

Competition policy for jobs and industrial development

19 May 2021

The context of competition policy

1. South Africa's competition regime blends traditional competition concerns with developmental outcomes appropriate for South Africa. Our competition policy aims to address our high levels of economic concentration and promote effective competition that supports industrialisation, builds dynamic firms, protects and creates jobs and promotes economic inclusion and transformation.
2. Our economy remains characterised by a racially-skewed spread of ownership and high levels of economic exclusion. Concentrated markets tend to inhibit new entrants, limit investment and employment, and stifle innovation. Dominant firms are able to charge higher prices and exclude rival firms, disadvantaging customers which pay more for inferior quality products and reducing the competitiveness of the economy. This results in increased imports, depriving the local economy from expanding industrial output and jobs.
3. Our competition policy provides a range of tools to increase competitive dynamism, including through regulation of mergers and acquisitions; tackle high concentration and abusive behaviour by dominant companies; proactive measures to open markets and develop a more inclusive and transformed economy; and measures to advance the public interest – and complements other industrial policy tools like industrial support and trade policy.

Mergers and acquisitions: pursuing the public interest

4. Merger control must play a key role in maintaining an ecosystem of competitors in the domestic economy, addressing concerns about added economic concentration by way of restructuring of existing markets while advancing the public interest. Proposed mergers are evaluated not only on competition impacts (such as whether the merger will result in the removal of an effective competitor and hence greater horizontal integration as well as vertical integration by way of mergers between up and downstream firms in a specified market) but also on the impact of the merger application on the public interest.

5. The public interest is defined in the Competition Act, and includes five key considerations which Government and the competition authorities must have when considering a merger. Section 12A(3) of the Act provides as follows:

“When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on—

- (a) a particular industrial sector or region;
- (b) employment;
- (c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market;
- (d) the ability of national industries to compete in international markets; and
- (e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.”

6. A number of proposed mergers have been prohibited on competition grounds, and where mergers are approved, numerous examples are found where conditions attached to the mergers to promote the public interest.
7. Agreements reached between merging parties and government, using the provisions of the Competition Act, have produced significant developmental outcomes in a range of areas and provide a guide to the market of the kinds of concerns that policy-makers will explore with merger parties. The following seven areas are highlighted.
8. **First, employment.** Policy-makers will seek to avoid retrenchments that are merger-specific and where feasible, require merging firms to commit to maintain aggregate employment levels for a defined period (these have ranged from 3 to 5 years), while providing for the necessary flexibility to effect changes to the shape of employment in a merged firm (for example addressing duplication in key functions). In some instances, agreements have been reached with merger parties to actively expand the total employment of a firm following a merger, with numeric targets agreed between the state and the firm affected. This ensures that mergers are as far as possible capable of producing pro-growth outcomes. Further, policy-makers must pursue the expansion of education and skill development in firms and sectors. Merger commitments have included quantified financial support for skills development in a firm; providing opportunities for interns; and making bursaries available in key scarce-skills areas linked to the business of a merged party.
9. **Second, broad-based ownership.** During merger proceedings, account will be taken of the impact of a proposed merger on broad-based ownership of a firm.

Policy-makers will seek to have a greater number of black South Africans drawn into ownership of firms. Following the amendment of the Act in 2018, a greater focus is now placed on promotion of employee/worker ownership arrangements in merged firms, accompanied by board representation for persons nominated by the workers concerned.

