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P A P E R S

An Evaluation of the Influence of BEE on the Application of Competition Policy in South Africa

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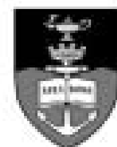

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Abstract
The links between BEE and competition policy are outlined in the Competition Act of 1998. It is recognised in the preamble to the Act that competition law has to specifically address the excessive concentration of ownership and control of the economy and the unjust restrictions on the full participation of black people in the economy that arose from the various Apartheid laws. Thus, the Act allows for exemptions from the provisions on anti-competitive practices where such practices promote the ability of black-owned and controlled enterprises to become competitive. Furthermore, decisions on mergers on public interest grounds made by the Competition Commission and Tribunal take into account the effect that the merger will have on the ability of black small businesses or firms to become competitive.

Although the objectives of competition policy seem very clear in theory, it is unclear what has been happening in practice. The paper aims firstly to look at the effect accepted BEE policies have had on the application of competition legislation. A critique of the relationship between the two will be undertaken and finally recommendations will be made on how practice can be modified to match more closely with theory. The methodology that will be used will include a literature review as well as an analysis of relevant cases that have been brought before the competition authorities.

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Introduction

The post-democracy government led by the African National Congress has stated that its economic objective is to create and sustain an adaptive economy that is characterised by growth, employment and equity. Their task, although not unique from that of other developing countries, is made more challenging than usual by the historical circumstances from which it originates. South Africa has emerged from a system of Apartheid, which systematically and intentionally restricted the majority of South Africans from participating meaningfully in the economy. The government, mainly through its Department of Trade and Industry, has outlined several strategies in order to foster the effective transformation of the economy. Furthermore, several pieces of progressive legislation, such as the Employment Equity Act, aimed at this transformation process have also been passed (DTI, 2003).

It is against this background of transformation that Black Economic Empowerment (BEE) has become the buzzword in economic circles. The ideals of BEE seem to permeate through every sphere of economic activity even impacting on new and established pieces of legislation. The interaction of BEE and relevant pieces of legislation is not always harmonious or particularly welcome. It is nonetheless inevitable and also indicative of future trends in the South African economy.

This paper looks at the relationship between BEE and one such piece of legislation, the Competition Act of 1998. BEE and the Competition Act are discussed separately at first and then looked at in relation to each other. This paper attempts to move towards charting a wider and more dynamic definition of the relationship between the two that moves beyond just considering the explicit provisions made for BEE in specific sections of the Competition Act. What the paper ultimately aims to shed some light on is this: Is it possible for competition policy and BEE to act in a mutually re-enforcing direction given the conflict that might arise over the importance of efficiency over equity or vice versa?

Background on Black Economic Empowerment

What generally distinguishes South Africa from the rest of the world is its peculiar history, often succinctly referred to as our 'legacy of apartheid'. It is within the context of this legacy that the majority of South Africans find themselves economically disempowered today. This lack of entitlement is most evident in the fields of education and primary health care as well as access to basic services and a living wage. It is also within this context that the rationale for black economic empowerment (BEE) arises (Black, 2002).

The Black Economic Empowerment Commission in its report broadly defines black economic empowerment as "an integrated and coherent socio-economic process within the context of the national transformation programme which is aimed at redressing the imbalances of the past by

substantially and fairly transferring the ownership, management and control of South Africa's financial and economic resources to the majority of its citizens" (BEECom Report, 2001). The objectives of BEE may also be defined in terms of how the ANC measures the success of BEE as set out in their 2002 conference resolutions. Five indicators are used:

- Ownership
- Operational participation and control within firms
- The transfer of skills to blacks, particularly in senior positions
- The contribution of firms to employment creation; and
- Whether schemes lead to an overall reduction in poverty and income inequality.

Most recently the Department of Trade and Industry (DTI) has released a document outlining their broad-based strategy for BEE. While similar to that of the BEECom especially in terms of the definition and objectives of BEE it provides some enlightenment in terms of the key principles government sees as underpinning BEE as well as the proposed policy instruments to be used in order to achieve BEE.

As mentioned above, the strategy is underpinned by four key principles. The first is that BEE is broad-based: the aim of the process of BEE is to accelerate the deracialisation of the South African economy and facilitate the speedy re-entry of historically disadvantaged communities into the mainstream economy. The second principle states that the process of BEE is inclusive. All enterprises operating within the economy are encouraged to participate in the process of empowerment, the logic being that a more equitable economy will benefit all South Africans, individuals and enterprises alike. The third principle underpinning the strategy is the association between BEE and good governance. Apart from effecting transformation, empowerment should also be associated with the improvement of the quality and transparency of all economic activity. The last principle concerning empowerment is that it is part of the government's growth strategy. No economy can grow while excluding any part of its population and so the government strategy emphasises an empowerment process that is associated with not only the redistribution of existing wealth, but with growth, development and enterprise development (DTI, 2003).

