

# **Competition Policy Perspective: The mis-regulation of the South African Fishing Industry<sup>1</sup>**

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## **Abstract**

Although the fishing industry is by far one of the smallest contributors to South Africa's GDP, the fishing industry employs a disproportionately high number of unskilled labour. DAFF policies and regulation of the fishing industry are aimed at achieving transformation, that is, an increase in the levels of black ownership and market competition. The goals of the policies and regulation of the fishing industry are not divorced from the goals of the Competition Act as captured in the preamble and public interest considerations. The reconsolidation of fishing rights to the few established companies through various pooling arrangements merits closer scrutiny as this threatens to compromise the very aims of regulations in the fishing industry and the objectives of the competition policy. DAFF reports that 57% of the fishing industry is transformed, unfortunately this has not translated into the promotion of small and medium sized enterprises or firms owned by historically disadvantaged individuals' active participation in the industry. This paper defines transformation as *active* participation of black fishing rights holders at all levels of the value chain. The Competition Authorities have found that being vertically integrated (harvesting, processing and marketing) is critical to effectively compete in the fishing industry. The paper argues that advancement of transformation and competition in the fishing industry requires innovative thinking on the part of regulators. The objective of policy formulation should be aimed at easing barriers to entry along the fishing industry value chain. This paper sets out the regulatory framework for the allocation and transfer of fishing rights and it also highlights the pooling arrangements in the fishing industry and the barriers to entry. The paper focusses on how the transformation of the industry should be used as a tool to facilitate competition. To support this argument, this paper looks into a recent merger case between *Oceana and Foodcorp*. Finally, we discuss, the 2020 allocation of fishing rights and the industry structure going forward.

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## 1 Introduction

The importance of the fishing industry lies in its ability to provide livelihood to poor communities along the South African coast. Although the fishing industry is by far one of the smallest contributors to South Africa's GDP, it employs a disproportionately high number of unskilled labour. According to the Department of Forestry and Fisheries (DAFF), the industry contributed 1% to GDP in the year 2011. However, in the same year, it employed more than 10,000 people, 45% of which are full time and the remaining being seasonal workers and fisherman. In the same period, DAFF reported that the fishing industry had also created 2 400 indirect jobs.<sup>3</sup> Approximately 60% of jobs in the industry are occupied by unskilled labour.<sup>4</sup>

DAFF policies and regulation of the fishing industry are aimed at achieving transformation, that is, an increase in the levels of black ownership and market competition. The goals of the policies and regulation of the fishing industry are not divorced from the goals of the Competition Act as captured in the preamble and public interest considerations (i.e., in the consideration of mergers and exemption applications). Amongst other benefits, competition policy is considered as a tool that should lead to the lowering of input costs along the value chain; stimulate entrepreneurial activity and contribute towards the realisation of socio-economic objectives.<sup>5</sup> At the core of driving socio-economic objectives is the promotion of small-and-medium-enterprises and historically disadvantaged individuals (HDI) participation in the economy.

The reconsolidation of fishing rights to the few established companies through various pooling arrangements merits closer scrutiny as this threatens to compromise the very aims of regulations in the fishing industry and the objectives of the competition policy. DAFF reported that over half (57%) the industry (in terms of fishing rights allocations) is in the hands of historically disadvantaged individuals (i.e., small rights holders).<sup>6</sup> Ideally this should translate into the promotion of small-and-medium enterprises active participation in an industry (i.e., transformation of the industry) that is highly concentrated and prone to cartel arrangements. Unfortunately this has not been the case. The presence of historically disadvantaged individuals in as far as the allocation of rights is concerned has not translated into a transformed industry.

This paper defines transformation as *active* participation of black fishing rights holders at all levels of the value chain and this is because the Competition Authorities have found that being vertically integrated (harvesting, processing and marketing) is critical to the ability to effectively compete. The inability of small rights holders to effectively compete can be attributable to the high barriers to entry (i.e., economies of scale, capital intensiveness of the industry, etc.), the fishing rights allocated to small rights holders are insufficient to justify the necessary investment and therefore these smaller rights holder enter into a range of pooling

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<sup>3</sup> Department of Fishing and Forestry (DAFF) 2011. Transformation in the South African Commercial Fishing Industry and Marine Aquaculture Sectors. 2011.

