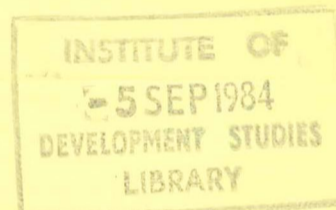


**AN ASSESSMENT OF COMPETITION  
POLICY IN SOUTH AFRICA**

by

**J.V.Tregenna—Piggott**



**Occasional Paper No. 8**

**Economic Research Unit  
Department of Economics  
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## 1. INTRODUCTION

Industry, like everything else, operates in a changing environment and is itself organically evolving with continual changes in structure and methods of operation. The attitude of the government should thus also be flexible in order to cope with these changes, and its role as a determining factor of market structure should be continually under review.

On 1 January 1980, South African competition policy took a new direction with the implementation of the Maintenance of Promotion of Competition Act No. 96/1979. It would, therefore, appear appropriate to assess both the current legislation and its forerunner in an attempt to discuss why the previous legislation could be regarded as having failed, and to evaluate the likelihood of success of the present Act.

In both the theoretical and applied parts of this paper, special emphasis will be given to the treatment of mergers in competition policy. There are two reasons for this. In the first place, recent studies<sup>1</sup> have shown that the major contribution to increased levels of concentration has come from mergers rather than from the natural growth of firms. Secondly, from the practical aspect, it is far easier to maintain levels of concentration or deconcentration by inhibiting mergers, or by unscrambling mergers that have occurred, than by retarding the growth of firms or hiving off part of their activities in some way.

This paper commences with an analysis, in Section 2, of the South African industrial structure and trends in concentration. In Section 3 the theoretical aspects of competition policy are considered with a view to ascertaining whether economic theory can provide an indication as to the direction that competition policy should take. It also enables one to evaluate the legislation against a theoretical yardstick.

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<sup>1</sup> See, for example, L. Hannah and J.A. Kay, Concentration in Modern Industry, London: Macmillan, 1977.

Section 4 considers the previous legislation, namely, the Regulation of Monopolistic Conditions Act No. 24/1955. The emphasis is more on its failings rather than on a detailed analysis of its various clauses. In Section 5 the new legislation is studied in some detail, with particular regard to the degree of success it is likely to achieve. This is followed in Section 6 by a brief examination of competition policy in certain other countries and a comparison of their approach with that adopted in South Africa. Finally, the main points which emerge from this study are summarised in Section 7.

## 2. INDUSTRY IN SOUTH AFRICA - GROWTH, STRUCTURE AND CONCENTRATION

The aims in this section are to provide a brief historical sketch of industrial growth in South Africa, analyse the country's present industrial structure, and identify trends in industrial concentration.

### Growth and Structure

The development of the modern South African economy may be divided, for the purpose of this paper, into four periods, the first being the agricultural phase from 1652 to 1870. During this period there was very little in the way of industrial activity; the small manufacturing sector which existed was related to agriculture and consisted of such trades as milling, tanning and wagon-building.

The second phase lasted from 1870 to 1910 and may be regarded as being predominantly a mining era, with the discovery and exploitation of diamonds in the Kimberley area and gold in the Witwatersrand and Eastern Transvaal. Almost from the commencement of mining operations, the location of the minerals necessitated the employment of large amounts of capital which resulted in a high degree of concentration in the mining-financial institutions which still dominate the industry. Furthermore, many of the materials, such as explosives and mine cables, required by the mines are fairly standard and this has led to a monopsonistic position, that is, only a few buyers, existing in several mining-related industries.

A third phase lasted from about 1910 to 1933 and was characterised by growth in the manufacturing sector. The year 1910 has been chosen by economic historians such as de Kiewiet<sup>2</sup> since it was the date of Union which heralded centralised political control and the establishment of an

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<sup>2</sup> C.W. de Kiewiet, A History of South Africa, London: Oxford University Press, 1979.

adequate economic and transport infrastructure. An alternative date for the commencement of the third phase would be 1914; with the commencement of World War I there was both an upsurge in demand for industrial goods and a certain amount of interruption in the shipment of goods from the United Kingdom which was at that time by far the largest supplier. These factors led to a sharp increase in local industrial production.

The fourth phase, from 1933 to the present, marks the continued development of manufacturing to the extent that it is now more important to the economy than mining and agriculture combined. Following the end of World War I in 1918, there was a relative decline in manufacturing as South African industry had once again to meet the challenge of European and American producers. The year 1933 is taken as the starting point for modern industrial expansion. In that year, amongst other events, South Africa left the Gold Standard, and the Iron and Steel Corporation (ISCOR) was established with public funds. The former event led to the re-establishment of investor confidence and the inflow of capital, while the latter was symbolic of the growth of the necessary industrial infrastructure. Since then there has been a continuous process of import substitution for political, economic and, more recently, strategic reasons.

Table 1 shows the percentage of Gross Domestic Product (GDP) by kind of economic activity for selected years.

Comparing 1920 with 1979, it can be seen that the main changes relate to agriculture, the share of which fell by one-third, and the 'secondary industries' category which trebled its share during this period. The relative decline in 'secondary industries' and 'services' in recent years can be ascribed to a large upturn in the mining sector. This upturn has in the main been due to increased prices obtained for gold and diamonds, but it has also been due to increases in mineral production. The mining sector now has about the same relative importance to the economy as it had in 1920 when 'secondary industries' was a comparatively unimportant sector.



Table 1 Percentage Distribution of Gross Domestic Product  
by Level of Economic Activity,  
1920-1979

Activity	1920	1930	1940	1950	1960	1970	1973	1976	1979
Agriculture	22	14	12	17	12	9	8	7	7
Mining	19	17	20	13	14	10	13	13	18
Secondary (a) Industries	10	13	16	22	24	31	31	32	30
Services (b)	49	56	52	48	50	50	48	48	45
	100	100	100	100	100	100	100	100	100

Notes: (a) 'Secondary Industries' comprises manufacturing, construction and electricity.

(b) 'Services' comprises wholesale and retail, transport, financial activities, community services, government and non-profit institutions.

Source: South African Reserve Bank Quarterly Bulletin, June 1971 and March 1980.

Table 2 Gross Output in Manufacturing by Main  
Geographic Regions, 1972

Region	Gross Output (R 000)	% of Total Output
Pretoria/Witwaters- rand/Vereeniging	4 436 312	47,36
Durban/Pinetown	1 258 467	13,75
Cape Town and environs	910 677	9,95
Port Elizabeth/ Uitenhage	633 963	7,03
Total - all regions	9 155 319	100,00
Total - metropo- litan regions	7 149 419	78,09

Source: 1972 Census of Manufacturing: Statistical Year Book, 1978, Pretoria, Government Printer, 1978.

### Concentration

As regards the modern South African economy, it is characterised by high levels of concentration on a geographic, overall and industry basis. Geographic concentration is concerned with the extent to which industry is centralised in certain areas. Overall concentration is related to the concentration levels taking all industrial concerns into account, while industry concentration looks at the position in individual industries.

The four metropolitan regions produce an overwhelming proportion of the output, with the largest producing nearly one-half of the total output (Table 2). This type of concentration, like the others, is due in part to historical factors, a combination of population, skills and available capital ensuring that the Witwatersrand has a predominant share in manufacturing output.

The overall level of concentration is also very high as can be seen from Table 3. In manufacturing, for example, it can be seen that the 3 142 largest firms, which together constituted 25 per cent of the total number, accounted for over 90 per cent of total turnover in 1972.

Table 4 shows the share of the largest companies in the total capital employed of quoted companies. As well as showing high levels of concentration, the table also shows that, generally speaking, the level of concentration has been increasing in recent years. The 'continuously present' category shows those companies which were trading throughout the period and again, in most categories, the size inequalities have increased over the period.

