Organisation for Economic Co-operation and Development

DAF/COMP/GF(2021)7

Unclassified

English - Or. English

24 November 2021

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

TRADE, DEVELOPMENT AND COMPETITION – Pursuing development goals through trade and competition law: perspectives and experiences from South Africa

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6 December 2021

This paper by Precious Nonhlanhla Ndlovu (Senior Lecturer, University of the Western Cape) was submitted as background material under Session I at the 20th Global Forum on Competition to be held on 6-8 December 2021.

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JT03486170

Pursuing development goals through trade and competition law: perspectives and experiences from South Africa

– Paper by Precious N. Ndlovu[1] –

1. At the start of the millennium, the United Nations adopted the Millennium Development Goals. When the MDGs era drew to a close, the United Nations adopted the Sustainable Development Goals in 2015, signalling a universal call to action to bring an end to poverty. It has been long accepted that trade liberalisation is a vehicle by which to pursue development. The World Trade Organisation's Doha Development Agenda attests to this. The African Union's adoption of 'Agenda 2063: The Africa We Want' and the subsequent establishment of the African Continental Free Trade Area also reflect the importance of trade liberalisation in the achievement of development goals. Members of the World Trade Organisation have also acknowledged that an effective competition law framework is necessary to ensure that trade is not distorted and ensure that the benefits of trade liberalisation are fully achieved. In this way, trade liberalisation and competition law have a mutually consistent, reinforcing, and complementary relationship. At the international level, South Africa is a member of the World Trade Organisation, while at the regional level South Africa belongs to the Southern African Customs Union, the Southern African Development Community, and the African Continental Free Trade Area. One of the basic tenets of international trade is the non-discriminatory principle which, among other things, requires the 'national treatment' of goods originating from a trade partner upon entering the commerce of another trade partner. The practical effect of the national treatment principle is that foreign goods originating from the territory of a trade partner must not be discriminated against, in favor of domestic goods. Goods of foreign origin (from a trade partner) must be given the same treatment as is given to domestic goods. Therefore, South Africa is bound by national treatment principle (and other international trade law rules) meaning that domestic firms in South Africa face competition from foreign firms and are thus not shielded from such competition. In turn, foreign firms operating in South Africa must not engage in anti-competitive practices. Recently, the South African Poultry Association applied the imposition of anti-dumping duties on imported chicken from Brazil, Denmark, Ireland, Poland, and Spain. The concerns raised by the Association were that the dumping of the chicken onto the South African market is unfair to local producers and negatively impacts local employment.

2. The competition authorities of South Africa have successfully prosecuted the American Natural Soda Association (ANSAC), an American Webb-Pomerene registered export association, for engaging in cartel practices, in violation of South African competition law. In South African competition law, cartels are regarded as the most egregious of all anti-competitive practices and where they occur in basic staple food products, the Human Rights Commission has indicated that cartels amount to stealing at the dinner table of the poor and most vulnerable of our society. Thus, it is appropriate for competition law to protect such vulnerable sectors of society by sanctioning cartel conduct. So, South African competition law applies to all economic activity within South Africa (as well as economic activity whose effect is felt within South Africa). Furthermore, South African competition law recognizes

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the role of foreign competition, and that competition must be promoted and maintained in order to expand opportunities for South African businesses in world markets.

3. Under South African law, competition policy refers to the overarching framework that encapsulates a plethora of measures undertaken by the government aimed at encouraging competitive business practices and market structures. This framework includes, but is not limited to trade policy, deregulation, privatisation, and competition law. For its part, competition law refers to the legislation adopted by parliament directed ensuring and sustaining free and fair competition. In South Africa, this is the Competition Act 89 of 1998. The Act was adopted in the wake of a new democracy and the new government's desire to create a more competitive economic environment that would deal with issues such as market concentration and abuse of dominance. The Act also created three enforcement institutions (the Competition Commission, the Competition Tribunal, and the Competition Appeal Court) to facilitate effective competition and ensure the participation in the domestic economy by formerly disenfranchised citizens. Thus, the issue of development permeates the Competition Act in one way or another. So, while the primary purpose of the Act is to promote and maintain competition in South Africa in order to achieve both core-efficiency goals (such as protecting and maintaining the competition process, economic efficiency, innovation, and consumer welfare), the Act is also concerned with development goals, which in South African competition law, fall under the rubric of 'public interest goals. These development goals include the promotion of employment and advancement of the social and economic welfare of South African citizens, ensuring that small and medium-sized enterprises (SMEs) have an equitable opportunity to participate in the economy and promote a greater spread of ownership stakes of historically disadvantaged persons.

