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National Dominant Firms, Competition Law and Implications for Economic Development in Southern-africa: case study of energy, beer and food

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National dominant firms, competition law, and the implications for economic development in Southern Africa: case studies of energy, beer and food[1]

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Summary

Competition law has been vigorously promoted by international financial institutions and donors across the continent. The OECD and World Bank have drafted a model law, while the UK's DfID has placed great emphasis on it as part of their thrust to 'make markets work'. The paper provides a critical overview of the experience of South Africa as a country that adopted a law in line with 'international best practice' in 1998. The paper examines, in a series of case studies, how dominant firms in South Africa have attempted to maintain and construct regional arrangements to protect their position. It then assesses the implications of these arrangements for economic development and whether the orthodox competition law framework and institutions are equipped to address the arrangements.

1. Introduction: the promotion of competition law

Competition law has been vigorously promoted as part of the wider economic reform agenda if donors and multilateral institutions. The OECD and World Bank drafted a model law, while the UK's DfID has placed great emphasis on competition law as part of its thrust to 'make markets work'. At the same time countries such as Malaysia and Singapore succeeded in rapid industrialisation without competition regimes, and have only adopted competition laws and established institutions relatively recently (in the past decade).

The International Competition Network (ICN) also played an important role in promoting competition law. This initiative arose out of the standstill at the World Trade Organisation of the Working Group on Trade and Competition Policy and was driven by the USA, closely followed by the European Commission (Souty, 2011). It was established in 2001. The emphasis was strongly on the need for international consistence in regimes for merger evaluation. This was followed by work on cartel detection and prosecution.

While the emphasis has been on the international 'best practice' that should be adopted by countries, and especially developing countries, there is substantial diversity in practice.

[1] Substantial portions of this paper are drawn from Roberts (2012b).

[2] This paper is written in a personal capacity and does not necessarily reflect the views of Competition Commission South Africa.

Competition regimes (laws and institutions) reflect countries choices about the appropriate standards, norms and conventions (see Gerber, 2010). For example, the objectives of the South Korean Fair Trade Commission (KFTC) are to encourage free and fair competition, prevent the concentration of economic power, and thereby promote 'balanced development' (Wise 2000). This is given that the early stages of rapid industrialisation were viewed as 'unbalanced', requiring an active competition policy addressed at dominant firms in that country (see Fox 2003; 2004). Under the Monopoly Regulation and Fair Trade Act (enacted in 1981) the KFTC has been oriented to addressing monopoly power and its effects, including 'unreasonable' practices and 'unjustifiable' restrictions on competition (Fox 2003). This orientation is consistent with a broad definition of free and fair competition, in the sense of a competitive industrial structure and the control of potential abuses and imbalances in the bargaining power between parties – in particular, subcontracting relationships to protect against exploitation of smaller firms (Hur 2004). Typically, in the short run such subcontracting arrangements would lower prices and hence not harm consumers. In the longer term, however, unfair subcontracting arrangements by large firms militate against the development of a dynamic base of small and medium firms able to invest in their own independent production capabilities. The KFTC has pursued an explicit strategy of promoting 'shared growth' of large firms and small and medium enterprises (KFTC, 2011). Amendments to the law in 1987 provided for further powers to address the concentration of economic power in the chaebol (Hur 2004).

This suggests that competition policy should be in line with government's industrial policy. For example, the competition institutions and implementation of competition measures have been closely linked to government's industrial policy in South Korea and Japan, despite both countries having competition laws strongly influenced by the USA (Amsden and Singh, 1994). There are also countries which have achieved rapid growth, such as Malaysia, that have not prioritised competition policy. Alternative policy instruments have been used to impact on the behaviour of large companies.

2. South African experience

While the objectives of the South African law are framed in terms of addressing the apartheid legacy of the concentration of control and the need to open up access to small businesses and those owned by historically disadvantaged persons, the practice has been a focus on merger control and cartel enforcement. This reflects the choices made regarding the specific provisions of the Competition Act which made addressing abuse of dominance relatively difficult.

