues as well as about competition issues are up to the Commission and the Tribunal. The original draft of the Competition Act would have given the Minister the power to apply the public interest criteria, that is, to override the competition policy decision on those grounds. But the Minister at the time decided to decline that power. The Minister may participate as a party before the Commission or the Tribunal in considering intermediate or large mergers, in order to make representations concerning the public interest grounds. (Sec. 18(1)) In only one sector, banking, is there a provision for ministerial invocation of other policy interests to displace the Competition Act: a bank merger may not be subject to Competition Act notification or review if the Minister of Finance certifies that it is in the public interest for it to be subject only to the



jurisdiction of the Banks Act. (Sec. 18(2)) Because public involvement or regulation does not create an exemption from competition policy, restructuring or privatisation transactions carried out pursuant to government policies would not be exempted from merger notification and review. The Commission and Tribunal would normally examine them if the requisite threshold requirements were met. (Competition Commission, 2002)

The parties to a proposed merger, or their unions or employees, may appeal the Tribunal's action to the Competition Appeal Court (CAC). The Commission may not appeal if the Tribunal rejects its recommendation, though. The CAC may confirm, amend, or set aside the Tribunal's decision. It is not clear whether the CAC could send the matter back for further proceedings. If not, then if the CAC sets aside the previous decision, it must issue its own decision, to approve or prohibit the merger or impose conditions. (Sec. 17)

The Commission tries to focus its resources by identifying quickly the mergers that are likely to be approved and those that are likely to be problematic. The Commission has offered a "fast track" process in its service standards, set out in a December 2001 memorandum describing the types of transactions that would qualify for this expedited treatment. Two types that virtually never have competition implications are property transfers and management buy-outs. The Commission will also deal quickly with transactions in which there is a failing firm or in which one party is a new entrant. Fast-track treatment is promised if there is no product or geographic market overlap among the firms. If the combined share exceeds 15%, fast-track treatment depends on the level of concentration and the magnitude of the increase. The structural thresholds for fast-track treatment are similar to those applied in North America: HHI below 1000, or HHI between 1000 and 1800 and increase less than 100, or HHI over 1800 and increase less than 50. The parties must provide the factual basis for their contentions about the market and the effects and efficiencies, and there must be a "comfort letter" from the unions abjuring an intention to raise issues about employment. For qualified transactions, the Commission undertakes to reach a decision in 20 days. (The period must be at least 10 days, because that is how long the minister has to indicate whether he intends to call attention to any public interest issues). Decisions on larger mergers are often issued on the day of the hearing. In 2000-01, this was true for 24 out of 35 such matters. In that period, only 2 merger decisions took longer than a week after the Tribunal's hearing. About a quarter of the large mergers notified over that period were elements of multinational transactions, and all of those were approved.

### Box 2 CHALLENGING ISSUES IN MERGER DECISIONS

In a short period of experience with wide-ranging, mandatory merger review, South Africa's competition policy institutions have issued dozens of decisions. The number is due no doubt to the obligation to review each large transaction and produce a decision about it, however brief. The range of issues the Tribunal and the Commission have addressed is impressive, as is the economic sophistication of their approach.

**Market definition:** In *JD-Elleries*, the Tribunal prohibited a combination between retail furniture chains. The Tribunal used its powers to obtain additional evidence and looked beyond superficial statistics to examine actual marketing strategies in detail. It concluded that the merger would reduce competition in local market service to poorer customers who are more likely to need to buy on credit terms.

**Regulation:** In *Tongaat-Hulett Group Ltd-Transvaal Suiker*, the Tribunal prohibited a merger in the sugar industry. The parties had argued, with no apparent sense of irony, that their merger would not affect competition because regulations set the price and so there was no competition to be affected. The Commission feared already-high concentration, de facto market division between industrial and consumption sales, and lack of imports or countervailing power. And one of the firms involved was the industry "maverick." (Competition Commission, 2001) The Tribunal sought additional evidence in its proceeding. In the end, the Tribunal thought it best to preserve the possibility of competition against the day that the regulations might be reformed. Written assurances from DTI that regulations would be reformed to stimulate competition did not persuade the Tribunal to permit the transaction to proceed.

**Efficiencies:** In *Trident Steel (Pty) Ltd-Baldwins Steel*, discussed above, the Tribunal determined that claims of efficiency were credible enough to justify a merger to near monopoly in specialty steel. The decision provides a nuanced guide to treating efficiencies and balancing claims about productive efficiency and consumer harm.

**Small business:** In *National Sorghum Breweries-South African Breweries*, a restrictive licensing agreement affecting the sorghum industry persuaded the Commission to prohibit the transaction. But then the reformation of that agreement permitted it to proceed. The Commission believes that result helped small business interests to compete.

**Vertical foreclosure:** In *Schumann Sasol-Price's Daelite*, the Tribunal tried to prevent a supplier of raw material, with a 70% market share, from acquiring a downstream customer, which had a 40% share of that product. The Commission had recommended approving the transaction, which resulted from settlement of a contract controversy between the parties, but the Tribunal rejected it because of the foreclosure of a large share of the market and the resulting two-stage entry requirement imposed on downstream firms. The Competition Appeal Court had the last word, though, and in its first substantive consideration of a merger, it reversed the Tribunal. The court contended that there is a world market for the raw material, wax, and that a producer of the downstream product, candles, would have no trouble getting the raw material. The court chided the Tribunal for relying on speculation, but the court's decision cites only counsel's argument in support of its own contrary conclusion, and the court relies mainly on presumptions from academic treatises about how vertical mergers might affect competition. .../

### Box 2 Challenging Issues in Merger Decisions (Cont)

**International markets:** In *Nampak-Malpak*, the Tribunal permitted a combination between major producers of packaging, despite the objections of many customers who argued that they did not have countervailing power. The Tribunal noted that the market was in fact bifurcated. One part is sales to multinationals that increasingly concentrate global production in one place rather than distribute it around markets. In that sector, a firm in South Africa must be unusually large and sophisticated to serve what might be global or continental-scale production. And in that sector, the new firm would rank only 31st in the world. The other part is sales to national firms, operating at smaller scale—but this sector can be served by the remaining, smaller firms. Moreover, the Tribunal found that entry at the smaller scale would not be that difficult. And a multinational buyer might sponsor entry (or support expansion of one of the remaining fringe firms) in response to abuse by the merged firm. The Tribunal did impose a condition, requiring divestiture of a plant making an insulation product, for which the market was local and the buyers dispersed.

**Differentiated consumer products:** In *Pioneer Foods-SAD*, the Tribunal approved a merger that appeared to result in a near-duopoly in ready-to-eat cereal. One reason for approval was the apparent ease of entry into the meusli-type products that were the acquired firm's principal item. Moreover, internationally branded firms that are not already in the South Africa market, such as General Mills, CPW, and Nabisco, could enter too. Comparative elasticity analysis was used to identify the degree of local market power, if any, of Kellogg and the new firm. The extent of product differentiation was found to make collusion unlikely. And the Tribunal noted that retailers might have an interest in sponsoring new entry to control abuse.

**Multi-market contact:** In *Mondi-Kohler*, the Tribunal agreed with the Commission's recommendation to prohibit what looked like a vertical combination involving an obscure industrial product, the cores used for winding textiles and paper. The raw material supplier was buying the core maker. In the broadly conceived "paper products" industry, South Africa is a duopoly, and the Tribunal determined that this combination would simplify aspects of overall duopoly co-ordination, particularly when considered in the context of another transaction that was pending at the same time.

The public interest considerations are independent of those based on competition and efficiency, and they are equally important. A merger that raises no competition policy concerns may still be barred because of other public interest considerations. At least one merger has been permitted only after the parties accepted conditions related to employment security, despite a finding that the transaction raised no competition concerns.<sup>8</sup> Considerations of the public interest often appear along with arguments about efficiency. The Tribunal has permitted otherwise anti-competitive mergers where there were strong showings of productive efficiencies that would outweigh the anti-competitive effect.<sup>9</sup> Public interest concerns have

been prominent in decisions about others, but they were not necessarily reasons to permit them. The Tribunal considered the risks of monopoly in educational practices severe enough to call special attention to, in imposing conditions on an acquisition involving franchising educational services.<sup>10</sup> The Competition Appeals Court has implied, though, that public interest factors should not prevent a merger if there are no competition policy reasons to do so.<sup>11</sup>

Merger control may be used to promote statutory policies of general interest. One of these is expanding the business ownership stakes of historically disadvantaged persons. For example, a firm acquiring machinery from another that was exiting claimed that its plan would increase employment and sales opportunities for black farmers; however, the firm would also have achieved a dominant position as processor in the region with the largest share of this product (cotton). The Commission required restructuring so the “empowerment partners” would be the acquiring firm, to introduce a new competitor. (Competition Commission, 2001, p. 9) There have been disagreements about what it means to implement these policies. The Commission once tried to impose conditions on the acquisition of a minority-controlled business, in support of the statutory criterion of supporting firms controlled or owned by historically disadvantaged persons. The Tribunal disagreed, reasoning that the goal of empowerment would be achieved by permitting the minority owners to sell out and apply their capital elsewhere if they wanted to. The only issue was this public interest factor, as the acquired firm, one of the only black-owned firms in the oil business, was not a significant competitive factor, having a market share under 1%.<sup>12</sup>

The merger control process also gives labour interests an explicit role. Unions must be notified of proposed intermediate and large mergers, so they can decide whether to participate in the review. Unions participate in about 20% of the merger proceedings, and about 20% of the unions that are notified decide to participate. (Competition Commission, 2001) These interested unions may also pursue appeals if they are dissatisfied with the outcome. Unions report that the notifications are prompt, but their participation in the process beyond that point is sometimes uncertain. Whether unions are notified about subsequent stages of the review and whether they can obtain access to the file may depend on the particular case handler and the willingness of the filing parties to permit access to confidential material. Unions have participated actively in several cases, notably *SFW-Distillers* and *Unilever-Robertsons*, making presentations about competition and consumer effects as well as about employment impacts. Clearly, though, the employment effects are important, and unions are interested being sure that the merger review process can be used to

protect those interests. Unions complain that firms delay filing their notification in South Africa in order to effect labour force changes before the unions must be alerted, and that the merging parties' representations about labour force impacts and plans are not accurate. Consideration of employment effects is not a novelty of the 1998 Competition Act, although the formal process of notification and participation is an innovation. Under South Africa's 1979 law, among the considerations relevant to the public interest determination was the effect on employment, and the old Competition Board occasionally rejected mergers because of adverse employment effects.

