

Competition versus policy

What is competition?

The *Maintenance and Promotion of Competition Act 96 of 1979* begins with a glossary of definitions. Noticeably absent from this glossary is a definition of the word “competition” itself. There are definitions for the operational terms, “restrictive practices,” “acquisitions,” and “monopoly situation”. But in this context, these terms are conceptually fuzzy and depend for their operational usefulness on the definition of the word “competition”.

Webster’s New International Dictionary defines competition (in the commercial sense) as, “The effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms; also, the relations between different buyers or different sellers which result from this effort”. It would have been a simple matter for the drafters of the Act to include such a definition, but they did not. The reason is, perhaps, that the above definition, when juxtaposed with the provisions of the Act, suggests that the Act is not designed to promote competition, but to limit it.

If one searches within the Act for an understanding of what is, in fact, being protected, the appropriateness of the Act’s title is brought into question. When applied in the way attempted by the Act, any definition of “competition” becomes very elusive. Further, a direct measure of competition is impossible. This is why the drafters of the Act were forced to resort to the targeting of negative proxies (i.e., “for the prevention and control of restrictive practices, acquisitions and monopoly situations”) rather than the actual “promotion of competition”.

The Act also fails to explain why “competition” is elevated to an end in itself. Perhaps “efficiency” would have been more suitable, and more easily justified, as a goal. Instead, the Act focuses on the number of suppliers in an industry, and the relations between those suppliers. At best, efficiency criteria are ignored, and at worst, efficiency is directly reduced by the activities of the so-called Competition Board. Further, by creating the Board, and giving it a badly-defined mission and open-ended investigative powers, the Government was effectively saying that “beyond this point, the rule of law is suspended in favour of rule by inquisition”. It makes no sense at all for such a board to exist; and strengthening it can only compound its errors.

By 1979, mainstream international economic thought (in particular, that of Robert Bork) had already brought into question the premises that motivated the Act. It was outdated before it was passed. The Act’s successor, expected in draft form in 1997, will also be seriously outdated, if it is to be based on the working-paper by Fourie, Lewis and Pretorius¹. That working-paper not only fails to offer improvements on the current Act, it advocates the compounding of its shortcomings. This will be addressed further below, but it is worth noting at this point that supporters of competition policy have still not been able to compile a workable definition of “competition”. They have resorted to claiming that “we’ll recognise it, when we see it”. So much for the rule of law.

Is competition an end?

In the economic context, it must be made clear that the implications of competition are far different than in a military or sporting context. Terminology such as “the captains of industry”, “economic power”, and “business empires” is useful for building glorious imagery, but is quite misleading when building an understanding of business and economics.

War is, at its unusual best, a “zero-sum game” in which the threat of violence induces one side to relinquish wealth and position to the aggressor. But more likely it is a “negative-sum game” – with a *modus operandi* of killing people and breaking things – in which wealth is destroyed while transferring some of the remainder from one side to the other. While some individuals may gain from the war, most lose in terms of wealth. This contrasts glaringly with what happens in a free economy.

The central characteristic of commerce is trade for mutual benefit; and this applies to everyone involved. In any voluntary exchange, each side expects to gain from it – otherwise they would not

agree. This does not guarantee that both sides will always be better off – but, more often than not, they are. People learn from their mistakes as well as their successes; and each opportunity embraced, creates more opportunities for themselves and others.

People quite naturally recognise the benefits of trade and production, and will, when permitted, engage in them. The resulting provision of services and goods is necessarily responsive to the needs and wants of all those who are willing to produce and trade. Profits are made when resources are employed to satisfy more strongly-felt needs and kept out of less desired uses.

How do traders know which uses are more valued than others? In the course of freely trading, the traders demonstrate their preferences by their actions – by how much they are willing to offer in return for a particular good or service. This is how prices are established. Every time a transaction occurs, a price is agreed to. Observation of prices thus yields an abundance of information about people's wants, and about the relative availability of the resources needed to satisfy those wants. This latter clause is important, because more wants can be satisfied if lower-cost ways can be found of providing the goods and services. Profits follow accordingly.

It is not necessary for either side of a trade to be overly concerned about the welfare of the other (though this is not forbidden) but it is necessary for all to accept the ownership rights of the other. This respect for property rights is essential, otherwise trade would be replaced by war, which is not at all a win-win situation. Unlike war and politics, commerce is not a practice of winner-take-all. As commerce expands, everyone is offered new opportunities to increase their livelihood. But when war and politics expand, the opposite occurs.

Politics is conceptually distinct from both war and commerce. But as the size and scope of governmental activities expand, politics degenerates into an unsteady mixture of conflict and favour-trading. This is one of the best documented and, until recently, least popular lessons of history. The practical demonstration of “government failure” was a hard lesson to learn for those who had pinned their high hopes on grand theoretical designs. And the lesson has not been consistently taken to heart.

Limits or leviathan?

