**Barriers to Entry, Exclusionary Strategies and Inclusive Growth**

*Romeo Kariga* and Lindiwe Khumalo***[1]

## 1. Introduction

Highly concentrated industries tend to have high barriers to entry which may be structural, regulatory, or strategic and this on its own may be used as an exclusionary strategy in the market that has the effect of limiting inclusive growth. Structural and strategic barriers are the most likely to be difficult or they may take longer to overcome making it more difficult for new entrants in the market. This has the effect of diminishing the promotion of inclusive growth. Merger regulation and regulation of prohibited practices[2] are some of those tools that competition authorities and economies may use to ensure that remedies that promote new entrants into the market are imposed to promote inclusive growth. Remedies that promote entrance by new firms are likely to counter the effect brought by high barriers for incumbents.

The paper seeks to discuss how competition policy can use remedies to ensure that barriers to entry do not deter inclusive growth especially in merger regulation and enforcement of prohibited practice cases. The paper gives a few case studies of how industries with high barriers have inhibited inclusive growth in highly concentrated markets and how remedies have been used to try to ensure that there is new entry in the market or a great improvement in consumer welfare that is likely to promote inclusive growth. It also shows how South African competition authorities have fared in ensuring inclusive growth and what still needs to be done achieve greater results. A few selected South African cases will be discussed to illustrate the potential that competition authorities possess to achieve greater results. Lastly a way forward for government and completion authorities is suggested.

## 2. The meaning of inclusive growth

While there is no consensus on what inclusive growth means, there are some significant principles that are enunciated by different authors that help in defining and measuring inclusive growth. Ali and

*Senior Legal Counsel in the Legal Services Division, Competition Commission of South Africa. The views in this paper are those of the writer and are made in his personal capacity and do not reflect the views of the Competition Commission.
** Principal Analyst in the Mergers Division, Competition Commission of South Africa. The views in this paper are those of the writer and are made in her personal capacity and do not reflect the views of the Competition Commission.
[2] A "prohibited practice" is defined in the Competition Act as "…a practice prohibited in terms of Chapter 2". Chapter 2 prohibits cartels (section 4), restrictive vertical arrangements (section 5), and abuse of a dominant position (sections 8 and 9).

Zhuang (2007) state that inclusive growth means "growth with equal opportunities," therefore it focusses on creating opportunities and making the opportunities accessible to all.[3] Ali and Soni (2007) describe inclusive growth as growth being inclusive when it increases the social opportunity function.[4] They state that this depends on the average opportunities available to the population and how these opportunities are shared amongst the population. Klasen (2010) presupposes that "inclusive growth can be characterized as broad-based growth that includes *non-discriminatory participation"* this is important for growing economies like South Africa as it has connotations of a willingness or a desire to promote growth that has been suppressed by discriminatory principles.[5] Ranieri R and Ramos RA, (2013) postulate that "a distinguishing feature of inclusive growth is that rather than being limited to income outcomes, as pro-poor growth is, it also includes the manner through which growth takes place."[6]

What is clear from the discussion above is that an inclusive growth strategy will entail creating economic opportunities which is anchored on social inclusion to ensure equal access to opportunities by all. Promoting social inclusion requires public intervention in promoting good policy and sound institutions to advance social and economic justice and level the playing fields, amongst other things. In concentrated markets which are generally characterised by high barriers to entry, there are few market participants and it becomes imperative for competition authorities to intervene by ensuring that such factors do not deter entry but allow entrants into the market in order to stimulate competition, improve consumer welfare and achieve efficient levels of growth.

### 3. Government intervention and inclusive growth

The National Treasury of South Africa stated that "A competitive, diversified and more inclusive economy is essential to improve trade performance, expand and sustain job creation, and strengthen revenue generation."[7] The National Development Plan of the South African Government ("NDP") also promotes enhanced competitiveness, expanded infrastructure, greater spatial efficiency in growing cities and accelerated rural development. It prioritises measures to build a capable, effective state that delivers services to citizens while encouraging business investment and growth. Several interrelated sectoral and developmental programmes give greater content to the outcomes envisaged in the NDP. These include the work of the Presidential Infrastructure Coordinating Commission, the Industrial