General concerns about the structure of the political economy have not been elements of merger control, despite the prominence of these issues in the debate about the law in the 1990s. The Commission and the Tribunal take a standard competition-policy approach to merger analysis and actions. Concerns about aggregate concentration and pyramid-like investment structures, although still of some interest, have not been issues in deciding particular cases.

To a surprising extent, competition policy in South Africa is merger policy. Even before the new law was adopted in 1998, merger control was the task that occupied most of the competition policy attention. That pattern has continued under the new, stronger merger control processes. The bar preferred the previous system because it was comparatively informal and low-key. On the other hand, it was also less transparent. The evident overbreadth of the review obligation that had been imposed by the original thresholds was a matter of some criticism in the business community. The revisions in 2000 to reduce the scope of mandatory filing, and the "fast track" policy adopted in 2001 to focus effort on the most significant transactions, have tried to meet those criticisms. The decisions to date show that, in terms of substantive economic analysis and sensitivity to policy context, merger review in South Africa is done at a high level of sophistication.

## **Institutional issues: Enforcement structures and practices**

South Africa's new institutions are trying to implement an economics-based policy in an enforcement culture whose preoccupation with legalism is a connection to the old way of doing things. Merger review processes are established, but the procedures for enforcement and exemptions now need more attention.

### ***Competition policy institutions***

The principal innovation in the 1998 Competition Act was independent, effective enforcement bodies. The power of decision was taken away from the Minister and given to an independent Competition Tribunal. Even the office that is responsible for investigations and recommendations was moved out of DTI and reconstituted as the new Competition Commission. The Competition Act also created a special court, the Competition Appeal Court. Much is made of the novelty of these institutions, but there is some continuity with their predecessors in roles and in personnel. The chairperson and the other permanent member of the Tribunal were members of the old Competition Board, and several senior staff at the Commission had held similar positions at DTI in the secretariat of the Competition Board.

The Commission is the investigative and executive body. Despite the implication of the name, the Commission is an executive administration, not a collegial body, with power vested principally in the Commissioner as its chief executive officer. The only other required appointment is the Deputy Commissioner. The term of office is 5 years, and it may be renewed. (Sec. 22) The Commissioner may only be removed for cause, that is, for serious misconduct, permanent incapacity, or engaging in activity that may "undermine the integrity" of the Commission. The Minister of Trade and Industry appoints the Commissioner and Deputy Commissioner and sets their compensation and conditions of employment, in consultation with the Minister of Finance. The Commissioner has an annual performance agreement with DTI and is responsible to the Minister. The Commission and staff are subject to the generally applicable rules against conflict of interest and misuse of confidential information. (Sec. 20(2)) The Commissioner is responsible for managing the Commission and staff, supported by an office at DTI for administrative details. A principal difference between the independent Commission and the old Competition Board secretariat is that the Commission has more resources. Supported by substantial filing fees for mergers, the Commission has a staff of nearly 100 employees at its office in Pretoria.

Although the Commission is the first stop for the application of the Competition Act, the Competition Act's list of its functions does not begin

with law enforcement, but with promoting market awareness. The Commission is to “implement measures to increase market transparency” and “to develop public awareness” of the Competition Act. The Commission investigates and evaluates violations, grants exemptions, reviews and authorises or refers mergers, and appears before the Tribunal. The Commission has several regulatory roles. It negotiates agreements with other regulators to harmonise their respective jurisdictions and participates in proceedings at other regulatory authorities. And it is to review legislation and regulations and report to the minister about any that permit non-competitive behaviour. (Sec. 21(1)) The Commission may inquire and report to the Minister of Trade and Industry on matters “concerning the purposes” of the Act. The Minister is to present such reports, as well as reports about competition problems in legislation and regulations, to the National Assembly.

The Competition Tribunal operates as a collegial body. It is considered a tribunal of record, although not a formal court. By law, it is to have from 3 to 10 members plus a chairperson, all of them nominated by the Minister of Trade and Industry and appointed by the President of South Africa. (Sec. 26) The members’ tenure is like that of the Commissioner, that is, they serve five year terms and are removable only for cause; however, the chairperson may only serve two consecutive terms in that office. (Sec. 29) Membership is not formally representative of interest groups, but the members are to represent a “broad cross-section of the population.” The members must be qualified and experienced in the matters the Tribunal deals with, and they may not be officials of political parties or movements. (Sec. 28) One constraint on the members’ qualifications is the need to include enough lawyers to assign at least one lawyer to each panel dealing with a case. Remuneration and terms of employment, which are set by the Minister, may not be reduced during a member’s term. (Note that the Commissioner, who may serve longer and is more like a civil servant, does not enjoy this protection against a pay cut). In 2001, the members included 6 lawyers, three economists, and a chartered accountant.

The Tribunal is the first-instance decision-maker about larger mergers and complaints about restrictive practices and abuse of dominance. It also adjudicates appeals from Commission decisions about smaller mergers and exemptions. (Sec. 27) It has the power to issue interim relief, and this procedure has been its principal task, after merger reviews. The Tribunal has some power to conduct its own inquiry, and thus it is not limited to hearing the evidence and arguments presented to it by the Commission and parties. Matters are heard and decided by panels of three members.

All but two of the Tribunal’s members serve part-time. The pay for their service is not very high. The combination of those factors may create

problems in dealing with complex cases. The Minister disagreed with the Tribunal's interpretation of the compensation formula and cut the members' daily rate by more than 50%. That dispute has not yet been fully resolved. (Competition Commission, 2001, p. 4, 7) Several members recently left the Tribunal for private practice or other purposes—one of them to join the staff of the Commission—in part because of the low compensation for their time. Relying on part-time service will be make it difficult to assemble panels to hear complex non-merger matters, for which many days of hearing time are needed to take evidence.

The role of the Department of Trade and Industry is principally in policy and legislation, as well as the appointment process. DTI is responsible for the budgets of the Commission and Tribunal. (Competition Commission, 2002) Despite these ties, the decision-making independence of the Commission and the Tribunal are well-established. Independence of enforcement from political influence was considered necessary for the new competition policy structure to be credible to the markets and to the citizenry. The Commission's law enforcement functions are not subject to political direction, even though the Commissioner is officially responsible to the Minister. The Commission is enjoined by statute to be "independent and subject only to the Constitution and the law," to be impartial and "perform its functions without fear, favour, or prejudice." (Sec. 20(1)) Other officials and institutions of national, provincial, and local government are instructed to assist the Commission to maintain its independence and impartiality. (Sec. 20(2)) The Tribunal, like the Commission, is similarly enjoined to be independent and impartial. The Minister has made representations about public interest considerations in some matters, as provided by statute. There has been no indication of any political effort to influence enforcement decisions about the competition merits, though.

The Competition Appeal Court has the status of a High Court. In fact, the members must be High Court judges. It has at least 3 members, appointed by the President on the advice of the Judicial Services Commission. Other High Court judges may be seconded to the CAC as acting judges. Terms of service are set by the President at the time of appointment. The judges' compensation and tenure protection are based on their service on the High Court. (Sec. 39)

The Constitution requires that there be an avenue of appeal to an independent court. The CAC serves that role, while, it is hoped, developing a particular expertise about complex competition matters. The CAC may review any decision of the Tribunal concerning legal error and jurisdiction. The CAC may consider an appeal concerning the substantive merits of any final decision of the Tribunal (except a consent order) and of any interim decisions for which the Act permits an appeal. The CAC may confirm,



reverse, amend, or remand. The CAC hears and decides cases in panels of 3 judges, although a single judge may decide interlocutory or procedural matters. The CAC has only issued about a dozen decisions in 3 years. Most of the CAC decisions are about questions of procedure and jurisdiction. There is little record yet to show how the CAC is developing or applying expertise about the substance of competition law.

The new institutions are turning out a flurry of decisions, mostly about mergers. Of the Tribunal's nearly 175 decisions in just over 3 years of operation, 125 are about large mergers (nearly all of which were approved). All basic statutory materials and the decisions of the Tribunal and the CAC are available on clear and straightforward websites. The Commission publishes annual reports and quarterly bulletins, which also appear on the Commission's website. These do not necessarily report all Commission actions, though. Advisory opinions are not usually publicised, and thus they are not available as guidance for others. There have been few formal guidelines so far. The merger guidelines that the old Competition Board issued in 1981 are still considered useful by practitioners, particularly with respect to the threshold issue of characterising the change of "control." (Brassey et al., 2002, p. 229) The Commission has resisted issuing a new guideline on this subject under the 1998 law, contending that more experience is needed with the new system.

### ***Competition law enforcement***

Application of the law combines administrative and quasi-judicial approaches. The Commission has the first responsibility with respect to every matter arising under the Competition Act. Decisions in contested matters are made by the Tribunal, on the record and after an open hearing of the views of the Commission and the parties. The Tribunal also has the power to impose sanctions. And parties may appeal any final Tribunal decision (and some other ones as well) to the CAC. Actual experience with the enforcement process is limited, except for mergers. Most non-merger matters have been resolved by consent agreements or delayed by applications for interlocutory relief. (Competition Tribunal, 2002)

The Commissioner has the power to initiate a complaint against a prohibited practice. On receiving a complaint or information from a third party about a prohibited practice, the Commission must initiate an investigation. (Sec. 49B) The matter must be referred to the Tribunal or closed within a year. If it is closed, the complainant must be notified. (Sec. 50) The 1-year deadline for Commission action may be extended, by order of the Tribunal or by the agreement of the respondent. The Tribunal may order interim relief in order to prevent serious or irreparable damage while the Commission's investigation is pending. The interim relief process,

discussed further below, has become the primary means for litigating private disputes and claims.

A consent order negotiated with the Commission must be confirmed by the Tribunal, which can refuse to accept it or indicate needed changes. A consent order can include an award of damages to the complainant. (Sec. 49D) Although the Tribunal must agree with a consent order, the CAC has no power over it. The consent order process requires that the respondent admit wrongdoing. The admission of wrongdoing is a necessary predicate to a follow-on civil action. To avoid that onus and reduce the exposure to civil liability, respondents have tried to settle matters without a consent order. The Commission would like to find a way to support that approach, to increase its success rate. At first, the Competition Act invited firms to request advice about whether a practice was prohibited, and it provided for “comfort letters” from the Commission in response. That section (formerly Sec. 10(2)) was deleted in the 2001 amendments. Now, firms have to ask for exemption or formal advisory opinion and pay a fee for that service. Those fees range from R2500 for a plain advisory opinion up to R100,000 for processing an exemption application for a professional association.

