



## Goals of Economic Regulation: insights and experience from South Africa

Simon Roberts

CCRED, University of Johannesburg and CMA

[www.competition.org.za](http://www.competition.org.za)

Comments in personal capacity

CCP, UEA

16 September 2019

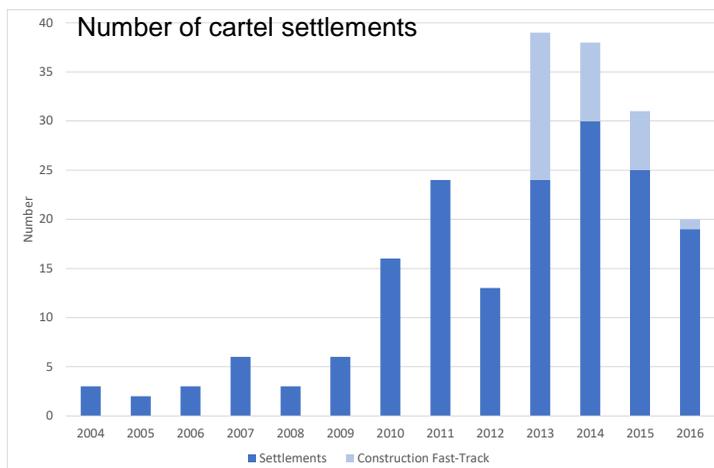
### South Africa as a poster child for the regulatory state?

- Markets at heart of 1994 democratic project...
  - competition law as the *market fix* for highly concentrated, unequal economy, being liberalised
  - regulators as governance for utilities
- Competition Act 1998, in force 1999; amended 2018
  - Need for stronger competition enforcement identified repeatedly thereafter in reviews of economy
- Adopted international 'best practice'
  - Independent institutions, with strong legal checks on their action
- Outcomes?
  - Liberalised, internationalized economy; high concentration persists
  - Poor its growth, productivity, employment, inequality
  - Where to now?

## Competition record

- SA held up as success to competition law
- Mergers
  - Pre-merger notification above thresholds; SLC & public interest
  - Important decisions, including international mergers
- Cartel enforcement kick-started by CLP coupled with proactive enforcement (prioritization, screening)
- Abuse cases: very few, long and drawn out cases
- What is the job of competition law and policy?
- Inquiries: banking, healthcare, data prices, supermarkets, transport

*2003 OECD review found focus on mergers appropriate as companies broadly compliant, and then....*



...collusion 4.0?

What about new competitors?

Meetings in churches, rugby stadiums, hotels, on fishing trips.....

*'We had to stop irresponsible price-cutting'*

*'...the market had to be managed'*

*'Nobody is harmed..... except for customers'*

Cartels as theft...

... perception is enforcement has not made a difference



## Abuse of dominance

- Abuse conduct:
    - Excessive pricing
    - Refusing access to essential facilities
    - exclusionary abuses
    - Price discrimination prohibited where anti-comp effect (subject to explicit justifications)
  - Tests:
    - effects demonstrated on consumers and/or substantial foreclosure
    - efficiency defence
    - excessive price against economic value, as price in 'long run competitive equilibrium'
- [NB 2018 amendments]
- 25 abuse cases referred to Tribunal
  - 18 of these cases involved previous/ current SOCs (13) or sectors with prior state support (5)
  - Tribunal decided 21 cases; in 11 of which found abuse
  - 4 findings were overturned; 2 appeals pending
  - Conclusive finding of abuse in 5 (also settlements, some substantive)
  - Penalties for SAA, Telkom, Foskor – state-owned!
  - Why so few? dangers of over-enforcement? ('don't try this at home')
  - Naïve pigeon-holes & tests
  - Very long legal processes
  - Exclusion of potentially effective competitors?