<sup>4</sup> Department of Fishing and Forestry (DAFF) 2011. Transformation in the South African Commercial Fishing Industry and Marine Aquaculture Sectors. 2011.

<sup>5</sup> Department of Trade and Industry, Proposed Guidelines for Competition Policy, A Framework for Competition and Development, 1997.

<sup>6</sup> See DAFF's Transformation in the South African Commercial Fishing Industry and Marine Aquaculture Sectors.

arrangements which have also not been effective in driving competition because in most instances the small rights are 'transferred' to the established firms in the industry.

A drastic shift in regulations is required in order to foster a more competitive fishing industry. Although DAFF and the Competition Authorities have joint jurisdiction in the evaluation of mergers, the Competition Commission is not involved in setting out the parameters at the onset of a cycle when rights are allocated. Better synergy between the Commission and DAFF is required, as when a merger comes for evaluation at the Commission, DAFF would already have a decision. The advancement of transformation and competition in the fishing industry requires innovative thinking on the part of regulators. The objective of policy formulation in the fishing industry should be aimed at easing the barriers to entry along the value chain. This will foster the ability of small rights holders to effectively compete while realising governments socio-economic objectives boosting the participation of small-and-medium enterprises and the historically disadvantaged individuals.

The first section of this paper sets out the regulatory framework for the allocation and transfer of fishing rights. The second section highlights the pooling arrangements in the fishing industry and the barriers to entry. The fourth section discusses how the transformation of the industry should be used as a tool to facilitate competition. The fifth section looks into a merger case between Oceana and Foodcorp to support the arguments in the preceding section. Section six discusses the 2020 allocation of fishing rights and the industry structure going forward. Lastly, section seven concludes.

## 2 Fishing industry regulations

The South African fishing industry operates within the restrictions of regulations by the Department of Agriculture, Forestry and Fisheries ("DAFF"). It is regulated in terms of the Marine Living Resource Act of 1998 ("MLRA"). Under the MLRA, DAFF regulates the fishing industry by issuing fishing rights for each fish sector<sup>7</sup> for commercial, subsistence and recreational fishing in South African waters. This paper focuses on the commercial fishing rights.<sup>8</sup> DAFF allocates separate fishing rights for each fish sector. A fishing right is not a property right awarded to entities.<sup>9</sup> A fishing right is granted to a person or entity in terms of section 21 of the MLRA and may not be transferred without the approval of the Minister.<sup>10</sup> Fishing rights are allocated for long-term periods of between 8-20 years after which the bidding process for the rights in each fish sector is reopened. In 2005 a competitive rights allocation process was conducted which resulted in the awarding of long-term fishing rights (up to 20 years) across 22 fishing sectors.<sup>11</sup> The next allocation or reallocation of commercial fishing rights will again be open in the year 2020 for certain sectors (i.e., small pelagic and hake).

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<sup>7</sup> A fish sector refers to the different species of fish (i.e., hake, south coast rock lobster, small pelagic, horse mackerel, etc.).

<sup>8</sup> A fishing right is statutory permission to harvest a marine resource for a specified period of time where after the right reverts back to the State.

<sup>9</sup> General Policy On The Allocation And Management of Long Term Commercial Fishing Rights, 2005, pg 13

<sup>10</sup> General Policy On The Allocation And Management of Long Term Commercial Fishing Rights, 2005, pg 13

<sup>11</sup> Before the year 2001 the decisions allocating commercial fishing rights were taken annually. From that year on, in some fishing sectors, a policy was adopted of allocating medium-term rights of up to four year.