As regards industry concentration, individual industry levels are high as might be expected. Manufacturing is divided into 181 industries amounting to the five-digit ordering of the Standard Industrial Classification, and figures show that in 58 of these industries, the three largest firms account for at least 70 per cent of the turnover in

Table 3 Distribution of Turnover in four Major Divisions in the South African Economy, 1972

Percentage of firms	Manufacturing		Wholesale and Retail		Construction		Transport	
	No. of firms	% of turn-over	No. of firms	% of turn-over	No. of firms	% of turn-over	No. of establishments	% of turn-over
5	628	63,1	2 679	68,5	392	63,2	465	72,6
10	1 257	75,7	5 360	77,0	785	74,6	931	81,5
15	1 885	82,7	8 041	81,8	1 177	80,8	1 396	85,9
20	2 513	87,1	10 722	85,2	1 569	84,9	1 861	88,9
25	3 142	90,3	13 404	87,8	1 961	87,9	2 327	91,0
30	3 770	92,6	16 085	89,9	2 354	90,3	2 792	92,7
35	4 399	94,3	18 766	91,6	2 746	92,2	3 257	94,1
40	5 027	95,6	21 447	93,1	3 138	93,7	3 723	95,2
45	5 656	96,7	24 128	94,4	3 530	95,0	4 188	96,1
50	6 284	97,5	26 809	95,5	3 923	96,0	4 654	96,8
55	6 912	98,1	29 490	96,4	4 315	96,9	5 119	97,4
60	7 541	98,6	32 172	97,3	4 707	97,6	5 584	97,9
65	8 169	99,0	34 853	98,0	5 099	98,2	6 050	98,4
70	8 797	99,3	37 534	98,6	5 492	98,7	6 515	98,8
75	9 426	99,6	40 215	99,0	5 884	99,1	6 980	99,1
80	10 056	99,7	42 896	99,4	6 276	99,4	7 446	99,4
85	10 683	99,8	45 577	99,7	6 668	99,6	7 911	99,6
90	11 311	99,9	48 259	99,8	7 061	99,8	8 376	99,8
95	11 939	99,9	50 940	99,9	7 453	99,9	8 842	99,9
100	12 568	100,0	53 623	100,0	7 845	100,0	9 307	100,0

Source: Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act 1955, Government Printer, Pretoria, 1977, p.40.

Table 4 Overall Concentration by Capital Employed 1955-1974

	Top 3 companies	Top 10 companies	Top 20 companies	Top 50 companies
<b>All Industries 1955-74</b>				
% Share 1955	18,78	33,32	44,43	60,04
% Share 1974	17,67	34,65	46,77	65,16
Total % Change	-5,91	3,99	5,27	8,53
Annual % Change	-0,31	0,21	0,28	0,45
<b>All Industries 1955-74 (continuously present)</b>				
% Share 1955	25,24	43,90	56,98	73,61
% Share 1974	24,96	44,35	59,48	77,45
Total % Change	-1,11	1,03	4,39	5,22
Annual % Change	-0,06	0,05	0,23	0,27
<b>All Manufacturing 1955-74</b>				
% Share 1955	15,08	28,57	40,96	62,80
% Share 1974	21,08	37,73	50,14	70,40
Total % Change	33,42	32,06	22,41	12,10
Annual % Change	1,76	1,69	1,18	0,64
<b>Manufacturing 1955-74 (continuously present)</b>				
% Share 1955	22,91	41,28	57,67	79,40
% Share 1974	28,97	51,27	65,23	85,74
Total % Change	26,45	24,20	13,11	7,98
Annual % Change	1,39	1,27	0,69	0,42

Source: J.V. Tregenna-Piggott, Concentration of South African Industry, Occasional Paper No. 5, Durban: Department of Economics, University of Natal, 1976.

their industry.<sup>3</sup>

One must consider whether there are any special influences at work in the South African economy which would explain these levels. An important point to consider here is the lack of an effective competition policy in the past. Although this pre-judges to some extent the conclusions of Section 4, it is generally argued that the 1955 Act and its predecessors have been ineffective in the control of competition-reducing forces. Other concentration-inducing factors would include the high tariff barriers to exclude foreign competition, the small size of the effective demand for products, the long distances between the major centres and the historical factors which have been mentioned earlier.

To conclude, therefore, it can be seen that the present-day South Africa has a large and growing industrial sector which is highly concentrated with correspondingly weak competitive pressures.

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<sup>3</sup> Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act No. 24, 1955, Pretoria: Government Printer, 1977, p.38

### 3. THE THEORY OF COMPETITION POLICY

Governments must have certain guidelines in formulating their policies towards the organisation of market activity. These guidelines should have some theoretical justification in the sense that they should seek to evaluate what could be regarded as being the best type of organisation taking into account the aims of policy makers and the particular circumstances, if any, relating to the economy. It is questionable, however, whether guidelines can ever be suitable substitutes for legislation, particularly as they do of necessity carry the weight of clauses in an Act. The difficulty in formulating policies lies in the fact that there is no measure of agreement as to the various goals to be achieved or to the relative importance to be attached to the goals. The theory of competition policy is, therefore, difficult to evaluate. Swann states, for example: "it does not take very long to discover that not only is there no theory of competition policy; there is not even a coherent theory of competition".<sup>4</sup> Nevertheless, an attempt must be made to formulate a basis for competition policy.

In this section the intention is briefly to consider the role of the State in competition, and then to discuss different approaches to competition. These approaches are not, of course, mutually exclusive and are, in fact, highly interrelated.

#### The Merits of State Intervention

Proponents of a *laissez-faire* type of economy are faced with a dilemma over the extent of the role of the State in mergers and the structure of industry. If the State prevents a merger from taking place, then this

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<sup>4</sup> D. Swann, D.P. O'Brien, W.P.J. Maunders & W.S. Howe, Competition in British Industry, London: George Allen & Unwin, 1974, p.92.

(iii) *Optimal amounts of output.* This condition is concerned with securing an optimal allocation of resources. It will be met when the marginal rate of transformation (MRT) is equal to the MRS between the same goods. The MRT is the rate at which one good can be transformed into another by shifting resources from one to another. Symbolically this condition holds when

$$MRT_{xy} = MRS_{xy}$$

If they were not equated, some people could be made better off at no cost to others simply by shifting resources from one good to another.

From Table 5 it can be seen that perfect competition yields an optimum position whilst monopoly does not.

Table 5. Summary of the Extent to which Competition and Monopoly are able to Satisfy Optimising Conditions

Optimising Condition	Monopoly	Competition
Condition 1	Not necessarily satisfied. If the monopolist discriminates, then the ratio of marginal utilities will vary because consumers face different price ratios.	Satisfied - the price of goods is the same to all consumers and they are unable to influence price, so the marginal utilities of any set of goods will be the same for all consumers.
Condition 2	Not necessarily satisfied. If monopolist is also a monopsonist, then he can influence input price and MPPs will vary.	Satisfied - producers will use combination of inputs with the same MPP ratios as the price of inputs is the same for all producers.
Condition 3	Violated since MRS is not equal to MRT due to pricing which results in outputs have different price/marginal cost ratios.	Satisfied - since firms equate the ratio of the marginal costs of the products with ratio of product prices.

This type of static optimality has, however, been attacked on a number of grounds. Lipsey and Lancaster's<sup>9</sup> theory of 'second best' shows that if all the Paretian conditions are not present in part of the economy, then the level of welfare might fall if the conditions are created in other sections. The conditions can be compared, but it is not possible to reach a conclusion.

A further problem inherent in a discussion of Pareto optimality is that of income distribution. As there is no general agreement on the ranking of different income distributions, one cannot compare one individual's gain with another's loss, and it is impossible to measure the changes in welfare for the community as a whole.

These two problems do not cover all the limitations of the allocative efficiency approach. It is sufficient to say that the difficulties inherent in the approach are very great given the inevitability of non-Paretian conditions.

Dynamic efficiency: This is concerned with the rate of technological change. If a high level of dynamic efficiency is achieved, then this might outrank other performance goals due to the effect of compounding, as higher growth percentages given a much greater product over time.

Traditional economic thought as illustrated by Pigou<sup>10</sup> and Hadley<sup>11</sup> has been that as the monopolist is by definition not subject to competitive pressure, he will remain with the existing methods of production. More modern theorists such as Schumpeter<sup>12</sup> and Galbraith<sup>13</sup> argue

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<sup>9</sup> R.G. Lipsey & K. Lancaster, "The General Theory of Second Best", Review of Economic Studies, Vol. 24, 1956, pp. 11-38.

