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Radical economic transformation through transformative competition law and policy

by

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Abstract

In 2017, the Department of Economic Development published the Competition Amendment Bill and issued a public call for comments. One of the main objectives of the Bill is address market concentration and racially-skewed patterns of ownership in the economy. The proposed amendments give competition authorities the power to undertake interventions to address concentration, thus broadening the Competition Commissions mandate from addressing uncompetitive conduct to addressing uncompetitive structures. The proposed amendments are aligned with the government's radical economic transformation agenda, the National Development Plan and the public interest provisions of the Competition Act. The Competition Commission has the power to conduct market inquiries to investigate the general state of competition in a market – these inquiries have proven to be lengthy and expensive processes. The proposed amendments suggest using market inquiries to address structural challenges in a market. I call the approach taken in these proposed amendment to the Competition Act and the Competition Commission's mandate transformative competition law. The purpose of this article is to consider the proposed transformative provisions in the Competition Amendment Bill within the context of the discourse on radical economic transformation with specific reference to merger control and market dominance. The article focuses on the interplay between radical economic transformation and competition law, and determines whether it is necessary and/or possible for competition authorities to intervene. To the extent that such intervention is necessary, this article will identify measures that can be put in place to make the intervention of competition authorities effective.

1. Introduction

In December 2017, the Department of Economic Development published the Competition Amendment Bill and issued a public call for comments. One of the main objectives of the Bill is to address market concentration and racially-skewed patterns of ownership in the economy. The proposed amendments give competition authorities the power to undertake interventions to address concentration, thus broadening the Competition Commissions mandate from addressing uncompetitive conduct to addressing uncompetitive structures. The proposed amendments are aligned with the government's radical economic transformation agenda, the National Development Plan and the public interest provisions of the Competition Act. The Competition Commission has the power to conduct market inquiries to investigate the general state of competition in a market – these inquiries have proven to be lengthy and expensive processes. The proposed amendments suggest using market inquiries to address structural challenges in a market but place time limits on the duration of a market inquiry. I call the approach taken in these proposed amendment to the Competition Act and the Competition Commission's mandate transformative in nature. The purpose of this paper is to consider the proposed transformative provisions in the Competition Amendment Bill within the context of the discourse on radical economic transformation with specific reference to merger control. The article focuses on the interplay between radical economic transformation and competition law with a particular focus on the proposed regulation on creeping mergers and a new and broader market inquiry.

In my paper I will argue that the shift from regulating conduct to regulating structure has a transformative vision of economic empowerment in South Africa and may have the effect of increasing greater participation by historically disadvantaged South Africans in the economy.

The South African Competition Act No 89 of 1998 ('Competition Act') acknowledges the importance of public interest considerations in competition matters and thus provides for the consideration of matters which impact society generally, beyond the boundaries of competition law.[2] Public interest considerations are first mentioned in the preamble of the Act, the purposes of the Act and then provided for as a specific consideration in the substantive evaluation of mergers under Section 12A of the Competition Act.

2. Contextualising the Competition Act

The role of competition law in a market is controversial. The Chicago school of thought proposes that market efficiency should be the sole role of competition law and that other

[2] L Kelly *et al Principles of Competition Law in South Africa* (2017) 191.

considerations, such as consumer welfare, should not play a role in competition law. While the Post-Chicago school of thought proposes a competition law that is based on consumer welfare rooted in economic efficiency.[3] Some scholars within the Post-Chicago school of thought posit that industrial policy has no space in the regulation of competition as it harms market forces and enables the entry of businesses which are unable to compete in the market.[4] Many jurisdictions, nonetheless, accept that competition law is not about efficiency alone but ought to include consumer welfare and public interest considerations. South Africa is one such jurisdiction.

In South Africa the white minority ruled the country for centuries, from colonialism to apartheid. Apartheid was both a social and economic policy; it excluded the black majority from participating meaningfully in the economy by limiting their right to own property and participation in key industries. This led to an concentration of ownership as 6% of the population of the country, the white minority, controlled the bulk of the economy.

