COMPETITION LAW AND POLICIES IN SOUTH AFRICA:

A CONSUMER WELFARE PERSPECTIVE

By

RAKGORI ANDREW POOE

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Supervisor : Ms P.F. Lembede
Co-Supervisor : Prof R.R. Mears

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ABSTRACT

Competition law and policy is increasingly becoming an important part of public economic policy. Post 1994, South African competition policy has been viewed as one of the critical policies to be used to correct the faults of the old system. The multiplicity of goals and objectives found in the competition act do not only reflect the input of various stakeholders, but also the importance of the competition policy in the development of the South African economy.

Prior to 1994, the protectionist policies resulted in the local firms not being competitive when dealing with their global counterparts. Strong state ownership, protectionism and import substitution differed with what was found in developing countries in that South Africa had strong property rights as well as developed market institutions.

The aim of this study was to get an understanding of how competition policies and laws affect consumers. To achieve this aim, the study assessed how the competition commission prioritises and handles consumer related cases. The study further assesses the interaction between competition authorities, consumer protection agencies, and consumer bodies.

The approach herein is that of a case management study of the impact of competition laws and policies on addressing the goal of consumer welfare. The study focuses on competition authorities, in particular, the competition commission and the complementary role played by consumer protection agencies and consumer bodies. As a result key informant interviews were conducted with representatives of the competition commission, the DTI office of the consumer protection and the National consumer forum. The study found among other things that there is a weak relationship between the competition authorities and the DTI office of the consumer protection.

DECLARATION

I, RAKGORI ANDREW POOE, declare that the mini-dissertation for the degree of Master of Commerce in Economics at the Mafikeng Campus of the North West University hereby submitted, has not previously been submitted by me for a degree at this or any other university, that it is my own work and that all material contained herein has been duly acknowledged.

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I am also my father's son. Papa, though you are no longer here with us, I have never stopped feeling your presence in my life. Thanks for watching over us.

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ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ACCCC	Australian Competition and Consumer Commission Commissioner
CUTS	Consumer Unity Trust Society
CCI	Competition Commission of India
DFID	The Department for International Development (Britain)
DTI	Department of Trade and Industry: South Africa
IMF	International Monetary Fund
NCF	National Consumer Forum
OCP	Office of Consumer Protection: South Africa
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading
RSA	Republic of South Africa
ZCC	Zambian Competition Commission
UKNCC	United Kingdom National Consumer Council

CHAPTER 1

THE PROBLEM AND ITS SETTING

1.1 Background and Introduction

The aim of the study is to examine how competition authorities and institutions impact on consumers. The relationship and interaction of consumers and consumer groups with competition authorities is an important element of strengthening the application of competition policies and laws. As a result weak institutions, both on consumer and competition authority side, is not good for the effective application of the competition policies.

Competitive markets are considered to be good for consumers. As a result monopolies and imperfect markets are generally regarded as being harmful to both the consumers and the economy as a whole. This is mainly because monopolies are associated with a lack of rapid innovation and technological improvements, which in turn harm consumers as new methods of producing at less costs are normally forgone. The country's economy also suffers from being left behind in terms of new technologies as compared to its global counterparts.

The adoption of competition laws and policies in market economies is viewed as a necessary response to ensure that markets function properly to the benefit of the specific country's economy. Consumers are generally viewed as prime beneficiaries of these competition laws and policies.

1.2 Problem statement

There is a growing interest in developing countries regarding the role of competition policies to meet specific needs of individual countries. South Africa's post-1994 government also responded with the new competition legislation that included consumers as key beneficiaries.

In this study, an analysis of both consumer and competition authorities will be used to provide evidence of how the two relate to each other in South Africa. Two extremely opposite competition models, namely, perfect competition and monopoly will be examined, to highlight the influence of both the cost of poor competition and the relevance of competition laws and policies.

1.3 Aims and objectives of the study

The aim of the study is to get an understanding of how competition policies and laws affect consumers.

To achieve this, the following objectives are analysed:

1.3.1 Assessing how the competition commission prioritises and handles consumer related cases

1.3.2 Examining the competition institutions' programmes towards consumer awareness

1.3.3 Assessment of the interaction between competition authorities, consumer protection agencies, and consumer bodies

1.4 Hypothesis and research questions.

The following are the research questions asked in the study;

1.4.1 There is no definite relationship between competition authorities and consumers and consumer groups in South Africa

1.4.2 Most consumers are not aware of the importance of competition law and policies to their wellbeing

1.4.3 The weak consumer constituency and structures affect the implementation of competition law negatively

1.4.4 Competition authorities have high consideration for the consumer welfare objective as outlined in the competition Act of 1998

1.4.5 There is a weak relationship between competition authorities and consumer protection agencies

In short, the hypothesis investigated by this research is that the competition law and policies are ineffective, because they do not promote consumer welfare as legislated.

1.5 Research Methodology

This study is mainly an investigation of competition commission case management studies of the impact of competition laws and policies on addressing consumer welfare. The research focuses on the competition authorities, in particular the competition commission, and the complementary role played by the consumer protection agencies and consumer bodies. As a result key informant interviews of a structured nature were conducted with representatives of the Competition Commission, the DTI office of consumer protection, and the National Consumer Forum.

The three bodies were mainly interviewed for three reasons. Firstly, to assess the consumer awareness programme of the three bodies. Secondly, to understand how these bodies interact with each other in addressing the goal of consumer welfare. Thirdly, to examine how these bodies prioritise and manage consumer related cases.

In addition 100 questioners were randomly completed by individual consumers mainly in the Gauteng province. This was mainly a consumer survey to determine the level of awareness amongst consumers for two main reasons. Firstly to determine the impact of the awareness programmes of the three interviewed bodies on consumers. Secondly, to determine whether consumers are aware of their rights regarding unfair business practices.

The first step was to do an in-depth literature study the relationship between to assist in the development of a questionnaire. This included the assessment of competition commission's consumer related cases and a summary of how other countries implement competition laws and policies. This was mainly done in relation to the consumer welfare goal of the competition policies of the studied in reflected countries. The assessment of cases assisted in determining both the commitment of the commission to address the goal of consumer welfare and also in determining the independence of the competition authorities in executing this mandate.

1.6 Relevance and importance of the study

Competition law and policy is increasingly becoming an important part of public economic policy. In the post-1994 South Africa, competition policy has been viewed as one of the critical policies to be used to correct the faults of the old system. The multiplicity of goals and objectives found in the competition act do not only reflect the input of various stakeholders, but also the importance of the competition policy in the development of the South African economy.

South Africa's pre-1994 protectionist economic policies resulted in difficulties for local firms to be competitive when dealing with their global counterparts. According to the OECD report (2003a:9), South Africa's protectionist model, which promoted state ownership, protection, and import substitution differed with what is found in other developing countries. This is because these protectionist policies were coupled with strong property rights and well developed market institutions.

As a response to these inherent economic challenges, the post-1994 government designed an economic policy package that included the creation of a new strong competition policy regime. Chetty, Hartzenburg and le Pere (2004:1) highlight that the new policy regime is meant to introduce greater transparency, accountability and efficiency. As such, it aims to improve delivery of services to ensure better welfare for previously disadvantaged citizens.

