

South Africa's Current Competition Policy Cases: The Search for Economic Growth

Tamara Paremoer

Divisional Manager of Mergers and Acquisitions, Competition Commission of SA²⁷

The 2018 amendment of the Competition Act identified the de-concentration of the South African (SA) economy and addressing the racially skewed spread of ownership and control as its primary objectives. These amendments flow from the purpose of the South African competition law, which recognises that effective competition is not only important to improve efficiency and deliver lower prices to consumers, but that opening the economy to greater economic participation by all South Africans is also a question of equity.²⁸ As emphasised by Stiglitz, market power has distributional effects: the rents of monopolies come at the expense of consumers. Therefore, increases in market power increase inequality.²⁹

The high levels of concentration, low levels of dynamism and high barriers to entry in the SA economy are well documented, as are the low levels of black ownership and control of firms.³⁰ These features of the economy impose several constraints to growth. They limit the ability of many South Africans in being able to participate meaningfully in economic activity, and they increase the magnitude of the effects of failure or exit by any one firm (e.g. Edcon merger³¹ where more than 43 000 jobs were at risk; and Sibanye/Stillwater merger³² where 12 900 jobs were lost). Conversely, opening markets to participation enhances mobility and opportunity,

thus increasing equity and efficiency. Competition law assists in removing barriers to productive economic participation by “outsiders” based on the principle that inclusion contributes to dynamism and efficiency.³³

These dynamic effects of competition, as well as the importance of competition policy in promoting transformation (and transformation, in turn, contributing to greater dynamism), are the key themes of my contribution, which links competition policy, growth and employment.

The contribution is structured around two key areas of work of competition authorities:

1. The first relates to merger control and focuses on retention/protection of employment and the extent to which mergers promote transformation of ownership. Merger control also contributes to addressing concentration by employing forward-looking analysis to prevent further concentration in the economy.
2. The second relates to de-concentration. It focuses on curtailing abuse of dominance and opening markets and value chains to greater competition. I will focus on the ways in which recent market inquiries have focused on facilitating entry by small and black-owned firms.

²⁷ The views expressed in this paper are my own and do not necessarily reflect those of the Commissioners or the Competition Commission of South Africa.

²⁸ Fox, E and Barkhoum, M. (2019). *Making Markets Work for Africa*. Oxford University Press.

²⁹ Stiglitz, J. (2017). *Towards a Broader View of Competition Policy* in Bonakele, T; Fox, E and Mncube, L. (eds). *Competition policy for the New Era. Insights from BRICS countries*. Oxford University Press.

³⁰ Buthelezi T., Mtani T. and Mncube L. (2018) *The extent of market concentration in South Africa's product markets* and Roberts, S. (2017) *Barriers to Entry and Implications for Competition Policy* in Bonakele, T; Fox, E and Mncube, L. (eds). *Competition policy for the New Era. Insights from BRICS countries*. Oxford University Press.

³¹ Parentco (Pty) Ltd/Edcon Limited [LL117Sep16]. Competition Tribunal of South Africa

³² Sibanye Gold Limited (T/A Sibanye-Stillwater)/Lonmin Plc [LM315Mar18]. Competition Tribunal of South Africa.

³³ Fox and Barkhoum *op cit*.

Retention of employment: public interest in merger control

Competition, and particularly mergers, are often seen as job-destructive, but this is not true on aggregate. As emphasised above, more competition tends to result in lower prices, higher quality, greater participation, increased output and an associated increase in job creation overall.³⁴

The SA merger regime explicitly incorporates elements of “public interest”, which include the protection and promotion of employment. This means that authorities are required to assess the effect of the merger on public interest, including employment, in addition to assessing its effect on competition. Any adverse effects on the public interest are usually remedied through conditions. Prior to the amendments to the Act, the public interest provisions were the only section of the Act that explicitly called for the consideration of increased participation in deliberations on competition matters. This has now been extended to the abuse of dominance provisions.

The interrogation of the rationale for merger-specific employment losses is particularly important given that a merger represents a break in the implicit contract between worker and employer.³⁵ The provisions also push back against claims of merger-related efficiencies that are linked to restructuring, and often simply represent a transfer from labour to capital.

In practical terms, the authorities assess the effect of the merger on aggregate employment and on the quality/terms of employment. Public interest conditions often place a two to three year moratorium on job losses (though periods of up to five years have been imposed, for example in Clicks/Netcare³⁶) and have a bias towards protecting unskilled workers who are least likely to find alternative employment in the

current economic climate. If job losses cannot be prevented, merging parties will usually establish a re-skilling and employment fund to assist workers in preparing for alternative forms of work, or to support the education of a member of their household (e.g. a reskilling fund was imposed in the merger between CPG/Merchandising business of Imperial³⁷ and Boundary Terraces/Bravo³⁸). In the past five years, more than 165 000 jobs were saved as a result of effective merger control.

These assessments become more complex in a slowing economy with an increasing number of cases involving ailing or failing firms. The authorities are called upon to make much tougher calls because these transactions are assessed against a counterfactual of firm exit. In this case, the retention of *some* employment is always better than the alternate, and the case would usually turn on the competition assessment in light of the likely counterfactual (e.g. Videx/Aveng where the Commission prohibited a merger in various steel products including mining roof bolts on competition grounds, despite 100 job losses that would have been saved if the merger was approved).³⁹

In terms of the promotion of a greater spread of ownership, the recent amendments require a two-fold assessment. The authorities must assess the effect that a merger may have on “*the promotion of a greater spread of ownership, in particular to increase the levels of ownership of historically disadvantaged persons and workers in firms in the market*”, as well as its effect on the ability of small and medium-sized businesses, as well as black-owned firms to enter into, participate in and expand in a market.⁴⁰ This speaks directly to the themes of de-concentration emphasised above.

