

COMPETITION POLICY AND SECTOR-SPECIFIC REGULATION AT THE CROSSROADS: THE SOUTH AFRICAN EXPERIENCE

Abstract

Competition policy and regulation are often regarded as two most important and inter-related areas of regulatory policy. The policies are designed to address weaknesses (or market failures) within the market system. If used efficiently and complementary to each other, competition policy and regulation can both play a key role in improving the quality of regulation in a particular country, thus creating healthy and competitive markets. However if they are used inefficiently, they can distort the functioning of market forces and results in markets that are not contestable (monopoly structure) and difficult to access for new entrants. The paper looks at the experience on the application of these policies in different countries and ways in which they can be used to achieve a common objective of having competitive and contestable markets.

1. Introduction

The 2014 Antitrust Academic of the Year,¹ Prof D. D. Sokol, likened antitrust immunities to a virus which the government creates, gets out of control, and then tries to control it (Sokol, 2009). Specifically, he explains that sometimes government creates regulation that immunises certain anticompetitive conduct from competition policy and the *immunized* conduct starts to generate externalities to the economy. Unfortunately, the cure (competition policy) is not allowed to treat the virus (anticompetitive behaviour) because the government, through regulation, has rendered that anticompetitive behaviour immune from application of the competition policy.

Similarly, after obtaining independence in 1994, the South African Government engaged in extensive reform programmes, which programmes resulted in certain regulation being passed to monitor and control professional activities in different industries. Such industries include medical, the built environment and legal, amongst others. However, over the past ten years, some of these regulated professional bodies have approached the Competition Commission South Africa (CCSA) requesting it to grant them exemptions which allows them to engage in certain conduct. The conduct for which the exemptions were sought is prescribed in terms of the relevant profession's regulation (Acts of Parliament) but is in contravention of the Competition Act.

¹ He was voted by the Global Competition Review. Accessed on 23 August 2016 at <https://www.law.ufl.edu/faculty/d-daniel-sokol>

To this end, the CCSA refused to grant the exemption applications by these regulated professional associations². Consequent to the rejection of the exemption applications, some of the parties to such exemption applications are being prosecuted³ for continuing to engage in conduct which the CCSA ruled to be anti-competitive. Others are intending to appeal to the Competition Tribunal against the decision of the CCSA not to grant the exemption applications.⁴

The basis of the CCSA's decision not to grant the exemptions (the Law Society and CBE) was that the conduct would (i) reduce the quantity supplied to the relevant market thus pushing the prices up; (ii) increase the regulatory burden thus increase the cost of doing business faced by economic agents; (iii) the conduct defies the logic of regulatory economics in that it penalises smaller consumers, which consumers regulations is intended to protect; (iv) the conduct had the potential of reversing the gains made by the CCSA in dismantling cartels and their effect in priority sectors. However, despite being furnished with these reasons, some of the applicants⁵ remained adamant that they are entitled to engage in certain conduct because it's a fulfilment of their roles in terms of legislation.

This development raises policy questions that may have an implication on the ability of the CCSA to enforce the competition policy or the affected agencies (or professional bodies) in carrying out their legislated mandate. These questions include some of the following, which questions motivated us to write this paper:

- Why is there a conflict between competition policy and sector legislation if they were all enacted for the best interest of the economy and the general public?
- Does competition policy have jurisdiction over conduct arising from legislation? If not, what is the way forward?
- Should the relevant legislation be changed or can the conduct be implemented in a modified manner that minimises its anticompetitive effects?

These questions can be an opportunity for the CCSA to expand the influence of the Competition Act in all sectors of the economy or the development of legislation in the country.

² The Law Society of the Northern Provinces (LSNP) and Council for the Built Environment exemptions

³ The CCSA investigated and decided to refer to the Tribunal complaint against the Law Society of the Northern Provinces (LSNP) for contravening section 4 of the Competition Act. This application was part of the Law Society exemption application. Furthermore, the CCSA recently undertook a raid and seizure operation against shipping lines and cargo operators (Association for Shipping Lines exemption) who previously had applied to for an exemption in terms of the Act for the same conduct.

