



South Africa<sup>1</sup> is situated at the Southern tip of Africa and is bordered by Namibia, Botswana, Zimbabwe, Mozambique and Swaziland.

The British seized the Cape of Good Hope area in 1806, after which many of the Dutch settlers (the Boers) trekked North to establish their own Republics.

The discovery of diamonds (1867) and gold (1886) stimulated the generation of wealth, and impelled immigration, thus, intensifying the suppression of the native inhabitants.

The Boers resisted British advances for some time, but were defeated in the Boer War (1899-1902). The resulting Union of South Africa operated under a policy of apartheid – the separate development of the races.

In 1910, South Africa became a self-governing union as a member of the Commonwealth. In 1961, South Africa became a Republic and withdrew from the Commonwealth. The United Nations refused to recognise the Republic and South Africa effectively began a 30-year period of international isolation. The country was excluded from international organisations and sporting events, and also had economic and trade sanctions imposed that served to slow down the economy, to such an extent, that it could no longer survive in the isolation. The 1990s brought a political end to apartheid and ushered in democratic rule.

### Economy<sup>2</sup>

South Africa has the most advanced economy on the African continent. Since 1994, particularly, the country's economy has been growing rapidly. Its geographical position provides an ideal gateway to sub-Saharan Africa.

South Africa is a middle-income, emerging market with an abundant supply of natural resources. The country also

### PROFILE

|                                   |   |
|-----------------------------------|---|
| Population:                       | 45.3 billion***                               |
| GDP (Current US\$):               | 159.9 billion***                              |
| Per Capita Income: (Current US\$) | 2,780 (Atlas method)**<br>10,070 (at PPP.)*** |
| Surface Area:                     | 1.2 million sq. km                            |
| Life Expectancy:                  | 48.8 years**                                  |
| Literacy (%):                     | 86 (of ages 15 and above)**                   |
| HDI Rank:                         | 119***  |

#### Sources:

- World Development Indicators Database, World Bank, 2004
- Human Development Report Statistics, UNDP, 2004

(\*\*) For the year 2002

(\*\*\*) For the year 2003

has a stock exchange that ranks amongst the 10 largest in the world; a well-developed financial, legal, communications, energy, and transport infrastructure, hence an efficient system of distribution of goods, to major urban centres throughout the region.

South African economic policy is fiscally conservative, but focuses on targeting inflation and liberalising trade, in order to increase employment growth and household income.

### Competition Evolution and Environment

The new South African Government signalled its intention to review the South African competition law regime in the White Paper on Reconstruction and Development in 1994 (Notice 1954 Gazette 16085 of 23 November 1994). The need for a new competition law in South Africa must be seen in the context of a historical legacy of excessive economic concentration and ownership, collusive practices by enterprises and the abuse of economic power by firms in dominant position.

\* Original paper submitted in September 2004. Revised in October 2005 & February 2006. Comments were received from the South African Competition Commission

1 <http://www.cia.gov/cia/publications/factbook/geos/sf.html>

2 <http://www.cia.gov/cia/publications/factbook/geos/sf.html>

Although a competition statute<sup>3</sup> had been in existence for several decades, the enforcement agency was poorly resourced and its formal powers were, for the most part, limited to advising the Government. The Government had publicly ignored several important recommendations from the competition authority, for example, the decision by the Government to permit a merger that effectively divided the alcoholic products market between a beer monopoly and a wine and spirits monopoly – with consequences that continue to determine the structure of this market. It was widely assumed that anticompetitive conduct was rife, although in the previous Act's 25 years of existence, there had not been a single successful prosecution of anticompetitive conduct.

South Africa has a rather colourful history of drafting competition-related laws. The first attempt was made in 1949, when the Undue Restraint of Trade Act No. 59 was adopted. This law was repealed and a new one was adopted in 1955: Regulation of Monopolistic Conditions Act No. 24. The penultimate law was the one adopted in 1979.