Law and institutions

Competition law in post-apartheid South Africa had two main motivations. The first was the imperative of addressing the size and power of a small number of conglomerates, as was reflected in its position in the Reconstruction and Development Programme (ANC, 1994). The second was the emphasis on removing market distortions as part of the programme of economic liberalisation (see, for example, the reference to competition in the Growth Employment and Redistribution programme, Department of Finance, 1996).

The tension between addressing the apartheid legacy and the liberalisation agenda is reflected in the combination of relatively expansive objectives of the Act with the specification of the provisions in the legislation being quite restrictive, especially regarding abuse of dominance (Roberts, 2012a). The objectives of the Act emphasize the ability to participate in the economy, including by small and medium enterprises and by historically disadvantaged persons. They also identify the need to address the legacy of apartheid in terms of concentrated ownership and control.

The framework for the legislation itself had been negotiated between business, government and labour. The narrow framing of specific provisions was strongly argued for by business, in terms of the need for 'certainty' (Roberts, 2000). The business constituency also strongly supported independent institutions and a limited role for the Minister in proceedings. This emphasis accorded closely with the policy stance taken by the government following the sharp depreciation in the Rand in 1996 and perceived need to maintain the confidence of business and international markets.

Under the Act the Competition Commission has the responsibility to investigate mergers and anti-competitive conduct, and the Competition Tribunal rules on cases. The Competition Appeal Court was also established, as a specialist division of the High Court. The Tribunal members typically have a legal or economics background, and a panel of three members is formed to hear and decide on each matter apart from intermediate mergers, decided by the Commission (which decisions can be appealed to the Tribunal).

The Tribunal hearings are legal in nature, with discovery of relevant information, factual and expert evidence being led and subject to intense cross-examination, and extensive legal argument. While the Tribunal has inquisitorial powers, in practice the Tribunal processes have been adversarial nature. Many successful legal challenges have been brought on procedural or narrow technical grounds limiting the scope of the Commission and Tribunal to inquire into the multi-faceted aspects of conduct and to frame their decisions.[3]

The main test for merger evaluation is whether there is a likely substantial lessening of competition, with particular factors identified in the law that need to be considered. If the merger is likely to have anti-competitive effects then it is necessary to consider whether there are any technological and/or efficiency gains that may offset this. The Tribunal is also required to consider public interest issues in all mergers.

Under the Competition Act (section 4(1)(b)) cartel agreements to fix prices or other trading conditions, allocate customers, suppliers or territories, or to collude on a tender, are all illegal *per se*, meaning that no anti-competitive effect has to be demonstrated to prove a contravention. In addition to cartel prohibition, the Competition Act also covers a broader prohibition (section 4(1)(a)), relating to agreements, concerted practices, or decisions by an

[3] However, the recent Constitutional Court judgment in the *Senwes* case found that the Tribunal does have considerable scope to determine its own process and the evidence it requires to make a decision.

association of competitors that have the effect of substantially lessening or preventing competition in a market where the effect of the arrangement has to be evaluated. If found guilty of contravening section 4(1) (b), the Competition Act allows the competition authorities to impose a financial penalty up to a maximum of 10 percent of one year of a company's affected turnover. Financial penalties are not levied for first-time contraventions of section 4(1)(a).

The specific abuse of dominance provisions in sections 8 and 9 stipulate effects-based economic tests (with some exceptions, such as for excessive pricing). There are also explicit pro-competitive, efficiency and technology defences for most of the abuse prohibitions. Section 8(a) prohibits a dominant firm to charge an excessive price to the detriment of consumers. An excessive price is defined under the Competition Act as a price which bears no reasonable relation to the economic value of the good or service, and is higher than such value. Economic value is not defined in the Act.