"The perceived counterpoint of this concentration of private wealth and economic power was precisely the dispossession, the poverty, and the unequal and unfair treatment of the majority black population."[5] In response to this challenge, the government proposed guidelines for the development of an anti-trust policy and legislation which was to be undertaken by the National Economic Development and Labour Advisory Council (NEDLAC). Through NEDLAC, a draft competition Act was developed in 1998. The memorandum which accompanied the draft legislation stated that the economy in South Africa is characterised by *unusually high levels of market concentration*.[6] The memorandum further stated:

> "The overriding objective of competition policy and its associated instruments is the promotion of competition in order to underpin economic efficiency and adaptability, international competitive- ness, the market access of [small- and middle-sized enterprises], diversification of ownership in favour of members of historically disadvantaged communities, and the creation of new employment opportunities."[7]

The Competition Act retained these objectives. The preamble of the Competition Act states that one of its objectives is to provide all South Africans equal opportunities to participate fairly in the economy. Section 2(c) of the Act states that the purpose of the Act is to promote

[3] D Sokol 'The tensions between antitrust and industrial policy' 22 *George Mason Law Review* (2015) 1248.
[44] Ibid.
[5] D Lewis *Thieves at the Dinner Table: Enforcing the Competition Act* (2012) 5.
[6] Eleanor M Fox 'Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia' 41 Harvard International Law Journal (2000) 579, NEDLAC *Explanatory Memorandum Accompanying the Competition Act of South Africa No 89 of 1998*.
[7] Ibid.

employment and advance the social and economic welfare of South Africans and section 2(f) states that another purpose of the Act is to promote greater spread of ownership and increase the ownership of historically disadvantaged persons in the economy.

The 'unusually high levels of market concentration' noted by the memorandum accompanying the Competition Act still persist; this is expressed in the proposed amendments, despite the progressive objectives of the Competition Act.[8] These high levels of concentration are attributed to strategic barriers to entry, low rates of business formation and mergers and acquisitions.[9]

South Africa is ranked by the World Bank as the most unequal country in the world.[10] Inequality is a persistent problem which is harming the economy. According to a Stellenbosch University researcher, Anna Orthofer, 10% of the population in South Africa earns 90-95% of its wealth.[11] On average, CEOs of companies earned between 120 to 1332 times more than the average earner at their companies.[12] Further to that, in a land audit published by the Department of Rural Development and Land Reform it was found that 72% of farms and agricultural land owned by individuals was owned by white people. These shocking statistics necessitate a coordinated and collective response through industrial policy, hence the National Development Plan. Inequality harms growth and without growth there can be no development.

3. The concept of radical economic transformation

The then Deputy President Cyril Ramaphosa, now President of South Africa, has said that radical economic transformation is an idea founded on the concept of building an inclusive and more collective economy. Through this policy measure, government hopes to create sustainable growth, increased employment, reduced inequality and a deracialised economy.

The purpose of radical economic transformation in my understanding is to structurally changes the economy in order to facilitate the equitable enjoyment of the country's resources which would lead to economic development. Competition law comes into play in the radical economic transformation agenda through its ability to facilitate market transformation and remedy anti-competitive conduct, and soon structures. It is important to note that concentration is often

[8] Department of Economic Development *Competition Amendment Bill, 2017* Government Gazette No 41294, 7.
[9] Ibid.
[10] The World Bank *World Development Indicators: Distribution of income or consumption*. http://wdi.worldbank.org/table/1.3 .
[11] N Smith 'How inequality is wrecking SA's economy, and what we can do about it' *Business Day* (21 October 2017) https://www.businesslive.co.za/bd/opinion/2017-10-16-alarming-statistics--how--sas-economy-suffers-from-inequality/.
[12] Ibid.

linked with underrepresentation of previously disadvantaged groups in certain industries, as noted in the memorandum accompanying the proposed amendments.[13]

The National Development Plan is a policy document promulgated with the aim of eliminating poverty and reducing inequality in South Africa by 2030.[14] Inclusive growth is a theme which appears throughout the NDP. A key feature of the NDP is raising employment, one of the public interest consideration to be taken into account during a merger is the effect that the merger will have on employment. The NDP states that:

> "[a] sustainable increase in employment will require a faster-growing economy and the removal of structural impediments, such as poor-quality education or spatial settlement patterns that exclude the majority. These are essential to achieving higher rates of investment and *competitiveness*, and expanding production and exports".[15]

Competitiveness is at the centre of the development agenda. It is a key driver of the economy. South Africa's economic development strategy is formulated in the National Industrial Policy Framework[16], implemented through the Industrial Policy Action Plan[17]. One of the key aims of the Plan is to *diversify the economy*, this diversity occurs not only through increasing technological transfer, but also through diversifying the groups of individuals who participate in the economy and have ownership over structures within the economy.

