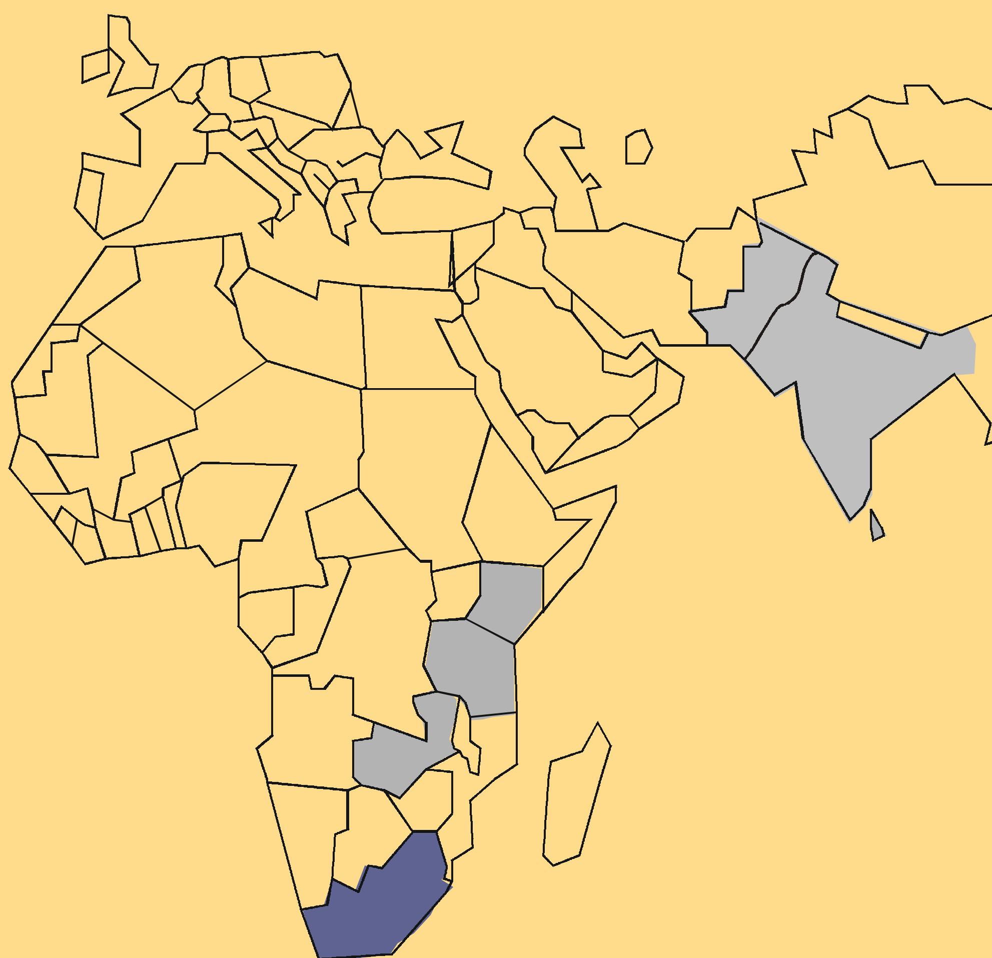
COMPETITION POLICY & LAW IN SOUTH AFRICA

– A KEY COMPONENT IN NEW ECONOMIC GOVERNANCE



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LIST OF ABBREVIATIONS

ANC	African National Congress
GATT	General Agreement on Tariffs and Trade
IDC	Industrial Development Corporation
NEDLAC	National Economic Development and Labour Council
PABX	Private Automatic Branch Exchange
RN	South African Rand
SADC	Southern African Development Community
SDI	Spatial Development Initiative
SMME	Small Medium and Micro Enterprise
SPII	Support Programme for Industrial Innovation
THRIP	Technology and Human Resources for Industry Programme
WTO	World Trade Organisation

FOREWORD

The promulgation of the new Competition Act in 1998 marked another milestone in South Africa's public policy transformation. The Act contemplates a new regulatory infrastructure but also puts in place a regime that is meant to contribute to economic growth and global competitiveness. Equally importantly, the Act consciously seeks to promote the social and economic welfare of citizens and open ownership and participation in the economy to previously disadvantaged groups. The efficiency and welfare promotion dimensions of the Act give it a unique character among competition regimes and the authorities have, since the Act's implementation, sought to meet the challenges posed by the Act.

An important component of the Act is its attempt to 'democratise' competition. There is thus an imperative to bring all relevant stakeholders into the purview of the Act, including business, labour and consumers. Improved competition regulation can only occur with their full participation and the importance of this interface cannot be emphasised enough.

Much work however still needs to be done in creating an awareness among the stakeholders about the function and purpose of competition policy. The legacies of the past make that task all the more formidable and the Competition Commission welcomes any initiative which assists in expanding and promoting that much needed awareness, especially insofar as such efforts contribute to providing better information and analysis.

It is therefore encouraging that the CUTS 7-Up Project has selected South Africa as a developing country whose competition regime was worthy of evaluation and assessment. The South African country report is a useful addendum to the emerging base of information and covers all relevant areas of the work of its competition authorities. The value added is that the report forms part of a comparative study of other competition environments. This will certainly prove beneficial to practitioners, advocates and analysts alike and is an invitation to all stakeholders to participate in expanding the frontiers of competition law and policy.

Menzi Simelane
Commissioner
South Africa Competition Commission

PREFACE

The far-reaching changes to South Africa's competition regime form part of a general trend by its government to overhaul public institutions and reform policies in keeping with the country's new democratic ethos. The new government in 1994 inherited an institutional architecture and statutory machinery from the previous order that was ill-suited to the imperatives of transparent government and the demands of managing a modern economy. As a consequence, there has been a vigorous and robust effort to restructure the apparatus of the new South African state in a manner that reflects the letter and spirit of its constitution.

South Africa's new competition regime is emblematic of the reformist impulses which have guided the general institutional restructuring effort. The new regulatory regime marks a refreshing departure from the anachronistic vestiges of the previous framework, and when the Competition Commission was established in 1999 it gave South Africa its first independent regulator. In what is a unique configuration, the addition of the Competition Tribunal and Appeal Court provide the basis for developing an effective jurisprudence for giving life to what is widely acclaimed as a visionary statute.

The preamble of the Competition Act of 1998 has an explicit normative thrust which recognises: "That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans." The Act and the authorities it established thus seek to address these legacies which are still very much an incubus on the growth and efficiency of the South African economy and its prospects for becoming globally competitive.

The inclusion of South Africa in the CUTS 7-Up project was thus timely since it provided an opportunity—as this report will attest—to appraise and evaluate the efficacy or otherwise of the country's fledgling competition regime. The project also had the salutary effect of involving several of the authorities' officials in its reference group meetings. The perspectives of practitioners added another useful dimension which considerably enriched the report itself. The report further highlights a critical need for building a consumer culture and advocacy platform in South Africa. This is a challenging area whose underdeveloped nature is symptomatic of the general disenfranchisement of the majority of citizens during the apartheid era.

With competition policy taking on greater importance as one of the new issues in the WTO, the CUTS comparative study should serve a range of developing countries with a wealth of useful information and instructive guidelines. To the extent that the South African case illuminates many of the problems, issues and challenges developing and transitional societies confront in establishing viable and effective competition regimes, the

Institute for Global Dialogue considers itself fortunate in having been associated with this project.

I would like to acknowledge the hard work of Shibe Lebelo and Simon Roberts in preparing this report. I would also like to acknowledge the contributions of the Trade and Industrial Policy Secretariat (TIPS), which was associated with the Project during the initial period.

Dr Garth le Pere
Executive Director
Institute for Global Dialogue

CHAPTER-I

Introduction

1.1 Contents and Main Issues Raised in the Paper

A new competition law was enacted in South Africa in October 1998 and came into force in 1999. It forms an important part of reforms to both address the historical economic structure in South Africa and encourage broad-based economic growth. After a general background, we assess the market structure and review the elements of the emerging policy framework, before examining the competition law in more detail.

The report assesses the competition framework in South Africa, with a view to its effectiveness in promoting economic efficiency and consumer welfare as part of economic development. The report is an input into the 'Comparative Study of Competition Regimes in Select Developing Countries', co-ordinated by the Consumer Unity & Trust Society of Jaipur, India. It incorporates comments from the National Reference Group meeting of June 28th 2001.

It forms an important part of reforms to both address the historical economic structure in South Africa and encourage broad-based economic growth.

After a description of the general and economic context against which competition policy in South Africa is set, the report assesses the policies that influence this backdrop. This locates the rationale for competition policy in a South African context. It then outlines the changing competition regime with the enactment of the Competition Act of 1998 and the establishment of the Competition Commission, Competition Tribunal and Competition Appeals Court in 1999. The institutional capabilities of these organisations are assessed in terms of their human, physical and financial resources based on interviews with key staff members. The effectiveness of the institutions is then explored through a brief analysis of the work undertaken by them in the last two years.

1.2 The Research Process

The report draws on a questionnaire administered to the competition authorities. It should, however, be noted that despite numerous attempts to obtain the information required and many trips to the Competition Commission in particular, not all the requested information was provided. Many more meetings had to be arranged than originally envisaged as several were cancelled by the Commission due to various reasons, including other commitments and work pressures on Commission staff. In addition, much of the information requested in the questionnaire was not provided because it was deemed to be either unavailable or of a confidential nature.

The institutional capabilities of these organisations are assessed in terms of their human, physical and financial resources based on interviews with key staff members.

The study also drew on interviews with key stakeholders to critically evaluate the impact of the new regime from different perspectives. These included interviews with consumer and business representatives, and the regulatory body for broadcasting and telecommunications (as outlined in chapter seven).

CHAPTER-II

Socio-Economic Context

2.1 General Background

With the first democratic election in 1994, South Africa emerged from three centuries of racially based minority rule, including a final forty-six years of virulent ideological apartheid. By systematically practising race-based discrimination for many decades, the minority white population accumulated most of the resources of the country. A new constitution came into effect in 1996, and the ANC-led government (re-elected in 1999) has undertaken a broad legislative programme to address the legacy of apartheid. This has included legislation reforming the labour market, health, education and social services, as well as various measures to promote socio-economic development. The government has also implemented policies to liberalise the economy.

The distribution of income is so unequal that whites in South Africa achieve a standard of living broadly comparable with the second rank of industrialised countries, whereas most Africans in the country live in poor conditions, as reflected in a range of social indicators.

The South African economy is classified as a middle-income economy by the World Bank, with GNP per capita of US$3,310 in 1998, and compared with other countries in sub-Saharan Africa it is both prosperous and large, with a population of around 40 million. However, the distribution of income is so unequal that whites in South Africa achieve a standard of living broadly comparable with the second rank of industrialised countries, whereas most Africans in the country live in poor conditions, as reflected in a range of social indicators (table 1).

Table 1: Comparative measures of inequality and social indicators in selected countries - 1998

	S. Africa[i]	Poland	Chile	Brazil	Venezuela	Malaysia	Thailand
GNP per capita $US	3,310	3,910	4,990	4,630	3,530	3,670	2,160
GDP per capita, $US at PPP	8,488	7,619	8,787	6,625	5,808	8,137	5,456
Human Dev. Index	0.697	0.814	0.826	0.747	0.770	0.772	0.745
Share of richest 20%:share of poorest 20%[ii]	22.3	-	17.4	25.5	-	12.0	7.6
Life expectancy(yrs)	53.2	72.7	75.1	67.0	72.6	72.2	68.9
Infant mortality[iii]	60	10	11	36	21	9	30
Adult literacy rate %	84.6	99.7	95.4	84.5	92.0	86.4	95.0
Population without access to safe water %	13	-	9	24	21	22	19

Source: UN Human Development Report 2000

Notes:

i) There are particularly large differences between the races in these aggregate indicators.

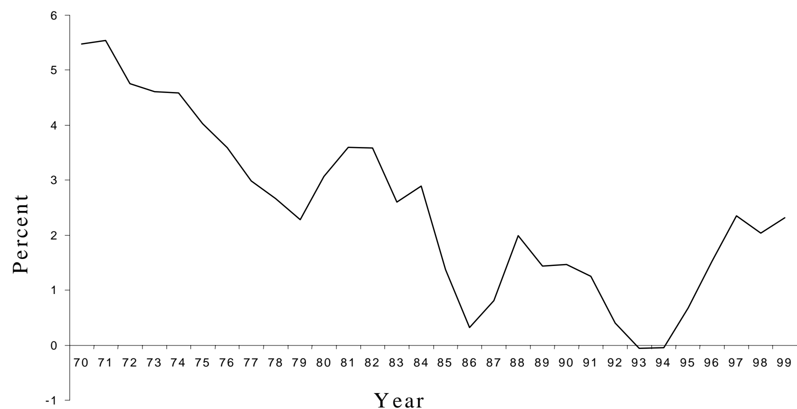
ii) Latest year with available data.

iii) Deaths of infants under one year old per 1000 live births.

