How labour should approach the Competition Act

Simon Roberts explains the objectives of competition policy and points to how labour can use the new Competition Act to alter the behaviour of companies.

Internationally, people are placing increased emphasis on competition policy South Africa has followed this trend and a new Competition Act will come into force on 1 September 1999. The legislation also reflects the ANC-led government's concerns with the concentration of ownership and control in the South African economy – the majority of firms are controlled by the five biggest companies The Act has important implications for workers and it is important that unions use the new law effectively

The increasing emphasis on competition policy has also coincided with liberalisation and a reduction in state intervention in many countries Greater openness and international competition has been one factor underlying an increase in mergers between very large transnational firms in different sectors This has reinforced large businesses' role in shaping the economy

What is competition about?

Competition is not directly about how many firms there are and how big they are. Competition is more about how firms behave. The new Competition Act together with the institutions responsible for administering it – the Competition Commission and the Competition Tribunal – should have a major impact on firms' decision-making and behaviour.

Firms compete with each other to try and win customers, increase sales and make higher profits Competition can allow consumers greater choice and lower prices It encourages firms to be innovative and develop new products

But, the playing field is not level. Large firms are likely to try and control the market to increase their profits They could limit the supply of goods and raise the price of these goods When only a few firms produce a product (as in many markets in South Africa), they try to use their size to influence the market – this is called using their 'market power'. For example, they may raise prices and make less products – this results in lower levels of employment. Managers may use market power to hide their own failings or to sit back and have a quiet life.

Firms who are colluding (working together to combine their power), may also choose inefficient technologies. For example, a firm may choose to use capital intensive technology because it maintains

the power of managers relative to workers, even though labour intensive technology may be more appropriate for production.

Firms may also use competition as the reason for cost-cutting, targeting labour. But, competition is more about being able to do things better in the future. This is management's responsibility, and cutting labour costs may be a way of avoiding this responsibility and placing it on the backs of workers instead.

If workers are concerned about the availability of products at reasonable prices and a growing economy with increased job opportunities, then they must take competition policy seriously.

Objectives

Efficiency

Competition policy's main aim is economic efficiency, resulting from how firms behave and interact with each other. Efficiency has different definitions, and different interest groups select the definition that suits them best. Efficiency depends on what are counted as costs and how products are valued (and by whom).

Constructive co-operation

Is competition always the best way forward? Co-operation may be a better way of encouraging technological development and improving production capabilities. This requires a framework that encourages constructive co-operation, while guarding against co-operation and collusion for the sole purpose of increasing profits.

The new Competition Act in South Africa recognises the above concerns by defining the purpose of the legislation broadly to include an efficient and effective economy, gains to consumers in terms of quality, price and variety of products, employment, broader ownership, and participation of small- and medium-sized enterprises.