The industry is also regulated in terms of Total Allowable Catch (“TAC”) and Total Allowable Effort (“TAE”). TAC refers to the total volumes of the resource (i.e., a particular fish sector) that may be harvested in a particular season/ year. The TAC is determined following thorough scientific and environmental studies into the sustainability of each fish sector. While the TAC may fluctuate from year to year depending on findings of the scientific and environmental studies, the proportion of the TAC allocated to a quota holder (also referred to as fishing right holder) remains the same. TAE refers to the (1) the number of fishing days allowed in a given season or year for a specific fish sector; (2) restrictions on the vessel type to be used (i.e., engine capacity, etc.) and (3) the number of vessels/ trawlers allowed in each fish sector.

Regulations also allows for fishing rights (or quota allocations) to be transferred between participants in the industry. DAFF assesses the transfer of fishing rights in accordance with the governing principles outlined in the *Policy for the Transfer of Commercial Fishing Rights* (“the transfer policy”) in terms of section 21 (2) of the MLRA. Fishing right transfers are considered in accordance with two broad principles. Firstly, DAFF considers whether the transfer would lead to a consolidation of fishing rights (i.e., quota) and effort (TAE) in a specific fishing sector. To this end, the transfer policy states that:

*“While the Department encourages the consolidation of Right Holders in the Fishing Industry, the Department is opposed to monopolies which may operate to the detriment of smaller Right Holders in any fishing sector. .... The Department will not determine a maximum threshold of the TAC that any one Right Holder may hold or control, but will monitor whether any large Right Holder acts in a manner contrary to fair competition practices.”*

In terms of the MLRA, DAFF is also mandated to consider levels of market competition in the fishing industry.

Secondly, DAFF considers the degree to which the transformation (i.e., level of black ownership/ BEE) of the transferee and the ownership of the quota and vessels would change upon the approval of the transfer. DAFF would decline any application for the transfer of rights which leads to the dilution of black shareholding in an entity.

### **3 Pooling arrangements and barriers to entry**

Harvesting fish is capital intensive (i.e., investment in a vessel and investment in a processing facility) and the quota’s allocated to individual entities are often not sufficient to justify investment in vessels and/ or processing facilities. As such, fishing right holders often enter into some forms pooling arrangements in order to maximise efficiencies and achieve economies of scale. The pooling arrangements are summarised as follows:<sup>12</sup>

- a) Small quota holders sell (on annual renewable contracts) their fishing rights to a processing company which catches fish for them (i.e., paper quota holders);

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<sup>12</sup>Nielsen and Hara (2006). Transformation of South African industry fisheries. *Marine Policy* (30), 43 – 50.

- b) Small quota holders enter into a joint venture agreement with established players in the industry involving catching and/or processing and/or marketing;
- c) Small quota holders pool their quotas with other quota holders and jointly invest in a vessel; and
- d) Where a quota holder owns a vessel, they acquire fishing rights in other fishing sectors in order to achieve scale requirements.

Pooling of resources is also a way of overcoming barriers. Barriers to entry are largely uniform across the different fish sectors. Entry and expansion into the fishing industry mainly depends on three factors; securing fishing rights access to a fishing vessel and the capital for participation along the value chain. Fishing is a capital intensive process, the cost of a less sophisticated of the range trawler is placed in the region of R48 million and large deep seas or mid water trawlers can range from R120 to R150 million.<sup>13</sup> It is crucial for each fishing right owner to illustrate access to a vessel suitable for harvesting a particular fish sector.<sup>14</sup> Vessels operating in each fishing sector are linked to a proportion of TAC or TAE allocated to quota holders operating the vessel. Due to the capped number of permitted vessels, prices are inflated as new entrants often buy used vessels from existing owners.<sup>15</sup> Vessels remain largely owned by established companies.

Given that a trawler can be at sea for at least 40 days most of the fish is processed on board. The capital and operating costs result in a significant proportion of the small quota holders not having the capacity to operate at this intensive level. The small quota holders do not have the economically viable scale and therefore established companies harvest, process and market on their behalf. The restrictions on the number of vessels and scale requirement has created an interdependent relationship between small right holders and established fishing companies. This cycle is difficult to break as these small quota holders do not meet the minimum efficient scale and cannot approach financing institutions with economically unviable quota allocations for financing. Small quota holders can only attempt to negotiate catchment fees and enter into joint venture agreements with established vertically integrated companies. Absent a public auction system, rights holders are placed at a disadvantage when negotiating catchment fees with established companies, low fees have been reinforced by a historic cartel agreement uncovered in 2008. Such cartel conduct has held ransom the progress of transformation especially in key sectors such as small pelagic fish.