Economic growth has declined significantly since the mid-1970s, albeit with a slight up-turn in the late 1990s (see chart 1). The extremely poor economic performance in recent years must also be set against a population growth rate of around 2.0 percent, such that real gross national income per capita in 1999 remained just 82 percent of the 1980 peak level.[1] The apartheid legacy is undoubtedly a major factor in the poor growth performance, along with the high levels of inequality and poverty.

The extremely poor economic performance in recent years must also be set against a population growth rate of around 2.0 percent, such that real gross national income per capita in 1999 remained just 82 percent of the 1980 peak level.

Chart 1: Real GDP Growth Rate



Source: Calculated from South African Reserve Bank data

Despite the pickup in the rate of growth in second half of the 1990s, there have been significant reductions in formal employment over this period. Unemployment in 1999 stood at 23.3 percent on a strict definition and 36.2 percent on a broad definition,[2] which includes those claiming to want work but who are not actively searching.[3]

2.2 Market Structure and Competition

There is little doubt that corporate ownership and control in the South African economy is highly concentrated. In the latest manufacturing census, for 46 percent of the 57 main product groupings, the largest four firms account for more than half of output, while in a further 35 percent of groupings the four firm concentration ratio is between 0.25 and 0.50.[4] Concentration is even greater if measures of firm size are based on control, which is often exerted through minority stakes and holding companies, such that many different companies in a sector can be identified as being part of the same conglomerate grouping.

Corporate ownership and control in the South African economy is highly concentrated.

Historically, five main conglomerate groupings have controlled the majority of economic activity and they accounted for 54.7 percent of the capitalisation of the Johannesburg Stock Exchange in 1998. These groupings have remained under the control of a small number of families, with their performance oriented around the exploitation of minerals. The conglomerate structures remain similar to what has been termed 'personal capitalism',[5] with a relatively low level of evolution of managerial structures and with relationships between the groups characterised by co-operation and some contestation for position, but only a relatively low level of competition.

2.2.1 Recent Developments

In recent years there has been a process of corporate restructuring, reflected in a significant increase in merger activity. According to data compiled by Ernst & Young, merger and acquisition activity more than doubled in value terms in 1997, and almost doubled again in 1998, while the number of deals also increased rapidly.[6]

A number of trends can be identified underlying this increase in activity:

There has been an unbundling of ownership structures in diverse conglomerate groupings in order to separate operations in unrelated sectors.

First, there has been an unbundling of ownership structures in diverse conglomerate groupings in order to separate operations in unrelated sectors. Associated with the unbundling has been a series of black economic empowerment ventures. These have led to a de-concentration of ownership in the South African economy, and a significant reduction in the proportion of the capitalisation of the Johannesburg Stock Exchange (JSE) identified as controlled by the established white-owned large conglomerates, although the five largest groups still controlled more than half of the market capitalisation of the JSE in 1998 (table 2).

Table 2: Summary of Control of JSE Market Capitalisation (Percentage of Total)

	[i] 1985	1990	1991	1992	1993	1994	1995	1996	1997	1998
Anglo American Corp	53.6	44.2	42.4	33.7	38.2	43.3	37.1	27.5	22.6	17.4
Sanlam	12.2	13.2	13.2	15.6	12.0	10.5	12.4	11.0	10.6	9.9
Liberty Life	2.0	2.6	3.7	4.7	6.2	7.2	7.3	11.1	11.9	9.5
Rembrandt	3.8	13.6	15.2	14.6	15.5	13.0	7.8	10.6	9.9	9.0
SA Mutual	10.6	10.2	10.4	14.2	10.7	9.7	11.2	10.2	11.4	8.8
Anglovaal[ii]	2.1	2.5	2.9	2.9	3.4	3.6	2.9	3.0	1.5	0.8
Black owned gps[iii]	-	-	-	-	-	-	-	6.3	9.3	8.9
Top 5 gps collectively	82.2	83.8	84.9	82.8	82.6	83.7	82.3	72.7	66.4	54.7

Source: McGregors (1999), Who Owns Whom.

Notes:

i) Control is assessed by *McGregors* taking into account the various cross-holdings of shares that exist and may be associated with a relatively small direct shareholding in any given company.

ii) In 1998 the Anglovaal shareholding was split equally giving the Hersov and Menell families each control over 0.4% of the JSE capitalisation.

iii) The Black owned groups are identified as such by *McGregors*. They are quite diverse, some deriving funds from Trade Union pension funds, others consisting of private individuals who acquired their own wealth or borrowed from commercial banks.

Second, alongside unbundling there has been a series of mergers to consolidate the operations of conglomerates in a particular sector to enable greater focus and better strategic direction, for example, the formation of Anglogold from Anglo-American's various gold interests, and the acquisition of packaging concerns by Anglo-American's subsidiary engaged in paper manufacture. These processes of consolidation of control have involved both vertical and horizontal mergers, and have also built new links across conglomerate groupings.

Processes of consolidation of control have involved both vertical and horizontal mergers, and have also built new links across conglomerate groupings.

Third, there has been a process of internationalisation of South African business, as illustrated by the creation of the Billiton group (listed in London) by Gencor, the restructuring of Anglo-American/De Beers and Minorco holdings, and the overseas listings of Liberty Life and Sappi. There have also been mergers of South African companies associated with changes in global ownership patterns in particular industries.

While there has been a lessening in the concentration of ownership in the economy as a whole, there has been increasing concentration in many sectors of the economy.

These developments imply that while there has been a lessening in the concentration of ownership in the economy as a whole, there has been increasing concentration in many sectors of the economy. This has apparently been driven by the imperative need to improve efficiency, as well as companies' desire to improve their strategic position, including factors that increase their market power. Competitiveness concerns in conjunction with liberalisation may therefore have stimulated the consolidation of competing firms in industries, leading to fewer firms, although this does not necessarily imply that competition has become less intense.

The conglomerate restructuring to focus on core operations is part of the ongoing internationalisation of South African business and, to an extent, a lessening of identification of ownership and managerial control with a family grouping.

On the surface, these developments appear to represent a break with the past, but many of the underlying reasons for the changes have strong threads of continuity. The conglomerate restructuring to focus on core operations is part of the ongoing internationalisation of South African business and, to an extent, a lessening of identification of ownership and managerial control with a family grouping. While this has been stimulated by the increasing openness of the South African economy, these policy changes are consistent with the evolving interests of the conglomerates. Similarly, although the participation of black-owned corporate groupings does reduce concentration, it can be argued that the limited and gradual nature of the extension of black ownership reflects the enduring influence of the conglomerates in adapting to political changes. The established conglomerate groupings have been able to largely achieve a re-balancing of ownership on their own terms and to pursue their own objectives of restructuring and refocusing control, and shifting ownership to international financial centres (in New York and London).[7]

CHAPTER-III

Social and Economic Policies Affecting Competition

The **Reconstruction and Development Programme** ***consisted of a series of broad objectives around improving housing, education, health and infrastructure for the historically disadvantaged majority population.***

Upon its elected in 1994, the ANC government undertook a process of restructuring and liberalisation. The *Reconstruction and Development Programme* consisted of a series of broad objectives around improving housing, education, health and infrastructure for the historically disadvantaged majority population. This relied mainly on a reorientation of government spending, rather than a more ambitious programme. Indeed, at the level of macroeconomic policy, the government has reduced the budget deficit from 6.2 percent of GDP in 1994/95 to 2.4 percent in 1999/2000.[8] At the same time the central bank's independence was entrenched in the new constitution of 1996 and interest rates were increased by the Reserve Bank governor in an attempt to reduce inflation. The macroeconomic strategy, as set out in the *Growth, Employment and Redistribution* programme of 1996, envisaged that macroeconomic stability would encourage foreign investment, and that trade liberalisation would lead to export-led growth. The government also embarked on a progressive restructuring of state assets, which included corporatisation and commercialisation of state-owned enterprises, and increased private ownership. Coupled with these measures were industrial policies which largely relied on a set of investment incentives to encourage investment and growth. The main areas of policy impacting on competition are now addressed in more detail.

3.1 Trade Liberalisation

The tariff liberalisation program, however, goes further than required by the GATT agreement, and has been justified in the South African government's macroeconomic strategy as being essential for the generation of export-led growth.

South Africa has undertaken a far-reaching trade liberalisation program, agreed to under the General Agreement on Tariffs and Trade (GATT) in 1994, and implemented under the World Trade Organisation (WTO). This built on trade reforms introduced by the previous government in the early 1990s. In addition to lowering the average tariff level by approximately one third over five years, more than 10,000 tariff lines have been rationalised to less than 6,000 and the differentiated tariff rates standardised to just six rates ranging between 0 percent and 30 percent.[9] The steepest reductions have been in those sectors previously most heavily protected. Quantitative and formula duties have been converted to *ad valorem* tariffs. Other trade-related measures that contravene WTO rules, such as local content requirements and export incentives have been abolished. The tariff liberalisation program, however, goes further than required by the GATT agreement, and has been justified in the South African government's macroeconomic strategy as being essential for the generation of export-led growth.[10] This is based on the merits of an 'open' or 'outward-oriented' economy, following the perceived failure of an import substituting industrialisation approach.

With liberalisation, trade flows increased. The ratio of exports to GDP increased from 22.2 percent in 1994 to 25.4 percent in 1999 and imports increased from 19.9 percent to 22.9 percent.[11] Although gold continues to account for a large proportion of export earnings, its significance has

been declining over the last decade. On these measures South Africa is a relatively open economy.

3.2 Privatisation, Restructuring of State Assets and Regulatory Policy

Linked with the liberalisation and deregulation process, in 1996 the government embarked on a plan to restructure state assets. This included selling off various companies that were no longer seen as being relevant to the role of the state, such as a small airline associated with a previous 'homeland' government, and a company owning a set of holiday resorts. It also included progressive corporatisation and commercialisation of the utilities and infrastructure services, with the establishment of regulatory bodies and the sale of equity stakes, generally to 'Strategic Equity Partners' who are viewed as having particular technical and management expertise along with capital. The partners have generally been major foreign investors in the same field.

It also included progressive corporatisation and commercialisation of the utilities and infrastructure services, with the establishment of regulatory bodies and the sale of equity stakes.

- ***Transport:*** The main transport parastatal, Transnet, was fully commercialised, and pilot programmes are underway concessioning commuter rail services. A sale of equity is also planned by the government in the railway operator, Spoornet. A 20 percent equity stake in the national airline, South African Airways has already been sold to Swissair. A stake in the Airports Company of South Africa has been sold to Aeropuerti di Roma, and a further 'Initial Public Offering' of shares is planned to advance privatisation. Toll road concessions have also been sold for sections of major routes.

- ***Electricity:*** The electricity parastatal Eskom has been progressively moved to a more commercial basis. A National Electricity Regulator has been established, and plans for separating generation, transmission and distribution into different entities and allowing competition are being drawn up.

- ***Telecommunications:*** Following the 1996 Telecommunications Act, a 30 percent stake was sold in 1997 to a consortium comprising SBC Communications of the USA, and Telkom Malaysia. At the same time a five-year monopoly was granted to Telkom in the provision of the fixed-line public service telephone network, with the option of a further year depending on Telkom's performance in terms of a range of criteria. In the provision of value-added network services (including internet services), Telkom has operations that compete directly with private operators, and there have been many complaints and ongoing court battles relating to the access to its network provided by Telkom. The telecommunications sector regulator has recently been merged with the broadcasting regulator to form the Independent Communications Authority of South Africa (ICASA). There are currently two licenses for mobile telephone operation, with a third recently having been issued.

The telecommunications sector regulator has recently been merged with the broadcasting regulator to form the Independent Communications Authority of South Africa (ICASA).

3.3 Industrial Policy and Investment

The apartheid government's industrial policy focused mainly on the development of heavy industry associated with the processing of minerals, and was based on very cheap electricity.[12] Basic iron & steel, non-ferrous metals, and chemicals accounted for 42 percent of manufactured exports in 1996. The previous government's policies also reinforced the dominance of a small number of mining-based conglomerates.

Since 1994, the ANC government's industrial policy has included a mixture of incentive programmes, support for skills development, and programmes

aimed at the development of small, medium and micro enterprises (SMMEs). However, the trade liberalisation programme has also tended to reinforce the existing competitive advantages of minerals-based manufacturing.

3.3.1 Investment Promotion

The direct investment promotion measures put in place consist of the Tax Holiday Scheme, Spatial Development Initiatives, and Industrial Development Zones.

The direct investment promotion measures put in place consist of the Tax Holiday Scheme, Spatial Development Initiatives, and Industrial Development Zones. The aim of these programmes was to develop regional industrial clusters. The Tax Holiday Scheme launched in 1996 is open to firms making new investments which exceed RN 3 million. Firms get a two-year holiday for each of three sets of criteria: spatial location; employment and labour intensity; and industry sector (yielding a maximum of six years of tax holiday). A further foreign investment grant encourages companies to bring in new industrial equipment.

The Spatial Development Initiatives (SDIs) were introduced in 1996 and identify regional locations with the potential to develop regional agglomerations of economic activity based on the co-ordinated provision of infrastructure by the government and parastatals together with investment incentives. The SDIs that have been established include regional industrial areas, agro-tourism areas, metropolitan corridors, and focused Industrial Development Zones. The largest SDI is the Maputo Development Corridor, running from Pretoria/Johannesburg to Maputo and involving the upgrading of transport infrastructure, ports, border posts, streamlining of regulations, and specific investment projects.