The Competition Act is a product of negotiations amongst different stakeholders. These consultations with various stakeholders that included government, business, and labour, resulted in the Act having multiple objectives. According to the OECD report (2003a:18), the goal of providing consumers with competitive prices and choices is in line with the economic theory of consumer welfare.

However, in dealing with the achievement of the consumer welfare objective, South Africa's competition authorities are faced with a challenge of weak consumer constituency. This is mainly so because, despite there being numerous entities, institutions, and consumer groups, South Africa does not have a strong independent body representing the general interests of consumers (OECD, 2003a:61). This creates a vacuum for a strong consumer voice that can ensure that the competition authorities respond more vigilantly to consumer issues.

According to the Competition Commissioner, hereafter referred to as the Commissioner, the mention of consumer interests in the competition act was a necessary response to combat the use of misinformation by businesses when dealing with consumers (Simelane, 2002:2). This is done to prohibit businesses from gaining a competitive edge over one another at the expense of consumers.

There is generally a poor synergy between consumer policy and competition policy in South Africa. The government in recognition of the current competition and consumer protection challenges in addressing the question of consumer welfare, has since initiated measures to review consumer policy. The review includes the potential of linking consumer and competition policy (Lewis, 2000:2; OECD, 2003a:61).

The rhetoric of competition authorities on their commitment is not well understood or communicated. Rachagan (2003:20) argues that it is in the nature of competition authorities to exhort consumers to be vigilant and to complain about anti-competitive behaviour. Yet, there is often not enough willingness to recognise consumer involvement and participation as a right. More specifically, there has been a willingness to permit challenges to the decisions of competition authorities' not to take action on findings in favour of particular competitors.

1.7 Outline of the study

Chapter 2 is a literature review of available current literature, which was used in the study to assist in analysing and concluding on the findings. This chapter gives an in-depth analysis of the literature in order to gain insight in the relevancy of the material to the problem statement. This includes various competition models, roles of competition policy and law, particularly in developing countries, and the application of competition laws and policies in South Africa. The assessment of the application of competition laws was mainly done through competition cases that have been handled by the competition authorities.

Chapter 3 discuses the international competition policies and how various jurisdictions practice the goal of consumer interest. The countries selected and studied are Australia, Canada, India and Zambia.

Chapter 4 analyses the research results obtained from the questionnaires completed by individual consumers and the questionnaire drafted for the key informant interviews. All the distribution of questionnaires and interviews were perfumed in the Gauteng Province. The chapter also analyses the perception of consumers regarding the competition authorities and the other two interviewed bodies, namely, the DTI Office of Consumer Protection and the National Forum. The programmes of the three bodies that strive towards the empowerment of consumers are also analysed.

Chapter 5 is a summary of the main findings and conclusions reached from the research results. Tentative recommendations are also provided in this chapter.

CHAPTER 2

THEORIES AND LITERATURE REVIEW

2.1 Introduction

The aim of this chapter is to provide a basic and sound theoretical background from the competition policies and theories. This helps to explain why consumers are regarded as prime beneficiaries of these policies and laws.

While there are many studies regarding the role of competition policies in the development and management of free market economies, the current debates around these policies, evolve around the contextualisation of the policies to address the specific economic needs of a country (Edwards, 2004:1). This has led to many studies regarding the development of competition policies and laws for transitional economies.

This chapter further exploits the role of competition laws and policies in transitional economies. The South African competition policies and laws including various regimes and relevant competition law cases are also highlighted in this chapter.

2.1.1 Competition and market structure theories

The concept and theory of competition can be traced back to Smith in his 1776, The Wealth of Nations, publication. Cayseele and Van den Bergh (1999:469) argue that Smith, by anticipating the welfare theorems with his invisible hand theory, identified competition as a force responsible for the best feasible outcomes to be expected from economies.

It is believed that the implementation of competition laws and policies concerns the market conditions in which intervention by the competition authorities can improve consumer welfare (Bishop and Walker, 1999:16). The

scope for such intervention is displayed by two extreme economic models, namely, perfect competition and monopoly. This is because these models provide two very different market outcomes. In the case of perfect competition, consumer welfare is maximised, while in the case of the monopoly model, consumer welfare is not maximised.

The concern of competition authorities over the business concentration and behaviour is mainly based on the neoclassical structure, conduct and performance theory (SCP). Cooper (2001:820) states that this is because in SCP analysis the central concern is with market performance.

The SCP theory recognises the structure of the market as the main influence on the behaviour of market participants (Mohr, Fourie and associates, 2000:340). Consumers are also key market participants and as a result any form of market conduct by businesses directly impact on them. It is because of the SCP theory that the understanding of market structure, and in particular the understanding of key elements of market structure, is regarded as a central part in the application of competition policy.

However, Reekie (1991:29) questions whether the complex nature of markets may be captured and understood by a simple SCP theory. Studies that empirically tested the validity of the theory by institutions such as the Harvard University and the Massachusetts Institutes of Technology in various countries, including South Africa, also found that the widely accepted single one-way relationship is not as simple as generally accepted (Smit, 1999: 6).

The new industrial economic school of thought argues that competition authorities should rather adopt a practical and evidence based approach when dealing with competition law cases (Legh and Dingley, 2004:4). This is because such an approach is better in dealing with the realities of the market place.

According to Cooper (2001:27), the focal point of market structure analysis is to assess the ability of the markets to support competition. This is because

competition is viewed as a solution to the economic performance problem. As Mohr and Fourie (2004:272) further emphasise, market structure plays a vital role in understanding how firms are likely to behave in pursuit of profits.

The understanding of the key elements of the market forms a critical basis for competition regulators. Shepherd (1998:70) mentions market share, market concentration and conditions of entry as the three main elements of structure.

Firstly, market share is very significant in indicating the firm's degree of dominance. Higher market shares are usually the indicators of higher monopoly power, while firms with lower shares may usually not be able to exercise any market power. Secondly, market concentration, which is indicated by a combined market share of leading firms, is important in showing the degree of oligopoly. Thirdly, barriers to entry or conditions that make it difficult for potential competitors to enter the market are a serious cause of concern for competition. These barriers may include patents, mineral rights and strategic actions of firms to deter entry (Shepherd, 1998:70).

In practice the application of the market structure concepts by competition authorities requires a deep understanding of economics and the application of that knowledge on a case by case basis. As a results the analysis and applications of these concepts, which include an understanding of complex concepts, such as the relevant market, the percentage share of every firm in the market, and identification and measurement of each entry barrier around it, requires highly skilled people (Rachagan, 2003:17).

2.1.2 Perfect competition

A good understanding of how a perfectly competitive market functions, coupled with the information about conditions in that market, is often enough for a meaningful analysis of that specific market (Mohr et al. 2000: 17).

In a perfect competition model there is no need for any regulation to increase consumer welfare. This is mainly because perfect competition delivers, firstly,

productive efficiency, which occurs when sets of products are being produced at the lowest possible cost. Secondly, there is *allocative efficiency*, which relates to the difference between the cost of producing the marginal product and the valuation of that product by consumers (Bishop and Walker, 1999:14). Effective competition in a market requires that there must be a strong mutual pressure amongst many firms. This further implies that none of the market participants can influence the price of a product and as a result the forces of demand and supply mainly determine the price.

