

Balthasar Strunz

The Interface of Competition Law, Industrial Policy and Development Concerns

The Case of South Africa

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The Case of South Africa

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To my parents

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Brussels, Belgium
May 2018

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Part III Conclusion

**8 Conclusion: Complex Relationship Between Industrial Policy,
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Act	Competition Act, 1998
AECI	African Explosives and Chemicals Industries
Am. Econ. Rev.	The American Economic Review
Am. U. Int'l L. Rev.	American University International Law Review
AMSA	Arcelor Mittal South Africa
ANC	African National Congress
Antitrust Law J.	Antitrust Law Journal
APDP	Automotive Production and Development Programme
ARMSCOR	Armaments Corporation of South Africa
Art	Article
ASGISA	Accelerated and Shared Growth Initiative for South Africa
Asian Perspect.	Asian Perspective
BEE	Black Economic Empowerment
Bell J. Econ. Manage. Sci.	The Bell Journal of Economics and Management Science
Bill	Competition Bill, 1998
CAC	Competition Appeal Court
Camb. J. Econ.	Cambridge Journal of Economics
CB	Competition Board
CC	Competition Commission
CF	Competitiveness Fund
CFI	Court of First Instance
Chi-Kent L.Rev.	Chicago-Kent Law Review
Chin. Polit. Sci. Rev.	Chinese Political Science Review
CJEU	Court of Justice of the European Union
CLP	Corporate Leniency Programme
Colum. Hum. Rts. L. Rev.	Columbia Human Rights Law Review
Colum. L. Rev.	Columbia Law Review
ConC	Constitutional Court
COSATU	Congress of South African Trade Unions

CT	Competition Tribunal
CTCP	Clothing and Textiles Competitive Programme
DCCS	Duty Credit Certificate Scheme
DePaul L. Rev.	DePaul Law Review
DTI	Department of Trade and Industry
EAC	East African Community
EC Treaty	European Community Treaty
ECJ	European Court of Justice
ECJ	European Competition Journal
ECLR	European Competition Law Review
Econ. J. (London)	The Economic Journal
EDD	Economic Development Department
EER	European Economic Review
EJDR	The European Journal of Development Research
EJLR	European Journal of Law Reform
ELJ	European Law Journal
ELR	European Law Reporter
EPA	European Partnership Agreement
ESCOM	Electricity Supply Commission
EU	European Union
Europ. J. Law Econ.	European Journal of Law and Economics
FAV	Fuel Alternative Price
FDI	Foreign Direct Investment
Finance and Trade Rev.	Finance and Trade Review
G.C.L.Rev.	Global Competition Litigation Review
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GEAR	Growth, Employment and Redistribution
GSA	Grain South Africa
Harv. Int'l L.J.	Harvard International Law Journal
HDI	Historically Disadvantaged Individual
ICASA	Independent Communications Authority of South Africa
ICC	Industrial and Corporate Change
ICN	International Competition Network
IDC	Industrial Development Corporation
IMF	International Monetary Fund
Int. J. Ind. Organ.	International Journal of Industrial Organization
Int. Rev. Law Econ.	International Review of Law and Economics
Iowa Law Rev.	Iowa Law Review
IPAP	Industrial Policy Action Plan
IRCC	Import Rebate Credit Certificate
IRJFE	International Research Journal of Finance and Economics
ISCOR	Iron and Steel Corporation
J. Afr. Hist.	The Journal of African History

