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2021-09
Southern Centre for Inequality Studies (SCIS)
https://hdl.handle.net/10539/33895

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BLACK ECONOMIC EMPOWERMENT PROJECT

SCIS Working Paper | Number 22

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September 2021

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

SOUTHERN CENTRE FOR INEQUALITY STUDIES

Competition Policy and Black Empowerment: South Africa's Path to Inclusion

Liberty Mncube[1] **and Hardin Ratshisusu**[2]

Abstract

Competition law is not just about the efficiency goal. Placing value on opportunities for black owned businesses to enter, expand, and participate in markets is likely to be a key element in South Africa's route to become an efficient, competitive economic environment focused on development and ultimately benefiting all South Africans. The first democratic government of South Africa prioritised the transformation of society on a non-racial, democratic and local foundation. The expectation was that all law in South Africa would contribute to, amongst other things, economic transformation and redress the imbalances created by past racial divisions, and more important foster the participation of the previously marginalised people to participate in the mainstream economy. In South Africa, equity is a recognized goal and a permissible consideration of competition law and a key driver of inclusive markets, economic development and, ultimately, empowerment of black people.

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Introduction

In the mid-1990s, the first democratic government of South Africa prioritised transformation of society on non-racial, democratic and local foundations. All law in South Africa is expected to contribute to economic transformation and redress the imbalances related to past racial divisions. The Competition Act of 1998 (the Competition Act) was enacted as a transformative legislation and is part of this fabric. In years of colonialism and apartheid, black businesses were totally excluded from participating in the formal economy by discriminatory laws. Racial discriminatory laws and other policies, such as preferences in subsidy and support programmes, were designed to support white business and shielded white business from competing with black firms. These policy measures resulted in racially skewed concentrated markets and created roadblocks in the participation of black-owned firms in the formal economy.

The Competition Act states that its purpose includes promoting competition in order to promote a greater spread of ownership in the economy, in particular, to increase the ownership stakes of historically disadvantaged persons. This purpose aligns with the right of equality contained in South Africa's Constitution. The Constitution enjoins, if not authorises, the State to take measures to advance the equality of previously disadvantaged people (black affirmative action programmes). The objective of increasing the ownership stakes of historically disadvantaged persons in the Competition Act is a legislative measure of this kind.

The political motivations of South Africa's competition law are recorded in the preamble of the Competition Act.[3] The preamble details relevant contextual facts, including that apartheid and other discriminatory practices of the past resulted in excessive concentration of the economy. Racially skewed economic concentration results in fewer opportunities for emerging black entrepreneurs to participate in markets. The preamble labels restrictions on free and full participation in the economy by all South Africans as "unjust" rather than simply "inefficient". This is not to say that the preamble does not recognise the problem of inefficiency. It does. Importantly, the preamble states that an efficient, competitive economic environment focused on development will benefit all South Africans.

It is accepted that, for consumers, excessive market power increases the cost of goods and services. For workers, excessive market power reduces wages and, for policymakers, excessive market power holds back innovation and retards economic progress while creating profits that flow disproportionately to the wealthiest in society. Worse still, the poor and disadvantaged in society, who are majority black South Africans, are more likely to be the victims of excessive market power and have the least ability to avoid its consequences. This dynamic exacerbates economic inequality and compounds the harms of the apartheid economic legacy.

Competition policy therefore encompasses the aim of both promoting and maintaining competition in the marketplace and promoting other government policies that allow competitive markets to develop in a way that is not detrimental to society and to achieve inclusive economic development. Competition policy includes competition law enforcement and competition advocacy, with this paper focusing on the former (competition law enforcement).

We first discuss the multiple goals of competition law. Using selected competition cases, we then discuss how concerns about black economic empowerment have been treated in the competition authorities' enforcement of merger and exemption regulation. This is followed by a reflection on the 2018 amendments to the Competition Act which give serious regard to economic transformation and, in particular, the promotion of businesses owned or controlled by black South Africans. A conclusion is then offered.

Black empowerment, equity and efficiency

At its root, competition policy is a response to the universal pursuit of economic power. Those who have economic power, gain it at the expense of those who do not. While there are other reasons for competition law, hostility towards the abusive use of economic power primarily underlines the adoption of competition law in many countries, including South Africa.

[3] In the US, for example, the political motivations of the Sherman Act reflect the concerns for small businesses and farmers who blamed the trusts for many economic misfortunes. See generally Gotts (2019) and Hovenkamp (1988).

Dating back to the eighteenth century, the economics profession has pointed out that competition in markets increases efficiency, maximises a society's resources and allocates them to their best use. Developments in economics of the nineteenth century elaborately detailed how competition maximises efficiency. This view became central to the adoption of competition laws by many countries across the world. Moreover, those countries that prioritised competitive markets began to realise that domestic competitive markets generate comparative advantages in global markets. Put simply, firms sharpened by domestic competition are better competitors in global markets.

