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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution by South Africa

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Ms Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division,
Tel: +33 1 45 24 18 77, Email: Lynn.Robertson@oecd.org.

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INDEPENDENCE OF COMPETITION AUTHORITIES: FROM DESIGNS TO PRACTICES

-- South Africa--

1. Purpose and structure of this report

1. This report is prepared in response to the OECD's call for country submissions on the subject *Independence of the competition authorities – from designs to practice.* The submission is drafted for the purpose of the OECD's forthcoming discussion of 1-2 December 2016.

2. We have endeavoured to answer every question listed in the OECD's call for country submissions. However, in order to deliver a complete and coherent response which places our practices in their matching context, the sequence of our responses does not follow that of the questions posed in the call for country submission.

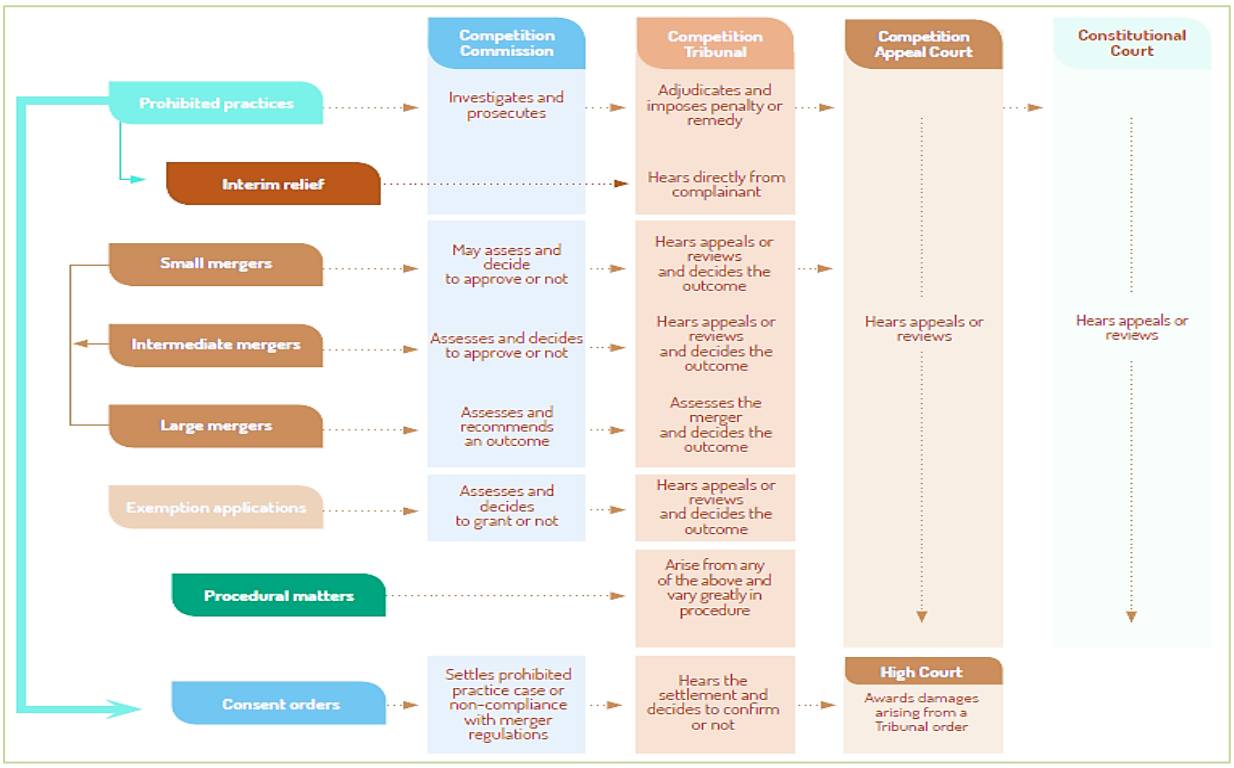
2. Introduction

3. South Africa's competition authority consists of the Competition Commission of South Africa (CCSA), which is the investigative and prosecutorial arm, the Competition Tribunal of South Africa (CTSA), which is the adjudicative arm and the Competition Appeal Court (CAC), which hears appeals from the CTSA. Competition matters can also be appealed to the highest court in the land – the Constitutional Court of South Africa – if the competition matter raises a constitutional issue.

4. Below is a structural representation of the competition authority and the function of each agency within the authority.