Small pelagics have a substantial number of right holders (109) sharing TAC of about 90 000. In an industry that requires between 20 000 to 25 000 tons of fish to meet minimum efficient scale to operate a processing plant, right holders do not meet this requirement. The main companies, according to rights allocations and processing capacity were Pioneer Fishing (24%), Oceana (21%) Foodcorp (19%), Westpoint Processors (18%) and Gaansbaai Marine (6%).<sup>16</sup> These established companies also lock up fishing quotas from the small players through various pooling arrangements. It is small wonder then that not many are unable to operate at scale in the economy as some right holders such as Emachibini Fisheries, Eyethu Fishing, Eigelaars Bote EDMS and a number of fishing companies do not

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<sup>13</sup> Facts and Figures of the The South African Deep Sea Trawling Industry Association, 2013. Available online <http://www.sadstia.co.za/index.php/about-sadstia/members>. Last accessed: 26 march 2014.

<sup>14</sup> The General Policy on the allocation and management of long term commercial fishing rights, 2005

<sup>15</sup> Nielsen and Hara. 2006. Transformation of South African industrial fisheries. Marine Policy, pg6

<sup>16</sup> 2012 Fishing industry handbook for South Africa, Namibia and Mozambique. George Warman Publications, Cape Town South Africa

even reach 5 000 tons. What remains unclear; is the number of small fishing companies who are partly owned by the established ones and which economic units they control.

A similar trend of concentration and complex ownership has transpired in the hake market. In an industry worth R5 billion hake accounts for approximately 50% of total landed value and is the most profitable of the fisheries, two thirds of which are generated from exports.<sup>17</sup> The deep sea hake trawling is highly capital and labour intensive that it employed approximately 8600 people, 2850 of which are sea going, all full time employees.<sup>18</sup> The two main producers of deep sea hake are I&J and Sea Harvest- the two held 55% of the market in 2011.<sup>19</sup> The hake sector is characterised by diverse range of business models from catch and sell operations to highly sophisticated internationally competitive vertical integrated food companies. Successful participation of historically disadvantaged individuals in the industry requires value adding to products. A competitive market is required in order for this to happen; there is an interdependent relationship between competition policy and transformation objectives.

#### 4 Transformation as an instrument to facilitate competition

The South African competition policy recognises the need for transformation given the country's history of high levels of economic concentration and control.<sup>20</sup> Given SA's historical context, competition policy was identified by the new dispensation government as tool for improving participation of the companies owned by historically disadvantaged individuals in the economy. Hence the Competition Act seeks to balance competition goals and socio-economic objectives. The Competition Act aims to promote competition in order to promote efficiency, adaptability and the development of the economy to ensure that small and medium-sized enterprises have an equitable opportunity to participate. And to promote a greater spread of ownership, in particular, to increase the ownership stakes of historically disadvantaged people.<sup>21</sup>

Specifically, in merger regulation the Competition Authorities are required to consider the likely effects of the merger on the ability of small businesses, or firms controlled or owned by historically disadvantaged individuals, to become competitive.<sup>22</sup> When assessing a merger transaction, the Competition Authorities are mandated in terms of the Competition Act to consider whether the merger is *likely to substantially prevent or lessen competition* and then determine whether *the merger can or cannot be justified on substantial public interest grounds* (i.e., the ability of small businesses, or firms controlled by historically disadvantaged individuals, to become competitive; the effect on employment; the effect on a particular industry sector; and the ability of national industries to compete in international markets).<sup>23</sup>

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<sup>17</sup> Fact and Figure of Deep Sea Hake Sadstia website. Available online: <http://www.sadstia.co.za/index.php/about-sadstia/members>. Last accessed 26 March 2014

<sup>18</sup> Facts and Figures of Deep Sea hake Sadstia website <http://www.sadstia.co.za/index.php/about-sadstia/members>. Last accessed: 26 March 2014

<sup>19</sup> The 2012 Fishing industry Handbook for South Africa, Namibia and Mozambique. George Warman Publications.