Traditional economic theory, as summarised by Shepherd (1999:8) and Mohr et al. (2000), highlight the existence of many firms, lack of collusion amongst firms, no dominant firms, no barriers to enter the market, homogenous products, perfect knowledge by both buyers and sellers and non government intervention, as key structural conditions for effective competition.

When a market has a large number of firms, the level of competition amongst the firms tends to be higher as compared to a market with few firms. However, having a larger number of firms is no guarantee that competition levels will be high (Smit, 2005:4). This is mainly because the perfect competition model is an ideal situation which rarely exists in practice (Das and Kumar, 2001:2).

However, it is generally accepted that competition plays a significant role in the efficiency of firms, because it puts more pressure on firms to innovate and use the latest available technologies. Modern policy analysts, as pointed out in the United Kingdom National Consumer Council referred to as UKNCC report (1995:7) still rate competition high and view it as a means of determining which firms deserve to succeed in the market. This is because they believe that firms that fail to innovate and cut costs will eventually lose profits and disappear from the market.

2.1.3 Monopoly

Monopoly is the opposite of competition, and as a result the monopolistic industry consists of a few firms. Many economists reject monopoly mainly because of its welfare costs. This is because monopolies charge prices higher than their marginal costs. This implies that people's decisions do not reflect the true cost to the society (Colander, 2001:270). Markets that are characterised by monopolies give rise to inefficiency in production, and this can result in welfare losses (Bishop and Walker, 1999:14).

Misallocation of resources is one of the serious problems resulting from a monopolist. According to Shepherd (1999:43) a monopoly distorts the allocation of resources by cutting output and driving a wedge between prices and marginal costs. As a result the effect of larger monopolised industries is likely to have a greater impact on the economy as a whole.

Many countries view regulation as an important aspect of responding to monopolistic market structure. Countries such as the United States have since developed anti-trust policies and laws. These policies and laws are aimed at dealing with the anti-competitive problems associated with monopolies and other structural problems of the markets. The objectives of these policies are to control market power and to exploit the structure of the big firm to the benefit of consumers (Mohr et al. 2000:354).

The extent of a firm's market power, which may be used in cases of monopolies, monopolistic competitors and oligopolies, can be best demonstrated by the Learner index:

$$L = (P_i - MC_i / P_i)$$

Where P represents the price of a product, "i" and "MC" is product i's marginal cost)

The Learner index has values of between zero and one, and the higher the index the more the market power of the firm (Pindyck and Rubinfeld, 2001:341; Smit, 2005:4).

2.1.3.1 Social cost of market power under monopoly

Figure 2.1: Profit-maximisation and social costs under monopoly

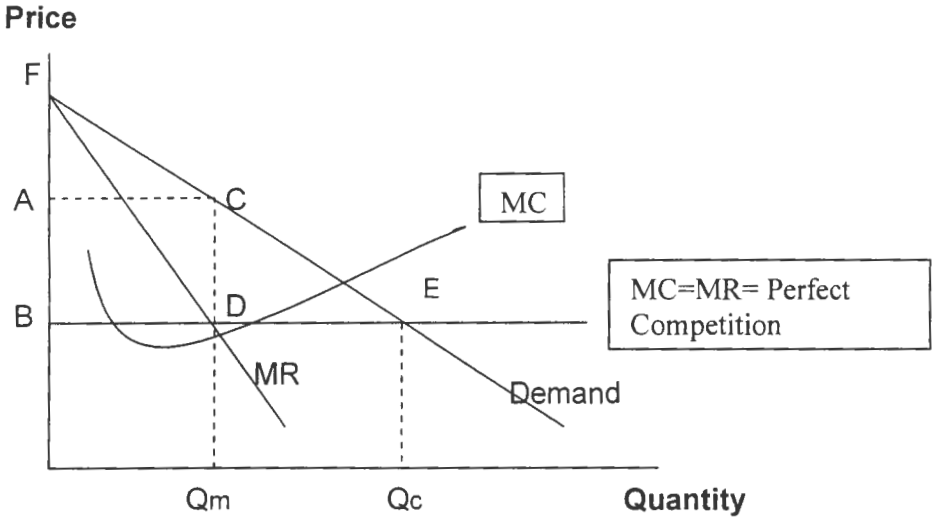

Figure 2.1 demonstrates the contrasting scenarios found in monopoly and competitive markets. The figure is summarised by a downward sloping demand curve. MR represents the marginal revenue curve, while MC represents the marginal cost curve. Monopolist equilibrium is represented by point C with point A as the price and Q_m as the quantity demanded.

The monopoly equilibrium point is different from perfect competition, mainly because under perfect competition profit is maximised at the point where price equals marginal cost, and that point is represented by E. This point also intersects the marginal cost and the demand curve. The perfect competition price is therefore point B with Q_C as the output level produced.

Figure 2.1 shows that in the monopoly market, the price is higher and the output is lower than in a competitive market. The consumer surplus for monopoly is represented by the triangle FAC which is smaller than triangle FBE, which represent the consumer surplus in a competitive market. This implies that consumers benefit more in a competitive market than in a monopoly market.

Although ABEC represents the social cost of monopoly, not all is lost since ACDB is allocated to producer surplus. Producer surplus as explained by Smit (2005:5), as the difference between what a producer is willing to receive for its product and what the producer actually receives for it. In essence the deadweight loss of monopoly to society is represented by triangle CDE.

Monopoly is therefore regarded as an inefficient market structure. This is because monopoly produces less output; employs fewer resources and charges higher prices (Mohr et al. 2004:298).

2.2 The role of competition policy and law

An understanding of the meaning of both competition policy and law is the appropriate starting point in understanding the economic role of the two concepts. According to Rachagan (2003:4) competition policy encompasses all the government policies intended to influence competition in markets, while competition law is the legal framework to give effect to this policy.

According to Nanda (2005:1) a good competition policy and law must promote entrepreneurship and growth of small and medium enterprises by lowering entry barriers. Lowering entry barriers impacts positively on the economy because small businesses and entrepreneurial activities promote economic growth and job creation.

According to Kaira (2007:2) and Das and Kumar (2001:23), an appropriate competition policy should mainly cover two areas. Firstly, it should include policies that enhance competition in local and national markets. Competition

policies should not be isolated from the broader economic policies of specific countries. This further implies that liberalised trade policies and economic deregulation policies should be amongst policies to be considered when formulating competition policies. Secondly, competition law should gives effect to the prevention of anti-competitive businesses by firms and unnecessary government intervention in the market place.

Although various countries are generally advised to adopt competition policies and laws based on their specific economic and political needs, Das and Kumar (2001:25) highlight that there are three main factors that inform the need to adopt such policies. Firstly, to create and enforce measures that takes care of anti-competitive practices that restrict the free and fair competition. Secondly, to condemn unfair business conduct practiced by firms on consumers. Thirdly, to maintain and promote the spirit and culture of fair competition in the market.

The promotion of competition policy is therefore well in line with the assumed benefits of competition theory, in particular the enhancement of consumer welfare. According to Rachagan, (2003:4) traditionally, economic efficiency has been the key aim of competition policy and competition law. This is because it is assumed that effective enforcement of this law contributes immensely to the efficient functioning of the progressive market economy that in the long-run results in both producer benefit and consumer welfare.