The Department of Trade and Industry strategy outlines a number of policy instruments it intends to use in achieving its objectives. The first of these is the introduction of a broad-based BEE Bill into Parliament. The aims of this piece of legislation are to allow the Minister of Trade and Industry to issue guidelines and codes of good practice on BEE as well as to establish a BEE Advisory Council to advise the President on the implementation of BEE and related matters. The second policy instrument government intends to use is that of regulation. The main regulatory measure that government plans to use is the 'balanced scorecard', which aims to measure progress made in achieving BEE by enterprises and sectors. This scorecard will measure the three core elements of BEE: ownership and control of enterprises and assets, human resources development and employment equity as well as indirect empowerment through preferential procurement and enterprise development. Other policy instruments to be used include the restructuring of state-owned enterprises, preferential procurement

by government, institutional support mainly through the BEE Advisory Council and the use of partnerships and charters (DTI, 2003). In pursuing this approach to BEE, government as mentioned before, seems to have drawn on established measures which have been successful in other countries as well as at home.

The policy instruments mentioned in the strategy refer to legislation that has been designed for the sole purpose of addressing the issue of empowerment. Since 1994 however, government has also endeavoured to include principles of equity and redistribution in other pieces of legislation that have been passed. One such piece of legislation is the Competition Act of 1998, which forms the basis for competition policy in South Africa.

The Competition Act of 1998

South Africa's antimonopoly legislation dates back to 1955, with the Maintenance and Promotion of Competition Act having being passed in 1979. Due to problems regarding institutional framework, capacity, and more importantly, the orientation of the National Party government,
this legislation and the Competition Board established by it proved to be ineffective. Its impact on the state of competition in the South African economy also proved to be minimal (Fourie, Lewis and Pretorius, 1995).

With the start of the first democratic presidency in 1994, the ruling party undertook a series of policy reforms. The need for a revised competition law was high on the agenda for economic reforms to be undertaken. This agenda was guided by the objectives of the ANC as set out in its 1992 document, Policy Guidelines for a Democratic South Africa. In the guidelines, the ANC already pledged to introduce anti-monopoly, anti-trust and merger policies in order to curb monopolies and the continued domination of the economy by a white minority. The legislative reform process started in 1998 with negotiations between labour, business and government held under the framework of the National Economic Development and Labour Advisory Council (NEDLAC). In addition the Department of Trade and Industry prepared a document entitled Proposed Guidelines for Competition Policy. Through NEDLAC, the legislation was drafted and the Competition Act came into effect in September 1999 (Fox, 2000).

It is noted in the Explanatory Memorandum accompanying the Competition Act that the overriding objective of competition policy is the promotion of competition in order to advance economic efficiency, international competitiveness and adaptability as well as the market access of SMMEs, creation of new employment opportunities and the diversification of ownership in favour of historically disadvantaged South Africans (Fox, 2000). The basic theme of these objectives is followed through in the actual objectives as set out in the Competition Act
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:

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.

The objectives can generally be classified into two. There are those that seem to promote economic efficiency over other considerations while other objectives are based on the consideration of public interest especially in terms of a more equitable wealth distribution. This variation of South African competition policy is what makes it unique from other policies, especially those of developed countries. There are conflicting schools of though over whether competition policy should be used to address issues of public interest and these shall be discussed below.

<u>Role of Competition Policy: Efficiency versus Equity</u>

There is a tendency, especially among developing countries to include social goals in their competition policy. This is not always compatible with the explicit goals of regular competition policy, which are to promote a free and competitive business environment. A situation arises therefore where policies that do not explicitly aim to achieve allocative efficiency are put in place in order to achieve seemingly more pertinent welfare and social goals. There is an ongoing debate over whether competition policy offers a suitable platform to address such concerns. There are a group of policymakers and researchers who feel that equity considerations have no place in competition policy, while another group argues that in some cases, while efficiency may be the main goal of competition policy, it need not be its sole ambition.