⁴ The CBE has approached the Tribunal with an intention to appeal the decision by the CCSA not to grant their exemption application.

⁵ The Law Society and the CBE

However, if not properly handled, this development can also be a threat to the implementation of the Competition Act in regulated markets as certain players obtain immunity from the application of the Competition Act.

Therefore, it is on the basis of the foregoing that we felt compelled to review some of the exemption applications that were filed with the CCSA on the basis of sector regulations. Before we briefly discuss the details of the cases, we start by giving an overview of the theory on regulation and competition policy and the overlap between the two policies. We will also review how such overlap is handled in other jurisdiction. The outline of the paper is set out below.

Sections 2 and 3 of the paper discuss theoretical background and intersections between competition policy and regulation. Further the sections also consider the regulatory tools applied by these policies in achieving their own objectives.

Section 4 discusses the South African experience on the application of competition policy in regulated industries.

Section 5 and 6 consider our observation and conclusions.

2. Theoretical background on regulation and competition policy

The South African history has been characterised by events that left scars of social, political and economic inequality. Consequent to this unfortunate history, the Reconstruction and Development Programme (“RDP”) was promulgated with an objective to introduce a strict regulatory and anti-trust legislation in order to redress some of these challenges.

According to the RDP, the central objectives of such legislation was to eliminate numerous anti-competitive practices such collusive practices, exploitation of consumers and to open the South African economy to greater ownership participation by a greater number of its people. In addition, the legislation was to ensure that participation in the mainstream economy by small and medium-sized enterprises and previously disadvantaged individuals or groups. To this end, a number of regulatory bodies were instituted, among them the Competition Board which has now become to be known as the CCSA.⁶ This led to the present situation where we have both regulatory institutions and the CCSA intending to address the same challenges but using different approaches.

Literature suggests that sector regulation is more likely to have multiple objectives than competition authorities (Sokol, 2009). For competition authorities, efficiency in markets may be the sole objective. However, sector regulation may be required to balance efficiency

⁶ The Reconstruction and Development Programme Policy framework, white paper 1994

concerns and other government strategic objectives given the prevailing political concerns. Thus, in some cases, there is congruency and some conflict between competition and regulation policy.

For instance, conflict may arise when regulation restrict effective competition between undertakings by establishing or raising entry barriers or impose behaviours on the incumbent firm that may be condemned under competition policy i.e. fixing minimum prices or territorial market divisions. On the other hand, complementarity arises when regulation is implemented to directly control specific elements of abuse of market power by setting standards of fair competition.

The remainder of this section provides an overview of the similarities and differences between the objectives and application of regulation and competition policies.

2.1. The objective of competition policy

The primary objective of competition policy is to maintain and protect effective competition.⁷ Hence, as one of its core function, competition policy has been designed to protect a proper functioning of the market forces of demand and supply.

Among the key factors for efficient, effective and competitive markets are the following: easy entry and exit from the market; incentives for firms to compete on price, product and service quality and not impeded by regulation and that dominant firms are prevented from acting unfairly in a way that reduces competition.⁸ Competition policy should therefore be understood as a mechanism that addresses a particular variety of market failure, namely, the monopoly problem.⁹ Under a monopoly market structure, the market outcome is often sub-optimal. In addressing the monopoly problem, competition policy has to impose a series of prohibitions on the behaviour of the incumbent firm either to prevent the illegitimate acquisition of market power or to control its exercise of market power in a case where it has already been acquired.

2.2. The objective of regulation

Regulation can be defined as a rule of order having the force of law, prescribed by a superior or competent authority, relating to the actions of those under the authority's control.¹⁰ Unlike competition policy, the objectives of regulation in markets are generally much broader and more complex because they also encompass other objectives such as technical standards

⁷ Better Regulation for Growth, 2010: a papered for the World Bank Group

⁸ 'Better Regulation for Growth', 2010: the World Bank Group

⁹ Dunne, Niamh; Competition law and economic regulation: Making and Managing Markets

¹⁰ Joaquin Almunis, 2010; Competition v Regulation: where do the roles of sector specific and competition regulators begin and end?

and consumer protection. Although the some of the objectives of regulation may be outside the jurisdiction of competition policy, many a times they are complementary to competition policy in creating and maintaining competitive markets.

