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### **THE INSTITUTIONAL AND POLICY FRAMEWORK FOR REGULATION AND COMPETITION IN SOUTH AFRICA: A PRELIMINARY MAP**

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# **THE INSTITUTIONAL AND POLICY FRAMEWORK FOR REGULATION AND COMPETITION IN SOUTH AFRICA: A PRELIMINARY MAP**

## **INTRODUCTION**

South Africa is a country characterised by inequity, inequality and poverty. The public and private sectors have shown a commitment to the need for change and have also implemented policies and services to address these burning issues in the country. There is a need to balance the desire to ensure centralised control, to ensure an even-handed approach to policy implementation and service delivery to all sectors of the population, focusing on the areas of greatest need. At the same time, this centralised approach must be balanced with the need for growth in the economy through a focus on competition and competitiveness. This paper attempts to map the institutional and policy framework and the context from which it has emerged since the demise of the apartheid state.

## **THE LEGAL FRAMEWORK FOR COMPETITION AND REGULATION IN SOUTH AFRICA**

The transition to democracy in South Africa in 1994 brought fundamental changes to the form and function of the state and the accompanying institutional and policy framework. Before the introduction of the new dispensation, parliament was considered to be sovereign. This changed in 1994 when South Africa became a constitutional democracy after incisive debate amongst a wide-ranging group of role-players in the socio-political-economic discourse and concluded in the constitutional negotiation process (CODESA).

Important to the legal context of regulation and competition in South Africa is the common law principle flowing from Roman Dutch law that “the law ought to be just and reasonable, both in regard to the subject matter, directing what is honourable, forbidding what is base; as its form, preserving equality and binding all citizens equally”(Voet, 1729: 1.3.5.). This implies that the law in general and legislation in particular must comply with the criteria of reason, generality, consistency, equality, certainty and fair process.

The Constitution of the Republic of South Africa (Act 108 of 1996) “is the supreme law of the Republic. Law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled” (The Constitution, 1996: section 2). The cornerstone of democracy in South Africa is the Bill of Rights (The Constitution Chp.2: section 7-39) which “applies to all law, and binds the legislature, the executive, the judiciary, all organs of state” and “binds a natural or juristic person”. The Bill of Rights applies to, and sets out the rights of all people in the country in some detail. Such rights relate to Equality (section 9), Freedom and Security of the Person (section 12), Freedom of

Religion, Belief and Opinion (section 15), Freedom of Association (section 18) and Labour Relations (section 23). It is also at this level of the legislative framework in South Africa that the first examples of regulatory authorities emerge in the form of various commissions and authorities established to evaluate and monitor certain of the issues and themes arising from the Bill of Rights.

It is important to briefly refer to specific legislation, enacted in terms of the Constitution, and relating to access to information and administrative justice. The legislation promoting access to information (Act 2 of 2000) was enacted “to give effect to the constitutional right of access to *any* information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights ...”. Coupled with this, is legislation promoting administrative justice (Act 3 of 2000) that deals with the right of a person “to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action ...”. The preambles of each of these laws refer to transparency, accountability and (in the case of the latter legislation) openness. It is clear that these two laws can, and will have a fundamental effect on the manner in which proceedings relating to regulation and competition will be conducted.

One must, when setting the legal framework, examine a further concept, namely that of governance. Governance is fundamental to the process and conventions of regulation and competition. It is however important to draw a distinction between the various models of governance of which two, namely the Rechtsstaat and the Public Interest models are of particular interest to South Africa (Polit & Bouchaert, 2000:53).

The Rechtsstaat Model views the state and its organs as the central integrating authority within society, with its essential focus the predominance of the Constitution and the preparation, promulgation, and enforcement of laws by Parliament. A strict adherence to the law, the following of precedent, legal correctness at all times and legal/administrative controls are further characteristics. France and Germany fall within this Rechtstaat category.

The Public Interest Model is followed in the so-called “Anglo-Saxon” states such as Australia, New Zealand and the United Kingdom. According to this model, the state plays a very subdued and restrained part in the ordering of society. Government (often dismissed as “Big Government”) is considered a “necessary evil”, while Ministers of state and officials are constantly held up to public scrutiny and account.

The question must then be rightly asked what was, and what is the situation in South Africa? It is clear, given the definition quoted above, that the “old” South Africa showed some characteristics reminiscent of a Rechtsstaat, albeit in a degenerate form. The socio-political-economic controls

referred to *infra* were such that, the legal and legislative system in place at the time created very little room for individuals, organisations and institutions to reflect any new and changing circumstances and situations.

The prevailing situation in present day South Africa, based upon the supremacy of the Constitution, and with a strong role for Parliament, reflects a sharp leaning to the Rechtsstaat. It is however interesting that echoes of the Public Interest Model are detectable in the South African legislative landscape that will have an increasingly important role to play in the areas of regulation and competition in the country in the future.

The reform of competition law in South Africa came to the fore in 1998 in response to the publication of a policy document the year before (Proposed guidelines for Competition Policy, 1997). The preamble to the new legislation (Competition Act, Act 89 of 1998) states (in part) that “credible competition law, and effective structures to administer that law, are necessary for an effective functioning economy” that will “create greater capability and an environment for South Africans to compete effectively on the international markets”. This will lead to the regulation of the “transfer of economic ownership in keeping with the public interest” and the monitoring of “economic competition”, and provides for the establishment of regulatory bodies.

It is apposite to refer to the case law and precedent that has already begun to emerge in South Africa, especially following the promulgation of the Competition Act. Amongst the many cases dealt with by the [Competition Tribunal](#) are: ISCOR Limited & Saldanha Steel (Pty) Ltd, Shell South Africa (Pty) Ltd & Tepco Petroleum (Pty) Ltd, Nestlé (South Africa) (Pty) Ltd and Dairymaid-Nestlé (Pty) Ltd, Chevron Corporation and Texaco Inc and Siemens Aktiengesellschaft AG and Atecs Mannesmann AG. As can be seen from this list (which is by no means exhaustive), there are a number of well-known international companies and organisations that have utilised legal processes to ensure fair and equitable competition in the corporate environment in South Africa. Many of the industries that have been the subject of adjudication in the [Competition Commission](#), the Competition Tribunal and the Competition Appeal Board are located in arenas that are highly regulated by the state and that are subject to a high degree of state control and, organization such as the petrochemical, pharmaceutical and banking industries, to name but three.