10. **Third, supplier-development and localisation measures.** Competition policy, while tackling concentration, also lays the basis for increased industrialisation and the development of a more inclusive, transformed and vibrant economy. This includes the promotion of greater localisation and active support for and development of small and medium businesses. The Act requires mergers to be considered on the criterion of their impact on industrial sectors and regions. Policy-makers and merged firms have reached agreement on measures to promote greater levels of supplier development (often through supplier-development funding levels that are agreed and set aside by the merged firm and deployed to strengthen and expand local suppliers); or commitments on products that a firm will localise in its supply-chain (these have included key agricultural inputs for food companies; packaging; local consumer products by retailers and capital equipment) and on undertakings to maintain and improve levels of local procurement following the merger. In some cases, these commitments include greater partnership with public entities to promote joint efforts to industrialise the economy. The overall impact of a merger on employment and development of suppliers and related industries are often enhanced by the proximity of key decision-makers to the local economy. In a number of mergers, firms have committed to establish or maintain their corporate headquarters for the African continent in South Africa.
11. **Fourth, investment.** Policy-makers seek to promote deeper and higher levels of investment in order to enhance the ability of local industries to compete in international markets and to create local jobs. In a number of cases, merger parties have agreed to a target of additional investment (above the baseline of what the pre-merger firms contemplated), in order to boost overall growth, competitiveness and jobs. Such targets are generally agreed to be achieved over a given period (say 3 years) and in many instances, the discussions during merger proceedings nudged firms to expand their growth-ambitions.
12. **Fifth, downstream beneficiation.** Policy-makers and competition authorities have explored the impact of a proposed merger on downstream sectors, particularly in mining mergers or acquisitions, which impact inter alia on employment. Settlement agreements or terms set by the authorities have included commitments by merger parties to invest in downstream production in South Africa and/or ensure that local downstream players have preferential access to minerals mined in South Africa.

13. While these five areas cover the key public interest areas that come up in many mergers, consideration of the specific sectors and value-chains that a company operates in may enable other or additional areas to be identified, for example in issues of greening the economy or expanding exports. Engagements with merger parties can be expedited through careful consideration by merger parties of the extent to which a proposed merger can be structured to advance the public interest goals in the competition legislation and policy.
14. The authorities will consider both the public interest and potentially pro-competitive or anti-competitive impacts of mergers and on a case-by-case basis, make the necessary determinations.

Market Inquiries - addressing harmful effects of economic concentration

15. In a number of studies on the SA economy, there is growing concern about high levels of concentration and the impact thereof upon a viable competitive process and the enhancement of welfare. There is also evidence that highly concentrated markets can stultify innovation and inclusive economic growth.
16. Concentration refers to the extent to which a small number of firms account for the overwhelming share in a given market. The South African economy is characterised by unusually high levels of concentration, in part due to pre-democracy government policies, strategic barriers to entry created by incumbents, including companies that were privatised but gained huge market share prior thereto by virtue of state largesse, low rates of business formation, the small size of the domestic market and mergers and acquisitions. Concentration at the levels observed in South Africa is not adequately explained by improvements in efficiency nor is it in many cases driven by innovation.
17. Recent amendments to competition legislation provided for the remit of Market inquiries to include issues of industry structure, including the level and trends of concentration and ownership in a sector. It provides the competition authorities with enhanced powers to address the harmful effects of economic concentration. The development of more dynamic firms must be supported by active measures to open the economy through Market Inquiries which examine dynamics in a sector and make recommendations to enhance competition, industrialisation and transformation. Examples include the Data Market Inquiry's impact of lowering data costs and providing zero-rated access to educational and government services at a critical time when the pandemic has forced learners and citizens online. The Grocery Retail Market Inquiry resulted in agreements with some large retailers which will end the practice of exclusive leases and thus enable small grocers, butchers and others to access retail space in malls.

18. It is recognised that sometimes concentration may be unavoidable given a combination of scale economies in production and the size of the domestic market. However, even in these instances it is incumbent upon firms in these markets not to exploit customers or exclude rivals, and particular attention should be paid to ensure that black South Africans are not excluded.

Cartel and abuse of dominance investigations - addressing anti-competitive behaviour by large firms

19. Cartels and highly concentrated markets can limit market access for new players, impeding the opportunity for previously excluded South Africans to enter the formal economy. Cartels further curtail innovation and investment.

20. Abusive behaviour by dominant companies is strongly challenged. We have a successful record of tackling cartel behaviour in sectors such as construction, primary steel and bread. Excessive pricing by dominant companies has resulted in significant administrative penalties such as the fine imposed in the steel sector. Buyer power and price discrimination provisions introduced in the amended competition legislation seek to limit abuse by dominant firms, as do the amended provisions on abuse of dominance.