2.3. Conceptual issues

2.3.1. *The application of the policies*

Competition policy is generally applicable across all markets, unless the sector is expressly or implied exempted.¹¹ Regulation on the other hand is enacted on a sector by sector basis. For example, the regulation for one sector does not affect the functioning or operation of the other sectors.

2.3.2. *Ex-ante vs ex-post*

Except for merger review (which is forward looking), competition policy mainly operates on ex-post and it is basically termed a 'harmful approach'.¹² The enforcement of competition policy occurs after the anticompetitive (illegal) conduct has occurred and its effects in the market have already been proven.

On the other hand, regulation relies on an ex-ante– a forward looking – approach. The ex-ante approach alters certain business conduct which is entirely legal in the market and place restrictions on the conduct. Regulators can set price controls and formulae, often called 'price capping'. This means forcing the monopolist to charge a price that is below the profit maximisation price.

2.3.3. *Availability of information*

The ex-post competition policy approach has the informational advantage in that it requires an assessment of the conduct after the alleged abuse of dominant position or cartel conduct has taken place. Therefore, information required for the ex-post approach is mostly limited to the conduct being investigated. Whereas the ex-ante regulatory approach requires much more information on the sector concerned in order to work appropriately. Regulation ventures into an unknown territory and it is for this reason that regulators are required to collect as much information as possible on the nature and purpose of regulation.

2.3.4. *Nature of remedies imposed on undertakings*

¹¹ Dunne, Niamh; Competition Law and Economic Regulation: Making and Managing Markets

¹² Competition Policy versus Sector-Specific Regulation in Network Industries – The EU Experience (by Prof. Pierre- Andre Buigues. The paper submitted to UNCTAD'S Seventh Session of the Intergovernmental Group on Competition law and Policy, Geneva.

Competition policy and regulation also differs in the type of remedies imposed on undertakings. Competition policy remedies are addressed to specific conduct or behaviour of the firm. The remedies imposed by competition policy in case of a possible violation are generally structural in nature. For example, in merger cases competition policy would consider remedies that resolve the competition problem and effectively preserve competition. Structural remedies would generally involve the sale of physical assets by the merging firms or requiring that the merged firm create new competitors through the sale of licensing on intellectual property rights. Whereas regulation use remedies that are designed to address the conduct of an undertaking. For example, a detailed pricing levels or conditions mandating provision of certain services.

3. Intersection between regulation and competition policy: Experiences from other countries

The application of competition policy in regulated industries differs in different countries. In some countries, regulated industries are presumed to be antitrust immune; that is competition provisions do not apply to their conduct. However, in other countries competition policy is applied on all economic activity occurring in that country including those in regulated industries.

In the table below, we carry out a brief review of how competition and regulation policy interacts in the USA, UK and Australia. We were however not able to experiences on the application of competition policy in regulated industries in developing countries.

Table 1: Application of competition policy in regulated industries: Selected international experiences

Jurisdiction	Current position
USA	Competition policy does not apply to regulated industries. No competition policy can be applied on conduct arising from the implementation of a law. They do not have an exemption provision. However, should a concern or complaint be brought to the attention of the competition authority, the following rule-of-reason test is applied: <ul style="list-style-type: none"> • Was the intention of legislation to displace competition? • Is there a government body actively supervising the regulatory body in order to avoid regulatory capture?
UK	Competition policy does not apply to regulated industries if: <ul style="list-style-type: none"> • There is no alternative to achieving the same objective.

	<ul style="list-style-type: none"> • If the rules are required for the necessary functioning of the profession.
Australia	<ul style="list-style-type: none"> • Competition Policy applies to any conduct even if the conduct is provided for in the legislation that regulates the profession in question. • Therefore while professional associations/councils can help educate members and maintain high standards and ethical behaviour, they must also ensure that they comply with the Competition and Consumer Act • However, if they seek immunity from the Competition and Consumer Act, they must apply for Authorisation. • Authorisation may be granted by the Australian Competition and Consumer Commission (“ACCC”) if the likely public benefit from the conduct outweighs the likely public detriment including from any lessening of competition that would be likely to result.

