

## Remarks at the opening of the Conference on Competition Law, Economics and Policy, by the Minister of Economic Development, Mr Ebrahim Patel, 4 September 2014.

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In September 1999, the competition authorities, freshly created by an act of Parliament, opened their doors. Over the next 15 years they developed strong institutions, ground-breaking investigations of corporate conduct and a rich jurisprudence. Today it is my pleasure to offer warm congratulations to the leaders of these institutions and their staff.

Let me start with seven reflections on the work of the competition authorities through the lenses of a policy-maker.

First, public policy is about promoting overall economic and social development. Competition policy and competitiveness are not ends in themselves but rather must be located within and support the overall public policy framework, subject to the law and the constitution.

Second, industrial policy refers to the set of instruments that governments across the world use to promote or expand an industry or a set of industrial activities. For this to be sustainable, governments generally aim to foster competitiveness at firm, sector and national economic level. By competitiveness I refer to the ability of enterprises to gain or retain market share without state protection or monopoly positions.

Third, there is a difference between competitiveness and competition policy. Competitiveness embraces, and is supported by, a number of measures that contribute to a dynamic, high-performance economy, ranging from skills development, technology policies and R&D, access to and cost of capital, availability and pricing of logistics systems, energy supply, water and ICT systems, a healthy workforce, productivity levels, the exchange rate of the currency, etc.

In contrast, competition policy normally refers to efforts directed at the structure of industries, such as the number of firms and the level of rivalry among them. It has traditionally emphasised restrictions on activities like:

- price-fixing and market segmentation;
- the abuse of market dominance through measures such as predatory pricing; and
- the impact of one firm buying a rival, a supplier or a customer on the overall structure of a market.

I draw this distinction because it locates competition policy rightly as a subset of broader competitive policies, which in turn are part of our industrial policy framework.

Fourth, competition policy regulates mergers and acquisitions, but this is not simply a process of certification: a “yes or no” tick-box approach. Our law provides an opportunity, and indeed an obligation, to align corporate

strategy (by which I refer to mergers or takeovers) with public interest considerations.

Fifth, competition policy is legitimately concerned with combating cartels and abuse of market dominance; this must become a greater focus of the authorities in the period ahead.

Sixth, competition policy goes wider than the Competition Act. It includes other actions by government that addresses the structural roots of concentration. For example, where we use the provisions of the Act to limit abuse of market dominance by large enterprises, other government measures can also promote investment by new entrants, which would enlarge the pool of competitors.

Seventh, the Competition Act goes beyond issues of competition to embrace our wider developmental and industrial goals. Indeed, our legislation is both innovative and pioneering in its focus on industrial development, employment and transformation as explicit considerations that the competition authorities must apply to certain proposed transactions. The preamble, purposes and the provisions of section 12A of the Competition Act all speak powerfully to this.

In short, competition policy in SA must unavoidably reflect our realities and preoccupations; it is not simply American anti-trust legislation with a local packaging.

We can, and should, learn from the competition experience of other jurisdictions, including advanced economies, but need to accept that our priorities of industrialisation, job creation and transformation are critical.

During the anti-colonial struggle in the 1950s, Kwame Nkrumah famously said: “Seek ye the political kingdom and all else will follow”.

In the 1980s, during the high-water period of neo-classical economics, the call was: “seek ye efficient markets and all else will follow”.

Our experience shows that both these calls are too absolutist, that development does not always and necessarily flow from one single policy fixation, that successful societies experiment, try different approaches, and use policies in combination. The proof of that pudding is not in ideological purity or theoretical modelling but in the impact and outcome. The forthcoming BRICS Competition Conference that will be hosted by South Africa is an excellent opportunity to share experiences and identify issues relevant in developing country economies.

I have said that Government policy frameworks provide the context within which an effective competition policy is pursued.

The National Development Plan sets out a long-term vision of the society we seek to achieve by 2030. Its implementation framework is the New Growth Path, which essentially argues that the structural and systemic features of the economy created by apartheid and its growth path cannot deliver overall development simply by increasing the rate of growth. Development requires a fundamental shift, or to use the language of the contemporary political discourse, radical change to the structure of the economy if we are to lift our real rate of development, employment, industrial capacity, rural inclusion and economic well-being. This is what we mean by inclusive growth, or a new growth path.