J. Comp. Econ.	Journal of Comparative Economics
J. East. Asian Stud.	Journal of East Asian Studies
J. Econ. Lit.	Journal of Economic Literature
J. Econ. Perspect.	Journal of Economic Perspectives
J. Empir. Leg. Stud.	Journal of Empirical Legal Studies
J. Labor Res.	Journal of Labor Research
J. Law Econ. Organ.	Journal of Law, Economics, & Organization
J. South. Afr. Stud.	Journal of Southern African Studies
JCLE	Journal of Competition Law and Economics
JHRP	Journal of Human Rights Practice
Lancet	The Lancet
Law Soc. Inq.	Law & Social Inquiry
Loy. U. Chi. L.J.	Loyola University Chicago Law Journal
MDIP	Motor Industry Development Programme
MEC	Mineral-Energy Complex
Mich. Law Rev.	Michigan Law Review
Minister	Minister responsible for the Competition Commission in terms of s 1(1)(xvi) of the Act (until 2009 Minister of Trade and Industry, since then Minister of Economic Development)
MTSF	Medium-Term Strategic Framework
NDP	National Development Plan
NERSA	National Energy Regulator of South Africa
NGP	National Growth Path
NHN	National Hospital Network
NIPF	National Industrial Policy Framework
NPC	National Planning Commission
Nw. J. Int'l L. & Bus.	Northwestern Journal of International Law & Business
OECD	Organisation for Economic Co-operation and Development
PetroSA	The Petroleum Oil and Gas Corporation of South Africa
PIC	Public Investment Corporation
POP	Point of Presence
PSTS	Public Switched Telecommunications Services
R&D	Research & Development
RDP	Reconstruction and Development Programme
Rev. Econ. Stat.	The Review of Economics and Statistics
RIDE	Revue Internationale de Droit Économique
S	Section
S. Afr. J. Econ.	South African Journal of Economics
S. Afr. Mercantile L.J.	South African Mercantile Law Journal
SAA	South African Airways
SAB	South African Breweries
SACTWU	South African Clothing and Textile Workers Union

SADC	Southern African Development Community
SALJ	South African Law Journal
SAPEG	South African Petroleum and Energy Guild
SAPIA	South African Petroleum and Refinery Industry
SAPT	South African Posts & Telecommunications
SAR&H	South African Railways and Harbours
Sasol	Suid-Afrikaanse Steenkool-, Olie- en Gasmaatskappy
SATS	South African Transport Services
SAVA	South African Vans Association
SCA	Supreme Court of Appeal
SCLR	Southern California Law Review
SEZ	Special Economic Zone
SLG	Spring Lights Gas
SME	Small and Medium Enterprises
SMME	Small, Medium and Micro Enterprises
SOE	State-Owned Enterprise
SPC	Sector Partnership Fund
SPII	Support Programme for Industrial Innovation
Sw. J.L. & Trade Americas	Southwestern Journal of Law and Trade in the Americas
TAC	Treatment Action Campaign
Telecomm. Policy	Telecommunications Policy
TFEU	Treaty on the Functioning of the European Union
THRIP	Technology and Human Resources for Industry Programme
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
U.Kan.L.Rev.	Kansas Law Review
U.T.L.J.	University of Toronto Law Journal
UC Irvine L. Rev.	UC Irvine Law Review
UN	United Nations
Univ. Penn. Law Rev.	University of Pennsylvania Law Review
US	United States
Utah L. Rev.	Utah Law Review
VANS	Value-Added Network Services
VISA NO	VISA National Organisation
VPNS	Virtual Private Network Services
Wayne L. Rev.	Wayne Law Review
WCCPF	Western Cape Citrus Producers Forum
Wis. Law Rev.	Wisconsin Law Review
World Bank Res. Obs.	World Bank Research Observer
World Compet.	World Competition
World Dev.	World Development
World Econ.	The World Economy
WTO	World Trade Organization

Chapter 1

Introduction: Research Questions and Competition Law in a Developing Country Context



1.1 Research Questions

The South African Walmart case is a focal point of the interface of competition law, industrial policy and development concerns. When in 2010 Walmart made public its intention to acquire Massmart, parent company of a number of well-known South African retail chains, the government and trade unions mounted the barricades: Walmart, which had already been cited as the epitome of profit-driven business conduct ignorant to the fate of its own workforce, now embarked on taking over a number of popular South African brands.¹ The merger did not have any negative effects on competition. This would normally suffice for a competition authority to clear it. However according to the South African Competition Act ('Act'), there is a second hurdle. Mergers have to also pass muster with a public interest test.² This second hurdle provided the opportunity for three ministers of government, five trade unions and a small enterprise forum to become part of the assessment process. One minister had meddled with the parties even before the case got under way. When the Competition Tribunal ('Tribunal') rejected to impose on Walmart collective bargaining commitments and a local procurement quota, government—represented through its ministers—did not shy away from taking the matter on appeal. However also the Competition Appeal Court ('Appeal Court') threw out the parties' claims.³ It explicitly opposed misusing competition law in order to address industrial policy issues.