Far from suggesting that government is a pernicious leviathan that must be eradicated at all costs, the lesson is simply that government is suited only for certain activities. It can't give us short cuts to prosperity. It can't “run” the economy; and it can't protect us from reality. Its attempts to act beyond its range of competency have always been expensive exercises, no matter how grandiose the results, or how spread-out the costs.

It is a citizen's duty to recognise the limits of government's competency and to restrict its actions accordingly. Although citizens' performances in this regard have a spotty history, the duty remains. The choices can be made either at the constitutional level – where the government's powers may be restricted sufficiently – or, failing this, at the level of policy. The current South African constitution permits the Government to pass and enforce legislation that regulates residents' activities quite extensively. Thus it is at the policy level that the issue of Competition Policy will be debated.

What is a policy?

During the entire life of the *Maintenance and Promotion of Competition Act* various statutory monopolies (such as Telkom, the Post Office, and the SABC) have existed, providing inferior service, wasting resources, and legalistically crowding-out any direct competitors. One would expect such genuine cases of monopoly to be the first and most obvious targets of the Competition Board, but they are untouched.

Even in the areas where it is applied, the phrase, “Competition Policy,” can be seen as a misnomer when compared to its typical results. Whenever explicitly practised, its only real connection with competition has been in the possibly good intentions of its promoters – though quite

clearly not the intent of the governments that enacted it. Neither in its present form, nor in the exaggerated form suggested by Fourie, Lewis and Pretorius, can competition policy actually promote competition. Nor can its advocates justify public prosecution of alleged cases of what they call “restrictive practices, acquisitions and monopoly situations.” Every one of their arguments has been refuted by authorities in the fields of economics and jurisprudence. Competition policy is carried forward only by the momentum of its ideological dead-weight.

It is the intention to interfere in the economy that generally brings the word “policy” to the fore. The word is not normally used when the policy is not to interfere. This common asymmetry creates a subconscious bias toward policy-activism when any particular category of policy is brought into the discussion. Thus, a policy of *not interfering* with economic processes is all too easily equated with *not having a policy*, which, in turn, is equated with *doing nothing*.

This is particularly clear in the case of so-called competition policy. Unless one clearly intends to intervene, there is no need even to have a name for such a policy, let alone an actual policy programme. Yet, by creating the name, “Competition Policy,” the policy activists have shifted the onus of persuasion away from themselves.

Imparting a functional understanding of the nature of market processes is one of the great pedagogical challenges of our century. It is not widely appreciated that much of what emerges “in the market” can be judged only by the freeness of the market processes themselves – i.e., by the freeness of people to trade. There is no other standard of comparable objectivity. Those who denigrate market results imply that they are privy to a set of universal standards that is superior to, and should be allowed to override, the choices of individuals. This is the basic deficiency of the working paper by Fourie *et al*; and this is why it fails.

A symptom of this failure is the neglect of genuine sources of anti-competitive behaviour: those of the government. A true competition policy would consist of the repeal of a whole complex of unnecessary regulations, taxes, and government spending programmes. Instead Fourie *et al* advocate the expansion of interventionist powers by replacing the Competition Board with three bodies: a “Competition Tribunal”, an “Investigative Agency” and a “Competition Appeal Court”. The increased number of bodies would certainly signal a mushrooming of administrative costs. Add to this the costs to business of compliance, and the costs of Tribunal decisions, then even if some of those Tribunal decisions improved competition or efficiency, there would *still* be a net social loss.

The Fourie, Lewis and Pretorius working paper ends by exhorting that, “the government must stand firm and not compromise its views on competition policy under pressure from vested interests” (p.27). This is a rather ironic statement when contrasted with their statement (p.3) that there are “strong indications that the high levels of concentration in South Africa are acting as a strong deterrent to foreign investment”. They add that foreign companies “may be loath to attempt to enter markets dominated by a few large firms”. This shows that Fourie *et al* are not themselves free from influence by vested interests; *foreign* vested interests are given special treatment. They presume that these foreign groups are interested only in promoting competition, rather than in reducing the competitiveness of current South African producers. This further suggests that Fourie *et al* are unaware of the potential for third-party manipulation of their tribunal system.

An example of such shameless manipulation occurred in the 1995 anti-trust investigation of Microsoft’s activities by the U.S. Justice Department. Several of Microsoft’s competitors in online software complained that Microsoft was bundling such software into its Windows 95 product. What the complainers conveniently failed to mention was that their own marketing strategies included similar practices. Clearly they are not really opposed to product bundling, or to products that become industry standards. Rather they are opposed to others doing it before, or better, than they can.

One clearly suspects that beneath all the current talk in South Africa about increasing competition there is actually a willingness to destroy the competitiveness of current producers. The proposals of Fourie *et al* are consistent with a negative-sum political strategy of hampering current producers in order to create potential business gaps for politically favoured interest groups. Although

these particular groups would gain, the overall effect on South Africa would be one of net wealth destruction. Fourie *et al*, and their supporters, must reconcile their interventionist proposals with the moral implications of the resulting loss of efficiency, and the rising real cost of living – a cost that will be paid by all South Africans.

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