The new growth path's key pillars can be summarized in six 'i's:

- Industrialisation, to expand the productive economy
- Infrastructure rollout, to provide both economic and social platforms for development,
- Investment, in new industries and new productive capacity
- Innovation, to stimulate new product development, new ways of doing things as the means of capturing or retaining markets,
- Integration, to expand the size of our markets by bringing together the economies of African countries, and
- Inclusion, through growth that is jobs-rich, that pulls in black South Africans and young people into the economy.

Our policy framework puts employment and jobs targets at the centre of public policy. It requires us to use the full range of public policy tools to expand productive and decent jobs in the economy.

Since the adoption of the New Growth Path almost four years ago, the economy has created 1,4 million new jobs.

Infrastructure investment is up: In the past five years, the state spent R1,1 trillion in new infrastructure provision, in the largest infrastructure build programme of the last 50 years.

To give a sense of the scale of infrastructure, I want to tell you the story of electricity. In South Africa, the first household was provided with electricity in about 1890, in Cape Town. From that date until 1996, the first census year of our democracy, 5,2 million households were connected to the electricity grid. Between 1996 and today, more than 7,2 million additional houses have been connected.

In other words, the democracy delivered more in less than 20 years than what apartheid and colonialism did in 106 years.

Industrial funding has expanded: since 2009, the Industrial Development Corporation invested R59 billion in expanding our economic capacity, forging new activities in the green energy sector and film-making, and expanding output in agro-processing, mining and parts of manufacturing.

I want to share an anecdote that illustrates what we are achieving.

Fans of Grey's Anatomy, a popular American medical drama series, will know the scene where a patient is rushed to hospital, dramatically wheeled into the trauma unit, the doors are flung open, and the stretcher is wheeled to a full-body scanner. Ten seconds later, the image of the patient appears, the doctor enlarges it and immediately makes a diagnosis, and the patient is wheeled to an operating theatre.

Advanced technology indeed.

What you may not know is that the full-body scanner on display was invented here in South Africa. It is made in South Africa and exported to a number of other countries. It is funded by the IDC, its 93% shareholder.

As an integral part of our broader economic development strategy, the competition authorities have stepped up their actions against cartels and their promotion of public-interest considerations.

On the whole, I think that our competition authorities have been remarkably effective over the past fifteen years.

The first five years from 1999 essentially involved institution building and reacting to the hundreds of mergers that annually require approval.

In the second five years, from 2004 to 2009, the commission began more energetically to investigate collusion. Moreover, the trade unions started to engage more actively under the law to highlight employment and industrial concerns.

In the last five years, the competition authorities have really come into their own, with a solid pipeline of anti-cartel investigations, systematic consideration of public interest issues and the development of a significant jurisprudence.

I am particularly pleased at the strategic, innovative and scaled-up way that the commission and tribunal have dealt with matters.

By strategic, I mean the focus on products and industries that are either

- important to poorer consumers such as bread, flour and poultry;

- or critical inputs into the national infrastructure plan such as construction services, steel, pipes and cement;
- or significant intermediate goods in our industrialisation drive, such as polymers, paint, telecommunications and fertilisers.

By innovative, I refer to the outcomes of investigations and merger considerations that went beyond traditional reliance on penalties alone.

These new approaches included

- breaking up the operations of a dominant player,
- setting up public interest funds using fines or mandatory commitments on companies,
- promoting use of local R&D,
- reinstating retrenched employees,
- requiring reductions in the price of bread and flour and more recently telephony and internet services,
- discounts for storage space for smallholder farmers and
- a pricing remedy on a dominant player that is now the subject of an appeal.

For scaled-up, I can refer to one metric: the value of remedies and fines imposed by the competition authorities climbed tenfold compared to the previous five years, reaching almost R6 billion. This increase in the penalties paid by colluders is an indication of the level of solid investigation by the Commission and the compelling evidence that it is uncovering.

The basis for successful prosecution and of settlements has been the increased capacity of the Commission to undertake complex investigations and legal cases. This increased capacity is shown among others by the increased resources the state has put into the commission and tribunal; in constant 2014 rand, the competition authorities' budget from the state rose from R65 million in 2009 to R190 million in 2014. From 2000 to 2014, the number of staff at the Commission doubled, from around 80 to around 160, with a tenfold increase in the number in legal services and a tripling of the number in research.

The competition authorities have also developed a remarkably innovative approach to remedies. They have not stopped simply at banning or punishing inappropriate behaviour. They have gone further to mobilise resources and actions that contribute directly to economic development and job creation. In particular, they support inclusive growth by opening opportunities and resources for small businesses and by protecting employment.