<sup>10</sup> A.C. Pigou (ed.), Memorials of Alfred Marshall, New York: Kelley and Millman, 1956.

<sup>11</sup> A.T. Hadley, "The Good and Evil of Industrial Combination", Atlantic Monthly, Vol. 79, March 1897, pp. 377-385.

<sup>12</sup> J.K. Galbraith, American Capitalism: The Concept of Countervailing Power, Boston: Houghton Mifflin, 1952.

that it is the large firms which possess greater resources and access to funds, and that the freedom from competitive pressures acts as a spur to innovation since the excess profits enable the larger firms to undertake the risky expenditure associated with innovative activity. As Galbraith<sup>14</sup> states, "there is no more pleasant fiction than that technical change is the product of the matchless ingenuity of the small man forced by competition to employ his wits to better his neighbour. Unhappily it is a fiction".

A number of studies, such as those by Horovitz<sup>15</sup>, and Scherer<sup>16</sup> and Comanor<sup>17</sup>, show a positive but mild correlation between concentration (as a proxy for monopoly policy) and innovative activity. In a review article Yamey states: "it is fair to summarise by saying that the positive relation between concentration and innovative activity is modest on a generous interpretation of the findings and that there is no firm supporting evidence for it on a stricter interpretation, and that any beneficial effect of concentration is likely to be exhausted before high levels of concentration are achieved".<sup>18</sup>

Internal efficiency: If a firm is well managed, it will minimise costs for any given level of output. 'X-inefficiency' occurs when company managers relax, and is defined as the excess of actual costs over minimum possible costs.

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<sup>14</sup> *Ibid.*

<sup>15</sup> Ira Horovitz, "Firm Size and Research Activity", Southern Economic Journal, Vol. 27, 1962, pp. 298-301.

<sup>16</sup> F.M. Scherer, "Firm Size, Market Structure, Opportunity and the Output of Potential Invention", American Economic Review, Vol. 55, 1965, pp. 1097-1125.

<sup>17</sup> W.S. Comanor, "Market Structure, Product Differentiation and Industrial Research", Quarterly Journal of Economics, Vol. 81, 1967, pp. 639-657.

<sup>18</sup> B.S. Yamey, "Do Monopoly and near-monopoly matter?" in P. Peston & B. Cory (ed.), Essays in Honour of Lord Robbins, London: Weidenfeld and Nicolson, 1972.



Leibenstein<sup>19</sup> considered that X-inefficiency was more likely to occur in a large firm due to the lack of competitive pressures. A similar concept to X-efficiency is that of 'organisation slack' developed by Cyert and March.<sup>20</sup> When large firms are not under pressure, they develop certain slack in the organisation which is only taken up when the firm is under some competitive or other pressure. The balance of evidence does, in fact, support the existence of both X-inefficiency and organisational slack in large firms.<sup>21</sup>

Cost efficiency: Of all the arguments in favour of monopoly and the existence of a high level of concentration in an economy, the most persuasive and the most generally accepted is that of the existence of economies of scale. If it could be shown that the minimum efficient size of plant was of such dimensions as to exclude all but the largest firms in an industry, this would be a telling argument in favour of the existence and importance of economies of scale. This argument reached a pinnacle of popularity in the United Kingdom between 1966-1970 with the Industrial Reorganisation Corporation whose primary function was to attempt to increase concentration levels in British industry by influencing the market mechanism so that industry could take account of existing economies of scale.

Whilst there has been no doubt amongst economists since the time of Adam Smith<sup>22</sup>, with his famous example of pin makers, that economies of scale do exist, there is little unanimity as to what could be considered to be the ideal level of concentration in an economy. This is partly due to the difficulties in measurement as well as in separating and evaluating firm and plant economies.

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<sup>19</sup> H. Leibenstein, "Allocation Efficiency vs X-efficiency", American Economic Review, Vol. 56, 1966, pp. 392-415.

<sup>20</sup> R.M. Cyert & J.G. March, A Behavioural Theory of the Firm, Englewood Cliffs: Prentice-Hall, 1963, pp. 36-38 and passim.

<sup>21</sup> See, for example, H.R. Edwards, Competition and Monopoly in the British Soap Industry, Oxford: Oxford University Press, 1962, p. 68.

<sup>22</sup> Adam Smith, The Wealth of Nations, New York: Random House, Edition 1937, p. 4.

Assessment of Performance Goals: In considering the attainment of performance goals, one comes up against the problems outlined in the introduction to this part. How, for example, does one both measure and weigh allocative efficiency gains for competitive industries against the gains to be achieved from economies of scale? Williamson<sup>23</sup> has attempted to solve the problem with his trade-off model, but it would appear to have more theoretical than practical value. One is reduced to the 'on the one hand.....on the other hand' type of argument. An example of this is the British Green Paper Review of Monopolies and Mergers Policy which concludes its assessment of the various arguments as follows: "increased concentration can yield benefits and disadvantages. The benefits of greater concentration are, however, difficult to quantify. They include improved industrial efficiency, better international competitiveness and increased employment which all contribute to higher living standards. The disadvantages are equally hard to measure. In general, they are equivalent to higher prices and as such reduce the welfare of consumers. To determine whether increased concentration is in the public interest, the advantages have to be evaluated and weighted against an estimate of the detriments to ascertain the net benefits. In some instances greater concentration yields few benefits and the potential to abuse market power. But equally, monopolists or oligopolists can be highly efficient and responsive to the needs of the consumer".<sup>24</sup> In the light of the indeterminate conclusions which can be obtained from a study of the achievement of performance goals, it is beneficial to study other concepts in the theory of competition policy.

#### Workable Competition

This has been defined by Sosnick as "an attempt to indicate what practically attainable state of affairs is socially desirable in individual

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<sup>23</sup> O. Williamson, "Economies as an Antitrust Defence: The Welfare Trade-offs", *American Economic Review*, Vol. 58, 1968, pp. 18-36.

<sup>24</sup> A Review of Monopolies and Mergers Policy: A Consultative Document, Command 7198, London: H.M.S.O., 1978, p. 15.

capital markets".<sup>25</sup> The concept was introduced by Clark<sup>26</sup> and could be said to be based on the Chamberlinean<sup>27</sup> view of the existence of elements of both competition and monopoly in market structure. In his explanation of workable competition, Clark might be regarded as the forerunner of Lipsey and Lancaster<sup>28</sup> in propounding a theory of 'second best'. He writes: "One central point may be put abstractly. If there are, for example, five conditions, all of which are essential to perfect competition, and the first is lacking in a given case, then it no longer follows that we are necessarily better off for the presence of any one of the other four. In the absence of the first, it is *a priori* quite possible that the second and third may become positive detriments; and a workably satisfactory result may depend on achieving some degree of 'imperfection' in these other two factors".<sup>29</sup>

Although there have been a number of articles on workable competition giving different criteria of workability, Sosnick has asserted that there are three common groups of conditions.<sup>30</sup> These are the conditions of structure, conduct and performance. Sosnick emphasised the conditions of performance since these can incorporate the norms of the relevant policy makers.

How far, then, does the concept of workable competition take one in search for a pertinent theory of competition policy? Unfortunately a consensus amongst economists would argue that the concept does not take one very far. As the criteria have to be stated in rather vague terms, they can appear tautological. For example, if one says that workable competition requires a large number of firms, this is similar to

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<sup>25</sup> S.H. Sosnick, "A Critique of Concepts of Workable Competition", *Quarterly Journal of Economics*, Vol. 72, 1958, p. 380.

<sup>26</sup> J.M. Clark, "Towards a Concept of Workable Competition", *American Economic Review*, Vol. 30, 1940, pp. 241-256.

<sup>27</sup> E.H. Chamberlin, *Theory of Monopolistic Competition*, Cambridge, Mass: Harvard University Press, 1947.

<sup>28</sup> Lipsey and Lancaster, *op cit.*

<sup>29</sup> Clark, *op cit.*, p. 242.

<sup>30</sup> S.H. Sosnick, *op cit.*

saying that workable competition requires a workable number of firms! A further type of criticism lies in the fact that there is no mechanism for weighting the various norms or criteria so that it is difficult to assess whether or not the 'workability' of an industry has increased as a result of some curtailment of monopoly power. There are problems associated with this concept of workable competition which, taking everything into account, would not appear to make the concept suitable as an instrument of policy.