Accepting the efficiency motivations, South Africa has put forward other reasons to maintain competition law. South Africa's competition law has multiple goals.[4] The principal objective of competition law is "to promote and maintain competition". This suggests that competitive markets, as an alternative to more intrusive government regulation or control, should be at the centre of allocating resources. The principal objective is accompanied by six goals aimed at creating an inclusive economy. The first goal is economic efficiency (recognising the total welfare standard). The second goal is concerned with competitive prices and choices for consumers (recognising consumer welfare and consumer choice standards).[5]

The other four goals of competition law are concerned with equity (or public interest). The first public interest goal is to promote employment. The second public interest goal is to expand opportunities to participate in world markets. The third public interest goal is to ensure equitable opportunities for small and medium enterprises to participate in the economy, and the fourth public interest goal is to promote a greater spread of ownership, in particular, to increase ownership stakes of historically disadvantaged persons. The objective "to promote and maintain competition" is, in itself, an intermediate objective with economic development capturing all six goals as the ultimate objective. South Africa made the choice to give authority to the competition authorities to consider the specified public interest issues, including black empowerment, in their decisions.[6]

In designing competition law to fit socio-economic characteristics, South Africa elected an approach that went against the grain given the trends in developed countries. This approach has enhanced the credibility and legitimacy of competition law.[7] As Fox (2018) explains, the argument that competition law should only pursue the goal of efficiency was the gospel from at least the 1960s and gained momentum in the 1980s. The pursuit of equity as a goal of competition law was regarded as wrongheaded, because such an approach would undermine efficiency, resulting in the size of the pie shrinking and society being worse off. Simply put, equity undermines efficiency. The cornerstone of this thesis was laid by Arthur Okun in his influential 1975 book, *Equality and Efficiency: The Big Trade-off*. In his book, which was very popular until the early 21st century, Okun concluded from theory that, as we equalise the distribution of income, we decrease the efficiency of the economy and therefore that society should forgo greater equality for a healthier economy. Okun's main contribution was to liken these mechanisms to a "leaky bucket". While very important, Okun's hypothesis offers only a limited relevance to South Africa's competition policy.

Democratic South Africa remains concerned with income equality, which is equality of outcome, but the equality (or equity) embedded in the preamble of South Africa's competition law is equality of opportunity and inclusiveness. Moreover, recent empirical research has shifted our understanding of efficiency and equity. For example, Berg & Ostry (2011) and Berg, Ostry & Zettelmeyer (2011) show that when economic growth is looked at over the long term, the trade-off between efficiency and equality may not exist. In fact, equality appears to be an important

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[4] South Africa's first democratic government intentionally made competition regulation its favoured means of regulating private and public companies in the public interest. South Africa is not unique in its emphasis on public interest goals as part of competition law. See Motta (2004), noting that, in the European Union, there are also multiple non-economic factors considered as part of the goals of competition law, such as the promotion of market integration and environmental reasons.

[5] See Lande (2013). According to the consumer choice goal, the range of options available to consumers should not be significantly distorted by anticompetitive practices. The goal focuses on conduct that anti-competitively limits the natural range of choices in a market but is not based on any specified number of choices. The consumer choice goal does not prohibit all reductions in choice.

[6] Markets and economics are innately political (Vaheesan, 2018). A country that elects to have only consumer welfare as a goal of competition policy is making value choices to focus exclusively on economic welfare and ignores non-economic objectives. The adoption of the consumer welfare standard is political in its conception, and it promotes particular outcomes over other outcomes.

[7] In 1997, following consultations with stakeholders, the Department of Trade and Industry (DTI) published its proposed guidelines on competition policy. The DTI guidelines stimulated a public debate on how competition policy in the public interest could help restructure the economy. The DTI guidelines proposed a reformed competition law as one tool to help in the process of promoting opportunity, inclusiveness and efficiency.

ingredient in promoting and sustaining growth. The difference between countries that can sustain rapid growth for many years, or even decades, and the many others that see growth spurts fade quickly may be the level of inequality. Countries may find that improving equality may also improve efficiency, understood as more sustainable long-run growth.

South Africa's competition law is a product of a legislative process that was unique to South Africa and which involved input from multiple stakeholders, all with divergent interests.[8] In democratic South Africa, mistrust of concentrated markets and large white-owned firms who had benefited from past privileges, left South Africans with something of a dilemma. Economic power concentrated in a few white hands was (and remains) offensive. On the other hand, allowing inefficient firms to survive comes at the expense of higher prices and low-quality products for consumers.