### Competition Law and Institutions

A new competition law was enacted in South Africa, in October 1998, and came into force in 1999. It forms an important part of reforms: address the historical economic structure in South Africa; and encourage broad-based economic growth.

The stated purpose of the Competition Act, 1998 (Act No. 89 of 1998) is to promote and maintain competition in South Africa, in order to achieve the following objectives:

- to promote the efficiency, adaptability and development of the economy;
- to provide consumers with competitive prices and product choices;
- to promote employment and advance the social and economic welfare of South Africans;
- to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- to ensure that SMEs have an equitable opportunity to participate in the economy;
- to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

The Act deals with two main areas: prohibited practices and mergers. Prohibited practices are further distinguished as restrictive practices (horizontal and vertical practices) and abuse of a dominant position. The Act also makes provisions for the granting of exemptions to firms.

The Competition Act set up three institutions, namely The Competition Commission, The Competition Tribunal and

The Competition Appeal Court, which are independent of the Government, in order to achieve the above objectives.

The Competition Commission has a range of functions, which include:

- investigating anticompetitive conduct;
- assessing the impact of M&As on competition and taking appropriate action;
- monitoring competition levels and market transparency in the economy; and
- identifying impediments to competition, and playing an advocacy role in addressing these impediments.

The Tribunal's main functions are to:

- grant exemptions;
- authorise or prohibit large mergers (with or without conditions); and
- adjudicate in relation to any conduct prohibited in the Act, conduct broadly referring to anticompetitive actions.

The Competition Appeal Court has status similar to that of a High Court. It has jurisdiction throughout the Republic

#### Box 54.1: Price-fixing in Healthcare Industry

The South African Competition Commission initiated and completed an investigation into price fixing in the healthcare industry, and has referred its findings to the Competition Tribunal. The Tribunal has determined that the Respondents: the South African Medical Association (SAMA), the Hospital Association of South Africa (HASA) and the Board of Health Care Funders (BHF) have all contravened Section 4(1)(b)(i) of the Competition Act of 1998, by directly or indirectly fixing prices.

Within SAMA, there are practitioners that are competitors, for example urologists competing with other urologists or general practitioners competing with other general practitioners. The recommendation of tariffs for such practitioners to use, therefore, constitutes price fixing. In the case of HASA, the association recommends tariffs, in terms of which charges can be levied for certain services provided by the private hospital groups, who are all competitors and members of HASA. Likewise, the BHF recommends a scale of benefits to its members. The tariffs are intended to be guidelines for the purchasing of healthcare services.

It came to the Commission's attention that the respondents recommend and publish tariffs annually. Precedent by international competition authorities views this conduct as price fixing under competition law. The Commission agrees and has determined that it constitutes a prohibited practice regardless of whether the tariffs are adhered to or not.

3 The Maintenance and Promotion of Competition Act, 1979.

and is a Court of Record. The Competition Appeal Court may consider any appeal against, or review of, a decision of the Competition Tribunal; confirm, amend or set aside a decision or an order that is the subject of appeal or review by the Competition Tribunal; and give any judgment or make any order that the circumstances require.

## Anticompetitive Business Practices and Consumer Abuses

### Box 54.2: Sugar Cartel in South Africa

Industrial users of sugar in South Africa say the South African Sugar Association (SASA) is acting as a cartel, fixing prices significantly higher than the prevailing world price.

Attempts by these users to import sugar are frustrated by the fact that tariffs are triggered upward, in response to a downward movement in the world price of sugar. A small group of large players in the sugar industry account for most of the country's domestic sugar production. The production, marketing and export of sugar, as well as its domestic price, are controlled and regulated by the SASA.

Instead of setting a fair price, suspicion has arisen that it is working more as a legalised cartel, protected by high tariffs. A proposed merger between the Tongaat-Hulett Group and Transvaal Suiker Beperk threatens to further restrict competition in the industry. The Competition Commission has recommended to the Competition Tribunal that the proposed merger be prohibited.

