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# Centre on Regulation and Competition

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### REGULATION AND COMPETITION IN SOUTH AFRICA

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# **REGULATION AND COMPETITION IN SOUTH AFRICA**

## **ORIENTATION**

“What activities does government currently involve itself in, and are these activities properly attuned to the achievement of the strategic objectives it has set for itself?” In general, good regulatory frameworks protect public interest and support essential services. Fair competition and accurate pricing result in increased efficiency, while standard-setting serves customers’ interests and prevents infrastructure from threatening the sustainability of natural resources. International best practice shows that role definitions are critical to effective regulation and competition – it is particularly important that the regulatory function be separated from the functions of policy making and implementation.

As with other human phenomena, regulation and competition in South Africa are better understood and explained in terms of a holistic systems perspective considering context, structures, functions and outcomes. This approach will broadly be used in this paper to deal with the issues in respect of regulation and competition in South Africa. South Africa is renowned for the fundamental transformation that has been taking place in the country for many years now and that has gained momentum subsequent to the first democratic elections held in 1994. These elections followed serious and committed negotiations for a new constitutional dispensation during the early nineties.

South Africans are apparently quite protective of their perceptions of their uniqueness. This applies to their ideas, their policies, as well as their models of regulation and competition. This is also argued in a discussion document issued by the South African Department of Trade and Industry (DTI) on 27 November 1997, entitled “Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development”:

“Because of the challenges that follow from our legacy of economic distortions, a uniquely South African approach to competition policy is required. That policy must be grounded in the underlying mandate given to the Department of Trade and Industry through political processes prior to the 1994 election, and through strategies of governance approved since. This set of policy guidelines fuses these different mandates, by assuring the public that on the one hand competitiveness and efficiency are pursued, and on the other hand that this process

will ensure access to many more people previously denied an equal opportunity to participate in the economy.” (DTI, 1997:1)

In respect of regulation, the establishment of a regulatory regime prior to the restructuring of a public monopoly has become standard practice in South Africa and many such regulators now exist. Even ministers are now expressing concern about the current practices. They believe that the proliferation of independent regulators is likely to grow as the restructuring programme is accelerated. They are particularly concerned that certain regulators have adopted a policy-making role independent of government. Both the rapid increase in the number of regulators and the lack of clarity about roles and responsibilities are seen to contribute to market uncertainty that could eventually undermine the achievement of restructuring objectives.

In general, all in South Africa should benefit from the improvement in the regulatory environment in the key sectors (such as energy, telecommunications and transport) that are dominated by State-Owned Enterprises (SOEs). South Africa’s globalising economy will benefit from lower prices and/or improved outputs, which will enable it to become more competitive and thus create more employment and investment opportunities. The unemployed and poor, specifically in the sectors involving SOEs, will stimulate investment and enhance customer satisfaction, thereby ensuring that the quality of life is improved for all. The South African approach to regulation and competition should therefore take cognisance of the particular South African context, which raises fundamental issues in respect of legitimate policies, as well as the effective and appropriate implementation of these policies to simultaneously be economically efficient and socio-politically equitable.

To further elaborate upon and enhance the uncovering of current and emerging issues in respect of South African regulation and competition, this paper will focus on:

- the South African context for regulation and competition, including some historical trends that led to the current reality in respect of regulation and competition in South Africa and highlighting both the present and emerging issues;
- the current reality regarding the policy for regulation and competition and the institutional landscape linked to the issues in these regards;
- some aspects of possible future scenarios in respect of regulation and competition in South Africa;

- provisional observations in respect of some South African sectoral cases from a restructuring perspective.

Finally a summary and conclusion will be provided.

This framework and matrix will also be used for the envisaged continuing research process. Researchers will be encouraged to elect research foci from the broad matrix framework and to fill the blocks in the matrix. In this way, an attempt will be made to gather as much knowledge and information in respect of all the issues broadly contextualised within the research issue framework. A provisional copy of this framework is attached hereto as Annexure A.

## **THE CONTEXT FOR REGULATION AND COMPETITION IN SOUTH AFRICA**

When considering the context for regulation and competition in South Africa, cognisance has to be taken of global trends as well as of the particular South African realities. The South African realities are affected by global trends, but also reflect the unique South African context and needs.

### **Global Trends**

According to the International Labour Organisation (ILO), restructuring and privatisation operate together all over the world and fundamentally imply a redefinition of the role of the state, with a corresponding transfer of ownership, operating and development rights in state-owned enterprises (SOEs), as well as of the associated financial risks, to the private sector. Simultaneously, the state has had to assume new responsibilities in regulating privatised monopolies or in strengthening the social protection that was previously provided by SOEs (ILO 1999:4-5).

The ILO (1999:4) identifies some of the global historic trends that have affected restructuring and privatisation during the past three decades. These trends and their effects include:

- the worldwide recession, which affected all the economies of the world during the late 1970s;
- the debt crises that many African and Latin American countries have been facing for a long time, but which culminated during the early 1980s, and

- the shift to market economies in Asia, Eastern Europe and Latin America during the 1990s.

These trends threw light on the operation of state enterprises and the latter were often claimed to be inefficient. On the basis of this, restructuring and privatisation started in Canada and the United States during the late 1970s. Processes of divestment of public transport and utility companies in France, Germany and the United Kingdom started and gained momentum in the early 1980s. Under the broad auspices of the World Bank (WB) and the International Monetary Fund (IMF) and their activities globally, many of these policies and initiatives spread across the globe and affected the comparable institutions and processes in developing countries. As has been said, all these developments fundamentally affected the role of states across the globalised world.

These trends have also exerted their influence in South Africa. Due to a number of factors, which will become clear from the discussion to follow, and as can be expected, these trends were not followed exactly in the South African case.