[3] Ifzal A. and Zhuang J. (2007): *Inclusive Growth towards a prosperous Asia: policy implications.* ERD Working Paper – Economics and Research Department - Asian Development Bank.
[4] Ifzal A. and Son H.H. (2007): *Measuring Inclusive Growth. Asian Development Review* – Vol. 24 pp. 11-31.
[5] Klasen S. (2010): *Measuring and Monitoring Inclusive Growth: Multiple Definitions, Open Questions, and Some Constructive Proposals*. Asian Development Bank
[6] Ranieri R. and Ramos R.A. (2013): *After All, What is Inclusive Growth? International Policy Centre for Inclusive Growth* (IPC-IG) No 188.
[7] Securing Inclusive Growth http://www.treasury.gov.za/documents/mtbps/2013/mtbps/Chapter%201.pdf p1

Policy Action Plan, the National Education Collaboration Trust and the new phase of the expanded public works programme.

The above government initiatives are aimed at ensuring that the lives of the general population in South Africa are improved. There have been calls for the competition authorities to show greater demonstrable outcomes that uplift the lives of the people of South Africa through competition enforcement.

## 4. Inclusive growth and Competition Policy

Economies worldwide are skewed due to different reasons, one being lack of growth in industries or sectors which may be characterised by numerous impediments, man-made and natural. An industry such as the South African oil industry has not grown much in the past decade due to it being a highly regulated industry resulting in high barriers. Thus in this instance the growth is muffled by legislation as the industry is highly regulated by the Department of Energy through the Minerals and Petroleum Development Act 28 of 2002 ("Minerals Act"). There are also natural barriers such as the location of oil deposits and inputs to the manufacture of oils which manifest as barriers to entry for any potential entrant into the market. With coal being available inland the only synfuel refinery is located inland and the technology used therein poses as a barrier to entry.

Hartzenberg (2006) reiterates that small and medium-sized enterprise ("SMEs") development is crucial due to the structure of the South African economy which is characterized by "high levels of concentration and the conglomerate structure of business in many sectors of the economy."[8] These are viewed as important challenges for small business development in South Africa. Also the conglomerate structure of business in South Africa and the strong vertical linkages that exist in many industries are deemed to be effective barriers to entry for smaller enterprises.

The main aims of competition policy are to promote competition; make markets work better and contribute towards improved efficiency in individual markets and enhanced competitiveness. Competition policy aims at ensuring that competition in the market place is not restricted in a way that is detrimental to consumers and for as long as it is detrimental to consumers it may inhibit growth in the economy. Competition policy should promote economic participation, economic efficiency, and consumer welfare. Therefore competition policy may be a useful tool in promoting inclusive growth. In economies like South Africa, which previously excluded certain economic groups from economic participation and/or development of industries, it can help to improve the social and economic injustices

[8] Hartzenberg T. (2006): *Competition Policy and Practice in South Africa: Promoting Competition for Development, Symposium on Competition Law and Policy in Developing Countries*. Northwestern Journal of International Law and Business, Vol. 26: Issue 3

that excluded other firms from actively participating in industries to help grow them. Competition policy has numerous tools such as merger regulation and the prevention of prohibited practices, amongst others, which may be used to achieve inclusive growth. Competition policy as a regulatory instrument is important in enhancing a country's growth as will be shown below.

The Competition Act No.89 of 1998 amended ("Competition Act") through merger control and enforcement of prohibited practises, is an instrument of competition policy that may be used to promote inclusive growth envisaged by the different government initiatives. This can happen by ensuring that mergers which occur in highly concentrated industries are carefully reviewed and if harm is identified it is remedied with actions that will allow inclusive growth. Structural remedies are deemed the best as they have a likelihood of introducing a new entrant or increasing competition in the market. In addition, proper enforcement of prohibited practice cases will yield results that will enhance competition, empower small to medium businesses to participate in markets, create jobs and reduce the cost of production while increasing the quality of goods and services.

**5. Prohibited practices and inclusive growth**

Proper enforcement of cartels and the abuse of dominance provisions in the Competition Act will greatly impact on inclusive growth in South Africa. This will happen by reducing barriers to entry, lowering the cost of doing business for market players and increasing consumer welfare. In some instances like when divestiture is ordered, a new entrant or competitor would be introduced into the market which may effectively compete with the incumbents. In other instances, competitors can be empowered to meaningfully participate in markets through proper remedies when firms that have committed prohibited practices are sanctioned. Remedies can be used in cases relating to abuse of dominance or cartels.