Teleconference between the authors and the aforesaid antitrust authorities

4. Application of competition policy in regulated sectors: the South African experience

4.1. Competition policy applies to all economic activity

In terms of section 3(1), the Competition Act of South Africa applies to all economic activity within, or having an effect with the Republic. However the Competition Act exempts collective bargaining and agreements that are defined in terms of the Labour Relations Act. The Competition Act also exempt concerted conduct designed to achieve non-commercial socio-economic objective.

Further sections 3(1A) and 82 of the Competition Act explains that:

- In so far as the Competition Act applies to an industry or sector that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in Chapter 2 and 3, the Competition Act must be construed as establishing concurrent jurisdiction.
- Section 21(1)(h) states that the CCSA must negotiate agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector and to ensure consistent application of the Competition Act.

It is clear from the above sections that the competition policy in South Africa applies to all economic activities within or having an effect within the Republic with the exception of collective bargaining agreements and non-commercial activities. Thus, competition policy in South Africa also applies to regulated industries. Therefore, there is no industry or sector in

South Africa that is immune or automatically exempted from the application of competition policy.

However Section 10 and Schedule 1 of the Competition Act allows firms to apply for an exemption from the application of the competition policy provided they satisfy certain criteria. In the context of the South African competition policy an exemption is used as a tool that provides protection or immunity for firm from the enforcement action by the Commission and precludes third parties from lodging a complaint in relation to the exempted conduct. There are three broader categories of exemptions provided for in the Competition Act, namely:

- Single or category exemption (section 10(1));
- Exemption for intellectual property rights (section 10(4)); and
- Exemption for professional rules by professional associations (Schedule 1).

4.2. Cases involving regulated sectors in South Africa

The CCSA has dealt with a number of cases (both exemption applications and complaints) in regulated industries. All the conduct for which the exemption was being sought emanated from the relevant legislation ratified through Acts of Parliament. This section discusses some of these cases in detail by highlighting the relevant provision of sector regulation requiring the applicant to engage in certain conduct.

4.2.1. Exemption application by the Council for the Built Environment (“CBE”)

The relevant sections of legislation allowing the applicants to engage in the prohibited conduct are set out below:

The Council for the Built Environment (“the CBE”) Council for the Built Environment Act 43 of 2000

Identification of work

20 (1) The council must, after receipt of the recommendations of the councils for the professions submitted to it in terms of the professions’ Acts, and before liaising with the Competition Commission in terms of section 4(q)—

(a) determine policy with regard to the identification of work for the different categories of registered persons;

(b) consult with any person, body or industry that may be affected by the identification of work in terms of this section.

(2) The council must, after consultation with the Competition Commission, and in consultation with the councils for the professions, identify the scope of work for every category of registered persons.

Section 26(1) for all the professional councils and section 27(1) for the South African Council for the Property Valuers Council (“SACPVP”) state:

Identification of work

26. (1) *The council must consult with—*

- (a) all voluntary associations;*
- (b) any person;*
- (c) anybody; or*
- (d) any industry,*

that may be affected by any laws regulating the built environment professions regarding the identification of the type of engineering work which may be performed by persons registered in any of the categories referred to in section 18, including work which may fall within the scope of any other profession regulated by the professions' Acts referred to in the Council for the Built Environment Act, 2000.

(2) After the process of consultation the council must submit recommendations to the CBE regarding the work identified in terms of subsection (1), for its consideration and identification in terms of section 20 of the Council for the Built Environment Act, 2000.