It is important to remember that South Africa, as a member of the international economic and financial community, is also subject to international conventions and agreements that set a particular framework for regulation and competition. South Africa is a signee or member of a wide variety of organisations and institutions that, in many if not most cases, imply regulation and/or competition rights elements and responsibilities with which the country must comply. Provision is also made in

the Constitution that international agreements, customary international law and international law are binding on the Republic of South Africa, unless inconsistent with the Constitution or an Act of Parliament (The Constitution, 1996, Chp.14: section 231-232). It is important for South Africa to appreciate the multilateral trade implications of competition law and policy, because the interpretation, application and enforcement of South Africa's competition law is bound to have international implications. At present, there are no legally binding multilateral disciplines on competition policy within the [World Trade Organisation \(WTO\)](#) framework. There are, however, many provisions in various [WTO agreements](#) that have a direct impact on competition policy and of which any national competition law and authority must take account.

## **REGULATION AND COMPETITION IN SOUTH AFRICA: THE INSTITUTIONAL FRAMEWORK**

The fundamental changes to the form and function of the state in 1994 had a dramatic impact on the contours of the institutional landscape. A brief reference to some of the historic driving forces and constraints prior to 1994 on the evolution of regulatory institutions will serve as background for a description of the post-1994 situation.

Prior to 1994, the previous South African regime, like many governments elsewhere, came increasingly under severe resource constraints. Specifically in the 1980s privatisation and the off-loading of state assets were considered the appropriate policy responses. However, apart from becoming official policy in 1987 (White Paper on Privatisation & Restructuring Policy, 1987), and except for the contracting out of certain government services, the privatisation drive had lost some momentum by the beginning of the 1990s and was eventually put on hold during the period of constitutional negotiations in the period immediately prior to the advent of the new dispensation in 1994. The [African National Congress \(ANC\)](#), suspicious of the then government's approach to privatisation and the possible hidden agenda of selling the family silver before a new government could come to power, effectively put a halt to these initiatives.

The result was that only one (Isacor, a national steel parastatal) of the five state institutions that had originally been earmarked for privatisation was eventually privatised, while corporatisation policies, according to which government retained ownership of state assets, were successfully adopted for others. The South African Transport Services (SATS) was for example transformed into a public company (Transnet) and the erstwhile Department of Post and Telecommunications into two public companies (Telkom and the South African Post Office respectively). The only other noteworthy development during this period was the inception of the abolition of the agricultural control boards (institutions setting prices of agricultural products and controlling marketing channels). Certain of

these institutions have transformed themselves into producer or shareholder-owned marketing companies. However, although little institutional change took place on the regulatory front during this period, vast change was being negotiated in the constitutional arena.

The establishment of constitutional democracy in South Africa in 1994 has brought with it a restructuring of intergovernmental relations and a redefinition of the social and economic regulatory responsibilities of the different spheres of government as delineated in the Constitution of 1996. All government action is governed by the Constitution that establishes the regulatory competence of the different spheres of government. The broad contours of the institutional regulatory map are made up of institutions in the national, provincial and local government spheres. These distinctive, interdependent and interrelated institutions each have their own legislative and executive capacities and accompanying regulatory functions.

At national level, Parliament (consisting of two houses, the [National Assembly](#) and the [National Council of Provinces](#)) is the principal legislative body with regulatory and control functions relating to the President and the Cabinet. It controls the regulatory performance of all administrative institutions. In turn, the [Constitutional Court](#), as the highest court in the country dealing with constitutional matters; exercises control over (amongst other aspects) the constitutionality of the actions of Parliament. Constitutional democracy is strengthened and supported by a number of institutions. For example the [Human Rights Commission](#), the [Commission for Gender Equality](#) and the [Independent Electoral Commission](#), all established in terms of the Constitution.

A diverse population of organisational forms covering the full spectrum from national government departments (30) (e.g. [Department of Labour](#) in the occupational health and safety sector) on the one hand, to miscellaneous statutory control bodies and regulatory councils (e.g. the [National Gaming Board](#), the [Independent Communications Authority of South Africa](#) and the [Competition Commission](#) to name a few) on the other are responsible for social and economic regulatory functions in the national sphere. As far as regulation within government is concerned, the South African institutional landscape is not unique and follows the pattern found elsewhere with institutions such as public audit bodies, professional inspectorates, ombudsman agencies and central agency regulators (e.g. the Auditor-General, the Independent Complaints Authority, the Public Protector and the Public Service Commission).

This pattern is more or less replicated in the provincial sphere of government within the nine provincial administrations and in the local sphere within the 284 municipalities. The new local government dispensation that also provides for municipal service enterprises and local public-private partnerships will probably lead to the creation of even more regulatory authorities at local level,

adding to the existing myriad. The complexity of the regulatory landscape both in terms of the number of institutions involved and diversity of organisational type is probably higher at this time in the national sphere than in the other two spheres of government.

With increasing number, extent and complexity of regulatory activities, some institutions such as state departments and other public institutions with executive functions have been given authority to extend the provisions of acts by proclamation, regulation and other binding instructions. This has led to the establishment of numerous administrative tribunals with judicial powers within the frameworks of the relevant acts.

As far as the economic regulation of business is concerned, the [\*Competition Commission\*](#) plays a crucial role in investigating anti-competitive conduct, the assessment of the impact of mergers and acquisitions on competition and the monitoring of competition levels and market transparency in the economy. The Competition Commission is an independent body. Its decisions may be appealed to the [\*Competition Tribunal\*](#) and the *Competition Appeal Court*.