The first group of scholars do not dispute the importance of social goals, and especially their usefulness in rectifying existing economic distribution inequalities. Instead they contend that other, more specific policies should be used to achieve this redistribution. This kind of rationale is evident in the way the competition or antitrust laws of the United States of America and other European countries have been formulated. US antitrust laws in particular have been honed to obtain maximum efficiency and in effect, squeeze out any earlier concerns of equity (Fox, 2000). Reekie (1999) is especially vocal about the ideal role of competition policy in South Africa. According to him, the welfare of society is maximised when its resources are allocated within the economy in a way that enables consumers to satisfy their wants as far as technological and physical constraints permit. The

wealth of the society is also maximised in this way and the aim of competition policy should therefore be to help bring about this result. In analysing the objectives set out in the Competition Act, Reekie maintains that only objectives (a) and (b) are relevant in mapping out the desired path of the competition authorities and therefore should be what the authorities concentrate their work on. At the same time, taking each of the objectives into account could lead to internally inconsistent policy advice due to their somewhat conflicting nature. It is clear that tough political choices have to be made between which of the varying objectives to pursue at any particular point in time, these choices should just not have to be made by competition authorities. If they attempt to do this, it just affects the predictability of their decision and also provides an opening for inappropriate lobbying by defendants (Reekie, 1999). In short the view that Reekie and others advance is that competition policy should be used to promote allocative efficiency. If the government wishes to achieve other objectives such as the redistribution of income and wealth or the promotion of previously disadvantage people's interests they should find other, more suitable avenues to do this (Reekie, 1999).

While using competition law to advance the interests of groups that have been traditionally marginalised may seem inefficient and even outdated to those in developed countries, the argument for preference is more powerful in developing countries. This becomes even more pertinent if, as in the case of South Africa, the marginalised group comprises the majority of the population. In cases like these, efficiency is seldom the goal legislators value above all else (Fox, 2000). Firstly, an economy that has previously been run by an elite segment at the expense of the majority may often be unable to reach its efficiency potential, in the dynamic sense, until a certain level of equality has been achieved. It follows that in order for an economy to operate at its maximum potential, all previously disadvantaged members of the community should be able to participate fully in all its activities. Not only will this result in a transparent and impartial competition climate, it will also facilitate the flow of dynamic creativity among would-be entrepreneurs. Secondly, it is sometimes possible that in certain economies, other goals such as the equitable distribution of economic opportunities may be more important than efficiency. It seems as if this choice should be the prerogative of each country (Fox, 2000).

In the case of South Africa, David Lewis, the Chairperson of the Competition Tribunal has consistently defended those sections of the competition legislation that cater for concessions based on public interest concerns. In his view, public interest is ' the mad, old uncle that comes knocking on the door when we have nowhere to hide.' The only solution is to find some way of living with him. In short, no public agency that relies on public support can escape the influence of a strongly held public interest (Lewis, 2002). Furthermore, Lewis counters that it is inevitable that in a developing country such as South Africa, where distributional and poverty problems are at the forefront, all social and economic policies are expected to contribute to the alleviation of these problems. Competition policy is not exempt from this expectation and under these circumstances it is better to be seen to be grappling with such issues transparently and effectively rather than occupying a purist view of what competition policy should consist of (Lewis, 2000).

BEE and Competition: A Broader View

The links between BEE and competition policy in South Africa are evident both in the objectives of the Act as well as in specific sections, specifically those concerned with mergers and anti-competitive practices. It is recognised in the preamble to the Act that competition law has to specifically address the excessive concentration of ownership and control of the economy and the unjust restrictions on the full participation of black people in the economy that arose from the various apartheid laws. One of the objectives of the Act is to promote employment and advance the social and economic welfare of (all) South Africans while another is to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons. Furthermore, in section 10(3) of the Act an allowance is made for exemptions from the provisions on anti-competitive practices where such practices promote the ability of black-owned or controlled small businesses and firms to become competitive. In addition, as set out in section 12(3) of the Act, decisions on the justification of a merger on public interest grounds made by the Competition Commission and Tribunal must take into account the effect that the merger will have on the ability of black-owned or controlled small businesses or firms to become competitive.

This is however a static and narrow view of the relationship between BEE and competition. Here, BEE is seen as merely a tool for the advancement of equity considerations; and if competition is seen as promoting efficiency, the two become conflictual. There may be another, more dynamic way to define the relationship between BEE and competition that will be discussed.

