Pricing conduct, State aid and the implications for industrial development in South Africa

Yongama Njisane[1]

Abstract

The advent of the democratic dispensation in South Africa brought about a shift in the economic policy direction of the country. This shift in economic policy was necessitated by not only the need to address historical socio-economic imbalances, but also the aim to move the South African economy from its erstwhile pariah economic status and re-integrate it back into the global economy. It is well accepted that the South African economy was and still is characterized by the effects of the historical legacy of the economic concentration and ownership, collusive practices and the abuse of power by firms in dominant positions throughout the apartheid era. Therefore, the adoption of trade liberalisation policies sought to open up the South African economy to international competition and to allow South African firms to compete on a global stage. Similarly, the identification of the manufacturing sector as one of the key drivers of economic activity was aimed at not only enhancing South Africa's manufacturing capacity for the export markets but also to stimulate downstream industrial activity, with the aim of realising positive employment and productive externalities.

To achieve the aforementioned, the South African government adopted a number of State aid initiatives such as investment incentives in order to attract investments into South Africa and the manufacturing sector in particular. Alongside these initiatives by government, the development of competition legislation and the interventions by the competition authorities, particularly in the intermediate industrial goods sector, provide lessons regarding the competitive impact of pricing conduct by dominant firms and the provision of State aid by government on industrial development. This paper uses case studies of the interventions by the competition authorities in the intermediate industrial goods sector to explore the competitive implications of pricing conduct and State aid to the realisation of industrial development objectives.

Keywords: Pricing conduct, dominance, State aid, competition, industrial development.

---

[1] This paper is written in the authors' personal capacity and does not necessarily reflect the views of the Competition Commission of South Africa. Yongama Njisane is a Principal Economist at Competition Commission SA.

Introduction

Historically, economic policy in South Africa was shaped by and centered on the dependence on extractive industries like the mining of minerals such as gold. In many ways, this focus remained even in post-apartheid South Africa. The Organisation for Economic Co-operation and Development ('OECD') notes that some of the economy's basic structures that still remain were set up when diamonds and gold were discovered in the second half of the 19th century[2].

Given this background and the likely risks of the economy overly-depending on the mining sector, the pre-democracy governments raised major, modern industries around the extraction of natural resources. This industrial activity was mainly undertaken by State-owned enterprises ("SOEs"), which had been specifically set up for such purposes and thus dominated manufacturing by the end of the 1930s[3]. As will become clear further on in the paper, the dominance of these SOEs in South African manufacturing activity has persisted into the post-democratic South African market structures.

Along this developmental trajectory and owing to international isolation and economic sanctions against the apartheid regime, the design of South Africa's industrial policy was heavily focused on strategic investments to ensure self-sufficiency. It has been argued that pressure arising from the economic sanctions resulted in little State support for sustainable exports and low levels of competitiveness in many domestic industries[4].

As a result of the aforementioned historical design of the South African manufacturing sector, the sector and the South African economy in general, became highly concentrated. Roberts (2012) states that the South African economy was characterized by large national champions in key industries such as fertilizer, chemicals, defence equipment, fuel and petroleum, aviation, telecommunications and steel[5]. Industries such as textiles, pulp and paper, for example, owe their existence to support from the State-owned Industrial Development Corporation. Modern day examples of former SOEs include Telkom, Sasol and ArcellorMittal. The government's role in the economy persisted through the 20th century and

---

[2] Competition law and Policy in South Africa, An OECD peer review, May 2003, page 9.
[3] Competition law and Policy in South Africa, An OECD peer review, May 2003, page 10.
[4] *The dividend of democracy: 20 years of economic growth*, available at http://www.mediaclubsouthafrica.com/economy/3815-the-dividend-of-democracy-twenty-years-of-economic-growth.
[5] Roberts, S. (2012) Effects based tests for abuse of dominance in practice: The case of South Africa, page 2.

did not decline. For example, by the 1970s, the government owned or managed nearly 40 percent of the country's productive assets[6].

These former (and current) SOEs, received extensive State support which took many forms such as actual legislation, exclusive licenses, sustained investments, financial aid and relationships. It is argued that such State support was designed to not only protect these firms from competition and ensure that they do not fail but also to ensure their profitability[7]. As a result, the South African economy is characterized by the effects of the historical legacy of the economic concentration and ownership, collusive practices and the abuse of power by firms in dominant positions throughout the apartheid era (Parsons, 2009 and Roberts and Makhaya, 2014).

The dawn of democracy in South Africa was occasioned by market liberalization and the privatization of many of the SOEs listed above. The newly elected democratic government, recognizing the negative economic effects of South Africa's isolation from the world markets during the apartheid years, designed a number of investment promotion incentives whose main objective was not only to promote investment in South Africa but also bridge the gap between the upstream and downstream industries. According to the Department of Trade and Industry ('DTI'), the recipients of such State aid were expected to link the upstream and downstream industries. This, the competition authorities have interpreted to mean that the State aid provided was to be used to 'support' consumers of the vital intermediate products produced by the producers which received State support[8].

Makhaya and Roberts (2014) state that the South African economy exhibited high levels of concentration[9], which resulted in, *inter alia*, unfavourable prices charged to consumers; and feeble development of small and medium size businesses. Accordingly, the task of the current competition law regime was to, *inter alia*; address the highly concentrated market structures to promote greater efficiency. The National Industrial Policy Framework ("NIPF") notes that although the post-apartheid period has shown horizontal unbundling of conglomerates, this has been replaced by vertical re-bundling, which has had the effect of

[6] Competition law and Policy in South Africa, An OECD peer review, May 2003, page 10.
[7] *Competition Commission v Sasol Chemical Industries Limited*, case no: 48/CR/Aug10 (011502)
[8] *Harmony Gold Mining Limited,Durban Roodepoort Deep Limited vs Mittal Steel South Africa Limited,Macsteel International Holdings BV*, case no 13/CR/Feb04, para 104, page 37.
[9] Companies owned by the Anglo American Corporation accounted for 43 per cent of the JSE's capitalisation in 1994. There was a government sanctioned cement cartel and other state-owned enterprises which produced critical goods and services to the economy (Sasol and ArcelorMittal, (the then Iscor), to name a few).

compounding the problem of high (and in some cases rising) concentration in many sectors.[10]

Why does competition policy matter for industrial development?

The linkage between competition policy and industrial development is dependent on whether competition policy can and should be used as a policy tool for the attainment of economic development objectives, particularly in developing economies. Accordingly, I first deal with the linkage between competition policy and economic development and then explore the linkage between competition and industrial policies.

