

## **EXPERT REPORT RW (A)**

### **THE LEGISLATIVE PURPOSES AND HISTORY OF THE SOUTH AFRICA COMPETITION ACT**

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The Competition Act creates a Competition Commission, Competition Tribunal and Competition Appeal Court to implement a robust competition law and policy, both to promote competitive markets and economic efficiency, and to advance socio-economic equity and development. The history and text of the Act make clear that equity considerations are not to be treated as platitudes, but equal and complimentary policy goals alongside efficiency objectives. They help define the nature of efficiency under the Act, and should help competition authorities set priorities.

South Africa's Competition Act was adopted in 1998 to remedy inherited competition laws that were too weak and not tailored to meet the circumstances of the New South Africa. The previously existing legal regime failed to address the needs of South Africa in at least four respects.

First, the old competition law and enforcement system was ineffectual, even after passage of a new act in 1979 and amendments in 1986. "It is widely acknowledged that there were so many technical flaw with the 1979 Act and its 1986 amendments that competition law has again been judged relatively ineffectual, on both substantive and logistical grounds," concluded the Department of Trade and Industry's 1997 Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development.<sup>1</sup>

Second, and relatedly, by the 1990s, South Africa found itself characterised by a high level of economic concentration.<sup>2</sup> The competition law did not provide a framework to address the issue of economic concentration. The previous "Act does not address the extent of concentration of ownership nor market share; there are no provisions for vertical or conglomerate relations; there is little leverage to prevent (or even know in advance) mergers and acquisitions which intensify concentration; and the Act does not contain strong prohibitions of anti-competitive activity," concluded the Competition Policy Guidelines.<sup>3</sup>

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<sup>1</sup> "Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development," Department of Trade and Industry, 27 November 1997, 3.2.4.

<sup>2</sup> *Id* at 1.1.

<sup>3</sup> *Id* at 3.3.1

Third, post-apartheid South Africa needed a law that was cognisant of apartheid and other discriminatory laws of the past, and their impact on the national economy. The law needed to enable competition enforcement agencies to take appropriate action to remedy historic imbalances, and also to differentiate among business practices so as to permit and promote empowerment initiatives.<sup>4</sup>

Finally, moving forward in the post-apartheid era would require a competition policy and law that was explicitly developmental in orientation. Competition policy was to be carried out both to ensure the functioning of competitive markets and to ensure that the economy was directed to advance the broad national interest in development. "An efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans," states the Preamble to the Competition Act.<sup>5</sup>

To replace the previous law, the Competition Policy Guidelines outlined a Competition Act that was intended to provide a more robust system for promotion and enforcement of competition policy, to embody an equity orientation and to incorporate a developmental perspective. The Competition Policy Guidelines asserted that "competitiveness and development are mutually-supporting rather than contradictory objectives, if policies are properly aligned."<sup>6</sup>

The Competition Policy Guidelines' policy goals are reflective of the aspirations for South Africa's macroeconomic policy, and the Competition Policy Guidelines specifically locates competition policy in the framework of GEAR (Growth, Equity and Redistribution Framework Strategy), as well as the RDP (Reconstruction and Development Programme). "Government envisaged the prohibition of anti-competitive practices and the adaptation of corporate structure to meet broader socio-economic objectives. These objectives were amplified in GEAR, which became the Government's macroeconomic strategy in mid 1996:

'1.1 As South Africa moves toward the next century, we seek

- a competitive, fast-growing economy which creates sufficient jobs for all workseekers;
- a redistribution of income and opportunities in favour of the poor;
- a society in which sound health, education and other services are available to all; and
- an environment in which homes are secure and places of work are productive."<sup>7</sup>

Looking forward to the creation of a new competition law, the Competition Policy Guidelines emphasised the compatibility between competition and development,

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<sup>4</sup> Competition Act, Preamble; Competition Act 2.6; See also Eleanor Fox, "Equality, Discrimination, and Competition Law: Lessons From and For South Africa and Indonesia," *Harvard International Law Journal*, Spring 2000, 41 *Harv. Int'l L.J.* 579.