Traditionally, ownership considerations have been the mainstay of BEE, and although other indicators such as the transfer of skills, operational participation and control within firms and the alleviation of poverty have been pinpointed they do not necessarily cover the full scope of 'broad-based' BEE. Another important source of empowerment that has only recently come to the fore in terms of popular BEE policy strategies is the creation and fostering of efficient and sustainable small, medium and micro-sized enterprises (SMMEs), with the view of using them as an engine for growth. Given this country's legacy of big business domination, constrained competition and unequal distribution of income and wealth, the small business sector is seen as an important force to generate employment and more equitable income distribution, to activate competition, exploit niche markets (both internally and internationally), enhance productivity and technical change, and through all of this stimulate economic development. Furthermore, experience has shown that in the past black people have been able to make far greater progress in the micro- and small-enterprise segments of the economy than in medium-sized and larger enterprises (Department of Trade and Industry, 1995). There is increasingly more room for SMMEs to operate as a successful tool for empowerment. The proliferation of successful SMMEs however can only be encouraged in an economic environment that is conducive to the creation of SMME initiatives. This is the area where competition policy can play an important role. Anti-competitive practices and behaviour impede on both the entry of new firms as well as the ability of small firms to become medium and large competitors and it is up to competition policy to address

these practices as well as barriers to entry which make it difficult for black SMMEs to enter the market and succeed in their endeavours.

Case Studies of Matters bought before Competition Authorities

The use of BEE considerations as a significant factor in terms of public interest grounds in the cases brought before the Competition Commission and Tribunal has recently started to gain momentum. Interested parties can use the public interest argument in two ways. In the case where a merger is anti-competitive, it can be approved on public interest grounds and conversely, a merger that is competitive can be prohibited if deemed to substantially affect public interest in a negative way.

Three cases involving issues around BEE have been selected as case studies. Although public interest is relevant for both the decisions made regarding merger and restrictive practice cases, this paper will only focus on those involving proposed mergers. Three indicators will be used to assess each case in terms of the influence of BEE on the decisions taken. The indicators that will be looked at are whether there were any levers motivating the case for black ownership, how the cases impacted on the ability of prospective firms to enter the market and on whether the decision taken was one where competition policy could be seen as reinforcing empowerment.

[1]Shell South Africa and Tepco Petroleum

The oil industry in South Africa is one of the more concentrated ones and is characterised by its highly regulated and capital-intensive nature. The industry is also a high volume, low margin one with a low growth rate as well as low profit margins. There are six main players in the industry who are not only crude refiners but also distributors of the final product which is marketed under their recognisable brand names, namely Caltex, Shell, BP, Engen, Total and Sasol. Other firms in the industry at that time included Afric Oil, Exel and Tepco.

The petroleum industry has not been immune to the effects of government's drive towards increased BEE. The major oil companies and other industry stakeholders adopted the 'Charter for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the Petroleum and Liquid Fuels Industry' in November 2000. According to the Charter, participating companies and stakeholders intend to bring ownership and control of the industry by historically disadvantaged South Africans to approximately 25% by 2010.

It is within this context that the proposed merger between Shell South Africa (SSA) and Tepco Petroleum took place. Tepco Petroleum was a subsidiary of Thebe Investment Corporation, a broad-based black empowerment holding company. Due to the mature nature of the industry as well as the high structural barriers to entry, it is difficult for new players without vast resources to establish

[1] Discussion largely based on written decision by Competition Tribunal, Case No: 66/LM/Oct01

themselves in the market. It is due to this that Tepco found itself in a financially precarious situation, consistently incurring net losses. Without any alternative funding solutions, Thebe decided to sell Tepco to SSA in order to retain a stake in the industry. According to the agreement between the two parties, in the first step of the transaction, SSA would be restructured into two groups, Shell South Africa Energy which would deal with the refinery, chemicals, renewables, gas and power, exploration and production businesses. The other group, Shell South Africa Marketing would be mainly responsible for the marketing and distribution of commercial fuels, liquefied petroleum gas, lubricants and bitumen. In return for selling its subsidiary, Tepco to Shell, Thebe would acquire between 17,5% and 25% of the newly formed Shell South Africa Marketing. As part of the agreement, Shell undertook to retain the Tepco brand under its predominantly black management for as long as this remained a viable option.

The Competition Commission recommended that the merger be approved subject to the following conditions:

- That Tepco continue to exist in the market jointly controlled by Thebe and Shell South Africa
- The Tepco brand should be maintained as a viable brand in the market place
- Any agreement between the parties pursuant to these conditions had to be submitted to the Commission for approval before its implementation.