¹ See merger case *Edgars Consolidated Stores (Pty) Ltd and Rapid Dawn 123 (Pty) Ltd* 21/LM/Mar05, 4 July 2005 (CT) para 26.

² Republic of South Africa, 'Competition Act, 1998', No 89 of 1998, s 12(A)(3).

³ See cases *Walmart Stores Inc and Massmart Holdings Ltd* 73/LM/Nov10, 29 June 2011 (CT) 123; *The Minister of Economic Development and Others and The Competition Tribunal and Others; SACCAWU and Walmart Stores Inc and Others* 110/CAC/Jul11 and 111/CAC/Jun11, 9 March 2012, First ruling (CAC). Cases taken by the Competition Tribunal are available at <http://www.comptrib.co.za/cases/>, cases by the Competition Appeal Court at <http://www.comptrib.co.za/cases/appeal/>.

The above case, which unfolded between 2010 and 2012, is a recent example for how competition law can be confronted with concerns that are not related to the protection of competition.⁴ The fact that the South African Competition Act accommodates such concerns, sweeps the debate on industrial policy into the arena of competition law enforcement. But this debate is not limited to industrial policy. In a developing country context, considerations for development may likewise play a role. Both industrial policy and development concerns can be expressed as part of the law or impinge on the way it is enforced.

This book will analyse the overlap of competition law, industrial policy and development concerns. It will do so based on the case of South Africa, where countering the devastating effects of more than 40 years of Apartheid remains paramount. When Nelson Mandela became the first non-white President of the Republic in 1994, South Africa was a deeply divided country. To some degree it still is. The Apartheid regime—which lasted from when the National Party came to power in 1948 to the early 1990s—had erected an inhumane system of racial segregation.⁵ This system had reserved the benefits of economic growth to a small white minority. The non-white majority, whose labour formed the foundation of economic growth, was marginalised and driven into poverty. Apartheid was thus later defined as a crime against humanity in the Rome Statute of the International Criminal Court.⁶

In order to establish its two-part society—Apartheid is an Afrikaans term for ‘being apart’, literally meaning ‘Apart-hood’—the nationalist governments implemented a range of policies. Since South Africa is rich in minerals, these policies focused primarily on sectors such as mining, minerals beneficiation and energy. They were directed at providing a cheap, low-skilled black working class for the mining houses and ancillary industries.⁷ This in part contradicted the government’s goal of moving blacks to rural areas. However between the political imperative to preserve segregation and the necessity to structure the economy in an efficient way, it was always the former that predominated decision-making.⁸ What directed politics beyond the segregation objective was the leadership’s goal to break the dominance of British capital and support Afrikaans business.

With such strong political impetus there was little space for considerations of competition. To the contrary, government was anxious to not challenge large-scale capital, even if that meant a deterioration of market structure.⁹ The Apartheid regime actively intervened in the economy, too. The creation and support of state-owned enterprises (‘SOEs’) was seen as a means to gear economic development towards its

⁴ *Walmart Stores Inc and Massmart Holdings Ltd* 73/LM/Nov10, 29 June 2011 (CT) para 1.

⁵ See H Marais, *South Africa Pushed to the Limit: The Economy of Change* (2011) 9–10.

⁶ International Criminal Court ‘Rome Statute of the International Criminal Court’ (1998) Art 7(1)(j).

⁷ On the connection between Apartheid and cheap labour, see A Hirsch, *Season of Hope – Economic Reform under Mandela and Mbeki* (2005) 12ff.

⁸ C Feinstein, *An Economic History of South Africa – Conquest, discrimination and development* (2005) 151.

⁹ B Fine and Z Rustomjee, *The Political Economy of South Africa – From Minerals-Energy Complex to Industrialisation* (1996) 117.

political goals. This had left South Africa with highly concentrated markets and a dearth of competition culture.¹⁰ Most of the firms that the Apartheid government had supported still profit today, either from then financed production facilities or ongoing subsidisation. As a result, powerful incumbents still block the development of markets crucial to the South African economy by abusing their dominance and crowding out competitors. In order to fight this double legacy of Apartheid policy—an impoverished, deprived black population as well as detrimental market concentration and anticompetitive firm conduct—the first democratic government enacted a new competition law, the Competition Act, 1998. This Act should enhance the role of competition and help to turn South Africa into a modern, more competitive economy.