### **The South African Approach**

The South African approach is well summarised by the IFR (1999). According to the IFR (1999:2), the South African approach to restructuring and privatisation does not really fit any of the models applied elsewhere in the world. The general thrust in South Africa is to shy away from Thatcher, former East Block and Latin American approaches to dealing with regulation and competition. South Africa, for example, puts more emphasis on the restructuring of the state sector than on privatisation. In some ways, South Africa seems to follow the French example, where the state remains a majority stakeholder in situations of privatisation. However, where the French prefer domestic private investors, the South African approach has been to involve foreign investors, but then only as minority partners. Restructuring is also driven by means of strategic alliances leading to long-term collaborative partnerships. Examples include acquisitions, mergers, equity relationships, joint ventures, public private partnerships (PPPs) and marketing and purchasing agreements.

According to the IFR (1999:3), the African National Congress (ANC) and its alliance partners in government, the South African Communist Party (SACP) and the Congress of South African Trade Unions (COSATU), initially favoured heavy state intervention and even nationalisation policies for the South African economy. However, after coming to power in

1994, the ANC abandoned the concept of nationalisation as a policy, and even its first policy statement, the Reconstruction and Development Programme (RDP), made no reference to privatisation. The RDP focussed mainly on the provision of housing and food, land tenure reform and infrastructure provision, all generally provided for or controlled by the state.

The RDP was criticised for its focus on development and redistribution rather than on investment and growth. The RDP objectives were restated during 1996 and a macro-economic plan, the Growth, Employment and Redistribution Plan (GEAR), was announced in May 1996. Subsequent to this, the Ministry of Public Enterprises published a discussion document dealing with the restructuring of State assets. Privatisation as an option was handled very carefully, given Cosatu's explicit rejection of this possible strategy. However, during September 1996, Cosatu announced support for partial privatisation in the form of supporting the selling of minority stakes to foreign strategic partners. Subsequent to this, restructuring efforts occurred in terms of partial privatisation when Telkom (the South African telecommunication organisation) sold 30% of its ownership to an American company, SBC, and Malaysian Telkom for R6-bn. This was done to improve telephone networks, human resource management and customer services in this business.

The trade unions were still uneasy about the privatisation aspects of restructuring and, in 1997, a National Framework Agreement (NFA) was concluded by the ANC government and the unions. In the NFA, the government committed itself to consultation with the unions if and when restructuring was considered. Even this initiative did not significantly speed up the restructuring process. What did make an impact to speed up the process, however, was the creation of the National Empowerment Fund (NEF), specifically to benefit black empowerment groups and companies that wanted to acquire privatised assets. In this way, for example, the Airports Company sold 49% of its shares to the following concerns: Airoporti Di Roma (ADR), which bought 20% with the option of acquiring a further 10%; the NEF (10%); and employees (9%). As ADR is a foreign (Italian) company, the state retained 51% of the total share of the Airports Company. The Airports Company model seems to reflect current South African best practice. In a similar way, President Thabo Mbeki announced during 1999 that the South African Airways (SAA) would be restructured by selling a 20% share to Swissair, 5% to the NEF and 5% to black empowerment groups, leaving 70% in state ownership. A further 10% may, however, be sold to another foreign partner in due course.

All these initiatives provide some indication of the South African approach to restructuring and privatisation. This approach was preceded by some attempts toward restructuring and privatisation that were conducted by the South African government prior to 1994.

Prior to 1994, the previous South Africa regime, like many governments elsewhere, increasingly came under severe resource constraints, specifically in the 1980s. This placed renewed emphasis on moving public functions and services into private hands through privatisation and off-loading as the appropriate policy responses. In 1985, privatisation was accepted as part of the economic policy in South Africa for many of the same reasons that have made it a new economic creed almost worldwide, and in 1987 the government's position was formulated and spelled out in a White Paper (White Paper on Privatisation & Restructuring, 1987).

However, except for the contracting out of certain government services, for example building and maintenance of roads and toll roads and the introduction of compensatory tariffs, the privatisation drive lost some momentum by the beginning of the 1990s and was eventually put on hold during the period of constitutional negotiations. The ANC, suspicious of the then government's approach to privatisation and the possible hidden agenda of selling the family silver before a new government could come into power, effectively put a halt to these initiatives. The results were that of the five state institutions that were originally earmarked for privatisation, only Iscor (a steel company) was eventually sold, while corporatisation policies, in which government retained ownership, were successfully adopted for others. The South African Transport Services, for example, was transformed into a public company, Transnet, and the Department of Post and Telecommunications into two public companies, Telkom and the South African Post Office.

After democratisation in 1994, the new government, under pressure from the unions, proceeded very cautiously with what is now referred to as the "restructuring of state assets". A policy distinction between "strategic" and smaller "non-strategic" enterprises was initially made by the new government: the partial sell-off of minority stakes in strategic institutions (e.g. the telecommunications sector) was only initiated in 1997, while some of the other smaller "non-strategic" enterprises (e.g. public resorts) were to be sold out of hand once the necessary corporatisation and turnaround strategies had been implemented. By 1999 the lack of tangible progress led to more and more criticism from the South African private sector and



the international financial and economic community. The government responded with its *Policy Framework for an Accelerated Agenda for the Restructuring of State-owned Enterprises* in August 2000. A programme for the restructuring of the major SOEs has now been put in place, signalling the political intent of the government. It is envisaged that most restructuring activities will be completed by 2004.

### **Selected Contextual Issues**

These broader economic, social and political contextual trends also influenced the policy and implementation options, choices and actions, specifically in respect of regulation and competition matters. The most fundamental issues emanating from the context of regulation and competition in South Africa can be summarised as creating an approach that simultaneously provides for growth and development as well as for the alleviation of poverty and inequality or, as stated earlier (TDI 1987:1), "... by assuring the public that on the one hand competitiveness and efficiency are pursued, and on the other that this process will ensure access to many more people previously denied an equal opportunity to participate in the economy".