Investigative powers are broad, but they are subject to judicial oversight in sensitive areas. Any premises may be entered and searched if there are reasonable grounds to believe that a prohibited practice is taking place there (or has taken place, or is likely to), or that there is anything connected with an investigation under the Competition Act in the possession or control of someone on the premises. Such a search requires a warrant, issued by a High Court judge or magistrate. (Sec. 46) A warrant may not be needed to enter and search business premises, though, if the owner or person in control consents to the entry, or if the official reasonably believes that a warrant would be issued but that delay to obtain one would defeat the object of the search. (Sec. 47) That is, the statute permits an *ex parte* “dawn raid” search of business premises. The investigators may examine documents, ask for information about them, take notes and make copies, use computer systems to search and reproduce electronically stored information, and attach and remove evidence. (Sec. 48) Due process protections apply. A search must be done with due respect for decency and order and for personal dignity, security, freedom, and privacy, and persons must be advised of their right to an attorney or advocate. But the statute also authorises means to make searches effective. Police may accompany the investigators and overcome resistance with reasonable force, such as breaking a window to gain entry. (Sec. 48, 49) The Commission may compel testimony (subject to protection against self-incrimination) and production of documents or other evidence. (Sec. 49A) The Commission has had to use the search and seizure powers, against a company that reneged on a promise to provide information in

response to a summons (which was withdrawn in view of the promise); the High Court upheld this exercise of power, which was done pursuant to a warrant. (Competition Commission, 2001, p. 35)

Confidentiality is the first subject in the section of the Competition Act on investigation powers. This position probably reflects its priority to the business community and perhaps to the government too. A firm's designation of its material as confidential is binding on the Commission. The Commission may ask the Tribunal for a ruling on whether the information so designated meets the statutory requirements, and if so, for an order about access to it. (Sec. 44) Other persons may apply to the Tribunal for access subject to an appropriate order, and they may appeal denial of access to the CAC. (Sec. 45)

Tribunal hearings must be public, except to the extent necessary to protect confidential information, but procedures may be flexible. Telephone and video conferences are authorised, for example, and the hearing may be conducted either informally or inquisitorially. (Sec. 52) Parties (respondents and complainants) and some third parties with a material interest (such as the parties entitled to notice about mergers) may participate in Tribunal hearings, with the right to put questions and examine evidence presented. (Sec. 53) The Tribunal has the powers to summon witnesses and compel their testimony, subject to protection against self-incrimination, and to require production of documents. (Sec. 54, Sec. 56) The Tribunal is not bound to act just like a court in all respects. For example, the Tribunal may accept evidence that is unsworn or that would not be admissible in court. (Sec. 55)

In merger matters, the Commission must act within at most 40 days. There have been complaints about delays. Different reports about the timeliness of Commission action may be related to differences in the complexity of the cases involved, the degree to which parties have been forthcoming in the Commission's investigation, and to the style and reputations of the legal representatives involved in different matters. Processing generally meets target dates, at least for mergers. But the Commission is still taking the time to review each matter, in part because it is using the merger filings as an opportunity for the staff to learn more about industries. The "fast track" process offered in early 2002 seems to be working. Some of the complaints about delays appear to come from disputes about whether the parties' filings qualified for fast track treatment. The Tribunal is not subject to statutory deadlines in merger cases, although it has generally moved expeditiously, convening hearings promptly (within 10 days) after receiving CC recommendations. For advisory opinions and action on exemption applications, the Commission has set targets in its service standards, which it claims to be meeting, at least on average. These

targets range from 5 days for clarifications to 8 weeks for advisory opinions about complex prohibited practices. That the average time taken is almost exactly equal to the target for many categories implies that there are some matters taking quite a bit longer (or that the Commission is always using all of the time up to its self-imposed deadline).

The Tribunal has the power to order a wide range of remedies. These can include stopping prohibited practices, requiring a respondent to supply another party on terms reasonably required to end a prohibited practice, ordering divestiture, declaring conduct to constitute a prohibited practice in order to establish the basis for a civil action, declaring an agreement to be void, or ordering access to an essential facility on reasonable terms. (Sec. 58) An administrative financial penalty may also be imposed against the prohibited practices that are specifically named in the Competition Act: horizontal price fixing, market division, and collusive tendering, minimum resale price maintenance, exploitative pricing, and denial of access to an essential facility. Other prohibited conduct may also be subject to administrative financial penalty if it is repeated after the Tribunal orders it to stop. And the administrative penalty may be imposed against non-compliance with merger reporting requirements and processes. The amount of the penalty depends on the nature, duration, gravity, and extent of the violation, any loss or damage suffered, the respondent's behaviour, the market circumstances, the profit from the violation, the respondent's co-operation with the authorities, and whether there have been previous violations. The maximum penalty is 10% of the firm's annual turnover in and exports from South Africa. (Sec. 59) The Commission has the power to initiate High Court proceedings to collect these penalties. (Sec. 64) Divestiture can be required to undo a merger that contravenes the statutory requirements, or to remedy abuse of dominance if no other remedy would be adequate or if the respondent has repeated a previous violation. Divestiture orders must be specifically confirmed by the CAC, though. (Sec. 60) These sanctions and orders provided by statute are largely theoretical, so far, as the Tribunal has issued very few final remedial orders or orders enforcing compliance with process.

Criminal penalties against individuals might be invoked for recidivism or for hindering the enforcement process or breaching confidentiality requirements. Breaching the rules protecting confidentiality, failure to comply with investigative requirements, and other acts that subvert the process are offences punishable by fines up to R2,000 and imprisonment up to 6 months. Much more substantial penalties can apply against failing to comply with interim or final orders of the Tribunal or CAC, namely fines up to R500,000 and imprisonment up to 10 years. (Sec. 73, 74) These offences

and penalties too are still theoretical, as there have not been any actual cases yet.

The CAC is intended to be the first and last level of appeal on the merits from Tribunal decisions applying the Competition Act. Its decisions about the interpretation and application of the Competition Act are final. Its decisions about the jurisdiction of the Commission and the Tribunal or about constitutional matters may be appealed to the Supreme Court of Appeal or the Constitutional Court, respectively. (Sec. 62) That further appeal is not a matter of right, however; leave to appeal must be obtained from the CAC or from the higher court, and that leave may be conditioned on an order concerning security for the costs of appeal. (Sec. 63) Where the Commission and the Tribunal have disagreed, a party's further appeal to the CAC could produce curious results. The Tribunal, as a court of first instance, does not defend its position before the CAC. And the Commission, whose views the Tribunal rejected, may choose not to defend the Tribunal's position either. Unless there is another party ready to take that position (including perhaps a third party ready to make the argument as an *amicus*), the CAC might hear only the appellant's views. In the candle wax case, the Tribunal was not present to defend its own reasoning, and the unbalanced argument probably explains the CAC's somewhat unbalanced opinion. One option in this situation is to appoint an *amicus* to present the unrepresented position. This procedure has a parallel in South Africa's Constitutional Court. The *amicus* would probably be appointed by the CAC, but it is not clear who would pay the *amicus*. One obvious source is the Commission's budget, although that would mean applying the Commission's funds to advocate a position with which the Commission disagrees.

Combining the powers of investigation and application has raised sensitivity about the quality of investigative process. The Commission intends to litigate thoroughly claims related to access to restricted information, whether they involve internal deliberative documents or company confidential documents. As the new institutions test the new tools, there have been some embarrassments and growing pains. Parties have sometimes challenged errors through suit in the High Court rather than through petitions for review or appeals to the specialised CAC. One matter was thrown out in a High Court challenge when it appeared that the Commission's referral to the Tribunal had not been authorised formally by the Commissioner or Deputy Commissioner, but instead by the Executive Committee of division heads. The first Commission enforcement effort stumbled when the Commission investigators took the media with them on a dawn raid, a tactic that drew severe criticism from the Supreme Court of Appeal. The Commission had to return all the documents.

An injured party has some power to initiate an action to obtain relief, but only after first submitting a complaint to the Commission. If the Commissioner declines to refer a complaint to the Tribunal, the complainant can then do so itself. (Sec. 51) The complainant can proceed independently only after the Commission issues a certificate of non-referral, or after the statutory one year period has passed without Commission action, which is deemed to be equivalent. The Commission inaction is deemed to be dismissal, but that has no estoppel effect against the complainant. The Tribunal must conduct a hearing about every matter referred to it, whether by the Commission or by a complainant. (Sec. 52(1)) Normally, parties bear their own costs, but the Tribunal may award costs to the prevailing party. (Sec. 57) The number of “non-referral” matters that have been brought to the Tribunal by complaining parties is about the same as the number of complaints referred by the Commission—a fact that is evidence mostly of the low priority and long delays for non-merger matters at the Commission. Some matters were “non-referred” because the Commission did not finish its investigation and recommendation within a year.

A more common way for a party to demand Tribunal action is through a claim for interim relief. A party that has made a complaint to the Commission may petition the Tribunal for an order of interim relief pending the completion of the Commission’s investigation. (Sec. 49C) The complainant must persuade the Tribunal that the respondent has engaged in a prohibited practice, that relief is necessary to prevent serious or irreparable damage to the complainant, and that the “balance of convenience” favours granting the order. The standard of proof is *prima facie*. The process is similar to, and built on, the provisions for preliminary relief *pendente lite* in South African courts. Interim relief may be ordered for up to 6 months or until the completion of the hearing on the merits. The Tribunal may extend the period if the hearing has not been completed when the 6 months is up. Out of 14 applications, the Tribunal has granted interim relief 4 times. Each time, the respondent has appealed further. Interim relief cases tend to proceed independently from the underlying complaint process at the Commission. Indeed, it appears that parties may prefer to keep the Commission out of the Tribunal process, so they have more control over the procedure and proof in a familiar, court-like adversary setting.