In terms of section 59 of the Competition Act, the Competition Tribunal of South Africa ("Tribunal") can impose an administrative penalty on a firm for a first time contravention of a cartel in terms of section 4(1)(b)(ii) and abuse of dominance in terms of sections 8(a), (b) and (d) of the Competition Act. Section 59 provides in relevant part that the Tribunal may impose an administrative penalty only for a cartel in contravention of section 4(1)(a), and for prohibited practice in terms of section 8 (c) if the conduct is substantially a repeat by the same firm of conduct previously found by the Tribunal to be a prohibited practice.

By far the Competition Commission of South Africa ("Commission") and Tribunal have been successful in imposing penalties on firms found to have contravened the Competition Act. While fines have been a useful tool in the arsenal of competition authorities, there have been calls from the general public and government to show greater impact on markets after imposition of penalties. With such demands, the

competition authorities need to look beyond the traditional fines and come up with remedies that effectively stimulate competition in the markets and ensure that consumers benefit from the efforts of competition authorities. The Commission seems to be headed towards that direction with the adoption of its new 2015-2020 Strategic Plan whose vision is "Regulating for a growing and inclusive economy."[9]

The demands for demonstrable outcomes that benefit consumers are not only being called for by the general public and government. They form the basis upon which the Competition Act was enacted.[10] It is arguable that the outcomes that the Competition Act is enacted to achieve may not be achieved by competition policy alone but by broader policy instruments that work hand in hand with competition policy.

Apart from the penalties that can be imposed in terms of section 59, which the competition authorities have used to a large extent, the Tribunal is further empowered by section 58 to impose remedies broader than fines when a firm has committed a prohibited practice. Section 58 of the Competition Act provides that the Tribunal may:

> "…make an appropriate order in relation to a prohibited practice, including—
>
> (i) interdicting any prohibited practice;
>
> (ii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;
>
> (iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section;
>
> (iv) ordering divestiture, subject to section 60;
>
> (v) declaring conduct of a firm to be a prohibited practice in terms of this Act, for purposes of section 65;
>
> (vi) declaring the whole or any part of an agreement to be void;
>
> (vii) ordering access to an essential facility on terms reasonably required".

Section 58 therefore serves to confer broad powers on the Tribunal to impose any "*appropriate order*" in relation to a prohibited practice. Even in cases where a firm is a first time offender under section

[9] Competition Commission of South Africa Strategic Plan 2015-2020 at p18, accessed at http://www.compcom.co.za/wp-content/uploads/2015/03/Strategic-Plan-2015-2020.pdf.

[10] The Preamble of the Competition Act states that the Competition Act is meant to:

- Promote the efficiency, adaptability and development of the economy;
- Provide consumers with competitive prices and product choices;
- Promote employment and advance the social and economic welfare of South Africans;
- Expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- Ensure that small- and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- Promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

8(c) and section 4(1)(a), section 58 empowers the Tribunal to make an appropriate order to address the harm identified. This may take the form of remedies to address the harm caused by a cartel or the conduct of the dominant firm in a specific market. Remedies for cartels and abuse of dominance cases have the potential to impact the market and greatly contribute to inclusive growth in a great way since the remedies usually involve greater benefits for consumers.

5.3.1 Abuse of dominance and inclusive growth

Section 58 has not been broadly explored by the competition authorities to remedy wrongs where a firm has contravened the Act under section 8(c). The section was utilised in the ***Senwes***[11] case after it had been remitted from the Constitutional Court. The Commission proposed divestiture though Senwes had been found to have contrived section 8(c) of the Act, on which a penalty cannot be imposed for a first time offender. The case was settled between the Commission and Senwes.[12]

The Commission more recently has used section 58 in the remedies it is seeking in the predatory pricing case against **Media24.**[13] In that case Media24 was found guilty of predatory pricing under section 8(c), which does not require a penalty for a first time offender. After the finding of the Tribunal, the parties had to file remedies proposals in preparation for the remedies hearing. In that case the Commission asked for Meda24 to be ordered to pay an amount of R15 500 000.00 to a Community Newspaper Development Fund which would be used to sponsor a new entrant in the Goldfields Region to remedy the harm caused by the pricing behaviour of Media24. Media24 objected to the establishment of the fund arguing, among other things, that the fund amounts to the payment of an administrative penalty when Media24 is a first time offender under section 8(c) on the conduct decided on by the Tribunal. The case is still to be heard by the Tribunal.