Lewis (2000:3) also refers to these particular issues when he indicates the multiple objectives that a system of regulation and competition have to satisfy in the South African context. According to him, in a developing country like South Africa, the distribution and poverty problems are large and all social and economic policies, including competition policy, are expected to contribute to the alleviation of poverty and improved economic distribution. To win support for competition goals and competition systems, the authorities should be seen to be grappling with employment problems and other major social issues. Ordinary citizens must be convinced by seeing the relationship between effective competition policy – and systems, one may add – and the realisation of their social goals.

More specifically, the following contextual issues will have to be considered by regulation and competition policies and systems in South Africa:

- **Politically** there are issues such as the perceptions and action of powerful actors, like organised labour and the business sector, in respect of regulation and competition. As has been indicated, Cosatu, which is not only a very powerful trade union grouping but also a member of the present governing alliance with the ANC and the SACP, holds very strong

policy views on the nature and extent of the role of the state in the South African economy and in regulation and competition.

- **Economically** South Africa needs policies and actions, also in respect of regulation and competition, which will:
  - ~ increase investment in the struggling economy,
  - ~ promote sustainable growth at levels much higher than the disappointing growth rates of between 1% and 3% during the past three years,
  - ~ contribute to the alleviation of poverty in a country where approximately half of the citizens live in abject poverty and where there is a distinct negative poverty bias towards rural blacks/Africans, women and children and also where there are definite geographic areas where mainly blacks/Africans live and where poverty is most severe (IFR, 2000:6-39),
  - ~ contribute to job creation in a situation in which about 1/3 of the economically-active population is unemployed and the unemployment is even higher amongst blacks/Africans, rural residents, females and in provinces where the black population is highest (IFR, 2000:6-10),
  - ~ contribute to an improved distribution of wealth where the degree of income inequality as measured by the gini coefficient is one of the highest in the world (IFR, 2000:6-47).
- **Socially** the regulation and competition policies and systems should aim at development, improved social equity and personal empowerment, especially for those sectors and individuals in South African society that were fundamentally disadvantaged by the discriminatory policies and practices of the previous apartheid system.

The combined effect of the political, economic and social contexts of regulation and competition should be that it deliver development, goods and opportunities to the previously disadvantaged majority in South Africa. This has to be done by means of prioritisation towards less-developed communities and geographic areas, as well as preferential actions for the previously disadvantaged in terms of access to opportunities in respect of business, procurement and in the fields of human development education, training and employment. The primary issue is, of course, to reconcile this preferential prioritisation with economic

effectiveness, efficiency and productivity. To manage these modalities in satisfactory ways represents a myriad of complex policy, institutional and management challenges.

There are also issues, emerging and current, in respect of the technological and cultural contexts for regulation and competition. For present purposes these issues will not be elaborated upon here, but should be evident from the discussion in other sections of this document.

### **REGULATION AND COMPETITION IN SOUTH AFRICA: THE CURRENT POLICY AND INSTITUTIONAL REALITY**

As has been shown in the previous section, regulation and competition in South Africa have an interesting, if not speckled, history. In summary: The National Party Government of the previous South African regime launched initiatives in respect of restructuring and privatisation policies and systems for regulation and competition in the latter days of their rule, but these were not very successful. Initially, the lack of success might be explained in terms of a lack of experience and comparative example, but during the early 1990s the momentum was definitely stalled by the resistance of the liberation movements towards serious and far-fetching economic restructuring when they perceived themselves as a potential government in waiting. This attitude was reinforced by the then ideological positions of the ANC, SACP and Cosatu in respect of the role of the state, which entailed a principled resistance to privatisation and other forms of economic restructuring that might have led to a removal of valuable state assets from government ownership or the preferential advantaging of previously white-owned businesses and commercial enterprises.

Subsequent to the successful constitutional negotiations and the first democratic elections in 1994, there initially was not a serious thrust to prioritise seemingly less politically-relevant issues such as regulation and competition policies and systems. In respect of the more visible, and perhaps seemingly more important, aspects of economic restructuring of state assets and actions of privatisation and commercialisation, the interest and thrust were much higher. However, the levels of political differences and conflict effectively made policy and action in this respect very conflictive in nature and progress along these lines was therefore slow. The biggest issue was possibly the difference of opinion and approach in the government alliance, between the ANC on the one hand and the SACP and Cosatu on the other hand, in respect of the desirability of reducing the role of the state in the economy through economic

restructuring and especially through privatisation. Some of this resistance has been overcome by means of the South African approach to restructuring and the requirement of a black empowerment element in these processes, as discussed above.

For the purposes of systematic presentation, the further discussion will be divided firstly into those aspects dealing more generally with competition and secondly those aspects dealing more generally with regulation. As will become evident, these concepts and practices are so intricately linked that this distinction is difficult, being somewhat tenuous at best and artificial at worst.

### **Competition in South Africa: Selected Aspects and Issues**

With regard to competition, in 1997 the new government published a document called “Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development” (DTI, 1997) that was championed by the Department of Trade and Industries. According to this document, the DTI wanted to spur public debate on how competition policy could contribute to the restructuring of the economy in order to achieve a more effective economy. The DTI also made it clear that it believed that competitiveness and development were mutually supportive rather than contradictory matters. Any competition policy guidelines should also support both the macro-economic (national economic management) strategy and micro-economic restructuring (promoting more efficient firms and industries).

The DTI also acknowledged that the then existing competition law was inadequate to meet the newly-stated objectives and that another law was required.

Subsequent to the publication of this document, a process was managed and a new act was promulgated in 1999, namely: the **Competition Act, 1998, Act 89 of 1998**, hereafter referred to as the **Competition Act, 1998**. This Act was amended in 2000 (Act 89 of 1998 as amended by Act 15 of 2000) and introduced a new system for the management and conducting of competition policy in South Africa. This act should also be read in conjunction with two other acts, being:

- the **Preferential Procurement Policy Framework Act, 2000, Act 5 of 2000**, which provides a policy framework within which preferential procurement by government departments can be operationalised in order to promote equity and empowerment, and
- the **Public Finance Management Act, 1999, Act 1 of 1999** (as amended by Act 29 of 1999), which is aimed at improving financial management and management performance in the public sector.