5. The independence of the competition authority derives from (1) the Constitution of the Republic of South Africa (no. 108 of 1996) which in sections 33 and 34 provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, "another independent and impartial tribunal or forum"; (2) the legislation that established and guides it; (3) the institutional design of the authority as a whole; and (4) the internal practices of the individual agencies within the competition authority. A closer look at each of these categories reveals the reasons for, and the importance of, independence as an institutional value, initially to the law makers and subsequently to the agencies that have administered our competition law since their establishment in 1999.

Diagram 1: Structural and functional overview of the competition agencies[1]



3. Independence drafted into the law

3.1 Why was independence drafted into the law?

6. Around 25 years ago, at the dawn of South Africa's new democracy, it became clear that the African National Congress (ANC) – which at the time was a liberation movement poised to win the country's first democratic election – planned to target the economy's concentration in the hands of the white minority when it finally came into power. One newspaper reported that the ANC had "*made an anti-monopoly drive part of its agenda*". This drive was partly in response to reports that, by 1994, the largest five conglomerates in South Africa controlled entities accounting for 84% of the capitalisation of the Johannesburg Stock Exchange and the largest conglomerate alone accounted for 43%. In addition the conglomerates were characterised by a network of cross holdings and shared directorships which enabled control to be exerted over far reaching pyramid structures.

7. The growing "anti-monopoly" talk coupled with the imminent take-over by the ANC in 1994 made South African business nervous. According to a historic report[2], business considered the ANC's desire to introduce anti-trust legislation along the lines of the US and British models "*perfectly foolish*". Apart from sanctions and nationalisation, this was an issue on which big business parted ways with the ANC. In response to Nelson Mandela's announcement that the ANC would consider anti-trust laws as a means to reduce concentration Gavin Relly, then the managing director of Anglo America (South Africa's largest conglomerate), said he did not think South African's were foolish enough to kill the goose that laid

1 Taken from the Competition Tribunal's annual report of 2015/2016

2 *Is big also bad? ANC and Industry agreed to differ* – from WITS newspaper archives

the golden egg. The labour unions, for their part, considered competition policy to be part of a business-friendly agenda.

8. So it was in this atmosphere of distrust between the different sides in the debate that the ANC government, business and labour forged ahead with negotiations to bring about comprehensive reform to the existing but largely ineffective competition regime in South Africa. In his book *Thieves at the dinner table* (2012) David Lewis, the former chairperson of the CTSA who took part in these negotiations, described the relationship between the ANC and the old business establishment as "*one of mutual suspicion marked by fairly regular bouts of considerable turbulence.*"

9. Although there was a functional Competition Board administering South Africa's competition law at the time, its powers were narrowly circumscribed and its ability to act was limited. Moreover the decisions of the Competition Board were subject to review and approval by the Minister of Trade and Industry. The Competition Board thus lacked independence and was criticised in some quarters for making decisions subject to political influence.

10. The Competition Bill, the blue print for South Africa's current Competition Act 89 of 1998, took just over four years to be brought to Parliament. It was the result of negotiations between representatives of business, labour and State officials in a special tripartite negotiating forum referred to as the National Economic Development and Labour Council (Nedlac), with each side keen to protect their interests in South Africa's new democratic era.

11. Because of the distrust between business and the ANC and because the previous competition regime was seen to be politically biased, it was important to build transparency and independence into the new law to avoid the accusation that one form of State control had simply replaced another.

12. Evidently the Competition Act achieved this goal because four years after the promulgation of the Act and the establishment of the current competition agencies, the OECD's 2003 peer review of South Africa's competition agencies observed that *"The principal innovation in the 1998 Competition Act was independent, effective enforcement bodies. The power of decision was taken away from the Minister and given to an independent Competition Tribunal. Even the office that is responsible for investigations and recommendations was moved out of [the Department of Trade and Industry] and reconstituted as the new Competition Commission. The Competition Act also created a special court, the Competition Appeal Court."*

3.2 What the current law provides on independence[3]

13. Previously the CCSA and CTSA fell within the ministry of trade and industry, like their predecessors, but in 2009 came under the ministry for economic development (EDD). The role of the ministry is principally in policy and legislation, as well as the appointment process.

14. The CCSA is enjoined by statute to be "*independent and subject only to the Constitution and the law*," to be impartial and "*perform its functions without fear, favour, or prejudice*" as detailed below. Also, other officials and institutions of national, provincial, and local government are instructed to assist the Commission to maintain its independence and impartiality.

