29 January 2018

The Director-General: Economic Development Department
Attention: Ms MT Mushi

Comments on the Competition Amendment Bill 2017

Dear Ms Mushi,

Attached are comments from the African Centre for Biodiversity (ACB) on the Competition Amendment Bill 2017. If you have any queries, please contact us as follows:

Mariam Mayet, Executive Director of ACB mariam@acbio.org.za
Stephen Greenberg, Research coordinator of ACB, stephen@acbio.org.za

Regards,

The ACB team

African Centre for Biodiversity comments on Competition Amendment Bill, 2017

Economic Development Department "Competition Act (89/1998): Call for Public Comment; Background Note on Competition Amendment Bill; Competition Amendment Bill, 2017 and Explanatory Memo on Objects of Bill", Government Notice 1345, Government Gazette Vol 630 No 41294, 1 December 2017[1]

Introduction

The African Centre for Biodiversity (ACB) is a South African non-government organisation working in the fields of biosafety and genetic modification, seed systems, corporate power, agroecology and food sovereignty. Our geographical area of focus is Southern and East Africa, and we work in continental and global networks. ACB has made submissions and engaged with the South African competition authorities in a number of merger cases relating to seed and agrochemicals. This includes the Pioneer-Pannar merger proceedings in 2010-12[2], where the ACB was granted leave by the CompetitionTribunal on the 19th August 2011, to intervene in the merger proceedings on public interest grounds, particularly with regard to the effect the merger would have on small scale farmers. This was itself precedent setting in that it was the first time the Tribunal had allowed NGOs to intervene in merger proceedings. More recently ACB has engaged with the Competition Commission in the form of research, submissions and meetings on the Bayer-Monsanto merger proceedings in 2017[3], as well as conducting and sharing research on the related mergers/acquisitions of ChemChina-Syngenta and Dow-DuPont in the biotechnology-seed-agrochemical sub-sector[4].

In the course of our engagement with the mergers mentioned above, we raised a number of concerns:

- Corporate concentration will lead to higher food prices for consumers. Evidence for this is borne out in maize seed prices outstripping the price of grain in South Africa[5], for example. This relates to the concerns about negative welfare impacts the Economic Development Department (EDD) raises in relation to concentration in the economy.
- We raised issues about the negative impacts of concentration on innovation, which EDD also flags as a concern. However, we recognise deeper structural features of the economy that shape the way innovation takes place, and where and under whose control this happens. ACB supports a decentralised approach to innovation that opens space for many smaller projects with diverse objectives and approaches. The creativity inherent in the inhabitants of the country can create a different and more diverse, dispersed and equitable economy. But resources need to be decentralised. A focus on globally-competitive high technology, intellectual property (IP) and centralised decision making and control of resources (as EDD concedes in its explanation of the amendments) cannot support such an alternative.
- Weaknesses in the competition framework which focuses on distinct product markets that prevent an analysis of impacts of consolidation across a number of related product markets, e.g. biotechnology

[1] All page references to this document unless otherwise specified
[2] ACB 2012. "The Pioneer/Pannar seed merger: Deepening structural inequalities in South Africa". https://acbio.org.za/wp-content/uploads/2015/02/Seed-Merger.pdf; ACB 2012. "Smallholder farmers and consumers to pay the price for corporate seed merger…", media release, 28 May https://acbio.org.za/smallholder-farmers-and-consumers-to-pay-the-price-for-corporate-seed-merger/
[3] ACB 2017. "The Bayer-Monsanto merger: Implications for South Africa's agricultural future and its smallholder farmers", https://acbio.org.za/the-bayer-monsanto-merger-implications-for-south-africas-agricultural-future-and-its-smallholder-farmers/; ACB 2017. "Submission to the South African Competition Commission on Bayer-Monsanto merger", 13 March, https://acbio.org.za/wp-content/uploads/2017/03/ACB-Bayer-Monsanto-Submission.pdf
[4] ACB 2017. "The three agricultural input mega-mergers: Grim reapers of South Africa's food and farming systems", https://acbio.org.za/wp-content/uploads/2017/04/Mega-Mergers-Bayer-Monsanto.pdf
[5] Grain SA 2016. "Indices of the price of maize seed and the producer price of maize", Price Indices, December 2016.

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methods and products, white maize seed, yellow maize seed, glyphosate etc.
A share of power in all of these product markets can lead to a structural shift in the direction of agricultural input research and development (R&D) and a marginalisation and exclusion of other actors outside those with concentrated power in many fields. In our submissions on the Bayer-Monsanto merger, we refer to a technological platform with cross licencing and patent pooling between the biggest corporations in the seed and agro-chemical markets. Because these activities are considered to be in different product markets, or because there are quite a few smaller producers of particular products (e.g. crop specific chemical applications), these are not considered anti-competitive. This has allowed corporations to accrue significant power to themselves. Such interlinkages are not adequately dealt with in existing competition legislation.