The NDP states that "[i]f South Africa registers progress in deracialising ownership and control of the economy without reducing poverty and inequality, transformation will be superficial. Similarly, if poverty and inequality are reduced without demonstrably changed ownership patterns, the country's progress will be turbulent and tenuous."[18] As such, the approach taken in the amendments of the Competition Act is in line with the NDP. The NDP seeks to change racialised ownership patterns within the economy. In order for this to occur, all policy positions needed to be framed with similar positions. Furthermore, the Competition Act is one of a number of regulatory measures which are being amended to be brought in line with the NDP. The Department of Trade and Industry has also published a Draft Intellectual Property Policy which aims to bring the regulation of intellectual property in line with the objectives of the NDP.[19] Competition law and its interaction with intellectual property is a subject matter which

[13] Amendment Bill (note 6 above), 10.
[14] National Planning Commission *National Development Plan 2030: Our Future – make it work* (2012), 17.
[15] Ibid
[16] Department of Trade and industry (2007) *National Industrial Policy Framework*.
[17] Department of Trade and Industry (2016) *Industrial Policy Action Plan*.
[18] National Planning Commission (note 13 above) 17.
[19] Department of Trade and Industry *Draft Intellectual Property Policy of the Republic of South Africa: Phase 1* (2017) (the draft policy is on file with the author.)

is explored in the draft policy, in particular, the provision of essential medicines, intellectual property and competition law.

These policy developments indicate that competition law is concerned with more than market efficiency and consumer welfare. Justice Jafta posits that the Competition Act was passed to promote the values which the Constitution is founded on, in particular the values of equality, freedom and the advancement of human rights.[20]

4. The public interest and the Competition Law Amendment Bill

The Amendment Bill enables competition authorities to consider racially-screwed pattern of ownership within the economy. These measures are said to be required in order to "realise the transformative vision of economic empowerment for all South African," particularly historically disadvantaged individuals.[21]

Public interest considerations currently play a significant role in merger evaluation in the Competition Act. In Section 12A of the Act, four public interest considerations during merger evaluation are listed. These considerations are the effect that the merger will have on:

> (a) a particular industrial sector or region;
>
> (b) employment;
>
> (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
>
> (d) the ability of national industries to compete in inter- national markets.

In the *Harmony Gold/Gold Fields Limited* merger, the Competition Tribunal held that all mergers must first undergo an evaluation which considers whether they will likely prevent or lessen competition.[22] If a merger is found to not likely prevent or lessen competition, it must then be justified on the public interest grounds. If it is found to likely prevent or lessen competition, it must still be subject to the public interest grounds.

The application of the public interest test in the Competition Act during merger evaluation can lead to the rejection of a merger that would not lead to a substantial lessening of competition and also save a merger that would otherwise be rejected as leading to a substantial lessening

[20] N Manyathi 'Role of competition law in a democracy' (2012) *De Rebus* 49.
[21] Amendment Bill (note 6 above) 7.

[22] Tribunal case Number: 93/LM/Nov04 para 41.

of competition.[23] Mergers may also be approved with conditions which act to remedy the public interest concerns. For example, in the *Wal-mart/Massmart*[24] merger which took place in 2012, the competition authorities approved the merger on condition that the merging parties would develop the Massmart Supplier Development Fund, the purpose of which being to remedy the threat of loss of employment and sales by local suppliers.

The Wal-mart/Massmart merger is one of the biggest mergers which have taken place in South Africa. In this merger, Wal-mart which is one of the largest retailer and wholesaler in the world, intended to acquire Massmart, a South African retailer. In 2011, the Competition Commission considered this merger and concluded that it would not likely lead to the substantial prevention or lessening of competition and would not result in negative impacts on employment, small businesses or a particular sector and should therefore be approved without conditions.[25] At the Competition Tribunal, the merger was approved on condition that a R100 million development fund would be put in place by the merging parties to contribute to the development of small and medium enterprises and businesses owned by historically disadvantaged persons. This approval was, however, resisted by labour unions and various government departments which led to its review by the Competition Appeal Court.

In its application of the public interest consideration relevant in this merger, the Appeal Court went into a discussion about public policy, competition law and globalisation. The submission received from the government expressed concern about the entry of global firms in the South African economy, the Appeal Court rejected this submission as beyond the scope of the public interest provisions in the Competition Act. The Appeal Court ordered a maximum amount of R200 million to be allocated to the supplier development fund by Massmart over a period of 5 years.