Exclusionary conduct is covered under sections 8(b), (c) and (d) of the Competition Act. Section 8(b) prohibits a dominant firm from denying access to an essential facility. Section 8(c) prohibits a dominant firm from engaging in exclusionary conduct defined in general terms, with no penalty for a first contravention and with the onus on the complainant to demonstrate that the anti-competitive effect outweighs its technological, efficiency or other pro-competitive benefits. An exclusionary act is defined as that which impedes or prevents a firm entering into, or expanding within, a market. Section 8(d) identifies particular types of exclusionary acts that are prohibited as an abuse of dominance, and where a penalty may be imposed for a first contravention.

Price discrimination with the effect of substantially preventing or lessening competition is prohibited under section 9, and has no penalty for first offence. A finding depends on the pricing being for equivalent transactions of products of like grade and quality. The dominant firm may establish that the differences are justified on various grounds, including reasonable allowances for cost differences and meeting competition.

The record

A very large part of the Commission's work in the first five years was taken up with merger evaluation as compulsory pre-merger notification meant that a large number of deals had to be evaluated right from the commencement of operations. The Commission has evaluated around 400 mergers per year, most of which raised no competition or public interest concerns. Public interest concerns have in almost all cases been to do with potential job losses associated with the merger and typically this has led to the imposition of conditions limiting retrenchments and/or providing retraining and other opportunities for affected employees.

In 2011 and 2012, the assessment of three notable mergers raised other public interest concerns to do with the effect of the mergers on the development of industries and local suppliers. The Walmart acquisition of Massmart was subject to a condition providing for the development of local suppliers. The Kansai acquisition of Freeworld (a paint manufacturer) included conditions on investment to be made. The Arcelik acquisition of Defy (a local fridge manufacturer) also involved commitments to the development of local manufacturing.

The Commission has referred an average of 9 cases per year from 2000 to 2012. Since the mid-2000s, cartel enforcement increased, while the number of abuse of dominance cases referred by the Commission has averaged just 1.5 per year. The relatively large number of cartel cases in recent years is due largely to the success of the corporate leniency policy and a proactive stance to investigating areas of likely collusion (Makhaya et al., 2012). This involved the Commission, from around 2007, identifying priority sectors of the economy and, based on initial research and information gathering, initiating investigations. The uncovering of two cartels in particular, in bread and in concrete pipes, led to wider investigations as the same companies were found to be implicated in conduct in related products.

The abuse of dominance cases are notable for the fact that most have been against a former state-owned company (or currently state owned in the case of South African Airways). These include referrals against Telkom (2 cases), SAA (2 cases), Sasol (3 cases), Mittal Steel, Foskor (owned by the Industrial Development Corporation) and Safcol. Moreover there have been several involving firms whose position is based in historic state support and/or regulation in agriculture markets namely Senwes, Rooibos, Patensie. There has also been cases referred against the beer and cigarette quasi-monopolies, SAB and BATSA, with historic ties to the apartheid state.

Of the 19 abuse of dominance cases referred to the Tribunal in the 12 years to end August 2011, 10 had been ruled on by the Tribunal, 3 have been settled and 6 are still to be decided. The Tribunal found abuse had occurred in 7, of which 2 were over-turned on appeal. This means there are 5 cases in which findings of abuse of dominance have been sustained, involving SAA (2 cases), Patensie Sitrus, Senwes and Telkom. In only the SAA cases have there been penalties. The Senwes matter was ultimately upheld by the Constitutional Court and, although there are no penalties as it is for section 8(c), there are possible remedies, still to be determined by the Tribunal. There have been 5 settlements in all (2 of which were settled before referral) of which 3 had substantive undertakings. These were the settlements by GlaxoSmithKline and Boehringer-Ingelheim, Sasol Nitro and Foskor (which also included a penalty).

While in recent merger decisions there has been attention on the ability of small local firms to participate in industries, in cases of anti-competitive conduct this emphasis has not been present, at least when the final decisions of the appeal courts are taken into account. Citing the effect on competition as being most important and not the effect on specific competitors, the CAC over-ruled the Tribunal decision on price discrimination by Sasol against Nationwide Poles. In Netstar-Tracker, the ability of smaller firms to enter the industry and the effect of rules setting up obstacles to them doing so was discounted by the CAC due to there already being a few larger competitors. In the SAB case brought by the Commission, and dismissed by the Tribunal due to the decisions of higher courts, the role of smaller participants in the distribution chain was effectively dismissed.