## Energy regulation and energy policy

- Multiple failures – disarticulation of policy and regulatory regime
- Legacy of unsustainable cheap electricity with sweetheart deals for heavy industry
  - Failure to invest; price too low for IPPs
  - Delayed over-compensation: power gen at inflated prices
  - Massive price increases from 2008; relative prices not addressed
- Renewable Energy IPP programme (outside regulation & energy policy – led by Nat Treasury)
  - Successive rounds - reduced prices as learning took place
- Now?
  - Integrated utility effectively bankrupt due to inflated investment costs in coal stations
  - Climate change requires major shifts

## Telecoms regulation

- Telecommunications services corporatised as Telkom in 1991
  - Monopoly on fixed line; 50% owner of Vodacom
- 30% strategic equity stake to SBC and Telekom Malaysia in 1997
  - Monopoly continued to 2002, on basis of universal service targets
- SA Telecommunications Regulatory Authority established in 1996
  - price cap of basket of services, version of CPI-X formula
- Second National Operator delayed effectively to 2006
- Competition cases against Telkom over decades
- Mobile: Third operator licenced in 2001
- Spectrum licencing delayed; along with digital migration
- Proposals for Wireless Open Access Network
  - Extensive litigation

## Rethink? regulation 'over-sold'

- 'baby and the bathwater'?
- Address markets and democracy – workable solutions which can command broad support
- Paradox that independent regulatory framework provided 'cover' for poor governance?
- ...and 'hospital passes' to competition regime
- Failure to grapple with relative prices & economic structure
- Static and dynamic? - investment decisions, new business models, implications of climate change?
- Trust in markets? Homo economicus running amok?
- Regulation as *part of* the 'political settlement', not substitute for policy agenda

## Need to create competitive rivalry to achieve inclusive growth...

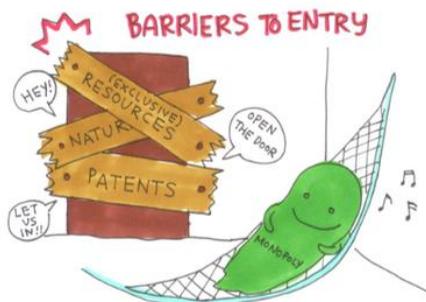
- Performance-based competition, stimulating investment in capabilities, learning; rewarding effort & creativity
- Participation and share of returns (ownership and control *matter*)
- But: inherited structure with advantages and barriers which are embedded

## ... but barriers to entry limit rivalry, protect insiders – what are these barriers?

- History matters, are first-mover advantages, consumers are sticky, market imperfections in finance...
  - scope for strategic actions by incumbents, to skew the market
- Routes to market are very important
- Consumer inertia and switching costs
  - Importance of distribution, retail, building brands, display space
  - Network industries and effect
- Control of infrastructure
- Scale economies
- Implications? Patient capital and time to build capabilities
- Vertical integration raises costs where requires investment at different levels (e.g. LLU in telecoms)
- Learning? Capabilities and internal practices & knowledge

11

## Broad-based black economic empowerment - changing or reinforcing political settlement?



But has not had intended effects

- 1 Enhanced opportunities for individuals, not groups
- 2 Little to no structural change or redistribution of productive resources
- 3 Moves debate from a political to a managerial terrain (focus on codification, measurement and compliance)
- 4 This shifts responsibility towards a generic 'system' run by accountants, technocrats, auditors and certifiers which implement but bear no responsibility
- 5 System so complex that it legitimised 'outsourcing' of management from state to private sector, weakening state

### **Findings from studies that huge economic benefits from entry and effective rivalry**

- Network industries (banking, telecoms)
- Supermarkets
- Agro-processing
- Fast-moving consumer goods
- Airlines

Research suggested a five-pronged solution for SA

- Regulate *for* competition and rivalry (in network industries)
- Amend Competition Act (now happened)
- Finance for risk and rivalry
- Open routes to market, e.g. supplier development
- Reorientation of industrial policy

Key roles for taxation, education, etc