In all the biotechnology-seed-agrochemical merger cases, the competition authorities ultimately approved the mergers/acquisitions, with relatively minor conditionalities. Pioneer-Pannar was required to set up a regional research hub. But this was already part of their strategic plan for regional expansion. The technology is still owned outside South Africa and the merger saw the external acquisition of Pannar's extensive germplasm collection, technical expertise, patents, products and national and regional market footprints. The Bayer-Monsanto acquisition was approved on condition of divestiture of Bayer's cotton interests. However, this is a minor and dying market in South Africa, Bayer's technology was not even fully commercialised yet, and Monsanto is already totally dominant in the cotton seed market even without Bayer's assets.

The systematic approval of large scale corporate mergers in biotechnology-seed-agrochemicals has highlighted the limitations of competition policy and law. As it is structured, it clearly is unable to prevent extremely high levels of domination in sectors with significant long-term implications for ownership and control, as well as economic development. In this regard, we support efforts by EDD to strengthen the capabilities and powers of the competition authorities to investigate and intervene to deconcentrate markets in South Africa.

ACB is of the view that IP and private ownership of information are inherently detrimental to free economic activity, and leads inexorably to centralisation and concentration of economic resources and power. This is closely connected to financial power in South Africa and globally. The biotechnology-seed-agrochemicals sub-sector of agricultural inputs in future is liable to merge with farm machinery, big data and livestock genomics and the might of finance capital is obscured but ever-present in the background[6].

Proprietary and exclusive control over information is at the heart of the contemporary networked information economy[7]. Copyrights, patents and plant breeders' rights are valuable property. The capacity to process large amounts of data looking for patterns is essential to this highly centralised and concentrated economic model, with an inbuilt tendency towards greater concentration over time especially on the financial level. So-called 'new', discrete knowledge is built on a long history of prior socialised work, including the scientific method itself. It is a product of social endeavour that has been captured and channelled by large private interests.

[6] Clapp, J. 2017. "Bigger is not always better: The drivers and implications of the recent agribusiness megamergers", Global Food Politics Group, University of Waterloo, Waterloo, ON.; IPES-Food 2017. "Too big to feed: Exploring the impacts of mega-mergers, consolidation and concentration of power in the agri-food sector", www.ipes-food.org; ACB 2017. "The three agricultural input mega-mergers", cited above.

[7] Castells, M. 1996. *The information age: Economy, society and culture. Vol I: The rise of the network society*. Blackwell, Oxford and Massachusetts; Benkler, Y. 2006. *The wealth of networks: How social production transforms markets and freedom*. Yale University Press, New Haven and London; Stephan, H., Power, M, Hervey, A.F. and Fonseca, R.S. 2006. *The scramble for Africa in the 21st century: A view from the South*. Renaissance Press, Cape Town.

Patent and copyright holders today have excessive power to control the flow of information and knowledge. The IP regime is heavily skewed towards narrow private rights. The logical argument is that exclusive use of 'new' technologies for a period allows the 'inventor' to recoup their costs of R&D, and to cover the risk associated with research possibly having no fruitful result. The benefits of this are considered to outweigh the costs of *ex post* ("after-the-fact") inefficiency that occurs when IP protections prevent other innovators from building on new technologies[8].

However, there are strong arguments to indicate that private IP rights hinder innovation and cause greater concentration over time, and are inappropriate for our times and circumstances[9]. This is apparent throughout the economy, including in agricultural inputs where ACB works. Control of 'blocking patents' on key technologies (including processes and products) force others to pay before they can use or commercialise their own innovations. This also allows patent holders of these key tools and techniques to appropriate the benefits of any public domain innovation[10]. It encourages collusive behaviour in the context of competition policy and law. Cross-licencing and patent pooling agreements are particular forms of cooperation necessitated by IP rights themselves. But in the context of private ownership and control, this is no more than legalised collusion that solidifies concentrations of economic power and resources. Evidence of this is borne out by formal mergers between these multinational corporations, and an agreed redistribution of the market between them (e.g. Bayer-Monsanto divestiture of assets to BASF). The ETC Group refers to these webs of cross-licensing as 'non-merger mergers', in that they effectively enable competitors to lock up markets without the regulatory approval required for formal mergers[11].

As ACB, we align with the view that the public interest benefits of free access to information are much higher than the public interest benefits of long term exclusive rights to information and knowledge. Information and social knowledge are 'non-rivalrous' goods[12] with zero marginal cost[13] and their free flow and diverse reworking is beneficial to society. Our engagement with the Bill is intended to seek ways to support the reorientation of South Africa towards less concentrated, more diverse and decentralised economic and social systems, with a free flow of information that can enable the flowering of creativity and innovation in the population at large. We envisage an economy based on a broad spectrum of productive units from small enterprises (individual, cooperative and commercial) through medium and in some case large, but with the goal of deconcentrating as a matter of economic revival with a much broader and diversified base.