With the new constitutional framework firmly in place, the new government has proceeded very cautiously with privatisation in pursuit of what is now euphemistically referred to as the “restructuring of state assets”. The existence of powerful state-owned enterprises (SOEs) raises numerous issues in respect of competition regulation in South Africa, as it does elsewhere. South Africa has a number of very large SOEs in the transport, telecommunications and broadcasting, energy and armaments sectors. Although these SOEs were previously nominally responsible to some or other government department, they were for the most part, laws unto themselves. Many have now been privatised, partly privatised or are in the process of being privatised or undergoing major restructuring. Newly privatised SOEs have been granted specified periods of exclusivity in exchange for a contractual commitment to meet specified public service mandates.

The establishment of a regulatory regime prior to the restructuring of a public monopoly has become standard practice in South Africa and many regulators are the result. A selected group of regulatory authorities in one sector provides a first order view of the way in which regulatory agencies are created and institutionalised in South Africa. The [\*Independent Broadcasting Authority \(IBA\)\*](#) had been established in terms of the Constitution to take over broadcasting regulatory tasks previously performed by the Ministry of Home Affairs and the Postmaster-General. At the same time the [\*South African Telecommunications Regulatory Authority \(SATRA\)\*](#) regulated the telecommunication industry. In 2000 the IBA and SATRA were merged to establish the *Independent Communications Authority of South Africa (ICASA)* that now regulates telecommunications and broadcasting in South

Africa, combining the functions of SATRA and the IBA. This example illustrates the rapidly changing regulatory landscape in just one industry in South Africa.

The rapid evolution and proliferation of the more “independent” type of regulatory bodies in the relatively short period since 1994 have raised questions about the types of autonomy conferred on these bodies and upon their officials, and the forms of control exercised over them. These various regulators, established in terms of acts of Parliament, are financed mostly with money appropriated by Parliament, though additional income could be raised by way of fees or licenses, are subject to audit by the Auditor-General and must submit an annual report to the relevant Minister (compare for example the Competition Commission or ICASA). But apart from these provisions they are independent and the controls over them are limited to the abovementioned measures. The fact that Ministers have expressed concern that certain regulators have adopted a policy-making role independent of government serves as an indication of their level of independence.

The debate in South Africa concerning inter-agency relationships, and the division of responsibilities between different agencies and levels in the system has just begun. The issue of the relationships and potential jurisdictional conflicts between competition and regulatory authorities has received attention in a recent policy document (Radebe, 2000). Both the rapid increase in the number of regulators and the lack of clarity about roles and responsibilities are seen to contribute to market uncertainty that could eventually undermine the achievement of restructuring objectives. The arguments and debates that have reached the High Court<sup>1</sup> turn on the question whether the jurisdiction for competition matters should resort with sector regulators, with competition authorities, or both. The jurisdictional conflict over which authority should regulate which area, leads to expensive litigation over purely procedural matters. In order to ensure the consistent application of the legislation guarding competition matters across sectors, the Competition Commission may negotiate agreements with other regulatory authorities, participate in their proceedings and advise or receive advice from any regulatory authority. The sector regulators regard themselves as better guardians of the public interest than the competition authorities. The distinction between technical regulation and competition regulation is often blurred. As an example, technical decisions regarding spectrum use in the telecommunications sector and accompanying decisions about licensing may profoundly impact upon the intensity of competition in the sector.

Administrative and managerial issues linked to the issue of accountability and autonomy arise from the financing and staffing of these authorities that are mostly financed from public funds, and thus should be publicly accountable. However, to function properly they need a fair amount of managerial autonomy and separation from the constraints normally imposed upon government departments. This may create a need for less control and accountability and more independence. The issue is one of

balancing the tension that seemingly exists here. A practical manifestation of this issue relates to the procurement and retention of expert staff. As a result of their higher levels of managerial autonomy, these classes of institutions with the use of public funding often compete successfully with ordinary state sector employers for expert staff by offering much more attractive benefits packages than can be offered by government departments.

On the question of the existence of codes, guidelines or other constraints which induce regulator officials to respond to public interest considerations, it should be noted that government institutions in every sphere of government, so-called organs of the state (which include the independent regulatory bodies) as well as public enterprises are subject to the basic values and principles governing public administration defined in the Constitution. These include *inter alia* values and principles relating to professional ethics, the effective and efficient use of resources, and the requirement that services must be provided impartially and fairly. Furthermore the right to just administrative action is enshrined in the Bill of Rights and given effect in national legislation (Promotion of Administration of Justice Act, 2000, Act 3 of 2000). It would therefore seem that judicial review can act as an important constraint on regulatory administrative action, at least as far as procedural accountability is concerned.

A further, related political/administrative issue involves the control and accountability of independent regulatory authorities. In the relatively short period of its existence before it was merged with SATRA to form ICASA, serious accountability problems were raised during the late 1990s concerning the abuse and misappropriation of funds to benefit IBA councillors and staff. Authorities have thus drawn public criticism for actions based on a lack of public control and accountability. This is a manifestation of the classic question, “who guards over the guardians?” or, for present purposes, “who regulates the regulators?” There have been different approaches to the structuring and functioning of these control and accountability relationships, ranging from the requirements for reporting to Ministers and/or Departments to direct accountability to Parliament. The ideal is probably direct accountability to Parliament or to any other democratic legislative authority, but given the time, resource and technical constraints of these bodies, this ideal is likely to be over-ambitious. This leaves open the issues of properly legislating for, and structuring a functional system of public accountability for these bodies.

The influence and participation of customers or users in regulatory authorities is normally promoted in prescriptions regarding the composition and appointment of the governing boards, commissions or councils. The prescriptions in this regard vary from the very specific (for example in the case of the *Judicial Service Commission* where the representation of the professions and other roleplayers is prescribed in detail) to the fairly vague where it is left to the responsible Minister or the President (sometimes on the recommendation of the National Assembly) to appoint ‘suitable’ persons (for

example in the case of the [Competition Commission](#)). The process sometimes prescribes participation by the public in the nomination process, requiring transparency and openness and the publication of a shortlist of candidates (for example in the case of ICASA).