<sup>20</sup> Roberts, S.(2004). The role of competition policy in economic development: the South African experience. TIPS, 8.

<sup>21</sup> Competition Act of South Africa No 89 of 1998.

<sup>22</sup> Competition Act of South Africa No 89 of 1998.

<sup>23</sup> Competition Act no. 89 of 1998. <sup>23</sup> Competition Act of South Africa No 89 of 1998.

Employment issues in merger analysis have been given more attention in considering public interests compared to other considerations such as the ability of small businesses and businesses owned by historically disadvantaged to effectively compete.<sup>24</sup> On occasion, the ability of small and medium-sized enterprises to have an equitable opportunity to participate in the economy is equated to black shareholding in large corporations. Certainly in the fishing industry, the large fishing companies have used the resulting increase in black shareholding as one of the motivating factors for the acquisition of fishing rights (quotas) from small quota holders.

The Competition Act envisages transformation to be more than just black shareholding in large firms. Given the history of exclusion and excessive concentration levels, transformation and competitive markets will not be realised if the majority of the population continue to be excluded from actively participating in economic activity. It has been argued that *“development-friendly competition policies need to have different objectives from those normally posited for advanced economies. Further such policies also need to be specific to the stage of a country’s economic and industrial development as well as its institutional and governance capacities.”*<sup>25</sup> The Competition Act does recognise South Africa’s history of excessive concentrations and economic exclusion, however there often is disjuncture between policy and implementation. As the Competition Authorities and DAFF have joint jurisdiction over the fishing industry, as far as merger control is concerned, it is important to consider whether DAFF regulations allow for effective competition in the fishing industry. This is a priority especially given the industry’s history of collusion in some fish sectors and extreme concentration in others.

The Commission’s multiple investigations on cartel conduct in the industry and subsequent finding against several industry participants is indicative of the risks of concentrated markets.<sup>26</sup> Collusion was ubiquitous as industry players were colluding at all levels of the value chain and in multiple fish sectors. The investigation was initially in respect of price fixing and/or fixing of trading conditions and market allocation in contravention of section

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<sup>23</sup>In the assessment of a merger between Walmart and Massmart, the Competition Authorities did consider the ability of small and-medium sized business, or firms controlled by historically disadvantaged person, to become competitive after an objection to the merger was brought by various government departments and the Trade Unions. There is a need for public interest guidelines in merger assessment in this regard. It is not clear for instance where public interest considerations can be considered as standalone factors during merger assessment or the competition authorities should balance competition with public interest considerations. We would argue that given the fact South African is a developing country which is characterised by high concentration levels with about 80% of the population excluded from economic participation, public interests factors as outlined in the Act should be assessed as standalone.

<sup>23</sup>Singh, A and Dhumale, R (1999). Competition policy development and developing countries. T.R.A.D.E. Working Papers, No 7, South Centre, Geneva.

<sup>23</sup>However, the transfer is only valid until the long term contracts expire in 2020 where after the rights revert back to the state.

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<sup>25</sup>Singh, A and Dhumale, R (1999). Competition policy development and developing countries. T.R.A.D.E. Working Papers, No 7, South Centre, Geneva.

<sup>26</sup>Respondents included Oceana, Foodcorp Premier Fishing, Gaansbaai Marine and industry bodies SAPFPA (South African Pelagic Fish Processor Association and SAPFIA (South African Pelagic Fishing Industry Association)

4(1)(b) of the Competition Act in respect of small pelagic fish. At the conclusion of the investigation, the Commission found that there had been a longstanding and open practice in the industry whereby the price of raw fish, price of a quota and prices for canned fish were fixed in respect of small pelagic fish. There was also a non-compete clause between Tiger Brands, Brimstone and Sea Harvest. It emerged that Oceana and other industry players had agreements across other fishing sectors, Oceana subsequently admitted to the contravention of the Competition Act and paid R34.75 million in 2012. Literature elsewhere, suggests that fines are inconsequential to companies, as they are budgeted for. Structural changes and introduction of new players in the industry may prove to be more a credible remedy in concentrated and vertically integrated industries.