Policy imperatives

- Explicit incorporation of women in the definition of "historically disadvantaged persons";
- Radical and inclusive transformation of the economy requires a model that is not so fixated on competition as the sole relevant form of economic relations, but which also nurtures cooperation as the basis for economic relations and activity;

[8] Halpert, M.T. and Chappell, M.J. 2017. "*Prima facie* reasons to question enclosed intellectual property regimes and favour open-source regimes for germplasm" *F1000Research*, 6:284 (doi:10.12688/f1000research.10497.1)
[9] Halpert, M.T. and Chappell, M.J. 2017, cited above; Boldrin, M. and Levine, D. 2008. *Against intellectual monopoly*. Cambridge University Press, New York; Benkler, Y. 2006. *The wealth of networks,* cited above.
[10] Benkler, Y. 2006. *The wealth of networks.* cited above, p.342
[11] African Centre for Biodiversity 2015. "Heavy hands: Monsanto's control in South Africa", http://acbio.org.za/wp-content/uploads/2015/02/GMO-Monsantos-May2011.pdf
[12] It can be used repeatedly without the holder losing anything, as opposed to a 'rivalrous' good such as an apple which, once consumed, cannot be consumed again.
[13] Once the information is produced they are no further production costs for additional units, unlike a material product that has costs to produce another one. There may be distribution costs, but these are significantly lower for information than for material goods.

- ACB fundamentally disagrees with EDD's embracing of economies of scale (and hence concentration in some circumstances) not only as a necessity but as a virtue. ACB is of the view that concentration in the economy is inherently negative in the long term, and that it is in the public interest to cap the scale of production, and to decentralise resource ownership and use;
- We agree with the need for greater policy alignment, starting from a review of trade policy that is forcing domestic producers out of business, drawing wealth out of the country, and makes the task of redistribution, deconcentration and diversification of the national economy more difficult;
- Likewise, domestic support on land redistribution, agriculture, water and local and national markets need an overhaul to accommodate a more diversified and decentralised production base;
- ACB supports the amendments aimed at strengthening the powers of the competition authorities to proactively investigate and develop remedies to deconcentrate markets, especially market inquiries;
- ACB is of the view that divestiture is necessary for deconcentration but that it must be complimented with redistribution plans and reallocation and reuse of resources to suit a more decentralised, deconcentrated and socially just economic system.

Objectives of the amendments

The Competition Act recognises that past discriminatory laws have led to excessive concentrations of ownership and control in the national economy, and recognises the need to widen economic ownership and opportunity, especially small and medium enterprises[14] owned by "historically disadvantaged persons" as set out in section 3(2) of the Act[15].

The Bill seeks to advance the objectives of the Act through "creating and enhancing the substantive provisions of the Act aimed at addressing two key structural challenges in the South African economy: concentration and the racially-skewed spread of ownership of firms in the economy" (p.6). The primary concern the Bill seeks to respond to is that concentration in the economy leads to barriers to entry into markets that limit the economic activities of black enterprises (p.7). EDD highlights further negative impacts of concentration including on welfare through reduced competition, and its stultifying effect on innovation (p.7).

The Act sets out "public interest" goals defined in terms of efficiency, prices, employment, ownership and economic participation (p.6). There is a redress objective in this, but EDD also highlights the economic benefits of "harnessing of the skills, talents and productivity of all South Africans" (p.14). The emphasis is on race, as indicated in 3(2) of the Act on defining historically disadvantaged persons. ACB agrees that racial redress and justice, and equity in opportunity, are central to a transformative agenda in South Africa. At the same time we also call for the explicit incorporation of women in the definition of historically disadvantaged persons, with the obvious intersectionality between race and gender being a focal point (i.e. black women as a core constituency).

[14] As set out in the Schedule of the National Small Business Act 102 of 1996 as amended, which indicates sectoral thresholds on number of employees, annual turnover and gross asset value. We do not know but assume that these thresholds are adjusted for inflation and other factors over time.

[15] "In section 3 (2) of the Act, the term "historically disadvantaged persons is defined. This section states: "(2) For all purposes of this Act, a person is a historically disadvantaged person if that person—
(a) is one of a category of individuals who, before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race;
(b) is an association, a majority of whose members are individuals referred to in paragraph (a);
(c) is a juristic person other than an association, and individuals referred to in paragraph (a) own and control a majority of its issued share capital or members' interest and are able to control a majority of its votes; or
(d) is a juristic person or association, and persons referred to in paragraph (a), (b) or (c) own and control a majority of its issued share capital or members' interest and are able to control a majority of its votes."

The amendments seek to enable the competition regulators to scrutinise the causes of concentration, the racially-skewed patterns of ownership in the economy, and emphasises the need for tailored measures to deconcentrate markets (p.7). The Bill includes requirements for explicit consideration of concentration in mergers and abuse of dominance cases, as well as strengthening market inquiries and effective remedies. Supplementary measures are included to improve policy coherence and promote procedural and institutional efficiency within the competition authorities and in relation to external actors (p.7).

We agree with the broad objectives of the amendments, which seek to promote and facilitate wider economic participation through strengthening competition authorities' power to investigate and reduce concentration in the economy. However we also have some concerns about the restrictions imposed by the EDD's approach to competition and concentration in formulating the amendments. We will turn to these first and then go to the specific amendments.