Competition Policy as a tool of Economic Development

It is generally accepted that competition policy primarily seeks to encourage free market conditions, by ensuring equal opportunities for all business to stimulate economic efficiency and protect consumers[11]. In this regard, Du Plessis *et al* (2011) state that the benefits of competition policy enhance productivity and ensure that resources are allocated efficiently and that this ultimately improves consumer welfare. These outcomes (i.e. increased productivity and efficient allocation of resources) are central to the achievement and success of any industrial and economic development framework. Brooks (2005) also argues that competition in product markets widens choices, lowers prices and increases production efficiency, and ultimately contributes to an economy's growth and development. Joekes and Evans (2008) argue that competition policy creates an enabling environment that can assist an economy to meet its developmental objectives.

Competition law is a policy tool used to regulate anti-competitive behaviour, such as cartel conduct, anti-competitive mergers and abuses of dominance. This kind of regulation can give rise to far-reaching benefits in terms of the developmental trajectory of a country as well as the individual consumers in that particular country. Without proper implementation of competition policy, it is argued that there is a risk that monopolistic firms will abuse their positions of dominance to the detriment of both consumers and competition. For instance, dominant firms may engage in anti-competitive behaviour such as charging excessive prices or even limiting output in the relevant antitrust markets. Moreover, these firms may engage in acts that are designed to increase barriers to entry or exclude potential rivals from participating in markets, to the detriment of competition. In this regard, it is arguable that the

[10] Republic of South Africa. Department of Trade and Industry. 2014. *National Industrial Policy Framework*, available at http://www.thedti.gov.za/industrial_development/docs/niPF-3aug.pdf.
[11] Neuhoff *et al*, (2006), *A Practical Guide to the South African Competition Act*., Lexis Nexis Butterworth, page 11.

pro-competitive and beneficial consumer and economic developmental outcomes arising from an appropriately implemented competition policy regime far outweigh any concerns relating to the implementation of same in developing countries.

Roberts *et al* (2011) show that the citizens of developing countries are more vulnerable to anti-competitive behaviour than those in developed countries. So it's crucial that competition policy should be crafted specifically to address the individual needs of each developing economy. In addition, competition policy should be seen as a complementary policy tool to other growth strategies.

Du Plessis e*t al* (2011) state that most markets in developing countries are highly concentrated; characterised by high levels of barriers to entry; and state-owned monopolies. So the inadequacies faced by developing countries are, in fact, indicative of a need for the implementation of an appropriate competition policy regime. Alvarez *et al* (2007), although approaching the use of competition policy as a tool to address social concerns, indicate the implementation of an appropriate competition regime may assist in the developmental state of an economy, in the sense that competition authorities will generally address unfair competition by dominant firms given that consumers and small businesses are unlikely to be able to do. Adam and Alder (2008) argue that the introduction of competition policy provisions to restrict abuses by dominant firms will have a positive impact on the proper functioning of markets, and the growth rate of a developing economy.

Singh and Dhumale (1999) argue that it is important for developing countries to have a competition policy regime which is designed to take into account their unique levels of development as well as their long-term objectives for sustainable economic growth. The authors argue that in a developmental state, the fundamental principle for competition policy should be aimed at balancing economic efficiency with socio-economic equity and development.

Against this background, it is arguable that the implementation and enforcement of an appropriately designed competition policy framework is critical to the achievement of economic development objectives, underpinned by industrial development. I now turn to explore this link below.

Competition policy and the link with industrial development

Schumpeter (1934) was one of the first economists to introduce technological changes, industrial structure and industrial development into economic development. Schumpeter's (1934) concept of industrial development was based on the incorporation of product innovation, product differentiation, market creation and the changes in market structure as a result of innovation and differentiation[12]. Siddharthan (1984), in assessing the relevance of non-price variables in explaining the industrial performance of India, found that those industries that produced more differentiated products, invested more in research and development and employed more skilled labour, developed faster than those that did not. The author found that industrial performance and growth is largely driven by investments in technology (research and development), product differentiation, innovation and skill formation[13]. These factors of industrial development referred to by Schumpeter (1934) and Siddharthan (1984) above are interestingly also ingrained in the principles of competitive rivalry in competition economics.

It is universally accepted that industrial policies, although sector-specific, are broadly aimed at improving the competitiveness and abilities of domestic firms. In order to achieve this, a number of interventions are put in place including, *inter alia*, subsidies and investment incentives. Another element that is critical for the success of any industrial development policy is the relative ease of entry or expansion in any of the identified industries. Das Nair (2008) notes that where there are high barriers to entry or expansion and conditions of imperfect competition, there may be insufficient competitive rivalry to constrain supra-competitive prices over time.

Roberts (2010) finds that competitive rivalry has been an important part of the industrial development of several East-Asian developing countries such as South Korea and Japan.[14] The author notes that strategies for industrial development in these countries have typically involved substantial intervention from the state in order to ensure developmental outcomes. Roberts (2010) further argues that in each of these examples of successful state intervention, government support to domestic firms was predicated on the firms achieving a certain level of competitive performance in order to enjoy continued protection and state support. For instance, these governments forced firms to develop their capacity to compete more effectively in export markets if they wished to enjoy continued state support. This

[12] Schumpeter, J.A., (1934), reprinted, The Theory of Economic Development, Oxford University Press, New York, 1961.

[13] Siddharthan, N.S., (1984), Industrial Structure, Non-Price Competition and Industrial Development, *Economic and Political Weekly*, vol 19(31/33), pp 1307 – 1310.

[14] Roberts, S. (2010). 'Competition policy, competitive rivalry and a developmental state in South Africa', Chapter 11 in O. Edigheji ed. Constructing a Democratic Developmental State in South Africa: Potentials and Challenges, HSRC Press, Pretoria.

created competitive rivalry between domestic firms which incentivised them to incorporate more efficient technologies and production processes in order to compete more effectively in domestic and export markets and therefore enjoy continued state support.[15]

The above examples highlight the centrality of ensuring competitive rivalry to achieving successful industrial development in that interventionist industrial policy was applied in conjunction with strong incentives that encouraged dynamic rivalry between firms. Industrial policy is broadly about the state instituting targeted interventions to support and develop sectors that are identified as having the potential to foster long-term economic growth as a result of their strong linkages to other sectors in the economy. In this way, these sectors are able to grow and compete internationally in a manner which also creates growth in other related sectors.[16]

Noland and Pack (2003) state that some of the tools of industrial policy, which were applied extensively in many of the East Asian countries, include: credit directed at specific sectors with below-market interest rates, favourable profit tax regimes, subsidization of inputs, the control of the entry and exit of firms, export targets, subsidies for research and development, and favourable trade tariffs.[17] The South African industrial policy tools, particularly those implemented in recent years, are broadly captured in the NIPF which is enacted through the Industrial Policy Action Plan ("IPAP"). Briefly, the NIPF focussed on a number of strategies which, *inter alia*, included industrial financing and incentives programmes; sector diversification and developmental strategies; regulatory changes; skills development; the provision of infrastructure; funding for research; and trade policy[18].