#### Social Welfare Functions

A basic premise in the consideration of government interference in market structure is its effect on social welfare. In other words, would social welfare be increased as a result of the implementation of anti-trust action? However, this in turn poses a further question, viz., how does one ascertain the value judgements on which one measures social welfare?

One type of social welfare function which has been discussed in relation to allocative efficiency is the Pareto principle. The difficulty with this type of function, however, as mentioned earlier, is that the principle cannot say anything about a change which improves the position of some while worsening the position of others. Since virtually all policy changes adversely affect someone either absolutely or relatively, the concept has very limited forms of practical application.

Another social welfare function which Harberger<sup>31</sup>, amongst others, has championed is one which ignores the distributional effects of policy changes. It can be expressed as: maximise  $W = TR + S - (TC - R)$

when  $W$  = net economic benefit  
 $TR$  = total revenue  
 $S$  = consumer surplus  
 $TC$  = total cost  
 $R$  = inframarginal rent

There are, however, various practical and theoretical problems to be con-

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<sup>31</sup> A.C. Harberger, "Three Postulates for Applied Welfare Economics: An Interpretive Essay", Journal of Economic Literature, Vol. 9, 1971, pp. 785-797.

sidered in this and related functions when applied to anti-trust policy. On a purely practical plane it would be extremely difficult to obtain the necessary data to make any useful observations, whilst from a theoretical viewpoint it does seem erroneous to give the same weighting to producers and consumers and indeed to different classes of consumers.

On balance, therefore, it would seem wise to follow the conclusions of Rowley on this concept: "We simply do not know enough about the working of modern advanced economies to be able to insert with any confidence an expression designed to take account of irremediable inefficiencies. Better by far in such circumstances to leave bad alone".<sup>32</sup>

#### Per se Prohibitions

An approach to competition policy based on non-discretionary rules has a number of appealing features in terms of simplicity and lack of ambiguity. This is the traditional approach to anti-trust in the United States and it encapsulates the belief that social welfare can be maximised by the maintenance and encouragement of competition by rigidly drafted rules.

Although a *per se* approach is simplistic in terms of the lack of value judgments inherent in the concept, its practical implementation is a different matter. If, for example, there is a *per se* prohibition on four firms or fewer accounting for over 70 per cent of the market as proposed by the Neal Committee,<sup>33</sup> then one must determine how to define a market or industry. This problem has never been satisfactorily solved and in practice the legislation has left it to the courts to provide acceptable definitions. A further problem lies in the determination of the levels of concentration which could be regarded as acceptable.

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<sup>32</sup> C.K. Rowley, Anti-trust and Economic Efficiency, London: Macmillan, 1973, p. 17.

<sup>33</sup> "The White House Task Force on Anti-trust Policy (The Neal Committee), reprinted in Journal of Reprints for Anti-trust Law and Economics, Vol. 1, 1969, pp. 663-826.

petition policy. A number of different approaches to the problem have been analysed with the final one being considered to be the most suitable. This choice is not made with any degree of confidence in terms of either the degree to which it is an improvement on the other approaches or in the extent to which it represents original thought on the problem. Theory and practice are often, of course, inextricably entwined and it could be argued that a factor influencing one's choice of approach should be the probable effectiveness of the machinery for implementing the policy. If, for example, either the competition legislation or the implementing body was ineffective, then a *per se* approach might be preferred since this type of option, by definition, takes the discretionary element out of competition policy.

To conclude, the everyday world is one which is dominated by oligopolies, and comparison between perfect competition and monopoly can be considered to be redundant to some extent. What one must aim for, therefore, is to examine industry to see if competition can be made more effective in an oligopolistic structure, guard against abuses of monopoly power, and carefully monitor and control the further growth of monopoly power.

#### 4. THE LEGISLATION OF 1955

The main purpose of this section is to analyse the Regulation of Monopolistic Conditions Act No. 24 of 1955 (hereafter called the 1955 Act). This Act remained the cornerstone of South Africa's competition policy for almost 25 years. In order properly to evaluate the present legislation it is necessary to study the 1955 Act in some detail and to consider the way in which it operated.

##### Main Features

Although South African competition policy could be said to have commenced with the Cape Meat Trade Act No. 15/1907, the first serious attempt to regulate monopolies was the Undue Restraint of Trade Act No. 59/1949. This Act was, however, of limited scope as the whole question of monopolistic practices was being considered by the Board of Trade and Industries. The report of the Board,<sup>41</sup> which was accepted in principle by the government, contained various policy principles which were incorporated in the resultant legislation, namely, the 1955 Act.

The principle feature of the 1955 Act, and indeed of the present legislation, is that it was an enabling measure. This means that the Act could not be contravened in that it did not forbid any type of structure or conduct. It merely established the framework for dealing with the problems.

A further feature of the Act, to which reference will be made later, is that it only referred to abuses of monopoly power which had already occurred and could not anticipate the likelihood of the effect of any action.

Under Section 2 the Act was deemed to apply when monopolistic conditions had certain deleterious effects by restricting competition. These effects were:

- (i) restricting the output or disposal of any commodity; or
- (ii) limiting the facilities available for the production or distribution of any commodity; or

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<sup>41</sup> Board of Trade of Industries, Republic of South Africa's Report No. 327 of 1951, Regulation of Monopolistic Conditions.

- (iii) enhancing or maintaining prices; or
- (iv) preventing the production or distribution of any commodity by the most efficient and economical means; or
- (v) preventing or retarding the development or introduction of technical improvements or the expansion of existing markets or the opening up of new markets; or
- (vi) preventing or restricting the entry of new producers or distributors into any branch of trade or industry; or
- (vii) preventing or retarding the adjustment of any branch of trade or industry to changing circumstances.

The restriction of competition must take place as a result of one or more of these circumstances:

- (a) every agreement, arrangement or undertaking, whether legally enforceable or not, between two or more persons;
- (b) every business practice or method of trading including any method of fixing prices;
- (c) every act or omission on the part of any firm, whether acting independently or in concert with any other person; and
- (d) every situation arising out of the activities of any firm or class or group of persons.

It can be seen, therefore, that for Section 2 to apply, a combination of circumstances had to exist. There had to be some monopolistic condition as defined under clauses (a)-(d) alone which restricted competition, and which caused one or more of the effects listed above (i)-(vii).

Three separate parties were involved in the administration of the Act, namely, the Board of Trade and Industries, the Minister of Economic Affairs and the Special Court.

Section 3 of the Act laid down the main duties of the Board. It had the duty of undertaking investigations, but only under the direction of the Minister. If the Board came to the conclusion that a monopolistic condition existed, it then had to use its discretion as to whether or not such condition was in the public interest. If the monopolistic condition was thought



to be against the public interest, then the Board could, with the approval of the Minister, negotiate for the discontinuation of the condition. Section 6 laid down the measures which the Board could recommend to the Minister to halt the practice. These measures included the reduction of duty payable on imported goods in the particular industry and the declaration in the Government Gazette that such monopolistic condition was unlawful. Section 3 of the Act also laid the duty of supervision of the implementation of agreements and orders on the Board.

The Minister had very considerable powers under the Act. As has been seen, he had the sole power to order investigations. According to Section 6, he was also not bound by the decisions reached by the Board in its investigations, and could overrule its conclusions. The Minister alone had the authority to order the Board to negotiate with the parties to terminate the monopolistic condition. The choice of penalty under Section 6 was at the discretion of the Minister and if there was an appeal against his decision, it was his duty to deal with the administrative functions related to the appeal.

The Special Court was established to handle appeals from any firm affected under Section 6. It consisted of a judge of the Supreme Court and two qualified members. The decision of the Special Court was final.

Section 8 laid down penalties for contravention of the Act, in terms of failure either to provide information or comply with an order. The maximum penalty was a fine of R20 000 and/or imprisonment for up to five years.

This section has considered the framework of the Act and the part played by the various parties. It has highlighted the key role of the Minister with his wide discretionary powers.