What the Apartheid regime had ignored is that competition is about two things: an incentive mechanism and the freedom to compete. The incentive to organise production processes efficiently has a spurring effect as it propels business to produce high quality goods at the lowest price. The freedom to compete fulfils an integrative role. It ensures that not only established incumbents but also smaller firms can participate in competition. In this context, competition law serves as a tool to both maintain the incentive mechanism and protect the freedom to compete. It constitutes the legal framework which competition requires in order to not neutralise itself.¹¹ In other words, freedom to compete can exist only if there are rules protecting competition in the first place.¹² According to a more inclusive perspective of competition law, the law fulfils several functions—legal, economic and societal.¹³ Whilst the legal function is expressed through the individualised imperative to refrain from conduct not based on the merits, the other two functions concern the implications of anticompetitive conduct for society as a whole. The economic function refers to competition law's formative dimension with regard to common values, such as open markets, entry barriers and dispersion of economic power.¹⁴ Competition law's societal function is about its potential to counteract economic imbalances and thereby contribute to achieving equality.¹⁵ This function ultimately

¹⁰S Roberts, 'The Role for Competition Policy in Economic Development: The South African Experience' (2004) 1.

¹¹W Fikentscher in W Fikentscher (ed), *Die Freiheit und ihr Paradox: Über Irrtümer unserer Zeit* (1997) 1, 71.

¹²This remains true no matter how economics-based competition law becomes. Competition law has to offer administrable rules that give clear guidance to business. See EM Fox, (2006) (3) *Utah L. Rev.* 725, 740.

¹³See W Fikentscher in W Fikentscher (ed), *Die Freiheit und ihr Paradox: Über Irrtümer unserer Zeit* (1997) 1, 65ff.

¹⁴Defending such political values as integral to antitrust against the purely economic approach of the Chicago School, see early account by R Pitofsky, (1979) 127 (4) *Univ. Penn. Law Rev.* 1051, 1052ff.

¹⁵See J Drexl in Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb (ed), *Wettbewerbspolitik und Kartellrecht in der Marktwirtschaft: 50 Jahre FIW – 1960 bis 2010 (Festschrift)* (2010) 175, 188–189 and 190. Referring to Ronald Dworkin's critique of the efficiency paradigm, the author emphasises the importance of guaranteeing the protection of competition to all participants – consumers, sellers and competitors. All citizens should be enabled to define for themselves their respective role in the market and to pursue their economic interests

also contributes to the free formation of will and decision-making; as an instrument to safeguard competition, it ascribes a fundamental democratic value to competition law.¹⁶ Hence, competition law is not solely about protecting a process that stimulates productive, allocative or dynamic efficiencies but one that directly benefits all members of society through its integrative element.¹⁷

Whilst competition law aims to prevent behaviour that distorts competition, industrial policy is prone to do exactly that. It relates to the policies which governments adopt in order to achieve economic growth. These policies are typically directed at increasing competitiveness of particular industries and transforming them towards more sophisticated levels of production.¹⁸ By applying industrial policy, governments set incentives and they demand or proscribe specific behaviour. This intervenes with the incentive mechanism of competition, which in this case does not function according to supply and demand but alongside government policies.¹⁹ The types of industrial policy vary according to the state of economic development of a country. Although the implementation of industrial policy is perceived as more demanding in a developing country context, these countries will generally be more likely to intervene in market processes.²⁰ This is for the simple reason that in developing countries industrial policy will rarely only be motivated by the goal of achieving economic development. Instead, this goal will often be intertwined with more immediate development concerns, such as the provision of basic services, the creation of employment or the prices for food and fuel.²¹

Conflict with competition law arises if industrial policy encourages or produces behaviour which competition law outlaws. In this case reconciliatory mechanisms have to be found in order to not curtail the efficacy of the law. At the same time, government may in the above sense see competition law not only as a tool to protect competition but also as one of many policy instruments to fight poverty and reduce skewed wealth distribution so as to create economic opportunities for citizens.²²

accordingly. Such model of competition which emphasises equal treatment in the sense of market opportunities as opposed to equality in results does not contradict the freedom principle.

¹⁶ See G Amato, *Antitrust and the Bands of Power: The Dilemma of Liberal Democracy in the History of the Market* (1997) 2–3. In a similar vein O Andriychuk in D Zimmer (ed), *The Goals of Competition Law* (2012) 95, 102.