## **CURRENT POLICY SETTING FOR REGULATION AND COMPETITION**

South Africans are apparently quite protective of their perceptions of their uniqueness. This applies to their ideas, their models of regulation and competition as well as their policies. To gain some insight into the government's philosophy of state-market relations it is necessary to refer to two important post-1994 macro policy statements namely the [Reconstruction and Development Programme \(RDP\)](#) and the [Growth, Employment and Redistribution Plan \(GEAR\)](#).

The RDP was basically the first policy statement of the ANC Alliance after coming to power in 1994 and was modeled on its "Ready to Govern" election platform. The RDP is important from the perspective of social regulation as it focuses mainly on the provision of housing and food, land tenure reform and infrastructure provision, all generally provided for or controlled by the state. The RDP has aimed to combat unemployment and poverty in the first instance by pursuing the goal of improving production and household income through job creation, increased productivity and economic efficiency, improving conditions of employment and the creation of opportunities for all to sustain themselves through productive activity; secondly by improving living conditions through better access to basic services, health care, education and training; and thirdly by establishing a social security system and other safety nets to protect the poor, disabled, elderly and other vulnerable groups.

The RDP was criticised for its emphasis on development and redistribution rather than on investment and growth. The RDP objectives were restated during 1996 and the second major policy statement in the form of a macro-economic plan, the Growth, Employment and Redistribution Plan (GEAR), was announced in May 1996. GEAR in turn focused on the importance of creating macro-economic conditions that would facilitate economic growth and development within the context of structural change underway in both the South African, and the global economies. Thus a line was drawn in the regulatory arena that differentiates between issues of social and economic regulation. These two major policy statements highlighted a potential fault line between the social and economic regulatory dimensions that runs through the subsequent policy debate and policy strategies adopted by government. This tension exists within government between the Alliance partners [the ANC, the [South African communist Party \(SACP\)](#) and [Congress of South African Trade Unions \(COSATU\)](#)] as well as between actors in society at large i.e. labour, business and government.

This is evident in the government's competition and privatisation policies. It is the government perception that there is an excessive concentration of economic power in the South African market,

which necessitates the "transfer of economic ownership in the public interest". The Competition Act follows mainstream European Union, and to an extent United States competition law by prohibiting practices in restraint of trade whether vertical (between firms, supplier, or customer) or horizontal (between firms and abuses of dominance by dominant firms). It has an underlying social and economic objective. The social objective is to promote "the ability of small businesses owned by historically disadvantaged persons to become competitive".

In addition, government argues in its policy statements (DTI, 1997) that because of the challenges that flow from the legacy of economic distortions, a uniquely South African approach to competition policy is required. There is the need to fuse the two policy imperatives, on the one hand to pursue competitiveness and efficiency in the economy, and on the other hand to ensure that this process will ensure access on the part of many more people previously denied an equal opportunity to participate in the economy.

The debate has also centred on how the so-called 'new economy' will affect the application of competition law in a developing country like South Africa. The advent of the new economy, evidenced by phenomenal growth in the information technology sector and increased use of the internet to conduct business transactions, clearly requires a different approach in applying competition laws. The labour movement also is concerned with the threat of employment loss arising out of increased efficiency and merger activity.

The importance of Black Economic Empowerment (BEE) is illustrated by the fact that in 2000 and 2001 respectively, 11 and 13 black economic empowerment deals were approved. As a result, historically disadvantaged persons are now increasingly securing business opportunities and participating at board and management levels to influence strategy. BEE mergers have been seen as useful vehicles for implementing accelerated employment equity programmes to achieve corporate affirmative action goals, and to develop market access and penetration strategies.

The South African policy approach to privatisation is well summarised in the 2000 policy document (IFR, 1999:2). According to this document the South African approach to restructuring and privatisation is relatively unique. The general thrust in South Africa is to shy away from Thatcherite, former East Block and Latin American approaches to regulation and competition. South Africa, for example, puts more emphasis on the restructuring of the state sector than on privatisation. South Africa's approach seems in some respects reminiscent of the French example where the state remains a majority shareholder where state assets are privatised. However, where the French prefer domestic private investors as venture partners, the South African approach has been to involve foreign investors, but then only as minority partners. Restructuring is also driven by means of strategic

alliances leading to long-term collaborative partnerships. Examples include acquisitions, mergers, equity relationships, joint ventures, public private partnerships (PPPs) and marketing and purchasing agreements.

On the matter of self-regulation in South Africa there has long been a tradition that the rights of practice and the rules of conduct for professional occupations are determined by bodies drawn exclusively or predominantly from members of the professions concerned. These forms of self-regulation are exercised through councils or institutes normally, but not always with statutory backing e.g. the [Health Professions Council of South Africa](#) or [South African Institute of Chartered Accountants](#). Such groups regulate their own affairs under powers given to appropriate institutions (control bodies). Practitioners in the relevant professions, elected or nominated members and members of the public service are normally represented on these control bodies. The appointment of an industry Ombudsman (e.g. the [Banking Ombudsman](#) or the *Life Insurance Ombudsman*) as a form of voluntary regulation has also gained popularity in last 10 years.

The agricultural sector is an interesting case in point of self-regulation. In the 1960s, legislation was promulgated regulating the marketing and pricing of agricultural produce. More than 20 control boards were established for different products. More recently there has been a move away from this approach and control boards as such were abolished after 1995. Many of these control boards were transformed into producer or shareholder controlled marketing associations, some of which perform a form of self-regulating function. (e.g. *Agri-inspec* which oversees the importation of agricultural products). The levies paid by the producers are not compulsory which may cause some problems for these associations to function properly, for example to undertake the relevant research. However, these agricultural associations may approach government to allow them to impose statutory levies which can be utilised for information, research and marketing. Government is, however, generally not amenable to the reintroduction of statutory levies.

The most fundamental policy issues emanating from the context of regulation and competition in South Africa derive from an approach that simultaneously provides for growth and development as well as for the alleviation of poverty and inequality, as stated earlier "... by assuring the public that on the one hand competitiveness and efficiency are pursued, and on the other that this process will ensure access to many more people previously denied an equal opportunity to participate in the economy"(DTI, 1997).