#### The Act in Operation - An Evaluation

It is difficult accurately to evaluate the 1955 Act or any other legislation since it is very difficult to quantify all the ramifications. One can say with reasonable confidence, however, that the Act could be considered to

be a failure. This can be inferred for several reasons. In 1975 the government set up a Commission of Inquiry into the Act and as a result of the report of the Commission, the Act was superseded by the Maintenance and Promotion of Competition Act No. 96/1979 (the 1979 Act). A further reason for the assumption of failure can be gathered from the Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act No. 24/1955. The chairman of this Commission was Dr. D.J. Mouton who was also at the time a member of the Board of Trade and Industries and as such was closely involved in the working of the 1955 Act. The Report is highly critical of the 1955 Act and as there was no minority report, it is safe to assume that Dr. Mouton himself was also highly critical of the Act.

The 1955 Act is analysed according to the following criteria:

- (a) an assessment of its structure and
- (b) an assessment of the way in which it was administered and the degree of success it achieved.

This distinction is of necessity an artificial one since the performance of the Act will depend to a considerable extent on the adequacy of its structure. However, there are those features and failings of competition policy in South Africa which can be directly attributable to the structure of the Act whereas others are due to the way in which the Act was administered.

#### Structure of the Act

An important aspect of the legislation is that it could only deal with abuses after they had occurred. In other words, it was unable properly to evaluate the likely consequences of, for example, a merger; whilst the Minister had the power to dissolve a merger once it had occurred, the practical difficulties involved in restoring the *status quo* of the parties were so great that in fact the Minister's powers on this point were never used during the lifetime of the Act.

A further weakness of the legislation lay in the fact that the Act was an enabling measure. As has been mentioned earlier, this meant that the Act could not be directly contravened and therefore a heavy responsibility

was laid on the Board of Trade in administering the legislation due to the lack of direct guidelines. This point will be returned to when dealing with the present legislation, but basically the lack of an exact definition of a monopoly, for example, in terms of market share, meant that it was difficult to establish criteria as to which industries should be investigated.

As the Board of Trade could only act under the direction of the Minister, this added a further complication to the administration of the Act and was a contributing factor to the delays in reporting that arose.

An additional criticism concerns the Special Court. Apart from the fact that not one appeal to the Court was made during the life of the Act, there is also a conceptual problem. Beacham<sup>42</sup> has pointed out that it is strange that appeals should be made to the Special Court against a directive of the Minister since both points of law and a reassessment of the facts of the case would have to be determined. Beacham continues: "Anti-trust cases are notoriously difficult, often involving value judgements and the balancing of economic effects which cannot be established with certainty or be easily quantified. But there seems to be no reason to suppose that a Court of Law is better equipped to decide these matters than an administrative tribunal".<sup>43</sup>

It would seem clear, then, that the 1955 Act had certain structural weaknesses which made it difficult for a successful competition policy to be implemented.

#### Effectiveness of the Act

This evaluation includes an analysis of the aims of the government in promoting the legislation and of the theoretical basis for the Act. An insight into the aims of the government can be found in the words of the Minister of Economic Affairs when introducing the Bill: "This is not anti-monopolistic legislation. It is just a bill to regulate monopolistic conditions and it

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<sup>42</sup> A. Beacham, "Competition Policy in South Africa", South African Journal of Economics, Vol. 42, 1974, pp. 118-126.

<sup>43</sup> *Ibid*, p. 124.

appears very clearly from this, that even though a monopoly exists and even though combines exist, they can still be justified in South Africa if they do not have a deleterious effect on the public".<sup>44</sup>

The essence of the Act, therefore, as gleaned from its title and the Minister's statement, seems to be towards a policy of regulating or controlling monopolies so as to restrict or eliminate their harmful effects on the public. If one accepts that certain structures such as monopolies lead to certain types of market conduct, e.g., restrictive practices may lead to certain levels of performance like high profit rates, then there are various options open to the administrators of competition policy. They can try to affect the structural aspects, the conduct aspects or a combination of the two.

As far as the 1955 Act was concerned, it would seem to have been the policy to ignore the structural aspects and to focus attention on aspects of conduct so as to provide what could be regarded as satisfactory performance norms. One must then give further attention to what could be regarded as the harmful effects of monopolies and also to what constitutes the public interest.

If one reconsiders the deleterious effects of monopolistic conditions under Section 2 of the 1955 Act, which have been listed earlier, one could conclude that the main emphasis lay on the efficiency of production and the levels of barriers to entry since four conditions (namely iv-vii) relate to them. It is, of course, dangerous to reach conclusions on relative importance by number counting alone, but the concept of productive efficiency was emphasised in various reports of the Board of Trade. It has been written of the importance of economic performance: "the most important goals relevant to the present investigation are the efficient use of the country's resources, the encouragement of progressiveness and innovation in the economy, the achievement of economic growth and a higher standard of living".<sup>45</sup>

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<sup>44</sup> Hansard, 28 February 1977, p.1824.

<sup>45</sup> Report No. 1220M, para. 366, Board of Trade and Industries, 1967.

It would seem, therefore, that even if the same number of monopolies existed at the end of the lifetime of the legislation as at the beginning, then this would not in itself be indicative of the failure of the Act, provided that the effect of these monopolies did not have deleterious effects on the public.

Section 5, in fact, did lay down what these effects were. A difficulty which arises in the assessment of the Act is in evaluating the extent to which these effects actually existed. For example, it is very difficult to quantify the extent to which monopolies are responsible for effect (iii) under Section 2 of the Act, namely, for enhancing or maintaining prices. One way of evaluating the Act, which is adopted here, is to examine the reports of the Board of Trade in terms of their degree of success in regulating monopolistic conditions.

Table 6 gives details of investigations upon the Minister's directives for the period 1955 to 1979. A study of this table shows certain things to be apparent. Firstly, the length of time taken to report: the average time taken to investigate from the date of directive to the date of report was over two years. This would appear to be due in part to the necessity to go through the Minister, but also in part to the conditions relating to the Board of Trade itself. The Mouton Commission reported that the Board of Trade was exceptionally busy during this period and that it lacked qualified staff. It would seem to be the case that these directives had a fairly low priority in relation to the other activities of the Board of Trade.

One might conclude from a study of Table 6 that the basic industrial structure of South Africa was not touched by these investigations. It is, of course, difficult to define what is meant by the basic industrial structure, but a number of these investigations refer to relatively minor industries; out of a total of 20 reports, for example, three refer to local conditions in Bloemfontein. A number of others refer to resale price maintenance. Whilst it cannot be denied that resale price maintenance is an important restrictive practice, it might not be considered so important in relation to a study of monopolistic conditions in various industries. If there are

TABLE 6

PARTICULARS OF INVESTIGATIONS UPON THE MINISTER'S DIRECTIVES  
UNDERTAKEN IN TERMS OF ACT NO. 24 OF 1955 IN THE PERIOD  
1955-1979

Report No.	Date of directive	Date of Report	Subject of investigation	Board's findings	Action taken
437(M)	Apr 1956	Apr 1958	Groceries	Monopolistic conditions in the distribution of groceries and the supply of biscuits	Prohibited by Government Notices Nos. 1839 and 1940 of 1958
465(M)	Apr 1956	Sep 1958	Liquor	Monopolistic conditions - condoned in the public interest	None
489(M)	Jul 1957	Feb 1959	Tyres	Monopolistic conditions - condoned in the public interest	None
606(M)	Mar 1959	Apr 1960	Sanitary ware & hardware	Monopolistic conditions in the distribution of all sanitary ware and hardware and in the supply of certain products (salt glazed pipes, wall tiles and metal doors & windows)	Arrangement concluded with merchants, Government Notice No. R.763 of 1961 - no action in respect of manufacturers
883(M)	Mar 1959	Dec 1961	Motion pictures	Monopolistic conditions in distribution	Voluntary arrangement reached with suppliers of motion pictures which was incorporated in the report
940(M)	Sep 1961	Jul 1962	Cigarettes & tobacco	Monopolistic conditions in distribution	Arrangement concluded with suppliers as per Government Notice No. R. 1913/4 of 1963
985(M)	Jun 1960	Dec 1962	Pharmaceutical products	Monopolistic conditions - condoned in the public interest	None
1071(M)	Dec 1961	May 1964	Books, newspapers & periodicals	Monopolistic conditions in respect of the distribution of books & newspapers - condoned in the public interest except certain practices of CNA in regard to newspapers	Arrangement concluded with CNA as per Government Notice No. R.942 of 1966