The most recent case assessing the issue of promoting a greater spread of ownership and participation is the PepsiCo/Pioneer merger decided

³⁴ Tirole, J. (2017). *Economics for the Common Good*. Princeton University Press.

³⁵ Behar, A and Hodge, J. (2008). *The Employment Effects of Mergers in a Declining Industry: The Case of South African Gold Mining*. The B.E. Journal of Economic Analysis and Policy, De Gruyter, vol. 8(1) pages 1–20, August.

³⁶ Clicks Retailers (Pty) Ltd/The retail pharmacy business carried on by Netcare Pharmacies 2 (Pty) Ltd with Medicross Clinics/The front shops of the in-house retail pharmacies operated by Netcare Pharmacies (Pty) Ltd within Netcare Hospitals. [LM055Jul16]. Competition Tribunal of South Africa.

³⁷ CPG In Store (Pty) Ltd And The Merchandising Business Of The Consumer Packaged Goods Division Of Imperial Logistics Of South Africa Group (Pty) Ltd. [LM079Jul19] Competition Tribunal of South Africa.

³⁸ Boundary Terraces O42 (Pty) Ltd/Bravo Group (Pty) Ltd. [LM272Mar19]. Competition Tribunal of South Africa.

³⁹ See press statement on the Videx/Aveng transaction at <http://www.compcom.co.za/wp-content/uploads/2020/01/Weekly-Media-Statement-November-2019.pdf>

⁴⁰ Competition Act, no 89 of 1998 as amended.

on 6 March 2020. The merger will result in the de-listing of Pioneer Foods which will obviously reduce the ability of direct and indirect participation by human development indexes (HDIs) in the firm. To address this concern, PepsiCo agreed to establish a R1.6 billion share ownership scheme (unencumbered) for workers (the majority of whom are black) and to facilitate participation by workers in decision-making by granting them representation at board level in the SA entity.⁴¹

A final point with respect to mergers is that the authorities are now explicitly required to assess “creeping mergers”, a phenomenon where a single merger, on its own, may not raise competition concerns, however, successive small mergers collectively entrench concentration. This assessment has long been discussed in highly concentrated private hospital markets and is also being used to assess competition in auto markets where we have seen an increasing trend towards corporatisation at the dealership level, accompanied by a worrying lack of transformation.

Promotion of employment: de-concentration and dynamism

Recently, market inquiries have been at the forefront of the authorities’ attempts to open markets to new entrants. This was especially evident in the grocery retail inquiry where recommendations included the removal of restrictive exclusive leases that prevent the entry and growth of smaller stores and niche retailers in shopping malls, the removal of differential rental rates that disadvantage smaller retailers, the removal of apartheid-era trading time restrictions that limit the growth of “spaza” shops, and a requirement that equivalent trading terms be applied to all retailers and suppliers regardless of size.⁴²

The requirements relating to buyer power can also now be regulated through amendments to the abuse of dominance provisions. These changes are important in light of work done by the Commission and by National Treasury, in partnership with the Centre for Competition, Regulation and Economic Development (CCRED) at the University of Johannesburg (UJ), on barriers to entry that emphasises the importance of supermarkets as a route to market, as well as the importance of taking a value chain approach in encouraging entry and growth in consumer goods.⁴³

The Data Market Inquiry, which found that SA data prices are high overall and that high prices have a disproportionate impact on poorer consumers, also recommended a substantial reduction in data prices.⁴⁴ This talks to the broader emphasis in our abuse of dominance investigations on factors that influence the cost of doing business and the pace of economic activity. These include factors that may have an adverse effect on competition in public transport (for example, the recently referred case against the Passenger Rail Agency for South Africa (PRASA) for refusing to provide access to essential transport infrastructure at Park Station⁴⁵) and ongoing investigations into excessive pricing in relation to ports. However, it is important to note that the competition authorities are more constrained in areas where sectors with natural monopoly features are subject to economic regulation (as they should be). This leaves less room for a competition authority to assess and prosecute excessive pricing. However, where reorganisation and structural separation of natural monopolies are considered, the competition authorities can engage in proactive advocacy efforts to support the efficacy and sustainability of these initiatives.

⁴¹ Competition Tribunal. 6 March 2020. *Competition Tribunal SA approves one of Pepsico’s largest acquisitions Outside US, with wide-ranging package of public interest conditions*. Available [here](#).

⁴² Competition Commission of SA. 25 November 2019. *The Grocery Retail Market Inquiry Final Report*. Available [here](#).

⁴³ See the CCRED series on Barriers to Entry [here](#). The National Treasury’s paper on [Economic transformation, inclusive growth, and competitiveness](#) also references some of the work on Barriers to Entry.

⁴⁴ Note that an announcement in this regard was made at 10am on 10 March 2020, on the day the presentation was given. The results have therefore not been included in this paper (which was submitted prior to presenting at the Colloquium), although they were discussed as part of the presentation.

⁴⁵ Competition Commission of SA. 10 February 2020. *The Competition Commission Prosecutes PRASA for Abuse of Dominance*. Available [here](#).