In evaluating the merger, the Competition Tribunal took a number of factors into consideration. The first of these was to look at whether the merger was likely to prevent or lessen competition if it were to be approved. Although there were concerns that the merged entity's market shares in certain magisterial markets would be high, this would not bring about market power since petroleum prices are regulated. Added to this was the fact that entry barriers at the retail level of this industry are low and that any of the other major companies could enter local markets to counteract market power if the price of petroleum was ever deregulated. The Tribunal therefore concurred with the Commission in that the merger if approved would not substantially prevent or lessen competition in the relevant markets.

The Tribunal then examined the merits of the transaction on public interest grounds. The Competition Act states that the Tribunal must consider the effect the merger will have on, among other public interest grounds, the ability of small, black-owned or controlled business or firms to become competitive. In terms of the Act, the assessment of public interest on a particular transaction may result in a pro-competitive merger being prohibited or conversely in an anti-competitive merger being approved. The extent to which public interest should play a role in a decision reached by the Tribunal is not explicitly stated in the Act, which only requires that the public interest grounds be 'substantial'.

In judging this particular case on public interest grounds, the Tribunal set about examining whether the rationale applied by the Commission in approving the merger subject to the conditions mentioned above was in fact valid. The first condition set out by the Commission involved Tepco continuing to exist in the market as a company jointly owned or controlled by Thebe and Shell South Africa. The Tribunal was critical of this condition on the grounds that it amounted to the two parties restructuring

the deal in a form that neither of the parties wanted. Due to the environment of the oil industry, a small company like Tepco would have little chance of sustainable growth even if Shell were to become a shareholder. It is also be unlikely that Shell would agree to a condition designed to keep the operations of the two companies separate. As the Tribunal puts it: *"Empowerment is not furthered by obliging firms controlled by historically disadvantaged persons to continue to exist on a life support machine."* The Commission also recommended that Tepco be maintained as a viable brand in the market place. According to the Tribunal they could find no public interest that would be served by imposing the compulsory continuation of a brand name on Shell. All this would serve would be to prolong a non-viable business option. In view of these observations the Tribunal felt that the third condition, pertaining to the parties informing the Commission about any other mutual agreements after the merger, was also not justified. According to the Tribunal, the parties are free to make whatever arrangements suit their respective commercial interests.

Despite the recommendation by the Commission the Tribunal decided to approve the merger between SSA and Tepco without any conditions. They maintained firstly, that the transaction would not lead to a black investor exiting the petroleum industry: Thebe would still acquire a 25% stake in a major oil company. The transaction would also enable SSA to comply with the provisions of the Petroleum Charter. The Tribunal also acknowledged the fact that the decision taken by Thebe to partake in the transaction could be the most commercially prudent one given the circumstances. Furthermore, if the Tribunal were to impose the conditions set out by the Commission, Thebe would bear the price of the failed transaction; they would have to look for another buyer who would accept the conditions imposed on the transaction at a potentially discounted selling price.

The Tribunal also remarked on the Commission's seemingly 'paternalistic' approach. They contend that the Commission's role is to promote and protect competition in the light of specified public interests. It is not to influence the commercial decisions taken by the public element it is supposed to defend, especially in the case where no threat to competition exists. Furthermore, although the intentions of the Commission may be noble, they are advised by the Tribunal to not carry out their public interest mandate in a way that is so zealous, that the end result is more damage to precisely those interests they seek to protect.

[2]Coleus Packaging and Rheem Crown Plant

The crown manufacturing industry at the time of the proposed merger could best be described as a duopoly with one firm, Rheem Crown Plant completely dominating the other (MCG) due to a standing agreement they hold with the major demander of bottle crowns, South African Breweries (SAB). This dominance is indicated in the market shares both companies occupy. Rheem has 90% of the market while MCG has 10%. However if we disregard the purchases of SAB, Rheem's market share falls to 59% while MCG's rises to 41%.

[2] Competition Tribunal, Case No:75/LM/Oct02

Crowns are usually made out of sheets of tin plate and used as closures on glass bottles, containing either soft drinks or alcohol. They come in either the twist-off or pry-off variety. Although the cost to beverage producers of purchasing crowns is negligible in relation to the total cost of the beverage, crowns play an important role in the efficient production of beverages. Firstly, a poorly made crown may inhibit the process of inserting the crowns on the bottles (crimping) and thereby cause an unnecessary delay in the production process. Poorly made crowns could also result in pressure being released from the bottle causing the beverage to decay at a quicker rate. More importantly, bottle crowns are often used by beverage companies as part of their marketing strategies often with the purpose of advertising promotions, competitions etc.