Roberts (2010) and Brooks (2007) argue that industrial policy and competition policy should therefore be viewed as complementary policy tools whereas traditional market-based theories may find that state intervention in the form of industrial policy contradicts the precepts of a free competitive market. South Africa's experience and industrial development trajectory has shown that the creation of highly concentrated industries is not contributing effectively to inclusive growth, sustainable economic development and the creation of

---

[15] Ibid.

[16] Brooks, D. H. (2007). "Industrial and Competition Policy: Conflict or Complementarity"; Asian Development Bank Institute (ADBI) Research Policy Brief No. 24. Available online: http://www.adbi.org/files/rpb24.pdf.

[17] Noland, M. & Pack, H. (2003). "*Industrial Policy in an Era of Globalization"* referenced in Brooks, D. H. (2007). "Industrial and Competition Policy: Conflict or Complementarity"; Asian Development Bank Institute (ADBI) Research Policy Brief No. 24. Available online: http://www.adbi.org/files/rpb24.pdf.

[18] A National Industrial Policy Framework, Department of Trade and Industry, Available online:http://www.thedti.gov.za/industrial_development/docs/niPF-3aug.pdf.

conditions that are conducive to new entry in markets. Such a scenario is generally identified as one of the key risks of an industrial policy regime that is not closely linked with competition policy, particularly in small economies. Brooks (2007) argues that the lack of coordination between industrial and competition policies results in the creation of barriers to entry, the protection of incumbent firms, and rent seeking.[19]

State aid and the implications for competition

State aid can broadly be defined as any form of financial or other support extended by a State to a local institution serving the public. State aid encompasses a wide range of interventions including, *inter alia*, direct subsidies, tax concessions, state guarantees and investments from public funds in circumstances where a private investor would not have given support.

In some circumstances, government intervention in the form of State aid is considered necessary for a well-functioning economy to offset the disadvantages occasioned by markets not performing optimally. The recent global economic crisis has reaffirmed the view that markets do not always perform as they ought to, nor does free and unregulated competition always deliver the most socially desirable outcomes[20]. The provision of State aid to firms in specific, designated industries is generally driven by industrial development imperatives which encompass a number of objectives including, *inter alia*, encouraging economic activity in a particular region, providing access to products or services that the market would not ordinarily provide or counter decline(s) in designated industries.

While State aid can take various forms, a single common feature is that the provision of such public largesse affects competition in the relevant markets given that such aid favours or advantages certain firms over others. Due to the fact that only some firms may receive such State aid, industrial policy effectively alters the nature of rivalry between domestic firms. It is argued that this imbalance can be counteracted by faster growth in these sectors, provided that the objectives of industrial policy are realised, and this growth can in turn create new entry and growth in the long-term. This is notwithstanding the fact that some of the incentives offered to firms in the short-run may sometimes affect competition between firms in the short-term.

[19] Brooks, D. H. (2007). "Industrial and Competition Policy: Conflict or Complementarity"; Asian Development Bank Institute (ADBI) Research Policy Brief No. 24. Available online: http://www.adbi.org/files/rpb24.pdf [Site accessed: 29 October 2013]; p. 2.

[20] Miek Van der Wee, speech delivered at conference on "competition enforcement challenges and consumer welfare", Islamabad, 2 December 2011, at page 4.

Implicitly, this suggests that competition policy should to some extent accommodate the long-term efficiency objectives of industrial policy despite the short-term losses to competition that may occur. Noland and Pack (2005) argue that successful industrial policy allows for the "accumulation of additional rents by local incumbents to provide them with a financial cushion to support entering new product and geographical markets".[21] The corollary to this is that if the state neglects to create new entrants and industries in its developmental framework, this may, in the long-run, result in limited competition. This is evident in many industries in South Africa.

There is a view that State aid left unabated could be just as harmful to competition as traditional offences like cartel conduct or abuse of dominance. There are a number of ways in which the provision of State aid, when not vetted for competition compliance, can harm competition as illustrated in the few practical examples below[22]:

- Unchecked State aid can distort competition between competitors. For example, if a government subsidizes company "A", and not its rivals, this company will be able to take a larger share of the market than it would have had in the absence of that subsidy. So company "A" would do quite well in that market, even if it was far less efficient than its rivals who did not receive any aid.

- State aid, when not vetted for competition compliance, could stifle innovation and risk taking which ultimately benefits consumers. If company "A" would have easy access to state subsidies, it would feel less need to compete on merits. It would not have a strong incentive to improve the efficiency of its operations or to invest in product or process innovation.

- The provision of unchecked State aid can disincentivise firms from adopting difficult measures required to become more efficient. Constant provision of State aid may create moral hazard in that it may encourage recipients to take excessive, unjustified risks in the knowledge that profits will be privatized, whilst losses would be "socialized".

[21] Noland, M. & Pack, H. "The East Asian Industrial Policy Experience: Implications for the Middle East"; Egyptian Centre for Economic Studies (ECES), Working Paper No. 106 (December 2005); Available online: http://www.mafhoum.com/press9/265E12.pdf; page 7.
[22] Miek Van der Wee, speech delivered at conference on "competition enforcement challenges and consumer welfare", Islamabad, 2 December 2011, at page 3 & 4.

- If State aid results in the exit or foreclosure of competitors, it can be deduced that this would likely lead to consumer harm given that the exclusion or foreclosure of competitors implies less choice, product differentiation and ultimately higher prices for consumers.

- State aid can also harm competition even if it does not affect pricing directly. In this regard, it is commonly accepted that investments are strategic substitutes and therefore the provision of State aid that reduces the cost of capital will allow the recipient to increase investment at the cost of its rivals. It may then sell more at a higher price while the competitors sell less at a lower price.

- State Aid could also result in below cost pricing (commonly referred to as predatory pricing) if given in large amounts. Such predatory pricing conduct could lead to the exit or foreclosure of competitors to the detriment of consumers.

- Unchecked State aid could keep inefficient firms who should exit the market on account of their inefficiency on indefinite life support.

Given the various possible ways in which the provision of unchecked State aid can harm competition, competition authorities such as the European Commission ("the EU") incorporate State aid provisions in their competition regime. These provisions give the EU the powers to assess whether such State aid, granted to firms, will have a negative impact on competition and to the extent that this is not likely, to approve such State aid.

The State aid provisions in the EU are set out in Articles 107 to 109 of Chapter 1 of Title VII of Part Three of the Treaty on the Functioning of the EU ("TFEU")[23]. Article 107 is divided into three parts as follows:

- Article 107 (1) states that State aid is prima facie prohibited and unlawful: "*Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*."
- Article 107 (2) sets out certain categories of State aid which are exempted from the general prohibition referred to above and are thus considered to be in line with the

[23] Richard Whish et al *Competition Law* 7th ed 2011, p. 49 - 50.

internal market. These, *inter alia*, include State aid related to social development or aid provided in response to natural disasters.