Comments on competition and concentration

1. Competition

We understand that the Bill is specifically on amendments to the Competition Act. But we note EDD's uncritical adoption of competition as the only relevant economic relations in our society, with inter-firm competition unquestioningly viewed as the best guarantor of innovation, better quality, lower prices and economic growth. This is a deep debate on the role of competition in society that we cannot get into detail on here. However, in this context, ACB is of the view that radical and inclusive transformation of the economy requires a model that is not so fixated on competition as the sole relevant form of economic relations, but which also nurtures cooperation as the basis for economic relations and activity.

Even large scale commercial economic activity today is built fundamentally on complex cooperative relationships[16]. One example is that there are many firms as suppliers of intermediate goods and services into value chains. Another example of cooperative activities is internal vertical integration and supply chain management. Already long ago competition ceased to be the driving force of the large scale capitalist economy. In the United States already in the early to mid-20th century,

> "modern business enterprise took the place of market mechanisms in coordinating the activities of the economy and allocating its resources … The market remained the generator of demand for goods and services, but modern business enterprise took over the functions of coordinating flows of goods through existing processes of production and distribution, and of allocating funds and personnel for future production and distribution"[17].

These are essentially cooperative activities, and as such form the material and technical basis for a truly socialised economy. However they are shaped and controlled by large private economic interests with the power to dictate the terms of participation and distribution of value in supply chains. Value is appropriated and extracted through chain control and governance systems. As corporations become multi-nationalised and foreign owned, this value is extracted outside the country, making the tasks of redress and progressive and inclusive economic transformation at a national and regional level more difficult.

[16] Jorde, T. and Teece, D. 1990. "Innovation and cooperation: Implications for competition and antitrust", *Journal of Economic Perspective*, 4:3, pp.75-96.
[17] Chandler, A. 1977. *The visible hand: The managerial revolution in American business*. Harvard University Press, Cambridge, Mass. p.1

In practice this model has led to a concentration of resources. In agricultural biotechnology for example (as we have previously argued[18]), the extension of the IP regime to living organisms led to significant private sector interest in agricultural biotechnology R&D. Patents have been granted in the genetically modified (GM) seed sector for a range of breeding aspects, including tissue culture methods, gene introduction methods, the composition of the DNA construct and its effect on genes, selectable markers, associated regulatory sequences and novel promoters to methods of gene introduction[19]. Internationally, patents were also granted on new chemical formulations for agrochemicals, going back many decades. There are many different patents, sometimes thousands, on related products and processes and these continue to roll over in time. As some patents expire, other related ones remain in place and new ones are brought into being. If the lifespan of a patent or other IP right is 25 years or more, this can lock up information indefinitely. This prevents the body of knowledge from ever being finally being opened to public access, as is meant to happen at the expiry of a patent. Private ownership over this information prevents its sharing and use except on the terms of the rights holder in conjunction with the state. This IP regime has facilitated a rapid process of concentration in agricultural inputs, with mergers between biotechnology, seed and agrochemical companies that previously were distinct entities. This history is well documented[20], including in ACB submissions to the competition authorities. The model encourages economies of scale that reproduce ever more complex technologies that ever fewer large enterprises can produce. These become 'too big to fail' and seek special treatment on this basis.

In our submission to the Commission on the Bayer-Monsanto merger[21], we highlighted the existence of a dominant technological platform in biotechnology-seed-agrochemicals as an example where apparent competition in the market is restricted to a few large corporations that have the resources and scale to compete on the dominant platform. This has a double effect. On the one side, 'competition' internal to the technological platform is reduced through cross licencing, patent pooling and other means to prevent the complete freezing up of technological development. On the other side, any domestic producers including small enterprises who are not on the dominant technological platform (in this case biotechnology and agrochemicals) are marginalised so that consumer choice is reduced to a narrower band of available technologies driven by the dominant players. Unfortunately, the EDD explicitly embraces the resulting economies of scale not only as a necessity but as a virtue. Our comments on the Competition Amendment Bill must therefore be taken in the light of the limitations imposed by adopting competition as the start and end of economic relations in contemporary society.

EDD has the difficult task of identifying potential openings towards more radical transformation that are not already foreclosed by corporate and financial power. In this regard, the EDD's call for greater policy alignment is crucial. A number of multilateral agreements - including those in the World Trade Organisation (WTO) such as the General Agreement on Trade in Services (GATS) which forces open services markets to external companies; the Trade Related Intellectual Property Rights (TRIPs) agreement; and the Agreement on Agriculture (AoA) – structure the economy in such a way that so-called global competitiveness (but in reality underpinned by an unbalanced global trade regime, subsidies and other forms of inequality) pushes so-called 'inefficient' domestic producers out of business, often transplanting domestically produced goods and services with lower cost but often inferior quality external goods and services.