Given the importance that crowns play in the manufacture of beverages, big players like SAB will always seek to protect its interests by securing long-term contracts with crown manufacturers, as was the case with their agreement with Rheem. One of the conditions of this agreement however is that Rheem is obliged to comply with SAB's stringent quality standards as well as keep up with demand. The best way to ensure this would be to either have a controlling stake in Rheem or to acquire it completely as a subsidiary. At the time of the proposed merger Rheem was a subsidiary of Highveld Steel, although it was far from being one of its core business interests. As the returns from its operations declined, Highveld lost interest in expending effort on the running of Rheem and as staff morale decreased, top personnel opted out. Given this situation, the only viable options for Highveld were to either sell off Rheem to SAB, through Coleus, its subsidiary or exit the market.

The proposed merger was a vertical one: SAB, a customer, was buying out one of its suppliers. Vertical mergers usually raise three concerns:

- Raising rivals costs by means of input or customer foreclosure
- The ability to promote co-ordinated conduct between competitors (collusion), and
- The ability of a vertically integrated firm to evade price regulation

The second and third concerns were not important in this case since firstly, there is no price regulation in the industry and secondly, Rheem has no incentive to collude with MCG especially given the substantial difference in the size of the two firms as well as the fact that crown manufacturing is not core to SAB's business activities.

The issue of foreclosure however is relevant and was given consideration by both the Commission and the Tribunal. The first part of the observation concerns customer foreclosure. Since MCG is the only other domestic firm in the market, this pertains to the effect the merger will have on the ability of MCG to remain competitive in the market. These concerns seemed justified taking into account that a company responsible for 78% of the current purchases in the market would acquire and control their only competitor. According to a report prepared by KPMG, if MCG were to be excluded from the prospect of being awarded a contract from SAB and ABI (which is controlled by SAB) they would not be viable given their present volumes of production. On the other hand, fears of foreclosure were also expressed by other purchases in the beverage market, most notably Guinness UDV and Distell. Their concerns were centred around the implications of relying on Rheem as a supplier of bottle crowns.

Firstly, Rheem could resort to price discrimination, resulting in SAB being treated more favourably. Alternatively, Rheem's supply to the other beverage manufacturers might be restricted or even refused. Given the highly competitive structure of the market in terms of marketing and product promotion, there is a danger that SAB would have access to the other firms' confidential business information which they would need to divulge to Rheem as part of their production requirements.

The Competition Commission recommended that the merger be prohibited on the grounds of anti-competitive behaviours due to vertical integration and the threat of foreclosure especially with regard to MCG. The Commission was of the view that the vertical integration, which would occur as a result of the merger, would substantially lessen or even prevent competition. Furthermore the Commission was particularly concerned on the foreclosure effects the merger would have on MCG. Firstly, MCG would not be able to secure any transactions fom SAB and any of its subsidiaries (particularly Amalgamated Beverage Industries (ABI)). Due to the extent of SAB's dominance in the market, MCG would have to probably exit the crown market and lead to Rheem gaining monopoly status in the market. Furthermore, the Commission had to consider the matter in terms of public interest grounds as set out in the Competition Act. Since MCG is controlled by WIPCapital, an empowerment group, the Commission had to take into account the effect the merger between SAB and Rheem would have on the competitiveness of MCG. Their view was essentially that the negative public interest concern added impetus to the other competition concerns they had already expressed.

The tribunal decided to approve the merger subject to certain conditions. The first was that SAB should dispose at least 40% of the issued share capital to a black empowerment partner within two years provided that the crown plant had been rehabilitated to its reasonable satisfaction. The Tribunal also ordered that a supply agreement previously concluded between SAB and MCG come into force by the 31 March 2003. Furthermore, all employees of Coleus would be obliged to sign confidentiality agreements in relation to the activities of their customers. The rest of the conditions laid out pertain to production and efficiency requirements.

[3]Anglo American plc and Kumba Resources

Although the case involving the merger between Anglo American plc and Kumba Resources, has not been decided by the Tribunal it has emerged as the most significant case thus far especially in terms of the weight that BEE considerations should carry when the Tribunal has to decide on a merger. It is also significant solely because of the standing that Anglo has, given its dominance in mining and most of industry in South Africa for close to a century. The intervention of the Industrial Development Corporation (IDC) and the ensuing public spat between them and Anglo has also resulted in the case gaining media prominence.