The Commission also used settlement agreements with **Telkom**[14] to come up with creative solutions that benefit the consumers at large. The Tribunal commended the Commission for not just focusing on penalties but for looking for broader solutions to stimulate and enhance competition for the ultimate

[11] *Competition Commission v Senwes* Limited case documents for the case in the Tribunal, Competition Appeal Court, Supreme Court of Appeal and Constitutional Court accessed at http://www.comptrib.co.za/search/SphinxSearchForm?Search=senwes
[12] Cf *Competition Commission v Senwes Limited* Tribunal Case Number 016484 accessed at http://www.comptrib.co.za/assets/Uploads/110CRDec06-016485.pdf
[13] *Competition Commission v Media24 Limited* Tribunal Case Number 013938/CR154/Oct11 accessed at http://www.comptrib.co.za/assets/Uploads/Reasons-for-Decision-Media24-Section-8-Case-Signature-Documentfinal.pdf
[14] *Competition Commission v Telkom SA SOC Limited* Tribunal Case Number 016865 accessed at http://www.comptrib.co.za/assets/Uploads/016865-Telkom.pdf

benefits of consumers. In that case Telkom admitted guilt to engaging prohibited practices;[15] pay a financial penalty of R200 million, functional separation between Telkom's retail and wholesale divisions along with a transparent transfer pricing programme to ensure non-discriminatory service provision by Telkom to its retail division and ISPs; effective monitoring arrangements of its future conduct; and wholesale and retail commitments for 5 years estimated to yield R875 million savings to customers.

All the above cases show that the competition authorities can indeed seek remedies that go beyond the imposition of administrative penalties and be able to greatly impact market and thus spur inclusive growth.

The low usage of creative remedies in abuse of dominance cases may be as a result of few cases being successfully prosecuted by the Commission. The Commission thus needs to carefully select cases to prosecute, and prosecute them well to achieve greater results. The cases need to be in markets that greatly impact consumers and have the potential to meaningfully contribute to inclusive growth.

5.3.2 Cartels and Inclusive Growth

The impact of cartel enforcement in South Africa on inclusive growth has become the focus of a recent World Bank Report.[16] The World Bank looked at the cartels that South Africa successfully dealt with in the construction inputs, food and related markets and healthcare products over a period of 15 years.[17]

The World Bank Report found that after the intervention in the cement industry in 2011, the price of cement decreased by 7.5%-9.7%. Furthermore the first time is 80 years in 2014, two new firms managed to enter into the cement market creating approximately 3 400 jobs.[18] Though it is not clear that the new entrants successfully entered the cement market because of the breaking down of the cement cartel in 2011, one cannot afford to ignore the impact of that. Indeed the breaking off of the

[15] Telkom admitted to engaging in margin squeeze to its ISP competitors, excessive pricing to customers for some services; refusing to give a competitor access to an essential facility when it is economically feasible to do so; engaging in exclusionary acts and selling services by forcing the buyer to accept a condition unrelated to the contract. These acts were in contravention of section 8(a), 8(b), 8(c), and 8(d)(ii) of the Competition Act,

[16] South Africa Economic Update, Promoting Faster Growth and Poverty Alleviation Through Competition, World Bank Group, February 2016, Edition 8.

[17] 76 cartels were detected and sanctioned in the following order: 17 in construction and inputs, 12 in food and related markets and 7 in healthcare products.

[18] World Bank Report *Supra* at p44-46.

cartel contributed to the ease of entry into the market for the two new firms and to lowering the costs of doing business.

By tackling cartels in the wheat flour, poultry, pharmaceuticals, and maize, the costs of those products for the poor have decreased by 7-42% for wheat flour, 25% for poultry, 10-15% for pharmaceuticals and 10% for maize. The World Bank Report states that by tackling cartels in these four essential items for the poor, 202 000 people stood to be lifted above the poverty line, poverty rate was cut by 0.4%, the lower retail prices helped the cash grants for the poor to stretch further and the savings gained for the bottom 40% of the population were 3.4 times larger than that for the top 40%.[19]

While the World Bank Report is commendable in trying to measure the impact of competition on the reduction of poverty, it uses a number of economic computations that have wide ranging assumptions. This is because poverty is a wide concept and many factors affect its reduction and it is difficult to attribute certain achievements to competition authorities.