Competition law enforcement and industrial development?

In cartel enforcement, the work of the competition authorities has achieved notable successes. Since a more proactive approach was adopted to enforcement in 2006 the Competition Commission has identified a slew of cartels, many of them of the established firms in industrial products continuing a quiet life and protecting their rents (Makhaya et al., 2012). In several important cases these include cartels that operated across southern Africa such as in cement and concrete pipes. Multi-level cartels have also been identified in several value chains, apparently to raise entry barriers to protect the collusive arrangements.

However, viewed from the perspective of addressing the power of entrenched dominant firms with their roots in apartheid policies, the record does not look good (see Roberts, 2012a, for a fuller assessment). The government's industrial policies have repeatedly identified the power of such corporations in sectors such as steel and basic chemicals as an obstacle to the growth of diversified industrial development. But, as reflected above, there has been almost no successful measures taken under the abuse of dominance provisions against these firms.

3. How regional arrangements may reinforce market power

3.1 Liquid fuels and derivative products

The development of the chemicals industry in South Africa is closely related to two requirements: first, the demand for explosives and fertilizer inputs by mines and farmers; and, second, the apartheid state's concern with its vulnerability to sanctions on crude oil imports (see Dobreva et al. 2005; Fine and Rustomjee, 1996; Roberts and Rustomjee, 2009).

After the Second World War and the election of the National Party in 1948 a strategic aim of the apartheid government was to reduce its dependency on imported oil. This underpinned the creation of Sasol, the largest producer today in southern Africa. The National Party used the enabling 1947 Liquid Fuel and Oil Act to create the first Sasol oil from coal plant (utilising adapted German WWII technology) in the 1950s at Sasolburg, with financing from the state's Industrial Development Corporation. Following the 1973 oil price increase, it was decided to construct Sasol 2 in Secunda. A further increase in global pricing prompted the decision in 1979 to construct Sasol 3, following immediately after the commissioning of Sasol 2 at Secunda. At the same time, Sasol was partially privatised, partly in order to raise the capital required to construct Sasol 3.

Sasol employs the Fischer-Tropsch process of the gasification of coal to produce synthetic liquid fuels. The development of the technologies had a range of spin-offs, and resulted in a major industrial chemicals complex founded on organic chemicals from the processing and refining. Sasol has grown to dominate the basic chemical sector and has become a major domestic supplier of liquid fuel. It is important also to note that the development of chemicals was not motivated by the normal import substituting industrialisation strategy. The strategic goals of the apartheid state meant that it was concerned only with key industries (mining, agriculture) and key products (liquid fuels). The strategy was generally not concerned with developing competitive manufacture of downstream consumer chemicals. The extremely skewed nature of income and consumer demand reinforced this pattern and the bias to heavy upstream industrial chemicals.

The developments over the past two decades under liberalisation have been heavily influenced by the two key features of the previous half century.

First, Sasol's position of market power in the domestic industry is a result of state support, implemented in its pursuit of strategic aims, rather than profit-maximizing objectives. The support included infrastructure provision, regulation of markets including the petrol and diesel markets, and a major R&D effort including centres of science and technology across the country.

Second, Sasol's oil from coal project led to unique technological capabilities being developed. These capabilities have provided the base for it to become an internationally competitive and internationalised industrial chemicals company, with operations on five continents, and secondary listing on the New York Stock Exchange.

The last decade has seen varied developments – with capabilities being strengthened in some areas (largely around Sasol) and lost in others. In the 1990s, Sasol invested in the Mozambique gas fields and, in partnership with the Mozambique state and the South African state's Central Energy Fund, constructed a gas pipeline to transport the gas to its plants in Sasolburg and Secunda. diversifying its input away from coal. The new natural gas feedstock coming onstream from 2004/5 has underpinned Sasol's growth.