A party that has suffered loss or damage from prohibited conduct may sue for damages in court, if damages were not already provided in a consent order with the Commission. But that suit depends on a prior finding from the Tribunal or the CAC, which the plaintiff must file with its lawsuit. Conduct that is prohibited by the Competition Act is not void for other legal purposes until the Tribunal or CAC declares it void. If the Tribunal certifies that conduct constituting the basis for a claim of damages has been found to be

prohibited by the Competition Act, that certificate is conclusive proof, binding on the civil court. If an issue concerning prohibited conduct arises in another kind of civil suit, the judge in that action may not consider it on the merits, but instead must apply the order of the Tribunal (or CAC), if there is one. If there is no order, the judge must refer the issue for the Tribunal's consideration, provided its resolution is necessary for the final outcome of the suit and it has not been raised simply for delay or distraction. (Sec. 65)

### ***International trade issues in competition policy and enforcement***

Conduct that has an effect in South Africa may be subject to the Competition Act. (Competition Commission, 2001) It is not necessary to show that the effect in South Africa is anti-competitive, so the *per se* rules could prohibit conduct outside South Africa. A merger outside South Africa may have to be notified and approved if the parties' sales or assets in South Africa exceed the notification thresholds. Looking in the other direction, South Africa has considered adopting an exemption from its Competition Act for export cartels, that is, for restraints whose effect is felt entirely outside the country. (Competition Commission, 2001)

The extent and nature of international trade, or constraints on international trade, are considered in analysing the facts of particular cases. For example, in a merger case in the highly distorted sugar market, the Tribunal considered the impact on competition of regulatory interventions in other jurisdictions. But the competition bodies do not have a formal role in the application of the laws that directly affect international trade. Antidumping disputes and other trade matters are the responsibility of the Board of Tariffs and Trade (BTT). The connection between trade and competition institutions had been much closer under the old law, but one reason was that competition policy was subordinated to protectionist trade policy. The Board of Trade and Industries, the precursor to the Competition Board, was also responsible for tariff issues (indeed, it was generally known as the "Tariff Board"). The Commission could participate in BTT proceedings, and it might be important for it to do so, in view of South Africa's long history of import substitution and protection. The legacy of a closed, protected economy still colours policy, and the application of the Competition Act must be sensitive to that history.

In principle, application of the law is non-discriminatory with respect to location or status. Foreign firms have invested or operated in South Africa for a long time. There have been no formal complaints that the competition law is applied to foreign firms differently than it is to domestic ones. In theory, perhaps, a foreign firm might be in a different position with respect to some public interest factors. No difference in treatment has appeared in

fact, though. Foreign status sometimes affects the ability to get information, mostly because of the practical difficulties of distance. To overcome some of those difficulties, in one investigation of a US export cartel the Commission relied on contacts with other jurisdictions that were pursuing the same problem.

South Africa has no formal co-operation agreements with other competition agencies. But even without formal arrangements, the Commission has worked with the European Commission, Canada, Australia, and the US in merger matters. Ongoing relationships are maintained with other competition authorities in the region, notably in Zimbabwe, Zambia, and the other countries of the Southern African Development Community (SADC). (Competition Commission, 2001) South Africa's central role in the regional economy makes it a potential hub for a regional competition policy capacity.

#### *Agency resources, actions, and priorities*

At the Commission, 91 posts are authorised, although the actual complement has been somewhat below that level. At the Tribunal, there is a support staff of about 11. Of the 10 authorised members of the Tribunal itself, all but 2 serve part-time, and 3 of the part-time positions are vacant. The 4 staff divisions at the Commission that are most directly responsible for substantive competition issues—compliance, mergers, enforcement-exemptions, and policy and research—each has about 12-14 people. There are also a legal division, which is somewhat smaller, and an administrative support division, which is much larger, accounting for over 30% of the Commission's staff—despite the Commission's ambitions to take full advantage of information technology and become a paper-less office and to rely heavily on electronic information sources rather than build a conventional library.

The budget comes almost entirely from fees, nearly all of which come from merger notification filings. In 2001, 89% of the Commission and Tribunal budgets came from merger fees. (Competition Tribunal 2001, p. 21; Competition Commission, 2001, p. 17) That proportion will probably decline due to the reduction in the fee levels and the increase in filing thresholds. Reliance on fees for income is risky. The legislature has provided back-up funding of R2 million per year for 3 years, to make up for a shortfall in fee income if necessary.



Table 1 Resources

|      | Person-years | Budget |
|------|--------------|--------|
| 2001 | 96           | R15.4M |
| 2000 | 77           | R10.6M |
| 1999 | 8            |        |

Source: Competition Commission, 2002

The Commission's enforcement-exemptions division, which does all of the enforcement matters other than mergers, is well short of filling the 21 positions that are authorised. The compliance division, which is responsible for maintaining contacts with stakeholders, deals with communications, outreach and education, and corporate compliance. One of the principal corporate compliance services is providing non-binding advisory opinions about notification and compliance issues. This means that informal advice about whether conduct complies with the law and enforcement for non-compliance are done in different offices. This division of labour probably improves the efficiency of the enforcement division by eliminating distractions, but it may also dilute the authority of the advisory opinions.

Mergers receive by far the greatest attention. The Commission expends 38% of its resources on merger evaluations. Nearly all of the Tribunal's time and attention have been devoted to merger matters, although some of the non-merger interim relief cases have been time-consuming and complex. The other major commitment at the Commission, accounting for 28% of its resources, is investigation of prohibited practices. Other significant functions are education and information (13%) and policy research (11%). Relatively less attention goes to advisory opinions (5%) or exemption applications (4%) and even less to legislative review (2%). (Competition Commission, 2001) Some exemption applications appeared to be unusually resource-intensive, or else the exemption process was less efficient. The average cost per action for exemptions was much greater than for other actions, and the rate of staff output was much lower. In the first year of operation, mergers were turned around in an average of 48 days, and complaints took an average of 112, but exemption applications averaged 149. (Competition Commission, 2001, p. 11)

Priorities may shift away from mergers toward enforcement of the other parts of the Competition Act. The initial merger workload strain has eased. The backlog of notifications that greeted the new institutions is now gone,

and the rate of filings has declined significantly. Management changes at the enforcement-exemptions division, where there was considerable turnover in the first year of operation, may improve efficiency. That division, like the mergers division, has been reorganised into units defined by industry, in part to develop staff expertise about industry issues and increase the staff's credibility with the parties they must deal with outside the Commission.

It has been a challenge to attract and retain professional staff who can deal effectively with the private sector's experienced and well-paid representatives. The Commission sometimes retains outside counsel. Outside law firms are used principally for procedural issues and for appearances where local practice requires using an advocate in court. Some veteran competition lawyers have been retained under long-term arrangements to present cases to the Tribunal. In the past, some were willing to do this for a fraction of their normal rates. The Commission's litigation budget is R3 million, or about 20% of its total.

Table 2 **Enforcement Actions**

|                             | horizontal agreements | vertical agreements | abuse of dominance | mergers |
|-----------------------------|-----------------------|---------------------|--------------------|---------|
| 2001: matters opened        | 13                    | 21                  | 25                 | 220     |
| sanctions or orders sought  | 4                     | 4                   | 5                  |         |
| orders or sanctions imposed | 2                     | 1                   | 2                  | 0       |
| 2000: matters opened        | 15                    | 22                  | 48                 | 407     |
| sanctions or orders sought  | 2                     | 3                   | 3                  |         |
| orders or sanctions imposed | 1                     | 1                   |                    | 6       |
| 1999: matters opened        |                       |                     |                    | 331     |
| sanctions or orders sought  |                       |                     |                    |         |
| orders or sanctions imposed |                       |                     |                    | 8       |

Source: Competition Commission 2002

The principal gap in capacity is in mid-level professionals. The Commission can pay salaries that are equivalent to those paid by South African law firms to relatively junior attorneys, with about 2 years of experience. But the private sector can offer better prospects for the long term. Thus, the Commission, like enforcement agencies everywhere, finds that either it cannot attract ambitious, bright younger staff, or it cannot keep them after they have enough experience to be most effective. The private sector has offered to detail junior-level professionals to the Commission, but the Commission believes it has a greater need for people with more experience than the private sector has offered. The skill shortage is a general problem in South Africa. Private-sector professional firms also find that they must offer partnerships and other inducements relatively quickly in order to attract and retain the people they want. And the Tribunal too may find that it will be difficult to attract and keep members with the qualifications that the positions demand.

## **Limits of competition policy: Exemptions and special regulatory regimes**

### *Economy-wide exemptions or special treatments*

The Competition Act does not contain a rule for determining what to do if another law or regulation permits or requires actions that might be considered anti-competitive. Most likely, if a case of conflict arose the courts would apply the general rule of construction that general laws do not override special ones (even special ones that had been enacted previously) unless the intention to do so is explicit.

This issue has required second thinking. At first, the 1998 Competition Act excluded “acts subject to or authorised by other legislation.” Courts began to interpret this phrase so that firms in regulated industries escaped Competition Act oversight whether or not the other regulatory process also controlled anti-competitive conduct. First, the Supreme Court of Appeal found that there was no Competition Act jurisdiction over bank mergers, because the banking regulator also passed on them.<sup>13</sup> Then, a High Court judge found there was no Competition Act jurisdiction over an agricultural co-operative because it was subject to regulation under a marketing statute.<sup>14</sup> The problem was repaired just in time. The High Court decision was reversed on appeal, because there were no regulations actually in place and the mere potential for regulation was not sufficient to oust Competition Act jurisdiction. And the legislation was amended to avoid the problem in the future.

As amended in 2000, the Competition Act now provides that if another regulatory scheme applies to competition matters, concurrent jurisdiction with the Competition Act is presumed. The amended law also instructs the relevant regulatory bodies to work out procedures and agreements with the Commission for avoiding duplication and exposure to multiple liability. (Competition Tribunal, 2001, p. 7) The Competition Act neither explicitly defers to other regulation nor explicitly claims preference over it. No case of purported conflict has arisen since the law was amended. The competition agencies probably would not take law enforcement action against conduct that was authorised by another law or regulation, even though that might be jurisprudentially conceivable now. Instead, the Commission would probably advocate changing that law or regulation.

The Competition Act contains only one general exemption, covering collective bargaining and labour agreements. (Sec. 3(1)(a), (b)) In addition, a related type of concerted action is also exempted, namely “concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.” (Sec. 3(1)(e)) The evident purpose of this provision is to

prevent the use of the Competition Act against boycotts or similar actions with social justice themes. Much may depend on the interpretation of “designed.” No doubt the goal of labour picketing about wages and job conditions, although it is economic, would be considered “non-commercial.”

The Competition Act applies to the state itself, and thus government-owned entities are fully subject to it. Cases involving the behaviour of state-owned entities include a predation complaint against South African Airlines (SAA), which is now wholly owned by the government after the failure of its private partner. The complaint was dismissed because the complainant did not show that SAA’s prices were below the relevant measure of cost. Thus the Tribunal did not have to decide whether the government ownership made it credible for SAA to threaten to absorb losses in order to drive out competition. A more interesting complaint is pending against Transnet, a parastatal whose Portnet division owns and controls the nation’s ports. A logistics company alleges that it is excluded from the market by a long term lease from Portnet that gives a rival preferential access. The complainant demands either an equivalent lease or an order giving it access to the “essential facility.” But Portnet contends that granting piecemeal relief under the Competition Act will compromise its attempt to revise the regulation of the harbours in order to promote competition. One of Portnet’s proposed reforms would be the establishment of a port regulator with competition jurisdiction.