The regulators' transformation agenda must ease economic concentration along the industry value chain and encourage the participation of small quota holders by dissipating barriers to entry. In this regard, the reallocation of fishing rights can be used as a tool. Although fishing rights are the property of the State, DAFF regulations allow the transfer of these rights between participants pending their BEE outcome. When fishing rights are transferred from one player to another, DAFF has the opportunity to reallocate resources to small enterprises that participate in the harvesting to marketing of fish. As the "transfer of rights" is characterized as a sale of an asset in the terms of the competition law, the Commission has assessed a few merger transactions in the fishing industry involving a number of fishing sectors.<sup>27</sup> The recent merger between Oceana and Foodcorp in small pelagic fish highlights the inconsistent application and misinterpretation of what 'transformation' between the Competition Authorities and DAFF.

## 5 Case study: Oceana and Foodcorp merger

Our point regarding the continued lost opportunity to transform the industry along the value chain is best illustrated by the recently filed merger between Oceana and Foodcorp. Oceana and its BEE partner Ulwandle Fishing were acquiring the small pelagic fishing rights and assets of Foodcorp. The merger was approved subject to the divestiture of the Glenryck brand and its fishing quota. Glenryck is the second biggest suppliers of canned fish and a competitor to Oceana. The merging parties were willing to part with the Glenryck brand but not the fishing quota that accompanied the brand. Their premise was that the new owner of the Glenryck brand would be able to procure fishing quota from third parties or imports and did not need the support of the currently designated fishing rights to support the brand.<sup>28</sup> To prove their point, the merging parties presented an offer to buy the brand from Bidfish, a company that manufactures fish for retail in house brands.

Along with the brand, the Commission ordered a divestiture of the small pelagic business of Foodcorp after the Commission had found from its investigation that the consolidation of the merging parties' small pelagic fish quota and contracted quota would substantially prevent or lessen competition in the small pelagic fishing sector. The consolidation of Oceana's and Foodcorp's small pelagic businesses effectively meant the consolidation of market leading brands (i.e., Glenryck and Lucky Star) to the detriment of low income earners who are the

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<sup>27</sup> However, the transfer is only valid until the long term contracts expire in 2020 where after the rights revert back to the state.

<sup>28</sup> Tribunal decision

largest consumers of canned pilchard. The Commission found that without the allocated fishing rights, the new Glenryck owner would not be able to effectively compete with Oceana. The Commission found that third party options or imports will always be much more expensive than using own fishing rights. As a result, the brand was unlikely to survive post-merger leading to the lessening of competition and the likely eventual dying out of the Glenryck brand. At the time when this merger was filed with the Competition Commission, DAFF had already approved the consolidation of Oceana's and Foodcorp's fishing businesses regardless of the fact that there was black (smaller) player who was willing to buy Foodcorp's fishing business.<sup>29</sup> The Commission's witness Mr Sangela, owner of Ntshonalanga Fishing expressed interest to purchase the brand and fishing quota. He said that for true transformation to occur consideration had to be given to smaller players such as him.<sup>30</sup>

In its affidavit to the Tribunal, DAFF highlighted that the BEE status was of outmost consideration in the matter, including Oceana's proven track record to utilise its fishing quota and that of third parties. Although DAFF was never going to approve a transaction that diluted BEE, they should have given consideration to the lack of structural transformation and ceased the opportunity to award the Foodcorp quota to black SMMEs that participate in the harvesting to marketing of fish. The Tribunal agreed with this view, as contained in the decision;

*"[O]ne glaring omission from the list of considerations.....was that no regard was given to the position of smaller players or the promotion of competition in the industry. The only reference one can find is that in terms of the Transfer Policy DAFF shall give consideration to the concentration levels in a fishing sector when it deliberates on the transfer of rights."*<sup>31</sup>

As it currently stands, the transfer of the Foodcorp quota to Oceana leads to re-concentration of small pelagic fish. This is concerning given the on-going section 4(1) investigation. Furthermore, the award of fishing rights in the future depends on current participation in the harvesting to marketing of fish. Hence, if a player was a paper quota holder, they are likely to lose their portion or remain a quota holder. There are no growth prospects due to the barriers to capital and fixed fishing rights for a number of years.