Sasol has also consciously internationalised and has sought to diversify globally, buying into the downstream chemical industry in Europe and in initiating two capital intensive gas-to-liquid (GTL) plants in Nigeria and Qatar and a petrochemical complex in Iran in partnership with other trans-national corporations. It also has a polymers joint venture in Malaysia with Petronas.

Extensive regulatory arrangements were in place in liquid fuels to support Sasol, while the importance of agriculture and mining meant that these constituencies were supported under apartheid. Since 1994, the regime has changed. In particular, at the end of 1998, Sasol gave the required 5 year notice to end the Main Supply Agreement. This meant that from the end of 2003 Sasol has been free to enter and expand into the marketing and retailing of fuel, and the Other Oil Companies (OOCs) have not been required to buy Sasol product. Price regulation remains on some products, principally retail petrol where the pump price is set.[4] These prices are set with a view to ensuring a rate of return for the industry on marketing assets.

It appears as if Sasol's termination of the MSA was linked to its anticipation of de-regulation by government and the related competitive pressure (Competition Tribunal, 2006, para 123). Sasol's main strategy to respond to actual and expected changes in regulation and protection was to consolidate its position through mergers and ensure that it continued to occupy a

[4] See: Windfall Tax Report (Rustomjee et al., 2007); Competition Tribunal Sasol-Engen merger decision.

national champion position, indispensable for the country's security of supply. At the same time it 'promised' to continue to invest to ensure supply met demand and to develop petrochemicals production (National Treasury, 2007). Despite the mergers being blocked, Sasol has still been able to maintain and even strengthen its entrenched position.

Regional arrangements

Critical dimensions of corporate power need to be understood at the regional level. First, control over feedstock sources (coal, gas, oil) is the basis for a firm's position. Second, the infrastructure and investment required for their exploitation are typically substantial, may require investments across countries and will be supported if the supply is regional rather than limited to a single country coupled with deep sea exports. Third, coordination arrangements between competitors may well be regional in nature.

Sasol was established inland, close to Johannesburg, with ample coal reserves, the investment necessary to exploit it, and a network of pipelines. It effectively dominated supply to the overland market for fuel, including to Botswana, Zimbabwe and Zambia. To this was added its controlling stake in the Natref crude oil refinery at Sasolburg, supplied by pipeline, and the gas pipeline from Mozambique direct to Secunda. This puts it at the centre of a network delivering feedstock to its fuels and chemicals operations, best positioned to serve the local inland markets of southern Africa. We highlight the particular example of fertilizer, below.

The pricing of the gas has been subject to maximum regulation, for the first ten years from 2004 to 2014, with the volume weighted price not to exceed an average price of selected European countries, while individual customers can be charged up to a maximum determined as the price of their alternative energy source (including the cost of physically switching to gas). This latter provision is effectively the monopoly price in any case as it is the maximum price that Sasol would have to offer in order to attract the individual buyer to switch to natural gas.

Fertilizer cases

The nitrogenous fertilizer value chain runs from ammonia through to the supply of blended fertilizer products (including other nutrients in addition to nitrogen) to farmers. Ammonia is typically produced from natural gas.[5] In South Africa it is produced by Sasol, approximately half as a by-product of the coal to liquid fuels production, and half from natural gas piped from Mozambique. By reacting ammonia with nitric acid ammonium nitrate is produced. This has two main uses, in fertilizer and explosives. In South Africa Sasol, Omnia and AECI produce ammonium nitrate. The main fertilizer derivative, limestone ammonium nitrate, is only made by Sasol and Omnia. AECI concentrates on explosives and sold its fertilizer business, Kynoch, to multinational fertilizer, Yara, although it has subsequently been sold once more to local interests.

[5] Ammonia is a gas at room temperature and is usually transported and stored in chilled liquid form in refrigerated and pressurized tanks and ships. The handling and storage of ammonia is capital intensive, as it needs to be stored at minus 33 degrees centigrade.