Realising that the issue of market concentration and transformation within industry were persisting concerns, the Department of Economic Development engaged with a number of stakeholders and as a result of these engagements, five priorities were identified, namely

(i) The provisions of the Competition Act relating to prohibited practices and mergers must be strengthened.

[23] L Reyburn et al *Competition Law of South Africa* (2008) 93.

[24] Tribunal case number: 73/LM/Nov10 (29 June 2011); Competition Appeal Court: 110/CAC/Jun11 and 111/CAC/Jun11.

[25] Commission case number: 2010Nov5445.

(ii) Special attention must be given to the impact of anti-competitive conduct on small businesses and firms owned by historically disadvantaged persons.

(iii) The provisions relating to market inquiries must be strengthened so that their remedial actions effectively address market features and conduct that prevents, restricts or distorts competition in the relevant markets.

(iv) It is necessary to promote the alignment of competition-related processes and decisions with other public policies, programmes and interests.

(v) The administrative efficacy of the competition regulatory authorities and their processes must be enhanced.[26]

The five identified priorities informed the drafting of the Amendment Bill.

5. Transformative amendments

The structural features of the market that give rise to dominance are presently difficult to address under the existing provisions of the Act. The existing Act does not enable the Competition Commission or the Tribunal to address concentration, but only collusion and market abuse. In order to address this, the draft amendments regulate creeping concentration and create a new, broader market inquiry.

5.1. Creeping concentration

An important issue which the Amendment Bill seek to address is one of creeping concentration. This, in the proposed amendments, will be addressed through clause 7(a) which amends Section 12A of the Competition Act to include considerations of cross-directorships and cross-shareholdings in all mergers. Clause 8, which will be Section 12B, requires merger activities engaged in by the parties seeking a merger during a three year period preceding the sought merger to be reported. This is so in order to reveal merger activities which fell below the statutory threshold.

Creeping concentration occurs when a large firm acquires one or more smaller firms within the same industry where each individual acquisition does not necessarily substantially lessen competition while concentration within the industry increases over time.[27] The issue of

[26] Amendment Bill (note 6 above).
[27] G Robb 'Creeping mergers- should we be concerned? A case study of hospital mergers in South Africa' (2014) http://www.compcom.co.za/wp-content/uploads/2014/09/Creeping-mergers-conference-paper-Final.pdf.

creeping mergers has been acknowledged by the Competition Tribunal in two merger decisions, namely *Edgars/Rapid Dawn*[28] and *Phodiclinics/Protector*[29].

In the merger between Edgars and Rapid Dawn, the Competition Tribunal expressed with concern that:

> "It needs to be noted however that there seems to be an increase in the number of acquisitions in which relatively small players, that claim to be financially constrained, are being bought by larger competitors. The result of this is a slow but steady increase in concentration. Cognizance should be taken of this creeping level of marginal acquisitions and the effect this might have on competition in the retail sector."[30]

In the United Kingdom ('UK'), competition authorities have the power to address anti-competitive market structures. Where a market study is performed and it is found that an industry is uncompetitive in the UK competition authorities can impose remedies which include requiring firms to divest assets and business units.[31] In 2009, the Competition Commission of the UK undertook an investigation into whether any features of the market for airport services in the UK by British Airports Authority Ltd ('BAA') prevents, restricts or distorts competition with the supply/acquisition of services in the UK and whether there is an adverse effect on competition as a result.[32]In its inquiry, the Competition Commission of the UK found that the common ownership of the airports in Edinburgh and Glasgow is a feature which prevents competition, the common ownership of three airports in London also prevents competition and the common ownership of Southampton with Heathrow and Gatwick prevents competition between them. The Competition Commission of the UK concluded that the only effective remedy to the adverse effect on competition would be divestiture.[33] As such, BAA was ordered to sell the airports in Gatwick and Stansted to different purchasers. BAA was further ordered to divest either the Edinburgh or Glasgow airport.

I make reference to the UK's BAA case in order to show that other jurisdictions have taken measures which may otherwise be viewed as drastic in order to advance consumer welfare and improve competitiveness within a market. I make reference to this case also in attempt to

[28] Tribunal case number: 21/LM/Mar05 para 20 and 30.
[29] Tribunal case number 122/LM/Dec05 para 13.
[30] Edgars/Rapid Dawn (note 27 above) 20.
[31] Robb (note 26 above).
[32] Competition Commission *BAA airports market investigation: A report on the supply of airport services by BAA in the UK* (2009) at 5.
[33] Ibid 15.

ease some of the concerns which have been expressed by certain commentators in news outlets.[34]

We have already seen that it is possible for competition authorities to issue conditions which remedy conduct which occurred in anticipation of a merger through the Wal-mart/Massmart merger where the Competition Appeal Court ordered the reinstatement of workers who had been retrenched in anticipation of a merger.[35] Issuing a remedy post-merger is indeed possible, feasible and has been done in other jurisdictions as well. It would effectively address the issue of creeping concentration.