Although there is no general exemption in favour of small businesses, the Competition Act includes a clear policy of recognising and supporting their interests. Support for small business is closely related to the policy of empowering historically disadvantaged populations, as their business operations are often small ones. Small business support and empowerment are among the criteria for exemption under Sec. 10. Moreover, concerns about the position of smaller businesses may also be an element in enforcement priorities. Decisions of the Tribunal and the Commission about the claims of small farmers against national co-operatives and about the claims of franchisees against dominant franchisers are consistent with the Competition Act’s explicit purposes to give SMEs an equitable opportunity to participate in the economy. The policy of increasing the ownership stakes of historically disadvantaged persons often means trying to support Black Economic Empowerment companies (BEEs). Choices in particular cases can be complex, though. BEE claims may be a front for anti-competitive conduct. Sometimes it is not clear which outcome actually promotes the statutory goal. The Tribunal once decided that mandating the preservation of BEE positions could actually contradict the purpose of empowerment. Small businesses and BEEs have the right to participate in the consideration of public interest factors in reviewing mergers.

### *Sector-specific exclusions, rules and exemptions*

The possibility that other regulators could be involved in competition policy matters is a question that predates the Competition Act. Before 1998, some other statutes gave sectoral regulatory bodies jurisdiction over competition matters. The Telecommunications Act 1996 required the South African Telecommunications Regulatory Authority to ensure fair competition within the telecoms industry. The Airports Company Act 1993 established a Regulating Committee and empowered it to outlaw restrictive practices by the Airports Company Ltd.; moreover, the restrictive practices that this Committee was to oversee were the ones defined in the Maintenance and Promotion of Competition Act 1979. These sectoral laws did not formally derogate from the Competition Board's power to deal with restrictive practices and acquisitions in these sectors; however, these laws did not provide a way to sort out jurisdictional conflicts, either. (DTI, 1997)

When the Competition Act was amended in 2000 to preserve its jurisdiction over regulated industries, the details of concurrent oversight were left to be worked out by agreements among regulators "to the extent possible." (Sec. 3(1A)) These agreements are to set procedures, promote co-operation, and provide for exchange of information and protection of confidential information. (Sec. 82) The Commission's compliance division is working to develop such agreements with other regulators for financial services and banks, telecoms, and electric power. The process has gone furthest for telecoms and electric power. These agreements probably cannot explicitly demarcate or allocate respective jurisdictions, because the regulators and the Commission could not decline to exercise powers that are assigned by law. Rather, the agreements are likely to serve as guidelines about how the regulators and the Commission will manage their relationships. The Commission has made it a priority to conclude these agreements. To achieve harmony and provide an occasion for sharing views among the community of regulatory officials, the Commission has promoted the establishment of a regulators forum, which meets quarterly.

In practical fact, if not as a matter of law, jurisdiction under the Competition Act may depend upon the completion of an agreement with the sectoral regulator. The Tribunal recently heard an argument that the port operator, Portnet, being a division of a state entity, is a "regulatory authority" established by national legislation responsible for regulating the transport industry, with concurrent jurisdiction. And Portnet argued that, since no agreement had yet been reached between the Commission and its parent Transnet about sharing jurisdiction, the Tribunal had no jurisdiction over its conduct. The Tribunal determined that it could decide the matter without reaching this question, so it remains unresolved.

### *Banking*

The banking sector presents the thorniest jurisdictional situation. It was a bank merger that precipitated the crisis about regulatory authorisation and shared jurisdiction. In that merger, the acquiring firm (in a hostile bidding situation) claimed that, because bank mergers were subject to control by the Registrar of Banks under the Banks Act, 1990, there was no jurisdiction under the Competition Act. The target claimed that the deal would be anti-competitive and sought the Tribunal's assistance in resisting it. The matter was taken to the Supreme Court of Appeal, which ruled that bank mergers were subject only to the Banks Act. The bank employees' union appeared in the process to oppose the merger, because of the threat to jobs. The union is concerned about a merger process that bypasses the Competition Act, because only in the Competition Act process does the union have a formal stakeholder role. The bank regulators, the Registrar of Banks and the South Africa Reserve Bank (SARB), did not disagree with the Commission about the substantive merits of this case. Some later cases suggest that disagreements between the bank regulators may motivate the arguments about the need for special sectoral treatment here.

The Minister of Finance may remove a banking merger from the jurisdiction of the Competition Act if he deems it to be in the public interest. (Sec. 18) The public interest is not defined, but it was understood that the Minister would use this section only to facilitate urgent regulatory approval where the acquisition of a failing bank was necessary to prevent systemic risk. The Minister of Finance has used this power on several occasions. Even if Sec. 18 is invoked, the Minister, through the Registrar of Banks, may ask for the Commission's opinion in connection with the review of the transaction under the Banks Act. Some bank merger agreements have been made contingent on the Minister's invocation of Sec. 18 to avoid the Competition Act notification process. The Commission has sometimes questioned whether the exercise of the Sec. 18 power was appropriate, where the merger did not involve a failing firm but it did significantly increase concentration in some markets.<sup>15</sup>

The decision to invoke Sec. 18 begins with a recommendation from SARB's Bank Supervision department. The Minister of Finance makes the final decision, though, and on at least one occasion, the Minister did not agree with the SARB recommendation to invoke Sec. 18. SARB has been concerned that the Competition Act process adds time, and that even the provision for invoking Sec. 18 can exacerbate systemic problems by calling public attention to a bank's difficulties. Review of mergers of second-tier banks for which the Minister issued Sec. 18 notices have been wrapped up in 2 or 3 weeks, but processing one for which the Minister declined to invoke Sec. 18 took several months. The Commission contends that it can

respond quickly, even overnight, if there is an emergency threat of failure, and the Tribunal can also be convened promptly. The merger review process need not result in a public announcement before their action is complete, especially if maintaining confidentiality is important to protecting other values such as banking system stability. The Minister's decision and action under Sec. 18 is privileged and would be known only to the applicants. If the Minister's action becomes public, it is probably because the parties decided to make it public.

SARB's Banking Supervision Department has resisted concurrent jurisdiction. In its annual report for 2000, it argued that concurrent jurisdiction might lead to uncertainty and thus impair stability. Because the Banks Act, Sec. 37(2)(b), calls for consultations in aid of SARB action, the SARB questions what the value of consultations on some other basis would be, and it worries that a disagreement and then deadlock between the agencies would undermine certainty and stability. SARB has not reached an agreement with the Commission about shared jurisdiction. Its preferred resolution would be for all bank mergers, of healthy banks as well as problem banks, to be handled only by the bank regulators, with no formal role for merger notification or review at the Commission or the Tribunal. Instead, the competition bodies would be invited to comment to SARB on the competitive implications of transactions. Despite the disagreements, and no doubt in an effort to work toward resolving them, a senior SARB official has been tapped for the steering committee of the regulators' forum.

#### *Agricultural co-operatives*

Competition problems in agriculture stem from long-standing government policies of protection. Marketing boards were established early in the 20th century to stabilise production and fix or subsidise prices. The government intended to reduce their importance in the 1990s, as the Marketing of Agricultural Products Act 1996 withdrew state sanction for the single-marketing channels in order to increase market access and promote efficiency. Old patterns have persisted in contract relationships, though, where they are no longer required by law. Some co-operatives reorganised themselves as companies, perpetuating the single-market effect through exclusive supply arrangements that foreclosed supply to new entrant processors and distributors. Former members are resisting efforts to hold them to previous output commitments. (Competition Tribunal, 2001, p. 17)

An early battle was fought in the raisin industry. The raisin marketing board converted to a company in 1998. It had a market share of about 90%. A would-be competitor filed a complaint and application for interim relief to prevent enforcement of the new company's exclusive supply agreements. The monopoly's enforcement tool was a newly adopted rule that accelerated



the debts of members who did not comply with their obligations. When the Tribunal issued the requested order, the monopoly obtained an order from the High Court that the Competition Act did not apply to the raisin industry at all. The Supreme Court of Appeal reversed that decision, restoring the Tribunal's jurisdiction. More recently, a Tribunal decision in 2002 found that a local citrus packing company, also the successor to a co-operative, was dominant and that its exclusive-supply demands upon its shareholders were an abuse. These marketing boards and co-operatives no longer have any explicit or even implicit exemption. But the habit of collective action is long-standing, and efforts to revive some form of formal exemption would not be surprising.

### *Professional services*

Professional associations may apply for exemption for their rules of self-government that otherwise have the effect of substantially preventing or lessening competition. A special schedule to the Competition Act sets procedures and standards for such exemptions. The Commission may exempt the rules if, "having regard to internationally applied norms," the anti-competitive restraint is reasonably required to maintain professional standards or the ordinary functioning of the profession. The Commission must consult the responsible Minister or member of the Executive Council about an application for this exemption. Professional associations that are subject to this procedure include those authorised by statutes for accountants and auditors, architects, engineers, estate agents, attorneys and advocates, scientists, surveyors, urban planners, appraisers, doctors, dentists, nurses, dental technicians, pharmacists, veterinarians, chiropractors, and other allied health care professionals and para-professionals. Others may be added, by notice published by the Minister.

The only association to apply so far for such an exemption was the General Council of the Bar of South Africa (GCB), on behalf of its constituent bar groups. The Commission exempted the bar groups' rules about recommended fees as a benchmark for adjudicating complaints about overcharging. The Commission objected to a rule requiring prior bar approval before entering a contingent fee agreement, and to the rule preventing advocates from dealing directly with clients. (The government was planning to eliminate this rule in pending legislation). The Commission also declined to exempt rules that would prevent truthful advertising. For this decision, the Commissioner cited international experience, including the OECD CLP roundtable on professional services. But the Commission signalled its willingness to accept tight controls on untruthful advertising and a rule prohibiting self-laudatory ads. Other rules to which the

Commission objected were those that controlled premises and prevented associations among advocates. (Competition Commission, 2001, p. 39)

The GCB took the Commission to court over its action. It did not appeal to the Tribunal and then to the CAC, though, but petitioned directly for review in the High Court. The GCB objected to the Commission's failure to consult with the Minister of Justice and Constitutional Development and to procedural defects in the Commission process. One formal defect, which the Commission conceded, was that the provisions for Schedule 1 exemption do not provide for the imposition of conditions in the same way that the Sec. 10 exemptions do. But the Commission denied that procedural deficiencies gave the High Court jurisdiction to assess the substantive merits of the Commission's action, because that would amount to empowering the High Court to create exemptions from the Competition Act, contrary to the legislation's grant of exclusive jurisdiction for that purpose to the Commission and the Tribunal. The High Court ruled in favour of GCB, in an opinion that was highly critical of the Commission. The High Court did not limit itself to ruling on the claimed deficiencies in process, either, but also opined about the net competitive effect and hence the exemption for the GCB's rules.