The purpose of the **Competition Act, 1998**, which came into effect on 1 September 1999, is to promote and maintain competition in South Africa. The Act provides for the establishment of three institutions for the administration of the Act:

- The Competition Commission
- The Competition Tribunal
- The Competition Appeal Court

The functions and activities of these three powerful and independent bodies are discussed hereafter.

### ***The Competition Commission***

The Competition Commission has a range of functions in terms of Section 21 of the **Competition Act, 1998**. These include (Competition Commission: 2000):

- investigating anti-competitive conduct in contravention of Chapter 2 of the Act;
- assessing the impact of mergers and acquisitions on competition and taking appropriate action;
- monitoring competition levels and market transparency in the economy;
- identifying impediments to competition and playing an advocacy role in addressing these impediments.

In order to ensure the consistent application of the Act across sectors, the Commission may negotiate agreements with other regulatory authorities, participate in their proceedings and advise or receive advice from any regulatory authority.

The Competition Commission is an independent body. However, its decisions may be appealed to the Competition Tribunal and the Competition Appeal Court.

The head of the Competition Commission is the Commissioner, who is the Chief Executive Officer (CEO) of the Commission. The Commissioner is appointed for a five-year term and is accountable to the Minister of Trade and Industry in Parliament.

The six divisions in the Commission reflect its core activities: Enforcement and Exemptions, Mergers and Acquisitions, Compliance, Legal Services, Policy and Research and Corporate Services.

The Commissioner's Office has three staff members who support the Commissioner directly. The role of the Commissioner's Office is to:

- ensure effective co-ordination between divisions;
- liaise with external stakeholders, such as Parliament, government departments, regulatory authorities and international organisations;
- maintain the integrity, transparency and accountability of the Commission.

### ***The Competition Tribunal***

The Competition Tribunal was established in terms of Section 26 of the **Competition Act, 1998** and commenced operation on 1 September 1999.

The Competition Tribunal adjudicates competition matters presented to it by the Competition Commission. The Tribunal's main functions are (Competition Tribunal: 2000):

- to grant exemptions;
- to authorise or prohibit large mergers (with or without conditions);
- to adjudicate in relation to any conduct prohibited in terms of section 57 of the Act, which conduct broadly refers to anti-competition actions.

The Competition Tribunal is an independent body and is subject only to the Constitution and the law. The Tribunal is headed by a Chairperson appointed by the President of the Republic

of South Africa. In addition, the President, on the recommendation of the Minister of Trade and Industry, appoints ten Tribunal members to serve for a term of five years each.

### ***The Competition Appeal Court***

The Competition Appeal Court (CAC) is a specialist division of the South African High Court. Decisions of the Competition Tribunal can only be appealed to the CAC. The CAC is staffed by judges with a special interest in competition law.

No decisions of the Competition Commission, Competition Tribunal or the Competition Appeal Court are subject to ministerial veto. Not even the Supreme Court, the highest court in the land, has jurisdiction over competition matters (Lewis: 2000).

### ***Current issues in respect of Competition***

Since its inception in 1999, the Competition Commission has reviewed and attended to a number of matters in respect of issues such as:

- the abuse of dominance, primarily from smaller firms alleging dominance abuse by their intermediate suppliers,
- alleged horizontal restraints, and
- alleged vertical restraints.

A number of issues relating to competition policies and systems have been identified for the South African case. Lewis (2000:1-4) highlights some of these issues under the headings of:

- multiple objectives,
- weak consumer constituencies,
- powerful state-owned enterprises,
- a need to develop new approaches to competition for developing economies such as South Africa, and
- skill constraints.

The issues in respect of **multiple objectives** are:

The South African **Competition Act, 1998** specifies a range of objectives that have to be served by competition law and be promoted by the institutions responsible for its enforcement. The usual competition objectives are naturally included in the list, but they are linked to objectives to protect small and medium enterprises (SMEs), the promotion of employment and support for the growth of Black-owned enterprises. In such a situation, mergers have to be evaluated on competition grounds, but the impact of the merger transaction should also be assessed in terms of its effects on employment and on advancing the ownership stakes of black entrepreneurs. In this way, the result could be that a pro-competitive action may be disallowed because of its employment consequences. On the other hand, an anti-competitive merger may be permitted because it advances black economic empowerment. The Act also does not provide the decision makers with any guidelines for weighting these criteria.

**Weak consumer constituencies** are an issue because of the generally poor state of organisation of the consumer constituency in South Africa – the actual people whose interests should be served by the competition policy and system. Although many elements of the South African civil society are quite well organised and consumer boycotts were used as a powerful political strategy during the struggle against apartheid, strong consumer organisations never really took root. There is a real need to gain the active participation of consumers through the implementation of the Act. Failure to do so will lead to a situation in which the competition institutions will remain vulnerable to a reduction of their power and resources, irrespective of a very strong statute.

The existence of **powerful state-owned enterprises (SOEs)** creates numerous issues in respect of competition regulation in South Africa, as it does elsewhere. Although most developing countries are committed to strengthening the market by, *inter alia*, holding back state involvement in the economy, they have to grapple with the powerful legacy of SOEs, which either may still exist or may recently have been privatised. South Africa has a number of very large SOEs in the transport, telecommunications and broadcasting, energy and armaments sectors. Although these SOEs were previously nominally responsible to some or other government department, for the most part they were laws unto themselves. Many have now been privatised, part privatised or are in the process of being privatised or undergoing a



major restructuring. The new shareholders in certain of the privatised SOEs have been granted specified periods of exclusivity in exchange for a contractual commitment to meet a specified public service mandate.