.

The World Bank Report correctly recommends that regulation needs to support competition in the telecoms market and that it needs to be reformed to stimulate entry and competition in the telecoms market. Currently, South Africa has access to slower network that is very expensive when compared to other countries. For instance, 1GB data costs US$14.10 in South Africa yet it costs US$22.10 in Cameroon. Yet South Africa ranks 75$^{th}$ out of 123 countries on World Economic Forum's Network Readiness and its average download speed of 4.5MBps ranks 119 globally.[20] Even though the Commission achieved a lot in the settlement with Telkom, many more benefits need to be achieved and to trickle down to the consumers. Even though the competition authorities have achieved a lot in the telecoms industry particularly by prohibiting transactions that may have caused more harm to consumers, measures need to be designed to increase competition and improve the welfare of consumers.

Case Study of Pioneer Settlement

The case of *Pioneer Foods*[21] raises a lot of positive lessons and clearly shows that settlement agreements in cartel cases can be used to contribute meaningfully to economic development that is broad based.[22]

[19] World Bank Report *Supra* at p53-58.
[20] World Bank Report *Supra* at p46-53.
[21] *Competition Commission v Pioneer Foods (Pty) Ltd* Tribunal Case Numbers 10/CR/Mar10 and 15/CR/Mar10 accessed at http://www.comptrib.co.za/assets/Uploads/1015CRMar10-Pioneer.pdf
[22] Cf T Bonakele and L, *Designing Appropriate Remedies for Competition Law Enforcement, The Pioneer Settlement Agreement*, Journal of Competition Law and Economics, June 2012, accessed at

The Commission referred two complaints against Pioneer. The first complaint related to white maize products cartel which comprised of all the major market players including Tiger Brands, Pioneer, Foodcorp, and Premier. The Commission concluded that that the respondents had contravened section 4(1)(b)(i) of the Act. The second complaint referred to the Tribunal related to the milled wheat products cartel against Tiger Brands, Pioneer Foods, Foodcorp and Godrich Milling. The Commission found that the respondents had been involved in a cartel in contravention of section 4(1)(b)(i) and (ii) of the Act.

The Commission alleged that Pioneer's conduct across the various industries mentioned above likely harmed consumers through higher prices for essential food items together with stifling entry and expansion by competitors particularly small and medium enterprises. In the settlement, Pioneer undertook to (i) desist from conduct which infringes on the Act; (ii) adjust the specific prices of flour and bread products over a defined period to reduce its gross profit margin by R160 million; (iii) increase capital expenditure by R150 million over and above its current capex budget; and (iv) pay an administrative penalty of R500 million to the National Revenue Fund, of which R250 million was allocated for the establishment of the Agro Processing Fund.

The remedies that were agreed to by Pioneer had the positive impact of reducing the price of bread for a period of time. In addition, the penalty was crafted in a creative way to address the harm identified. More particularly the establishment of the Agro Processing Competitiveness Fund had a positive impact in the affected sector. The Commission conducted an impact assessment in which it studied the impact of that fund.[23] The impact assessment showed that as of September 2014, 29 firms benefited from the fund, and 2 266 jobs were created after the approval of R183 million for disbursement to the selected small to medium enterprises. The fund had grown to R355 558 931.00 through co-funding from the Industrial Development Corporation.[24]

Indeed competition authorities need to come up with creative remedies, like in the *Pioneer* case, that ensure that the harm identified is rectified and that competition in the affected sector is improved for the ultimate benefit of consumers. In addition, the improvement of competition in a sector through

---

http://www.compcom.co.za/wp-content/uploads/2014/09/Designing-Appropriate-Remedies-for-Competition-Law-Enforcement-The-Pioneer-Foods-Settlement-Agreement-25082011.pdf; and L Mncube and A Ngwenya, *South Africa's Pioneer Settlement: an innovative way to remedy competition law violations in developing countries?* accessed at https://www.researchgate.net/publication/265109325_South_Africa's_Pioneer_Settlement_an_innovative_way_to_remedy_competition_law_violations_in_developing_countries

[23] T Mandiriza, M Viljoen and T Sithebe, *Has the Agro-Processing Competitiveness Fund Achieved its Objectives?* Competition News Edition 52 May 2015 p1.
[24] T Mandiriza *et al Supra* at p2.

strengthening small to medium enterprises ensures that more people are lifted out of poverty through employment creation.