Key features of the new Act

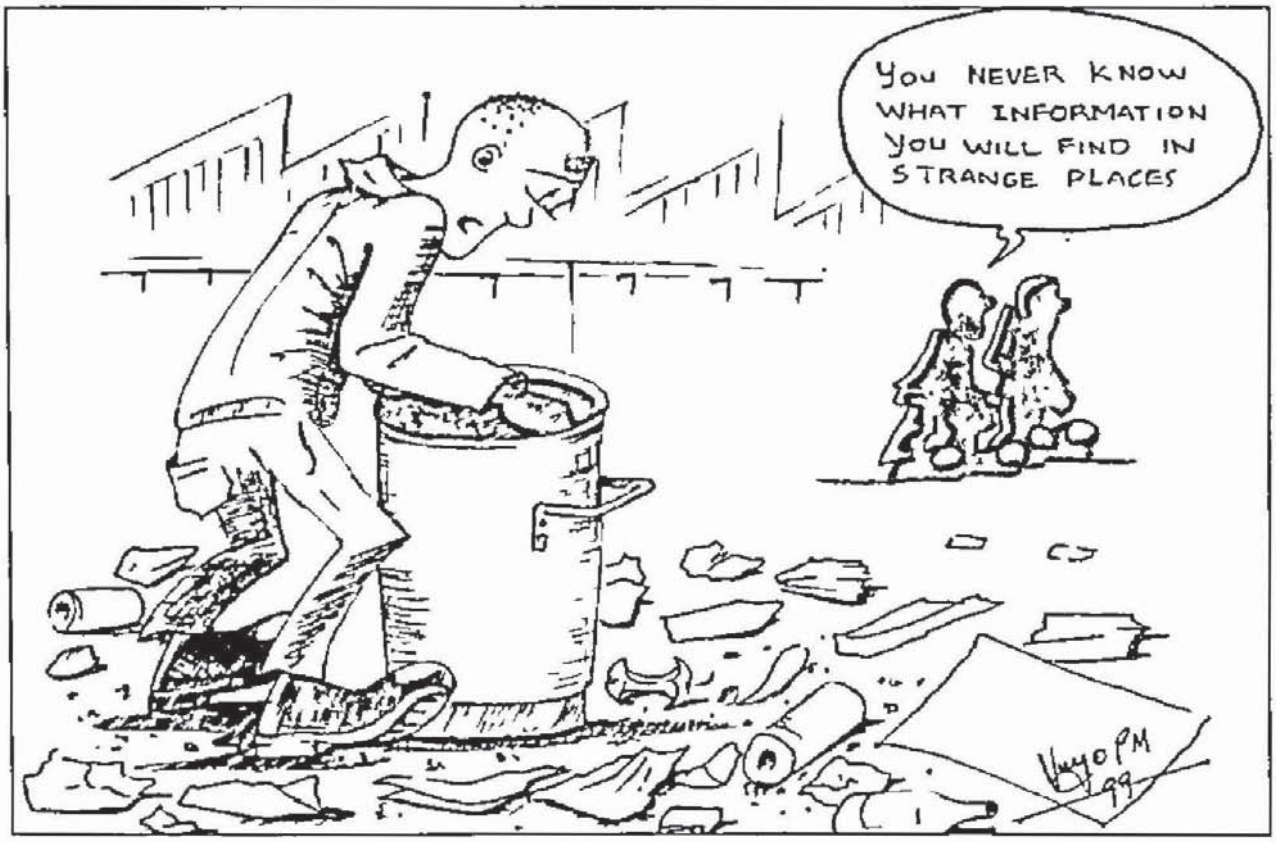
The new Act divides competition issues into the two main areas of prohibited practices and merger evaluation. In prohibited practices, the main issue is assessing if a firm is dominant and using this dominance negatively by engaging in prohibited practices.

The prohibited practices are further broken down into:

- vertical restrictive practices, such as refusing to supply;
- horizontal restrictive practices, such as firms colluding together to fix prices;

There are at least four very different dimensions to economic efficiency:

- **Technical efficiency:** where the firm makes the best use of its available resources by motivating employees and organising production effectively and without waste.
- **Allocative efficiency:** through the market mechanism the costs of producing goods are equated with the value that consumers get from buying an extra unit. This places the emphasis on the choices of consumers with money to buy the products. It thus emphasises free markets.
- **Social efficiency:** where the returns to the individual firm or consumer do not reflect the value to other groups. For example, firms will only invest in training to the extent to which it will improve their own production, and they do not take into account the value of improved skills to other firms who may hire the worker in the future, or to the worker him- or herself.
- **Creative or dynamic efficiency:** where decisions are judged not only in terms of their impact today, but in terms of their influence on the future development path of the economy.



- abuse of a dominant position, where a large firm uses its market power to charge higher prices;
- price discrimination, where firms charge higher prices to those who need the product most

In both of the areas of prohibited practices and merger control, the legislation makes allowances for arrangements which:

- improve technological capabilities;
- increase efficiency;
- promote exports;
- develop SMMEs and businesses owned by historically disadvantaged persons

The Act therefore allows for other concerns to be taken into account, even when an arrangement or a practice is seen as anti-competitive. For example, if a company claims it is going to increase exports it may apply for an exemption from the Act. This means that even where a company controls a sector, and has not been creating growth or jobs (although profits have been high) it can try to avoid competition policy by claiming to be efficient or internationally competitive

The Act does provide for firms to be punished if they do not abide by its provisions, for example by being fined But firms can only be forced to unbundle (break themselves up) if it can be shown that they are continuing to exploit their market power The Act does therefore not directly tackle the concentration of control in a small number of conglomerates. It only tackles how they behave.