- Article 107 (3) allows the European Commission ("EC") to permit a number of categories of State aid.

While there is little information regarding the incorporation of State aid provisions in the competition legislations of African countries, it is noteworthy that Tunisia, Seychelles and Togo have made provision for state aid in their Acts.

The South African Competition Act no 89 of 1998 (as amended) ("Competition Act") does not contain any provisions relating to State aid. However, as discussed earlier, State aid can distort the competitive process and reduce efficiency if there is no consideration of maintaining competitive neutrality[24]. South African legislation regarding SOEs is fragmented and there is no single framework that regulates SOEs. Absent State aid provisions, the Commission has dealt with such cases on an *ad hoc* basis and applied the provisions of the Competition Act accordingly. In most instances, the competition authorities have taken the view that they do not have jurisdiction and the case is accordingly dismissed. A cursory review of the cases notes the following key points are typically considered[25]:

- The Competition Act is applicable to the State and thus SOEs are fully subject to it.[26]
- The Competition Act's prohibited practice regime has as its objective the prevention of certain anti-competitive practices by firms who participate in markets and not the review of the exercise of State powers by State functionaries.
- The Competition Act does bind the state in terms of section 81, but only when it behaves through a vehicle like a firm, i.e. through an SOE.
- The South African competition authorities do not have the jurisdiction over matters related to the exercise of public powers except where the state exercises its power through a vehicle such as a firm (SOE).
- Where such matters are of an administrative nature and subject to review, they are adjudicated in one of the High Courts of South Africa.

[24] The concept of competitive neutrality essentially means that State-owned entreprises, who in most cases are beneficiaries of State aid, and private firms must compete on a level playing field.
[25] *AEC Electronics (Pty) Ltd v The Department of Minerals and Energy*, case number: 48/CR/Jun09; *Democratic Alliance v South African Airways Proprietary Limited and South African Express Proprietary Limited*, case no: 2013Jan007; *Petroline RSA Proprietary Limited v Transnet Limited*, 2011May0059; and *Jacques Smalle MP v The Central Energy Fund Soc Limited*, 2012Nov0665.
[26] Section 81 of the Competition Act no 89 of 1998 (as amended).

- The competition authorities also do not have the power to investigate or evaluate the exercise of public powers; nor do they have the capacity to refer such matters to a High Court.

It is interesting to note that although the South African competition authorities have recognized the competitive effects of State aid as far back as the famous Mittal[27] excessive pricing case in 2007, no clear guidelines have been set to either regulate the provision of State aid, given its competition implications, and various forms of industrial development incentives still continue to form an integral part of the policy tools used by government in achieving its industrial policy objectives.

This is particularly important because recently, the competition authorities noted, in the Sasol[28] excessive pricing case, that the historical State support received by the national champions such as Sasol continues to be relevant when assessing allegations of abuse of dominance against these firms. It is well-known that most of the firms listed above have all been found by the competition authorities as possessing statutory dominance in terms of the Competition Act in their respective markets. The competition authorities have found that these firms owe their dominant positions in no small measure to State support or ownership under the apartheid regime and beyond.

Currently, the South African industrial policy objectives, encapsulated in the Industrial Policy Action Plan, identify a number of transversal and sector-specific interventions directed at the manufacturing sector, particularly automotive products, plastics and pharmaceuticals, metals fabrications, capital and rail equipment, clothing and textiles, agro-processing, among others.

Against this background, the relevant question is what is the appropriate course of action when State support has the potential to harm competition? As previously indicated, State aid is considered necessary for a well-functioning economy to offset the disadvantages occasioned by markets not performing optimally. Also, the use of State aid forms an integral part of government’s design of economic policy that will produce inclusive and sustainable economic development outcomes.

[27] *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another*, case no: 70/CAC/A.

[28] *Competition Commission v Sasol Chemical Industries Limited*, case no: 48/CR/Aug10.

The examples of South Korea and Japan referred to above indicate that some governments have employed 'interventionist industrial policy' in a relatively successful manner within the context of a strong competition policy regime. Key to this outcome was the fact that incentives for firms that are placed in an advantageous position by industrial policy provisions were sustained in order to ensure that they continue to compete amongst themselves and internationally, thus retaining the benefits that arise from dynamic rivalry. It therefore appears that although fundamentally there may be a case for limited state intervention in markets in industrialized countries, the situation in developing countries such as South Africa seems to require an approach which is somewhere in between an interventionist state and maintaining market-based competitive rivalry.

The issue then becomes one of balancing short-term interventions and long-term goals to achieve inclusive growth in the long-term. In South Africa, both the industrial policy framework and the competition law regime seek to achieve these long-term gains. Industrial policy in developing countries may concern itself with creating and supporting new, viable industries and market participants whereas competition policy typically seeks to 'unlock' markets for entry and growth by preventing incumbent firms in concentrated markets from exercising market power to exclude the entry of new, efficient rivals. Furthermore, and importantly, competition policy is not necessarily against the existence of large firms – concerns arise when large firms seek to abuse their positions of market power.[29] The objectives of both of these frameworks are therefore closely aligned, *ceteris paribus*.

What is important is to ensure that there is policy coordination to prevent a situation wherein the implementation of industrial policy is not unknowingly misaligned with the objective of ensuring competitive rivalry to the benefit of consumers. Part of that coordination process would involve the incorporation of State aid consideration in the South African competition policy framework. The nature and design of that State aid doctrine is not considered in this paper but will rather form part of further research that will be conducted in future papers.

Pricing conduct and implications for industrial development

South Africa's experience as regards abuse of dominance conduct, particularly relating to pricing conduct by dominant firms, has mainly involved former SOEs. A brief review of economic literature shows that this situation is not unique to South Africa. The OECD (2009) notes that despite the broader social goals that they are often created to achieve, some

[29] Brooks, D. H. (2007). "Industrial and Competition Policy: Conflict or Complementarity"; Asian Development Bank Institute (ADBI) Research Policy Brief No. 24. Available at http://www.adbi.org/files/rpb24.pdf.

literature suggests that SOEs may be more and not less likely to abuse their dominance. This is because these SOEs, in many cases, are not required to generate high returns and are expected to fulfil a social mandate (such as ensuring wide access) which detracts from their ability to generate returns. Therefore, often their managers are motivated to expand the scale and scope of the operation instead.[30]

Sappington and Sidak[31] show that where SOEs are maximising a combination of profit and revenue, they have a greater incentive to abuse their dominance, especially by charging prices that are below cost or raising rivals costs. The SOE pricing decision is shown to be less sensitive to the higher costs associated with increased output, making SOEs more likely to set prices below the marginal cost of production. The authors show that this becomes more likely the less profit-focussed the SOE is. SOEs may also be more likely to engage in strategies to raise rivals costs, since this behaviour causes profit-maximising competitors to lower their level of output and/or increase prices which increases demand for the SOEs products, leading to an expansion of output for the SOE. Again, the authors demonstrate that there are stronger incentives for an SOE than a profit-maximising firm to raise rivals costs and attempt to exclude them.