## 6. Market Inquiries and Inclusive Growth

The Commission has been empowered through the market inquiry provisions that came into operation on 1 April 2013 to impact various markets where competition is not working.[25] The market inquiry provisions empower the Commission to analyse markets where competition is perceived not to be functioning well and to establish concretely why competition is not functioning well or at all, and what actions could be taken to increase the transparency and competition in those markets. The recommendations of the market inquiry go beyond prosecution of firms when they have been found to have contravened the Competition Act, but include recommendations on policy changes that will stimulate or strengthen competition.

The significance of this is that while it is clear that a market inquiry cannot solve all the competition problems in a specific market, it brings a lot of change in how businesses is conducted in various markets and thus improve competition in markets and consumer welfare. When the market inquiry is announced and conducted, there is a lot of focus on the market participants. Though the inquiry may not bring results in the short run, the focus on the market participants generally force them to change their behaviours in the marketplace.[26] For a market inquiry to achieve great results, great care must be taken in choosing the industry to be subjected to the market inquiry, designing and implementing the project plan, ensuring that there is participation from all key stakeholders including sector regulators, and implementing a proper formalised follow up and reporting mechanisms after the inquiry.[27] It is imperative that the Commission gives great emphasis to the follow up strategies after the conducting of the market inquiry to achieve demonstrable results.

## 7. Merger regulation, barriers to entry and inclusive growth

A review of barriers to entry in antitrust cases involves an investigation into what an entrant firm faces in a particular industry which must be overcome for it to become competitive. This has connotations of

[25] In terms of section 43A of the Act, a "market inquiry" should be interpreted to mean: *"A formal inquiry in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm".*
[26] Cf R Kariga and N Ally, *Can the Commission fix Competition Problems with Market Inquiries?* Accessed at http://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/5534a405e4b01b38213b5802/1429513221500/Neelofah+Ally+and+Romeo+Kariga_+Market+Inquiries.pdf
[27] *Ibid* at p15.

time, requirements and other factors. The Irish Merger Guidelines[28] refer to a barrier to entry as any factor that prevents or hinders effective new entry that might otherwise be capable of preventing a substantial lessening of competition arising from the merger. Barriers to entry are thus specific features of the market that give incumbents advantages over potential competitors. Von Weizsacker (1989) quotes Stigler (1968) who proposes that "a barrier to entry may be defined as a cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry."[29]

In merger analysis if the merger increases barriers to entry, the impact on competition is likely to be more severe since new entry that may have been possible pre-merger is likely to be prevented or impeded post-merger. Barriers to entry may be structural (technological), regulatory (legal), or strategic. When barriers are structural they may be driven by technology and production methods eg mineral deposits or other factors that may be needed to establish an effective presence in the market. These are also prevalent in markets driven by R&D such as maize growing and pharmaceuticals. Structural barriers on the other hand are likely to arise in markets which that are characterised by network effects. These markets are prone to 'tipping' which occurs "when customer preference gives one firm an advantage and the balance of power shifts in its favour, leaving it as the clear market leader."[30] This usually occurs when customers are reluctant to switch, thereby making it more difficult for new entrants to gain a sufficient customer base to be profitable.

Regulatory barriers include government legislation eg restricting the number of licences and legally enforceable intellectual property. With strategic barriers the deterrence of entry is caused by the actions that have been taken or threatened by incumbents (or that are likely in the future). The Australian Competition and Consumer Commission (ACCC) Merger Guidelines views strategic barriers as those that arise because of actions or threatened actions by incumbents to deter new entry, including but not limited to risk of retaliatory action by incumbents against new entry, such as price wars or temporarily pricing below cost, creation and maintenance of excess capacity by incumbents that can be deployed against new entry, creation of strategic customer switching costs through contracting, such as exclusive long-term contracts and termination fees and brand proliferation by incumbents, which may crowd out the product space leaving insufficient opportunities for new firms to recover any sunk entry costs, amongst others.