15. Section 20 of the Competition Act speaks directly to the independence of the CCSA and provides that:

[3] Adapted from *Competition law and policy in South Africa* by the Competition Tribunal (2003)

(1) The Competition Commission –

(a) is independent and subject only to the Constitution and the law; and

(b) must be impartial and must perform its functions without fear, favour, or prejudice.

(2) The Commissioner, each Deputy Commissioner and each member of the staff of the Competition Commission, must not –

(a) engage in any activity that may undermine the integrity of the Commission;

(b) participate in any investigation, hearing or decision concerning a matter in respect of which that person has a direct financial interest or any similar personal interest;

(c) make private use of, or profit from, any confidential information obtained as a result of performing that person's official functions in the Commission; or

(d) divulge any information referred to in paragraph 2(c) to any third party, except as required as part of that person's official functions within the Commission.

(3) Each organ of state must assist the Commission to maintain its independence and impartiality, and to effectively carry out its powers and duties.

16. Several other provisions speak to the level of independence of the competition authority. Examples are listed in brief below.

- The current Competition Act provides that, subject to confirmation by Cabinet, the Minister appoints the Commissioner, who serves for a renewable period of five years as the head of the CCSA, and the Deputy Commissioner. In appointing the Commissioner and Deputy Commissioner, the Minister also sets their compensation and conditions of employment, in consultation with the Minister of Finance. The Commissioner has an annual performance agreement with EDD.

- In terms of the Act the Commission may inquire and report to the Minister on matters "concerning the purposes" of the Act. The Minister is to present such reports, as well as reports about competition problems in legislation and regulations, to South Africa's parliament.

- The CTSA operates as a collegial body. It is considered a tribunal of record, although not a formal court. By law, it is to have from 3 to 10 members plus a chairperson, all of them nominated by the Minister of Economic Development and appointed by the President of South Africa, subject to confirmation by Cabinet. The members' tenure is like that of the Commissioner, that is, they serve five year terms and are removable only for cause; however, the chairperson may only serve two consecutive terms in that office.

- Membership is not formally representative of interest groups but, according to the Competition Act, the members are to represent a "broad cross-section of the population." The members must be qualified and experienced in the matters the Tribunal deals with, and they may not be officials of political parties or movements.

- To further safeguard the independence of the Tribunal members the Act provides that the remuneration and terms of employment, which are set by the Minister, may not be reduced during a member's term.

- The CAC has the status of a high court. In fact, the members must be high court judges. It has at least three members, appointed by the President on the advice of the Judicial Services Commission. Other high court judges may be seconded to the CAC as acting judges. Terms of service are set by the President at the time of appointment. The judges' compensation and tenure protection are based on their service on the high court.

- The budget allocated to the agencies is determined by the executive, and this budget must be approved by parliament. Furthermore every year the agencies must draft and present their annual reports directly to parliament. The minister of economic development observes this process but is not permitted to intervene in it.

3.3 Walking the tightrope between independence, autonomy and political influence

17. Nowhere is the independence of the competition authority questioned or tested in South Africa as it is in the public interest arena. Public interest in this context refers to that part of the Competition Act that was introduced into our law through the Nedlac process referred to above and that requires the competition agencies to consider the impact of a proposed merger, not only on the competition dynamics in a market but, on a defined set of 'public interest' factors. These factors include (1) employment and (2) the ability of previously disadvantaged persons to become competitive. Importantly, a merger can be approved or prohibited in South Africa's Act solely on the basis of its effect on the public interest.

18. The inclusion of public interest factors in South Africa's law was controversial from its beginnings in the Nedlac process. Even after the promulgation of the law, the agencies' consideration of public interest factors remained the subject of heated debate nationally and internationally. In 2002, when faced with scepticism from the business and international community about the appropriateness of including public interest provisions in South Africa's Competition Act, David Lewis said to do otherwise in our economic and political circumstance would be to lose relevance in the eyes of the public and ultimately *"consign the Act and the authorities to the **scrap heap"*.**

19. Until 2011 the competition authority had never decided a case solely on the basis of its effect on public interest which meant it had largely steered on the safe side of this debate. Until then it had merely imposed public interest conditions on mergers where it was evident the merger would have a negative effect on one or more of the public interest factors set out in the Act. But the authority's approach to public interest was tested when Wal-Mart, a large American based supermarket chain, sought to buy a controlling stake in Massmart which was one of South Africa's largest grocery chains. Not having previously had a presence in South Africa, the merger did not raise any competition issues.