It is also alleged that SOEs may also have greater ability to abuse their dominance due to the soft budget constraints which they face and other advantages. There is no need for an SOE to recoup as they have a broader mandate in terms which profit making is not the sole or primary objective. Nonetheless they may also have the ability to recoup through increasing prices in the market in which they have a monopoly. Despite the lack of an expectation or requirement of recoupment, if competitors are side-lined or exit, prices may rise in the long term. The conduct may also deter entrants and create a reputation for the SOE that it will respond aggressively to entry, leading to a lessening of competition.

These features of SOEs are interesting since traditional tests for abuse of dominance have been set up assuming profit-maximising firms, implying that a different approach may be required for SOEs. It is important to note also that competition authorities can only deal with problems after they have arisen, by which time competitors may already have been foreclosed from the market and entrants deterred. A competitive neutrality (guideline)

[30] State Owned Enterprises and the Principle of Competitive Neutrality, OECD Policy Roundtable, 2009

[31] Sappington, D. and Sidak, J. (2003), Competition Law for State-Owned Enterprises, *Antitrust Law Journal* No. 2 (2003).

framework would be more effective in ensuring that such problems do not arise in the first place.

The recently published Presidential Review Committee ("PRC") report[32] touches on the issue of competitive neutrality and the impact of South Africa's SOEs on competition in its discussion of economic regulation. It notes that economic regulation of SOEs in South Africa is inconsistent across sectors. The PRC report recommends that government implement an overarching framework for economic regulation with a focus on independence, competence, autonomy and transparency. It also notes that the framework should have regard to competitive neutrality but fails to go into any further detail on what this would mean in practice.

For this reason, it is not surprising that the competition authorities have received a number of complaints relating to former SOEs over the years, some of which have led to successful prosecution. We discuss these case studies below.

Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another

The 2007 excessive pricing[33] case against Mittal Steel South Africa Limited ("ArcelorMittal"), brought by Harmony Gold Mining Company Limited ("Harmony"), related to the pricing of flat steel products in South Africa. It is worth noting that ArcellorMittal was (and still is) the primary and dominant producer of long and flat steel products in South Africa. Further, the background to ArcellorMittal's development and growth in the South African economy was significantly underpinned by State support and preferential pricing on some of its key inputs such as iron ore. The focus of the discussion below and the relevance of this case study is how the Competition Tribunal ("Tribunal") approached the assessment of the alleged excessive pricing conduct, particularly how State aid or support played a significant role in the input cost determination for ArcellorMittal's steel products[34]. It is also important to note

[32] "Growing the Economy – Bridging the Gap", Presidential Review Committee on State-Owned Entities, available at http://www.thepresidency.gov.za/ElectronicReport/downloads/volume_1/volume_1.pdf.

[33] Section 8(a) of the South African Competition Act prohibits a dominant firm from "*charging an excessive price to the detriment of consumers*". An excessive price is defined as "*a price for a good or service which (aa) bears no reasonable relation to the economic value of that good or service; and (bb) is higher than the value reffered to in sub-paragraph (aa)*".

[34] ArcellorMittal, a previously State-owned and operated entreprise, benefitted from a number of incentive initiatives by government including, *inter alia*, the General Export Incentive Scheme and through accelerated depreciation tax allowances, the Regional Industrial Development Scheme (which later became the Small and Medium Manufacturing Development Programme) as well as a tax write-off under the Strategic Investment Programme.

that the steel industry is generally characterised by large economies of scale, high barriers to entry and high transport costs. Against this background, South Africa (and ArcelorMittal), at the time, enjoyed a number of cost advantages in the production of steel products, particularly abundant and good quality iron ore deposits, relatively cheap labour, electricity costs.

ArcellorMittal's pricing methodology for its steel product was based import parity pricing, which is essentially "*the practice of constructing the price of a domestically produced product by using the prevailing price in another jurisdiction – generally the closest alternative geography from which the product in question is available – and adding in notional transport and other freight costs in order to arrive at the local price of the domestically produced product*."[35] Lewis (2008) notes that "*The notion that domestic prices are then effectively determined by the cost structure prevailing in another country supplemented by freight charges that are not actually incurred is, incorrectly or otherwise, widely construed as an elaborate fiction designed to manipulate pricing in the producer's favour.*"

What is of interest about this case is how the Tribunal considered the role of State aid on the competitive landscape in the steel market in South Africa and tied this (in conjunction with ArcelorMittal's pricing conduct) to the impact on downstream manufacturing markets[36]. In this regard, the Tribunal indicated that when a firm has been the recipient of State support, the State is "*entitled to take an active interest*" in the pricing behaviour of such firms, that "*the risks for competition are substantially different*" for such firms and that, where relevant, these firms have an obligation to price their products in a manner that supports the consumers of the intermediate products that they produce. In this regard, the Tribunal appeared to consider that it would be in the public interest that the pricing behaviour of recipients of State support be aligned to the national developmental imperatives.

Competition Commission v Sasol Chemical Industries Limited

More recently, the Tribunal reaffirmed this approach in the excessive pricing case against Sasol Chemical Industries ("**SCI**")[37].

[35] Lewis, D., (2008), EXPLOITATIVE ABUSES – a note on the Harmony Gold v Mittal Steel excessive pricing case, speech made at the 2008 International Antitrust Law & Policy: Fordham Competition Law, available at http://www.comptrib.co.za/assets/Uploads/Speeches/lewis12.pdf.
[36] *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another*, case no: 70/CAC/APR07.
[37] *Competition Commission v Sasol Chemical Industries Limited*, case no: 48/CR/Aug10 (011502).

This case involved the production of a number of products including purified of propylene, produced from feedstock propylene, which is in turn used to produce polypropylene. Briefly, polypropylene is a key input for converters who use it in the production of industrial plastic products such as motor car parts, water tanks, etc. and household plastic products such as buckets, brooms, storage containers. It is noteworthy that an excessive price for polypropylene would have a knock-on effect on the costs of producing the various plastic products referred to above.

In terms of industry dynamics, feedstock propylene is produced in abundance in South Africa, as a by-product, by Sasol Synfuels, another subsidiary of Sasol Limited ("**Sasol**"). Purified propylene is not a traded good and Sasol has only one customer, Safripol Pty Ltd ("**Safripol**"). SCI supplies polypropylene to domestic customers at import parity pricing and also exports significant volumes to international export destinations.