To deal with these SOEs and their briefs and mandates, sector regulators have been established for their economic and technical regulation. There are, however, arguments and debates that have even reached the High Court on whether the jurisdiction for competition matters should resort with the sector regulators or with the competition authorities, or both. The SOEs and their sector regulators, for obvious reasons, regard themselves to be better guardians of the public interest in these cases than the competition authorities. The issue is whether this really is the case. Exclusion of these important economic activities from the ambit of the competition authorities may seriously constrain the competition regime. On the other hand, if the introduction of competition leads to a situation where basic services, such as telephone connections, are sometimes denied to developing areas in particular, the competition policy and system will also be discredited. Information comparison and comparative data will have to be used to advise Parliament on how to deal with this issue.

**Skill constraints** represent a challenge across the South African spectrum. This also applies to the fields of regulation and competition. To effectively manage these aspects, skills are needed in the areas of law, micro-economic and forensic auditing. Competition authorities have to compete for these scarce skills with the private sector in a market where public sector salaries are continuously lagging behind. A competition authority is therefore faced with a serious challenge to develop and retain competent and skilful employees.

The encompassing challenge and issue is **developing new approaches**. Developing countries, like South Africa, need to develop new approaches to the theory of competition and the enforcement of competition law. Much can be learned from the approaches in the developed world, but approaches will also have to be developed to meet the unique circumstances of developing countries. The basic issue here is how to reconcile the needs for development with competition policies and systems.

Many of the issues that are so eloquently stated by Lewis (2000) are confirmed in a document, “An Accelerated Agenda Towards the Restructuring of State-Owned Enterprises”, which is the result of a meeting of the Interministerial Cabinet Committee on the

Restructuring of State Assets (IMCC) held on 29 November 1999, and published as a policy framework (PF) in August 2000. This document will henceforth be referred to as PF 2000. (Minister of Public Enterprises, 2000)

### ***The Relationship between Competition Authorities and Regulators***

According to PF (2000:1-2), the following are emerging issues in respect of the relationships between competition authorities and regulators in South Africa:

- The **Competition Act, 1998** creates an institutional framework for the regulation of mergers and the prescription of anti-competitive behaviour. These areas are, to varying degrees, also the subject of various industry-sector or multi-sector regulators. Potential issues emerge from this situation in respect of:
  - ~ Jurisdictional conflict over which authority should regulate which area, leading to expensive litigation over purely procedural matters. This also prevents regulators from expending their energy on substantive issues.
  - ~ The distinction between technical regulation and competition regulation often being blurred. As an example, technical decisions regarding spectrum use in the telecommunications sector and accompanying decisions about licensing may profoundly impact upon the intensity of competition in the sector.
  - ~ Jurisdictional uncertainties, which may impact on the effectiveness of all the agencies involved. This can be exacerbated by differences in the prioritisation of objectives and methods used by competition and regulatory authorities. There seem to be four possible approaches to deal with potential jurisdictional conflicts:
    1. Grant competition authorities all the sectoral regulatory functions for a particular sector.
    2. Separate competition law enforcement for sector-specific regulation so that the competition authorities adjudicate all competition issues and the regulator deals with all regulatory matters.
    3. Create and manage concurrent jurisdiction between competition authorities and sectoral regulators on competition issues.

4. Provide the sector regulator with exclusive jurisdiction over competitive issues in its sector.

In South Africa these decisions have to be made in a consistent manner, but it seems that sector-specific approaches will be selected to address these issues for each sector specifically.

- These jurisdictional issues are also linked to a number of functional issues in respect of regulation and the competition policies and practices are identified by PF 2000. These include, *inter alia*:
  - ~ The need to draw proper distinctions between industries to ascertain their roles, functions and global and national positions to ensure that they are properly dealt with in terms of regulation and competition. Network industries providing electricity, water, gas and telecommunications should, for example, be distinguished from other regulated industries such as the sugar, agriculture or liquor industries, on the basis of their social impact resulting in regulation to ensure universal and affordable access to essential services under all circumstances.
  - ~ In the same way, the choice of policy and/or regulatory regime may be influenced by global competitiveness needs, technological advances and social imperatives. All these variables may influence the choices in respect of regulation and competition policies and practices in specific cases (PF 2000: 3-4).
  - ~ Regulatory approaches in respect of SOEs can be quite a formidable issue during and after the restructuring of such SOEs, due to the dangerous possibility of merely transferring natural monopolies from state control to an unregulated private-sector market situation. This is especially the case when customers have differential bargaining power, which may lead to less powerful customers being disadvantaged in an unregulated market. (PF 2000:15)

From the above it is evident that the phenomena of competition and regulation are so intrinsically connected that it is extremely difficult to distinguish among these concepts and the issues affecting them from a conceptual point of view. What follows now is an attempt to

deal more specifically with selected aspects of regulation, bearing in mind how difficult it is to distinguish between competition and regulation from both a conceptual and practical point of view.

### **Regulation in South Africa: Selected Aspects and Issues**

The South African regulation scene is characterised by a large number and range of independent regulators. Due to the number of independent regulators, attention will only be given to a small selection of regulatory institutions, namely:

- The Civil Aviation Authority of South Africa (CAA)
- The Micro Finance Regulatory Council (MFRC)
- The South African Telecommunications Regulatory Authority (SATRA)
- The National Electricity Regulator (NER)
- The Independent Broadcasting Authority (IBA)

The regulatory roles and responsibilities of these institutions will be discussed briefly to provide an overview of and insight into the South African regulation scene.

#### ***The Civil Aviation Authority of South Africa***

The South African Civil Aviation Authority(CAA) was established on 1 October 1998, following the enactment of the **South African Civil Aviation Authority Act, 1998, Act 40 of 1998**, in September of the same year. The Act provides for the establishment of a stand-alone authority charged with promoting, regulating and enforcing civil aviation and security.

The establishment of the CAA is consistent with international trends in regulating civil aviation and mirrors steps taken with the establishment of the South African Maritime Safety Authority, South African National Roads Agency and the Cross-Border Transport Agency in April 1998.