¹⁷ In a similar vein, see J Drexler in J Drexler, W Kerber and R Podszun (eds), *Competition Policy and the Economic Approach* (2011) 312, 314.

¹⁸ P Bianchi and S Labory in P Bianchi and S Labory (eds), *International Handbook on Industrial Policy* (2006) 3, 3.

¹⁹ See ML Possas and H Borges in M Cimoli, G Dosi and JE Stiglitz (eds), *Industrial Policy and Development* (2009) 447, 449–450.

²⁰ On purported barriers in developing countries, see H-J Chang, 'Industrial Policy: Can Africa do it?' (2012), talk given at IEA/World Bank Roundtable on Industrial Policy in Africa, Pretoria, 3–4 July 2012, 3ff. Noting that now industrialised countries at earlier stages applied industrial policy too, which justifies application in developing countries today, see M Di Maio in M Cimoli, G Dosi and JE Stiglitz (eds), *Industrial Policy and Development* (2009) 107, 136.

²¹ See DJ Gerber, *Global Competition – Law, Markets and Globalization* (2010) 253.

²² M Bakhoun, (2011) 34 (3) *World Compet.* 495, 499–500.

Such a viewpoint challenges competition law. It diminishes the value ascribed to competition *as such*, and it enhances a number of ‘corollary’ goals which could, one might argue, better be pursued outside the realm of competition law. Yet the perspective offers chances, too. In particular in case of developing countries, it may help to realise a more holistic approach that reconciles competition regulation with both industrial policy efforts and development concerns.

Such a holistic approach also meets the requirements of a more inclusive view on development. It is in line with suggestions to replace a means-based development perspective by one that focuses on freedom and capabilities.²³ What matters under such a perspective are not a person’s means of living but his or her capabilities, that is, his or her freedom to actually choose between alternatives of what he or she wants to do (‘capability approach’). This perspective recognises the extensive use of market forces if they are combined with the development of social opportunities.²⁴ It understands efficiency as in ‘freedom-efficiency’. This means that a transaction is efficient if it increases the number of opportunities of one person without decreasing those of any other person (efficiency seen as preference fulfilment). Whilst markets cannot simplistically be judged as positive or negative, it is important to synchronously analyse ‘freedom-efficiency’ on the one hand and inequality in the distribution of freedoms on the other hand so as to arrive at overall social priorities. This requires a multi-sided approach.

A debate that is related to this conception of a multi-sided approach, refers to how one should measure economic and social progress.²⁵ The prevailing measure relies on the Gross Domestic Product (‘GDP’), which is an aggregate measure of a country’s total sum of outputs.²⁶ This measure, however, is ignorant of the actual well-being of people, because it does not provide information about distributional issues or human activity.²⁷ Such a measure is limited to capture the ‘means’ which according to the ‘freedom and capability’ perspective are insufficient to display progress in development. Alternative ways to evaluate economic and social progress are therefore suggested.²⁸

The prominent ‘capability approach’ and alternative ways to measure progress point towards a new thinking which is more inclusive and more integrative than previous approaches to competition, industrial policy and development theory.²⁹

²³A Sen, *The Idea of Justice* (2009) 231ff. See further MC Nussbaum, *Women and Human Development* (2000) 70ff.

²⁴See A Sen, *Development as Freedom* (1999) 116ff.

²⁵See on this topic SR Osmani in K Basu and R Kanbur (eds), *Arguments for a Better World: Essays in Honor of Amartya Sen* (2008) 15.

²⁶‘The Trouble with GDP’ *The Economist* (30 April 2016).

²⁷See report by Commission on the Measurement of Economic Performance and Social Progress, ‘Survey of Existing Approaches to Measuring Socio-Economic Progress’ (2009).

²⁸See M Fleurbaey and D Blanchet, *Beyond GDP – Measuring Welfare and Assessing Sustainability* (2013); M Fleurbaey, (2009) 47 (4) *J. Econ. Lit.* 1029.

²⁹On the need for a broader framework with regard to industrial and competition policy, see CN Pitelis in P Bianchi and S Labory (eds), *International Handbook on Industrial Policy* (2006) 435, 443. For a broader view of competition law in regard of developing concerns, see EM Fox, (2007) 13 *Sw. J.L. & Trade Americas* 101, 105.