Industrial Development Zones are mechanisms for attracting investment in higher-level, export-oriented manufacturing, and are located within SDIs.

Industrial Development Zones are mechanisms for attracting investment in higher-level, export-oriented manufacturing, and are located within SDIs. They are particularly aimed at attracting foreign direct investment.

There are also a range of programmes aimed at encouraging exports, many run or managed by the Industrial Development Corporation (outlined in more detail below). An Export Marketing and Investment Assistance Scheme is also in place, providing funding for market research, trade missions and attendance at international exhibitions.

3.3.2 Small and Medium Enterprise Development

A Small/Medium Manufacturing Development Programme was established for foreign and local firms investing up to RN 3 million. It included an establishment grant worth 10.5 percent of qualifying assets, a profit/output incentive worth 25 percent of profit before tax in the second year, a further two years incentive grant provided certain labour intensity levels are met, and a foreign investment grant for investment in new plants and machinery.

Institutions targeted at support for SMMEs have also been established.

These incentive programmes have not been as successful as hoped, and in September 2000 the Minster of Trade and Industry announced the first of a new set of investment incentives. The new programme, the Small and Medium Enterprise Development Programme, caters for assistance on an investment in qualifying assets up to RN 100 million (rather than the RN 3 million previously) with a series of cash grants. In addition, a Skills Support Programme provides grants for training new staff as part of the expansion of existing, or new investment projects.

Institutions targeted at support for SMMEs have also been established. The Ntsika Enterprise Promotion Agency provides non-financial support for small, medium and micro enterprises, primarily on a wholesale level,

by operating through existing intermediaries such as local business service centres and vocational training institutions. Its role includes training trainers to increase the capacity of intermediaries, establishing a country-wide network of service providers, supporting the provision of targeted services for women, youths, disabled people and rural communities, tender advice centres for businesses to tender for government business, and information and research. Khula Enterprise Finance Limited was set up in 1996 to facilitate the provision of finance for SMMEs. It operates through existing financial institutions, by providing partial risk guarantees, and an equity programme, which seeks to leverage private sector investment.

THRIP provides funding for joint research projects between firms and researchers from higher education institutions.

3.3.3 Technology Policy

The Department of Trade and Industry established two main programmes in this area, the Technology and Human Resources for Industry Programme (THRIP) and the Support Programme for Industrial Innovation (SPII) in a concerted attempt to establish a new 'national system of innovation'. THRIP provides funding for joint research projects between firms and researchers from higher education institutions. It also matches industry investment in researchers, and promotes the mobility of researchers between participants in identified projects. SPII promotes technology development in manufacturing industries through direct financial and project management support for innovation of competitive products or processes.

3.3.4 Development Finance

The IDC provides both loan and equity finance, mainly for new projects, at subsidised rates.

In addition, a very important area of industrial policy relates to the operations of the Industrial Development Corporation (IDC), a state-owned development finance institution. The IDC provides both loan and equity finance, mainly for new projects, at subsidised rates. Its advances directly accounted for almost 12 percent of gross fixed capital investment in manufacturing in 1998/99, and its impact is much greater as it invests alongside private-sector agents. It has historically been oriented closely with the development of extremely large-scale mineral beneficiation projects. For example, investment in IDC projects in non-ferrous metals and basic iron & steel alone accounted for approximately 25 percent of total manufacturing investment from 1992 to 1997.[13] This orientation is only changing slowly – from June 1994 to June 1999 over half of IDC investments were classified as being in basic metals.[14]

The IDC has also established programmes providing finance for emerging entrepreneurs, for medium and large enterprises, and export credit facilities. These programmes include the Multi-shift Scheme, the World Player Scheme for industries facing restructuring following liberalisation, the Venture Capital Scheme, and the Low Interest Finance for Export Scheme. The latter has been discontinued following findings that it breaches WTO rules. The major use of the export credit facilities has been the arrangement of export credit facilities for financing South African capital goods supplies to the Mozal Aluminium smelter in Mozambique.

3.4 Labour Market Policy

The IDC has also established programmes providing finance for emerging entrepreneurs, for medium and large enterprises, and export credit facilities.

A series of labour market laws have been enacted to address the impact of apartheid on the South African labour market.

The *Labour Relations Act* of 1995 (amended in 1996) provides various employee rights, a framework for collective bargaining at the workplace and the sectoral level, and promotes employee participation in decision-

Changes have been proposed to exempt small firms from some of the Act's measures, such as those around the enforcement of collective bargaining agreements.

making through 'workplace forums'. The Act also provides procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration. Recently, changes have been proposed to exempt small firms from some of the Act's measures, such as those around the enforcement of collective bargaining agreements.

The *Basic Conditions of Employment Act* of 1997 stipulates minimum conditions such as weekly working hours, breaks, sick leave, maternity leave, annual leave and overtime pay, as well as procedures to be followed in the event of the termination of employment contracts. The Act also outlaws child labour.

The Act requires employers to draw up employment equity programmes with targets for the changes in the proportions of under-represented groups (generally women and black people) at different employment levels.

The *Employment Equity Act* of 1998 aims to promote greater representation of population groups and genders in employment at different levels. The Act requires employers to draw up employment equity programmes with targets for the changes in the proportions of under-represented groups (generally women and black people) at different employment levels, as well as programmes for these targets to be achieved. It is thus a form of voluntary affirmative action in that it requires commitments to training and staff development as part of changing the employment profile of organisations, but allows the organisations themselves to determine how this will be achieved. The Act requires the plans to be registered with the Department of Labour, to enable monitoring of progress and compliance.

3.5 Black Economic Empowerment

A major government concern is to increase participation in and control over economic activities by the black population in the country. While the government has not implemented direct measures to change ownership, these concerns have influenced policies such as SMME development and the entrepreneurial scheme of the IDC.

The Black Economic Empowerment Commission was also established, assigned with the task of recommending a framework, and measures for the government to take.

The Black Economic Empowerment Commission was also established, assigned with the task of recommending a framework, and measures for the government to take. Its report was recently concluded and includes a range of recommendations such as for prescribed assets for financial institutions, and government procurement measures.

Measures to weight government procurement in favour of businesses owned by historically disadvantaged people have already been implemented, with the *Preferential Procurement Policy Framework Act* being passed in 2000.

CHAPTER-IV

Competition law

4.1 The Competition Act of 1998

A new competition law was enacted in South Africa in October 1998 and came into force in 1999. It forms an important part of reforms to both address the historical economic structure in South Africa and encourage broad-based economic growth. A recent government policy document highlights the central role of competition policy in industrial development.[15] Competition policy is seen as central in increasing competitive market pressures, leading to firms becoming more efficient and internationally competitive.

Competition policy is seen as central in increasing competitive market pressures, leading to firms becoming more efficient and internationally competitive.

It was widely accepted that the previous competition law (the *Maintenance and Promotion of Competition Act* of 1979) and the Competition Board established by it were ineffective.[16] After being on the ANC-led government's policy agenda since 1994, consultations on a new law were undertaken in earnest in 1998. The principles of reform were negotiated between government, business and labour representatives in NEDLAC during 1998, based on a Department of Trade and Industry (DTI) framework document.

The increasing international integration of the South African economy was a major influence on the negotiation of competition legislation, and on the law that was written. Competition policy has also been brought to prominence in international trade fora and negotiations. At the same time, international competitiveness is one objective of the competition legislation. The provisions of the Act itself were based on international experience, and were drawn mainly from the examples of Canada, Australia and Germany. The provisions in the legislation addressing conditions specific to South Africa are focused on businesses that are owned or controlled by historically disadvantaged persons (for example, section 10(3)(b)(ii) of the Competition Act).

The provisions of the Act itself were based on international experience, and were drawn mainly from the examples of Canada, Australia and Germany.

The Competition Act was passed by Parliament in October 1998, with provisions to establish a Competition Commission with primary responsibility for determining and investigating cases under the Act, and a Competition Tribunal to rule on most cases. A Competition Appeal Court was also to be established. These institutions were set up during 1999, and the Act came into force on 1st September 1999.

The Act deals with two main areas: prohibited practices (covered in chapter 2 of the Act) and mergers (covered in chapter 3). Prohibited practices are further distinguished as restrictive practices (either horizontal or vertical) and abuse of a dominant position. In chapter 2, the Act also makes provision for the granting of exemptions to firms. Investigations into prohibited practices are initiated by the registering of a complaint, which may be made by the Competition Commission itself. The Commission then undertakes an investigation and presents its case to the Competition Tribunal, where the party(ies) may respond. Under the Act, all mergers

The Act deals with two main areas: prohibited practices (covered in chapter 2 of the Act) and mergers (covered in chapter 3).

over a certain minimum threshold (to be set by regulation) must be notified (an important change from the previous legislation). For mergers above a second, higher, threshold, the Tribunal must make a determination based on the recommendation of the Commission and other representations. Mergers between the two thresholds may be ruled upon by the Commission, whose decision can then be taken to the Tribunal by the parties if they so wish.

4.2 Objectives

The objectives of the Act are broad, and take into account a range of concerns that will not necessarily be consistent with each other in the actual evaluation of cases. They are stated in section 2 of the Act, as follows:

To an extent, the objectives reflect the differing pressures on policy-makers, and their prioritisation will depend on the development of precedents from cases.

"The purpose of this *Act* is 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 to 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."

There has been much discussion and criticism of the broad scope of the objectives.[17] Comments from different stakeholders represented in the National Reference Group (NRG) meeting reflected the different interests represented in the objectives. Some were critical of the lack of clear prioritisation of efficiency and consumer welfare over concerns such as the promotion of employment. Others (notably labour representatives) disagreed. To an extent, the objectives reflect the differing pressures on policy-makers, and their prioritisation will depend on the development of precedents from cases. When the criteria set out in the Act for the evaluation of cases are examined, it is evident that economic efficiency is the over-riding principle. This reflects the fact that the South African Act drew heavily from the Canadian legislation for provisions governing mergers and from Australian legislation for prohibited practices.[18] This is reinforced by the cases that have been ruled on to date, although employment concerns have been taken into account in several merger cases.

4.3 Prohibited Practices: Horizontal and Vertical Practices and Dominance

The primary test for both restrictive and horizontal practices in part A of the chapter is whether the practice 'has the effect of substantially preventing or lessening competition in a market'.

Chapter 2 of the Act addresses prohibited practices under restrictive agreements (horizontal and vertical), and abuse of dominance.[19] The primary test for both restrictive and horizontal practices in part A of the chapter is whether the practice 'has the effect of substantially preventing or lessening competition in a market' (sections 4(1)(a) and 5(1)). There are also specific types of horizontal practices that are prohibited *per se*. These include price fixing, dividing markets and collusive tendering. For these measures of the Act to apply, an agreement must be demonstrated.

Abuse of dominance in part B of chapter 2 depends on the identification of a firm as dominant based on its market share being at least 45 percent,

Market power is defined in the Act as being the ability to control prices, exclude competition or to behave to an appreciable extent independently of competitors, customers or suppliers.

or a share of between 35 percent and 45 percent provided the firm cannot demonstrate it does not have market power, or a share of less than 35 percent but where it has market power (with the onus on the Commission to demonstrate this). Market power is defined in the Act as being the ability to control prices, exclude competition or to behave to an appreciable extent independently of competitors, customers or suppliers. A series of acts are prohibited for a firm defined as dominant. These are excessive pricing, refusing access to an essential facility, and exclusionary acts (unless pro-competitive gains can be demonstrated). A separate sub-section deals with price discrimination by dominant firms.

In general, the effect on competition is therefore placed above the economic impact of the practice. Where there are gains to the economy from the practice, whether technological, efficiency or pro-competitive, these must be proven to outweigh the effect on competition by a party to the agreement. It is not clear how this comparison is to be undertaken, as it requires effects on each side to be measured in the same terms. The effect of lessening competition also cannot be determined separately from the decisions of the firm as to how it exerts the position it has developed. Other gains (for example, technological or pro-competitive) are integral elements of the firm's position.

Part C of the chapter also sets out the grounds under which firms may apply for exemptions from the Act. These grounds are focused more on the public interest, and cover the following: the maintenance and promotion of exports; the promotion of small businesses or firms controlled or owned by historically disadvantaged persons; declining industries; and the economic stability of an industry.

4.4 Mergers and Acquisitions

In a major departure from the previous legislation, the Act provides for compulsory pre-merger notification, subject to the merger being above thresholds set in terms of the assets and/or turnover of the merging entities. Notifiable mergers are separated into:

- Intermediate mergers - where the combined annual turnover or assets in the Republic of the acquiring firm and the target firm are equal to or greater than RN 50 million and where the assets or turnover of the target firm are greater than RN 5 million; and
- Large mergers – where the combined annual turnover or assets in the Republic of the acquiring firm and the target firm are equal to or greater than RN 3.5 billion, and where the assets or turnover of the target firm are greater than RN 100 million.

The processes for evaluating the mergers by the Commission and the Tribunal include assessing competition in the identified market taking into account the actual and potential level of import competition, ease of entry, countervailing power, and dynamic characteristics of the market, as well as the removal of an effective competitor.