The adoption of competition policy is, however, not meant for punishing firms that are growing, but rather to ensure that these firms' successful growth do not impinge on the right of other firms to be equally successful (Kaira, 2007:11). Competition policy is therefore essential to deal with some of the discrepancies that are normally associated with liberal markets.

The discrepancies often associated with market imperfections, particularly the pursuit of profit by firms, may often harm competition and as a result consumers. This is because in practice the supplier's goals of maximising

profits will often coincide with the consumer's goal of better value for money (UKNCC, 1995:4).

2.2.1 The role of competition policy and law in developing countries

Most transitional economies are adopting competition policies and laws that prohibit various restraints of trade and at the same time provide public or private rights of action to enforce such prohibitions (Kovacic, 2004: 265). This is because these countries view competition policies and laws as important elements of economic and law reforms for developing economies.

According to Mehta (2003:1), developing countries can benefit from the promotion of a healthy competition market, because a healthy competition culture promotes orderly economic growth and development, by enabling proper allocation of resources. These conditions can play a significant role in poverty reduction and sustainable development.

The decision to adopt competition policies and laws as an element of economic development in transitional economies raises a number of issues about the appropriate approach and the possible contribution of these policies and laws to economic progress (Kovacic, 2001:268).

Legh and Dingley (2004:2) argue that developing countries should adopt competition policies and laws informed by the political, legal, social and economic requirement of the specific country in question. However, these policies should include consumer protection and the interests of small businesses and labour.

According to Sigh and Dhumale (1999:14) there are key measures that can benefit developing countries in adopting competition policies and laws. Firstly, focusing on dynamic rather than static efficiency. Secondly, focus has to be on the optimal degree of competition that promotes long-term productivity growth. Thirdly, there should be an optimal combination of competition and co-operation between firms so as to achieve fast long-term economic growth.

Fourthly, there has to be government co-ordination of investment decisions. Fifthly, there has to be coherence between industrial and competition policies.

Various competition policies both in the developed and developing countries have consumer protection elements in the competition laws (Mehta, 2003:37). This is based on the belief that consumer protection adds to the competition's mission. According to Ireland (1997:28) competition laws and consumer protection laws have a lot in common. This is so because both laws are aimed at empowering consumers and providing them with choice.

Although competition policies and laws can play various significant economic development roles to developing countries however, in adopting such policies and laws, the countries must be flexible. Countries have to avoid measures that will affect the development goals (Rachagan, 2003:3).

In implementing competition law, the developing countries should focus on the needs of the larger consumer community. Nanda, (2004:1) argues that consumer welfare means different things to different groups of people. Those who are relatively rich and can afford all comforts of life are more concerned about their range of choice of goods and services. However, to those who find struggling, access to goods and services, rather than choice is the most important concern. The scenario of access to goods and services is more appropriate to developing countries. As a result access has to be the main concern of the competition law authorities in those countries.

Conditions in developing countries and the complex nature of competition law often pose a challenge for effective implementation. According to Rachagan (2003:17) there are three major challenges facing the implementation of competition law in developing countries. Firstly, there is a high degree of economic and legal sophistication that requires specialised enforcement agencies. Secondly, having the competition independent from corrupt practices and political influences. Thirdly, lack of adequate financial resources needed to employ the necessary technical and professional expertise to enforce the law.

2.2.2 Competition policies and consumer interests

The proposition that competition policies and laws promote competitive markets, as opposed to the interests of individual competitors, makes them, favourable from the consumer's perspective in a more general sense. Most competition laws reject market power and anti-competitive practices, because these practices have a tendency of affecting consumers negatively (Rachagan, 2003:9).

Competition policy benefits consumers primarily by ensuring the best utilisation of limited resources, providing consumers get better quality products at lower prices and curbing conducts that distort effective competition in a market (Consumer Unity Trusts Society , 2001:25).

The modern advocates of competition law believe that competition law should include consumer interests as one of its underlying objectives. This is better than merely assuming that such consumer benefit will be derived from the mere application of competition norms (Buttigieg, 2006:3).

The consumer interest perspective of competition authorities, however, cannot be achieved effectively without the support of the consumers. According to Lewis (2004:1), consumers can help to strengthen the work and character of competition authorities by being more active and vigilant. This is because active consumer involvement will help in building a competition authority that is conscious of the interests of the consumers.

For competition law to truly serve the consumer interest there must be the willingness to allow consumers to go beyond their role as complainants and informants. They need to be empowered to play the more active role as enforcers of the law (Rachagan, 2003:16).

According to Edwards (2004:3) there cannot be an effective competition market without a well informed consumer constituency capable of making choices. This includes the knowledge to take action against any abuse by

firms. As a result a vibrant and informed consumer constituency can only benefit and strengthen the work of the competition authorities.

Knowledge and information plays a key role in achieving the consumer welfare goal, because choice reduces the level of vulnerability amongst consumers. The OFT report Ramil Burden (1998:5) highlights that, consumers may be vulnerable for two main reasons. Firstly, some may have greater difficulty than others in obtaining the information needed to make decisions about which goods and services to purchase. Secondly, they may be exposed to a greater loss of welfare than other consumers, as a result of buying inappropriate goods or services, or alternatively failing to buy something when they need to do so. Unfortunately, the competition policies can not address the latter problem, other than advising the consumer.

The importance of consumer information and knowledge is one of the key arguments that highlight the importance of linking competition and consumer protection policies. Bhojani (1998:2) argues that consumer protection provisions can be seen as a form of competition policy. This is so because when consumers are given deceptive or misleading information about goods and services, they will be unable to choose properly between competitors and the competitive process will be damaged.

The linking of consumer protection and competition policies does not guarantee automatic results. As such Rachagan (2003:13-5) list four basic rules for ensuring that the consumer protection element functions effective in competition policy and law. Firstly, the consumer protection objective should be clearly stated in the competition legislation. Secondly, information on consumer gains needs to be made explicit and be available publicly. Thirdly, consumers and consumer associations should be empowered with legal power to bring actions to enforce competition regulations. Fourthly, the focus should be on the demand side. Focus on the demand side should include behavioral changes of consumers with the view to include them in policy measures.

2.3 Competition policies and laws in South Africa

South Africa is a developing country and requires a competition policy that would uniquely address the goal of seeking to foster competition in a manner appropriate to the characteristics of a developing economy. Accordingly, this policy might be different from that of larger and more developed economies such as the European Union and the United States (Legh and Dingley, 2004:2).

The origins of South Africa's comprehensive competition policy date back to 1955 with the Regulation of Monopolies 1995 (Act No 24 of 1955). The Board of Trade and Industry administered the 1955 Act (Smit, 2005:10). The Competition Board was an advisory body and as a result did not have power to take policy decisions and lacked both budgetary resources and independence from political interference (Jafta, 1998:5). For that reason the Board only dealt with eighteen investigations (OECD, 2003:4).