In excess of 20 million South Africans subsisted in a state of poverty in 1996 according to census estimates. (Statistics SA, 1996) The number of poor households typically has risen faster than the number of lower and middle-income households with the share of national income of Black middle-

income households rising and that of their White counterparts declining. Income distribution remains an emotive issue in the poverty debate. Within the Black community in particular the poorest 40% of households have suffered a decrease in household income whereas the most affluent have enjoyed income increases. The average household income of all income classes, other than the top 10%, has declined. In real terms the proportion of Black households in the top 10% of salary earners has increased substantially. Proportional Black dominance of the poorest 40% of South African households has also increased. These statistics suggest the emergence in South Africa of a new order in which inequality is less a matter of race than of increasing relative affluence of higher income groups across the racial divide.

Rising income inequalities within population groups are largely a function of changing patterns in the demand for skills in South Africa. Whilst the total number of Blacks employed has declined implying increased unemployment within this group, substantial increases have occurred in the relative number of black people employed in highly skilled occupations and in their earnings. Changing labour market demand particularly for unskilled labour is adduced demonstrably to have been a function of the regulatory environment applying particularly to the labour market in South Africa. Rising poverty can thus not be dissociated from the issue of regulation. Politically the stand-off on the issue of regulation of the economy turns to a large degree around the issue of regulation of the labour market. With the [Congress of South African Trade Unions \(COSATU\)](#) commanding a membership that in effect equates to a minority percentage of the South African labour force, the question is legitimately asked as to whether current regulatory regimes that in effect accord COSATU, as an alliance partner in government with the ANC and the SACP and a strong proponent of labour market regulation, a disproportionate voice do in fact in any meaningful sense represent an equitable arrangement. On the basis of current trends income inequality will increase, with declining employment in the unskilled and semi-skilled categories and increased demand for highly skilled and productive workers remunerated at commensurately higher rates. This is consistent with the present industrially driven economic growth path of South Africa and has clear implications for the prospects of the generally lower-skilled poor.

To win support for competition goals and competition systems, the authorities should be seen to be grappling with employment problems and other major social issues. Ordinary citizens must be convinced by seeing the relationship between effective competition policy – and systems, one may add – and the realisation of their social goals (Lewis 2000:3).

## **METAPOLICY REFORM IN SOUTH AFRICA**

The meta-polity of competition and regulation in South Africa has both international and domestic dimensions. With the advent of the new political dispensation, South Africa has once again been

admitted to the international community of nations. Where in the previous dispensation the country was isolated, it now finds itself re-admitted to the international mainstream. This has of course had significant implications for policy, adding a new dimension to the meta-polity of competition and regulation in South Africa.

The current phase of globalisation and liberalisation that has paralleled South Africa's readmission into the international community in particular, and the advent of the [World Trade Organisation \(WTO\)](#), have added new and complex dimensions to competition issues within the context of South Africa's emerging multilateral trade relations. The WTO, the [World Bank](#) and the [International Monetary Fund \(IMF\)](#) are increasingly setting the parameters of member governments' economic policies with significant domestic policy implications. Specifically the activities of the WTO Working Group on the Interaction between Trade and Competition Policy are significant in the context of competition and regulation. South Africa since 1994 has therefore at once been confronted with the challenge of re-establishing its competitive position in world markets after isolation whilst at the same time accommodating the dynamics of a rapidly evolving international trade environment. South Africa has significant obligations with implications particularly for the regulatory regime in terms of agreements concluded in the WTO as well as within the United Nations framework. Of significance also are those arrangements concluded within the [UN Conference on Trade and Development \(UNCTAD\)](#) and other forums such as the [Non-aligned Movement \(NAM\)](#), the [Organisation for Economic Co-operation and Development \(OECD\)](#), the [African Union](#) (AU – formerly the Organisation for African Unity (OAU)) and the [World Customs Organisation \(WCO\)](#). South Africa's interest specifically in UNCTAD derives from that organisation's role in researching interrelated issues of trade, technology, investment, services, competition and sustainable development in developing countries; in capacity building; and as a forum for intergovernmental dialogue and consensus-building between the hemispheres on these issues. South Africa's relations in this regard are co-ordinated by the Directorate: Multilateral Trade Relations of the [Department of Trade and Industry \(DTI\)](#).

With South Africa's re-emergence on the international scene after 1994 the country has been the focus of a number of capacity-building and advocacy initiatives on the part of international agencies. Certain of these initiatives have specifically addressed issues of competition and regulation<sup>2</sup>. In addition domestic research and advocacy capacity with a bearing on competition and regulatory issues has resided in academic research institutions at universities and technicons within South Africa. However, both the international and domestic dimensions of the meta-polity specifically of regulation and competition in South Africa have until comparatively recently been relatively amorphous. The establishment of the [Trade and Industry Policy Secretariat \(TIPS\)](#) in 2001 as an initiative of the [Department of Trade and Industry \(DTI\)](#) promises to provide focus on a wide range of policy

issues, not least issues of competition and regulation. TIPS is a corporate entity, established in terms of the Companies' Act 61 of 1973 to serve as a policy research and policy analysis clearing house for the Department of Trade and Industry, to strengthen the capacity outside of government to construct research on trade and industrial policy, and to play a role in research capacity-building in the Southern Africa region. TIPS has an international Advisory Board and a governing Board representing a wide range of departmental and policy research interests including the [Southern African Development Community \(SADC\)](#). The establishment of TIPS has coincided with the establishment by SADC of the [Southern Africa Trade Research Network \(SATRN\)](#) with the objective of serving the region's policy community with:

- ✍ Improved policy analysis;
- ✍ Greater analytical capacity; and
- ✍ Training and capacity- building around WTO processes.

TIPS is to manage the SATRN programme. In the past SADC countries have lacked sufficiently strong incentives to participate in the [General Agreement on Tariffs and Trade \(GATT\)](#), now the WTO. SADC however recognises that the nature of multilateral negotiations has changed with issues such as competition policy, trade in services, and labour standards gradually superseding in importance the traditional issues of tariff levels, trade preferences and differential treatment. Trade and competition policy has been identified as a specific field of interest for SATRN with special emphasis upon legislation and other measures such as sectoral regulations and privatisation policies aimed at promoting competition in the national economies of the region.