Hence, in any discussion about product markets and access to markets, equity and efficiency meet. Naturally, there are short run trade-offs. The fact that competition law explicitly encompasses both efficiency and public interest goals requires implementation coherence. There are nuanced ways to strike a balance between the trade-offs, but in a meaningful way. First, the Competition Act specifies what qualifies as a public interest to address the problem of discretionary bounds. Second, in merger control for example, a complete competition analysis (which focuses on balancing competition harms with efficiency) is done first and separately. The competition analysis is followed then by a public interest analysis, which analysis requires a careful balance of the net effect of a merger on the public interest factors as a whole. This separation keeps it clear what competition requires and makes it possible to observe trade-offs. To third parties, the separation makes it possible to predict competition enforcement outcomes. The separation has, in our view, advanced the cause of both efficiency and equity and has helped to make South Africa's competition law a flagship enterprise.

In emphasising the fact that part of its goal is promoting and maintaining competition in order to promote identified equity goals, such as black empowerment, democratic South Africa has constructed a competition policy for the underdog. Lewis (2012) correctly points out that, without room to account for the public interest goals, for example, protecting the entry opportunities for people without power (ensuring an equal opportunity for small businesses to participate and empowering the formerly excluded and disadvantaged black population), there would be no competition law in South Africa.

Mergers and black empowerment

Prior to the Competition Amendment Act 2018 (the Amendment Act), the public interest grounds specified in the Competition Act included the effect on the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive. The Competition Act prohibits mergers likely to substantially prevent or lessen competition, unless outweighed by technological efficiency or other pro-competitive gain or justified on certain public interest grounds. Uniquely, a merger could be prohibited or conditioned if, for example, it had a negative effect on the ability of firms controlled by historically disadvantaged persons to become competitive, whether it is anticompetitive or not.

South Africa has been the leading jurisdiction in advocating a competition regulation regime that is concerned with not only efficiency of markets but also equity goals to address inequities in the distribution of opportunity. The public interest path adopted by South Africa has not been without critics (Griffiths & Gumbie, 2015) but, in the main, there is broad acknowledgement that the South African merger-control regime has ensured mergers do not yield adverse socio-economic outcomes that could perpetuate inequality, unemployment and poverty (Njisane & Ratshisusu, 2017 and Raslan, 2016). In this section, we look at black empowerment and its application in merger analysis. To do so, we focus on several interesting cases. The cases are chosen to span a range of substantive issues and to highlight choices that offer illustrative guidance.

[8] Debate over the new proposed competition bill took place at the National Economic Development and Labour Council (NEDLAC). NEDLAC consists of business, government and labour and had been set up in 1994 as a platform to build consensus among the stakeholders.

To date, the focus of competition authorities, in applying public interest concerns in merger control, has been largely on preserving jobs and opening access to value chains. Between 1999 and 2010, the focus on transformation of the racially skewed ownership patterns was limited. The most interesting case during this period was the Competition Tribunal's (Tribunal) decision in *Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd* in 2002. This decision, in the early stages of the new merger regulation dispensation, may have chilled enforcement and focus of the Competition Commission (Commission). The transaction involved Thebe Investment Corporation (Pty) Ltd (Thebe)[9] selling its subsidiary Tepco Petroleum (Pty) Ltd (Tepco), after acquiring the shares of the minority shareholders in Tepco, to Shell South Africa (Pty) Ltd (SSA). Furthermore, the transaction required that, prior to the transaction, SSA would be restructured into two companies, Shell South Africa Energy (Pty) Ltd, responsible for the refinery, chemicals, renewables, gas and power, exploration and production businesses, and SSA, responsible for retail marketing, the marketing distribution network, commercial fuels, liquefied petroleum gas, aviation, marine, lubricants and bitumen. Thebe would acquire between 17.5% and 25% of the issued share capital of Shell SA Marketing. According to the parties, Tepco would become a wholly owned subsidiary of Shell SA Marketing and would for the foreseeable future remain a separate brand, distinct from Shell, and would still be managed by the current management which was predominantly black (at the time). Shell SA Marketing would retain the Tepco brand and develop it in the market for as long as it remained viable and profitable. In terms of the shareholders agreement, Shell would appoint three of the four directors to the Board of Shell SA Marketing, including the Chairman and the Managing Director of the Company, and Thebe would appoint one.

The Commission recommended to the Tribunal conditional approval of the merger. The conditions sought to ensure that Tepco continued to exist in South Africa and that its black economic empowerment shareholders retained a controlling stake in the merged business.[10] This required an amendment of the shareholders' agreement. The Tribunal took issue with the recommended conditions and rejected them. The Tribunal approved the merger without conditions.

In its decision, the Tribunal reasoned as follows: "The role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory and regulatory instruments – in this case the Employment Equity Act, the Skills Development Act and the Charter [Charter for the South African petroleum and liquid fuels industry] itself immediately spring to mind. The competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an over-zealous manner lest they damage precisely those interests that they ostensibly seek to protect."