(3) A person who is not registered in terms of this Act, may not--

- (a) perform any kind of work identified for any category of registered persons;*
- (b) pretend to be, or in any manner hold or allow himself or herself to be held out as a person registered in terms of this Act;*
- (c) use the name of any registered person or any name or title referred to in section 18 or 21; or*
- (d) perform any act indicating, or calculated to lead persons to believe, that he or she is registered in terms of this Act.*

(4) Subsection 3 (a) may not be construed as prohibiting any person from performing work identified in terms of this section, if such work is performed in the service of or by order of and under the direction, control, supervision of or in association with a registered person entitled to perform the work identified and who must assume responsibility for any work so performed.

Section 61A. Rules

(2) The council shall, after consultation with the professional boards, not less than three months before any rule is made in terms of this Act, cause the text of such rule to be published in the Gazette together with a notice declaring the council's intention to make such rule and inviting interested persons to furnish the council with any comments thereon or any representations they may wish to make in regard thereto.

Based on the aforementioned provisions, the Health Professions Council of South Africa ("HPCSA") formulated the following rules and published them in Government Gazette Notice R717 of 04 August 2006:

1. RULES DEALING WITH ADVERTISING

- Rule 3(2) - rule prohibiting canvassing and touting.
- Rule 4 – rule restricting the information to be printed on professional stationery by registered practitioners.
- Rule 5 – rule restricting the naming of professional practices.

2. RULES DEALING WITH CORPORATE STRUCTURE

- Rule 8(4) – rule restricting the formation of certain forms of practice models
- Rule 18 – rule restricting the employment of practitioners by non-approved practitioners (i.e. those not registered with the HPCSA)
- Rule 23 – rule restricting the participation, by a professional, in the manufacture (for commercial purposes) of medicines and medical devices.
- Rule 23A – rule restricting shareholding by practitioners in hospitals and other healthcare institutions.
- Rule 3(2) of Annexure 6 – rule restricting the formation of partnerships and other juristic persons amongst practitioners.
- (Sub-rule 7(4) – which is part of the rules restricting the sharing of fees)

3. RULES DEALING WITH BEHAVIORAL ISSUES

- Rule 7 – rule restricting the sharing of fees and the payment of commission.
- Rule 8A – rule restricting the sharing of consulting rooms.
- Rule 10 – rule obliging practitioners to share patient's medical history.

practitioner in, or a legal practitioner outside, the Republic, either by way of partnership, commission or allowance or in any other manner any portion of his professional fees.

(8) (a) Any person, except a practising practitioner, who for or in expectation of any fee, gain or reward, direct or indirect, to himself or to any other person, draws up or prepares or causes to be drawn up or prepared any of the following documents, namely—

- (i) any agreement, deed or writing relating to immovable property or to any right in or to immovable property, other than contracts of lease for periods not exceeding five years, conditions of sale or brokers' notes;*
- (ii) any will or other testamentary writing;*
- (iii) any memorandum or articles of association or prospectus of any company;*
- (iv) any agreement, deed or writing relating to the creation or dissolution of any partnership or any variation of the terms thereof;*
- (v) any instrument or document relating to or required or intended for use in any action, suitor other proceeding in a court of civil jurisdiction within the Republic, shall be guilty of an offence and on conviction liable in respect of each offence to a fine not exceeding R2 000 and in default of payment thereof to imprisonment not exceeding six months.*

(b) The expression "fee, gain or reward, direct or indirect" referred to in paragraph (a) shall not apply to—

(i) the salary or emoluments of an employee if no fee, gain or reward is sought or obtained by his employer from the person on whose behalf the document was drawn or prepared;

or

(ii) any commission or other remuneration to which any person is or may be entitled either by law or otherwise for services rendered in his capacity as executor, administrator, trustee, curator, tutor or guardian by virtue of his appointment as such by any court of law or under the provisions of any will or other testamentary writing, or as agent for any person holding such appointment.