The Tribunal, in its assessment of the alleged excessive pricing conduct, found Sasol to be dominant at both levels of the relevant markets i.e. the production and sale of purified propylene and polypropylene in South Africa. Following various tests used to determine the economic value of these products such as price-costs tests and international price comparisons, the Tribunal found that on the basis of the price-costs tests:

- the average markups of purified propylene prices over actual costs ranged approximately from 31.5 – 33%; and
- the average markups of polypropylene prices over actual costs ranged approximately from 26.9 – 36.5%.

On the basis of the above, the Tribunal found that SCI had contravened the provisions of the Competition Act by engaging on excessive pricing conduct.

One of the key considerations by the Tribunal, in reaching its conclusion was the history of State aid enjoyed by Sasol in the past. Notwithstanding the fact that Sasol has been privatised for many years, the Tribunal considered and placed emphasis on the State aid historically afforded to Sasol in its measurement of the reasonableness of the difference between the price charged and the economic value of purified propylene and polypropylene. In this regard, the nature of the state support received by Sasol included legislative and regulatory interventions which were aimed at ensuring the sustainability and profitability of Sasol. The Tribunal found that Sasol's dominance was attained and sustained as a consequence of such State aid and not as a result of risk taking and innovation and that this conferred upon Sasol a cost advantage that made it one of the lowest cost producers of feedstock propylene in the world, which ultimately made Sasol a low-cost producer of purified propylene and polypropylene. Notwithstanding Sasol's argument that the State aid, in monetary terms, had been repaid to the State, the Tribunal was of the view that, due to the considerable and prolonged nature of the State aid received, such state support State aid could not only be expressed in monetary terms given that it has had the effect of creating Sasol's dominance which endured into the markets considered in the case.

Of relevance and importance to the impact of such conduct on industrial development in South Africa, the Tribunal went further and stated that "*these excessive prices, maintained by an exercise of market power by SCI, have resulted in a missed opportunity for innovation and development for the domestic manufacture of downstream plastic goods. Cheaper polypropylene prices for local plastic converters could enhance local production thereby enabling them to compete more effectively with imported final plastic products, manufacture locally rather than overseas and introduce new products to South African consumers adding to their choice of product through greater innovation.*"

Nationwide Poles vs Sasol

The case was brought by Nationwide Poles CC ("**Nationwide**") against Sasol Oil Limited ("**Sasol Oil**"). Nationwide was a small producer of treated wooden poles in the Eastern Cape. Nationwide obtained wooden poles from sawmills and treated these poles with a preservative or a wax-additive called creosote. Nationwide's major customers were vineyards in the adjacent Western Cape Province. Sasol Oil, using the tar by-product from its synthetic fuel production process, produced a range of products; including creosote. The owner of Nationwide, Mr Foot, initially lodged a complaint of collusion and price discrimination with the Commission. The Commission found insufficient evidence of a contravention and issued a notice of non-referral; Mr Foot then approached the Tribunal directly and self-referred the matter.

Nationwide alleged that Sasol Oil charged it a higher price than its most important competitor in the downstream production of treated wooden poles. It was not disputed that Sasol Oil's price schedule did allow for discounts based on historical volumes purchased. The larger creosote customers received the most preferred prices and this resulted in a 3 – 4% cost differential, which the respondent argued was not substantial. Nationwide alleged that Sasol Oil's pricing policy with respect to creosote amounted to prohibited price discrimination in contravention of Section 9 of the Competition Act.

In evaluating the alleged conduct, the Tribunal found that Sasol Oil was indeed dominant in the market for the provision of creosote. The Tribunal further held that Sasol Oil, in setting the price of its creosote, behaved to an appreciable extent independently of its competitors, customers or suppliers.

In its assessment, the Tribunal noted that the price discrimination provisions of the Competition Act had been intentionally afforded a separate place in the Competition Act, apart from section 8 which generally deals with the abuse of dominance. The Tribunal put forward that the different treatment of price discrimination and its prohibition reflects the legislature's concern with maintaining accessible, competitively structured markets, which markets would accommodate new entrants and enable them to compete effectively against larger and well-established incumbents.

It was stated that in the absence of a level playing field or in the presence of price discrimination, SME's may find it difficult to enter new markets and even more difficult to thrive and to compete effectively on the merits. The Tribunal found that the legislators concern with the development of small business is reflected through one of the stated purposes of the Act being to ensure the equitable treatment of SME's. The Tribunal also referred to the explanatory memorandum to the Competition Act which set out the intention of the legislature as being, *inter alia*, to support SME's through the instruments and principles of the Competition Act.

Giving reference to the preamble and purposes of the Competition Act into an assessment of price discrimination, the Tribunal argued that "*although incorporating considerations of equity into competition analysis, which may be anathema to a competition law approach that insists on a pure consumer welfare standard that it is generally referenced by a reduction in output or an increase in price, the utilization of a fairness standard is not alien to the Act and practice. The Tribunal further argued that the mere fact that equity considerations sit uncomfortably in competition economics orthodoxy is no warrant for ignoring the intention by the legislature that such equity considerations play a role in the decisions of the Authorities. The Tribunal thus found Sasol guilty of contravening Section 9 of the Competition Act".*

Sasol Oil then lodged an appeal against the decision of the Tribunal. Sasol Oil concentrated its argument on the manner in which the Tribunal sought to interpret section 9(1) of the Competition Act. Sasol Oil argued that the Tribunal had erred in finding that the appellant's volume based discount pricing was likely to substantially prevent or lessen competition. Sasol argued that the Tribunal should have found that there was no such likelihood.

Ultimately, the Competition Appeal Court ("**CAC**") found in favour of Sasol Oil on the grounds that Nationwide had not presented sufficient evidence that Sasol Oil's conduct was likely to substantially prevent or lessen competition in the relevant market. The CAC averred that while Nationwide had established harm to its business, it had failed to demonstrate market-wide impact or harm due to Sasol Oil's behaviour.

In respect of the public interest approach adopted by the Tribunal, the CAC seemed to acknowledge that the protection of SME's is indeed an integral part of the Act. In support of this the CAC quoted the remarks of the chair of the Korean Competition Advisory Board, Kyu-UcK Lee: *'In a developing economy where, incipiently, economic power is not fairly distributed, competition policy must play the dual role of raising the power, within reasonable bounds, of underprivileged economic agents to become viable participants in the process of competition on the one hand, and of establishing the rules of fair and free competition on the other. If these two objectives are not met, unfettered competition will simply help a handful of privileged big firms to monopolize domestic markets that are used and protected through import restrictions. This will give rise to public dissatisfaction since the game itself has is not been played in a socially acceptable, fair manner'.* However, the CAC found that there was no basis for the Tribunal to extend the objective of protecting SME's, as it appears in the preamble and objectives of the Competition Act, into the inclusion and construction of Section 9.