The *Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd* decision of the Tribunal and its interpretation of public interest in mergers severely crippled the considerations of black empowerment in merger control.[11] Following this hurdle limiting the practical scope of the black empowerment public interest consideration in merger control, it would take the Commission at least over 10 years to actively require merger parties to consider empowering historically disadvantaged individuals. For example, in 2015, Easigas acquired Reatile Gaz. Reatile Gaz was a maverick firm, and was one of the few black-owned firms to have successfully entered the highly concentrated liquefied petroleum gas market in South Africa.[12] Through a series of complex steps of the transaction, it was contemplated that, post-merger, Reatile Gaz would hold 40% in Easigas, with 60% held by Rubie Energie SAS. Rubie Energie SAS was a shareholder of Easigas. The Commission approved the merger with conditions noting

[9] Thebe, a broad-based black empowerment investment holding company, was established primarily to use economic market mechanisms and opportunities to benefit previously disadvantaged people and communities.

[10] More specially, the Commission recommended that the merger be approved on the following conditions; (1) Tepco continue to exist in the market jointly controlled/owned by Thebe and Shell South Africa; (2) That the Tepco brand be maintained as a viable brand in the market place; and (3) Any agreement, including a shareholders agreement, between the parties pursuant to these conditions must be submitted to the Commission for its approval prior to the implementation thereof by the parties.

[11] Although concerns about the impact of merger transactions on black empowerment remained, as in 2005, and after a protracted hearing, the Tribunal conditionally approved the sale of Afrox Healthcare Limited to Business Venture Investments 790 (Pty) Ltd, whose major shareholders were two prominent black empowerment companies, namely, Mvelaphanda Strategic Investments (Pty) Ltd and Brimstone Investment Corporation Ltd. The Tribunal's decision prevented the opportunistic forays by Mediclinic Corporation Ltd (a major provider of healthcare), who for one reason or the other held a stake in the empowerment venture to acquire Afrox Healthcare, to secure additional hospital beds in a subsequent related transaction. See Business Venture Investments 790 (Pty) Ltd / Afrox Healthcare Limited [Competition Tribunal Case Number: 105/LM/Dec04 - Decided in 2005]

[12] Easigas (Pty) Ltd / Reatile Gaz (Pty Ltd [Competition Commission Case Number: 2015Sep0525]- Decided in 2015

that Reatile Gaz was majority owned by historically disadvantaged South Africans and post-merger this would not be so. This would be inconsistent with the Competition Act's purpose which states the need to address the historically skewed spread of ownership in the economy. The Commission imposed conditions requiring the enhancement of Reatile Gaz's role in Easigas through an increase in the contemplated shareholding in the merged entity and granting Reatile Gaz's shareholders approval rights on pricing policy, business plans and budgets. The merged entity was also required to ensure that the Board of Directors of Easigas includes at least three historically disadvantaged South Africans and that a prescribed ratio of the Executive Committee of Easigas be comprised of historically disadvantaged South Africans.

In another example, in 2016, the Commission conditionally approved the merger in which SABMiller Plc (SABMiller), Gutsche Family Investments (Pty) Ltd and the Coca-Cola Company (TCCC), sought to combine the bottling operations of their non-alcoholic beverages (NABs) businesses in South Africa under a single entity to be known as Coca-Cola Beverages South Africa (Pty) Ltd (CCBSA).[13] Further, through this transaction, SABMiller would transfer Appletiser, Grapetiser, Fruitiser and Peartiser (the Appletiser brands) and its Lecol brand to TCCC. The proposed transaction had a negative impact on Broad-based Black Economic Empowerment (B-BBEE) as it would have likely diluted B-BBEE shareholding from 20% to 11.3% post-merger. In order to address this concern, the Commission and the merging parties agreed on a set of remedies that were approved by the Tribunal. The Tribunal imposed conditions requiring Coca-Cola to increase its B-BBEE stake in the South African operations from 11% to 20%.

Dubbed one of the largest global beer mergers in 2016, Anheuser-Busch InBev acquired SAB Miller for a reported purchase consideration of US$104 billion.[14] SAB Miller, with its roots in South Africa, had been a success story for South Africa globally. The acquisition attracted concerns, primarily from trade unions and government, on the potential impact of the transaction on employment, the existing black economic empowerment scheme, supply chains as well as the impact on firms owned by historically disadvantaged persons. On black empowerment, SAB Miller had in 2010 adopted an empowerment scheme for employees in South Africa known as the Zenzele Scheme, which was to reach maturity in 2020. The Tribunal imposed conditions requiring the merged entity to submit to government and the Commission, after maturity of the Zenzele Scheme, plans for black economic empowerment to ensure the levels of participation by black people, especially employees, were maintained. Another spin off from the merger was the imposition of a condition requiring SAB Miller to divest of its 26.5% stake in Distell Group Ltd, a competitor in the flavoured alcohol beverages market. The 26.5% in Distell stake was divested to the Government Employees Pension Fund, duly represented by the Public Investment Corporation, which acquisition was approved by the Tribunal on condition that a portion of the acquired stake in Distell be sold to the black empowerment shareholder.