The new institutions

The Act establishes a Competition Commission and a Competition Tribunal The commission's responsibility is to investigate and evaluate prohibited practices and mergers Mergers are divided into small, medium and large mergers, based on the combined assets or turnover (that is sales) of the two companies The

commission must be notified of all medium and large mergers. The commission can make a ruling on intermediate mergers. It makes recommendations to the tribunal (for judgement) on large mergers.

In the case of prohibited practices, the investigation can be initiated by a complaint being submitted to the Competition Commission, or by the commission itself. Anyone directly affected (including unions) can make a complaint, or pass on information. If the commission establishes that a prohibited practice has taken place, it will refer the matter to the tribunal for judgement. Any person who is directly affected by the matter may participate at the tribunal hearing.

While in theory this opportunity is available to all, as with any law, there is a danger that it will be used to best effect by those with the time and resources. The Competition Commission's agenda will be influenced by the groups that make representations and push their interests. It is therefore very important that labour develops capacity to draw on the Act, as workers are clearly affected by firms' decisions. For example, firms often pursue mergers as a way of cutting costs and reducing employment. International evidence shows that firms that have merged tend to perform worse than they did before the merger and worse than other companies in the same sector.

Accessing the new institutions?

Labour must show, in its representation to the commission or tribunal, how firms are using their power to cut costs, restrict supply and increase prices. It must emphasise the importance of the Act's objectives on employment and social welfare. Labour's submissions will thus help stop firm's behaviour where it undermines the development of the economy in the pursuit of profits.

What are the main things that labour should consider when making a submission?

Mergers

The new Act states that unions must be notified if firms plan to merge. Here, unions can react to firms' arguments and make counter-arguments.

Firms will tend to argue that the merger is necessary for some, or all, of the following reasons:

- ❑ *It is necessary to create an internationally competitive business.* Sasol used this argument in their planned merger with AECI. It said that the technology used required large-scale production, especially when competing in international markets against foreign firms. In many areas this is true, especially in heavy industries (such as steel), where a larger factory may mean cheaper production. The question here should then not be 'should there be large firms?' – rather, the question should be 'how should the large firms behave?'

  A firm may only really need large-scale operations in one area of its operation. However, the firm may still use the argument of needing a large-scale operation, to support a merger of the whole operation.
- ❑ *The firm is failing and needs to merge to survive.* Here a company may argue that it needs to merge otherwise it will collapse. A competitor is likely to buy a poorly performing company in order to increase its market share and at the same time retrench many workers in the original company. Other possibilities are often not pursued, including the possibility of another buyer from outside the sector who sees

Labour's submissions should help influence the behaviour of companies.

buying a poorly performing company as an opportunity

- ❑ *The merger will enable firms to benefit from sharing technology, and/or is part of plans for expansion* It is argued that a firm that has developed technological capabilities or marketing networks can exploit these best by expanding through mergers A merger enables it to expand more rapidly than through its own investments But, the firm may also be tempted to increase profits by exploiting its potentially larger size and position – it may increase prices and lower production through the merger

Sometimes the above three reasons may be true, at least in part. But often firms are motivated to merge to cut costs by retrenching labour, and to increase control over a market. Evidence from other countries shows that in many cases the mergers do not achieve the benefits. Studies have shown that merging firms performed worse than the average in the sector, and many of the mergers were later broken up

Taking these factors into account, unions may not want to argue against a merger completely. Instead, they may argue for the firm to make certain commitments if it is going to merge. These conditions could include:

- ❑ creating jobs;
- ❑ retraining workers who are going to be relocated or retrenched;
- ❑ new investments;
- ❑ improving working conditions;
- ❑ using safer technologies,
- ❑ implementing a social plan;
- ❑ democratising the workplace;
- ❑ adhering to existing agreements;
- ❑ negotiating restructuring

In addition, labour's submissions can make reference to public interest considerations contained in section 16 (3) of the Act. These specifically make provision for the merger evaluation to take into account the

Consumers should be able to choose from a variety of products.

impact of the merger on:

- a particular industrial sector or region;
- employment;
- the ability of small firms and/or firms controlled by historically disadvantaged persons to become competitive.