20. The Wal-Mart / Massmart merger of 2011 drew protests outside the Tribunal court room and widespread calls for Wal-Mart to leave the country even before it entered. In that case, many employees were worried they would lose their jobs once Wal-Mart took over and suppliers worried that Wal-Mart would switch to overseas suppliers, given that supply chain management was the major self-proclaimed strength Wal-Mart brought to the market.

21. Amongst many stakeholders that made representations to the CTSA concerning the merger, the economic development department led a government submission requesting that several conditions be placed on the Wal-Mart / Massmart deal, in the public interest. It should be noted that in terms of the Act, the Minister may participate as a party in any intermediate or large merger proceedings before the CCSA, CTSA and CAC.[4]

22. Both the Minister and the unions requested that a supplier development fund be set aside for the benefit of emerging suppliers. At one point in the process trade unions requested that the merging firms set aside R500 million ($37 million) for the fund but this amount was eventually set at R200 million ($15 million) by a higher court.

[4] Section 18(1)

23. The controversy and the court processes that surrounded this deal brought two themes to the fore concerning the independence of the competition authority in the face of significant public interest concerns: (1) whether public interest factors in a merger were best placed in the hands of a competition authority or whether they were better dealt with by the executive or Minister; and (2) the weight attached to the government or Minister's views of a merger, specifically the public interest issues arising from the merger.

24. To the first point the International Monetary Fund's resident reporter, Alfredo Cuevas, responded to criticism of South Africa's handling of the Wal-Mart / Massmart deal in 2011 by saying "*The entry of an international company into any domestic market is always controversial. The Competition Tribunal issued a verdict based on its mandate and the most striking thing was not the controversy but that the process had been very transparent and played out properly*". This statement signals that in fact South Africa's adoption and maintenance of a public, fair and transparent process for assessing mergers – a process that is subject to judicial oversight – is more important than the identity of the body chosen to ventilate the issues. It is common knowledge that governments around the world do take public interest factors into account when assessing strategic mergers, however the process is not always carried out by an independent or autonomous competition agency nor is it always through a transparent process. This openness is what people and markets prefer.

25. The second point requires a more nuanced response. There is no doubt that the power given to the Minister by law to intervene on public interest grounds in terms of the law, provides government with a significant influence in the consideration of mergers and this role has been particularly prominent in international mergers that are perceived to have public interest considerations.

26. Companies have reacted differently to this. Some, in more recent cases, proactively seek government agreement before approaching the competition authorities. This has caused some to caution against this government influence, with some suggesting that it amounts to interference.

27. It is as a result of these sentiments that the Commission has published Guidelines on Public Interest Issues[5]. These have provided transparency and predictability on the consideration of public interest issues. Judicial oversight over these also guarantees independence of the competition authorities and the integrity of the process.

4. Institutional design promoting independence

28. The institutional design between the CCSA, CTSA and CAC, coupled with the internal practices each institution has developed, creates a system of checks and balances which promotes transparency and protects the independence of the competition authority.

29. Firstly the Act establishes three separate entities – the CCSA, the CTSA and the CAC – with three distinct functions. There is no overlap between these entities either in function or in their professional resources albeit that there is a minor overlap in the administrative function of the CTSA and the CAC. The CCSA and CTSA share a building but occupy separate floor spaces. A 2013 stakeholder survey conducted by the CTSA revealed that some legal practitioners were unhappy with the location of the CTSA but they did not allege any kind of bias by the CTSA in favour of the CCSA.

30. The CCSA performs the role of investigator and prosecutor. The CTSA is the adjudicative body. The CAC is the appeal body. South African courts made a clear distinction between the functions of the

5 http://www.compcom.co.za/wp-content/uploads/2016/01/Gov-Gazette-Public-Interest-Guidlines.pdf

CCSA and those of the CTSA when they established that the decisions of the CCSA in complaint investigations bear no final legal consequence as these must still be referred to the CTSA which will hold a hearing into the matter.

31. In Novartis SA (Pty) Ltd and Others v Competition Commission and Others (CT 22/CR/B/Jun 01, 2.7.2001) the court said: 'On the basis of its investigation the Commission determines whether or not a prohibited practice has occurred. If the Commission determines that a prohibited practice has occurred it cannot impose a fine or any other remedy, it must refer the complaint to the tribunal. Referring a complaint to the tribunal is not determinative of the complaint. All it means is that the respondent will have to face a hearing before the tribunal where it will be given an opportunity to respond to the allegations that it has engaged in a prohibited practice.'