In 2018, Rhône Capital acquired Fluidra. Both firms were active in the manufacture and supply of pool equipment and accessories.[15] At the time, Fluidra manufactured some of its pool equipment locally while Rhône Capital did not have any manufacturing activities in South Africa. It imported all of its products from its manufacturing plants elsewhere. The Commission was concerned that the merged entity may relocate Fluidra's manufacturing facilities. The Commission imposed conditions requiring the merged entity to establish a fund to sponsor the establishment of a B-BBEE entrant to manufacture pool equipment and accessories in South Africa. On local procurement, the merging parties were required to continue to procure from small and medium businesses or black-owned businesses for a specified period of time after the implementation date.

Arguably, there have been three main inflection points in the evolution of black economic empowerment in South Africa's merger regulation regime.

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[13] Coca-Cola Beverages Africa Ltd/Various Coca-Cola and Related Botting Operations [Competition Tribunal Case Number: LM243Mar15] – Decided in 2016

[14] Anheuser-Busch InBev SA/NV /SABMiller plc [Competition Tribunal Case Number: LM211Jan16] – Decided in 2016

[15] Rhône Capital L.L.C. / Fluidra, S.A [Competition Commission Case Number: 2018Mar0043] – Decided in 2018

First, it was the Tribunal's decision in *Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd* in 2002, wherein the Tribunal issued a cautionary note on the limitations of public interest provisions, especially in relation to the role of competition authorities in determining the impact of mergers on black empowerment.

Second, was the rise of government's participation in mergers. Government participation in mergers on public interest grounds is provided for in the Competition Act. In 2009, government began to actively participate in merger proceedings.[16] By far the most celebrated merger case involving public interest is Wal-Mart's acquisition of Massmart. The merger posed no competition problems. Wal-Mart previously had almost no presence in South Africa. Government intervened in this merger raising public interest concerns. Subsequently, government has intervened in all significant merger transactions involving public interest. In many cases, government has sought commitments to address public interest concerns, including requiring the setting up of funds to support black empowerment.

Third, the Amendment Act has paved the way for an explicit requirement for competition authorities to consider the impact of mergers on "the promotion of a greater spread of ownership, in particular, to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market". Following the Amendment Act, there have been at least two Tribunal decisions in 2020 ordering merger parties to address black empowerment concerns. For an example of these mergers, consider the acquisition of Pioneer Food Simba, a subsidiary of PepsiCo Inc, one of the major agro-processing companies in South Africa in 2020. As part of the transaction, Pioneer Food was to delist from the Johannesburg Stock Exchange and also dilute its B-BBEE ownership, which triggered concerns from government. The Tribunal imposed conditions requiring PespsiCo to implement a B-BBEE ownership plan and provide PepsiCo common stock to the value of R1.6 billion to be issued to a South African, broad-based workers' trust. The common stock would be unencumbered and would allow for immediately realisable dividends. Further, the conditions required that the stock in PepsiCo be converted into a direct shareholding in Pioneer Food of up to 13% after five years from implementation of the merger.

Also, in 2020, the Tribunal approved with conditions the acquisition of Comair Ltd (an airline business in South Africa) by a group of investors seeking to revive the company after the airline sector was heavily disrupted by the COVID-19 crisis. Government raised concerns about the prospects for employees who had lost their jobs when the acquired business was in business rescue. Government also required that employees be part of the new ownership structure through the employee share ownership programme. The consideration of employees as part of the envisaged structure of the merged entity was premised on the requirement in the Amendments Act which obliges the competition authorities to consider, as part of the enhanced public interest criteria, the impact of a merger on the promotion of a greater spread of ownership. On black empowerment, the Tribunal imposed conditions requiring the merged entity to allocate a portion of its shares to a B-BBEE ownership structure which would include the participation of an Employee Share Ownership Programme with a broad representation of black people. In addition, the conditions provide for the merged entity to enter into an agreement with one or more B-BBEE purchasers to acquire a minority stake in the merged entity on mutually acceptable commercial terms.