An opportunity presented itself for DAFF to meaningfully transform the fishing industry by not allowing the consolidation of fishing assets of two established players. DAFF should have ceased the opportunity to transfer the fishing rights to the potential competitor, who demonstrated the desire and has the ability to move from the realm of being a spectator owner to participant owner.

The contradictory interventions by DAFF and the Commission are illustrative of the disjointed policy approach previously indicated- DAFF already approved the transfer of rights while the Commission ordered a divestiture of small pelagic fish. Given the difficulty of shared jurisdiction between DAFF and the Commission, there is a required vigilance from the Competition Commission when fishing industry mergers are notified given the complex

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<sup>29</sup>He had already secured the capital for the purchase of Foodcorp's fishing business, but was not even considered by Foodcorp let alone DAFF.

<sup>30</sup> Ibid pg 35 para 102

<sup>31</sup> Ibid pg 35 para 101

shareholding, joint venture and catching agreements. While a merger might not cross the dominance threshold, it is important to take into consideration creeping mergers and the power of the merging companies in the market, as these cannot be viewed in isolation. Also, better cohesion between the Commission and DAFF is required to achieve the goal transformation and a competitive fishing industry.

## **6 The 2020 allocation of fishing rights and industry structure going forward.**

In this section we briefly discuss high level ideas on how to regulate the fishing industry with the aim of achieving meaning transformation and increase the level of competition. Before issuing long term contracts in 2020, DAFF needs to critically assess the transformation profile along the value chain especially of the economically important fisheries. When rights are out for reallocation in 2020, the small quota holders will be required to show that they are active participants in the industry. This is an ambitious ask in light of lack of technical support and capital from DAFF or government entities positioned to do so and even the lack of meaningful transfer of skills to small quota holders that enter into pooling arrangements with the established players.

As previously indicated, a forward looking approach to transforming the fishing industry requires regulators to seriously consider the structural barriers that relegate small quota holders to being just 'papers quota holders' and obscure members of joint ventures that do not enable them to pass the threshold from "spectator owner" to "participant owner". The starting point is to unpack the opaque shareholding structures of established companies and the joint venture ownership structures that allow established entities to claim they have transformed. The evident trend in mergers and joint ventures has been to reconsolidate towards historically established companies. An example of this recent trend was the acquisition of Bongoletu Group by Foodcorp and Oceana's acquisition of Lusitania's fishing business.

During the 2020 review of fishing rights, DAFF has the opportunity to restructure the industry by breaking path dependency of reconsolidation that the industry has been locked in. In the short run such an approach may cause job losses, however the long run ownership and economic participation would be diverse. There is very little literature on vertical integration in commercial fishing on which to base any model of the vertical structure of fisheries concerned. A possibility of such a structure is the halibut market in USA.

The post individual fishing quota (IFQ) halibut fishery in the USA draws similarities with South Africa reform objectives; the program was designed to ensure that the IFQ remain in the hands of the fishermen who had a history of past participation and dependency on the fish much like South African communities by the coast.<sup>32</sup> To attain the goal, two restrictions were placed on the trading and ownership of quota. The first divided catcher vessels into three different size classes and prohibited larger vessels from buying quota from smaller vessels. The second instituted an owner operated or owner on board requirement for second

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<sup>32</sup>Dawson R. 2006. Vertical integration in the post-IFQ halibut fishery. *Marine Policy* (30) 341-346

generation quota shares. <sup>33</sup>Taken together, these regulations also helped to ward off increased vertical integration, where processors had come to own and control the use of quota. The changes in the vertical structure of the halibut fish introduced changes in its trading as well. Where previously the market was owned by processors and marketers, the quota holders had more bargaining power. Smaller vessels remained and had larger pool of quotas to buy from. Secondly, if there was to be any entry then it happened in the smaller categories as there was potential for more quota available. There was a shift in bargaining power, fishermen rather than the processors were the main beneficiaries from this change in structure, and wholesale price rose 66% (raw fish) from the shift from frozen to fresh fish. The quality of the fish delivered was also far superior to the pre IFQ.