2.3.1 The maintenance and promotion of competition Act 96 of 1979

During the 1970s the Mouton commission launched an investigation to determine the effectiveness of the 1955 Act (Mouton, D.J, Benade, D.v.d.M Bräsler, D.G., Emdin, S., Fransen, D.G.,Morrison, W.L., Paxton, D.G., Pretorius, W.S., Ridsdale, F.J.,Weyers, J.L. and Scribante, G.S, 1977: 27). The Mouton Commission's findings were that the 1955 Act was ineffective and that oligopoly was intense in the sectors studied by the commission (DTI, 1997:13; Smit, 2005:11).

The findings of the Mouton Commission led to the promulgation of the Maintenance and Promotion of Competition Act 96 of 1979 (Smit, 2005:11). The Act was administered by the Competition Board (OECD, 2003:5).

The 1979 Act was as ineffective as the 1955 Act, and the Board had no executive powers. The Minister of Trade and Industry had all the powers to decide whether to accept or reject the recommendations of the Board.

Powers to further make decisions on all the necessary actions to be taken thereafter also rested with the minister (Smit, 2005:11; OECD, 2003:5; Torok, 2005:8).

Following the Board investigation into restrictive practices in 1984, the 1979 Act was amended in 1986 to classify the four restrictive practices as being prohibited per se. Firstly, resale price maintenance. Secondly, horizontal price fixing by firms. Thirdly, horizontal collusion between the firms to divide a market between them. Fourthly, horizontal collusion by firms to ensure success when tendering for projects (OECD, 2003:5). However despite these challenges, the Act remained inefficient to deal with the competition challenges facing South Africa (Smit, 2005:11; Hartzenberg, 2002:7).

2.3.2 The new consolidated Act of 1998

The new competition Act no. 89 was adopted in 1998 after a thorough and extended consultation process. This included four days of hearings and many written submissions to the parliamentary committee on trade and industry. The Act became effective on 1 September 1999 and was amended in 2000, in order to clarify the relationship between general competition law and other regulatory bodies, namely, the ICASA and the NER (OECD, 2003:17). The new Act is praised as one of the most sophisticated competition laws on the African continent (Kampel, 2005:20).

The competition act comprises of a multiplicity of objectives. The purpose of the act as outlined in the competition Act (page 14) is to promote and maintain competition in the republic in order to:

a) promote efficiency, adaptability and development of the economy,
b) provide consumers with competitive prices and product choices,
c) promote employment and advance the social and economic welfare of South Africans,
d) expand opportunities for South African participation in world markets
e) ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy, and

f) promote greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

The first two objectives of the Act are standard competition policy goals. The last four sets of policy goals as mentioned by the OECD report (2003:18), represent other public interest issues that are important to stakeholders that participated in the process of drafting the Act. The issues raised by various stakeholders include, employment and social and economic welfare, opportunities to participate in world markets, equitable opportunities for SMMEs to participate in the economy, and increasing the ownership stakes of historically disadvantaged persons.

The case for multiple goals is not the creation of developing countries. The US as the leading anti-trust nation in the world also started with multiple objectives. The US has since abandoned some of these objectives to focus more on the traditional competition policy goals (Legh and Dingley, 2004:2).

In summary, the new competition institutions as outlined by Mohr et al. (2004:308), have four main responsibilities. Firstly, the responsibility to investigate complaints against firms engaging in restrictive business practices. Secondly, evaluating and subsequently approving or prohibiting mergers and acquisitions. Thirdly, to conduct research, provide policy inputs, and educate and inform stakeholders. Fourthly, to conduct regulatory and legislative reviews.

2.3.3 Institutional framework

The recent studies on law and economic development show a growing recognition that the effectiveness of economic and legal reforms depends much on the quality of numerous supporting institutions (Kovacic, 2001:270). Accordingly, strong and independent competition institutions are also essential ingredients for the effective implementation of competition policies.

South Africa's post-1994 competition institutions are considered to be much stronger and independent as compared to the pre-1994 institutions (Chetty et al. 2004:18). Mohr et al. (2004:30) further argues that the new 1998 Act should be credited for creating independent and effective enforcement bodies. According to Torok (2005:4), South African competition institutions can be rated as being far more developed than most of the African countries.

There are three bodies responsible for the implementation of competition law in South Africa. The investigation and adjudication of all matters under the Competition Act is the responsibility of the Competition Commission, the Competition Tribunal and the Competition Appeal Court. No decisions of the three institutions are subject to ministerial veto and even the Supreme Court of Appeals, the highest court in the land, has no jurisdictions over competition matters (Lewis, 2000:1). The large bank merges as are happenings in the USA will can be stopped by them and large banks can fold in extreme situations as experiences today. Too much politics and to little economies in the goals.

Cliffer Deker Attorneys (2005:1) summarise the responsibilities of the competition bodies as follows: Firstly, the Competition Commission is the primary interface with the public. It is responsible for investigation and evaluation of mergers, prohibited practices and exemptions. It has the power to allow or disallow small and intermediate mergers. The Commission must recommend all large mergers to the Tribunal. Secondly, the Competition Tribunal is the adjudicative body and it is responsible for the approval of large mergers. The Tribunal adjudicates on prohibited conduct and is responsible for the imposition of penalties. Thirdly, the Competition Appeal Court is the highest competition jurisdiction body. It has the power to change decisions made by both the Commission and the Tribunal.

2.4 Prohibited practices

Prohibited practices are outlined in Chapter 2 of the Act. Part A of Chapter 2 is divided into two sections, namely, restrictive horizontal practices and

vertical practices. Part B addresses abuse of a dominant position. Unlike other competition laws, which usually group all restrictive practices into a single rule, South Africa's Competition Act separates the rule about restrictive practices between parties in a vertical relationship from the rule about horizontal restraints (OECD, 2003:24).

The prohibited practices may be categorised as either being per se violations or rule of reason. In legal terms a per se rule is an act or practice that violates legal provision regardless of whether it is harmful to competition or not. The rule of reason principle implies that the violation is based on the basis of the restricted practice's impact on competition (Mehta, 2002/3:81).

Per se violations are mostly prohibited outright. This is because these conducts are regarded as being too harmful to competition. It is for this reason that there is no need to prove an anti-competitive effect of the conduct. The rule of reason is applicable to conducts, which unreasonably limits competition (Ball, 2005:1).

In South Africa restricted horizontal practices are treated as per se violations, while restricted vertical practices are evaluated under rule of reason. The practice of resale price maintenance is the only restricted vertical practice that is being treated as a per se violation.

2.4.1 Restrictive horizontal practices

Horizontal restraints which involves concerted actions among entities in actual or potential competition with one another, are considered, the most serious violations of competition laws of many countries (Nyango, 2007a: 1).

The Competition Act of RSA (1998:2) prohibits outright agreements or practices between competitors. Firstly, it is prohibited outright to directly or indirectly fix a purchase or selling price or any other trading conditions. Secondly, dividing markets by allocation customers, suppliers, territories or

specific types of goods or services. Thirdly, collusive tendering is also considered a per se violation.