4. The substantive provisions of the Competition Act carry out the development goals in one form or another. For example, temporary exemptions from the Competition Act may be granted to business practices that are otherwise prohibited by the Act where such exemption is aimed at the realisation of specific objectives, such as the participation or expansion of SMEs, or firms controlled or owned hy historically disadvantaged persons. When evaluating notifiable mergers and acquisition, the competition authorities, are also enjoined by the Competition Act to consider whether merger can or cannot be justified on substantial public interest ground' with references to issues such as employment, the ability of small businesses or firms owned or controlled by historically disadvantaged persons to become competitive, and the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in the market. The consideration of these factors may lead to the merger being prohibited even though it is not anti-competitive, and it can also save a merger that would otherwise have been rejected on the basis of a pure competition criteria. In other circumstances, the competitive analysis of a merger and the public interest may converge and point in the same direction, in which case, the competition authorities can rely on these development goals to bolster their decisions on competition grounds. One of the prominent mergers that were evaluated by the competition authorities involved the American multinational retail corporation Walmart Inc when it acquired a majority stake in Massmart Holdings Limited, a South African retail group. In this transaction, several government departments made representations and recommendations to the competition authorities regarding conditions to be imposed on the transaction. The Competition Commission's analysis indicated that the merger did not raise any competition concerns since Walmart did not compete with Massmart in South Africa. However, the Competition Tribunal was of the view that the merger did raise some public interest concerns such as employment issues and the effect of the merger on small businesses and suppliers. To ameliorate these concerns, the merger was approved subject to certain conditions, including the establishment of a supplier

development fund aimed exclusively at the development of South African suppliers including SMEs, and business owned by historically disadvantaged persons, and the establishment of a training programme to train local suppliers on how to do business with the merged entity and Walmart.

5. The way that the development goals are pursued by the Competition Act has been criticised from South African commentators The criticisms range from the fact that these development goals make the decisions of the competition authorities unpredictable, that competition law is unsuited, for example, to promote employment, that the undefined social welfare objective of the Competition Act potentially conflicts with the other objectives, that the goal of expanding into world markets (while noble) should be addressed under international trade law and not under competition law, and that the goal of increasing the participation in the economy by historically disadvantaged persons is best achieved by removing the legal instruments that perpetuated the discrimination and not through competition law.

6. However, the competition authorities have steadfastly answered the concerns in several ways. For example, that it is clear from the Competition Act, that the development goals are always preceded by a full competition analysis to indicate whether the business practice in question has the effect of substantially preventing or lessening competition. In other words, development goals are not the singular test for evaluating business practices that fall within the purview of the Competition Act. Further, the consideration of development goals is specific to the business practices that may be before the authorities. For example, with mergers and acquisitions, the development goals can be considered only in so far as they are specifically caused by the transaction. In other words, it is not the role of competition law to go beyond the specific transaction and encompass concerns that are not related to the merger. Furthermore, that the public interest is not an infinitely elastic concept, it is circumscribed by the Competition Act's provisions mainly because the competition law is not directly concerned with the public interest. Most importantly, the competition authorities have acknowledged that they must guard against excessive deference to development goals when applying the Competition Act lest they turn an antitrust statute, albeit with a public interest aspect, into an unchecked vehicle of redistribution. Besides, it could not have been the intention of the legislature to confer such power to unelected institutions such as the Competition Commission and the Competition Tribunal. That said, the competition authorities have made it clear that the inclusion of equity considerations, for example in exemption applications by SMEs, do not conflict with or detract from the Competition Act's objectives even though this may be regarded as an anathema to some.