The Authority is governed by a Board of Directors appointed by the Minister of Transport and is representative of the aviation industry, management and business experts. Through a Performance Agreement with the Minister, the Board is accountable for the performance of

the Authority in carrying out its statutory functions and achieving its objectives. The National Department of Transport monitors the activities of the Authority (CAA: 2000).

#### ***The Micro Finance Regulatory Council (MFRC)***

The MFRC was established in accordance with a Usury Act Exemption Notice of 1 June 1999. The MFRC is an association incorporated under Section 21 of the **Companies Act, Act 61 of 1973**, and has been recognised as the official and single regulator of all money-lending transactions falling within the scope of the Usury Act Exemption Notice.

The primary aim of the MFRC has been identified as the promotion of the money-lending industry so as to allow for sustainable growth in the industry and to serve legitimate unserved credit needs.

Any money lenders who wish to avail themselves of the benefit of the Usury Act Exemption will be required to register with the MFRC and thereafter comply with the rules of the MFRC and the Exemption Notice (MFRC: 2000).

#### ***The National Electricity Regulator (NER)***

The NER is the regulatory authority of the electricity supply industry (ESI) in South Africa. It is a statutory body, established in terms of the **Electricity Act, Act 41 of 1987, as amended**. The NER was established on 1 April 1995 as the successor to the Electricity Board. The Minister of Mineral and Energy Affairs appoints board members, but once appointed, the NER acts independently and reports to parliament.

The NER is funded from a levy imposed on generators of electricity that is passed on to all customers of electricity. Customers of electricity therefore pay for the protection that they receive from the NER and the general body of taxpayers is relieved of this obligation (NER: 2000).

#### ***The Independent Communications Authority of South Africa (ICASA)***

Icasa was established after the merger of the South African Telecommunications Regulatory Authority (SATRA) and the Independent Broadcasting Authority (IBA) on 1 July 2000. This regulator now regulates telecommunications and broadcasting in South Africa, combining the previous functions of SATRA and the IBA.

The merger was legislated for in the **Independent Communications Authority Act of South Africa, 2000, Act 13 of 2000**. This Act followed, *inter alia*, after serious accountability problems were raised in respect of the previous IBA, which was accused of abusing and misappropriating funds to benefit IBA councillors and staff during the late 90s. Since the merger, the central government Department of Communications advises the Minister on policy matters and ICASA has the day-to-day responsibility of a regulatory watchdog, issuing licences, monitoring compliance with the act and rectifying non-compliance.

In this way, a large and diverse number of social, moral and technical regulatory aspects are combined for regulation by this authority.

The above randomly-selected groups of regulatory authorities provide a first-level view of the way in which regulatory agencies are created and institutionalised in South Africa. The ones discussed, however, represent only a very small segment of the probably hundreds of regulators that have already been created in the country. They are supplemented by many others that function at the central, provincial and local spheres of government in South Africa. The new local government dispensation, which will also provide for municipal service enterprises and local public private partnerships, will probably lead to the creation of even more regulatory authorities at local level, adding to the myriad of existing regulatory authorities.

### ***Issues in Respect of Regulation***

Many of the issues in respect of jurisdictional conflicts discussed in the section on issues in respect of competition apply *mutatis mutandis* to issues in respect of regulation and will not be discussed again here.

It does seem, however, that the establishment of this large number of regulators raises its own political issues. The PF (2000:1) reports that senior South African ministers expressed concerns about the practice of establishing new regulators for deregulated industries. This proliferation of independent regulators will grow as the restructuring process gains momentum. The ministers are particularly concerned that certain regulators have adopted a policy-making role that is independent of government. Market and political uncertainty is created by:

- The rapid increase in independent regulators and
- The lack of clarity about the network of roles and responsibility that have to be fulfilled by the different actors.

A further, related political/administrative issue involves the control and accountability of the independent regulatory authorities. As mentioned above, some of these authorities have drawn public criticism for actions based on a lack of public control and accountability. This is a manifestation of the classic question, who guards over the guardians or, for present purposes, who regulates the regulators. There have been different approaches to the structuring and functioning of these relationships, ranging from reporting to Ministers and/or Departments to being directly accountable to Parliament. The ideal probably is direct accountability to Parliament or any other democratic legislative authority, but given the time, resource and technical constraints of these bodies, this ideal is likely to be over-ambitious. This leaves open the issues of properly legislating for and structuring a functional system of public accountability for these bodies.

Administrative and managerial issues linked to the issue of accountability and autonomy arise from the financing and staffing of these authorities. If these institutions are funded from public funds (even indirectly), they should be publicly accountable. However, to function properly they need a fair amount of managerial autonomy separate from the constraints imposed upon normal government departments. This may create a need for less control and accountability and more independence. The issue is one of balancing the tension that seemingly exists here. A practical manifestation of this issue relates to the procurement and retention of expert staff.

As a result of their higher levels of managerial autonomy, these type of institutions often compete successfully with the ordinary state sector employers for expert staff by offering much more attractive benefits packages than can be offered by the respective government departments. This is done while fundamentally also using public funds.

The issue of the relationships and potential jurisdictional conflicts between the competition and regulatory authorities has already received attention in the section on issues in respect of competition.

In conclusion, it can be stated that there are many unresolved issues in respect of regulation and competition in South Africa that deserve research attention. A major encompassing issue relates to the future developments surrounding the macro issues of the role of the state in the South African economy and the roles and relationship between the most important political and institutional actors in this area. It may be possible to begin to predict these dynamics through a scenario analysis exercise. In the following section, brief reference will be made to this type of methodology without necessarily fleshing out the detail. A detailed study of the issue will probably be of such a magnitude that it will require focussed future research attention under the project.