32. The action of referring a case to the CTSA initiates proceedings in the CTSA. Once the CCSA has referred a case to the CTSA it becomes the complainant before the CTSA having the same status as the respondent and other parties who the Tribunal might allow to intervene. The Tribunal is required to adhere to the rules of administrative justice and due process which are already set out in the Competition Act.

33. The levels of appeal between the CCSA, CTSA and CAC ensure that parties who perceive any of the competition agencies to be biased, unfair or incorrect in their decision making have higher courts to ventilate their issues.

5. Internal practices promoting independence

34. The CCSA, CTSA and CAC have each developed internal practices that safeguard their independence respectively and examples of these practices are listed below. But perhaps one of the most important and far reaching safeguards is the role of the media in competition proceedings in South Africa. The media's keen interest and participation brings transparency and accountability to the competition process. This participation is derived from several practices, namely:

- the CCSA's practice of issuing media statements when they have concluded an important case;
- the CCSA's ongoing media briefings on specific cases but also on matters of general competition interest;
- the CCSA and CTSA's drive to keep the media educated on competition law and up to date on competition developments;
- the CTSA's practice of holding public hearings and inviting the media to all of them;
- the CTSA's practice of issuing media statements when they have a concluded a major case.

35. The CAC's hearings are also public and the media regularly attend the more significant competition law cases being heard there.

36. Both the CCSA and CTSA have appointed staff dedicated to liaising with the media on an ongoing basis. The CAC does not have staff dedicated to the media.

37. Because of the work of these agencies in promoting the media's involvement in competition, competition matters now form part of the daily business news in South Africa. The larger media houses also have reporters allocated specifically to competition news.

38. Statutory materials, publications and the decisions of the agencies are available on straightforward websites and the CCSA and CTSA are present on social media.

39. The CCSA has also developed other internal rules of procedure that safeguard its independence when making decisions. These include the measures listed below.

- All cases lodged with the CCSA are allocated to investigation teams that comprise team members from different departments in the CCSA. This means that no one investigator handles a case alone from start to finish. While the team work makes for a higher quality outcome it also minimises the risk of bias or undue influence of the investigation.

- All cases lodged with the CCSA are presented, in a written report, to a weekly meeting made up of the CCSA's executive. On the basis of the written report, its analysis and conclusions, the members of the meeting decide whether to accept the findings of the investigation team, reject the findings or request that further work be done in this respect. Again this helps to improve outcomes but also to minimise undue influence.

- The CCSA's internal procedures require that employees declare all gifts above a certain monetary value. The CCSA has previously returned corporate gifts it deemed inappropriate.

- The CCSA issues all parties with written reasons for its decision in every case.

- It is an offence in the Act to unduly influence any person carrying out their duties in terms of the Act.

- On its website the CCSA has a national hotline number on which any person can report fraud and corruption involving CCSA staff.

40. The CTSA has also developed internal practices which help it to maintain its independence from the influence of the CCSA, the ministry or other vested interests. These are set out further down below.

- None of the full-time CTSA members undergo a performance assessment or performance review. This helps to ensure that no CTSA member feels beholden to a principal when deliberating over a case. The CTSA is, however, accountable to the public through Parliament and presents both its plans and outcomes to Parliament's portfolio committee on economic development annually.

- CTSA members, management and case managers annually disclose their financial interests;

- Part-time members on the hearing panel must declare that they have no conflict of interest in a specific case on the court record;

- Parties may object to the composition of a panel on grounds set out in the Act;

- Gifts to the value of R300 or more have to be declared to the chairperson and recorded in the gift register maintained by the executive assistant in the office of the chief operating officer.

- The Tribunal has to walk a difficult path to ensure that it is transparent but simultaneously does not breach confidentiality.

- While hearings are open to the public, the CTSA will clear the room when confidential information is being presented.

- Tribunal panels always comprise three members, thus ensuring fairness in every decision. In the case of dissent, a majority and minority decision is possible. This requirement also helps to frustrate any efforts by parties to unduly influence the panel members.

- Written reasons are issued for all CTSA decisions which ensures that the panel's decisions are fully justified.

- It is an established rule and practice in CTSA proceedings that no party to a case may address any single panel member at any time outside the hearing. Case related side discussions take place in chambers in the presence of all three panel members and the parties to a case. Where written communication is concerned, the panel always communicates to parties through the case manager or in written documents addressed to all parties outside of the CTSA. In other words, there are no ex parte communications.