<sup>5</sup> Competition Act, Preamble.

<sup>6</sup> "Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development," Department of Trade and Industry, 27 November 1997, Executive Summary, 2.

<sup>7</sup> *Id* at 2.2.5.

efficiency and equity. "The expected benefits of competition policy include greater competitiveness and more sustainable, equitable development."<sup>8</sup>

A key means to achieve this harmony between competitive markets and development was to ensure that developmental concepts infuse competition policies, and a concern for competition and competitiveness inform developmental efforts. Competition Policy Guidelines examples of this mutual reinforcement include:

\* Competition policy is intended to "correct, over time, existing racial and gender biases in ownership and control throughout the public sector."<sup>9</sup>

\* Competition policy accepts the logic of market competition and importance of property rights "within a developmental context that consciously attempts to correct structural imbalances and past economic injustices."<sup>10</sup>

\* Competition policy should be enacted mindful of South Africa's impact on economically weaker countries in the region.<sup>11</sup>

The core focus of the competition authorities, the Competition Policy Guidelines envisaged, would be directed to the "efficiency and distributional consequences of significant concentrations of economic power," given that such concentrations of power may be manifested in "pricing behaviour prejudicial to consumers."<sup>12</sup>

The Competition Policy Guidelines noted that one cost of firms abusing positions of economic dominance is lost "dynamic efficiency," the dynamic, process of self-reinforcing benefits attached to competition.<sup>13</sup>

Proposing that the new competition law be directed at restrictive practices and abuse of dominance,<sup>14</sup> the Competition Policy Guidelines specified that while the new competition authorities should direct their attention to anti-competitive practices, they should retain power to institute structural remedies.<sup>15</sup>

In all such matters, the Competition Policy Guidelines concluded, equality and development considerations were fundamental. "It is therefore critical that all government policies -- including competition policy -- are aligned so as to reduce the uneven development, inequality and absolute poverty which is so prevalent in South Africa."<sup>16</sup>

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<sup>8</sup> *Id* at 10.1.

<sup>9</sup> *Id* at 2.4.3.

<sup>10</sup> *Id* at 2.4.11.

<sup>11</sup> *Id* at 2.4.2.

<sup>12</sup> *Id* at 8.1.1.

<sup>13</sup> *Id* at 8.1.1.

<sup>14</sup> *Id* at 8.2.3.

<sup>15</sup> *Id* at 8.1.4.

<sup>16</sup> *Id* at 10.1.

Particularly, this emphasis on development, equality and poverty reduction should be manifested in competition policy priority setting, the Competition Policy Guidelines stated: "And it is crucial that as Government considers which competition policy cases should be taken up, those that have the greatest developmental impact are prioritised."<sup>17</sup>

The Competition Act that emerged in 1998 embodies the complimentary goals of competitive markets, development and equity that had been highlighted in the Competition Policy Guidelines.

The purpose of the Act is described as "to promote and maintain competition in the Republic in order –

- (a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;
- (c) to promote employment and advance the social and economic welfare of South Africans;
- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."<sup>18</sup>

Thus the explicit purposes of the Act include promoting development, providing consumers with competitive prices and advancing South African social and economic welfare.

The Act's explicit developmental concern enlivens it with a motivation distinct from the operational principles of many industrialised country competition laws, as least as most commonly interpreted in the present era.<sup>19</sup> Yet as one prominent American commentator, New York University Professor Eleanor Fox has pointed out, South Africa's decision to simultaneously pursue efficiency, equality and distributional considerations in its competition policy may not only be a legitimate choice for the nation, but the most effective means to achieve efficiency goals. "Until the disempowered fully participate in the economy, the efficiency potential of the nation is not likely to be realised," she concludes.<sup>20</sup>

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<sup>17</sup> *Id* at 10.1.

<sup>18</sup> Competition Act, Chapter 1.2.

<sup>19</sup> Eleanor Fox, "Equality, Discrimination, and Competition Law: Lessons From and For South Africa and Indonesia," *Harvard International Law Journal*, Spring 2000, 41 *Harv. Int'l L.J.* 579, 593.

<sup>20</sup> *Id.*