The Commission can make an independent determination on intermediate mergers, while large mergers must be ruled on by the Tribunal, with the Commission having undertaken an investigation and presented a position. Intermediate mergers may still be appealed to the Tribunal.

The processes for evaluating the mergers by the Commission and the Tribunal include assessing competition in the identified market taking into account the actual and potential level of import competition, ease of entry, countervailing power, and dynamic characteristics of the market, as well as the removal of an effective competitor. Technological and efficiency gains that could offset any potentially anti-competitive effects resulting from the merger are also considered. Public interest issues may be taken into account, such as employment; the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive; and the ability of national industries to

compete in international markets. These are, however, secondary concerns, which must be set against competition implications if they are deemed to be significant.

While only a small number of mergers have been prohibited by the Tribunal, important precedents have been set.

While only a small number of mergers have been prohibited by the Tribunal, important precedents have been set. The success in setting such precedents means that it is less likely that parties will propose anti-competitive mergers, unless there are strong efficiency gains. In particular, the merger evaluations and judgements give an insight into how the different concerns of competition, economies of scale, international competitiveness and public interest factors such as employment are being taken into account.

The conclusions also highlighted the impact on low-income consumers who do not have access to other forms of credit.

- In the ***furniture sector*** the Tribunal ruled against the merger between Joshua Doore and Ellerines Holdings (the two largest furniture retailers) on anti-competitive grounds. Of crucial importance was the local definition of the market, and that these stores provided extensive credit facilities to their customers, unlike many of their competitors. Small, independent furniture retailers could not be considered as competitors of these stores since small stores normally operate on a cash basis and not on hire purchase like these stores. Competition concerns were identified, as the market shares of the merged stores would range from 40 percent to 60 percent in nine markets, and would exceed 30 percent in the remaining three markets examined. Furthermore, since the market shares were based on the number of stores, rather than turnover, the above market shares understate the concentration levels in these markets. The conclusions also highlighted the impact on low-income consumers who do not have access to other forms of credit. Although the Commission, in negotiations with parties, agreed to support the merger if 150 of the 650 stores were divested to a viable entity, preferably a black empowerment group, the Tribunal did not view these measures as sufficient to allow the merger.

- The ***sugar merger*** between Tongaat-Hulett and Transvaal Suiker Beperk was a direct combination of two horizontal competitors. The justification put forward by the parties was the need to be big in order to be competitive. The sugar market is already very concentrated, being dominated by two main producers. This merger involved the takeover of the third largest producer by one of the bigger two, further entrenching concentration. This case also reflected the role of competition policy in regulatory change. The sugar sector has been highly regulated in the past, but is now being liberalised. The Tribunal believed that increasing concentration would have lessened the benefits of deregulation. The response by the parties to the Tribunal's decision, that it deterred investment and reduced competitiveness, suggests that some in the business community have yet to come to terms with the new competition legislation.

Mergers have been allowed for efficiency reasons, even where there may have been anti-competitive effects, and potential employment losses have not been elevated above other concerns.

- In other cases, mergers have been allowed for ***efficiency reasons***, even where there may have been anti-competitive effects, and potential employment losses have not been elevated above other concerns. In the merger of Trident Steel and Baldwins Steel (Dorbyl Ltd) the Tribunal granted approval due to the gains from plant re-organisation and cost-savings. Import liberalisation was significant in its decision, as was the potential failing of the target firm.

- In several mergers, the judgements have included ***conditions***. In the decision on the merger between Bromor foods and Game, which related

to energy drinks, the conditions related to maintaining the number of competing brands. In the decisions on the deal between Telkom, TPI Investment and Praysa, the Tribunal indicated a willingness to enforce conditions related to employment. Essentially, as the parties had argued that the acquisition was motivated by efficiency gains which did not relate directly to contractions in employment and changing work conditions, the conditions of the Tribunal held the parties to their commitment in this regard.

The Commission opposed the merger based on an analysis of the competition effects and a weighing-up of the arguments made for efficiency gains by the parties.

- The ***vertical merger*** of Frame and Seardel, among the largest ***textile*** and ***clothing*** groups in South Africa respectively, was approved by the Commission as the companies have a vertical rather than horizontal relationship. In other words, they produce different products, and the merger does not therefore directly reduce competition. However, in the context of the merger, allowing for preferential supply of textiles products by Frame to Seardel's clothing factories, there could be a negative impact on competition, especially in the context of projected supply shortages of textiles products.

- Although the proposed ***banking merger*** between two of the four main retail banks was not decided upon by the Tribunal as it fell within the jurisdiction of the Minister of Finance, the Commission's submission had an important influence on the Minister's decision. The Commission opposed the merger based on an analysis of the competition effects and a weighing-up of the arguments made for efficiency gains by the parties. In particular, the negative effects of the merger on personal users and small businesses were emphasised. The efficiency gains were found to be unconvincing, and the employment losses that would result from the merger were also noted. The high profile nature of the case and the concurrence of the Minister's ruling with the Commission's findings were important in adding to the Commission's reputation.

Based on the rulings on mergers, a balance is struck between competition, and public interest concerns such as employment.

Based on the rulings on mergers, a balance is struck between competition, and public interest concerns such as employment. The construction of efficiency appears to be biased towards a structural understanding of competition, rather than to do with the behaviour of firms, with the Hirschman-Herfindahl Index[20] being used as a guide to whether a merger will have anti-competitive consequences.

The examples of cases where the authorities have allowed mergers which on the surface are anti-competitive do indicate that they place broader defined efficiency analyses over and above a narrow consumer welfare focus. In the ruling on the Trident Steel and Baldwins Steel merger the Tribunal discussed the various efficiency considerations along with international precedent. While it acknowledged the difficulty in quantifying claimed efficiencies (especially dynamic ones), it set a precedent for judging the 'order of magnitude' in balancing the differing effects. The placing of efficiency is consistent with a concern over encouraging investment and the taking into account of employment (which has social efficiency effects where there is high unemployment). With reference to concerns raised by the National Reference Group, there has therefore been a clear precedent set in the merger cases of prioritising economic efficiency over a narrower reference to consumer welfare. The rulings have also made extensive reference to international experience and cases, especially in the USA as well as in the European Union.

The rulings have also made extensive reference to international experience and cases, especially in the USA as well as in the European Union.

Although it is too early to make a proper assessment, there are also indications that the Commission will take into account ownership of firms

in order to fulfil the objectives of the Act in terms of the advancement of historically disadvantaged persons. For example, in the proposed Joshua Doore – Ellerines merger a key condition for the Commission supporting the merger after negotiations was the divestment to a black owned entity. As acknowledged by the Commission, it is, however, difficult for it to go out looking for suitable owners in cases such as this one.[21] The Tribunal has, in general, taken a sceptical approach to arguments in support of mergers on the grounds of increasing black ownership where the mergers are clearly anti-competitive.

The Tribunal has, in general, taken a sceptical approach to arguments in support of mergers on the grounds of increasing black ownership where the mergers are clearly anti-competitive.

4.5 Cross-Border Abuses and Extra-Territorial Jurisdiction

The Act applies to all economic activity within, or having effect within, the Republic of South Africa. In this way it provides for jurisdiction over mergers and for action against firms where the firms' primary domicile is not South Africa. In practice, the Commission and Tribunal have recognised that South Africa is a relatively small economy and is unlikely to oppose large international mergers that have already been approved in the USA or Europe. It is also possible to address the effects of export cartels operating from other countries, such as the USA, but difficult to accomplish in practice.

Links have been established with competition authorities in other SADC countries through various fora, including an annual SADC course on competition law and policy held at the South African Competition Commission.

Recognition has also been made of the relationships between competition law and trade policy, but with caution in regard to the specific needs of developing countries.

Recognition has also been made of the relationships between competition law and trade policy, but with caution in regard to the specific needs of developing countries. This has informed the government's position in WTO negotiations and has not directly impacted on the workings of the Commission and Tribunal. The South African Government's submission to the WTO Working Group on the Interaction between Trade and Competition Policy argued for certain preconditions including a period of technical assistance and capacity building for developing country participation, and a redefinition of the roles of multilateral institutions.[22]

4.6 Checks, Balances and Remedies

Pressures for the de-politicisation of competition policy led to the independence of the new institutions from government, and concerns over the discretionary power of the competition authority led to the separation of the Competition Commission and Competition Tribunal. In general, rulings of the Competition Tribunal may be appealed at a specifically constituted Competition Appeal Court.

The Tribunal may make various orders in relation to practices such as interdicting the practices; ordering the practices to be terminated; declaring agreements to be void; ordering access to essential facilities; ordering divestiture; and imposing administrative fines.

The Tribunal may make various orders in relation to practices such as interdicting the practices; ordering the practices to be terminated; declaring agreements to be void; ordering access to essential facilities; ordering divestiture; and imposing administrative fines. The fines may be up to 10 percent of a firm's annual turnover in South Africa (including exports). Divestiture may be ordered where a firm has abused a dominant position repeatedly and no other remedies are applicable to the practice. In such a case, the ruling of the Tribunal must be confirmed by the Competition Appeal Court.

CHAPTER-V

The New Competition Institutions – Structure and Functions

The new institutions are independent of the government, in contrast to the previous Competition Board, which was part of the Department of Trade and Industry and fell under the Minister. Concerns over limiting the discretionary power of the competition authority has also led to the separation of the Commission, the Tribunal and the Appeal Court.

Concerns over limiting the discretionary power of the competition authority has also led to the separation of the Commission, the Tribunal and the Appeal Court.

In the new institutions, the President appoints the members of the Competition Tribunal on the recommendation of the Minister of Trade and Industry from among nominations following publication in the *Government Gazette*. The Competition Commissioner is appointed by the Minister (normally following a process of advertisement). Apart from appointments, the Minister only has a right to make representations on public interest grounds as a party to merger proceedings (section 18 of the Act) or may make representations at hearings of the Tribunal where there is a material interest on the part of the government (section 53).

5.1 The Competition Commission

The Competition Commission is structured into 6 main divisions, as follows:

- Mergers & Acquisitions: Responsible for investigations into mergers as notified.
- Enforcement & Exemptions: Responsible for investigation of complaints of prohibited practices and for dealing with applications for exemptions of agreements and arrangements such as on technological or pro-competitive grounds.
- Compliance: Issues advisory opinions on practices and arrangements. Undertakes advocacy to increase awareness of the Act and promote compliance with the Act. Monitors compliance of parties with specific orders of the Commission and Tribunal.
- Policy and Research: Undertakes mainly economic research into competition issues and into market structure in specific sectors.
- Legal Services: Responsible for preparing cases for presentation to the Competition Tribunal.
- Corporate Services: Covers human resources, training, procurement, and the accounts and budgets of the Commission.

The majority of professional staff have a legal background, followed by a large number with economics training.

There is also a small Commissioner's office with administrators and project managers.

The largest numbers of professional staff are in the Mergers & Acquisitions and the Enforcement & Exemptions divisions. The majority of professional staff have a legal background, followed by a large number with economics training. The Commission receives part of its budget from the government and part from the filing fees charged to merging firms.

5.1.1 Procedures

The Commission has 30 days in which to undertake an initial evaluation of an intermediate merger. For cases requiring detailed investigation the Commission can ask for an extension of a maximum of 60 additional days. For large mergers the Commission must submit a recommendation to the Tribunal within 60 days of receiving the merger notice, or request extensions from the Tribunal of 20 days at a time. Mergers that have been notified and are under investigation are announced in the *Government Gazette*, and parties are able to register a material interest and an intention to participate. The main trade unions represented in the merging firms must also be notified of the merger and have an opportunity to participate.

Investigations into prohibited practices start from an initial complaint, which can be registered by the Commissioner or other persons.

Investigations into prohibited practices start from an initial complaint, which can be registered by the Commissioner or other persons. Where the complaint is made by another person, the Commission must decide whether or not to accept the complaint in terms of the Act. If the Commission decides not to accept the complaint, the complainant has a right of appeal to the Tribunal. Following the investigation of a complaint, the Commission must either refer the complaint to the Tribunal or issue a Notice of Non-referral within one year.[23] The Commission has wide-ranging powers to request information and to undertake 'search and seizure' operations to obtain relevant information. When the investigation nears completion, negotiations may be held with the party(ies) to settle the case without a formal hearing.

The Commission has wide-ranging powers to request information and to undertake 'search and seizure' operations to obtain relevant information.

5.2 Competition Tribunal

The Competition Tribunal is composed of two full-time and eight part-time members, from which three-person panels are drawn to adjudicate on cases. The members are drawn from a broad cross-section of the population of South Africa and have relevant qualifications and backgrounds in economics, law, commerce, industry, and public and consumer affairs. The Tribunal members are appointed by the State President, following a public nominations process. The Tribunal's secretariat comprises a chief executive officer, three researchers and eight administrative, registry and support staff.[24]

The members of the Competition Tribunal are drawn from a broad cross-section of the population of South Africa and have relevant qualifications and backgrounds in economics, law, commerce, industry, and public and consumer affairs.