Report No.	Date of directive	Date of Report	Subject of investigation	Board's findings	Action taken
1220(M)	Mar 1962	Dec 1967	Resale price maintenance	RPM a monopolistic condition not justified in the public interest	Minister gave notice of his intention to ban the practice - Government Notice No. R.1150 of 1968
1262(M)	Jun 1968	Part I: Jan 1969 Part II: Apr 1969 Part III: Apr 1969 Part IV: Jun 1970 Part V: Aug 1970	Applications for exemption from proposed ban on resale price maintenance	Rejected all applications for exemption except in respect of books, newspapers & periodicals	RPM prohibited on all commodities except books, newspapers and periodicals, petrol & tyres - Government Notice No. R.1038 of 1969
1273(M)	Apr 1967	Jan 1967	Building Industries Federation	Monopolistic conditions	Arrangement concluded with Building Industries Federation - Government Notice No. R.1802 of 1970
1350(M)	Dec 1969	Apr 1971	Buy-aid associations of Bloemfontein	Monopolistic conditions	Arrangement concluded with buy-aid association (SAMBA) Government Notice No. R.1955 of 1972.
1475(M)	Oct 1969	May 1973	Tender practices	Monopolistic conditions	Minister requested the Minister of Finance to instruct tender buyers to report restrictive tender practices regularly in order to enable him to instruct the Board to investigate harmful restrictions in terms of section 3(1) (a) of the Act

Report No.	Date of directive	Date of Report	Subject of investigation	Board's findings	Action taken
1603(M)	Apr 1973	Oct 1974	Matches	Monopolistic conditions - condoned in the public interest	None
1688(M)	Apr 1973	Jan 1976	Laundry & cleaning services in Bloemfontein	No monopolistic condition found	None
1794(M)	Nov 1973	Jul 1977	Books	No exemption from Resale Price Maintenance	None
1813(M)	June 1977	Aug 1977	Collective increases in the selling price of biscuits	Government Notice No. 1940 of 1958 still stands	None
1860(M)	Mar 1977	Apr 1978	Investigation into the exemption from the prohibition on Resale Price Maintenance on tyres and tubes	No exemption	None
1884(M)	Jul 1975	Mar 1978	Pharmaceutical Products	Monopolistic conditions	None at present
1913(M)	Aug 1978	Apr 1979	Monopolistic conditions in sale of petroleum products to members of SAMBA co-operative in Bloemfontein	No monopolistic conditions found	None

Source: Based in part on Table 1, p.20, Report of Commission of Inquiry into the Regulation of Monopolistic Conditions Act 1955. Government Printer, Pretoria, 1977.

monopolistic conditions in an industry, however, the suppliers can influence both the price and the quantity at which they sell to the public. Comparatively few of the investigations, therefore, were concerned with monopolistic conditions in industries, and of these, a number were condoned as being in the public interest.

A further feature which is apparent from a study of the reports is that there is of necessity a lack of continuity in the terms of the personnel employed in compiling these reports. This can be regarded as a further disadvantage to employing enabling measures since different members of the Board may apply different criteria. An important part of the legislation (and indeed of the present legislation) is how one defines the public interest. Neither Act did, in fact, lay down a definition of what is the public interest, although one of the reports under the 1955 Act declared that the public interest should be judged according to the following criteria:<sup>46</sup>

- (i) the efficient use of the country's resources;
- (ii) the encouragement of progressiveness and innovation;
- (iii) the achievement of economic growth and a higher standard of living;
- (iv) the attainment of stability of price, production, distribution and employment of labour and capital; and
- (v) the avoidance of excessive economic concentration in individual industries and the economic system as a whole.

An assessment of the success or failure of the Act might therefore depend to some extent on a number of value judgements made with regard to the aims of government and to what constitutes the public interest. It might be argued, for example, that insufficient emphasis was laid on the interests of individual consumers. But if, as might seem the case, this was not an important feature of the period during which the Act was in operation, then any criticism should be directed towards the stated policy objectives rather than to the way in which the Act was implemented.

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<sup>46</sup> Investigation into Restrictive Tender Practices in the Republic of South Africa. Report 1475M, para 207, Board of Trade of Industries, Pretoria, 1973.



However, given the aims of the Act, and the fact that it had certain structural weaknesses, it is apparent that it was administered in an unsatisfactory manner. It is also apparent that the Board of Trade must bear prime responsibility for the implementation of the Act and that, for the reasons outlined earlier, it would not seem to be a suitable body for the implementation of competition policy.

#### Summary

It is not really disputed that the 1955 Act failed. The only difficulty lies in apportioning the blame between the structure and operation of the Act. The importance of the distinction arises since the new legislation was designed to overcome the weaknesses of the 1955 Act.

It would seem that there were certain inherent weaknesses in the structure of the Act which make it impossible to operate successfully. In addition, the Board of Trade did not seem to be a suitable body to entrust with the administration of this Act, given its other duties.

## 5. THE LEGISLATION OF 1979

The procedure adopted in the examination of the 1979 Act is similar to that in the previous part. An important difference, however, is that the 1979 Act has only been in operation since 1 January 1980 and so it is not possible at this stage to evaluate its performance.

### Structure and Administration

As the Act does not give any real indication of the aims of the government, it is necessary to quote at some length from the speech of the then Minister of Economic Affairs when introducing the Bill in Parliament: "Our object with the Bill is to create more effective legislation in the interests of the business sector as well and especially for the presentation of the free market system which is the cornerstone of our country's economic life. It has never been the intention to disrupt, through the implementation of monopoly legislation, the economic growth and progress of the country in terms of the government's overall policy objectives. On the contrary, it is clear that a competition policy as envisaged in this Bill, will be formulated and implemented with due allowance for the country's broad economic policy objectives. It has always been the policy of the government.....to place a high premium on the preservation of healthy competition as a very important instrument, in fact as an important condition, for the proper functioning of the free market economic system in order to carry the country to new lengths of economic development".<sup>47</sup>

One can deduce from the Minister's statement that the government is faced with the same problem as mentioned in Section 2, namely, how does one ensure the effective working of the free market system without the necessity of intervening to a considerable extent in the market mechanism? A further conclusion which could be drawn from the Minister's statement is that the 1979 Act is similar to the 1955 one in that it appears to lay stress on economic progress as a prime policy objective rather than on protecting the

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<sup>47</sup> Hansard, 2 May 1979, p. 5427.

public at large from possible abuses of monopoly power.

The history of the 1979 Act is relatively simple. A Commission of Inquiry to investigate the 1955 Act was established in August 1975 and reported in March 1977. Two draft Bills were published in February and December 1978 before the final draft was laid before Parliament in May 1979. The Act was passed in July 1979 and came into effect on 1 January 1980.

As has been mentioned, the 1979 Act is similar to the 1955 one in that it is an enabling measure setting out the framework for the implementation of competition policy.

The tripartite administration of the 1955 Act is retained, although there are important differences. The Minister of Economic Affairs and the Special Court are both retained in their previous roles, but under Section 3 of the 1979 Act, the Competition Board is established in place of the Board of Trade and Industries. The Competition Board is an independent body although the President of the Board of Trade and Industries and the Registrar of Financial Institutions are *ex officio* members.

Section 6 of the Act lays down the duties of the Competition Board. This board has the power to initiate an investigation into a particular industry although the Minister can veto such an investigation if he considers it to be against the public interest. The Board must also undertake a continuous study of trends towards increased concentration with a view to the investigation of acquisitions. It must also issue guidelines to the public on the current policy on mergers.

An innovation introduced in the Act involves the treatment of mergers and acquisitions. As was seen earlier, the 1955 Act did not provide for the treatment of mergers except for the rather drastic and unused power of the Minister to dissolve such an acquisition. The parties to a merger or acquisition now have two choices open to them. They can approach the Board with the reasons for the proposed acquisition and try to obtain its

consent. Alternatively, they can go ahead with the acquisition without any consultation. If the parties follow the first course of action and obtain the consent of the Board, then this consent will preclude the Minister from dissolving the merger at some later date. On the other hand, if the parties go ahead without consulting the Board, or go ahead despite a negative ruling from the Board, they then risk the Minister taking action to dissolve the merger under Section 14(1)C.