2.4.2 Restrictive Vertical Practices

The Competition Act prohibits agreements between firms in a vertical relationship, which have the effect of substantially preventing or lessening competition in a market. The onus lies with the parties in an agreement to prove that any technological, efficiency or other pro-competitive gain resulting from the agreement outweighs the anti-competitive effect (Competition Act of RSA, 1998:19)

Most competition authorities consider vertical agreements to be mostly harmful when at least one of the participating firms is dominant. However, this does not imply that dominant firms in vertical agreement cannot result in efficiencies. As a result the effects of vertical agreements should be assessed on a case per case basis on merit. (Das and Kumar, 2001:11).

Although the practice of minimum resale price maintenance is prohibited outright, there are two conditions where it is acceptable for a supplier or producer to recommend a minimum resale price. Firstly, when the supplier or producer makes it clear to the reseller that the recommendation is not binding. Secondly, if the product has its price stated on it, the words "recommended price" appear next to the stated price (Competition Act of RSA, 1998:19).

2.4.2.1 Case study 1: Toyota South Africa Motors (Pty) Ltd

The practice of minimum resale price maintenance, hereafter referred to as, RPM, occurs when a manufacturer imposes a minimum resale price on a dealer (Competition Commission of RSA, 2004:1). The practice of RPM affects consumers negatively, because it prevents them from negotiating discounts on prices of goods and services (Ngwenya and Ngonyama, 2004:2). In a high profile case involving the practice of RPM, the Commission fined Toyota South Africa Motors (Pty) Ltd R12 million (Ntuli, 2004:1).

The case against Toyota demonstrates how an active and informed consumer constituency may impact positively on the work of the competition authorities. This is so because the case was launched after a prospective buyer of a new Toyota Corolla established that various Toyota dealerships were offering the same discount on a new Toyota Corolla range. The commission then considered the allegations as being enough to launch an investigation (Competition Commission of RSA, 2004a: 1-2; Smit, 2004:20).

The Toyota investigation findings and the public outcry over the high prices of new vehicles led to the Commission further initiating a formal investigation into the automobile industry as a whole (Competition Commission of RSA, 2004a:1-2). As a result a total of R51,65 million five was paid by various motor manufactures and dealers (Ntuli, 2006:2).

The outcome of the motor industry is expected to have a positive effect on consumers. This is because consumers can now negotiate discounts with dealers, without being limited by any excuses of maximum discount. This gives consumers greater power and as a result should lead, firstly, to increased competition amongst dealers, and secondly, lower prices for consumers (Ramburuth, 2005:3-4).

2.4.3 Abuse of dominance

The application of competition law is not against dominance or monopoly power per se, but rather the manner in which the dominant firms conduct themselves (Kaira, 2007:11). The determination of whether a firm has a dominant position is carried out in relation to a specifically defined market. Therefore, when the expression *market* is used, this is always with regard to the relevant market (Chakravarthy, 2007:2).

The definition of what constitutes a dominant firm differs amongst different countries. In South Africa, the Competition Act provides three different

conditions where a firm might be categorised as being dominant in the relevant market (Competition Act of RSA, 1998:20). Firstly, a firm is deemed to be dominant if it has at least 45 percent of a market share. Secondly, if it has at least 35 percent, but less than 45 percent of a market, unless it can show that it does not have market power. Thirdly, a firm may be dominant if it has less than 35 percent of a market if the Commission can prove that it has market power.

A firm cannot be accused of abusing its dominance if it does not at-least meet one the three categories. If the firm falls within the first category, there is no defence against dominance. For the second category, a firm may not be charged if it can prove that it does not have market power. For the third category it is up to the competition authorities to prove that firm has market power (Competition Commission of RSA, 2000:35).

The Competition Act further defines market power as a power of a firm to control prices, or exclude competition or to act to an appreciable extent independently of its competitors, customers or suppliers (Competition Act of RSA, 1998:11). The Act lists various anti-competitive conducts that a dominant firm should not engage in (Competition Act of RSA, 1998:21). Firstly, a dominant firm is prohibited from charging an excessive price to the detriment of consumers. Secondly, a dominant firm should not refuse to give a competitor access to an essential facility when it is economically feasible to do so. Thirdly, a dominant firm should not engage in various mentioned exclusionary acts. Exclusionary conducts include requiring a supplier or a customer not to deal with a competitor and selling goods or services below their marginal or average variable cost. Fourthly, price discrimination by a dominant firm is also prohibited. It is up to the firms to prove that engaging in these actions outweigh the anti-competitive effect arising from their actions.

2.4.3.1 Case study 2: South African Airways (Pty) Limited

In a major case concerning abuse of dominance by a dominant firm, South African Airways, hereafter referred to as SAA, was fined R45 million. In July

2005 the Competition Tribunal held that SAA had abused its dominant position in the market for the purchase of domestic airline ticket from travel agents in South Africa (Webber Wentzel Bowens Law Firm, 2005:3). In particular SAA was charged for requiring or inducing travel agents not to sell tickets for rival airline tickets to customers (Webber Wentzel Bowens Law Firm, 2005:3).

The Competition Tribunal found that SAA explorer scheme, which is a system rewarding travel agency staff with tickets on the basis of SAA tickets sold helped to reinforce the dominance of SAA (Mail & Guardian, 2005:1). The SAA conduct was also not good for consumers, because as a result of the scheme, customer preference was influenced significantly and consequently limited in favour of SAA (Finance 24, 2005:1).

It can also be argued that the SAA case reflects the independence of the competition authorities. This is because SAA is operating under Transnet which is a government parastatal reporting to the Minister of Public Enterprises. The absence of interference from the political authorities and the large amount SAA was fined, provide a positive picture about the government's respect for the independence of the competition institutions.

2.4.4 Mergers and acquisitions

When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or the Competition Tribunal must assess the strength of competition in the relevant market, moreover, the probability that the firms in the market after the merger will behave competitively or co-operatively investigated (Competition Act of RSA,1998:30).

Mergers and acquisitions might be horizontal, vertical or conglomerate. Horizontal mergers are mergers that involve firms that are competitors, for example two firms producing bread merging together. Vertical mergers involve firms that are at different levels of the production-supply chain. For example a firm producing beer merges with a firm producing bottles.

Conglomerate mergers involve two firms in diversified and unrelated business (Consumer Unity Trusts Society, 2001:17). Vertical and conglomerate mergers generally raise less competition concerns.

The Competition Act allows for mergers to be justified on public interest grounds. While considering a merger on public grounds the competition authorities consider the effects the merger on four various factors. Firstly, how the merger effect on a particular industrial sector or region. Secondly, how the merger effects employment. Thirdly, the effect of the merger on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons to become competitive. Fourthly, the effect of a merger on the ability of national industries to compete in international markets (Competition Act of RSA, 1998:31).

In essence the public interest consideration implies that a merger that raises no competition concerns might still be prohibited on the ground that it is against public interests (Chetty et al. 2004:16). However, the Act does not provide clear guidelines explaining how the public interest and competition concerns should be balanced when dealing with merger assessment.

Although there has been criticism by competition policy scholars and academics regarding the public interest consideration, Lewis (2000:2) argues that this is in line with the socio-economic challenges facing South Africa. As a result the current competition policy should be relevant to both social and economic challenges facing the country.

Morphet (2007:3) argues that the competition authorities have since 1999 been applying the public interest mandate in a good manner. This is despite pressure from interested parties to convince the authorities to either approve or disapprove mergers based on public interest grounds.