## **POLITICAL, SOCIAL & EXTERNAL INFLUENCES**

The evolution of participation by the organs of civil society in the regulation and competition system in South Africa cannot be divorced from the evolution of the broader political and democratic landscape within the country. The challenge of reconciling the complex, and often contradictory roles of a variety of players in a society in transformation inevitably also impacts upon the regulatory and competitive regime. Transformation in South Africa since 1994 has not been an event but a process - as yet not concluded- that in its conjuncture and its essential features constitutes part of a global movement towards democratisation, dismantling of authoritarian control and the refocusing of relationships between society, economy, nation state and the international environment. This process has at critical points, and as a natural extension of the evolving new democracy in the country, necessarily also impacted upon the role of civil society in relation to matters of regulation and competition.

According to Prseworski in O'Donelle *et a*, (1986) in the process of social reorganisation the challenge is to achieve the compromises necessary to dismantle the old whilst creating conditions

favouring the accommodation of emerging interests in the new. This raises the prospect of a disjuncture between political and socio-economic transformation (CASE, 2002). There is frequently an inherent tension in alliances established to facilitate democratic transition manifesting in divisions in its aftermath. This has been evident in South Africa within the Tripartite Alliance with significant divergences of view emerging on key economic issues between the ANC, the SACP and COSATU, not least on the regulation of the economy, and most particularly the regulation of the labour market and the privatisation of state assets. At the heart of the disjuncture between political and socio-economic transformation in South Africa is the matter of so-called “second generation rights” conferred in terms of the Constitution. (Act 108 of 1996) Such rights include the right to further education and the right of access to health care services, to sufficient food and water and to social security. The reality is that the slow rate of roll-out of social programmes in effect *de facto* limits these rights on the part of a large proportion of South Africans as yet inadequately served with basic infrastructure and other means of exercising them. In addition, the expectations of many in the population are fuelled by an inability to distinguish between absolute rights provided for in the Constitution and second-generation rights, leading to the view that the state must provide. This has profound implications particularly for the promotion of the market as a service delivery mechanism, for the restructuring of state assets and for privatisation.

Both the ANC and the [South African Communist Party \(SACP\)](#) had in exile largely subscribed to strong centralised institutions as the means of directing and regulating socio-economic and political development, with a marginal role for civil society in governance. But by the late 1980's when the real prospects of political transition in South Africa emerged the landscape had changed. The notion of a strong state as the key to accelerated development had been largely discredited by the disintegration of the centrally planned and –driven economies of Eastern Europe and the emerging incapacity of the welfare states in the West sustainably to deliver social services. Elements within the domestic South African system were however insulated from these realities and common cause has emerged between such divergent elements within the labour movement as the South African Congress of Trade Unions (COSATU), a leading participant in the anti-apartheid struggle, and predominantly white unions whose members had been amongst the staunchest supporters of apartheid. The basis of this common cause is a shared adherence to centralised control of public enterprises and the regulation of the economy. Caught between the insistence by right-wing forces on the supremacy of the market, and by left-wing elements upon the supremacy of the state, elements in civil society have had to carve a new niche for themselves. In this they have generally been assisted by the international celebration of the potential role of civil society as the answer to the inequalities generated by the market on the one hand and the bureaucratic ossification generated by the state on the other. (CASE, 2002) The ongoing debate between the ANC and its alliance partners in government, the SACP and COSATU, still strongly reflects an emphasis on the centrality of the state in the economy. Whilst the need to

involve and engage civil societal elements in the processes of governance is conceded, the focus of participation does not necessarily reflect recognition that civil society may play a progressive role independently of, or even in opposition to, government. There has indeed been some tension between the concepts of representative democracy as exemplified in the formal constitutional system of government in South Africa, and that of participative democracy in the interests of accommodating the minutiae of popular views and inputs particularly on economic and developmental issues. Clearly the evolving role of civil society will be determined by the extent to which this tension can be resolved and to which an inclusive view is espoused that accommodates both these dimensions.

The Reconstruction and Development Programme (RDP), the ANC's policy platform in the election of 1994, itself had its origins largely in civil society, specifically in COSATU policy documentation of the early 1990's. The RDP recognised civil society organisations as crucial actors in the development process. Its demise since 1994 from strategic policy prominence and its replacement at centre stage by the essentially macro-economic preoccupations of GEAR was accompanied for a period by an eclipse in the role in governance of civil society at large which was largely relegated to the margins as merely another vehicle for sectarian interest. Recognition of the centrality of macro-economic issues to the transition process had led in 1992 to the launching of the [National Economic Forum \(NEF\)](#) as a trilateral institution composed of government, organised business, and labour. The labour movement ended its boycott of the state-aligned National Manpower Commission that merged with the NEF after 1994 to form by act of Parliament (NEDLAC Act, 1994) the [National Economic Development and Labour Council \(NEDLAC\)](#). NEDLAC constitutes the nexus of the formal relationship between government, organised business, organised labour and organised community in versus the pursuit of consensus on issues of social and economic policy. It therefore stands at the commanding heights of a wide range of regulation and competition policy issues in South Africa. NEDLAC's work is conducted in four chambers (Labour Market Chamber, Trade and Industry Chamber, Development Chamber, Public Finance and Policy Chamber) and comprises:

Promotion of economic growth and participation in decision making; pursuit of consensus on economic and social policy; screening of labour legislation before its introduction into the Parliamentary process; screening of legislation on changes to economic policy prior to its introduction into the Parliamentary process; and promotion of policy co-ordination.

Debate on the efficacy of NEDLAC has largely revolved around the allegation that it has in effect marginalised a large component of the grassroots community from the economic policy process in which it is engaged. At the flood tide of popular demand for inclusive participatory democracy, so the argument goes, it in effect represents a consociation of organised elites whilst lack of capacity and of

a platform for participation has modulated the voices of a number of legitimate grassroots organisations relative to those of organised business and labour in South Africa.