One would expect that the Minister would use his powers of dissolving mergers far more readily than under the 1955 Act since parties to mergers which occur without consulting the Board, or against the Board's ruling, will leave themselves without grounds for complaint if their actions are subsequently set aside by the Minister.

Under Section 16, financial institutions are excluded from the provisions of the Act unless the prior approval of the Minister of Finance is obtained. This would seem to be a totally unnecessary restriction on the applicability of the legislation; no similar restriction exists in the competition policy of other countries and there do not seem to be any special conditions which would justify such a restriction in South Africa. One of the responsibilities of the Minister of Finance is to safeguard the stability of financial institutions. If two banks were to merge, it might be thought that the stability of the financial system would be increased with the consequence that consideration of the merger from the viewpoint of competition policy might be vetoed.

One of the factors which led to the considerable delays under the 1955 Act was that the Board of Trade and Industries could only negotiate with the parties after the report had been completed and handed to the Minister. Under Section 11 of the 1979 Act, the Competition Board can negotiate at any stage with the parties concerned. This should lead to a speedier and more efficient operation of the legislation.

The role of the second of the parties concerned in administering the Act, namely, the Minister of Economic Affairs, remains fairly similar to that under the 1955 Act, except for the greater discretionary powers granted to the Competition Board which were not available to its predecessor.

The role of the third administrative body, the Special Court, remains the same as under the 1955 Act. The maximum fine payable has been increased to R100 000 and/or five years imprisonment from the previous levels of R20 000 and/or five years.

It can be seen, therefore, that the 1979 Act is a considerable improvement on the 1955 Act in terms of the approach to the implementation of competition policy.

#### Will the Act Succeed?

The preceding analysis would indicate that the 1979 Act is based on the 1955 Act with similar methods of investigation, enforcement and definitions of monopolistic conditions. The key question to be considered, therefore, in assessing the 1979 Act, is whether the changes will be sufficient to make the new legislation a success, or whether the basic approach to the problem is flawed so that the 1979 Act will still not succeed despite the improvements.

I take the latter view in believing that as the approach to the problem is wrong, the degree of success achieved by the legislation will be limited. The word success is, of course, purely relative and there is no doubt that the new legislation will be considerably more effective than the 1955 Act. I personally doubt, however, whether in the words of the Act, the legislation will be effective in "the maintenance and promotion of competition".

The fundamental criticism of the approach of the 1979 Act is that it is an enabling measure which leaves too much to the discretion of the Competition Board. The competition policies of other countries are studied in Section 6 below and it can be seen that none of them take the South African approach to the problem.

What, then, is wrong with enabling measures and what alternatives are

available to policy makers? As the Act cannot be directly contravened, it places too great a responsibility on the Competition Board. This does not, of course, imply lack of competence in any way on the part of the Board, but that its task is likely to be too great. In other countries the legislation makes the task of the administrative body easier by, for example, defining monopolies in terms of market shares and forbidding mergers and restrictive practices unless they can be shown to be in the public interest. This does not mean that the alternative approach to an enabling measure is some type of *per se* approach to a particular type of structure or conduct. What it does mean is that certain industries are automatically referred to the administrative body in terms of their market structure, monopolising tendencies or some other statutory criteria. Without this structural approach, it is likely that the Competition Board will initiate its investigations in a somewhat haphazard fashion. Some of the investigations might result from complaints from members of the public or trade associations, and others might be instituted by the Board itself; but it is difficult to escape from the view that no overall perspective of the economy will be considered in terms of the desired market structure or code of conduct. Over a period of time, therefore, a rather piecemeal approach might be realised with, to some extent, industries being considered separately and without reference to overall policy or desirable levels of concentration.

It would seem that these dangers have been recognised by those responsible for drafting the 1979 Act in that, under Section of the Act, the Competition Board must publish guidelines as to its policy on mergers and undertake reviews of concentration levels. It does not seem likely, however, that this will solve the problem entirely. Statements in policies towards mergers as to what constitutes this public interest have, of necessity, to be couched in rather general terms and are, therefore, of limited use. Similarly, reviews of concentration levels are useful in showing the Board the trends in market structure but they do not indicate at what level of concentration or monopoly power an industry should be investigated. In addition, the statutory duty of the Board is limited to concentration levels and does not mention related profit levels. Without this information it is more difficult to make judgements as to what the attitudes to increasing monopoly power should be in South Africa.

Apart from this qualification regarding the general approach to the problem, the 1979 Act is a considerable improvement on its predecessors. As the Competition Board can now be involved *ab initio* in merger consultations, this will give both the Board and the Minister greater control over mergers and acquisitions. It is a pity, however, that a presumption against mergers is not made as is the case in other countries. This presumption would seem to be justified on the balance of evidence presented in Part 2: further, a large number of foreign competition policies carry this presumption. If it were to be included in South Africa it would make the task of the Competition Board easier rather than harder since the onus would be on the parties of the merger to prove their case before the board.

It would seem rather surprising that the Special Court has been retained in a similar form as under the 1955 Act. Apart from the conceptual difficulty mentioned in Part 4, the Court was not used during the 25 years the 1955 Act was in operation. There does not seem, on the face of it, any reason why the Court would be used more extensively under the 1979 Act, and one might have expected that the concept of the Special Court might have been either scrapped or reconstituted in a way which would make it more relevant for the purpose for which it was designed.

On balance, therefore, one would consider the chances of success of the new legislation to be much greater than that of its predecessor given the overall approach to the problem.

#### Summary

As the 1955 Act was regarded as a failure, policy makers had the choice of either adopting a completely new approach to the problem or of rectifying the most obvious faults in the 1955 Act. The latter course was chosen and the provisions of the 1979 Act do, by and large, eliminate the faults. The establishment of the Competition Board, with fairly wide discretionary powers, will greatly speed up the process of investigation and reporting and strengthen the control of mergers.

However, the lack of a rigid structure or presumptions on such matters as mergers, might well lead to a piecemeal approach to the problem of competition which might be lacking in overall direction and continuity.



## 6. AN INTERNATIONAL COMPARISON

The purpose of this section is to examine the competition policies of certain industrialised countries and to compare and contrast South African legislation.

### Features of Foreign Competition Policies

As a generalisation, it can be said that competition policies in industrialised countries are stricter than the South African legislation particularly in three aspects, namely, mergers, monopolies and market conduct.

#### Mergers

These countries seem to have a strong presumption against mergers. In Australia, for example, mergers are forbidden if they result in a position of market dominance: the only exemption allowed is if the merger can be shown to be in the public interest. In the United States mergers are totally prohibited if the effect would be substantially to lessen competition. As regards the United Kingdom, mergers which are above a certain size or which would create a statutory monopoly (25 per cent of the market) are referred to the Monopolies and Mergers Commission for consideration.

#### Monopolies

A number of industrialised countries have statutory definitions of monopolies with certain levels of market concentration being automatically investigated by the appropriate authority. In the United Kingdom this level is 25 per cent, in West Germany 33,33 per cent and in the European Economic Community under the Treaty of Rome, 40 per cent. Other countries, such as the United States and Japan, forbid monopolisation of industry, that is, the building up of market power, particularly through certain types of market conduct.

### Market Conduct

The competition policies of a number of countries declare certain types of conduct to be illegal. For example, price discrimination is illegal in Japan, Australia, the United States and the United Kingdom.

One can see from this summary of these important aspects of competition policies that a number of foreign countries have a reasonably strict and rigid interpretation written into their statutes to be acted on by the appropriate authority administering the policy.

### Competition Policy in Certain Countries

The United States, Britain and Australia have been chosen for our purposes as a fairly representative sample of industrialised countries. In addition, policies obtaining in the European Economic Community are also considered.