When a matter is referred to it under the Act, the Tribunal must:

- authorise or prohibit a large merger, with or without conditions;
- adjudicate appeals of the Competition Commission's decisions on intermediate merges and exemptions;
- adjudicate complaints of prohibited conduct and impose remedies; and
- rule on orders for interim relief.

The major work in the last year has been the setting up of the institution, recruitment and training of staff, and putting in place procedures to deal with cases efficiently.

5.2.1 Procedures

The Tribunal broadly operates in an inquisitorial rather than an adversarial manner. It has the ability to request information and conduct further analysis through its research section in order to understand an issue better. In more complex cases the Tribunal has adopted the practice of conducting pre-hearing conferences to reach agreement on procedural issues.

The Tribunal broadly operates in an inquisitorial rather than an adversarial manner.

The Tribunal operates in a transparent manner, and the hearings are open to the public. In this regard, parties must declare which information is confidential when they originally file their merger notification or complaint. After reaching a decision, its ruling is published on the Tribunal's website.

The Tribunal operates in a transparent manner, and the hearings are open to the public.

Groups with a material interest may register an intention to participate in hearings. In practice, this has only happened in a small number of cases. Trade unions have participated in merger hearings where there was possible employment loss, and government departments have made representations where cases have fallen within their policy ambit.

CHAPTER-VI

Capabilities of the Competition Institutions

6.1 The Competition Commission

6.1.1 Human Resources

Commission has found it difficult to find appropriately qualified economists, especially at senior level.

The Commission has a total of 91 permanent posts, of which 70 were filled in mid-2000.[25] Of these, approximately half are professional staff with tertiary qualifications. The shortage of economists with a strong postgraduate training has, however, meant that the Commission has found it difficult to find appropriately qualified economists, especially at senior level. In addition, the large number of mergers which the Commission had to evaluate as soon as it started operating meant that staff had to be moved to Mergers from the Enforcement and Exemptions division dealing with prohibited practices.[26] The Commission is in the process of rebalancing this to ensure that prohibited practices can be better addressed.

To retain staff members, the Commission is trying to improve on other areas that are not salary related.

Higher private sector salaries are also attractive to senior staff, who are difficult to replace, and several senior staff members have left in the past year or so. Only two of the Commission's six divisions still have the same managers as two years ago, and two divisions were without managers for a period of several months due to the inability to locate suitable candidates. The Commission is a new institution, and people may not want to join an organisation that does not have an established reputation. Therefore the Commission has resorted to headhunting in order to attract people. To retain staff members, the Commission is trying to improve on other areas that are not salary related. For example the Commission is working on social responsibilities such as building a crèche if there is such a need.[27]

The Commission is also committed to employment equity in which building capacity is an important component. Africans made-up 55 percent of staff in mid-2000, followed by 26 percent White, 13 percent Asian and 6 percent Coloured employees.[28] Women constituted 54 percent.

The building of institutional capacity by the Commission therefore depends to a significant extent on training and capacity building.

The building of institutional capacity by the Commission therefore depends to a significant extent on training and capacity building. This is pursued through various means. Formal training has included intensive training programmes in July and August 1999 and June 2000, conducted by international practitioners and experts in competition policy from competition authorities of other countries, the World Bank, and the OECD. The programme included sharing experiences with competition authority officials from Southern African Development Community countries.

Perhaps the most important learning takes place on the job. Senior staff in the Commission support the development of more junior staff, while consultants and experienced staff from US competition authorities, provided through international technical support programmes, have also

made an important contribution in passing on experience. The Commission has an internship programme for newly qualified graduates, where the interns are assigned to a mentor. The interns may then apply for a permanent post with the Commission. Finally, the Commission also supports the ongoing development of staff through the provision of bursaries, with the aim of 85 percent of staff obtaining at least a first degree. In the Commission's first year, 18 bursaries were awarded.

The Commission uses a computerised 'Case Management and Tracking System', which monitors the progress of cases, and enables authorised personnel to view their progress online.

6.1.2 Infrastructure and Facilities

The Commission is well equipped in terms of infrastructure and facilities, due to it being well resourced (see below). The Commission and the Tribunal are located in their own offices in Pretoria, which are part of a new office park. All staff have new computers and access to the latest software. The Commission uses a computerised 'Case Management and Tracking System', which monitors the progress of cases, and enables authorised personnel to view their progress online.

The Commission has advanced information systems including electronic faxing, email, intranet and internet facilities. This enables staff to use reference materials online and the web-based library index system. There is also a fully computerised PABX, telephone management and voice-mail system. However, the website for the Commission does not seem to provide as much information as it could. For example, it does not include a copy of the annual report.

6.1.3 Financial Resources

From the pool of Tribunal members, a panel of three are chosen to hear any given case.

The Commission appears very well resourced. Of the RN 53.4 million annual budget for 1999/2000, 46 percent was derived from voted funds (from government) and 49 percent from filing fees paid by parties (mainly for merger notification). The remainder was earned from interest and other income sources. Of the budgeted income, only RN 31.5 million was spent. The large amount of unspent revenue is partly due to the initial set-up of the Commission and the period covered by the first Annual Report being only 7 months. The expenditure was broken-down into RN 10.3mn on administrative costs and RN 21.2mn on operating costs.

6.2 Competition Tribunal

6.2.1 Human Resources

The Tribunal has a much smaller staff, reflecting its primarily adjudicatory role. It therefore does not have the same size of demands as are placed on the Commission in terms of collecting and analysing information required for case investigations. There are 12 full-time staff members running the Tribunal secretariat and a further eight part-time Tribunal members. From the pool of Tribunal members, a panel of three are chosen to hear any given case. Half of the secretariat staff has university degrees. The Tribunal members are all highly qualified individuals drawn from legal, economics or consumer affairs backgrounds. The Tribunal has clearly defined employment equity goals, and in this regard 67 percent of the staff are Black, and 8 percent Asian; 50 percent are female.

The Tribunal has a continuous training and development programme for staff, with specific areas being covered internally or externally through courses, workshops and attendance at conferences.

The Tribunal has a continuous training and development programme for staff, with specific areas being covered internally or externally through courses, workshops and attendance at conferences. Financial support is also provided for staff pursuing further studies. During 2000/01, 89 working days were spent in training (on average more than six days per

person). The majority of training time went to the research section, followed by Tribunal members.

A performance management system is used to determine the training and development needs of the institution.

A performance management system is used to determine the training and development needs of the institution. This is done in consultation with staff members, and is linked with an annual performance appraisal of staff and overall performance. Staff members receive performance bonuses and their salaries are adjusted annually according to their performance.

6.2.2 Infrastructure and Facilities

As with the Commission, the Tribunal is well equipped in terms of computing equipment. The Tribunal shares the library and resource centre with the Commission. The Tribunal manages its own website, on which reports of all cases are posted.

6.2.3 Financial Resources

In general, the institutions appear to be well resourced in terms of finances and equipment.

The annual budget for the Tribunal in 1999/2000 was approximately RN 10 million, of which approximately half came from government grants and half from the filing fees of companies. Only RN 4.3mn of this was spent, with the majority of expenditure on personnel and administration, and 26 percent on capital. This reflects the short seven-month period and the initial set-up time for the Tribunal. The budget for 2000/01 was RN 10.9mn of which 90 percent was from filing fees. No funding was received from government. The level of spending is associated with the volume of cases being lower than they had predicted. It is expected to rise as more prohibited practices cases are referred to the Tribunal by the Commission in the coming year.

The challenges of developing institutional capacity in terms of methodologies and analytical techniques should also not be underestimated.

6.3 Summary

In general, the institutions appear to be well resourced in terms of finances and equipment. They are also well staffed in terms of numbers, however, building an institution of this nature clearly takes time and this is coupled with a general shortage of skills in the areas of competition policy and law. This is partly due to it being a relatively new area. The increase in components of law and economics degrees which examine competition issues will mean that future graduates will be more suited to employment in these areas. The challenges of developing institutional capacity in terms of methodologies and analytical techniques should also not be underestimated. While training addresses this to some extent, an important part of these skills is gained through ‘learning by doing’.

CHAPTER-VII

Effectiveness of the Institutions

The effectiveness of the institutions can be assessed in a number of different ways. These include the processing of cases, the sources of complaints, and the enforcement of rulings. The accessibility of the institutions and their roles in terms of advocacy and awareness are also very important in assessing their impact. Awareness of the measures of the Competition Act itself will impact on the behaviour of firms, especially if they believe there is a credible threat of detection and remedy for actions which breach the provisions of the Act.

Implementation of the legislation involved determining a set of formal regulations, setting out guidelines, and establishing the procedures by which the institutions operate.

In their first year of operation much of the energy of the Commission and Tribunal was taken up with establishing the necessary institutions and procedures. Implementation of the legislation involved determining a set of formal regulations, setting out guidelines, and establishing the procedures by which the institutions operate. The compulsory pre-merger notification requirements in the new Act meant that the institutions were also immediately faced with the evaluation of large numbers of mergers.

To assess the operation of the institutions, interviews were conducted with members of the Commission and the Tribunal, and with stakeholders. Important inputs were also made by stakeholders as members of the NRG. It has been somewhat difficult to arrange interviews with staff members of the Commission. Many of the arranged meetings were postponed for various reasons, including the other commitments of Commission staff. Interviews have been held with the Commissioner, Menzi Simelane, and several staff members of the Compliance Division (Nozipho Buthelezi, Lebogang Molebatsi and William Maphoto). In addition, some of the requested information was deemed by the Commission to be of a confidential nature, and so was not provided. In the Tribunal, interviews have been held with the Chief Executive Officer, Shan Ramburuth, and the Head of Registry, Eugene Tsitsi, who were able to provide almost all of the information requested. Interviews were also held with Peter Hlapolosa of the Independent Communications Authority of South Africa, Thami Bolani of the National Consumers Forum and Michael MacDonald of the Steel and Engineering Industries Federation of South Africa (and also Business representative to NEDLAC). Information has also been drawn from media reports and the recently reported survey conducted by the Global Competition Review, 'Rating the Regulators'.

During the period covered by the first Annual Report, from September 1999 to March 2000, a total of 524 mergers were notified to the Commission, of which 331 were large mergers.

7.1 Competition Commission

During the period covered by the first Annual Report, from September 1999 to March 2000, a total of 524 mergers were notified to the Commission, of which 331 were large mergers on which the Commission is required to make a recommendation for judgement by the Tribunal (table 2). There were also 122 complaints of prohibited practices, and 71 advisory opinions were sought. The merger cases also included many which were covered by the transitional arrangements governing the change from the former Competition Board.

Table 3: Summary of Commission cases - 1 Sept 1999 to 31 March 2000					
Case type	**No of cases notified**	**No of cases finalised**	**% of cases finalised**	**Total no of investigators**	**Av no cases finalised per investigator**
Mergers	331	236	71	9[i]	26
Complaints	122	37	30	7	5
Advisory opinions	71	59	83	2	30
Total	**524**	**332**	**63**	**18**	**18**

Source: Competition Commission Annual Report 2000

Note: i) Staff from other divisions were seconded to the Mergers Division to assist with the abnormally high caseload that resulted from the notification of transitional mergers.

This compares with a total of 96 merger notifications in the first six months of 2001 (after the notification thresholds had been raised).[29] Based on a sub-sample studied by the Commission, the largest proportion of mergers (40 percent) were in the finance, insurance and real estate sectors, followed by wholesale and retail trade (20 percent) and manufacturing (20 percent). An estimated 57 percent of mergers have been of a purely horizontal nature, followed by 27 percent being conglomerate (a mixture of horizontal and vertical relationships). The final 16 percent represented acquisition by a foreign firm.

The ongoing caseload was around 12 cases per investigator in the Mergers Division and nine cases in the Enforcement and Exemptions Division.

It was also noted by the Commission that the ongoing caseload was around 12 cases per investigator in the Mergers Division and nine cases in the Enforcement and Exemptions Division. This is much larger than in many other jurisdictions. Despite this, cases were generally resolved within the stipulated time-frames. The average period for the resolution of mergers was 55 days, and for complaints, 100 days. In the second and third quarters of 2000, 31 complaints were concluded, and a further 26 were under investigation.[30]

Based on the first six months of 2001, of 58 complaints notified to the Enforcement and Exemptions division of the Commission, 14 have been concluded and the remainder are still under investigation.[31] The majority of complaints (63 percent) are of abuse of dominance (section 8 of the Act), followed by 29 percent being of vertical restrictive practices (section 5) and only eight percent of horizontal restrictive practices (section 4). The largest sector in which there have been complaints is services (30 percent), followed by pharmaceuticals (22 percent), manufacturing (13 percent), transport services (13 percent) and film distribution and exhibition (13 percent).

While the Commission seems to have dealt relatively well with the great demands placed on it from its first day of operation.

According to information received from the Tribunal, 11 complaints were referred to it by the Commission over the whole period from September 1999 to the end of March 2001. Of these, six were settled by consent orders, one has been ruled upon and four are still pending. A further eight complaint referrals were filed by complainants themselves after the Commission had issued notices of non-referral.