[3] based on transcripts of the hearings before the Competition Tribunal

Anglo brought an application to acquire stakes in Kumba Resources and Avmin before the Competition Commission in June 2002. Anglo has subsequently withdrawn from their planned acquisition of Avmin. Anglo ultimately wishes to have a 49% controlling stake in Kumba, which would result in them becoming the fourth largest player in the iron-ore industry. The Commission recommended that the merger be approved without any conditions. In September, the IDC filed an application to the Tribunal, asking to participate in the hearing regarding the merger. They cited material interest in terms of their stake in Kumba as well as their role as the government agency tasked with industrial development as valid reasons for their involvement in the hearings. The Competition Appeal Court granted them the right to participate in the hearings in March 2003.

Over the last few years Anglo's strategic objectives have been to increase their focus on operational efficiency, to develop the value chain downstream where possible and to look for acquisitions in their areas of interest, which meet their investment criteria. In line with their competitors, Anglo had been looking for iron-ore investments especially after their failed attempts at acquiring iron-ore assets in Australia and CVRD in Brazil. They therefore saw the imminent separation of Iscor and Kumba as a suitable opportunity to invest both in iron-ore and in South Africa. At the same time, Kumba met Anglo's investment criteria in that their business is large-scale and capital intensive with the potential to expand in South Africa and internationally. Additionally, Anglo maintains that they possess the necessary expertise as well as the financial capacity to turn Kumba into a successful and efficient operation. If Kumba were to merge with Anglo they would have access to Anglo's international mining expertise and Anglo would help Kumba exploit synergies, for example, in terms of how to save money on railage and finance port expansion. In short, Anglo would play the role of the supportive, major shareholder.

In terms of competition concerns, it is useful to look at both the horizontal and vertical market effects the merger could have. Anglo's acquisition of Kumba will not change the horizontal structure of the iron-ore market in terms of the number of companies competing to sell to third parties inside South Africa. Kumba and Asmang would still remain the only two players in the market. Possible anti-competitive vertical effects of the merger could include collusion and foreclosure both in terms of the steel and iron industry sectors. In terms of collusion, Anglo maintains that since steel prices are already priced at import parity there is no need for collusion: prices are already as high as they can go. In terms of foreclosure pertaining to the steel sector, there are fears that the costs of steel companies, Iscor's in particular, may be raised. However, due to an agreement that exists between Iscor and Kumba this is unlikely to happen. Furthermore, issues of foreclosure probably don't apply to potential entrants since, in terms of the Mc Kinsey Report to the Department of Trade and Industry in 2000; there do not seem to be any realistic opportunities in terms of creating any attractive greenfield investments. Considering foreclosure in the iron-ore industry, it seems unlikely, given its production figures over the past few years, that Asmang will be driven out of business as a result of the merger.

In terms of the zinc market, the merger is unlikely to have any effect on the pricing or economies of entering the zinc refining business in South Africa. Although currently the only two viable zinc-ore

plants in South Africa, Black Mountain and Rouch Panal are controlled by Anglo and Kumba respectively, the merger will not bring about a monopoly due to the importance imports play in the industry. Therefore, according to Anglo there do not seem to be any valid concerns in both the iron-ore and zinc-ore that the merger will substantially lessen or prevent competition if it is approved.

The IDC has asked the Tribunal to oppose the merger between Anglo and Kumba on public interest grounds. The IDC believes that the iron-ore sector not only still has more scope for restructuring, but also is also well positioned to assist the entry of BEE companies in the upstream iron-ore sector. The IDC envisions Kumba as a black-owned and controlled company (with more than 51% black ownership), and if Anglo were to acquire 49% of Kumba, this would not be possible. This merger would therefore pose a significant barrier to entry for a potential black entrant firm and would effectively impede on broader empowerment within the industry. The IDC has given a few reasons why they feel Kumba needs a BEE major shareholder, the most important one being that Kumba is a significant asset in an industry in which large barriers to entry exist. Although Anglo has committed to selling off some of its shares in Kumba to a BEE partner as a minority shareholder, the IDC maintains that this is not sufficient.

Insights from the Cases

The Tepco Petroleum and Shell South Africa case serves as a good example of the effect the current and upcoming 'charters' are bound to have on large corporations as they endeavour to meet the deadlines. As more and more companies change their ownership structure in order to reflect suggested racial ownership ratios, the competition authorities will be have to deal with an increasing number of mergers which have been agreed on in order to enable companies to comply with the relevant charter in their industry. It is clear that Shell South African went about acquiring Tepco in response to the Petroleum Charter. They can now boast of being 25% black-owned. The issue of whether black-owned brands, in this case Tepco, should continue to operate even at a loss rather than be taken over by a bigger industry player seems to be a contentious issue between the Commission and Tribunal. In this case the Tribunal makes it clear that it is sometimes more beneficial for a black-owned company to acquire a substantial stake in a bigger company rather than try to maintain their own brand with all its associated risks. Although both situations can be regarded as forms of ownership, the Tribunal seems to reiterate that the affected parties should be free to choose which option is optimal for their circumstances.