The International Competition Network through the ICN Remedies Handbook (2006) states that in essence, a divestiture seeks to preserve competition in a relevant market following a merger by either creating a new source of competition through the sale of a business or set of assets to a new market

[28] Guidelines For Merger Analysis adopted by the Competition and Consumer Protection Commission on 31 October 2014, accessed at http://ccpc.ie/sites/default/files/CCPC%20Merger%20Guidelines_1.pdf
[29] Von Weizsacker C.C.(1980): *A Welfare Analysis of Barriers to Entry*. The Bell Journal of Economics, Vol. 11, No. 2, pp. 399-420.
[30] Customer loyalty and long established relationships between customer and supplier also causes tipping.

participant or strengthening an existing source of competition through the sale to an existing market participant independent of the merging parties. To be effective, a divestiture will require the sale of an appropriate divestiture package to a suitable purchaser through an effective divestiture process. Another form of a remedy may require an assignment of a license of an IP right that is exclusive, irrevocable, and non-terminable with no ongoing royalties for a new entrant to be sustainable in the market.

A few landmark cases where the competitive harm caused by barriers to entry and instances where remedies were successfully used by the Commission to ensure entry of new firms into markets where they had previously been prevented from doing so. These cases have been able to promote inclusive growth in different ways. In **2002** the Tribunal approved with conditions the merger between ***Nampak Limited and Malbak Limited***.[31] The parties were competitors in the market for the manufacture of roofing insulation products which was highly concentrated and had high barriers to entry. The parties were ordered to sell the Bubblepack insulation machine currently manufacturing the products Alucushion, Alububble, and Bubblefoil or as distributed under other brandnames. The seller was required to provide, at the option of the purchaser, technical assistance, maintenance support and/or anything necessary to facilitate the commissioning of the Bubblepack machine by the purchaser. By ordering the merging parties to sell the machine it was contemplated that an effective competitor would enter and remain in the market since barriers were high.

In **2012** the Tribunal approved with conditions a merger between ***Nestlé SA ("Nestlé") and The Infant Business of Pfizer Inc.[32] ("Pfizer")*** where the merging parties were manufacturers of infant milk formula (IMF) in a market which was highly concentrated and had very high regulatory and other structural barriers. As a remedy the merging parties had to divest part of its business to a competitor and to ensure that the competitor was able to sustain the business therefore the transaction was approved with conditions to alleviate harm to the extent that it was exerted by high barriers. The structural remedies (involved IP and R&D) and strategic barriers (branding) imposed ensured inclusive growth as it encouraged the new entrant to stay in business for a 10 year period with the support of the merging parties.

In **2012** the Tribunal approved with conditions a merger between ***Oceana Group Limited ("Oceana") and V&A Cold Store (Pty) Ltd (V&A Cold Store).[33]*** The Commission had found that the barriers to entry were very high in the market for cold storage of loose fish as well as packaged fish (mainly) destined for the export market due to *inter alia* a lack of space in the harbour for expansion of

[31] Tribunal Case Number 29/LM/May02 accessed at http://www.comptrib.co.za/assets/Uploads/29LMMay02.pdf.

[32] Tribunal Case Number 65/LM/Jun12 accessed at http://www.comptrib.co.za/assets/Uploads/65LMJun12-015248.pdf

[33] Tribunal Case Number 77/AM/Jul12 accessed at http://www.comptrib.co.za/assets/Uploads/77AMJul12-2.pdf.

existing operations and potential entry of new players. Remedies that ensured entry were imposed to ensure that competitors and new entrants could have access to the storage facilities at the harbour.[34]

In **2014** the Tribunal approved the merger between ***Ferro Industrial Products (Pty) Ltd (Ferro Industrial) and Arkema Resins (Pty) Ltd[35] (Arkema)*** on condition that the new merged entity must sell off, amongst others, all product formulations and specifications belonging to Arkema for its unsaturated polyester resin or UPR products in order to address the competition concerns brought about by the transaction. The market was highly concentrated with very high barriers to entry. A new entrant purchased the assets in 2015 which is indicative of the authorities' drive for inclusive growth.