Sasol became the sole producer of ammonia and remains the only player in the market that is vertically integrated from ammonia to ammonium nitrate and derivative products such as LAN. The example of nitrogenous fertilizer illustrates how an entrenched position, in this case at the upper levels of the value chain, can lead to exclusion of smaller and 'outsider' firms at lower levels of the supply chain, as well as the limited efficacy of competition law in addressing such a situation.

In fertilizer, according to the Competition Commission of South Africa's cases, Sasol's monopoly position in South Africa in ammonia was underpinned by a cartel in derivative products which operated across the southern African region. The control of logistics infrastructure such as port terminals, storage facilities and railage was an important part of the arrangements, while alternatives such as shipping through ports outside South Africa, including Maputo and Beira, was a threat to the cartel's control over inland markets, such as in Zambia. These alternatives have been relatively poor, however. The result has been fertilizer prices set at import parity levels, substantially above those elsewhere in the world.[6]

Following complaints from two small blenders and suppliers of fertilizer, Profert and Nutriflo, the Competition Commission's investigation identified Sasol abusing its dominant position upstream, together with cartel arrangements on the part of Sasol, Omnia and Kynoch governing supply of fertilizer products to both South African and regional markets in the 'Import Planning Committee', 'Export Club' and 'Nitrogen Balance Committee'.[7] The competition cases, and the Competition Commission's analysis, indicated that ammonia is priced on an import parity basis by Sasol using a benchmark Ukraine price plus all related transport costs (including overland railage) to determine the price for Sasol's internal 'sales' as well as sales to third parties such as Omnia. These arrangements meant simply that farmers in southern Africa have been paying substantially higher prices than farmers in Europe for locally made fertilizer, despite relatively low local costs and extensive government support over the years.

The Competition Commission's cases argued that the growth of firms such as Profert and Nutriflo undermined the cartel margins which were the reward for Omnia and Kynoch continuing to pay the monopoly prices for ammonia and ammonium nitrate. The conduct reflects the inter-related nature of protecting a position of market power and its exercise, with restrictive and coordinated practices at multiple levels of a value chain. According to the Commission's cases, Sasol refused to supply and discriminated against Profert and Nutriflo, and charged them excessive prices. The fact that Omnia was vertically integrated, and AECI apparently only supplied ammonium nitrate for explosives, meant that Sasol was the only

[6] A comparison in 2010 put prices in Mozambique more than 50% above those in the US Gulf, Malaysia and Egypt. Annex X of 'Beira Agricultural Growth Corridor: Delivering the Potential', www.beiracorridor.com.

[7] This section is based on cases referred to the Competition Tribunal by the Commission. The consent and settlement agreement between the Competition Commission and Sasol Chemical Industries Ltd relating to the cartel conduct was confirmed by the Competition Tribunal in June 2009 and Sasol paid a penalty of R250.7mn. The consent and settlement agreement relating to the abuse of dominance by Sasol was confirmed by the Tribunal on 20 July 2010. Sasol agreed to divest all but one of its blending plants and made commitments regarding non-discriminatory pricing. There was no penalty or admission.

effective option for local sourcing of ammonium nitrate in order to supply blended fertilizer products.

In these circumstances competition is obviously not simply about removing the obstacles to entering and growing in a market. Nor is the enforcement of competition law necessarily a quick remedy. The Commission referred the cases in 2005 and 2006. After much litigation, they were due to be heard in 2010 when Sasol settled without an admission of guilt, but with substantive remedies around non-discrimination and withdrawal from fertilizer distribution.

Interestingly, Omnia subsequently has since invested in an expanded production facility for which it is seeking to import ammonia on a large scale, linked to investment in railway rolling stock necessary to do so.[8] Yara is now apparently supporting investment in logistics and storage facilities in Beira linked to sales and distribution into Malawi, Zimbabwe and Zambia.[9]

3.2 Beer

Many countries across the continent have been through a process of privatisation of formerly state-owned breweries over the past two decades. It now appears that SAB-Miller, Diageo and Castel entered into understandings which allocated countries to each other (see, Jenny, 2009). This implies that privatisation did not yield the revenues from the sales that reflected a value for the businesses, as these bidders would not have competed with each other. It also meant that the firms were local monopolies.

