

CPI's Africa Column Presents:

A new era of competition policy in South Africa?

By Trudi Makhaya¹
(Makhaya Advisory)

April 2017



Copyright ©2016

Competition Policy International, Inc. for more information visit [Competition Policy International.com](http://CompetitionPolicyInternational.com)

Competition policy has occupied an important place in public policy in post-apartheid South Africa. The current regime of competition legislation has been in place since the 1998. A product of negotiations between business, labour and civil society, it is also largely influenced by international best practice. The Competition Act deals with the traditional areas of competition regulation – merger control, enforcement against anti-competitive conduct (collusion, abuse of dominance, price discrimination), market inquiries and advocacy for pro-competitive behaviour by business and government. But beyond the traditional goals of protecting consumer welfare, in South Africa competition policy was meant to tackle some of the economic challenges inherited from the oppressive regime of the past. Thus, the purpose of the act includes the diversification of ownership in the economy, the promotion of small business and employment.

In major policy pronouncements, such as the State of the Nation address or the budget, the government has always acknowledged the work of the competition authorities. But it is in recent times that competition matters have been elevated in the national economic policy discourse. This development follows the adoption of the ruling party's economic policy stance of 'radical economic transformation'.

In his State of the Nation address in 2017, President Zuma defined radical economic transformation as: "fundamental change in the structure, systems, institutions and patterns of ownership, management and control of the economy in favour of all South Africans, especially the poor, the majority of whom are African and female." He went further to say that the competition authorities have done excellent work in dealing with cartels, but that government was now training its focus on "the other challenge, namely economic concentration, where a small grouping controls most of a market." This will be addressed by amendments to the Competition Act, aimed at 'de-concentrating' the economy. This suggests a departure from an amendment that is already on the books, but has not been proclaimed by the President, which aims at dealing with complex monopolies. In the current formulation of the amendment passed in 2009 but not proclaimed, scrutiny would fall upon markets where five or fewer firms collectively hold at least 75 percent of the market share.

This turn towards 'de-concentration' and competition takes place against growing rhetoric about the persistent power of 'white monopoly capital' in post-apartheid South Africa. Critics argue that the patterns of wealth ownership are no different than a time when black people were barred from practising professions or owning property outside reserves.

This new emphasis on competition policy brings to the fore several considerations for the private sector. Whereas in the past, competition policy has been focused on enforcement, and driven by the competition authorities, this current push is emerging from the top and is being interpreted and implemented by various parts of government. This could be a good thing because competition policy goes beyond mere enforcement against commercial actors. In the past, government policy and action has also undermined the emergence of competition, especially in sectors dominated by state-owned corporations.

Yet the new orientation towards competition brings with it some complications. Take for instance, the case of a recent policy paper on ICT. It is heavily infused with notions of fair competition, openness

¹ CEO of Makhaya Advisory and an associate at DNA Economics.

and inclusion. But the mechanisms sought to open the market come with the potential for unintended consequences on investment. Under the policy, the frequency spectrum over which mobile network operators transmit signal will no longer be assigned to companies on an exclusive basis. Whereas under the status quo operators pay a license fee for a defined spectrum allocation, the new model is based on a wireless open access network. The argument goes that there are over 400 entities that hold electronic communication network service licenses, but only six have been assigned 'high-demand' mobile broadband spectrum, creating an oligopolistic market structure. The open network advanced by the policy will be formed as a public and private sector consortium, including current spectrum holders. This has been met with scepticism from some analysts and sections of the industry, who argue that this radical departure from infrastructure-based competition may undermine investment in the sector. From media reports, it appears that government is open to some persuasion by industry on how to implement this policy and to different ways to foster competition.

This example illustrates the manner in which competition principles might translate into government policy in the era of radical economic transformation. It suggests that business must engage with competition policy in a decidedly different mode than in the past. The response from business will continue to involve legal strategy, but there is also an opportunity to offer economic evidence and highlight trade-offs to policymakers.

The dialogue happening in the financial sector is another instance of this orientation towards competition and transformation. As mentioned earlier, post-apartheid policy has always twinned traditional competition imperatives with those of transformation. And on both scores, but particularly on the latter, the prevailing sentiment is that policy has not delivered. In financial services, especially the banking sector, this charge is often couched in terms of propositions about the dominance of the 'big four' banks, high bank charges and limited black ownership of the sector. In March this year, Parliament's Standing Committee on Finance held public hearings on transformation in the financial sector, with a focus on "deracialisation; high level of monopoly; progress on implementation of the Financial Sector Charter and other related matters." The Financial Sector Charter is the legal framework which sets out targets for broad-based black economic empowerment in the sector.

Almost ten years ago, the Competition Commission convened a market enquiry into banking, though this was before it had the formal powers to do so that it gained through an amendment. The enquiry made recommendations, some of which have been implemented, whereas others were rejected as unworkable and others are still pending. Nonetheless, the tide of complaints against the banking sector has not ceased. The issues include the level of bank charges, the banks' perceived reluctance to extend finance to small and/or black-owned businesses and the barriers to entry and expansion in the sector.

In its submission to Parliament's hearings, the Black Management Forum referenced collusion in the foreign exchange market, which is currently being prosecuted by the competition authorities, which it argues, is facilitated by concentration. The advocacy group also submitted that banks have "a tendency [to] exclude[e] new entrants in the market and in our case black new entrants...we need to consider structural de-concentration policies including compelling the dominant players to unbundle and thus open up the market for black new entrants." The public dialogue on transformation and competition continues as different stakeholders float ideas about creating a state-owned or black-owned bank, amongst other interventions.

This elevation of competition in the political and policy spheres is likely to nurture the creative approach to settlements that the Department of Economic Development, the administrative custodian of the competition authorities, has adopted over the past few years. This is an approach that has seen comprehensive public interest conditions placed on the take-over of (once South African) SAB Miller by AB InBev.² The department has also overseen the formation of a sector-wide programme of investment and black economic empowerment commitments in the construction sector, in the aftermath of bid-rigging prosecutions by the competition authorities. Once again, there are public benefits to these undertakings and settlements. But they need to be underpinned by sound economic analysis to avoid inadvertently distorting competition by imposing obligations on some companies (say ones that happen to be undergoing a merger) and not others, or sending the wrong signals about the investment climate.

For the first time in 17 years, South Africa does not enjoy an investment grade rating from credit ratings agencies S&P and Fitch. This is a reflection of recent developments in the economy, with heightened policy uncertainty related to poorly justified leadership changes at the finance ministry, a sluggish economy and a fiscus under pressure. As policymakers scramble for solutions, competition policy enjoys an unprecedented level of visibility. This presents opportunities to revitalise the economy if sound economic analysis prevails.

² See <https://www.comptrib.co.za/assets/Uploads/INBEV/Final-Conditions-PUBLIC-VERSION-signature-document-2.pdf>.