The Commission's mandate for merger regulation also includes assessing public interest considerations and this is premised on Section 12A(3) of the Competition Act. This entails an analysis of the effect that a merger will have on employment, a particular industrial sector or region, the ability of small businesses or firms owned by historically disadvantaged persons to compete and the ability of national industries to compete in international markets. The Commission has successfully saved many jobs through enforcement of the public interest provisions. More still needs to be done in enforcing the other provisions of public interest issues to achieve more inclusive growth. For instance, the Minister of Economic Development intervened in the merger between ***Walmart Limited and Massmart (Pty) Ltd[36] (Walmart/Massmart)*** and more was achieved for small businesses though some criticise such interventions in competition cases by the government. The *Walmart/Massmart* case dealt with the effect of a merger on firms owned or controlled by historically disadvantaged individuals in becoming competitive ("BEE and SMMEs. The merger outcome ensured that SMME suppliers are included in the complex supply chain of the giant retailer which ultimately promoted inclusive growth. Though the merged entity has not been able to grow and affect the South African market as envisaged during the merger analysis, arguably SMME suppliers benefited from the imposed conditions.

Von Weizsacker (1980) states that "…entry into an activity may be socially suboptimal because the activity is not sufficiently protected." This is viewed as a case of positive externalities[37]or it is suboptimal as an incumbent firm is protected from entry, i.e., incumbent firms are overly protected." He postulates that barriers to entry are "socially undesirable limitations of entry, which are attributable to

[34] *Ibid* at par 22.
[35] Tribunal Case Number 018358 accessed at http://www.comptrib.co.za/assets/Uploads/Ferro-Reasons-25-September-2014-1.pdf.
[36] Tribunal Case Number 73/LM/Nov10 accessed at http://www.comptrib.co.za/assets/Uploads/73LMNov10-reasons-order.pdf; and Competition Appeal Court Case Number 110 and 111/CAC/Jul11 accessed at http://www.comptrib.co.za/assets/Uploads/Wal-Mart-and-Massmart-decision/110111CACJun11-Walmart-judgment.pdf
[37] An externality is a situation in which the private costs or benefits to the producers or purchasers of a good or service differs from the total social costs or benefits entailed in its production and consumption. An externality exists whenever one individual's actions affect the well-being of another individual -- whether for the better or for the worse -- in ways that need not be paid for according to the existing definition of property rights in the society.

the protection of resource owners already in the industry." In essence this means that when there are barriers to entry the benefits accrue to those already participating in the industry at the exclusion of incumbent firms. Von Weizsacker (1980) then suggests that "competition authorities" are well placed to help improve the allocation of resources and thus promote entrance into concentrated markets. One way of achieving this in merger regulation is the use of remedies.

Remedies may thus be used by competition agencies to resolve and prevent the harm to the competitive process that may result as a consequence of a merger or an anti-competitive dominant firm who is already in a market with high barriers. Remedies may either be structural or behavioural. Structural remedies are generally one-off remedies that intend to restore the competitive structure of the market. Behavioural remedies are normally ongoing remedies that are designed to modify or constrain the behaviour of merging firms (in some jurisdictions, behavioural remedies are referred to also as "conduct remedies"). Given that mergers bring about structural changes in the market, a structural remedy frequently will be the most appropriate solution when the merger gives rise to competition concerns.

**8. Way forward for antitrust**

Antitrust agencies and government industrial policy are important instruments that can be used to achieve great impact on the economy as they are able to measure inclusive growth through various tools. Effective merger regulation will go long way in reducing barriers to entry, stimulating or increasing competition in different markets while achieving greater consumer welfare. Merger regulation in terms of the Competition Act can achieve other objectives through the public interest provisions of the Competition Act. This will require competition authorities to seek solutions that go beyond saving jobs when mergers occur.

There is great need to move away from simply seeking administrative penalties and seek creative remedies in relation to competition law contraventions, remedies that bring changes in the behavior of market participants and remedies that greatly benefit the consumers. The competition authorities may have to intervene in sectors like telecoms through collaboration with industry regulators to achieve more results. Market inquiries may be the best in many sectors where competition is perceived not to be working. In such instances, high impact markets and cases must be selected to achieve results that are easily measurable and whose impact is easily visible in the market place.

While the competition authorities have achieved a lot since being established, the greatest difficulty seems to be measuring the impact of their efforts on the economy and poverty reduction. This remains an area that requires great focus as the competition authorities seek to show their effectiveness in impacting the economy and poverty reduction.