The most recent, and significant decision on a merger to address black empowerment concerns, was the Commission's prohibition a merger in 2021 in which ECP Africa Fund IV LLC and ECP Africa Fund IV A LLC (collectively referred to as ECP Funds IV) would acquire 95.78% of the issued share capital of Burger King South Africa (RF) (Pty) Ltd (BKSA) and 100% of the issued share capital of Grand Foods Meat Plant (Pty) Ltd (Grand Foods). ECP Funds IV did not have ownership by historically disadvantaged persons (HDPs) and workers whilst BKSA and Grand Foods were ultimately controlled by Grand Parade Investments Ltd (GPI), an empowerment

[16]Minister Ebrahim Patel, was appointed Minister of Economic Development in May 2009 and he championed considerations of public interest in merger control, engaging robustly with the competition authorities and negotiating public interest commitments with merging parties.

entity with 68.56% of its shareholdings held by HDPs, 22.87% of which is held by black women. The effect of the merger was to reduce the ownership by HDIs and workers in the target firms to zero.[17]

Following the prohibition, the merger parties entered into discussions with the Commission and the Department of Trade, Industry and Competition ("the dtic"), seeking to remedy concerns around the effect of the merger on the promotion of a greater spread of ownership and increasing levels of ownership by HDPs and workers in firms in the market. Thereafter, they approached the Tribunal for a reconsideration of the Commission's decision. The Tribunal approved the merger subject to conditions. The conditions included a commitment involving local procurement and improving compliance with the Enterprise Supplier Development element of the merger parties' B-BBEE scorecard.

The case studies assessed above illustrate the form of black empowerment that the Commission and Tribunal accept. What is common in all cases, except for the ECP Funds IV/BKSA/Grand Foods decision, is that merger parties have not contested these measures. This is a positive development allowing for the development of a practice other firms involved in mergers can follow. However, it is important to note that within the broad public interest goals there are also trade-offs that competition authorities should consider when making determinations on mergers that raise significant public interest concerns.

The Commission has also spelt out with sufficient clarity how it will assess the public interest relating to black owned businesses (Competition Commission, 2016). The Commission's approach to evaluating public interest considers: (1) whether there is likely an effect of the merger on public interest grounds; (2) whether such effect, if any, is merger specific; (3) whether such effect, if any, is substantial; (4) whether there are any likely positive effects to justify the approval of the merger; and (5) whether there are possible remedies to address any substantial negative public interest effects. Where the effect of the public interest consideration is found to be non-merger specific, the enquiry into that effect stops at that stage. Likewise, where an effect is found to be merger specific but not substantial, the enquiry into that effect will stop at that stage.

According to the B-BBEE Commission (2020), some large business entities achieved levels of certification for black empowerment: 74% in 2019 down from 76% in 2018, with non-compliant large business entities recorded at 26% in 2019 and 24% in 2018. However, on key empowerment indicators, such as management control, ownership and supplier development, the B-BBEE Commission (2020) shows a bleak picture. For example, the average black ownership of firms in the economy was recorded at 29% in 2019 and 25% in 2018. From the case studies on merger regulation outcomes since the enactment of the Competition Act in 1998, significant outcomes have been achieved through the remedies imposed, contributing positively to the B-BBEE objectives of South Africa. There are limits worth noting to what merger control can achieve, as it is a reactive tool that is dependent on mergers being consummated. It therefore necessitates a holistic approach that not only depends on merger control outcomes, but also that looks to other *ex-ante* regulatory instruments. It is a complex challenge requiring a multifaceted solution.

Exemptions and black empowerment

The Competition Act prohibits agreements and decisions that constitute restrictive practices. Hard core cartels[18] are prohibited *per se*. The Competition Act prohibits abuse of dominance practices aimed at excluding rivals or exploiting consumers. The system of prohibitions relating to abuse of dominance practices, horizontal and vertical restraints is balanced by an arrangement for exemptions. An exemption gives permission for applicants granted an exemption to contravene specific sections of the Competition Act. The Commission may grant an exemption for a specified term. On public interest exemptions, prior to the Amendment Act, the grounds for exemption included (1) maintenance or promotion of exports; and (2) promotion of the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive. In deciding whether or not to grant an exemption, the Commission must establish whether the restrictive practice, for which an exemption is sought, is required to

[17] On 20 July 2021 GPI issued a Stock Exchange News Services notice that the merging parties were 'actively' engaging the Commission, presumably with the view to remedying the harm the transaction has on the public interest, and possibly pursue a reconsideration of the matter before the Competition Tribunal.

[18] Hard core cartels are agreements among competitors not to compete, such as price fixing and bid rigging.

achieve the public interest objective and whether allowing firms to engage in the restrictive practice will contribute to the public interest objective.

We discuss below two exemption applications that have dealt with black empowerment. First, the National Hospital Network (NHN) exemption. The NHN is a non-profit company, a co-operative venture that is controlled by its members, a group of independent private hospitals who run medical establishments such as day clinics, subacute facilities and psychiatric facilities. These members are competitors in the provision of private healthcare services. On 1 November 2018, the Commission conditionally granted the NHN a five-year exemption commencing from 1 November 2018 to 31 October 2023. The NHN sought the exemption in order to engage in collusive conduct on the basis that the exemption would promote the ability of small businesses or firms controlled or owned by historically disadvantaged persons to be competitive.