The above discussion notwithstanding, what is of importance in respect of this case is the recognition by both the Tribunal and CAC on how discriminatory pricing conduct can have adverse effects on small businesses. Such discriminatory pricing conduct, when it is established that it does indeed give rise to competition concerns, can potentially have a negative effect on industrial development initiatives to the extent that it affects manufacturing activity in downstream beneficiation industries.

Lessons

Pricing conduct by dominant firms and its implications for industrial development

The case studies discussed above demonstrate how anti-competitive pricing conduct, particularly in the intermediate industrial goods sector, can potentially have a detrimental impact on industrial development initiatives in downstream manufacturing activities. In essence, this pricing conduct serves to increase downstream production costs by way of high input costs and thus renders domestic firms uncompetitive not only domestically, where consumers of such goods will experience high prices and low or no innovation, but also internationally. This is further augmented by the fact that South Africa, by virtue of its geographic location, is far removed from most international markets and therefore is likely to face significant transport costs in the trade of goods internationally.

Van Lil (2015), citing the 2014 NIPF, notes that cost-effective inputs are critical to a successful industrialisation process[38]. However, an obstacle to the success of the industrialisation process can partly be attributed to the exercise of anticompetitive pricing conduct in several concentrated input markets.

Mondliwa and Roberts (2014) state that "*The challenge for industrialising economies is to reach the threshold of competitiveness and to continually upgrade the ability to compete by bringing together a set of production capabilities, along with ensuring that the basic conditions are in place such as competitively priced inputs, access to finance and the ability to source appropriate technology. When there are price pressures on an intermediary input product, smaller margins mean that firms are unable to reinvest in up-to-date equipment and research and design. These firms may find themselves in a vicious circle of competitiveness with low investment and little development of capabilities. Instead, low cost inputs should be generating a virtuous circle of investment, increased efficiency, and economies associated with throughput and scale reducing average fixed costs.*"

The authors, in gauging the impact of Sasol's pricing conduct in the SCI case, note that in the period between 1994 and 2002, competitive pricing of polypropylene by Sasol led to 6% average annual growth. However, following a subsequent change in pricing policy to IPP, there was a 1% average annual contraction, coupled with a loss of 13 000 direct jobs. Van Lil (2015) notes that this is detrimental to the manufacturing sector, which is critical to the creating and sustenance of inclusive growth, especially because the manufacturing sector has a multiplier effect on the economy.

Fedderke and Simbanegavi (2008) make similar findings in their assessment of the inter-linkage between industry structure, particularly the South African manufacturing sector, pricing and industry performance[39]. The authors find high and increasing levels of

[38] van Lill, W., (2015), Excessive pricing in Mittal and Sasol: A view on the role of competition policy versus industrial policy, Paper prepared for the First Annual Competition and Economic Regulation Week at Elephant Hills hotel, Victoria falls, Zimbabwe on the 20 and 21 March 2015.
[39] Fedderke, J., and Simbanegavi, W., (2008), South African Manufacturing Industry Structure and its Implications for Competition Policy, Economic Research South Africa, Working Paper number 111, available at http://www.econrsa.org/papers/w_papers/wp111.pdf.

concentration in the South African manufacturing sector in the period up to 1996 and a spurious decline in the period thereafter. In the same period up to 1997, the authors observe high markups in the sector (see also Fedderke and Hill (2006)[40] and Aghion *et al* (2007)[41]). Aghion *et al* (2007) find that the average markup for the manufacturing sector for the sample period is approximately 54%. Fedderke *et al* (2005) and Aghion *et al* (2007) also find that the South African manufacturing industry markups are relatively higher than those observed in other countries.

Creamer *et al* (2012), in their assessment of pricing conduct in South Africa make some findings that are of relevance for this paper[42]. These findings, *inter* alia, include that price changes are significantly large on average, although small price changes also do occur. In respect of the magnitude of price changes, the authors find that for the producer pricing index ("PPI"), the average weighted magnitude of price increase is approximately 14.7%, compared to an average monthly PPI of approximately 6.8% over the relevant sample period.

The above shows that anti-competitive pricing conduct by dominant producers and suppliers of intermediate industrial input products can have a negative effect on downstream manufacturing activity. This is of concern, particularly given the strategic importance of the manufacturing sector to the achievement of sustainable and inclusive economic growth and development in South Africa. It is noteworthy that the development of abuse of dominance jurisprudence in South Africa has mainly centred on the role of current and former State-owned enterprises. This raises the question of how State aid, in its various forms, ought to be approached and applied in South Africa.

State aid and competition

As previously indicated, the South African Competition Act does not contain provisions relating to the State aid. It is accepted that State aid plays an important role in the South African economy particularly in light of the number of SOEs that operate in various industries and the number of investment incentive initiatives that underpin the implementation of South

[40] Fedderke, J.W., and Hill, A.J., (2006), Industry Structure and labour market flexibility in the South African manufacturing sector: a time series and panel data approach, Economic Research South Africa Working Paper Series 43, Economic Research South Africa.
[41] Aghion, P., Braun, M., and Fedderke, J., (2007), Competition and productivity growth in South Africa, Economic Research South Africa Working Paper number 54, available at http://dash.harvard.edu/handle/1/3350068.
[42] Creamer, K., Farrell, G., and Rankin, N., (2012), What price-level data can tell us about pricing conduct in South Africa, South African Reserve Bank Working Paper 12(04), available at https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/5117/WP1204.pdf.

Africa's industrial development policy framework. The discussion above on the development of South African jurisprudence on abuse of dominance conduct, by mostly former SOEs shows that there is a need to develop a State aid framework or legislation that will focus on the competitive effects of same[43]. Specifically, such a framework or legislation must make provision for competitive neutrality more generally.

This is of great importance given South Africa's industrial development policy framework, which suggests that it is likely that the State may play an even greater role in markets in future. To the extent that this involves supporting SOEs, or conceivably even creating new ones, this could result in distortions of competition. A framework for evaluating the provision of State aid would also serve to prevent or at least limit the likelihood that SOEs would be placed in positions of market power that create the incentive to act in an anti-competitive way.

Although a legislative amendment may be a step too far, it is proposed that the government, through the competition authorities create a system that facilitates the assessment of the potential effects of State aid on competition. In this check system, all proposed State aid above a certain threshold, particularly State aid that is provided discriminately or on a selective basis, should be referred to the competition authorities for assessment and approval prior to implementation. In this regard, to ease the burden on the competition authorities, the *de minimis* principle would apply.