*Source: Competition News, Edition 1, September 2000*

## Consumer Protection

The Consumer Affairs (Unfair Business Practices) Act, 1988 protects consumers by providing for the prohibition and control of certain business practices. South Africa also has an array of consumer protection bodies. A new consumer protection law is also under consideration. The most important of these bodies include:

### 1. The Business Practices Committee

The Committee makes recommendations to the Minister of Trade and Industry, regarding business conduct, which is considered to be harmful to consumers. It also recommends steps that may be taken to regulate or to eliminate such conduct.

### 2. Provincial Departments of Consumer Affairs

The Consumer Affairs Departments in South Africa are responsible for the implementation and monitoring of, *inter alia*; the Credit Agreements Act 75 of 1980; the Usury Act

73 of 1968; the Sales and Service Matters Act 25 of 1964; and the activities of small, medium and micro enterprises.

### 3. The South African Bureau of Standards (SABS)

The SABS was established in terms of the Standards Act 24 of 1945, to contribute towards the strengthening of the South African Economy, and towards the enhancing of the quality of life of South African people, by promoting quality and standardisation.

### 4. Statutory Professional Bodies

The legislature has made provisions for the establishment of several statutory professional bodies, whose objective is to assist consumers who have been subjected to 'dishonourable or unprofessional conduct', on the part of a particular member of the professional body concerned.

### 5. Self-regulatory Bodies

These so-called independent bodies have been set up, and are financially supported by the companies carrying out a similar or related type of business, to ensure that their system of self-regulation works.

### Box 54.3: Victory over Car Price Rip-offs

In December 2003 – in an investigation story entitled 'Car price rip-off' – the *Sunday Times* exposed the industry for maintaining inflated prices on new cars, despite the Rand's recovery against the Dollar and Euro.

The story revealed that South Africans were paying 10 percent to 20 percent more than they should be. Even low-end models such as the Toyota Tazz and the Renault Cleo were costing R 12,000 more than they did in 2001, despite being eight percent cheaper to produce.

Following the complaints that dealers were prevented from giving consumers discounts on inflated car prices, the Commission, after fining Toyota South Africa R 12 million (Rands) for price fixing, revealed that investigations were already under way into the pricing policies of other major manufacturers.

Responding to the disclosures last years, the Commissioner Menzi Simelane declared that the car manufacturers' refusal to cut inflated prices would be investigated. Simelane confirmed that investigations into the price structures of all major manufacturers were under way – and he expected more fines to be issued.

According to the Commission, Toyota's penalty is specifically related to the illegal practise of "minimum resale price maintenance".

*Source: Sunday Times, May 2004*

There is a move currently by the Department of Trade and Industry to draft a comprehensive consumer protection law, in consultation with a group of international advisers.

### Sectoral Regulation

The South African sectoral regulatory framework is characterised by a large number and range of independent regulators. Some of them are:

- The Civil Aviation Authority of South Africa (CAA); *The Airports Company Act 1993* established a Regulating Committee and empowered it to outlaw restrictive practices by the Airports Company Ltd.
- The Micro Finance Regulatory Council (MFRC);
- The Independent Broadcasting Authority (IBA);
- The National Electricity Regulator (NER); and
- The South African Telecommunications Regulatory Authority (SATRA)

### Telecommunications Sector – Regulatory Framework<sup>4</sup>

The regulatory framework of the telecommunications industry is structured to ensure a smooth transition from market dependency on a monopoly provider of essential services to a competitive market comprised of a number of telecom service providers. The Act, *inter alia*, focuses on three main objectives:

- promotion of universal and affordable telecom services;
- promotion of telecom services that are responsive to the needs of users and consumers; and
- promotion of fair competition within the telecommunications industry.

The Act also established the SATRA as an independent regulatory body for the telecommunications sector, as well as the determination of the principal regulatory instruments, namely the licences to be issued by Telkom SA (the main service provider), by the Minister for Posts, Telecommunications and Broadcasting; as well as the Ministerial mandates regarding interconnection and tariff regulation.