21. Anti-competitive behaviour by a dominant firm impacts not only consumers, but also businesses in the supply chain, particular small and medium businesses. This behaviour impedes the development of a competitive process in any market as the dominant firms seeks to foreclose on potentially viable entrants. In this context, one of the key objectives of competition policy is to provide the opportunity for the emergence of new entrepreneurs which can drive broad-based transformation. In some sectors, there is an imbalance in market power between customers in dominant firms and suppliers in smaller firms. The anti-competitive actions of dominant firms in such cases can affect the sustainability and viability of local, smaller or black-owned suppliers.

22. The recent amendments to the Competition Act clarify and, in some cases, expand upon what constitutes an abuse of dominance which includes, inter alia, charging an excessive price to consumers or customers, refusing to give a competitor access to an essential facility when it is economically feasible to do so, and refusing to supply goods or services to a competitor or customer when supplying those goods or services is economically feasible. These amendments, along with the regulations, have been critical in addressing price gouging during the pandemic.

23. The Act now has a clear focus on ensuring that the activities of dominant firms do not stifle the growth of small and medium enterprises and firms owned and controlled by black South Africans. A vibrant SME sector and inclusion of more entrepreneurs is critical for job creation, inclusion, economy dynamism and a competitive economy that enhances welfare. A particular obstacle to the achievement of these goals is that many small firms are plagued by the twin problems of paying higher prices for inputs and unfair practices in selling to dominant firms. The price discrimination amendments lower the threshold for abuse and contain volume discounts that work against smaller firms. The buyer power provisions prohibit dominant firms in designated sectors from imposing unfair prices and trading conditions on small and medium businesses and firms owned or controlled by black South Africans.

New areas for competition – digital markets, cross-border coordination and national security considerations

24. Policy makers across the world have increasingly focused on the growth in digital markets, and the challenges that these create include market dominance by platforms, characterised by the network effects and winner-takes-all markets, intersection between competition law and privacy. Many countries, notably the European Union have proposed laws to enhance competition for the so-called 'gate keeper firms'. China has ordered a separation of tech platforms and payment services; Australia is spearheading policy to force revenue-sharing between platforms and traditional media houses. Policy makers have remained seized with this matter and government has prioritised digital markets as part of its post-COVID recovery plan, with the aim of understanding the impact these have on SMMEs. These markets will be watched closely from a regulatory point of view to avoid late interventions where markets would have already reached a tipping point. This engages all areas of tools of competition policy, including mergers, abuse of dominance, market inquiries, vertical restraints and cartels.

25. Global economic integration requires competition authorities to coordinate more effectively on mergers and acquisitions that impact multiple jurisdictions. There have been examples in Southern Africa of close coordination between different national authorities on mergers that impact on more than one country. In the context of the African Continental Free Trade Area, consideration is being given to a Competition Protocol to complement the new trade integration measures that have been agreed by a number of African Union member states. Policy-makers will focus on the appropriate content of such protocol and the opportunity for deeper levels of information-sharing and regulatory approval coordination.

26. National security is a critical concern of every government and society expects that the Executive takes steps to protect the sovereignty and national security of the country. In respect of mergers and acquisitions, national security issues may

arise when a foreign firm seeks to acquire an interest, particularly a controlling one, in a local firm in a sector or activity with security implications, for example in security companies with large numbers of armed officials in their employ, armaments manufacturers or critical infrastructure. In the past two years, regulators in a number of cases have invoked powers in this regard. Changes to the SA competition legislation now provide powers to the Executive to introduce regulations defining the scope of such sectors and a procedure to consider whether a merger may be permitted where national security concerns are applicable. Policy-makers will give consideration to appropriate regulations and the timing thereof.

27. The measures identified above to change economic structure, limit abuse of dominance and proactively open the economy and stimulate development are critical tools to transform and grow a truly inclusive economy. So too are the strengthened provisions which allow the Competition Authorities more capacity and enhanced weight to enforce them.