[18] ACB 2017. "Submission to the South African Competition Commission on Bayer-Monsanto merger", 13 March. ACB, Johannesburg.
[19] Dunwell, J.M. 2005. "Review: intellectual property aspects of plant transformation", *Plant Biotechnology Journal* 3, pp.371–384.
[20] See for example ETC Group 2015. "Breaking bad: Big ag mega-mergers in play. Dow + DuPont in the pocket? Next: Demonsanto?", *ETC Group Communique* #114; Clapp, J. 2017. "Bigger is not always better…", cited above.
[21] ACB 2017. "Submission to the South African Competition Commission on Bayer-Monsanto merger", 13 March. ACB, Johannesburg.

Any effort to deconcentrate the economy and widen and diversify the production base without altering global trade and economic relations are doomed to failure. This does not mean cutting external ties. It means considering options for protecting and strengthening domestic small and medium scale production. Likewise, domestic support on land redistribution, agriculture, water and local and national markets need an overhaul to accommodate a more diversified and decentralised production base.

2. Concentration

Efforts to deconcentrate the economy are at the centre of the amendments. ACB is in support of this. However EDD hedges on the question of concentration. It starts off by indicating high levels of concentration in our economy, and raises some concerns, mainly focused on barriers to entry especially for small enterprises and firms[22] owned by HDPs, and on the potential negative impacts on innovation. But then there is a lot of discussion on concentration being a necessity and even good in a globalised economy where economies of scale are paramount. So the overall objective of the amendments is to support deconcentration and greater access, but not in all situations.

According to EDD "concentration refers to the extent to which a small number of firms account for the bulk of sales in a given market" (p.7). Thresholds being used by EDD include 'highly concentrated markets' using the Hirschmann-Heirfindahl Index (HHI), and Section 7 of the Act which defines a firm as dominant if "(a) it has at least 45% share of that market; (b) it has at least 35% share, but less than 45% share, of that market, unless it can show that it does not have market power; or (c) it has less than 35% share of that market, but has market power" (p.15).

By these measures, EDD has found the South African economy is characterised by "unusually high levels of concentration", in part due to strategic barriers to entry created by incumbents as well as low rates of business formation and as a result of mergers and acquisitions (p.7). EDD cites research conducted by the competition authorities that found "relatively high" economic concentration in many markets in South Africa as a result of racially-skewed historical development and isolation during apartheid. These gave rise to conglomerate firms and suppressed black producers and enterprises (p.9). An HHI score of 1,500 is considered un-concentrated, 1,500-2,500 is moderately concentrated, and over 2,500 is highly concentrated. With an HHI of 2,861 food and agro-processing is the fourth most concentrated economic sector in South Africa behind communications technologies, transport and pharmaceuticals (p.10). Concentration and racial exclusion often overlap (p.10). EDD says there is need to look at the causes of concentration and to deconcentrate markets, with far-reaching and targeted interventions to address concentration (p.7).

EDD highlights a number of negative effects of concentrated markets in "economic theory" including (p.9):

- Monopoly rents and maximising profits through higher prices that impede production, employment and investment;
- Lower incentive to innovation and investment because of lack of competition;
- Higher levels of income inequality and narrower ownership structures;
- Susceptibility to collusion (this is already dealt with in the existing Act on abuse of dominance or collusion).

The bracketing of these effects under "economic theory" suggests that EDD does not necessarily accept these arguments. In fact, EDD's main focus is on barriers to entry to new and emerging competitors, including through regulatory requirements, collusion and excessive and predatory pricing by dominant companies (p.10). However, elsewhere EDD says "the outlawing of concentration would not necessarily

[22] Firms are defined as including a person, partnership or trust in the Act (section 1(1)(ix))

induce entry or lower barriers to entry for firms" (p.12). So on the one hand, barriers to entry are a result of concentration, but on the other hand de-concentrating will not necessarily lower barriers to entry. It is not clear how these statements fit together.

EDD then shifts to say "it must be emphasised that, while concentration often imposes significant drawbacks on the economy and society, it may also bring benefits" (p.10). Unfortunately here EDD bows to corporate hegemony, and the fingerprints of corporate lobbies and their "legal and economic experts" (p.7) can be seen here.

EDD's argument essentially boils down to economies of scale, inter alia to use advanced technologies for production, distribution and sales; and to bring down cost per unit (potentially to the benefit of customers). Economies of scale and a significant presence in the domestic economy are considered necessary as a launch pad to global expansion as well as to compete against imports (pp.9-10). According to EDD:

> "economic concentration is a necessary feature in certain markets in which company size and scale of operation is critical and where significant economies of scale are accordingly required and realised … In a small domestic market this will lead to market concentration … concentration alone is not condemned in competition policy globally because scale is a desirable economic feature, particularly in mid-sized economies with export ambitions" (p.12).

Similar considerations are to be applied to markets characterised by unique or expensive technologies (p.12). EDD then goes on to say that in such conditions "outlawing of concentration would then have negative consequences for consumers" and "may also introduce inefficiencies into the markets, raising costs for consumers" (p.12). In the first place, costs are measured here only in terms of price, without consideration of the costs and benefits of employment, broad-based productive enterprise or welfare, not to mention rising ecological concerns. If "inefficiencies" in comparison with cheaper imports also lead to more people actively involved in economic activity and increasing their skills and knowledge, how does the trade off work? Secondly, the approach hangs on the question of what size and scale is "critical". Here we should keep in mind the long term negative consequences of 'too big to fail' firms and their 'critical' role in keeping the economy and society functioning (but in a particular pattern which favours their private interests over the public interest).