Some of the members of the NHN did not meet the requirements of being classified as either small businesses or firms controlled or owned by historically disadvantaged persons. The conditions imposed in the 2018 exemption included the imposition of a two-year grace period requiring NHN members who did not meet the legislative criteria to be classified as either small businesses or firms owned by historically disadvantaged persons to transform their ownership structures in order to meet the legislative criteria as stipulated. Any firm failing to meet the legislative criteria at the end of the two-year period would automatically be excluded from the exemption. These conditions were intended to enable the NHN to align fully with the objectives in the exemption application. The exemption required all firms who were members of the NHN to be small businesses or firms owned by historically disadvantage persons in order to meet the requirement. The Commission found it inconsistent (with the Competition Act) for the NHN to claim that it sought exemption to promote the objective of small businesses or firms owned by historically disadvantage persons, while some of its members were not themselves transformed and did not meet the requirements for exemption as prescribed in the law.

The 2018 exemption was not the first exemption granted to the NHN. The Commission had previously granted the NHN three exemptions on the premise that the exemptions were required for the objective of promoting the ability of small businesses or firms controlled or owned by historically disadvantaged persons to be competitive. The first exemption was granted in June 2006 for a period of five years. The second exemption was granted in May 2010 for an additional five-year period. The third exemption was granted in October 2014 for a four-year period.

The second interesting exemption application in which issues of black empowerment were important is the Western Cape Citrus Producers Forum, also known as "Summer Citrus" exemption. On 13 April 2018, the Commission refused to grant Summer Citrus an exemption. Summer Citrus is a voluntary association of approximately 230 citrus fruit growers from the Western Cape and certain parts of the Northern Cape regions. Summer Citrus had applied, on 8 October 2015, to the Commission to be exempted from the prohibition of collusive practices by its member growers, and to continue with their coordination of export activities to the United States of America. The Commission had previously granted Summer Citrus two exemptions on the premise that the exemption was required for the objective of promoting exports. Summer Citrus was, in essence, applying for another exemption to allow its member growers to continue with their coordination of export activities of citrus fruit for another period of five years, commencing on 16 June 2016 and ending in June 2021.

During the evaluation of the exemption application and, in considering appropriate conditions for the exemption, the Commission raised concerns regarding lack of transformation within Summer Citrus membership. In particular, the Commission was concerned that Summer Citrus had not been adequately extending some of the benefits of the previous exemptions granted to previously disadvantaged persons through transformation programmes. When the Commission suggested imposing conditions related to transformation, in particular black empowerment, Summer Citrus decided to abandon its exemption application.

Competition Amendment Act and black empowerment

In February 2019, President Cyril Ramaphosa signed the Amendment Act into law. The main focus of the Amendment Act is economic transformation. It provides for an extension of the mandate of the competition authorities to help open the economy to small and medium businesses and firms owned by black South Africans.

Economic concentration can have a number of negative effects. It can lead to higher prices for consumers; reduced investment and innovation in the industry; and can also create an environment which impedes the ability of small and medium businesses, particularly black-owned businesses, to participate fairly in the market.

Until the Amendment Act, the purpose clause relating to black empowerment was only textually woven into the merger control and the exemption provisions of the Competition Act (Fox, 2018). The Amendment Act maintains the architecture of the Competition Act, while aligning the operations with the stated purpose, particularly with regards to public interest (small and medium business, and ownership by black South Africans). The amendments, contained in the Amendment Act, relating to ownership by black South Africans fall into four main categories: (1) dominant firm abuses: buyer power and price discrimination; (2) exemptions for restrictive practices; (3) mergers; and (4) market inquiries. We elaborate the key themes below.

Dominant firms

Dominant firms are generally firms with market shares above 45% or firms which have substantial market power. The amendments acknowledge that small and medium businesses, and black-owned businesses are most vulnerable to various types of exclusionary strategies by dominant firms. First, the Amendment Act introduces a new restriction on price discrimination by dominant firms that will support small and medium businesses, and black-owned businesses against unfair pricing policies. The Amendment Act states that, when determining whether a dominant firm's conduct comprises prohibited price discrimination, the dominant firm must show that its conduct does not impede the ability of small and medium enterprises and firms controlled or owned by historically disadvantaged persons to participate effectively. The Amendment Act makes it more difficult for dominant firms to unfairly price discriminate against smaller customer firms through charging higher prices that have the effect of impeding (obstructing or preventing) small and medium businesses or black-owned businesses from participating in a market.

Second, the Amendment Act introduces a new provision relating to buyer power, which prohibits dominant firms from exercising their monopsony power. The new provision prohibits, in the designated sectors, a dominant firm from imposing unfair prices or other unfair trading conditions on a supplier that is a small or medium business or black-owned business. For example, imposing excessively low prices on small and medium businesses or black-owned suppliers to the point where the small and medium businesses or black-owned businesses are obstructed from participating in markets.