In analysing mergers, the Commission favours a balanced weight approach, which allows all the efficiencies to be considered in a merger analysis. This is as opposed to the interest of a particular group or constituency. This implies that neither the consumer surplus nor the producer surplus approaches take

precedence over the total impact of the merger on the market (Competition commission of RSA , 2004:10).

2.5 Competition policy on consumer interest in South Africa

South Africa has an array of consumer protection bodies. Makhubo (1999:5) highlights the following as some of the most important of these bodies, the Business Practices Committee, the Provincial Governments Departments of Consumer Affairs, the South African Bureau of Standards, statutory professional regulatory bodies and 'industry-specific' self regulatory bodies.

However, there is no explicit link between consumer policy and competition policy in South Africa. Marketing practices and consumer protection issues are not included in the Competition Act. Complaints of unfair competition are matters for private dispute resolution under common law rules. They may also come to the attention of the Department of Trade and Industry's Consumer Affairs section, which applies the Harmful Business Practice Act. However DTI has been reviewing consumer policy and the potential for linking it to competition policy (OECD, 2003:61).

The reviewing of consumer and competition policy is not surprising, because developing countries, such as South Africa should adopt competition policies that protect consumer welfare, health and safety (Hurungo and Tekere, 2002:4).

The competition authorities as highlighted by the chairperson of the Competition Tribunal have not been able to mobilise consumers to be more active in the implementation of competition law (Lewis, 2004:2). Stronger and more active consumer constituencies will without doubt increase the voice of consumers. This can have a positive impact on strengthening the competition institutions.

The absence of strong consumer movements during the transitional period of the new competition regime requires that the competition authorities must be

more active in exercising the mandate to self-initiate investigations. This is so because consumers might either be unwilling because of fear of big businesses, or simply unaware of their rights (Chetty et al. 2004:32).
South Africa can also draw lessons from countries such an India and Pakistan, which have well funded consumer organisations. Consumer movements need to be well resourced and must have the capacity to do research so as to bring forward complaints before the competition authorities (Consumer Unity Trusts Society, 2001:37).

Chetty et al. (2004:32), recommend that the South African competition authorities should expand the scope of consumer voices by instituting better advocacy platforms. However, Lewis (2004:2) argues that rather than focusing on advocacy per se, competition authorities should concentrate more on case management and case handling. This should primarily involve prioritising consumers in case selection, engaging with consumers in the investigative process, and transparency in the decision making process.

2.5.1 Case study 3: The Treatment Action Campaign (TAC)

The TAC's complaint with the competition commission against GlaxoSmithkline South Africa and other pharmaceutical companies lodged on 17 September 2002, provides relevancy of how a powerful and well organised consumer group may impact on the work of the competition authorities. The TAC alleged that the pharmaceutical companies abused their dominant position by engaging in restrictive practices. In particular the TAC alleged that the companies were denying other competitors access to an essential facility, charging excessive prices, and engaging in an exclusionary act (Lewis, 2004:3; Smit, 2005:19).

Under normal circumstances the case would have taken longer, given the nature of the complexities surrounding the allegations. However, the Commission responded to public pressure by speedily referring the case to the Tribunal. Consequently the companies opted to settle the case by offering to issue patent licences to local producers and as a result relinquishing the

monopoly achieved through patents. Accordingly the companies' decisions were mainly influenced by the fear of long legal battles and negative publicity (Lewis, 2004:3).

2.6 Summary of the main findings

The chapter demonstrates the usefulness of competition policies to free market economies, particularly in developing countries. What is essential is to align these policies to the broader economic framework, including socio-economic challenges of the individual countries. This is so because competition policy cannot effectively function in isolation from other government economic policies.

The cost of monopoly for consumers has been highlighted and as a result a case for regulatory intervention in the form of competition authorities has been put forward. While the perfect competition model is an ideal model for consumers and the economy as a whole, this is just an "ideal" that rarely exists in practice. This in itself implies that governments would continue to implement measures that would ensure that market imperfections do not impact too much damage on consumers.

The effective implementation of competition law is a complex process and requires a lot of resources. This might pose a serious challenge for developing countries. The necessary resources such as finances and professional expertise in competition law might not be readily available in these countries, because of other developmental challenges.

However, developing countries can benefit from the adoption of competition policies and laws. The benefits of healthy competition, such as the effective allocation of resources and innovation, can in the long-run promote sustainable development. The challenge for developing countries is to adopt competition policies that will not hamper other developmental goals.

Strong competition institutions are necessary for the effective implementation of competition laws and policies. South Africa's post-1994 competition

institutions appear to be strong and independent. This is an improvement compared to the pre-1994 institutions, which were advisory and subject to political influence.
South Africa's multiple competition goals are not unusual. Many countries and even developed countries, such as the United States started with many goals. The multiple goals should be viewed in the context of broader economic and developmental challenges facing the country.

However, the lack of clear guidelines regarding the public interest concept needs to be addressed by the competition authorities. The Act's silence on how to balance competition and public interest concerns might open a loophole for chance takers. In the process resources that need to be focused on serious competition issues might be wasted.

The interaction between consumer and competition policies is also essential if consumers are to significantly benefit more from competition policies. Consumer interests are an essential element of competition policy, mainly because the outcome of the intervention by competition authorities is expected to benefit consumers positively.

South Africa's weak consumer constituency remains a challenge to ensure that competition policy and law is utilised to the maximum benefits of consumers. While consumer authorities might be urged to promote consumer interests and to promote the competition agencies amongst consumers, it is not the authorities' primary mandate to form a strong and effective consumer group. Consumer activism can only be promoted by a strong and well resourced consumer lobby group.

Three case studies were highlighted so as to assess how the competition authorities have been applying the Act. Two case studies, namely, the Toyota and the TAC cases demonstrated how informed and active consumer groups could impact positively on the work of the competition authorities. The SAA case highlighted the independence of the competition institutions.

CHAPTER 3

APPLICATION OF COMPETITION POLICIES AND LAWS IN VARIOUS COUNTRIES

3.1 Introduction

This chapter provides a brief study of how other jurisdictions apply competition laws and policies. Two developed countries, namely, Canada and Australia are studied along with two developing countries, namely, Zambia and India. This is done primarily with the view to show how these countries deal with the issue of consumer interest so as to draw some lessons for South Africa.

3.2 Canada

Canada's competition policy started in 1889 with the law aimed at price fixing (1997:3). Canada was the first country to adopt a national competition Act (OECD, 2002:17). The Act has been amended on a regular basis to reflect the changing attitude in Canada towards competition policy (OECD, 2004:2).

The body responsible for the enforcing of the Canadian Competition Act is the Competition Bureau, hereafter referred to as the Bureau, which is an independent law enforcement agency (Kwinter, 2005:1).

The Competition Bureau enforces the Act in-order to achieve four goals and the Bureau lists them as follows (Competition Bureau, 2008:1). Firstly, to maintain efficiency and adaptability of the economy; Secondly, to expand opportunities for Canada's participation in the global market, this is also done with the recognition of the role of foreign competition in Canada; thirdly, to promote the participation of small and medium enterprises in the economy; Fourthly, to provide consumers with competitive prices and products choices.