Where there were competing businesses in a country, such as in Zambia, Kenya and Mozambique, it appears as if the companies engaged in transactions with each other to apparently ensure monopoly control over each country and remove the need for any horizontal coordinated arrangements. As such, the major beer multinationals, led by SABMiller and Castel, appear to have effectively allocated countries amongst themselves (see Jenny, 2009). Referring to the relationship between SABMiller and Castel:

> *'This agreement enabled us to develop opportunities', justified, Najil Fairbass, SABMiller Communications Director. Before adding: 'There may be antitrust laws at the national level, but none covering the continent. I don't see what the problem is.'* (Philippe Perdrix Le marché de la bière africaine monte en pression Jeune Afrique 10/09/2008, cited in Jenny, 2009)

Indeed, SABMiller enforced an agreement restricting competition in East Africa with Diageo in a London court. In 2002 East African Breweries Ltd (EABL) and Tanzania Breweries Ltd (controlled by SABMiller) entered into a Brewing and Distribution Agreement whereby TBL was to be the sole brewer and distributor of EABL brands in Tanzania. EABL's attempt to

[8] See Omnia Annual Report 2012.

[9] See 'Beira Agricultural Growth Corridor: Delivering the Potential', www.beiracorridor.com. According to Yara this was initiated by Yara in cooperation with key public and private sector stakeholders including Government of Mozambique and the Norwegian government's development agencies www.yara.com/sustainability/africa_program/partnerships/beira_agricultural_corridor/index.aspx downloaded on 21 August 2012.

acquire Serengeti Breweries, the rival in Tanzania, was blocked by a London high court injunction on 18 August 2009. The parties were then to resolve the matter through arbitration proceedings.[10]

In recent years there has been a change in some countries in Southern and East Africa with the expansion of Namibian Breweries and Heineken. In Southern Africa this has taken the form of a joint venture, Brandhouse, together with Diageo. After starting by exporting from the Windhoek based brewery, Brandhouse then established a large new brewery close to Johannesburg. While there are scale economies in beer brewing, perhaps as important are distribution and retail networks to move what is essentially a low value to mass product to consumers at the lowest cost. Issues in distribution have been the subject of a competition case in South Africa, dismissed on technical legal grounds.

In Tanzania, there has been a finding against the SAB-Miller related company, Tanzania Breweries Ltd (TBL), and the imposition of a substantial penalty of around US$20mn (Fair Competition Commission of Tanzania, 2010). The case involved TBL removing rivals signage and agreeing exclusive branding of outlets. The FCC found that the agreements between TBL (a dominant firm with in excess of 80 per cent market share) and outlets were anti-competitive and was fined 5 per cent of its turnover.[11]

Distribution and branding issues suggest that local or national dominance can be entrenched by anti-competitive arrangements working along country lines, as suggested by the SABMiller executive quoted above. In the case of Mozambique, SABMiller acquired the Maputo and Beira breweries (collectively became known as Cerveja de Mozambique) in 1995.[12] It then acquired the Laurentina brand in 2001, which was brewed at a separate brewery in Maputo, although SABMiller then restructured to operate from one site in Maputo.

3.3 Poultry

The poultry industry involves the rights (licences) to leading breeds, the supply of animal feed, and facilities for slaughtering, packaging and distribution.[13] The ownership of the breeds ultimately rests with a small number of multinational corporations led by Cobb and Aviagen. These companies typically licence by country. Breeding operations produce locally from imported great grandparent or grandparent stock, supplying day-old chicks which are reared as broilers for their meat. While the breeds are crucial to the operation, the largest cost by far is the animal feed. There are important scale economies through the supply chain. Other barriers to entry include access to the leading breeds and the capabilities necessary to establish an operation, especially at the breeding level. Barriers are much lower at the broiler level, where there are typically a much greater number of producers.