#### *Electric power*

The National Electricity Regulator (NER) has been established to regulate the incumbent state-owned electricity supply company, ESKOM. Eskom is a vertically integrated operation with a monopoly-level share of generation (well over 90%) and control of the high-voltage transmission system. Restructuring to encourage competition is just getting underway. Eskom has recently been corporatised, so it now pays taxes and dividends to the government. When the restructuring is further along and parts ESKOM are privatised or commercialised, NER will have more to do, as will the Commission in this sector. NER advocates setting up a competitive structure before privatisation. One project is to rationalise the distribution sector, by combining Eskom's national system and 250 municipal grids. The plan is to rebuild it into 6 geographically based distributors, which would be jointly owned by Eskom and the municipalities. These are conceived as local monopolies in retail supply, although some large customers would be able to choose among suppliers. There would be wholesale competition to supply these retail monopolies and the large single-site customers. The second project is to restructure generation and transmission. One proposal is to set up 5-7 generating firms with similar cost structures (with the nuclear facilities to be kept separate). But Eskom would still account for 70% of generation capacity. The Commission staff doubts that this will amount to competition, but NER believes it is the best that can be done in the

circumstances. NER wants to separate Eskom from the market maker-power exchange and the transmission system-ISO, while Eskom is trying to keep the transmission lines. One issue of uncertainty and dispute is where to draw the line between distribution and transmission.

The statute that now governs the electric power sector, which dates from 1987, does not mention competition. The upcoming Electricity Supply Act will include provisions about promoting competition, but it will not set a criterion or standard. Looking toward the day when there will be a role for the Competition Act in this sector, the Commission and NER have put together an agreement to work out their respective jurisdictions in the future. The two agencies are setting up a technical working team to identify the likely issues. The Commission had not been on the inter-departmental team planning the change in the industry, although there had been informal staff contacts. Commission participation in the future will be more formal.

### *Telecoms*

Another independent regulator, the Independent Communication Authority of South Africa (ICASA), is responsible for telecoms and broadcasting. The regulator has power to investigate and resolve complaints about abuses by the state monopoly, a function that obviously overlaps with the Competition Act's rules about abuse by a dominant firm. The Commission and ICASA have entered a memorandum of agreement, under which both bodies can act pursuant to their authorising statutes, while allocating a lead role to one or the other in a particular case. The Commission would take the lead if the issue is access to an essential facility, and ICASA would take the lead if it is breach of a tariff or licensing condition. The agencies will establish a joint working committee to coordinate responsibilities for particular investigations.

ICASA can regulate mergers, to the extent that it must consent to licence transfers. There has been one disagreement between ICASA and the Commission, about a broadcasting merger. The Commission found no competition or public interest problems with it, but ICASA rejected it because it found that the applicants did not qualify for an exemption from rules promoting greater black ownership in the sector. ICASA evidently concluded that the acquiring firm's share ownership structure was less representative of the black population to be supported than that of the target firm. ICASA also may have jurisdiction over anti-competitive behaviour, if that conduct breaches a licence condition or a prohibition in the telecoms legislation (Sec. 53) that overlaps in content, if not in literal text, the prohibitions of the Competition Act.

The fixed line telecoms monopoly was due to expire in May 2002. Telecoms is still a monopoly in fact, though, because a second operator does not yet exist. In mobile service, there have been 2 operators since 1994, and a third entered last year. The incumbent fixed line operator interpreted its statutory licence as granting it the exclusive right to perform certain services and thus authorising it to deny access to competitors. Disputes over this interpretation of the licence that have been referred to ICASA have not yet been resolved. A similar complaint has now been lodged with the Commission. With the ending of exclusivity, presumably the Tribunal now has the power to order access under the Competition Act.

## Competition advocacy and policy studies

Advocacy and policy studies have received less attention than enforcement. Economists in the Commission's policy and research division have interests and capacities for these matters. But the compliance division has had the primary responsibility for advocacy, because most of these efforts have been aimed at raising public awareness of the Competition Act, rather than studying and advising about the effect of laws and regulations on competition.

DTI has the principal responsibility for examining the competitive implications of legislative proposals. Some of these items are sent to the Commission for comment. Authority for Commission advocacy can be found in Sec. 21 of the Competition Act. Among the Commission's responsibilities are to participate in the proceedings of regulatory authorities, to advise and receive advice from other regulatory authorities, and to review legislation and public regulations, and to report to the Minister concerning provisions that permit uncompetitive behaviour. The Commission can undertake other, similar studies in response to a request from the Minister. Ministerial requests for studies and reports may deal with headline issues, such as the 20% increase in food prices in 2002. Another headline issue has been import-parity pricing, as downstream manufacturers complain of having to pay world-market prices for domestically produced raw materials, getting no break for savings in transport costs. Exchange rate changes probably had something to do with the appearance of both of these complaints. For food prices, the result was a Commission report about market conditions and a government resolve to monitor competition more closely. For import parity pricing, there may be enforcement action against some South African suppliers.

The Commission has engaged in some advocacy concerning sectoral regulation. Shortly after it began operation, the Commission made submissions to the financial regulators objecting to a proposed merger that would have created the largest commercial bank in Africa. Commission comments have been solicited concerning proposals to restructure telecoms, electric power, and ports concessions and regulation. Parliament is considering legislation to create a port regulator with competition jurisdiction. The Commission has argued that the general competition enforcement bodies should be responsible for competition issues in the sector. The Commission has also supported studies by academic consultants of regulatory issues in water, electric power, telecoms and media, aviation, and agriculture.

**Box 3 CONSUMER PROTECTION —  
THE NEXT HIGH-PRIORITY REFORM?**

Consumer protection policies and institutions in South Africa appear weak. The Department of Trade and Industry has been reviewing consumer policy and the potential for linking it to competition policy. There is no explicit link now. Marketing practices and consumer protection issues are not included in the Competition Act or in the responsibilities of the Commission and Tribunal. Complaints of unfair competition are matters for private dispute resolution under common law rules. They may also come to the attention of DTI's Consumer Affairs section, which applies the Harmful Business Practice Act.

Consumer protections are included in some specific laws about gambling, estate agents, time shares, and other common problems. But there is no broadly applicable national law about misleading advertising or unfair marketing practices, in part because consumer protection is a concurrent function between the national government and the provinces. The Consumer Affairs Act<sup>16</sup> follows the model of the pre-1998 competition law, giving the Minister discretion to outlaw practices after the fact. Aimed mostly at frauds, the legislation contains no mandatory rules to guide conduct in the future. The Consumer Affairs Act also provides for special consumer courts, which operate on an ad hoc basis.

The Commission, through its compliance division, has tried to increase awareness of consumers' interests in competition. Among the groups it has contacted are the South African National Consumer Union, the National Consumer Forum (an umbrella group of about 80 other organisations), the Consumer Institute of South Africa, the Department of Trade and Industry's National Consumer Affairs Office, and the South African Bureau of Standards. The Commission wants to increase awareness of the Competition Act among consumer groups, educate and inform consumers about the Act, and network to promote consumer welfare. It set up a Consumer Education Unit to do much of this.

Despite this plethora of entities, an autonomous, general-interest consumer movement has not yet formed in South Africa. Labour or civic organisations have on occasion engaged in consumer-related activism and boycotts, targeted at particular situations and problems. The Tribunal's rules allow for participation of consumer interests in its proceedings, but few consumer representatives have appeared. A notable exception is the Treatment Action Campaign (TAC). In the consideration of the Glaxo-SmithKline merger, TAC participated in order to advocate accessible HIV/AIDS drugs. And TAC has submitted a complaint to the Commission about the prices for HIV/AIDS drugs on behalf of consumers.

Commission economic studies also support enforcement decisions or address the public interest considerations in the Competition Act. The Commission's research division has analysed how mergers in South Africa have affected employment, using a one-year sample of 125 transactions.

Overall, the net effects were modest. All employment gains were in industries that were moderately concentrated (CR4 between .4 and .6, at the 5-digit SIC level), while most job losses were in the more concentrated industries. Another project is collecting information about concentration of ownership at the relevant market level, using data from the African Statistics project. That research has traced ownership patterns and relationships, again at the 5-digit SIC level. From this, the Commission derived a table of the top 10 “ownership companies,” indicating which groups had interests in broadly defined sectors, for assessing conglomerate mergers. Four groups that were found to be broadly diversified: Anglo-American (in 35% of the sectors), Sanlam (22%), Old Mutual (20%) and Rembrandt (18%). And the policy and research division has applied a structure-conduct-performance screen to identify manufacturing sectors where closer inspection is called for. Based on HHIs, concentration ratios, and conduct measures such as price-cost margins, advertising expenditure, and capital-labour ratios, the potential problem areas were found to be tobacco products, petroleum refining, office machinery, batteries, and television and radio sets. These findings were not consistent with the pattern of complaints, though, which have tended to deal more with chemicals (including pharmaceuticals) and paper products than with these industries that the study had identified as potential problem areas.

## Assessment and policy options

South Africa's competition policy institutions should be assessed in a developed, market-economy context. Moreover, the law and institutions are best appreciated in terms of how they have evolved from the previous regimes. A comprehensive competition law has been in place since 1955. The present law and institutional structure are the latest in a series of reforms, each of which was intended to create a broader, stronger system. South Africa's situation thus differs from the transitions of central and eastern Europe, where competition laws had never existed at all or where laws dating from the early 20th century had been repealed or forgotten. The extent of state intervention in South Africa's private-property, capitalist-market economy implies there might be policy challenges similar to those of the transition from plan to market, at least in some sectors. But there is no similar need to develop the institutional culture to support a system of private investment and market exchange. The development setting also differs from the usual transition situation. At an aggregate level, South Africa is a middle-income country comparable to some central European economies. But the variation in the level of economic activity in South Africa is much wider. A substantial part of the economy operates at the same level of corporate and market sophistication as the most developed economies. This is the part of the economy that has occupied the attention of the competition policy institutions. The development dimension does appear in some of the Competition Act's goals and criteria for exemption, but those issues have been second-order matters in practice. To be sure, aspects of the development challenge were important in the process of reform. One theme of South Africa's constitutional transformation in the 1990s was to redress economic imbalances, which corresponded to the racial divisions in the society. Stronger competition policy was proposed as a tool to help undo corporate structures that were charged with having prevented broader development and participation. These theme is reminiscent of the motivation of competition policy reforms in countries such as Hungary, Mexico, and Korea. In these countries, vigorous competition policy was also proposed as an element of a deliberate strategy of large-scale restructuring and reform. And the development dimension underlies current enforcement matters, notably the TAC complaint about the prices of pharmaceuticals to treat AIDS. The combination of perspectives and circumstances in South Africa makes it an obvious venue for this controversy. The complaint was asserted on behalf of patients that come mostly from the population that are not part of the fully-developed economy, and it is aimed at international pharmaceutical companies, which are. And the complaint was filed under a Competition Act that promises to make available the capacities of analysis and remedy that are familiar in other jurisdictions.