Nevertheless it is so that the advent of open democracy in South Africa has served as the genesis for a variety of emergent civil society structures with watchdog roles not least in the monitoring of legislation and of consumer affairs. Indeed many civil societal structures have begun to adopt new roles as participants in the policy-making process as receptiveness, albeit grudgingly at the outset, on the part of government to their engagement on a broader front in an essentially consultative role in governance issues has grown since 1994. This has implied on the part of such organisations a shift in orientation, mode of interaction, structure and skill. In particular it has seen the shifting of focus of organs of civil society away from spontaneous reaction to the issues of the day toward more cogent response to substantive longer-term issues.

At the level of the legislative process, NGO's are particularly prominent in the dissemination and monitoring of legislation at the committee stages in the Parliamentary process<sup>3</sup>. Through their monitoring, lobbying and capacity-building programmes, they strive to ensure that policy and legislative processes are transparent, accessible and accountable. These organisations enjoy no official status with Parliament but play an important role in disseminating information on a subscription basis and in encouraging debate around legislative and regulatory issues. Human rights organisations locally and internationally play a role in sustaining such activities in the promotion of open democracy<sup>4</sup>. In only one of the nine provinces in South Africa (Kwazulu-Natal) is a similar function performed in respect of the provincial legislative process<sup>5</sup>.

At the national level, the [Free Market Foundation of South Africa \(FMF\)](#), a member of the Global Economic Freedom Network plays a relatively unique role in promoting competitive economic practice in South Africa for its own sake, rather than on behalf of vested commercial interests. This NGO monitors legislative processes and has long been actively engaged in lobbying in the cause of the promotion of economic freedom. As with other similar bodies the FMF is partly supported by its subscription base and partly by donations and project funding.

South Africa does not have a particularly developed record of consumerism. At the time of the transition in 1994 the then South African Consumer Council merged with a number of other consumer bodies to form the [National Consumer Form \(NCF\)](#), a new umbrella body representing consumer affairs in South Africa. The NCF is a non-governmental organisation with affiliated member consumer bodies throughout the country. It is affiliated to Consumers International. Parallel to the NCF is the SA National Consumer Union, also a national NGO that has been in existence for 40 years and that is affiliated to the NCF. Neither the NCF nor the Consumer Union enjoy special recognition

by government whose own [National Consumer Affairs Office \(NCAAO\)](#) within the Department of Trade and Industry (DTI), supported by 24 provincial consumer offices, develops policy, legislation and regulations in the areas of consumer credit services, industry regulation and product standards. The NCAAO also has a remit to provide capacity-building to community-based consumer groups and to facilitate consultation and engagement of consumer groups in regulation. The Department is assisted in its consumer-related regulatory functions by three statutory bodies namely the Estate Agency Affairs Board (Act 112, 1996), the National Home Builders' Registration Council (NHBRC) (Act 95, 1998) and the [South African Bureau of Standards \(SABS\)](#) (Act 29, 1993). Appointments to the governance structures of these bodies are *ad hominem*. Institutions of civil society *per se* therefore do not play a formalised role. This is generally reflective of the current approach in South Africa according to which the formal role of institutions of civil society in the regulatory regime is essentially confined to the area of self-regulation. This applies to the professions and various other interests whose self-regulatory role is statutorily enshrined. These self-regulatory arrangements have evolved in an *ad hoc* manner over time and are provided for in diverse pieces of subordinate legislation administered by individual departments of government. No comprehensive picture exists of the nature and extent of the self-regulatory regime in South Africa that has evolved from these various arrangements.

Concern over the incidence of white-collar crime and corrupt and improper practice in South Africa has thrown into sharp relief cogent issues of ethics and not least has raised questions as to the efficacy of current self-regulatory arrangements, practices and mechanisms. It is generally recognised that the best protective measures business and government can take are to set their own houses in order through effective codes, controls and self-regulation. Organisations and occupational subcultures generate powerful pressures on members to conform to their expectations, and therefore have an influential regulatory role to play. Any effort particularly to deal with the problem of corrupt practice at this level must thus be aimed at changing the ethical climate within such subcultures. But when it comes to professional self-regulation, the concern has been raised that the boards and agencies charged with controlling professional misconduct often deflect criminal complaints away from the system, thus protecting fellow professionals from prosecution. Whilst professionalism *per se* is not under attack, there is some concern that professional self-regulation has in a sense robbed consumers of sovereignty and that self-regulatory practices have developed essentially to serve the interests of professional service providers.

Regulation of course is one thing – the effect of regulation by way of the actual modification of behaviour another. Indeed, the efficacy of regulation is a function essentially of two elements namely respect for the law and for the authority of the regulator on the one hand, and the capacity to implement regulatory measures and to bring transgressors to book on the other. On both these scores

South Africa currently encounters problems. In the first place respect for governing authority has historically been eroded not least by a culture of civil disobedience against the then apartheid regime that accompanied the freedom struggle. Elements of this psyche of non-compliance persist, complicating the regulatory environment and occasioning the recent pronouncements by President Mbeki on the need for moral regeneration in the country and the launch of the [Moral Regeneration Movement](#) at a Summit held in April 2002 (Moral Regeneration Summit, 2002). Clearly this state of affairs has implications for self-regulation on the part of John and Jane Citizen of their actions and of the viability of a self-regulatory “honour system” for the regulation of day-to-day activities. In the absence of a culture of compliance, the capacity to enforce regulatory measures has been sorely tested in key areas. The efforts required for example of the [South African Revenue Services \(SARS\)](#) in bringing to book large numbers of serial tax evaders, and of the [South African Broadcasting Corporation \(SABC\)](#) in at once encouraging and enforcing positive compliance with the requirement for television licensing bears testimony to the resource, and other implications of enforcement in prevailing circumstances. Yet South Africa’s enforcement capacity in many areas remains critically deficient. Whilst the country’s capacity to draft and enact progressive legislation is established, this is generally not matched by its capacity to implement such measures. A strategic approach to regulation policy in South Africa would therefore seem to have to address a broader canvas than would be the case in mature democracies.