The lesson to be taken from the US halibut market is that a paradigm shift is at times required to break path dependency from an exclusionary past. As the fishing rights come up for renegotiations in 2020, DAFF should also involve the Commission in the process to reallocation of fishing rights (quota). The partnership will help prioritise key policy principles in future merger evaluations. Putting competition outcomes front and centre in the allocation of fishing rights is not an addition to DAFF, its policies require them to assess whether large right holder acts in a manner contrary to fair competition. The Commission is a suitable entity for regulating competition in the fishing industry. The Commission has intervened in the fishing industry through determination of mergers, but these interventions do not have the desired effect, as the allocation process determined the rules of the game and the Commission has often found it constrained to deal with issues of transformation and the promotion of competition in the industry.

## 7 Conclusion

Competition policy in a developing context must be cognisant of the developmental challenges, the paper sought to illustrate through the fishing industry the obstinate challenges that are typical in the South African economy. The role of competition policy in such a context must promote the participation of historically disadvantaged individuals by bringing them into mainstream economy as envisaged in the Competition Act. This paper focused on how the transformation of the industry should be used as a tool to facilitate competition and looked at the recent merger between Oceana and Foodcorp to support this argument. To support this argument, this paper looks into a recent merger case between *Oceana and Foodcorp*.

This paper also sought to how reconsolidation of fishing rights to the few established companies through various pooling arrangements merits closer scrutiny as this threatens to compromise the very aims of regulations in the fishing industry and the objectives of the competition policy.

Whilst DAFF has policies in place to promote transformation through the MLRA of 1998, the competition aspect is often neglected due to mismatched policy implementation between DAFF and the Commission.

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<sup>33</sup>The only exception to the owner on board is in the case of joint ventures, partnerships and cooperation and other business forms where it is impractical to have the owner of the QS on board the vessel provided that the vessel is owned by the quota holder (Dawson, 2006).

Given the fact that being vertically integrated (harvesting, processing and marketing) is critical to effectively compete in the fishing industry, this paper argues that the advancement of transformation and competition in the fishing industry requires innovative thinking on the part of regulators. The objective of policy formulation should be aimed at easing barriers to entry along the fishing industry value chain.

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### Annexure A:

The table 1 and table 2 below illustrates the transformation trend in some of the strategic fisheries where DAFF wanted black involvement and a brief synopsis the economic contribution of the two sectors and their transformation profile relative to the rest of the industry respectively.

**Table 1: Percentage of black ownership for the years 2001, 2005 and 2009 as a percentage of rights holders with more than 50% of the TAC.**

Fish sector	2001(%)	2005 (%)	2009 (%)
Hake Deep Sea Trawl	25	27	56
Hake Inshore Trawl	42	48	82
South coast rock lobster	72	71	64
West coast rock lobster	60	62	70
Horse Mackerel	41	43	41
Small Pelagics	75	61	60

Source: Agriculture Forest and Fisheries (presentation)

**Table 2: The Hake and Small pelagic market in numbers (2011)**

	Hake deep sea trawl	Hake inshore trawl HIST	Small pelagic	All sectors

<b>Total Catch sales</b>	R5.4 billion	R257m	R900m	R7.5 billion
<b>Number of RH</b>	45	17	109	1503
<b>Number of economic units</b>	6	12	47	292
<b>Number of Black RH</b>	28 (62.6%)	11 (74%)	80(73.07%)	564 (60.47%)
<b>Number of female RH</b>	3 (18.69%)	2 (32%)	17(28.79%)	157 (23.57%)
<b>Total number of distinct vessels</b>	52	20	102	605
<b>Total number of employees</b>	5916	642	5204	22106

Source: Source: Agriculture Forest and Fisheries (presentation) and the fishing industry handbook for South Africa