South Africa's competition enforcement agencies are taken seriously. The higher profile of the Commission and the Tribunal, compared to the institutions that preceded them, is due in part to their new independence. In addition, the Competition Act sharpened the tools used on merger control, a subject that is of particular interest to the corporate and investor community. The degree to which the Commission and the Tribunal have concentrated on merger control would be unusual for new agencies in a developing, transition economy. But it is understandable in the context of South Africa's experience and level of development. Mergers had been the principal concern under the pre-1998 competition policy regime, too. In the political climate of the regime change, focus on mergers carries forward the theme of correcting excessive concentration of economic power. The new system of pre-notification and control produces a stream of public decisions demonstrating quickly how the law is making a difference. Merger decisions can be an opportunity for a newly formed agency to demonstrate and develop its capacities. Merger control can be less resource-intensive than enforcement against clandestine price-fixing or monopoly, because investigation is simplified by the process of notification, and the parties' interest in approval gives them an incentive to co-operate. Although the analysis of a merger often appears unusually complex to a non-specialist, it can be relatively straightforward for an experienced economist, once the facts are presented thoroughly. Here the continuity in experience at senior levels of the Tribunal has been particularly important to the successful implementation of coherent merger control under the Competition Act. On the other hand, devoting resources to merger control also helps develop specialists. Using merger review as a training opportunity, in which inexperienced staff can learn about how businesses actually operate, is more common in true transition settings, where there are few professionals in or out of government who have first-hand experience of the market economy. The regime change in South Africa led to a parallel situation, though, as it brought people who had had relatively little professional experience with business onto the staff of organisations like the Commission and the Tribunal.

Strong economic analysis has marked the decisions applying the Competition Act. Merger decisions show a confident application of standard approaches to market definition, entry, structure, and competitive effects, and a persuasive treatment of efficiency claims. The concepts applied are up-to-date, and the decisions are generally well-motivated and persuasive. To be sure, the CAC has occasionally disagreed, and not all parts of the business community in South Africa have been persuaded. Other policy features and motivations of merger control, such as the invocation of public-interest factors and pursuit of the goal of de-concentration, have been treated judiciously. Market developments have contributed to avoiding

controversies, too. As conglomerates have restructured in response to management, corporate, and financial market considerations, opportunities have been created to promote the empowerment goal.

South Africa's process for considering public interest claims recognises that those claims may be legitimate, but it tries to ensure that decisions which invoke them are transparent and insulated against direct political control. In South Africa, political officials can make the case for the public interest issues, by participating as parties in the proceedings, but they cannot decide the outcome. Other parties, particularly unions, can also appear in the process to make claims about the public interest issues. That avenue is being used less than had been anticipated. The low level of participation may be due to lack of resources, if not to lack of concern. Another avenue for invoking other policies, which is now being tested, is the process of designating an industry as deserving of exemption to protect economic stability. In principle, a ministry could not by its own decision override competition policy. Rather, the designation is the necessary predicate for the Commission and the Tribunal to consider this factor in their decisions. The designation power has not been used much yet, and whether a ministry's designation would be conclusive on the Commission and Tribunal, in effect requiring them to grant an exemption, remains to be seen. Such a reversal of priorities could reduce competition policy to ceremonial ineffectiveness.

The base of support for stronger competition policy remains uncertain, despite the educational and advocacy efforts of DTI and the Commission. In the absence of clear support for a consistent competition policy, lobbying for special exemptions and protections is more likely to succeed. Consumer organisations, which often support competition policy initiatives, are not prominent in South Africa. At the national level, consumer protection legislation only addresses some particular sectoral issues. DTI is working on measures to reform the consumer protection laws and institutions. One option that does not appear to be under consideration is to combine consumer protection and competition jurisdictions. Because South Africa already has a functioning market economy, it does not present the situation that is found in some transition countries, where a new competition agency can start out policing deceptive practices and demonstrating how markets can be made to work to benefit consumers while businesses reorganise into more efficient structures. There is less need for the Commission to play such a role in South Africa.

The Commission, and the Tribunal too, need rather to deal effectively with their counterparts in South Africa's well-developed legal and business community. For a long time, this community concentrated on promoting and defending the interests that benefited from policies of protection and monopoly, and thus they were content with a weak, discretionary, politicised

competition policy. Now that the market is opening, some in the business community would defend the continuation of hands-off competition policy, but now on the grounds that South African business needs to modernise and consolidate to be competitive in world markets. Long accustomed to a low-key approach of negotiated accommodation, some business leaders reacted with marked hostility the first time the Tribunal formally and publicly rejected a proposed merger. Their lawyers have picked up the theme. Enforcement initiatives are resisted by vigorous litigation over procedural and jurisdictional matters. It is of course appropriate to ensure that the law is observed in the process of applying it. Constitutional protections, the rule of law, and observance of due process are core values, and they are of particular importance in South Africa today. But experience shows how claims under these principles can be deployed to thwart action completely. In Mexico, for example, well-resourced respondents routinely resort to the constitutional *amparo* process to challenge procedures and jurisdiction and thus paralyse the application of public policy.

Such challenges are unavoidable in South Africa's highly legalistic enforcement culture. Where efforts to obtain information face the threat of legal challenges, effective investigations require competent legal technique in drafting and executing information demands. In the face of constant challenges, Commission management has had to decide whether it is worth the cost to continue to insist on compliance. The Commission has elected to fight these procedural battles now in order to establish basic principles, clarify the rules where necessary, and familiarise the courts with new processes. The Commission and the Tribunal are in slightly different positions with respect to these issues, although both bodies have faced the withering fire of collateral legal controversy. The Commission needs to improve its tactical litigation skills, or else outsource that function to private sector experts. The Tribunal needed to improve is appreciation of the precise observance of legal formalities in its decision process. These were unfamiliar to many of its members, who came to the subject from the perspective of economics and policy. Parties in Tribunal proceedings about interim relief have used every device and every opportunity to gain advantage over each other in what often looks like the scorched-earth motions practice of hard-ball private litigation. The Tribunal's decisions are paying more attention to process formalities now than they did at first, but the Tribunal has also shown some resistance to worrying too much over process detail. In South Africa's legal culture, overlooking process details as mere technicalities is a risky course. Parties are likely to encourage the High Court judges who sit on the CAC to insist that the Tribunal adhere to procedural standards that they are familiar with, and to seek other avenues for review if that course is unsuccessful.

Many in the legal and business community have perceived a kind of cultural dissonance with the Commission staff. The Commission's management has been moving to correct this situation, which may simply have been a sign of growing pains. Some staffers' suspicions about the private sector, and about lawyers in particular, were probably due to anxiety about being hoodwinked. Other factors, including differences in experience and background, probably play some part too. Firms have learned how to cope with this resistance. Concluding that the Commission staff would handle a merger faster if there were no lawyers involved, some companies submit the notifications that their lawyers have prepared as though they had done them on their own. A more important concern, though, is that the level of professionalism and expertise at the Commission and the Tribunal is uneven. The top managers at the Commission and the permanent members of the Tribunal are well respected. But concerns are expressed about consistency beyond that level. Most of the Tribunal's important decisions have been authored by the permanent members. The contributions of other members are unclear. The skills, responsiveness, and professionalism of the case handlers at Commission are reportedly variable. Reports of variability may have identified growing pains at the new institutions, and they may also reflect the skills shortage that affects the private sector in South Africa too. The effects of that shortage were no doubt exacerbated by the need to staff two independent bodies in South Africa's complex institutional structure. And the effects were compounded further by the imperative to create institutions that could be called "new." This probably encouraged rejection of some potentially valuable professional expertise because of connections with the previous regime. Another result was that people were put into positions that called for skills and judgement capacities that they had not yet developed. Some of the reported problems may have been localised to a few individuals, and improvements have been noted recently. Durable improvement will require developing a deeper "bench" of mid-level professional staff. Because of the nature of South Africa's enforcement culture, it will be particularly important to develop stronger legal capacities, in both technical skills and strategic judgement. Many observers find there is room for improvement here.

Another concern is the comparative lack of results so far in matters other than mergers. With mergers evidently receiving the top priority, the section of the Commission that handles complaints about restrictive practices and applications for exemption may have been starved of resources. Complainants were disappointed that consideration of their complaints typically took the full year, the process appeared unguided, and few cases resulted. Parties applying for exemptions and advisory opinions reported similar frustrations. And the Commission and the Tribunal have not been notably active in advocacy, either. The Commission's management has

taken several steps to shift resources to non-merger matters and to improve how they are handled.

The resource level is adequate, but it is somewhat lower than several comparable-sized countries. The total number of personnel at South Africa's two competition policy bodies is about the same as at the two similar bodies in Spain, that is, about 100. But that is significantly smaller than the total staff in Poland (about 190), and much smaller than in Korea (over 400). Having more resources would ease the problem of setting priorities. But finding those resources will require creativity, especially in view of the demand for qualified persons in South Africa. At the moment, the Commission has enough funds to pay competitive salaries, particularly to entry-level people with only a few years of experience. The problem is finding those people and persuading them to work with a government body rather than the private sector, which can promise larger rewards in the long run.

The role of the Competition Appeal Court, and thus the value of having a special judicial body for this subject, remain to be established. Of the 3 institutions created by the Competition Act, the CAC is the only one for which there was no experience with an antecedent. The provision for a special court under the previous legislation had never actually been used, because there were no formal decisions for anyone to complain about. In the absence of the CAC, the ordinary course of appeal from actions applying the Competition Act would probably have been to a panel of High Court judges. All of the CAC's judges are High Court judges; thus, what distinguishes the CAC from the most likely alternative is the fact that its members may be self-selected for a long-term interest in competition matters. One would hope that the CAC will develop more perspective and expertise about substantive issues than the High Court itself has shown in the handful of review matters that have come to it. But so far, the CAC's formalistic decisions look more like those of a High Court of general jurisdiction than those of a court with specialised substantive expertise. In the only CAC decision on the merits of a merger, the reasoning is doctrinaire and derivative, revealing that the judges are more comfortable referring to treatises and legal presumptions about economic effects than they are deferring to the Tribunal's assessment of economic evidence. To be sure, that proceeding may have been distorted, because the Tribunal did not participate to explain and defend its decision, and the CAC's result, to permit a vertical merger because it was not convinced there were any reasons for concern about foreclosure, is facially sound. But with only about 4 cases a year to decide, the CAC may not have enough to do to develop familiarity with the subject.