### **POINTERS TOWARDS POSSIBLE FUTURE SOUTH AFRICAN SCENARIOS IN RESPECT OF REGULATION AND COMPETITION**

A scenario development process to identify possible and probable scenarios in respect of regulation and competition in South African could follow the process suggested by May, quoted in the IFR (2000:1-26,1-27), this being:

1. To identify the central concerns in respect of the scenarios by focussing on the key decisions and issues involved.
2. To identify the developments or driving forces that are likely to have the most important influences on these central concerns in future.
3. To analyse these driving forces in terms of what can reasonably be predicted and what are the main uncertainties. Look for trends and trend breaks.
4. To assess the importance, certainties and uncertainties of the driving forces for central concerns as a prelude to defining the central themes of the scenarios.
5. To select scenario logics as main themes and/or assumptions around which scenarios are to be constructed.
6. To develop the scenarios, usually in the form of narratives presenting a plausible sequence of events. The focus must be on each of the scenario themes deduced from the previously identified driving forces.
7. To analyse the impact(s) of the scenarios on the central concerns from which the process began.
8. To analyse policy implications and identify indicators to monitor change as it occurs. To manage action in this regard.



For present purposes this process can not be conclusively addressed, however the central concerns to be analysed in South Africa would include:

- the socio-economic impacts of regulation and competition on black empowerment and poverty alleviation in their widest sense,
- developments in respect of policies with regard to the role of the state,
- political positions and policies of important political actors in the government alliance, such as the ANC, SACP and especially COSATU,
- relationships between the Cabinet, Central Government Departments and the regulation and competition authorities,
- relationships between the regulation and competition authorities mutually,
- control and accountability issues in respect of regulation and competition authorities,
- institutional and capacity issues in respect of the autonomous and effective management of regulation and competition authorities, and
- the capacity to successfully implement legitimate and relevant policies in respect of regulation and competition.

Such a scenario analysis may present a formidable but useful focus for further research in this area.

In the final section, a few sectoral case developments in respect of regulation and deregulation will receive brief attention.

## **SOUTH AFRICAN RESTRUCTURING SECTOR CASES**

As has been said, deregulation and privatisation are terms that, for political reasons, are avoided in South Africa. The more politically correct term used in South Africa is restructuring of SOEs. PF (2000) makes reference to a cabinet instruction to the Department of Public Enterprises to give priority to the restructuring of the four largest SOEs, being Eskom (electricity generation and distribution), Transnet (national transport service provider), Telkom (national telecommunications service provider) and Denel (armaments manufacturer and distributor). These four large SOEs operate in the energy, transport, telecommunications and defence industry sectors.

PF (2000) provides a very useful summary of all of these sectors for the South African cases.

In respect of the **energy sector**, international trends are that international policy shifts have occurred subsequent to the post-oil crisis energy policies. Governments are recognising, *inter alia*, that they do not have to be service providers. This new way of thinking is leading to commercialisation, incorporation and even privatisation.

In South Africa, the **White Paper on Energy Policy, 1998**, set out the policy objectives for the energy sector in the following way:

- increase access to affordable energy services,
- improve energy governance,
- stimulate economic development, and
- manage energy-related environmental impacts.

The objectives are to give customers choices and to take gradual steps towards a competitive electricity market. Eskom has to be restructured into separate companies for generation and transmission.

The NER was established in 1995 and regulates pricing, national tariff systems and national service and technical standards. The full detail relating to the regulatory regime has not been finalised and this needs to be done.

Eskom is a large capital and human resources intensive organisation that has to be corporatised and separated into two corporate entities catering separately for transmission, distribution and generation.

In respect of the **transport sector**, international trends point to increased liberalisation and deregulation of various aspects of public transportation systems. At the same time, transport operators are consolidating their efforts globally through alliances, joint ventures and outright acquisitions to improve delivery to multiple global destinations.

In South Africa, the **White Paper on National Transport Policy, 1996** and the **Moving South Africa, 1998** strategy document capture the policies and strategies in respect of transport for the following 20 years.

These documents provide for approaches that should:

- improve the nation's competitiveness and that of its transport system through improved effectiveness and efficiency,
- improve co-ordination, co-operation and information sharing to optimise customer service,
- get government to focus on policy, strategy formulation and substantive regulation, thus reducing its direct involvement in operations, infrastructure provision and services to allow for a more competitive environment.

The South African transport industry is dominated by the parastatal Transnet, which comprises 13 companies involved in multi-model transportation and related services employing more than 100 000 people. Transnet's profitability has been affected severely, as it has large pension and medical fund liabilities relating to pensioners who were employed by its predecessor, the South African Transport Services (SATS). Government has devised and is implementing a strategy to deal with this legacy.

Nevertheless, this debt remains a serious impediment to the restructuring of Transnet. Attempts are, however, being made to restructure all the component parts of Transnet.

These include:

- the restructuring of Transnet's debt, in which regard progress is being made,
- the corporatisation of Spoornet,
- the concessioning of some subsidiaries, such as Coallink, Luxrail and Linkrail,
- the commercialisation of Spoornet's general freight business,
- the corporatisation of Portnet and the creation of a new port authority and port regulatory body,
- continuing with the partnerships to link South African Airways (SAA) with international partners (Swissair) and to effect and initiate a public offering,

- the corporatisation of Petronet, the pipeline company,
- revising the airports regulatory framework and effecting an initial public offering for the Airports Company of South Africa (ACSA).

These actions are all aimed at reaching the policy goals and strategic aims set out above.

In respect of the **telecommunications sector**, global trends indicate that this is one of the fastest growing sectors in the global economy and that the sector is a key platform for the development of all other socio-economic sectors. Advances in technology and competition have rapidly led to international trends such as privatisation and vigorous competition resulting in lower prices and improved services. In addition, fairly independent regulatory institutions have been set up.