After the in-depth investigation, the competition authorities could come to three possible decisions[44]:

- Positive decision: where the proposed state aid is approved;
- Conditional decision: where the proposed state aid is approved with conditions;
- Negative decision: where the state aid is disallowed because it distorts competition in a significant manner without any corresponding gains outweighing the identified harm.

Conclusion

This paper draws from economic literature to make the argument that competitive markets (and by implication competition policy) are important for the realisation of industrial development objectives. The paper argues that there are two factors, among others, which

---

[43] It is noteworthy that the case studies discussed above are a sample of abuse of dominance cases by former SOEs in a number of other industries such as food and agro-processing.

[44] See State Aid control overview, available at: http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.htm.

have a bearing, from a competition perspective, on the success of industrial policy in South Africa.

First, pricing conduct by dominant firms, especially those that are producers and suppliers of intermediate industrial products can have a negative impact on industrial policy initiatives when found to be anti-competitive. In this regard, the paper uses case studies of anti-competitive pricing conduct cases by dominant SOEs in South Africa and shows how such pricing conduct can have a negative impact on downstream manufacturing activity. Therefore, the application and enforcement of an appropriately designed competition policy is critical to the success of industrial policy in South Africa.

Second, the paper recognises that State aid is important for the implementation and success of industrial policy objectives and that it can also be a necessary tool to remedy a market failure. The recent economic crisis is testament to this view. However, there is also a view that unchecked State aid has the potential to significantly distort competition to the detriment of consumers. In light of this tension and to avoid undesirable market outcomes, the paper proposes that South Africa must consider a State aid framework that will facilitate the vetting of the likely competitive effects of the provision of same.

REFERENCES

1. Aghion, P. Braun, M. and Fedderke, J. (2007) Competition and productivity growth in South Africa, Economic Research South Africa Working Paper number 54, available at http://dash.harvard.edu/handle/1/3350068.
2. AEC Electronics (Pty) Ltd v The Department of Minerals and Energy, case no: 48/CR/Jun09.
3. Brooks, D. H. (2007). Industrial and Competition Policy: Conflict or Complementarity; Asian Development Bank Institute (ADBI) Research Policy Brief No. 24. Available at http://www.adbi.org/files/rpb24.pdf.
4. Competition Act no 89 of 1998 (as amended).
5. Competition Law and Policy in South Africa, An OECD peer review, May 2003.
6. Competition Commission v Sasol Chemical Industries Limited, case no: 48/CR/Aug10 (011502)
7. Creamer, K. Farrell, G. and Rankin, N. (2012) What price-level data can tell us about pricing conduct in South Africa, South African Reserve Bank Working Paper 12(04), available at https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/5117/WP1204.pdf.
8. Democratic Alliance v South African Airways (Pty) Ltd and South African Express (Pty) Ltd, case no: 2013Jan007.
9. Department of Trade and Industry. 2014. *National Industrial Policy Framework*, available at http://www.thedti.gov.za/industrial_development/docs/niPF-3aug.pdf.
10. Fedderke, J.W. and Hill, A.J. (2006) Industry Structure and labour market flexibility in the South African manufacturing sector: a time series and panel data approach, Economic Research South Africa Working Paper Series 43, Economic Research South Africa.
11. Fedderke, J. and Simbanegavi, W. (2008) South African Manufacturing Industry Structure and its Implications for Competition Policy, Economic Research South Africa, Working Paper Series 111, http://www.econrsa.org/papers/w_papers/wp111.pdf.
12. Harmony Gold Mining Limited,Durban Roodepoort Deep Ltd vs Mittal Steel South Africa Ltd,Macsteel International Holdings BV, case no: 13/CR/Feb04.
13. Jacques Smalle MP v The Central Energy Fund SOC Ltd, case no: 2012Nov0665.
14. Lewis, D., (2008), EXPLOITATIVE ABUSES – a note on the Harmony Gold v Mittal Steel excessive pricing case, speech made at the 2008 International Antitrust Law & Policy: Fordham Competition Law, available at http://www.comptrib.co.za/assets/Uploads/Speeches/lewis12.pdf.
15. Miek Van der Wee, speech delivered at conference on “competition enforcement challenges and consumer welfare”, Islamabad, 2 December 2011.
16. Neuhoff *et al*, *(*2006*)*, A Practical Guide to the South African Competition Act, Lexis Nexis Butterworth, Johannesburg, South Africa.
17. Noland, M. & Pack, H. (2003) “*Industrial Policy in an Era of Globalization”* referenced in Brooks, D. H. (2007) Industrial and Competition Policy: Conflict or Complementarity; Asian Development Bank Institute (ADBI) Research Policy Brief No. 24. Available online: http://www.adbi.org/files/rpb24.pdf.
18. Petroline RSA (Pty) Ltd v Transnet Ltd, case no: 2011May0059.
19. Presidential Review Committee on State-Owned Entities, Growing the Economy – Bridging the Gap, available at http://www.thepresidency.gov.za/ElectronicReport/downloads/volume_1/volume_1.pdf
20. Roberts, S. (2010). ‘Competition policy, competitive rivalry and a developmental state in South Africa’, Chapter 11 in O. Edigheji ed. Constructing a Democratic Developmental State in South Africa: Potentials and Challenges, HSRC Press, Pretoria.
21. Roberts, s., (2012), Effects based tests for abuse of dominance in practice: The case of South Africa, available at

http://www.uj.ac.za/EN/Faculties/ecofin/economics/research/cce/Documents/EFFECTS-BASED%20TESTS%20FOR%20ABUSE%20OF%20DOMINANCE%20IN%20PRACTICE%20THE%20CASE%20OF%20SOUTH%20AFRICA.pdf

22. Sappington, D. and Sidak, J. (2003) Competition Law for State-Owned Entreprises, *Antitrust Law Journal*, vol 71(2), pp 471 - 523.
23. Schumpeter, J.A., (1934), reprinted, The Theory of Economic Development, Oxford University Press, New York, 1961.
24. Siddharthan, N.S. (1984) Industrial Structure, Non-Price Competition and Industrial Development, *Economic and Political Weekly*, Vol 19(31/33), pp 1307 – 1310.
25. State Aid control overview, available at: http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.htm.
26. State Owned Enterprises and the Principle of Competitive Neutrality, OECD Policy Roundtable, 2009.
27. *The dividend of democracy: 20 years of economic growth*, available at http://www.mediaclubsouthafrica.com/economy/3815-the-dividend-of-democracy-twenty-years-of-economic-growth.
28. van Lill, W. (2015) Excessive pricing in Mittal and Sasol: A view on the role of competition policy versus industrial policy, Paper prepared for the First Annual Competition and Economic Regulation Week at Elephant Hills hotel, Victoria falls, Zimbabwe on the 20 and 21 March 2015.
29. Whish, R. and Bailey, D. (2011) *Competition Law*, Oxford University Press, 7th edition, Cape Town, South Africa.