While the Commission seems to have dealt relatively well with the great demands placed on it from its first day of operation, recent reports based on the Global Competition Review's survey of competition practitioners (mainly lawyers) have found that the Commission is relatively slow in handling cases and unfocused in requesting information.[32] It was also

found to be weak in handling cartel cases. It must be borne in mind that the lawyers being questioned may in many cases be representing clients who the Commission is investigating, while the Commission represents the interests of those who are less powerful or are marginalised. However, it nonetheless raises some questions about the accessibility of the Commission, and it developing a reputation for the efficient handling of cases. The Commission has claimed that checks are necessary to record all meetings of staff with parties, however, the failure to provide some information requested for this project on the grounds of its confidentiality, and the difficulties in arranging meetings with relevant staff suggests that improvements could be made in transparency and accessibility.

The Commission has made significant efforts in advocacy and education about the role of competition policy.

The Commission has made significant efforts in advocacy and education about the role of competition policy. These have included a series of workshops and presentations to lawyers and stakeholders, especially in the initial phase when the Act was coming into force. Press coverage of cases has also been quite extensive. In addition, the Commission and Tribunal have jointly hosted two conferences, which were well attended by a wide cross-section of people interested in competition matters. The Commission also releases quarterly newsletters, although it is not clear how widely they are read. Interviews with Commission staff do, however, suggest that more could also be done in advocacy and education.

The constraints are attributed to the budget available, the capacity of the Commission, and the unorganised nature of the South African consumer movement. These are parameters within which the Commission has to operate, and it is continuing to meet with organised business (small and large) on education and advocacy issues. The level of outreach is also substantiated by the number of complaints received, although some of the complaints may misunderstand what is covered by competition legislation, as opposed to consumer protection measures.

Most of the complaints have been made by small businesses rather than consumers. This is important in terms of the role of competition policy in addressing the dominance of large conglomerates and supporting greater access to markets on the part of small companies. However, the very small number of consumer complaints suggests that further work needs to be done in this area. There is also a need to find out why there are no well-organised consumer groups and how, together with other stakeholders, the development of the consumer movement can be facilitated. It is also important to determine further ways of communicating competition issues. At the moment these are mostly only reported on in three newspapers (the Business Day, Business Report and the Sunday Times). There surely is a need for wider media coverage.

There is also a need to find out why there are no well-organised consumer groups and how, together with other stakeholders, the development of the consumer movement can be facilitated.

The Commission's first major investigation into horizontal restrictive practices, of alleged collusive behaviour in the cement industry, has been held up by court challenges following a 'search and seizure' operation on August 2nd 2000. Such operations are allowed under the Act where there are reasonable grounds to believe that a prohibited practice has taken place and where persons have information on the premises relevant to the practice. The search also only took place after the Commission had repeatedly requested information. The court challenge therefore goes to the heart of the powers of the Commission under the Act, and until its resolution hinders the operation of the Commission in these matters.

7.2 The Competition Tribunal

Information was obtained from the Tribunal for the periods from September 1st 1999 to March 31st 2000 and from April 1st 2000 to March 31st 2001.

During the 1999/2000 period, 28 merger transactions were referred to the Tribunal. Of these, half were decided during the period, 10 were decided in the following financial year and four were withdrawn. Of the cases decided during 1999/2000, it took the Tribunal on average less than 20 days to decide on a case. In addition to the efficiency of the Tribunal, the rapid turnaround time is due to the different role of the Tribunal in adjudicating, and the fact that the Tribunal's workload only increased once cases had already been investigated by the Commission. The Global Competition Review report attributed the performance to the fact that it had a more appropriate level of resources than the Commission, although this view is not necessarily supported by the above analysis of resources.

It took the Tribunal on average less than 20 days to decide on a case.

During the period 2000/01 the Tribunal heard 31 large merger cases which were dealt with in an average of 20 days. Only two of the large mergers were prohibited by the Tribunal. A further four were approved with conditions.

The Competition Commission has referred a total of 19 complaints to the Tribunal. Of these, consent orders were issued for six, 12 are still pending, and one was withdrawn. The agreement to consent orders in six of the cases referred to the Tribunal indicates acceptance of the provisions of the Act in the case of *per* se contraventions. It also suggests that, despite the small number of 'prohibited practice' cases taken before the Tribunal by the Commission, a reputation is being developed for effective actions, which leads respondents to agree concessions. However, it is clear that there has been much less progress in addressing restrictive practices which are not outlawed outright in the Act.

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The Tribunal has a very important role in being able to grant interim relief. A person making a complaint to the Commission against a prohibited practice by a firm may also apply to the Tribunal for interim relief with respect to that practice if there is serious and irreparable damage arising from the alleged practice. Thirty-one applications for interim relief were made up to March 31st 2001. Of these, interim relief was granted in five, three were dismissed, three are still pending, in one case the parties reached a settlement and a consent order was issued, and the remainder were taken off the roll or withdrawn. The majority of interim relief cases are dealt with quickly.

As noted above, there have been a number of applications for interim relief. The conditions on which this can be granted are much more restricted than for complaints, as interim relief does not involve a proper investigation. It can therefore only be granted where it is clear that the complainant will suffer irreparable harm during the period it will take for the Commission to investigate the complaint, and that the balance of convenience lies with providing relief. Nevertheless, the decisions by the Tribunal in this regard provide some indications as to how complaints of prohibited practices may be judged.

It is evident that apart from situations where arrangements are* per se *illegal under the Act, the evidence required is quite onerous.

It is evident that apart from situations where arrangements are *per se* illegal under the Act, the evidence required is quite onerous. For example, this relates to the behaviour of dominant firms in abusing their market power, such as by charging excessive prices. There are also a range of vertical arrangements which may by their nature reduce competition, but

which yield benefits. In many cases complaints about vertical restrictive practices have actually come from companies who have not themselves been awarded the contract, rather than from consumers who are negatively affected by the market power of the contracting parties.

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In the two cases where interim relief was granted by the Tribunal in the year up to March 2001, one involved an arrangement that forced a farmer to sell to a company that had formerly been a co-operative. The other was where restrictions in the supply of pharmaceutical products occurred as a result of horizontal arrangements between the supplying companies. Horizontal arrangements that restrict competition are one of the clearest areas under competition law.

7.3 The Competition Institutions and other Regulatory Authorities

There is concern that there are overlaps between the competition institutions and regulatory authorities. This has been raised by both the institutions themselves and by business. To deal with this issue there is currently a process of developing a memorandum of understanding between the competition institutions and the sector regulators to determine how they will deal with concurrent jurisdiction. This should prevent firms from 'forum shopping', as both institutions can evaluate competition concerns simultaneously. There is a recognition that the regulators and the competition authorities have complementary roles and strengths, but this has not yet been tested in practice.[33] It remains to be seen how these issues are resolved when there is disagreement between a regulator and the Commission. According to the concurrency of jurisdiction, in theory either institution should be able to act without the other's agreement.

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7.4 Business and Consumer Perspectives

It is difficult to make an objective assessment of the effectiveness of the institutions from the perspectives of consumers and business, partly because these are very heterogeneous constituencies themselves, and partly because the most vocal opinions expressed are not necessarily representative. The greatest area of concern is perhaps the low level of consumer participation in the form of complaints being registered and representations being made.

The greatest area of concern is perhaps the low level of consumer participation in the form of complaints being registered and representations being made.

7.4.1 Business

Based on the interviews and press reports, there are very mixed opinions on the new institutions and the law itself. Some believe that there has been a change in mind-set as a result of the new legislation and other liberalisation measures.[34] For example with the opening up to competition service has improved in areas such as telecommunications. However, there are complaints that in other sectors, such as banking and transport, firms are still very unresponsive to consumer needs, suggesting the lack of a competition ethos.

From the opposite perspective, there have been complaints that the competition legislation prevents South African companies from achieving the economies of scale required to be internationally competitive.

From the opposite perspective, there have been complaints that the competition legislation prevents South African companies from achieving the economies of scale required to be internationally competitive. This particularly applies to decisions to oppose mergers on the grounds of increasing concentration. It has been argued that this acts as a disincentive to local and foreign investment.[35] There may be a need to clarify the balance between the domestic market and international competitiveness demands. Provisions in the Act allow for international

competitiveness to be taken into account by the Tribunal. In the cases cited by business groups, the Tribunal therefore did not judge these factors to be persuasive.

7.4.2 Consumers

It also acknowledges that a stronger consumer movement will enable consumer issues to be better represented before the Commission, Tribunal and other regulators.

Although the voice of less powerful beneficiaries is often not heard in cases, the National Consumer Forum has indicated that it has so far been happy with the decisions taken by the institutions, and appreciates the opportunities provided to them to comment on cases. It also acknowledges that a stronger consumer movement will enable consumer issues to be better represented before the Commission, Tribunal and other regulators. They therefore emphasise the need for consumer awareness in general in the country. The recent successful case for the government and the Treatment Action Campaign group against a group of large pharmaceutical multinationals is an indication of the impact that an organised consumer movement can have.[36]

It must also be noted that the institutions have clearly established a reputation for independence, and for maintaining the confidentiality of information to which they have access in conducting investigations and making rulings.

CHAPTER-VIII

Conclusions

Both the Tribunal and Commission believe that they are succeeding in preventing further concentration in the South African economy (through merger regulation), but that they are still struggling to address the effects of the existing concentration.

The successful establishment of the competition authorities is a major achievement. They are relatively well staffed and resourced, and are building their institutional capabilities through training and accumulation of experience. Both the Tribunal and Commission believe that they are succeeding in preventing further concentration in the South African economy (through merger regulation), but that they are still struggling to address the effects of the existing concentration. In terms of competition policy objectives and the DTI policy framework, it is clearly the effects of market structure and firm behaviour that are important in terms of efficiency, competitive prices, greater economic opportunities, and broad-based economic development. This is very important in the context of the legacy of concentration in the South African economy. The authorities are certainly not achieving the hoped for impact in these areas as yet, although it may be argued that these aspirations are overly ambitious and misplaced.

The competition framework and institutions also appear to have been relatively weak in terms of providing consumers with an avenue to represent their interests vis-à-vis suppliers with market power.

The competition framework and institutions also appear to have been relatively weak in terms of providing consumers with an avenue to represent their interests vis-à-vis suppliers with market power. There has been more success (although still relatively limited) in small firms being able to bring cases where they have been subject to anti-competitive practices by dominant incumbents. As noted, this has manifested itself in a large number of complaints related to vertical restrictive practices, which are very difficult to assess. There have been relatively few to do with cartels and excessive prices, which various writers have recommended should be prioritised by new institutions.[37]

At the level of implementation, the Act places great demands on the new institutions being established, as it effectively requires them to replicate the data collection and depth of analysis of institutions in industrialised countries.[38] Skill shortages (particularly of economists) and the turnover of senior staff increase the challenges. The consequence of failing to achieve the necessary information collection and analysis is to advantage the firms to which the legislation applies. This is particularly acute in cases involving large conglomerates or multinationals, with whom the Commission is effectively on an equal footing in front of the Competition Tribunal.

The wider impact of the institutions in affecting business practices and behaviour as part of the transformation of the economy remains a challenge to be addressed.

With respect to mergers, where the onus is more on the parties to provide proof of efficiency gains, the institutions have made major achievements. And, despite the difficulties in prosecuting prohibited practices, the success of the institutions in establishing themselves and dealing with the demands in a relatively short space of time should not be underestimated. They have taken into account the various factors related to efficiency, and have established important precedents in how these can be weighed up. However, the wider impact of the institutions in affecting business practices and behaviour as part of the transformation of the economy remains a challenge to be addressed. To do this the

Commission needs to be both more accessible and more effective in using its powers under the Act. This has been limited both by the size of the demands on it and the ability of firms to challenge the provisions in Court. In several cases, firms have succeeded in slowing down the progress of cases or stopping them altogether through repeated legal challenges, often on technicalities. These challenges should be reduced with experience and the establishment of precedents, yet the tasks facing the competition authorities remain daunting if they are to realise the goals of the legislation.

NRG Meeting Summary

One of the important components of the 7-Up project was the formation of a National Reference Group (NRG) in each of the project countries. The main objectives of forming NRGs were to deliberate on the inputs prepared in each country, and to create a base for launching advocacy for a healthy competition culture. The NRGs comprised of representatives of the following categories of organisations/persons:

- Consumer organisations and other civil society organisations with a demonstrated interest in economic issues
- Experts/interested persons from academia and the media
- Business and chambers of commerce
- Competition & regulatory authorities
- Government (External Trade, Internal Trade and/or Consumer Affairs Departments)
- Politicians and/or parliamentarians
- Trade union leaders

The South African NRG met on the June 29th 2001, and again on November 27th. The meetings provided a useful opportunity to bring together various experts to discuss the project and the competition regime in general. The project was introduced and several issues were discussed, the highlights of which are detailed below:

- The country report complements other work on competition policy in South Africa and informs the general debates on the nature of market contestability and economic growth.

- It is not clear what the benchmark should be for South African competition policy. If it is ahead of the other developing countries in the project in terms of setting up its policy framework then developed countries or Newly Industrialised Countries might be a useful comparison. It was pointed out that the practical restrictions of the 7-Up project limited it to a specific focus on seven developing countries.