In these statements EDD clearly shows itself in favour of a continuation of a neoliberal trade regime that is in practice is stacked against domestic producers and facilitates the externalisation of wealth and capital from South Africa. Why is large-scale export orientation an objective of policy in our current context of concentrated economic wealth and the limited benefits such a path can accrue to "historically disadvantaged persons"? SABMiller, Anglo American, Old Mutual and others leaving South Africa has had no economic benefit to the South African economy apart from to shareholders whose stocks are valued in foreign currencies. Otherwise they now serve to siphon wealth offshore. In what way is this a 'benefit' of concentration for the country as a whole, and in particular for HDPs?

Similarly with economies of scale for effective competition against imports. According to EDD, "outlawing concentration … may simply result in imports of products replacing inefficient local, smaller producers" (p.12). This is in the context of a liberalised trade regime that permits the entry of cheap international goods even where domestic producers can feasibly produce. What determines 'efficient' production globally? The whole trading and domestic support regime under the WTO skews the playing field and allows large producer subsidies in the core capitalist countries while forcing open domestic markets in the peripheries. Private IP and control over technology is obviously skewed globally. This is patently unjust.

While EDD may recognise that this is the reality of our current situation, the Department chooses to make a virtue out of this condition. This unjust and unequal regime is then used to justify further concentration and economies of scale, and hence further marginalisation of smaller enterprises. A key issue is to revisit trade policy to provide more protection for nurturing domestic production. A similar circular logic is again employed with regard to "unique or expensive technologies". The very IP regime which allows for concentrated ownership of technologies and for their higher prices because of barriers to research that requires access to tools, enabling technologies, data and materials under proprietary control[23] is used to justify the necessity of further economies of scale.

"The Bill accepts that measures to contain concentration must take into account these cases, where the socio-economic benefits of achieving economies of scale outweigh the costs of concentrated markets" (pp.9-10). There is a question of how socio-economic benefits and concentrated markets will be measured and compared to establish which "weighs" more. The likely outcome is that companies in the concentrated core will claim large scale employment as a socio-economic benefit that justifies concentration. This is a circular logic because the only way they are able to employ so many people is because of their concentrated size. It is generally accepted that large-scale corporations employ comparatively fewer people per unit of output than smaller enterprises, and also eliminate many smaller enterprises. These are pointed to as a success of productivity and efficiency, even with these antisocial effects. In this sense, these concepts begin to run counter to the "transformative public interest" goals espoused by EDD.

In contrast, and as indicated in the discussion above and in our other publications and submissions, ACB is of the view that concentration in and of itself leads to undesirable long term outcomes in terms of welfare, economic participation, freedom and choice. We argue it is in the public interest to cap the scale of production, and to decentralise resource ownership and use.

EDD's indicates there was consideration of a threshold at which deconcentration investigations and interventions would automatically be triggered (p.12). EDD dismisses the idea of a threshold because of the complexity of "setting of thresholds of concentration in multiple specific product and geographic markets, which would have to be based on a prior detailed analysis of each market" (p.12). EDD rules it out because of the institutional capacity that would be required to implement it. This is an instance of underfunded regulatory authorities facing well-resourced corporate interests.

However, the notion of a threshold remains. As indicated earlier, EDD and the competition authorities already have threshold measures they use (e.g. HHI and Section 7 of the Act). The market inquiry mechanism permits for proactive market inquiries (precisely the "detailed analysis of each market" EDD indicates as necessary) and these can be used to investigate where a deconcentration threshold in a particular sector may be. ACB is in favour of the use of the market inquiries for this purpose, with public participation and efforts at deconcentration.

Priorities in the proposed amendments

As indicated above, within the limited context of competition as the framing for all economic relations, and some disagreements on the economic and public interest effects of concentration, we have the following comments to make on the proposed amendments themselves.

[23] Benkler, 2006. op cit. p.349

Five priorities for the amendments were established following consultation with "legal and economic experts" (p.7):

- Strengthen existing provisions on prohibited practices (collusion, abuse of dominance and price discrimination) and more consideration given to these features in merger proceedings, including addressing creeping concentration and horizontal coordination between competitors through common shareholdings;
- Special attention to the impact of anti-competitive conduct on small businesses and on firms owned by HDPs;
- Strengthen provisions relating to market inquiries including effective remedial actions;
- Promote the alignment of competition-related processes and decisions with other public policies, programmes and interests;
- Enhance administrative efficacy of competition regulatory authorities.

1. Collusion, market abuse and price discrimination

Collusion and market abuse are covered in existing Act but are limited. "The existing Act does not enable the Competition Commission or the Tribunal to address concentration, but only collusion and market abuse" (p.11). The objective is to strengthen these aspects of the Act as well as go beyond them in the form of the market inquiry mechanism.