Competition policy should be seen to be addressing the practices that impede on the ability of new firms to enter the market and existing small and medium-sized firms to become more competitive. Each decision taken should consider the implications, if any, for any other firm either wishing to enter the market or improve their competitiveness. One of the conditions placed on Coleus Packaging by the Tribunal is that the company should dispose of 40% of its issued share capital in Rheem to a black empowerment company within two years. This condition however seems to be offset by the effect the merger will have on MCG, the only other manufacturer of crowns in South Africa, which

significantly, is black-owned. Despite ordering SAB to follow through on a supply agreement previously negotiated with MCG, the Tribunal's decision does not seem to take into account the threat the merger between Coleus Packaging and Rheem places on MCG's continued survival. The issues of possible foreclosure are real and one has to ask whether the interests of MCG, as a black firm aiming to improve its competitiveness, were sufficiently addressed and consequently protected.

The Anglo American plc and Kumba Resources case, although still undecided is already being hailed as a landmark case in terms of determining the weighting the Tribunal will be seen as giving to BEE and other public interest considerations as compared to issues of competitiveness. This case is not only significant because it takes place within the mining industry, but also because of the magnitude of Anglo's influence in the South African economy. There is little doubt that the merger does not limit or lessen competition, and if competitiveness were the only factor to be considered the Tribunal would have no trouble in approving the merger. The intervention by the IDC however brings other issues to the fore. The IDC contends that the natural resources of a country should benefit the majority of people in that country. Kumba should therefore be controlled by a black-owned company in order to advance empowerment even further. What the IDC also seems to be opposing is the continued dominance of the South African economy by big conglomerates such as Anglo American. Although the IDC raises some pertinent issues with regards to black ownership and control within the mining sector as well as the implications of allowing an already dominant firm to carry out further acquisitions within this industry, one wonders whether they are not expecting the Competition Tribunal to act beyond its confines. In terms of the Competition Act, the key criterion to be used in order to determine whether or not to approve a merger is whether the merger is competitive or not. Only after this has been determined are issues of public interest then considered. BEE, which is classified as a public interest consideration should therefore only serve as an 'add-on' to the ultimate decision-making and not as a key deciding factor. If the Tribunal intends to follow this rationale in deciding cases, it seems as if the IDC is over-optimistic about being able to prevent the merger between Anglo American and Kumba Resources from taking place.

Some Concluding Thoughts

What is clear from the cases that have been studied as well as the general public view is that there are many versions of what BEE means to people and as many versions of how its policies should best be carried out. In terms of competition policy, the question that should perhaps be asked is this: if BEE is considered to have been successful what do we expect the structure of the economy to look like? In other words, if we have the same degree of concentration within sectors as currently exists, but the companies are black-owned and controlled, is this considered as success? Alternatively will BEE be deemed to have been successful if it facilitates the de-concentration of sectors and provides the platform for incumbent firms to successfully enter the market?

If the latter view is to be taken, it is perhaps important to examine what may prevent potential firms from entering a specific market or sector and more importantly what the role of competition policy

should be in each of these situations. Perhaps the best way to do this is to look at what may be creating barriers to entry. If, as in the case of the petroleum industry there are intrinsic barriers to entry such as genuinely high economies of scale, then the aim of competition policy should be to monitor the industry. In this case, especially with regards to BEE, competition policy should play a role that is not too vigorous in trying to decrease concentration within the sector but is rather aimed at increasing black ownership within these concentrated structures. On the other hand, if the barriers to entry in an industry are created by the influence of a dominant firm in the industry in terms of market power and vertical integration, the role of competition policy should be more vigorous. The aim of competition policy should be to ensure that ownership is spread over a reasonable number of firms with most of them being new, black-owned or controlled SMMEs.

Whatever role it might be called on to play, it is clear that competition policy is important for the facilitation of BEE. If the economic environment is to be seen as friendly towards those SMMEs wishing to break into a particular sector, competition policy will have to take its rightful place as the protector of small firms, which facilitates the freedom they have to take up new opportunities. Furthermore, if we prescribe to the broadest definitions of competition and BEE, we may even reach a situation where both are seen to be mutually re-enforcing and dynamically poised to bring about real transformation in the economy.

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