The relationship between competition and regulation is unsettled, although the rapid recovery from potentially crippling early decisions denying jurisdiction is a positive sign. The disposition on appeal of the second jurisdiction case probably corrected the lower courts' aberrations adequately, but amendment to the statute makes the correction more permanent. At the same time, the amendment introduced some uncertainty. The Competition Act's admonition to the agencies to reach agreements raises new problems, in the guise of moving toward resolution of old ones. As the ports litigation now shows, the law invites the interpretation that as a matter of law, jurisdiction under the Competition Act depends on the existence of a co-operation agreement between the Commission and the relevant sectoral regulator. There is evidently a predisposition in South African government to divide responsibilities rather than establish single bodies with broad authority. Thus a division of competition policy competence to parallel the division of sectoral regulatory competence may appear natural. South Africa's shortage of specialists in competition and economic regulation makes this hard to do, though. It might be more efficient to consolidate competition and regulation functions in a smaller number of entities. Before decision-makers will be willing to consolidate all competition policy responsibilities, over all sectors, under the Competition Act alone, the competition bodies may need to prove themselves to the public, the government, and the other regulators. Of course, that may also stimulate an opposite reaction from the parties that are subject to regulation. As enforcement of the Competition Act becomes more effective, businesses may argue for a sectoral regulator because it can be captured more easily. A new sectoral regime with competition policy responsibility is being proposed for ports. It is probably not coincidental that the Commission has been dealing with complaints about anti-competitive practices by an entity with ties to the agency that would become the new regulator.

Despite the concerns and reported problems, the competition policy bodies are recognised in South Africa as notably competent and serious. The Tribunal is comparatively well known and respected. The Commission has come in for more criticism, but many private sector observers are supportive, finding that the Commission has met the challenges of being a new body, with a new law, facing inevitable constraints on its capacities. The Commission and the Tribunal have listened to their critics and introduced improvements such as the service standards for timely responses and handling of non-merger matters. They are striving to follow best practices from the experience of other enforcement agencies around the world, knowing that is the measure being applied to them by South Africa's legal and business communities.

## Policy options for consideration

- ***Complete the agreements with other regulatory bodies providing for concurrent jurisdiction, to ensure consistent application of competition policy in all sectors.***

Clear understandings about how to handle potentially overlapping or conflicting powers would represent good policy co-ordination even if the Competition Act did not require them. To be sure, agencies might be able to work out problems as they come up without having reached a formal agreement on procedures in advance. This may be particularly easy in smaller countries with close-knit government communities. But the larger the community and the more formalistic the culture, the more important it is to have either explicitly separate laws or explicit agreement among the enforcers. The Competition Act's provision about these agreements has sparked another controversy, though, namely the claim that in the absence of an agreement, there is no Competition Act jurisdiction as a matter of law. That reading could lead to ineffective policy, balkanised by sector, obtained not by a formal, transparent legislative decision to separate the jurisdictions but by regulator's intransigence at the behest of a regulated industry. The courts may have to resolve this question. Another dimension that must be watched carefully is the tendency to proliferation of special sectoral regimes with independent competition policy responsibility. Too often, this represents an industry's effort to devise a producer-friendly regulator. The Commission and the Tribunal should continue to present the case for a unified approach. And they should continue to support and assist other regulators facing unfamiliar and complex competition problems within their jurisdictions. In telecoms, for example, the Competition Act may provide a valuable alternative method of dealing with access controversies.

- ***Improve handling and increase priority and resources for non-merger matters.***

This issue, which has been recognised for some time, has already received considerable attention. More experienced management is now in place. The Commission's service standards about dealing with applications for exemption and responding to complaints are a promising step. The Commission claims it is achieving generally good compliance with these standards. Some private sector observers demur about compliance with the promised deadlines, but their experience and data may date from before the service standards. Actions already taken or underway about steel pricing and boycotts by agricultural co-operatives illustrate the scope for action against abuses and restraints.

- *Bolster resources by accepting offers of third-party support—carefully.*

The Commission needs to strengthen the ranks of its mid-level professional staff. Doing this by development from within its ranks is a long-term project. The Commission needs to be able to offer higher pay over the long run, to persuade people to stay after they have learned the job. And it has to have the capacity to train the staff, or the patience to endure the consequences while they learn from their mistakes. An alternative that could bring faster results, and that might be necessary in any event even if the long-term goal is to develop the Commission's own staff, is to bring in mid-level people from other offices or even from outside the government. Flexible career paths, in which a person might move between private sector and government positions several times, in both directions, is not common in South Africa, so recruiting from the private sector may be difficult. But there are signs of interest that the Commission could pursue. Law firms have offered to send junior-level professionals to work at the Commission on short-term details. They and their firms would obviously benefit from this exposure to the enforcement agencies' perspective and process. The Commission believes, accurately, that its greater need is for mid-level professionals with enough experience to exercise judgement independently and to lead, manage, and train others. The Commission should nonetheless consider the offer seriously. Having Commission staff and private sector professionals working together, even if they are at about the same level of experience, could improve overall skill levels and foster more productive long-term understandings among counterparts at the operating level. It would be even better for the Commission's long-run personnel development if the detail included individuals with significant litigation experience.

Another source of third-party support is complainants. In the South African system, the Commission is a gatekeeper. Private parties must go to the Commission first before they can pursue a claim on their own. But there is no impediment to their helping the Commission pursue it for them. The TAC AIDS complaint represents such an opportunity, where the private sector representative is more than willing to help. Help may be particularly necessary in dealing with the complex issues, which would stretch the capacities of many competition agencies. To be sure, the high profile of the case implies that the process at the Commission and the Tribunal is likely to serve mostly as a fulcrum on which to turn the levers of public relations and political pressure. But the subject is timely and important, not only to South Africa but to many other countries. The legal, economic, and policy issues raised are at the cutting edge of developments in international competition and intellectual property law and policy. The case could be an occasion for inviting international co-operation, not just to get information but also to



compare views about the thornier legal and analytic issues about intellectual property rights and the relationships with international trade commitments and obligations.

- ***Discourage abuse of interim relief process.***

Although the Competition Act does not provide for pure private lawsuits, parties have found a way to create a close substitute. The Tribunal has had to entertain implausible, conclusory claims for interim relief about vertical agreements and allegations of dominance. The Tribunal is aware that many of these cases represent competitors' efforts to use the Competition Act to gain tactical advantages. Faster Commission action on these non-merger matters could help clear the dockets, by getting to the merits (or to an indication of where the merits probably lie) more quickly.

- ***Make more use of formal substantive guidelines.***

Clear procedures and guidelines for substantive analysis can compensate to some extent for lack of staff experience. But developing guidelines is not cost-free; it can divert the time and attention of the very people whose greater experience makes them most valuable as managers. Most competition agencies now use similar analytic methods, and thus the Commission might save some effort by drawing on the efforts of others.

- ***Clear up the compensation terms for the Tribunal, to attract and retain qualified members.***

The Tribunal, like the Commission, needs experienced people. Indeed, because of its final decision-making responsibility, the Tribunal's need for experience in its membership may be the greater. Attracting and retaining qualified members is difficult, for service that is part-time and at pay levels that are not competitive. The Tribunal's work to date is widely respected. To sustain a level of performance that maintains that reputation, vacancies on the Tribunal must be filled with fully qualified, experienced appointees. The appropriate level of professional qualification is implied by the link between the members' compensation and that of High Court judges. But because of disagreements about methods of computation, the members' compensation level now may be too low, particularly in view of the time demands of serving on Tribunal panels in extended evidentiary hearings. The Tribunal could not maintain the quality of its decisions if its members were willing to devote the necessary time at lower pay only because they could use the time to learn something about competition law. The Tribunal needs members who are already expert in the subject.

- *Use economic resources of the Commission more effectively in advocacy settings.*

There has been little experience with advocacy in South Africa. This function often represents a major part of a new competition agency's workload. Moreover, because state control under the previous regime was extensive, there are likely to be many lingering regulatory problems that deserve attention and correction. The Commission's economic resources would be more profitably applied to these matters than to maintaining data series about aggregate concentration and conglomerate cross-ownership.

## *Notes*

1. Reports average per capita GDP (PPP basis) vary greatly, ranging from about \$2700 (EIU) to about \$8500 (CIA).
2. In the Deininger and Squire dataset, the Gini coefficient for incomes in South Africa is .63 (1993), topped only by Gabon. The dataset is at <http://www.worldbank.org/research/growth/dddeisqu.htm>. The figure is based on the higher-quality, more inclusive data in the dataset.
3. GN 801, 2 May 1986.
4. Notice 1954 Gazette 16085, 23 November 1994
5. Although these statements do not control the law's application, they are not superfluous. They are still important enough for stakeholders to pay attention to their details. The first paragraph was amended in 2000, evidently to correct a misinterpretation or send a signal about a policy interest.
6. ISCOR Limited & Saldanha Steel (Pty) Ltd, Tribunal case no. 67/LM/Dec01.
7. Glaxo Wellcome, Case no. 15/CAC/Feb02.
8. Telkom SA Ltd./TPI Investments/Praysa, Tribunal case no. 81/LM/Aug00.
9. Trident Steel (Pty) Ltd and Baldwins Steel.
10. Naspers Limited/The Education Investment Corporation Limited.
11. Schumann Sasol and Price's Daelite, Case No. 10/CAC/Aug01. After rejecting the Tribunal's conclusions about competitive effects, the court found it unnecessary to consider whether public interest factors are relevant.
12. Shell-Tepco, Case No. 66/LM/Oct01.
13. Standard Bank Investment Corporation Ltd v. Competition Commission and Others; Liberty Life Association of Africa Ltd. v. Competition Commission and Others 2000 (2) SA 797 (SCA).
14. South African Raisins (Pty) Ltd. and Another v. SAD Holdings Ltd and Another 2001 (2) SA 877 (SCA).
15. Nedcor-B.O.E Bank.
16. Consumer Affairs (Unfair Business Practice) Act 71 of 1988.

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