Balancing efficiency and equity interests requires inevitable compromises. Fox (2018) correctly notes that valuing entry, participation and expansion of firms without power in the application of substantive principles of competition law is congruent with the aim of making markets inclusive and more robust. Until small and medium businesses or black-owned businesses are integrated into the formal economy, South Africa will continue to lag behind its potential to promote efficiency with equity.

Exemptions from restrictive practices

The Amendment Act states that the Commission may grant an exemption only if the agreement or practice concerned, or category of agreements or practices concerned, contributes to the promotion of effective entry into, participation in and expansion within a market by small and medium business, or firms controlled or owned by historically disadvantaged persons. The focus is on promotion of the ability of small and medium businesses or black-owned businesses to enter and participate in the market rather than to become competitive.

An important distinction is that, prior to the Amendment Act, an exemption could have been granted only if it promoted the ability of black-owned businesses "to become competitive". There is a clear efficiency and equity trade-off in the case of exemptions. It may be bad competition policy to allow anticompetitive agreements on grounds that the firms seeking the exemption only require it for the purpose of promoting opportunities to black-owned businesses and, in this case, the Amendment Act has been expertly crafted to precisely avoid this anomaly. Some black-owned businesses may be efficient while others may be inefficient. Agreements that are anticompetitive are almost always harmful and should not be allowed without a clear showing of a higher public benefit that could not otherwise be achieved. It may be good competition policy to require competition laws to avoid constructions

that allow inefficient firms to survive in markets at the expense of consumer harm as well as competitive and inclusive markets.

Mergers

The Amendment Act states that when required to consider a merger, the Commission or Tribunal must first determine whether or not the merger is likely to substantially prevent or lessen competition. Despite its determination, the Commission or Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds. The Amendment Act further states that when determining whether a merger can or cannot be justified on public interest grounds, the Commission or the Tribunal must consider the effect that the merger will have on the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in and expand within the market.

Prior to the Amendment Act, the competition authorities considered the effect of a merger on the ability of small businesses "to become competitive" in the market when considering whether the merger could be justified on public interest grounds. Again, the requirement "to become competitive" was seen as too narrow. As in the case of exemptions discussed above, in merger regulation, the Competition Act's objectives of efficiency and equity may sometimes point in different directions.

Market Inquiries

Economic concentration has many negative effects, including unfair pricing, which can impact on consumers and black-owned businesses, and can lead to an environment that makes it difficult for black-owned businesses to participate in the market. The Amendment Act empowers the Commission to consider the impact of market structure on the ability of small and medium businesses and black-owned businesses to participate in that market and gives them power to propose remedies which can open the market to greater participation of small and medium businesses and black-owned businesses.

Conclusion

In sum, South Africa has chosen to create its own path, adopting a competition law that responds to its unique socio-economic circumstances.

In some countries, competition law is only about efficiency. Only if welfare is reduced (in some instances welfare is measured as a reduction in consumer surplus) will conduct be seen as anticompetitive. It is irrelevant if the conduct in question benefits the rich at the expense of the poor. It is also irrelevant if the conduct impedes the ability of black-owned businesses to participate fairly in the market. In these countries, the pursuit of equity is feared. The concern is that it will protect inefficient small business, inefficient black-owned business and raise prices for consumers. Thus, equity is at war with efficiency.

In South Africa, equity is a recognised goal and a permissible consideration of competition law. Competition law is not just about the efficiency goal. The problem of inequality of opportunity cannot be avoided. Black-owned businesses represent the poor and the left-out majority of South Africans. Responding to injustices of the apartheid and colonialist economic legacies is important, for efficiency and as a moral imperative. In other words, the focus on both efficiency and equity clearly demonstrates that South Africa is looking for ways to make competition law responsive to economic inequality and past injustices of exclusion from economic life. So, it is an error to consider the pursuit of the equity goal to be an inefficient intervention as suggested by Okun's treatise. The alleged equity and efficiency trade-off does not describe anything important for South Africa. Placing value on opportunities for black-owned businesses to enter, expand and participate in markets is likely to be a key element in South Africa's route to becoming an efficient, competitive economic environment, focused on development and, ultimately, benefiting all South Africans.

South Africa has clearly chosen a trajectory of safeguarding opportunities for the outsider (black-owned businesses) to participate in markets. This route has the potential to produce more efficiency as well as more equity. We conclude by noting that South Africa has built a credible competition law enforcement system and strong institutions to

administer the law. The enforcement of competition law has, to some extent, helped bring better and more affordable goods and services to all South Africans. Yet, the goal of creating a greater spread of ownership in the economy, in particular to increasing the ownership stakes of historically disadvantaged persons, remains elusive. Perhaps there should also be consideration of other direct *ex ante* complementary measures other than competition regulation.

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