- A conflict of interests may arise in balancing the objectives of the Act. Efficiency considerations may conflict with the promotion of employment, and consumer welfare must also be considered. The need to promote international competitiveness must also be balanced against promoting competition in the domestic economy. South African policy developed out of a consultative process and must balance the resulting concerns. These issues are complicated by the fact that capital in South Africa is of a specific colour and black companies may not be able to take advantage of the Act because of financial difficulties.

- There was some question about whether all the objectives were actually reflected in the Act, for example in the criteria for evaluating mergers. There was also doubt over whether some of the objectives should be included in competition policy and legislation and whether it is possible to achieve them.

- The impact of the legislation on investment was highlighted; if policy is unclear then investors may be deterred. The effect on investment was also identified as an important factor in decisions by the competition authority.

- It was recognised that consumers, NGOs and interest groups need to be more pro-active. Vertical cartels are brought to the Commission's attention by businesses, but horizontal cartels are not addressed because consumers are not vocal enough. The public interest focus has not gained momentum in South Africa because advocacy organisations are in an embryonic phase and there is a general lack of strong consumer 'champions' raising consumer awareness.

- The main vehicle in existence is the National Consumer Forum (NCF). It made representations to the Commission on the failed furniture retail merger between Joshua Doore and Ellerines. The interface between the Commission and consumer organisations and how they can support each other presents a rich vein for research.

- Many of the firms that file complaints are small businesses. The Commission resolved the majority of these cases by concluding consent orders with the contravening firms.

- The participation of trade unions is very important in the Commission's handling of mergers. In 2001, trade unions participated in 30 of 130 mergers. It is compulsory for firms to notify trade unions of their intention to merge. Trade unions thus may participate in the merger proceedings and may file a 'notice of intention to participate' with the Commission.

- The Commission has six main activities: merger evaluations; investigations; exemption evaluations; advisory opinions; policy and research; education and information; and legislative reviews. Most of the Commission's resources are focused on merger evaluations and investigations. In 2001 most of the mergers were horizontal, involving firms that competed in identical markets.

- It is often difficult to assess whether a merger will bring FDI into South Africa. The most likely cases involve a foreign firm. Mergers also involved job losses—in 19 cases some 2000 jobs were lost due to mergers while only 450 were created.

- There has been an increase in the number of cases the Commission has dealt with involving small and medium sized enterprises (SMEs). Many of these cases negatively affected the ability of SMEs to effectively participate in the economy as a result of varying restrictive practices used by established firms, particularly in the agricultural and franchise sectors.

- The Commission has also dealt with prohibited practices (restrictive horizontal and vertical practices and abuse of dominance). There were 176 such complaints of which 70 percent have been resolved and the rest are still being investigated.

- There were important amendments to the Act as well. A new amendment gives the Commission concurrent jurisdiction with other regulators in respect of an industry or sector subject to public regulation. This corrects an anomaly where there is conflict of jurisdiction as happened in the Nedcor/Stanbic case.

- The problem and difficulty of extra-territorial regulation of firms was noted. Nine out of 14 countries in the SADC region do not have competition laws and authorities. It is important to have a minimum of ground rules to regulate the regional market so as to attract investment. In some small SADC countries the absence and relative weakness of competition authorities has contributed to predatory behaviour on the part of many of South Africa's larger firms, particularly the conglomerates. However, how viable will a supra-national regional competition authority be where national jurisdictions are inadequate or weak? At this stage a strong case might be made for competition policy harmonisation, which could serve as a route to eventual convergence. This is another area for research and investigation and a better exchange of information is needed at the regional level.

Synopsis of the Synthesis Report

The Synthesis Report is the culmination of the work undertaken in Phase I of the 7-Up project. This synopsis provides a summary of the Synthesis Report.

The Synthesis Report is the culmination of the work undertaken in Phase I of the 7-Up project, which is a comparative study of the competition regimes of seven developing countries of the Commonwealth namely, India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia. It brings together the results and findings from the individual country reports that provide details of the structure, functioning and efficiency of the institutional framework for enforcing competition law in the country.

The synthesis compares the experiences of the seven countries, providing a benchmark by which countries can evaluate their own progress and offering an opportunity for them to learn from developments elsewhere. This synopsis provides a summary of the Synthesis Report.

The 7-Up countries differ in terms of their geographical locations, population sizes, and specific developmental challenges.

The 7-Up countries differ in terms of their geographical locations, population sizes, and specific developmental challenges. They are also at different stages in terms of the development of their competition regimes. While India has had competition legislation in place since 1969, Tanzania and Zambia first enacted competition laws in 1994 and 1995 respectively. Accordingly, the countries have different levels of experience as regards the implementation of competition policy.

Every country in the study is undergoing a process of economic reform and market restructuring. In this sense, the project countries are not only developing, but also transition countries. This process has involved liberalisation of the economy, including a reduction of barriers to international trade and reduced state involvement in commercial enterprises.

Every country in the study is undergoing a process of economic reform and market restructuring. In this sense, the project countries are not only developing, but also transition countries.

Large state-owned enterprises have been privatised and replaced by profit-driven bodies. In this context, competition policy is extremely important in order to ensure that a smooth transition towards a well-functioning market occurs, and to avoid the danger of transferring dominant market positions to private enterprises. This would ensure a broader choice of goods at cheaper prices for consumers, and an efficient allocation of the economy's resources.

As part of the more general programme of reforms many of the countries have recently changed, or are in the process of changing their competition laws. As with other policy changes, this represents a shift in emphasis away from government control (e.g. price controls) towards the encouragement of market-driven efficiency, through competition.

As part of the more general programme of reforms many of the countries have recently changed, or are in the process of changing their competition laws.

However, some of the laws include objectives that are not directly related to the promotion of competition; for example one of the objectives of the South African Competition Act, 1998, is to "promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons", and the Sri Lankan Fair Trade Commission takes the control of inflation into consideration in its activities. In general, the key objectives are efficiency and consumer welfare, with a recognition that there may be a trade-off between static and dynamic efficiency.

Three main areas are generally considered to be the core concerns of competition policy in any country:

i) Restrictive trade (or business) practices;
ii) Control of monopoly power or a dominant position; and
iii) Mergers and acquisitions.

While each of these is covered under all of the 7-Up country laws, the manner in which they are covered differs somewhat.

No country prohibits all RTPs per se, but in some countries those practices that are regarded as particularly damaging are singled out for this type of prohibition.

Most countries identify specific actions that constitute an RTP; the others give a more general definition. In several of the 7-Up countries the definition of restrictive trade practices (RTPs) is related to the idea of a horizontal or vertical agreement between firms that restricts competition. In other countries RTPs also include restrictive actions by single enterprises.

No country prohibits all RTPs per se, but in some countries those practices that are regarded as particularly damaging are singled out for this type of prohibition. All countries include a 'rule of reason' provision whereby some practices can be justified either in the public interest, or on efficiency, technological progress or export grounds. The onus is usually on the offending party to make a case for itself, though in Sri Lanka the burden of proof is reversed. It is difficult to determine the precise criteria on which 'rule of reason' decisions will be based, but this process should develop over time to provide more predictable outcomes for enterprises, while allowing competition authorities the necessary flexibility to support developmental needs and other public policy aims.

Most of the 7-Up countries adopt a two-step approach to determining the abuse of monopoly power and dominant market positions.

Most of the 7-Up countries adopt a two-step approach to determining the abuse of monopoly power and dominant market positions. Firstly, they must establish that a position of dominance exists, and secondly, they must establish that this position is being abused. A prerequisite for this process is identifying the relevant market, in terms of its 'geographical' and 'product' dimensions. Most of the laws do not provide a clear prescription for how this should be done. India's new Competition Bill, although not yet in force, will be the only competition law to specify which factors should be taken into consideration in this regard.

Once the relevant market has been determined, dominance is assessed. The major factor for determining this in all countries is market share. Although there is no one-to-one relationship between a high market share and market dominance, which makes it difficult to set a threshold, this method is used as an important indicator in jurisdictions all over the world. The levels above which dominance is presumed in the 7-Up countries fall between 30 and 50 percent. India's new Bill takes a more behavioural approach, taking into account other factors such as the size and importance of competitors, technical advantages and the overall structure of the market. It is not yet clear how much weight will be allocated to each factor.

Once it has been established that a firm is in a dominant position, the second step is to determine whether this position is being abused.

Once it has been established that a firm is in a dominant position, the second step is to determine whether this position is being abused. Dominant firms are subject to the same prohibitions as other firms, while in some cases behaviour that is legitimate for non-dominant firms is also not allowed.

The only country that does not follow the two-step approach is Pakistan. Here, once market dominance is determined it is up to the dominant enterprise to justify its position on the grounds that it contributes substantially to efficiency, technological progress or the growth of exports.

In addition, the economic circumstances that prevailed in the country in 1970, when the MRTPO was enacted, led the law to prohibit excessive 'personal' market power per se. At that time there was a vast concentration of the country's wealth into the hands of 22 business families. The MRTPO set a threshold of 300 million Pakistani Rupees, above which an individual's assets are deemed to constitute an undue concentration of economic power. The remedy in these cases is divestiture of ownership.

All 7-Up countries have provisions to the effect that mergers and acquisitions likely to result in situations where competition will be limited are prohibited. Requirements on pre-notification, however, differ.

All 7-Up countries have provisions to the effect that mergers and acquisitions likely to result in situations where competition will be limited are prohibited. Requirements on pre-notification, however, differ; Pakistan requires that all mergers are notified to the authority; Kenya, Tanzania and Zambia require that all horizontal combinations are notified and approved (this limits their scope to deal with cases of vertical mergers with anti-competitive implications); South Africa requires pre-notification above a certain threshold; and India requires no pre-notification in either the existing Act or the proposed Bill. In Sri Lanka all mergers are notified, though the law actually only requires this in cases where combinations result in either the acquisition of a dominant position, or the strengthening of an existing one. The policy towards pre-notification has significant implications for the workload of competition agencies. In South Africa, this was part of the motivation for the amendment that introduced the threshold below which notification is not required.

Certain activities are shielded from the purview of competition law in some countries. In some cases this is because they fall under sector-specific regulatory regimes. However, the division of authority between the competition agency and the sector-specific regulator is often unclear.

In addition to the three main areas, some of the laws include provisions on unfair trade practices or consumer protection. In other countries these are covered under separate consumer protection laws, although Kenya and South Africa do not have any legislation covering either area.

Certain activities are shielded from the purview of competition law in some countries. In some cases this is because they fall under sector-specific regulatory regimes (this applies to many utilities, which are regarded as natural monopolies), however, the division of authority between the competition agency and the sector-specific regulator is often unclear. Both the Kenyan and the Indian governments have wide powers to exempt any enterprise that performs a 'sovereign duty'. Pakistan's Monopolies and Restrictive Trade Practices Ordinance specifically exempts all state enterprises. In South Africa firms can apply to the Competition Commission for exemption for a specific practice on various grounds, including the maintenance or promotion of exports or preventing the decline of an industry.

Some of the laws make use of the 'effects' doctrine, whereby foreign firms can be prosecuted for violations of competition laws that have an adverse effect in the domestic jurisdiction.

Some of the laws make use of the 'effects' doctrine, whereby foreign firms can be prosecuted for violations of competition laws that have an adverse effect in the domestic jurisdiction. However, as in the rest of the world, even where specific provisions for extra-territorial abuses are included this is not a guarantee that they will be effective in dealing with them. The South African Competition Commission and Tribunal have both recognised that they are unlikely to oppose a large international merger that has already been approved in the US or the EU, given the relative size of the South African economy. The second phase of the 7-Up project will examine these issues in more detail.

Various types of sanctions and relief are provided for in the competition laws of the 7-Up nations. These include cease and desist orders, fines, imprisonment and compensation to injured parties.

Various types of sanctions and relief are provided for in the competition laws of the 7-Up nations. These include cease and desist orders, fines, imprisonment and compensation to injured parties. The fines are often very low; in Kenya the maximum fine is approximately US$1,300 and in Tanzania it is approximately US$3,750. Such fines will not deter large

enterprises from anti-competitive practices. The South African and the new Indian legislation may be more effective since they relate the maximum fine to the size of the enterprise involved.

The powers of the competition authorities can be separated into 'investigative' and 'adjudicative' powers. Whether or not these powers are separated varies across the project countries, but all countries allow for appeal and final adjudication by and independent judiciary body.

The powers of the competition authorities can be separated into 'investigative' and 'adjudicative' powers. Whether or not these powers are separated varies across the project countries, but all countries allow for appeal and final adjudication by and independent judiciary body. The South African set-up with a 'self-contained' separate judicial system for competition cases is recommended by the World Bank-OECD Model law. However, such a set-up might not be constitutional in countries that provide for final Supreme Court jurisdiction in all cases, as is the case in India.

After the introduction of the new law in Tanzania, the Kenyan authority will be the only one that is administratively part of a government department. However, this does not mean that the other authorities have sufficient autonomy from central government. In Pakistan for example, an attempt to curtail cartelisation and collusive pricing in the cement industry resulted in government intervention to fix prices at a 'mutually acceptable level'. Several factors influence the level of an authority's autonomy, including the method by which funds are allocated. In addition to funds from central government, Sri Lanka and South Africa receive some of their income from the filing fees that they receive. This increases their independence.