"The amendment will enhance the prohibition of cartel activity in concentrated markets, which in turn, creates opportunities for entry into and expansion in these markets" (p.14). This does not respond to the existence of a concentrated core in and of itself, which sets the economies of scale at which it is feasible to operate. Whether this core is a single entity or collaborating entities in legal, semi-legal or illegal ways does not change the fundamental structure of the economy, important as it is to prevent collusion and market abuse. EDD argues the mere entry of other players into the market will have a deconcentrating effect (p.14). This is illogical. First, ending collusion in the corporate core does not necessitate easier access into the market by smaller players. Second, entry of smaller players into the market does not necessarily deconcentrate the core but could also bring greater competition between smaller players in the periphery. This in turn can lead to the results of competition and the relentless logic of economies of scale, concentration over time, in the periphery as well. There is evidence of this in recent work on informal retail from the Sustainable Livelihoods Foundation based in Stellenbosch, for example[24].

On abuse of dominance (pp.14-17), proposed amendments include consideration of impacts of excessive pricing not only on consumers but also on businesses; guidelines on how to determine excessive pricing; flexibility on benchmarks in determining predatory pricing (i.e. undercutting to remove competition); and the burden of proof to be placed on a firm to show pricing is reasonable after a prima facie case against it has been established by the Commission. When determining the penalty for abuse of dominance, the Tribunal must take into account the impact of contraventions on small businesses and firms owned by HDPs. On price discrimination by a dominant firm (s9 in the current Act), the proposal is to expand the prohibition to include price discrimination of dominant firms against suppliers. Again, the burden of proof will be on the dominant firm to show that price discrimination "is not likely to have an effect of preventing or lessening competition" (p.17). ACB supports these amendments.

For all of these prohibited practices, special attention must be paid to the impacts on small businesses and firms owned or controlled by historically disadvantaged persons. Exemptions may be granted based on

[24] Sustainable Livelihoods Foundation 2015. "The informal economy of township spaza shops". SLF, Stellenbosch. http://livelihoods.org.za/wp-content/uploads/2015/05/The-Informal-Economy-of-Township-Spaza-Shops-.pdf

entry, participation in and expansion of these businesses. Exemptions are expanded to include the economic development of an industry designated by the Minister (pp.17-18).

2. Merger control

Amendments to s12A of the Act (as amended by s6 of Act 39 of 2009) (clause 7a of Bill) seek "to explicitly create public interest grounds in merger control that address ownership, control and the support of small businesses and firms owned or controlled by historically disadvantaged persons" (p.19). Public interest is also elevated to equality with competition concerns when deciding on merger approval.

"The proposed amendments also seek to prevent creeping concentration, and the erection and maintenance of strategic barriers to entry, and the regulation of conditions under which a merger was approved" (p.18). Amendments to s12A and 12B of the Act (clauses 7b and 8 of the Bill) require disclosure of merger activities in the past three years to identify creeping concentration. They also propose mandatory disclosure of cross shareholdings and directorships, and changes in control over past three years, with express scrutiny of these relationships during merger proceedings (p.18). The amendments propose the "identification of measures to ameliorate any identified and credible concerns" (p18).

ACB supports the amendments on merger control, especially with active public participation, and we will support their use especially with regard to private IP rights and financial interests.

3. Market inquiries

Proposed amendments to s43A of the Act (as amended by s6 of Act 1 of 2009) (clauses 18-24 in the Bill) "provide for a flexible and responsible evaluation of concentration, especially through the market inquiry mechanism, and on that basis can develop evidence-based and reasoned measures to promote more developmental market structures" (p.11) … "The package of amendments … envisage that market inquiries will become the chief mechanism for analysing and tackling the structural problems in a market" (p.19). Outcomes will include measures to address concentration and transformation of ownership. Inquiries will be used to investigate the general state of competition in a market rather than the conduct of a specific firm. This differs from complaint inquiries which focus on a specific firms or firms.

s43A (clause 18 of Bill) provides for three categories of market features that may be relevant to a market inquiry: a) market structure; b) observed market outcomes; and c) conduct related to the market (whether suppliers, customers or firms) (p.19). s43A 3(b) provides a non-exhaustive list of market outcomes including prices, concentration, customer choice, quality of goods and services, innovation, employment and entry or exit from the market. The current section 10A on prohibition or regulation of complex monopolies is integrated into the list of market outcomes that may be considered for investigation (p.20).

A new test for market inquiries inserts "adverse effect" in place of the current "substantially prevents or lessens competition" (p.20). This lowers the threshold to enable the intervention of competition authorities. The Commission is empowered to enact remedies and prevent adverse effect on competition, including adverse effects on small businesses and firms that are structurally locked out of the market as a consequence of market structure and concentration. The Tribunal remains as an appeal mechanism (p.20). Amendments to s43C (renumbered 43E) and 43D of the Act (clauses 20, 21 and 22 in Bill) propose that the Commission must expressly decide on the specific issues in every market inquiry. The inquiry must consider whether there are structural features with an adverse effect on competition.