In South Africa, the activities of the Department of Post and Telecommunications were divided into the South African Post Office and Telkom in 1991. Telkom was incorporated as a legal entity under the South African Companies Act, 1973. The **White Paper on Telecommunications Policy, 1996** and the **Telecommunications Act, 1996, Act 103 of 1996**, followed after the new government came into power in 1994. These policy statements and laws established a framework to separate the regulatory, operational and policy-making functions in respect of telecommunications. The current regulator is ICASA (Refer to section 3.2, p. 19).

Telkom is the company concerned with the provision of telecommunication services in South Africa, although many competitors have entered the market. In respect of telephone services, two independent cellular telephone service providers have been granted licences to provide services, which has liberalised the telecommunications sector. Telkom is linked with international partners in a strategic equity partnership. Telkom is largely involved with traditional fixed-line operations, but also owns a 50% share in Vodacom, one of the two licensed cellular service providers currently operating in South Africa. It also has a strong Internet presence in the form of Intekon. Government owns 67% of Telkom's shares and has approved a public listing for 2001. SBC and Telkom Malaysia are strategic equity partners in Telkom and hold 18% and 12% of Telkom shares respectively. 3% of Telkom shares have been sold to black empowerment groups.

Further steps envisaged for Telkom include:

- progress in respect of the envisaged 2001 initial public offering is under way and
- policies to provide and determine a second national operator are in an advanced stage.

In respect of the **defence industry**, subsequent to the end of the Cold War there has been a reduced need for buying armaments, leading to declining sales volumes for armaments manufacturers.

A **White Paper on South African Defence Related Industries, 1999** was published by the South African government. In this White Paper, government gives recognition to the fact that defence-related industries are an integral part of South Africa's defence capacity and the strategic value thereof, but it also recognises the budgetary constraints and therefore will have to be very selective when deciding which technologies and capacities to retain. Government also recognises its duty to exercise control over armaments.

Denel is the major player in the South African defence industry, controlling about 50% of the Defence Industry turnover. Denel comprises of a holding company structured in three main groups: Aerospace, Ordnance and Commercial and IT Business.

The following action is envisaged by the South African government in respect of Denel:

- the corporatisation of Denel, probably through strategic equity partnering in the three business units.

This restructuring is aimed at improving the international competitiveness of Denel.

The above represents a view of the current reality in respect of the restructuring, regulation and competition of the four important and large industry sectors in South Africa that previously were controlled by SOEs.

There are also other smaller restructuring initiatives taking place that may provide interesting topics for research. For our current purposes they will not be discussed here. Given the current needs, a brief summary and conclusion will now be provided.

## **SUMMARY AND CONCLUSION**

The South Africa context is characterised by the legacy of apartheid, namely inequality and poverty. The current South African reality calls for emphasis to be put on policies and services that will address these challenges. In respect of regulation and competition, the public needs to be assured that competitiveness and efficiency will be pursued, while simultaneously ensuring access for many more people who were previously denied equal opportunities to participate in the economy. In respect of regulation, SOEs are being restructured and regulators have been established, creating some concerns from the side of political office bearers about the roles of these ostensibly independent regulators.

The dynamics of restructuring in South Africa reflect South African contexts and realities. As the South African government is an alliance between the ANC, the SACP and Cosatu, it has proved very difficult to privatise SOEs. After some resistance from Cosatu, a process of restructuring has been implemented according to which international partners are allowed to share ownership with the South African stakeholders and by which part of the restructuring advantages are transferred for the purposes of black empowerment. However, as is illustrated by the present Telkom/Cosatu conflict relating to retrenchments that have taken place subsequent to restructuring, these issues have not been settled finally.

The contextual issues that arise include political issues, such as the question whether and to which extent Cosatu will be able to influence the process from their powerful position, economic issues such as redistribution and social issues such as enhanced development and improved equity.

In respect of competition, the latest legislation creates a sophisticated hierarchy of institutions dealing with competition. These include the Competition Commission, the Competition Tribunal and the Competition Appeal Court.

Issues in respect of competition include multiple objectives having to be reached, consumer constituencies that are quite weak, skills shortages, and powerful SOEs that are being restructured, leading to issues in respect of their actions and regulation and the need to develop unique and functional approaches for the South African context and realities.

In respect of regulation and competition, serious issues have been created between the competition authorities and the numerous regulatory authorities.

The South African regulation scene is characterised by a large number and variety of ostensibly independent regulators. Important issues here are the rapid increase in the number of so-called independent regulators and the lack of clarity about the networks of roles, responsibilities and relationship created in this regard in South Africa.

Possible future scenarios in respect of South African regulation and competition should consider socio-economic impacts in respect of black empowerment and poverty alleviation, the outcomes of the debates on the role of the state and the intricate roles, relationships and responsibilities that will emerge and have to be managed.

Important sectors of the South African economy, such as the energy sector, the transport sector, the telecommunications sector and the defence sector, are being restructured. Many of the general and specific issues are concretised in these sectors and the institutions involved. All of these provide fascinating opportunities for future research and action. Therefore, let this action begin.

## LIST OF ACRONYMS

ADR	Airopoti Di Roma
ANC	African National Congress
CAA	Civil Aviation Authority of South Africa
CAC	Competitions Appeal Court
COSATU	Congress of South African Trade Unions
DTI	Department of Trade & Industry
ESI	Electricity supply industry
GEAR	Growth, Employment and Redistribution Plan
IBA	Independent Broadcasting Authority
ICASA	Independent Communications Authority of South Africa
IFR	Institute for Futures Research
ILO	International Labour Organisation
IMCC	Interministerial Cabinet Committee
IMF	International Monetary Fund
MFRC	Micro Finance Regulatory Council
NEF	National Empowerment Fund
NER	National Electricity Regulator
NFA	National Framework Agreement
PF	Policy Framework
PPPs	Public Private Partnerships
SAA	South African Airways
SACP	South African Communist Party
SATRA	South African Telecommunications Regulatory Authority
SMEs	small & medium enterprises
SOEs	State-owned enterprise
RDP	Reconstruction & Development Plan
WB	World Bank



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