The Law Society of South Africa ("LSSA") as the mother body enacted the aforementioned provisions. Then based on the aforementioned provisions, each law societies created their own rules which may be summarised as follows:

1. Professional fee guidelines (section 69(d) and (h) of the Attorneys Act)
2. Reservation of Work (section 83(1), (3), (6) and (8) of the Attorneys Act)
3. Prohibition of sharing fees with non-practicing attorneys (Law Society of Northern Provinces (LSNP) Rule 82, Law Society of Free State (LSFS) Rule 17(4), 17(5), 17(15), 17(30), Kwa Zulu Natal (KZNLS) Rule 14(b)(viii) and 18(a), Law Society of the Cape Of Good Hope (LSC) Rule 14.6.)
4. Prohibition of sharing offices with persons who are not practicing as attorneys (LSNP Rule 89.2, LSFS Rule 17(13), 17(14), 17(19), KZNLS Rule 14(b)(ix) and LSC Rule 14.7)

5. Advertising, marketing, touting and accepting or agreeing to accept remuneration for professional work at less than the fixed tariffs (Touting is regarded as an unprofessional conduct, LSNP Rule 91, KZNLS Rule 14(b)(vi), (xv) and (d), KZNLS Rule 5(1)(c) and 5(8) and accepting fee less than fixed tariffs, LSNP Rule 91.1.1.1, LSFS Rule 17(1)(a) and (b), KZNLS Rules 14(b)(x)(vi), 16A and 16(b)(xi) and (xii))

5. Discerning views and/or observations

After a review of the provisions of the Competition Act in South Africa and the decision it has taken against conduct emanating from legislation, the following views emerged:

5.1. All economic activity:

- Section 3(1) of the Competition Act is explicit that its provisions apply to all economic activity within, or having an effect with the South Africa. Therefore, all economic activity –whether or not – arising from regulation is subject the provisions of the Competition Act.

5.2. Concurrent jurisdiction:

- In so far as the Competition Act applies to an industry or sector that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in Chapter 2 and 3, the Competition Act must be construed as establishing concurrent jurisdiction.
- Section 21(1)(h) states that the CCSA must negotiate agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector and to ensure consistent application of the Competition Act.

5.3. Regulatory capture:

- Small interest groups may (mis)use government regulation to create immunity from competition policy. Consequently, the laws or regulations that are created tend to benefit a small but well organised group rather than the whole society. For example, in the CBE exemption, the Commission concluded that the implementation of the rules by the councils under the CBE will reduce the number of persons operating in the built environment industry, which will result in reduced aggregate output and higher prices for the engineering services. Such rent-seeking behaviour redistributes resources away from their efficient use for benefit of the greater society to where they only benefit a certain group.
- In some cases, sector regulators may see competition authorities as a threat to funding or prestige. This threat of regulators may cause them to seek greater control over the regulated industry. In such cases, the regulators may take steps to limit the role of the competition authority in that particular sector.

5.4. Active monitoring by government

- According to the USA, regulation is more likely to create negative externalities when there is no body that actively supervises the sector in order to avoid regulatory capture.

6. Conclusion and way forward

While the CCSA acknowledges that regulation may be an instrument to deliver better economic and social outcomes, when poorly conceived and left to incumbents may become burdensome and problematic to competitive forces. In this section we propose ways in which the benefits that may arise from regulation could be maximised and the harm to the consumers and competitive forces minimised. These proposals include the following:

6.1. Amendment of the Competition Act

Section 3 of the Competition Act should be clear on how to deal with cases in regulated industries. In particular, the section must be clear about which authority between the Commission and the Regulator has jurisdiction in respect of competition law matters. In the cases discussed above, there has been a debate between the Commission and industry players about which Act shall have effect in case of concurrent jurisdiction.

6.2. Regulatory impact analysis

As indicated above, regulatory capture results from minimal monitoring mechanisms by government. According to the USA, regulation is more likely to create negative externalities when there is no body that actively supervises the sector. It is therefore clear that if incumbents are left on their own without any oversight, they have an incentive to engage in conduct designed to exclude competition. We therefore propose that government or/ relevant departments overseeing these sectors must on a regular basis conduct a regulatory impact analysis on the effects (both positive and negative) of existing regulations on competition.

6.3. Advocacy

Through the advocacy programme, the Commission has been able to influence a number of policies and legislations in different sectors of the economy. It is therefore proposed that the Commission increase its advocacy programme.