The public interest concerns can also be grounds for representations being made by the Minister of Trade and Industry

Abuse of a dominant position

Many firms have market power not because they have merged but because they have grown over time to become dominant in their production area. Where there are few firms, and especially where costs for transporting products are high, consumers do not have many alternative options and the firms will have a tendency to charge higher prices.

It may not be viable to have many firms in the same sector, especially given the relatively small size of the South African market. This section of the legislation is to guard against large firms abusing by charging higher prices.

Any individual or organisation can make a complaint that a firm is charging an excessive price, or is unfairly excluding competitors (for example, by controlling the supply of raw materials). Labour might want to complain because prices are too high for basic products, or because firms have restricted production (and with it employment). If the Competition Commission agrees there are good grounds for the complaint, they can initiate a formal investigation.

The case then goes to the Competition Tribunal for judgement. The tribunal can punish the firm by fining them or forcing them to unbundle, if there is no other option. This means that, although the Act does not provide for measures to break up conglomerates, it is meant to ensure that conglomerates' behaviour does not stifle the economy, or prevent challenges to their position.

Restrictive practices

Firms may also use their strong position to enter into agreements, either with firms selling the same products, or with distributors or suppliers. These agreements would be designed to close down opportunities for others. For example, a company may supply shops with fridges but set the condition that only their products can be stocked. As with abuse of dominance, anyone can make a complaint to the commission, and the commission

may investigate if it thinks there is a case for a restrictive practice

Management will often argue that their interests are the same as workers, because if the firm makes more money and dominates the sector, they can pay higher wages But, in the end, the impact of a firm using its market power is often to reduce output (and also employment), and to charge higher prices which hurt everybody (and those with low income most of all)

The agreements between firms are almost always not obvious, and so getting information on them is going to be very important.

Labour therefore has a crucial role to play in:

- questioning the objectives of firms;
- highlighting the employment consequences;
- representing working class consumers;
- pointing to other relevant information on the companies concerned which the competition authorities may not focus on or be aware of.

In so doing, submissions can make reference to a broader definition of efficiency which includes longer-term development requirements, over the narrow cost reduction focus that is likely to preoccupy firms

The impact of the new Act

The objective of a submission will not necessarily be a negative one of opposing mergers A submission may aim to alter the behaviour of firms.The new legislation can have a major impact on the South African economy in making firms more accountable for their actions and, over time, will influence the nature of capitalism here. By establishing clear criteria on which firms' behaviour will be judged, proper implementation of the legislation means that profit seeking which is based on investment in human and physical resources will be distinguished from that based on the exercise of market power Co-operative arrangements that are constructive will be separated from those which seek collusion and the extension of control.

In recent years, South African business has been profitable while in many areas production and employment have stagnated Despite some unbundling, South African business is also still dominated by large conglomerates which own firms operating across different sectors of the economy, with the same directors sitting on the boards of many different firms.This enables them to extend and concentrate economic power, rather than to organise production more effectively. The challenge is for the legislation to be used by unions and other progressive parties to accelerate change, and form the platform for broad-based growth founded on meaningful access to the economy and recognition of all stakeholders

We should not underestimate the size of the task. In this, information is very important, and yet it is an area in which the balance is tilted dramatically in favour of large, established business But, labour is also an important source of knowledge and information on firms This places labour in a potentially strong position to influence outcomes, if it uses this information effectively. To do this, unions need to invest in information gathering and research Unions should train officials and shopstewards on how to identify important information, how to gather it and how to use it to make convincing arguments. Only then will they be able to reap the possible rewards. ★

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