## **IDENTIFICATION OF GAPS IN SOUTH AFRICA’S CURRENT INSTITUTIONAL AND POLICY FRAMEWORK**

The following issues have emerged in the present mapping exercise that could serve as pointers to the identification of gaps in the institutional and policy framework and to direct future research:

- ?? **Representational** issues: lack of consumer/community representation in governance structures of regulatory bodies; political instead expert appointees; lack of objective criteria for the appointment to some regulatory bodies; a shortage of analytical and technical skills and lack of experience to provide strategic leadership.
- ?? **Judicial** issues: allocation of jurisdiction between competition and sector regulators; judicial authority granted to state departments which should rather have been left with courts of law; a lack of control over the exercise of judicial functions by executive institutions and administrative tribunals, particularly in areas where no appeal against the decisions is allowed.
- ?? **Accountability** issues: concerns that some regulators have adopted a policy-making role, independent of government; the lack of information on policies and activities; direct accountability to public or stakeholders.

- ?? **Co-ordination** issues: a proliferation of regulators with no coordination of policies and rules.
- ?? **Conflict of Interest** issues: lack of guidelines in cases with conflicting objectives e.g. evaluation of mergers on competitive grounds the impact of the transaction on employment and on the advancement of ownership states of black entrepreneurs. A pro-competitive merger may be stopped because of its employment consequences; an anti-competitive merger may be permitted because it advances black economic empowerment.
- ?? **Globalisation issues**: the question as to whether South African competition policy enhances or impedes South African firms in the global market given the perception that South African firms face inequitable competitive conditions internationally; the question of regional integration of competition and regulation law and practices.
- ?? **Self-Regulation** issues: the mapping of the scope and nature of self-regulation in South Africa and questions around the efficacy of current approaches; differential treatment of sectors e.g. self-regulation in the agricultural sector;
- ?? Issues of **compliance and ethics**: the mapping of the requirements for the optimal communication and motivation of regulatory measures, the achievement of maximal voluntary compliance with regulation in South Africa and the question of appropriate integrated regulatory strategies crafted in accordance with those requirements.

## CONCLUSION

In this paper an attempt has been made to draw the contours of a preliminary map describing the institutional and policy framework of regulation and competition in South Africa. It would seem that the regulatory challenge in South Africa is to find the optimal balance between potentially conflicting economic and social objectives – between enhancing competition, reducing state debt increasing foreign direct investment flows, and facilitating economic growth and improved industrial competitiveness on the one hand and widening ownership in the economy and engagement at its commanding heights by historically disadvantaged South Africans according to the ideo-political agenda on the other. The catch-22 is that greater social delivery and development itself is constrained by slow economic growth. Issues that have emerged in this mapping exercise serve as pointers to direct future research.

## *Notes*

<sup>1</sup> The question if the Competition Commission or the Financial Service Board should regulate in the case of the hostile bid by Nedcor to take over Standard Bank in 2000

<sup>2</sup> CUTS Centre for International Trade, Economics & Environment (CUTS/CITEE) Comparative Study of Competition Regimes in Select Developing Countries of the Commonwealth – A Study funded in 2000 to 2002 by DFID

<sup>3</sup> The [Institute for Democracy in South Africa \(IDASA\)](#); the [Parliamentary Monitoring Group \(PMG\)](#); the Contact Trust.

<sup>4</sup> *Inter alia* the European Union Foundation for Human Rights in South Africa

<sup>5</sup> The [Provincial Policy Programme \(PPP\)](#) is a project of four organisations: [Lawyers for Human Rights \(LHR\)](#), [the Institute for Multi-Party Democracy \(IMPD\)](#), Black Sash and the [Institute for Democracy in South Africa \(IDASA\)](#)

## **LIST OF ACRONYMS**

ANC	African National Congress
CAC	Competitions Appeal Court
COSATU	Congress of South African Trade Unions
CODESA	Conference for a Democratic South Africa
DTI	Department of Trade & Industry
FMF	Free market Foundation of South Africa
GATT	General Agreement on Tariffs and Trade
GEAR	Growth, Employment and Redistribution Plan
IBA	Independent Broadcasting Authority
ICASA	Independent Communications Authority of South Africa
IFR	Institute for Futures Research
ILO	International Labour Organisation
IMF	International Monetary Fund
NACO	National Consumer Affairs Office
NAM	Non-Aligned Movement
NCF	National Consumer Forum
NEDLAC	National Economic Development and Labour Council
NEF	National Economic Forum
OECD	Organisation for Economic Co-operation and Development
RDP	Reconstruction & Development Plan the
SABS	South African Broadcasting Authority
SACP	South African Communist Party
SARS	South African Revenue Services
SATRA	South African Telecommunications Regulatory Authority
SATRNET	South African Trade Research Network
SMEs	Small & Medium enterprises
SOEs	State-owned enterprise
TIPS	Trade and Industry Policy Secretariat
UNTAC	UN Conference on trade and Development
WCO	World Customs Organisation
WB	World Bank
WT	World Trade Organisation

## **LIST OF LEGISLATION**

[Competition Act, 1998, Act 89 of 1998.](#)

Estate Agency Affairs Act, 1996 (Act 112 of 1996) as amended

[Independent Communications Authority Act of South Africa, 2000, Act 13 of 2000.](#)

[Housing Consumers' Protection Measures Act, 1998 \(Act 95 of 1998\) as amended](#)

[Public Finance Management Act, 1999, Act 1 of 1999.](#)

[Promotion of Administrative Justice Act, Act 3 of 2000](#)

[Promotion of Access to Information Act, Act 2 of 2000](#)

[South African Civil Aviation Authorities Act, 1998, Act 40 of 1998.](#)

South African Companies' Act, Act 61 of 1973, Section 21.

Standards Act, 1993 (Act 29 of 1993) as amended

[Telecommunications Act, 1996, Act 103 of 1996.](#)

[The Constitution of the Republic of South Africa, 1996 \(Act 108 of 1996\).](#)

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