

## **Whither competition policy?**

The government recently released its *Draft Competition Bill* (1998). The ANC and its partners went to the polls in 1994 on a platform which included promises to address the perceived unwarranted power of monopolies in the South African market. Now, four years later the proposed legislation is a conscious step toward fulfilling the governments promise in an international environment which is fundamentally changed.

The genesis of the *Bill* is in the perception among people in power that South African industries are unusually concentrated. This concentration is seen in turn as having a range of unfortunate effects, including "...reproducing the racially biased, highly centralised spread of ownership that is part of the apartheid legacy...", all of which appear in the motivation behind the legislation. The *Bill* is aimed at such diverse objectives as preventing the abuse of positions of dominance in local industries in the form of collusion and other practices, at protecting the interests of consumers, at promoting the emergence of small businesses, at creating employment, expanding opportunities in world markets, and promoting economic efficiency.

Clearly this is a portfolio of conflicting objectives.

### **The Detail**

The mechanisms and institutions proposed by the *Bill* are conventional: There will be a Competition Commission consisting of management, an inspectorate and a tribunal which will make determinations, enforceable with a stiff fine and /or prison sentence. A special high court of appeal will serve to check the basis on which determinations are made by the tribunal.

The provisions of the *Bill* are not to be subject to criminal sanction. Rather, the tribunal will issue compliance orders and interdicts, which if not obeyed will carry a heavy penalty. It will, on balance of probabilities, determine whether various prohibited practices have been committed.

### **The Prohibitions**

- "Restrictive horizontal practices", such as price fixing, establishment of quotas, restricting innovation, avoiding investment, dividing markets into territories and others.
- "Vertical restrictive practices" such as resale price maintenance.
- "Abuse of dominance" by output limitation, charging an excessive price, refusing a competitor access to an essential facility, predatory pricing, buying up essential supplies and many others, including *all* forms of price discrimination.

### **The Exemptions**

Firms entering into agreements may apply to the tribunal for exemptions from these wide ranging prohibitions. To succeed they must cite, as grounds, the agreements' capacity to promote exports, development of small businesses, businesses owned by "Previously Disadvantaged Individuals", or to prevent the decline of an established industry.

### **Mergers**

Mergers will be prohibited if the tribunal finds, on balance of probabilities, that the participants in the merger are likely to act un-competitively once merged. The tribunal may take up to three months to make this determination, which may be reviewed by the minister, presently Alec Irwin, who must apply a "public interest" criterion when considering it.

### **The Business View**

Business representatives to Nedlac, the on-going government-labour-business talk shop, made a series of objections to the bill: Charging an “excessive price” is a practice with severe ramifications in the new law, and consequently needs a clear definition. It also pointed out that the balance of probability level of proof required creates a degree of uncertainty, particularly concerning new products or processes. An innovating firm cannot be sure that, on balance it will not be found to be in contravention of the act, even where apparent built-in defences are available. This uncertainty is a clear deterrent to progress.

Business also has a problem with the government’s assertion that, in the event that two firms have a common director, a “rebuttable presumption” of collusion should be made. Stronger evidence of wrong-doing should be required.

### **The Labour View**

The Labour delegation to Nedlac is unhappy that the pre-election promise of “a commission to review the structure of control and competition in the economy” has not been carried out. Labour representatives provided an extension to the list of practices it would like to have seen prohibited, eg: “conscious parallelism” in pricing or the setting of interest rates, conscious exchange of information, “full line forcing” (requiring that a retailer carry the full range of the suppliers products) and fixing distributor prices are on the list.

### **Sorting out the Facts**

The SA government seems intent on constructing an institution whose functions are largely superfluous. The perception that SA markets are overly concentrated was formed in an era when the universe, as viewed from Pretoria was very small. Sanctions, both external and self imposed in the form of exchange control had contracted the economic swimming pool to an extent that was not fully appreciated by any of the political players, whether from right or left. Today in the context of an open economy and burgeoning global trade, SA markets are clearly seen as a tiny part of world markets, and SA mining, financial and industrial “giants” as pygmies in the international context. The best protection the local consumer can get is for the government to withhold its active protection of local monopolised sectors, not erect a confusing and ambiguous edifice of multi-purpose policy aimed at preventing co-operation between firms.

International trends are changing the world’s view of monopolies and competition. In the public sector, the private provision of infrastructure is taking hold. Industries which were once thought of as “natural monopolies” such as electricity and water provision are now subject to fierce national and international competition, both in operation and construction. The government’s competition policy should be to remove the artificial props presently supporting these giant state monopolies and to subject them to competition from international colossi. By merely avoiding the erection of artificial barriers to entry, the government can facilitate an environment in which new and surprising changes in market structure can take place. No bill, act or tribunal is needed to accomplish this.

### **Living in the Past**

Apparently the drafters of the *Bill* are living in a bygone era. As far back as 1973, UCLA economist Harold Demsetz taught us that the old Structure-Conduct-Performance (SCP) model is misleading. In this now all but defunct view, the key determinant of optimal market performance was seen to be the market structure, whether competitive, monopolistic or oligopolistic. In this world a diffused Structure begets competitive Conduct which begets optimal Performance in the form of maximum output for minimum price. This, asserted Demsetz, does not describe reality. He conceived of a

world in which high performance firms carve out markets for themselves by dint of their efficiency, creating niches, or markets they can dominate. Efficient Performance, therefore begets dominating Conduct which begets a concentrated Structure, thus turning conventional wisdom on its head. In his model, concentration is likely to be evidence of efficiency, a view which has been supported by research conducted by Wits academic, Dan Leach. In this kind of world, small businesses occupy a different position. They cannot be seen as the only form of efficient enterprise, since the large dominant businesses must also be given some well deserved credit. They do, however, play an important role: they are the cutting edge of innovation and, in the current context, niche identification. They form themselves, fight for niche market dominance and survive with only one aim in mind: to be taken over at a premium to Net Asset Value by a company with a larger market in mind and the financial backing to realise it. Far from being inimical to the “public interest”, mergers and take-overs are the mechanisms through which the public interest is not only being served but is continuously identified and defined.

This is a world in which the *Competition Bill* as it stands has no rightful place. Market contestation and domination are the laws of the global corporate jungle, and to attempt to draw the claws and teeth of South African participants will, in the unlikely event of being able to do so successfully, merely remove all remaining obstacles to the domination of our markets by an altogether larger and more virile range of international players.

The role of the South African government should be to help local businesses to group themselves together and operate and promote themselves in this environment, not to hinder co-operation and collaboration.

### **Further Reading**

Leach, DF (1997) The Concentration-Profit, Monopoly vs Efficiency Debate: Some New South African Evidence, *Contemporary Economic Policy*.

Reekie, WD (1996) *Monopoly and Competition Policy*, Free Market Foundation, Johannesburg.

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