In 2010, for instance, I announced in Parliament the ground-breaking settlement between Pioneer Foods and the Commission that involved cartel actions in bread, flour and poultry products. The settlement, costed at over a billion rand - a record at the time - provided for the breaking up of the cartel, compulsory reductions in bread and flour prices, and a large penalty, R250 million of which was used to finance an agro-processing competitiveness fund for enterprises outside the cartel.

We can also point to the recent settlement with Telkom. It included a requirement that Telkom reduce costs to consumers for broadband facilities by a total of R875 million over the coming three years. All of us sitting here should see the results in the form of lower internet costs and faster connections.

In the takeover of Afgri by Agrigroupe late last year, the competition authorities encouraged an agreement with EDD and other departments. Under this agreement, Afgri will provide R90 million to support small-scale farmers over the coming three years.

We can see the importance of this kind of remedy in the lives of people like Patros Masilela, an emerging farmer north of Pretoria. He has struggled to buy inputs, and his equipment is largely old and often out of service. In the coming season, however, he will receive holistic support under an Afgri programme that provides in-depth training, extension services, and access to credit and storage. As a result, he is excited – this is assistance that he could only dream of before this year.

The increasing use of the public-interest requirements in evaluating mergers has been critical in ensuring that competition policy has a growing developmental impact, saving thousands of jobs and providing millions of rands to support small and emerging enterprises.

The competition authorities have also begun to develop a uniquely South African jurisprudence. For instance, the Tribunal's path-breaking decision on polypropylene prices was notable both for its thoughtful assessment of the way that historic state support shaped Sasol's ability to produce at a

low cost today, and for its systematic evaluation of methods to identify abuse of dominance by analysing the prices charged.

Similarly, in the Walmart case, the Competition Appeal Court judgement reflects on the relationship between industrial and competition policy and the role of the public-interest clauses on mergers and on the relationship between larger and emerging enterprises in the South African context.

In the next five years, government will step up efforts towards economic transformation, toward ensuring not only more dynamic growth but also higher employment, greater equality, and increased opportunities for all South Africans.

The fundamental shift needs to be to avoid becoming a nation principally of borrowers and consumers and to focus on becoming to a greater extent a nation of savers and producers, with a stronger, more dynamic productive economy.

Manufacturing, mining and agriculture are the core of the productive economy and critical for long-term, sustainable and inclusive growth and job creation. We will do more to support these sectors.

We will need to focus on African regional integration to achieve the economies of scale required to attract investment.

At the same time, combating poverty and reducing income and asset and inequality feature prominently in our policy framework as part of efforts towards greater social equity but also as a means of deepening our market

and bringing more South Africans into employment and the economic mainstream.

Achieving these objectives means we must speed up the growth of small businesses, bring young entrepreneurs into the economy, strengthen the development of black industrialists and improve overall competitiveness.

All of this means that we expect much from the competition regime in the coming five years.

Economic coordination is important in any system. The competition commission may need to strengthen its working relationships with other public entities to ensure that its public mandate is more effectively pursued.

For instance, suppose a competition remedy seeks to support smallholders in agriculture or promote competition in the construction industry. In these cases, other state agencies should help ensure integrated support for the new enterprises by providing training, marketing assistance and extension and infrastructure as required.

This kind of alignment must in future, as in the past, respect the independence of the regulator. But all our agencies, however independent, work within the framework of national policies.

In the coming five years we will give effect to legal provisions on criminalisation of cartel actions, based on the strengthened the internal capacity of the competition authorities.

We will simplify processes and identify and act on gaps in the law and practice of the commission that lead to unnecessary litigation.

The market enquiry provisions of the Competition Act will be tested through the enquiry into the private health-care industry.

Because our efforts must be directed at better outcomes, the competition regime will need to shift from its current focus principally on market conduct to looking at industrial structure. That may require greater resort to divestiture remedies to address market power. It may also lead to a stronger focus on pricing remedies, particularly for critical inputs into the industrial economy such as steel, polymers, fertilisers and infrastructure inputs.

We may have to amend the law to more clearly empower the competition authorities in this area.

The effectiveness of the public interest conditions that the competition authorities have imposed during merger and acquisition processes will be evaluated. If necessary, we will strengthen the law and the capacity of the authorities in this area.

Finally, the jurisprudence over the next few years will be an important part of our ability to combine certainty with transformation, for corporations to have clarity on their obligations and permitted conduct during a period of change in the economy.