[10] See Press Statement, 18 August 2009. www.sabmiller.com.
[11] Fair Competition Commission of Tanzania (2010).
[12] www.sabmiller.com/index.asp?pageid=1160 accessed on 28 August 2012
[13] See, for example, Competition Tribunal decision in Astral-National Chick merger in 2002 (case number 69/AM/2001).

Poultry production represents a substantial value adding activity over production of crops such as maize and soya for animal feed. In the context of increasing commodity prices and foreign investment in land in southern Africa for the purposes of growing crops for animal feed, a critical question is whether the investments in expanded poultry production occur in southern Africa or whether the region simply becomes a bigger exporter of agricultural commodities.

In South Africa until around 2007 there was effectively a local duopoly in poultry, Rainbow Chicken and Astral Foods, with each firm having a major breed (the Ross and Cobb birds) and being vertically integrated into animal feed (Robb and Ngwenya, 2011; Grimbeek and Lekezwa, 2012). Interestingly, the main entrant, Country Bird, that challenged the duopoly in South Africa has its origins in Zimbabwe, and had expanded to Zambia and Botswana. This meant it had established capabilities and a track record enabling it to support the entry of a new breed, Arbor Acres, under licence and to support the breeding operation linked with a customer base. Country Bird had, however, been tied into arrangements as a small member of the Elite joint venture which obliged it to source its breeding stock from Elite, while the JV was essentially controlled by Astral after Astral's acquisition of National Chick in 2002. Subsequent to lodging a complaint with the Competition Commission Country Bird exited the Elite JV and established a rival breeding operation.[14] At the same time, Astral is associated with firms in other countries in the region.

The important point is that the firms operate across the southern African region, with relationships with multinational owners of the breeds. The outcome in any given country is a product of firm strategy and rivalry at the regional as well as national level. Market entrants are most likely to be those with existing capabilities, such as firms in the region or in related areas, including upstream or downstream activities.

4. Implications for appropriate legal provisions and institutional arrangements

Corporate strategies of large firms evidently operate at the regional level. This is equally true whether it is a single large firm seeking to protect an entrenched position or a few firms that are seeking to achieve collusive outcomes while undermining actual and potential entrants. In seeking to bolster their position, such firms are going to tie up critical inputs and resources, as well as access to facilities such as transport infrastructure. They will obviously also lobby governments.

Competition law has been promoted as somewhat of a panacea in this regard. The record from South Africa, reviewed here, suggests much more humble expectations are warranted. While there have been notable successes in uncovering local cartels, including those with a reach across southern Africa, the competition authorities have had much less success in tacking dominant firms engaged in protecting, extending and exerting their market power. In addition, there is also an important debate about what is the appropriate competition law and

[14] Country Bird, brought a complaint of exclusionary abuse of dominance, referred by the Competition Commission in 2008 (press release on poultry referral. www.compcom.co.za).

institutional structure for developing countries. While the push of international financial institutions and international donors is generally for convergence on industrialised country norms, the example of Korea outlined here illustrates that, if a competition law is to be adopted, there are divergent paths that can be taken.

The doubt about the importance of competition law is quite different, however, from the importance of competitive rivalry in disciplining the power of large corporations. Understanding the nature of rivalry at a regional level is important for a country's industrial policy, a policy that needs to engage with and influence corporate decisions. This is particularly so in Africa given the colonial legacy including where borders were drawn, the infrastructure developed such as to serve mineral extraction and movement of labour, and the continued influence of firms with their origins in links to colonial powers.

Ultimately this implies that industrial policy and competition policy, broadly defined, are intertwined by their nature. An appropriate legal framework needs to ensure the powers of the institutions to effectively analyse and address company behaviour, rather than emphasising legal checks and balances. In this regard, the provisions under competition law to obtain information from companies and uncover conduct may be more important than the sanctions and remedies imposed. Industrial policy and regulation are likely to provide more powerful tools to address conduct. Countries in the region have a shared interest in understanding the strategies of multinationals and in ensuring greater competitive rivalry to discipline their market power. Cooperation between competition authorities and/or an effective regional competition authority can be part of this. In this regard, Comesa has established a competition authority although it is still in its infancy.

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