The inquiry must say whether the Commission can impose a remedy and whether another regulator is responsible for further action. s43D (clause 21 in Bill) proposes that if the Commission can impose a

remedy, it is obliged to. Remedies are provided in clause 22 of the Bill amending s43E (amendment of old section 43C). They include existing ones in s60, including divestiture orders s60(1)(iv) in the existing Act. The Commission is to recommend divestiture, with the Tribunal to take the decision as a safeguard (p.21). The inquiry must give reasons for remedies identified (p.21).

ACB is of the view that divestiture is necessary for deconcentration but that it must be complimented with redistribution plans and reallocation and reuse of resources to suit a more decentralised, deconcentrated economic system, sector by sector, and across the economy as a whole. The sale of divested units to black commercial owners locked into existing supply relationships is not a structural change. In order to realise a structural change, de-concentration must lead to a fragmentation of centralised ownership and control and its dispersal in the society. This will produce a different economy, and EDD and the competition authorities are in a position to provide some systematic movement in this direction.

s43G of the Act (clause 24 in Bill) on participation and representations to market inquiry is amended to include those directly involved as well as other persons "who would, in the opinion of the chairperson of the inquiry, substantially assist with the work of the inquiry" s43G(1)(f)(iii).

Appeals to the Tribunal will be limited to the existing record used by the Commission and not a reconsideration or replication of the inquiry. The aim of this amendment is to reduce delays and litigious challenges to the process (p.21).

Overall we support the strengthening of the market inquiry process to facilitate actionable decisions on deconcentration of the economy and diversification of the base.

4. Policy alignment

EDD argues there is current weak policy alignment. There was discussion on centralisation of decision-making in the Executive, but this option was rejected on the basis that it would lead to a "dual approval system" (two centres of power), centred on the regulator on one hand and the executive on the other which will cause confusion, open opportunities to game the system, and produce delays. Separation of processes into competition and public interest issues is not considered appropriate as these need to be dealt with together as interconnected. Finally, EDD says that political decisions are "not subject to transparency and engagement that would be the case in a public regulator-led process" (p.22). Theoretically ACB is of the opinion that elected public representatives should have ultimate authority over regulators, but we also favour decentralised decision making and recognise the longstanding capital-state nexus that has systematically undermined democratic political representation. On this question, our main interest is that there is space for active and meaningful public participation in processes and decisions and we will remain vigilant in defending and strengthening these.

Ultimately EDD proposes that decision-making remains with the competition authorities but with space for greater participation by the responsible Minister, in decision-making, consideration of policy-related matters, better integration of policies across the state, and linking political and regulatory issues and processes more closely (p.22). Amendments to s43B of the Act (clause 19 in the Bill) give the Minister power to establish a market inquiry; s17 of the Act (clause 11 in the Bill) grants the Minister and the Commission the right to appeal against a decision of the Tribunal; and amendments to s45(3) (clause 26 in the Bill) gives the Minister the right to access confidential information but "legitimate commercially-sensitive information affecting a company" must be kept confidential (p.23). We do query how this is assessed and by whom. It will most likely be the "legal and economic experts" once again. Ultimately we hold the position that trade secrets are a form of exclusive ownership of IP and are not conducive to the long term development of a cooperative economy.

5. Improving the efficacy of the competition institutions

The objectives of the amendments under this heading are to enhance the capacity of the Commission and Tribunal to streamline processes and provide functions associated with the proposed amendments (p.23). Aside from the amendments that expand and clarify the role of Commission in market inquiries, amendments to s21A of the Act (clause 13 of the Bill) empower the Commission to gather information and study the impact of earlier decisions of the competition authorities. In light of rising seed prices following the biotechnology-seed-agrochemical mergers over the past decade, we fully support amendments which allow for such investigations. Amendments to s49E of the Act (clause 28 of the Bill) provides a leniency policy which gives effect to case law to encourage and protect whistleblowers who alert authorities to cartels based on full disclosure (p.24). Amendments to s44 and s45 of the Act (clauses 25 and 26 of the Bill) aim to streamline processes for determining access to confidential information (p.25).

Amendments also seek to regulate the question of appeals from the Competition Appeal Court (CAC) and prevent competition-related matters from being determined in multiple legal forums (p.23). Referrals of competition-related matters from the High Court to the Tribunal are included (p.25). The Act is brought into line with amendments to s168 of the Constitution which allows for appeals directly to the Constitutional Court (p.25).

Concluding comments

Overall, ACB is in support of the proposed amendments, notwithstanding some broader disagreements on the economic trajectory of South Africa, and the putative 'benefits' of concentration in some circumstances. We will seek to find ways to engage with the competition authorities to support market inquiries on concentration in the fields and sectors in which we work in particular.

We would like to note our concern with the public participation process. The people of the country are generally excluded from the discussion. This allows corporate lobbies to redirect efforts to deconcentrate markets, and to seek exemptions based on spurious grounds. The amendments were opened for comment in December when many people are spending time with their friends and families. This has given effectively less than 30 days for public comments. We do not believe this is reasonable to get proper public participation.