### United States

Fortas writes on United States competition policy: "Antitrust in the United States is not, in the conventional sense, a set of laws by which men may guide their conduct. It is rather a general, sometimes conflicting, statement of faith and economic philosophy, which takes specific form as the courts and governmental agencies apply its generalities to the facts of individual cases in the economic and ideological setting of the time. It is for this reason that both knowledge of the past decisions and a sense of the animating theory of antitrust are essential to understanding".<sup>48</sup>

The United States has had for some time both strong monopolies and anti-trust policies. The main statutes are the Sherman Act of 1890, and the Clayton Act of 1914 as amended by the Robinson-Patman Act of 1936 and the Celler-Kefauver Act of 1950. The Sherman Act, and in particular Sections 1 and 2, has proved a cornerstone of American anti-trust policy. Under Section 1

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<sup>48</sup> A. Fortas, "Foreword" in G.A.D. Nerle, The Antitrust Laws of the United States of America, Cambridge: Cambridge University Press, 1970.

every contract combination in the form of a trust or conspiracy in restraint of trade, was held to be illegal, while under Section 2 both monopolisation and attempts to monopolise were indictable offences.

The other main pieces of legislation have served to specify certain of the contracts in practices mentioned in the Sherman Act. The Clayton Act declared price discrimination and exclusive dealing arrangements to be illegal where the purpose of effect was to reduce competition. The Robinson-Patman Act was mainly concerned with defining price discrimination while the Celler-Kefauver Act extended control of mergers to include the acquisition of assets as well as shares.

The responsibility for the implementation of legislation lies with the anti-trust division of the Department of Justice and the Federal Trade Commission. Both bodies are responsible for collecting evidence on suspected violation, but only the Department of Justice can institute proceedings. The courts have taken the view that certain restrictive practices are illegal *per se*, and mergers which lead to increased levels of concentration have been declared illegal even if it can be shown that economies of scale result.

The American competition policy is important for several reasons, not just because of the political and economic importance of the United States, but also because the policies of countries such as Japan are based on the American legislative experience and those of countries such as West Germany seem to be strongly influenced by it. As a generalisation, it could be said that the competition policies of several other countries are moving towards the American type of solution of stricter rules and more of a *per se* approach.

#### The United Kingdom

The administration of competition policy in the United Kingdom rests with the Director General of Fair Trading, who is basically responsible for restrictive practices, and the Monopolies and Mergers Commission. The bases for the policy are the Restrictive Practices Act of 1956 and the Fair Trading Act of 1973.

As regards mergers, certain types may be referred by the Secretary of State at the Department of Prices and Consumer Protection to the Monopolies and Mergers Commission for consideration. These cases are ones where assets of £5 million or more are required, or where a monopoly controlling 25 per cent of the market is created. If an investigation is ordered, it must be completed within six months and the decision reached must be based on the concept of the public interest which includes a number of factors such as the promotion of competition, industrial efficiency and innovation. Sutton<sup>49</sup> has pointed out that the annual number of references is about 2,5 per cent of the annual number of mergers and that about one-half of the merger proposals, in cases where investigation was ordered, were abandoned before the reports were finalised.

As has been noted, a statutory monopoly exists where one firm has 25 per cent of the market or where a number of firms acting collectively have a 25 per cent share. There is no presumption against monopoly, merely that at these levels the industry is investigable.

In the case of market conduct, any type of restrictive agreement has to be registered with a number of conditions having to be satisfied before the agreement may be declared to be in the public interest. Recent discussions on competition policy in the United Kingdom have indicated that the policies are to be tightened still further with greater control over monopolies and mergers.<sup>50</sup>

#### Australia

The basis of competition policy in Australia is the Trade Practices Act of 1965 as amended. The Trade Practices Tribunal, together with the Commission of Trade Practices, is responsible for the administration of the Act. A whole range of restrictive practices are prohibited, including price dis-

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<sup>49</sup> C.J. Sutton, Economics and Corporate Strategy, Cambridge: Cambridge University Press, 1980, p. 107.

<sup>50</sup> See, for example, the Proposals in A Review of Monopolies and Mergers Policy: A Consultative Document, *op cit.*

crimination, exclusive dealings, restraintive trade and market sharing. If the market structures are altered in an anti-competitive direction as a result of mergers, then these are prohibited. Exemption will be granted by the Commission of Trade Practices only if it is thought that the public interest benefits. There is no presumption against monopoly or monopolisation, but abuses of monopoly power as a result of control or dominance are prohibited.

#### European Economic Community

It is pertinent to indicate the competition policy adopted in the loose confederation of states which comprises the EEC. The aim of EEC policy is to ensure that there is fair competition between states and that the trade barriers which were eliminated by the creation of the common market will not be replaced by other barriers erected by the private sector. The main legislation is contained in Articles 85 and 86 of the Treaty of Rome with these articles being administered by the European Commission whose decisions are binding, subject only to an appeal to the European Court.

A major area of concern lies in preventing the isolation of particular national markets by the abusive monopoly power or by various restrictive practices. Article 86 prohibits any abuse of a dominant position within the EEC insofar as this may affect trade between member states. This abuse would include discrimination or conditions of supply or restriction of production. Article 85 prohibits all agreements which have as their object the prevention, restriction or distortion of competition within the EEC. It has proved difficult for the Commission to prevent the abuse of monopoly power because of the difficulty of defining dominance in a particular market.

Up until the present time, the Commission has had difficulty in controlling mergers and is at present trying to increase its powers so as to control those mergers which would affect trade between member states. If these powers were granted, mergers above a certain size would have to be notified in advance to the Commission and would not be allowed to proceed if the result would be to hinder competition in the Common Market.

South African Policy Compared

It is clear from this brief survey of foreign competition policy that, even with the improvements of the new legislation, South African policy is still weaker than that in operation in other countries. Weak in this context means that the legislation does not set out the conditions under which monopolies, mergers or restrictive practices are referable. The South African legislation also does not have any stated views on the desirability or not of mergers or increased levels of monopoly power. However, the general trend in South Africa towards the tightening up of control of competition policy is similar to that being pursued in foreign countries.

This paper has studied competition policy in theory and practice in South Africa. As regards the theory, it is difficult to come to any firm conclusion due to the unsatisfactory state of the theory of the firm in the general field of economics. However, monopolies and monopolisation through mergers do have certain distinct disadvantages, and therefore before increases in monopoly power are allowed, the onus should be on those seeking to merge to show the benefit to the public at large from such mergers.

In South Africa the manufacturing sector is important and growing. However, the manufacturing base is still relatively narrow and the market limited. It is, therefore, clear that competition policy designed for large industrialised countries such as the United States or the United Kingdom, might not be suitable for South Africa which, by the nature of things, might of necessity have a monopolistic structure in a number of its industries. The act of building up an industrial base for South Africa involves the protection of domestic industries which further weakens the competitive process.

The Regulation of Monopolistic Conditions Act of 1955, which was the cornerstone of this country's competition policy until January 1980, was relatively ineffectual due to deficiencies in the powers given to the Board of Trade and also to the way in which the Act was administered. But the

Maintenance and Promotion of Competition Act 1979 is an improvement on the previous legislation as it gives considerable powers to the Competition Board and enables reports to be made more quickly and efficiently.

As the theory of competition policy appears somewhat inconclusive, one must consider on what grounds the 1979 Act should be judged. One test would be to see how it compares with competition policy in other countries. Whilst the fact that other countries do, in general, have a stricter policy does not necessarily mean that the South African approach is wrong, since different countries have different problems, it does indicate that it might be the 1979 Act which is out of step with modern thinking in this field. This Act does not give any presumption against mergers, monopolies or monopolisation, or any indication to the Competition Board as to the level of monopoly power at which abuse is likely to occur. One can, of course, recognise the difficulties encountered in making rules which are applicable to every industry, but in general this policy of indicating areas where abuse might take place, seems to work satisfactorily in a number of other countries.

To conclude, therefore, it is obvious that the 1979 Act has rectified a number of the weaknesses of the earlier legislation. If the Competition Board issues fairly comprehensive guidelines as to the circumstances under which mergers and acquisitions might be allowed, then it might overcome to some extent the difficulty of operating competition policy in a non-structured manner. It might not be too harsh to say that Parliament abrogated its responsibility to some extent by leaving open such vital matters as the policy towards mergers rather than specifying them in the legislation. Although it is too early to judge the legislation, one has the feeling that its success might be somewhat less than it might have been if a different, stricter approach to the problem of competition policy in South Africa had been adopted.

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