SATRA is also responsible for implementing policy and legislative compliance through a wide range of functions. These functions are similar to that of OFTEL, the telecom regulator in the UK, whose regulatory framework has been influential in the construct of the South African telecom regulatory system.

The role of the Minister of Posts, Telecommunications and Broadcasting is mainly to issue policy direction regarding telecom regulation. With the introduction of strategic equity investment in the sector, they are also in charge of administering the Human Resources Fund and Universal Service Fund, besides determining the policy directives for tariffs. The Minister's duties also involve, after formal

consultations with SATRA, the issuance of three licences to Telkom SA, detailed below. Other than these specific licences, all others are granted by SATRA.

Besides the sectoral regulatory bodies that have been established, there are also other laws that keep check on the regulation of certain sectors, for example:

#### Box 54.4: Tribunal Puts Brakes on Minimum Resale Price Maintenance

The Competition Tribunal imposed a penalty of Rand three million on Federal Mogul Aftermarket South Africa (Pty) Ltd, for having contravened the Competition Act. This is the largest penalty levied by the Competition Tribunal. It follows an earlier finding by the Tribunal that Federal Mogul had engaged in resale price maintenance by obliging distributors to on-sell Ferodo brake pads at a determined price and penalising those distributors who did not comply.

Resale price maintenance is a species of price fixing, considered to be a particularly egregious category of anticompetitive practice. Unlike other categories of prohibited practices, the South African Competition Act does not allow for the practice of resale price maintenance to be justified on the grounds that it may result in any technological, efficiency or pro-competitive gains.

Federal Mogul initially argued that the Tribunal's power to impose an administrative penalty was unconstitutional. However, the Tribunal found that a respondent in prohibited practice cases was not in an analogous position to a person accused in criminal proceedings, and that the Act provided adequate procedural mechanisms. Hence, the constitutional attack failed.

Whilst the maximum penalty (i.e. 10 percent of annual turnover) the Tribunal was entitled to impose amounted to just over Rand 6 million, the Tribunal found, after closer analysis of the factors specified in section 59(3) of the Competition Act, Rand 3 million was an appropriate penalty.

In the reasoning of its decision, the Tribunal concluded: 'the nature of the product and Federal Mogul's position in the market enables us to conclude, with confidence, that the damage wrought to the competitive fabric of the market was significant. Whilst Federal Mogul has not previously been found in contravention of the Act, it has not co-operated with the Commission in its investigation – indeed it has resorted to the expedient of legal technicality, and plain deceit, to throw the investigators off course'.

4 South African Telecommunications Regulatory Authority – Executive Summary. <http://www.polity.org.za/html/govdocs/misc/satra.html?rebookmark=1>

- Independent Communications Authority Act of South Africa, 2000;
- Public Service Regulations, 2001;
- Industrial Development Act 1940;
- The National Electricity Regulation is the regulatory authority for the electricity supply industry (ESI) in South Africa. It is a statutory body, established in the terms of the Electricity Act, No. 41 of 1987; and
- South African Civil Aviation Authority Act, 1998.

Before 1998, other statutes gave sectoral regulatory bodies jurisdiction over competition matters. *The Telecommunication Act 1996*, for example, required the SATRA to ensure fair competition within the telecom industry.

### Concluding Observations and Future Scenario

The following areas need assistance for an effective implementation of the Competition Act in South Africa:

- Complete the agreements with other regulatory bodies providing for concurrent jurisdiction, to ensure consistent application of competition policy in all sectors;
- Improve handling and increase priority and resources for non-merger matters;
- Bolster resources by accepting offers of third party support – carefully;
- Discourage abuse of the interim relief process;
- Make more use of formal substantive guidelines;
- Amend and clarify the compensation terms for the tribunal, to attract and retain qualified members; and
- Use the economic resources of the Commission more effectively in advocacy settings.

*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 African National Congress (ANC), the South African Communist Party (SACP), and especially the Congress of South African Trade Unions (COSATU);
- Relationships between the Cabinet, Central Government Departments and the regulation and competition authorities; and
- Control and accountability issues in respect of regulation and competition authorities.

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