5.2. A new market inquiry

The proposed amendments envisage that "market inquiries will become the chief mechanism for analysing and tackling the structural problems in a market, thereby advancing the purposes of the Act".[36] The focus of a market inquiry would thus shift from examining the conduct of particular firms to scrutinising broadly, "the general state of competition in a market".[37] The outcomes of the 'new market inquiry' are envisaged to include measures which address market concentration and the transformation of ownership.[38] The purpose of this new market inquiry will be to enable the Commission to inquire into a market structure and form interventions and remedies to instil market features that would enhance competition and advance the purposes of the Act.[39]

The proposed amendments establish a lower threshold for the intervention of competition authorities in a market. These amendments propose that the test for market inquiries should be "whether any feature or combination of features in a market that prevents, restricts or distorts competition in a market constitutes an "adverse effect"".[40] This standard is slight similar to the inquisition made in the UK where the competitiveness of conduct is tested on whether it has an adverse effect on competition

There has been multiple concern about the duration of market inquiries and the resources that are utilised during the process. Clause 19(b) of the Amendment Bill proposes that market

[34] A Visser "Proposed changes to the Competition Act 'radical' and 'far-reaching' Concerns about an increased wariness from clients to invest" https://www.moneyweb.co.za/news/south-africa/proposed-changes-to-the-competition-act-radical-and-far-reaching/.
[35] Tribunal case number: 73/LM/Nov10 (29 June 2011).
[36] Amendment Bill (note 6 above) 19.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid 20.

inquiries be completed within 18 months. This suggestion is well received. In order for it to maximise the effectiveness of this inquiry, the person presiding over the market inquiry would have to be granted discretionary powers similar to those of a judge in terms of deciding whether to permit postponements. It appears that one of the main reasons for the protracted nature of market inquiries is the number of postponements which occur during the process. One ought to be concerned as well, that during these lengthy processes, firms that engaged in anti-competitive practices have time and opportunity to cease these practices and fix their affairs thus obstructing the inquiry.

In this proposed process, the inquiry considers: (a) whether there are structural features that have an adverse effect on competition in a market; (b) whether the Commission can impose a remedy (and then creates an obligation for it to do so); or, (c) whether another regulator is responsible for further action.[41] During this process, the Commission is required to address any structural impediments to competition, including concentration and barriers to entry for small and medium enterprises and historically disadvantaged individuals. The amendments further empower the Commission by permit it to create new remedies which are demanded by its findings in market enquiries. The Tribunal is also empowered to use any remedy within its powers to address the findings made following a market inquiry.

The "new market inquiry" gives the Commission broad and far-reaching powers in order to address concentration and patterns of ownership. Concentration has been a concern since the inception of the Competition Act and its enforcement. Competition Law is indeed the right mechanism to tackle it. Patterns of ownership, however, may be beyond the scope of competition law. This challenge may be better addressed through a policy giving effect to Section 25(5) of the Constitution. South Africa's competition policy has been a transformative one which looks beyond merely market efficiency but competition authorities would do well to limit the scope of competition law in order to ensure that business certainty and market efficiency are not adversely affected.

6. Conclusion

In South Africa, the traditionally accepted competition law objectives have reconciled with public interest objectives. If it is accepted that a market is inherently unfair and exclusionary, based on race and gender, then active measures ought to be taken to redress this. The broad and transformative ambitions of the Competition Act can only be achieved if competition authorities adopt a radical approach to the enforcement of competition law. The proposed

[41] Ibid 13.

amendments will aid competition authorities in achieving these transformative ambitions through the use of the powers to be vested in the Competition Commission in particular in market inquiries.

This article proposes that the alignment of competition law with other public policies and development initiatives is welcome because it will transform the discipline and the outcomes achieved through its application. Competition law should not be technocratic, it should respond to the developmental challenges of our time and it should be aligned with the purport and spirit of the Bill of Rights enshrined in the Constitution.

The two transformative endeavours address in the Amendment Bill may indeed remedy some of the most pressing challenges of our time, namely concentration and exclusion within the markets.

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