The lack of funds has generally resulted in competition authorities with inadequate facilities and resources to carry out their functions, and insufficiently attractive salaries to draw high-calibre staff.

In most cases the authorities' budgets are extremely low. The lack of funds has generally resulted in competition authorities with inadequate facilities and resources to carry out their functions, and insufficiently attractive salaries to draw high-calibre staff. The largest portion of the budgets is usually spent on salaries, with very little on research and investigations, or meetings and conferences.

In most 7-Up countries there is also a shortcoming in the amount of on-the-job training for existing staff.

Many of the authorities are understaffed. There has been some difficulty in finding appropriate candidates to fill positions, and many research positions remain vacant. Though India has a large staff, this is dominated by support staff and there are few professionals. In most 7-Up countries there is also a shortcoming in the amount of on-the-job training for existing staff. In addition, authorities do not have access to adequate information on market structure; several of the countries have no industry database. In conjunction with the lack of experience and suitably qualified staff this will make complex tasks like assessing market dominance very difficult.

In many respects South Africa is better equipped than the other countries to carry out its functions. The office has a fully electronic information resource centre, and all reference material is available online. The Commission also uses a case management and tracking system, which allows users to keep track of the progress of cases. The Tribunal also has continuous training and development programmes and provides funding for staff to pursue higher study. However, even the South African authorities have difficulty in attracting high-calibre staff.

The introduction of a market economy has been relatively recent in the 7-Up economies, so there is a particular need to promote understanding in the general population on the benefits of competition and the costs of anti-competitive behaviour.

The introduction of a market economy has been relatively recent in the 7-Up economies, so there is a particular need to promote understanding in the general population on the benefits of competition and the costs of anti-competitive behaviour. Despite this need, the advocacy and outreach programmes of the competition authorities have been limited and most countries spend very little on publications and raising awareness.

On the whole, the 7-Up countries now have laws that are comprehensive enough to deal with the variety of practices and activities that infringe on the level of competition in their markets. Certain improvements would be necessary to complete this picture.

On the whole, the 7-Up countries now have laws that are comprehensive enough to deal with the variety of practices and activities that infringe on the level of competition in their markets. Certain improvements would be necessary to complete this picture. The main problems, however, are in the effective implementation of the laws. On the whole, the main barrier to this lies in the weakness in the capacities of the competition authorities, and their inexperience. Overcoming these difficulties will be much easier if governments and civil society are educated on competition issues.

7-UP COUNTRY PROFILES

	India	Kenya	Pakistan	South Africa	Sri Lanka	Tanzania	Zambia
Population[1] Millions (1999)	998	29	135	42	19	33	10
GDP Millions US$ (1999)	459,765	10,603	59,880	131,127	15,707	8,777	3,325
GNP/Capita US$PPP (1999)	2,149	975	1,757	8,318	3,056	478	686
Adult Illiteracy (1998): % Male (>15) % Female (>15)	 33 57	 12 27	 42 71	 15 16	 6 12	 17 36	 16 31
Poverty[2] % <National poverty line % <$1/day	 40.9 44.2	 42.0 26.5	 34.0 31.0	 - 11.5	 40.6 6.6	 51.1 19.9	 68.0 72.6
Exports % GDP 1990 1999	 7 11	 26 25	 16 15	 24 25	 30 36	 12 20	 36 29
Imports % GDP 1990 1998	 10 13	 32 35	 23 21	 19 25	 37 42	 35 27	 58 34
Currency	Indian Rupee	Kenyan Shilling	Pakistani Rupee	South African Rand	Sri Lankan Rupee	Tanzanian Shilling	Zambian Kwacha
Exchange Rate Currency / US$ (2000)	43.3[3]	76.2	51.7	6.9	75.1	800.4	3,110.80
Annual budget of CA US$ (2000)	406,582	235,892	325,919	7,742,678	97,870	162,056	193,005
Annual Govt Budget Millions US$ (2000)	68,840	3,230	13,560	23,270	3,395	1,010	340
% Government Budget	0.00059	0.00731	0.00240	0.03327	0.00288	0.01604	0.05619
Pattern of expenditure -% share (2000)							
Salaries & honoraria	66	54	33[4]	41	43	18	81
Establishment cost	31	36	16	21	53		0
Books, periodical etc	2.21	-	0.49		0.80		0
Research & investigation		-		7.1	0.39		11
Printing/publications		-			2.33		1.98
Meetings/conferences	0.66	0.33		3.6	0.18		5.87
Other		0.27					
Staff (2000/2001)							
Full time members	4	1	3	1	1	5	
Part time members	0	0	-	8	5	-	12
Professional	7	24	5		7	-	5
Support staff	85	6	25		7	-	6
Total	**96**	**31**	**33**	**78**	**20**	**5**	**23**

1 Data in the table comes from the World Development Report 2000, the World Bank, and the country reports.
2 Latest available year.
3 Budget and exchange rate figures for India are for 1999 (2000 not available).
4 Pattern of expenditure for Pakistan is for 1999.

ANNEXURE-I

Exchange Rates

	1980	1990	1999	2000
RN/US$	0.8	2.6	6.1	6.9
Source: World Bank, (2001).				

ANNEXURE-II

ABOUT 7-Up

The 7-Up Project is a two- year research and advocacy programme being conducted by the Consumer Unity & Trust Society (CUTS) with the support of Department for International Development (DFID), UK for a comparative study of competition regimes in seven developing countries of the Commonwealth.

The countries selected for the Project are India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia, which have similar legal systems, and are at similar levels of economic development.

Main Objectives

The project primarily aims to:

- Evaluate the existing competition law and its implementation on a few basic principles: budgets, autonomy, composition and structure of the competition regime and authority;
- Identify typical problems and suggest solutions, including on the basis of good practices elsewhere;
- Suggest ways forward to strengthen existing legislation and institutions dealing with competition and consumer protection issues;
- Assess capacity building needs of the government, its agencies and the civil society;
- Develop strategies for building expertise among the competition agency officials, practitioners and civil society to deal with anti-competitive practices, including cross-border abuses more effectively; and
- Help build constituencies for promoting competition culture by actively involving civil society and other influential entities during this exercise.

Project Implementation

The project is being implemented by CUTS Centre for International Trade, Economics & Environment (CITEE) under the close supervision of an international advisory committee who are experienced in competition and related issues. The research and advocacy work of the project at country level is being done by local partners/ research institutions in the relevant countries. The following institutions have been involved in the project as partners:

- *India:* National Council of Applied Economic Research, New Delhi and CUTS, Jaipur
- *Kenya:* Institute of Economic Affairs, Nairobi
- *Pakistan:* Sustainable Development Policy Institute, Islamabad and The Network for Consumer Protection, Islamabad
- *South Africa:* Institute for Global Dialogue, Johannesburg
- *Sri Lanka:* Law & Society Trust, Colombo and Institute of Policy Studies, Colombo
- *Tanzania:* Economic and Social Research Foundation, Dar-es-Saalam and Christian Council of Tanzania, Dodoma
- *Zambia:* CUTS Africa Resource Centre, Lusaka and Zambia Consumers Association, Kitwe

The Project comprises of two phases, where Phase-I studied the institutional framework for enforcing the competition law in the project countries and Phase-II deals primarily with cross border competition issues.

The project, implemented under the close supervision of an international advisory committee, has two components: research and advocacy.

The research output of the project is designed to be based on:

- Study of relevant existing literature
- Field study, and
- Consultation with local stakeholders

The advocacy component of the project includes raising awareness among the various groups of stakeholders through meetings and publications and building constituencies that would help shaping a healthy competition culture. In this regard a National Reference Group, involving various stakeholders, has been formed in all the project countries.

It is expected that the project will be extended to implement some of the results of the project including providing capacity building and technical assistance to governments and civil society, as well as advocating for a healthy competition culture at different levels.

ENDNOTES

1 South Africa Reserve Bank, (2000).

2 Statistics South Africa.

3 This may be because they have been become discouraged from actively searching and because the transport and communications costs of searching are high relatively to people's resources.

4 1996 Manufacturing Census, *Statistics South Africa.*

5 Chandler, A. Jr., F. Amatori, T. Hikino (eds.), (1997).

6 This is the number of deals for which values were recorded. For example, there were a further 193 deals in 1997 for which no values were recorded. Ernst & Young compile the data from press statements, public relations releases, published financial statements and director's reports.

7 Capital has been raised by black-owned corporate groupings from conglomerate-owned banks (in a period of high interest rates), assets have been sold which conglomerates wished to shed in any case (such as most notably in the case of JCI, where Anglo-American retained all the platinum interests, and the international gold holdings). The internationalisation of conglomerate groupings has included the listing of Billiton in London, Sappi in New York, and the increasing shift of assets to Minorco, formed prior to the 1994 election by Anglo-American, and listed first in Luxembourg and now London.

8 South Africa Reserve Bank, (2000).

9 The extent of liberalisation is also understated by the use of import values to weight average tariff rates. This practice means that categories with very high tariffs which deter imports will have a low or even zero weight, and hence the reduction in these prohibitive tariffs will not be fully reflected.

10 The policy document *Growth, Employment and Redistribution: A Macroeconomic Strategy* stated "....the central thrust of trade and industrial policy had to be the pursuit of employment creating international competitiveness. ....general progress towards an outward-oriented stance is reflected in a number of achievements:
- replacement of former quantitative restrictions with tariffs;
- rationalisation of the tariff structure by almost halving the number of tariff lines;
- abolition of import surcharges, completed in October 1995;
- phasing down of tariffs, begun in 1995, by on average one-third over five years; and
- phasing out of the general export incentive scheme, to be completed by the end of 1997."

11 SADC, (2001).

12 Fine, B. and Z. Rustomjee, (1996).

13 The IDC provided R14.1bn out of the R25.4bn of investment in these projects which, given the sub-market interest rates, implies a very significant subsidy to these sectors.

14 IDC, (1999).

15 Department of Trade and Industry, (2001).

16 Fourie, Lewis and Pretorius, (1995).

17 See for example Reekie, D, (1999).

18 The extent to which the South African legislation is in line with international 'best practice' as reflected in industrialised country legislation was highlighted in the NRG by the representatives of the competition institutions.

19 There is a minimum threshold: the Act only applies to firms whose assets or turnover in the Republic are equal to or greater than R5 million.

20 The index calculates the sum of the squares of the market shares of the firms in a market. A Hirschmann-Herfindahl Index value of 0 denotes perfect competition, and a value of 10,000 denotes pure monopoly. In a market where five companies each have a 20 percent market share, the Hirschmann-Herfindahl Index would be ($20^2+20^2+20^2+20^2+20^2$) 4000. For comparison, the US merger guidelines consider a value above 1800 as highly concentrated, and below 1000 as weakly concentrated.

21 Interview with Commissioner Simelane.

22 Submission made at the September 1999 meeting of the Working Group.

23 This time period can be extended by the Tribunal on application from the Commission.

24 This section draws substantially from the Annual Report of the Competition Tribunal for 1999/2000. It should be noted that, as the Tribunal only became operational on 1 September 1999, this period is only 7 months long.

25 These statistics are taken from the Commission's 2000 Annual Report. It was impossible to get more up-to-date information from the Commission.

26 Interview with Commissioner M. Simelane.

27 Interview with Commissioner M. Simelane.

28 Racial categorisations along the lines of the previous regime are widely employed in South Africa specifically in order to monitor the extent to which imbalances are being redressed and representivity achieved.

29 *Competition News*, edition 5, September 2001.

30 *Competition News*, edition 3 March 2001.

31 *Competition News*, edition 5, September 2001.

32 It should also be noted that all but two of the 25 countries rated were industrialised countries and that the two other developing countries besides South Africa, Brazil and Argentina, are significantly larger and achieved similar ratings to the South African Commission.

33 Interviews with Peter Hlapolosa, ICASA, and Commissioner M. Simlane.

34 Interview with Michael MacDonald.

35 See for example, *Sunday Times*, May 6th 2001 and *Business Report*, April 18th 2001. It should be noted that one of the merger decisions complained of by the most vociferous critic, Leslie Boyd of Anglo-American Industrial Corporation, was in fact blocked by the old Competition Board.

36 This case was not, however, before the competition authorities.

37 See, for example, Clarke, J, (2000).

38 As has been pointed out, weaker institutional capabilities and access to information in developing countries influence the appropriate competition law and policy (Laffont, J,. (1998).

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Institute for Global Dialogue

The Institute for Global Dialogue is an independent South African non-governmental organisation that provides analysis on the changing global environment and its impact on South Africa for the benefit of government and civil society.

The activities of the Institute centre around four programme areas:

1. Africa Dialogue, which aims to promote second-track dialogue on African countries and regions experiencing crises of governance;
2. Multilateral Analysis, which aims to analyse multilateral institutions as they influence global processes of change with a view to understanding their impact on South Africa and the global South;
3. Foreign Policy Analysis, which aims to provide policy analysis and recommendations on South Africa's foreign relations to the South African government, parliament, and civil society; and
4. Southern Africa, which aims to analyse and promote an understanding of factors that advance or hinder regional co-operation, sustainable development, and security in southern Africa.

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