As a result of the goal of providing consumers with competitive prices and choice, the Bureau has a responsibility to enforce some of the consumer protection laws. These responsibilities includes the enforcement of the Consumer Packaging and Labelling Act, the Textile Labelling Act and the Precious Metals Marking Act (Competition Bureau in 2008:1-2). Half of the bureau's enforcement staff is allocated to enforce laws against marketing practices that harm consumers (OECD, 2002:17).

According to the OECD report (2004:8), the Canadian authorities consider the enforcement of consumer protection laws as an essential part of its mission to ensure that the market functions competitively. This is because misrepresentation and misleading information may influence consumers to purchase goods and services.

The Canadian competition law provides for both criminal and civil punishment (Kwinter, 2005:1). Types that may carry either prison punishment or fines, or a combination of both prison and fines, include price fixing, bid rigging, misleading advertising, sales above advertised prices, pyramid schemes, and bait and switch advertising (Kwinter,2005:1; OECD, 2002:17).

According to Kwinter (2005:7), the Competition Bureau has been vigorous in prosecuting criminal violations of the Act that are focusing on consumer protection cases. As a result more emphasis on prosecutions has been on international price fixing cartels, resale price maintenance and deceptive marketing offences.

Although there is a strong legal framework favouring consumers, consumer participation and activism in market related debates are weak (OECD: 2002;17). This is so because despite there being some strong and active provincial associations, there is still a lack of a strong national consumer body.

The problem of active consumer participation cannot only be attributed to lack of resources as it is often the case in developing countries. This is so because

consumer groups get financial support from the Office of Consumer Affairs of Industry and the Canadials ministry and from regulatory bodies (OECD, 2002:18).

In ensuring that consumers fully benefit from the consumer protection legislations, the Competition Bureau works closely with the Office of Consumer Affairs, which is responsible for the consumer problems that are not fully resolved by the competitive markets, and the Competition Bureau (Ireland, 1997:30).

Despite Canada having the oldest competition policy in the world, its institutions do not resemble the independence that may normally be associated with such an experience. This is so because, the Canadian competition institutions have been criticised has being open to influences from political authorities. The criticism is mainly because of the placement of the bureau within the ministry of Industry in Canada (OECD, 2002:19).

However, the Bureau seems to be committed in ensuring that it raises public confidence as an independent institution. As a way of demonstrating its independence, the Bureau has taken measures that include the setting up of its own website and creating its own letterheads (OECD, 2004:10).

3.3 Australia

The Australian competition policy dates back to 1906 when the federal law dealing with restrictive practices was adopted (Kain, Kuruppu and Billing, 2003: 1). However, the main modern Australian competition law was enacted in 1974 with the Trade Practices Act (Fels, 2003:3).

The Australian Competition Act is enforced and administered by the Australian Competition and Consumer Commission (ACCC). The ACCC is a product of the competition policy reforms and was formed in 1995 by the merger of the Trade Practices Commission and the Prices Surveillance Authority (Holly, 2006:4; Kain et al. 2003:7).

As highlighted by Rachagan, (2003:41), the goal of the ACCC is to enhance the welfare of all Australians through the promotion of competition and fair trading. As a result the Trade Practices is regarded as a major instrument of insuring that consumers' interests are achieved in Australia (Kain et al, 2003:2).

In essence the ACCC has a national consumer protection mandate mainly focusing on business violations relating to misleading or deceptive conduct or product safety. In the instances of statutory limitations, the ACCC compliments the work of the State and Territory Consumer Affairs and the consumer affairs division of the treasury in ensuring that consumers are comprehensively protected (Kain et al. 2003:8).

In addition to implementing competition law, the ACCC is also responsible for administering the entire economic regulation. This is because competition policy was put at the centre of economic reforms which previously involved government as a major owner of the Australian infrastructure (Holly, 2006:2).

The ACCC regards itself as an independent agency that is only accountable to the Australian community. As a result it distances itself from any influence by the government or any interest group (Samuel, 2003:5). However the independence of the ACCC has not prevented the political authorities from recognising its importance as a result it allocates more resources towards the effective implementation of the Trade Practices Act (Fels, 2003:6).

The Australian authorities' view the promotion of competition in the market is a central part of the entire economic performance. As part of the review process of the competition policy, the National Competition Council has also been created to ensure that all other government departments participate in the promotion of competition (Holly, 2006:4).

The Australian law does not provide for criminal sanctions. However, there is a review to consider where cartels should carry criminal sanctions. If adopted,

the punishment would include imprisonment and fines for convicted individuals (Samuel, 2003:7).

In support of criminal prosecutions, there are already strong views in Australia that collusion is an unethical business practice and businesses that practice it should be regarded as stealing from the community (Fels, 2002:12).

The Australian authorities take the mandate of consumer awareness seriously. There is emphasis for the public to be informed about the work of the ACCC. Despite being directed by Section 8 of the Australian parliament to make information available to all interested parties including consumers, the ACCC has also been taking initiatives through media and public forums to inform consumers about their rights (Samuel, 2003:3).

According to Fels (2003:6), the use of the media adds value to the working of the ACCC. This is because if the public and the business are aware of the achievement of the ACCC, this results in gaining public support and it further promotes a competition culture within the business community.

In addition the ACCC is also accessible in various capital cities and towns. According to Kain et al. (2003:8) this is important because the ACCC is able to provide guidance to many businesses and consumers. The awareness programmes and advocacy programmes has resulted in the ACCC being more accountable since there is an intense focus on its activities by the public (Samuel, 2003:1).

3.4 Zambia

Zambia's Competition and Fair Trading Act came into effect in 1995 (Zambian Competition Commission 2006:1) .The Zambian Competition Commission, hereafter referred to as ZCC, was established in 1997 and is responsible for the enforcement of the Act (Consumer Unity Trusts Society, 2005:1; ZCC,2006:10).

The ZCC consists of thirteen Commissioners who represent various interest groups in society. As a way of ensuring that the interests of consumers are fairly represented, two of the thirteen commissioners, are the representatives of the consumer interests groups (Consumer Unity Trusts Society, 2001:2).

Zambia was mainly pressurised by the IMF and the World Bank to adopt competition policy as part of the structural adjustment programme (Consumer Unity Trusts Society, 2001:1). Competition policy is therefore part of the trade liberalisation policy package adopted by the government as part of the IMF conditions.

However, there seems to be more voluntary commitment by the authorities to ensure that competition law and policy is popularised. As part of the awareness programme there is a celebration for National Competition day in Zambia where there is more focus on competition policy activities (Mehta: 2003:29).

As is often the case in most developing countries Zambia's Competition Act provides for multiple objectives. Firstly, it is responsible to encourage competition in the economy. Secondly, to protect consumer welfare. Thirdly, to strengthen the efficiency of production and distribution of goods and services. Fourthly, to secure the best possible conditions for the freedom of trade. Fifthly, to expand the base of entrepreneurship (Zambian Competition Commission 2006:1).

Section 12 of the Act provides the ZCC 2006 with the power to enforce consumer protection laws. This includes consumers' right to safety, information, choice, hearing and a clean environment (Consumer Unity Trusts Society, 2002:25). Consumer complaints are dealt with by a specifically allocated Consumer Complaints Desk, which falls within the ZCC (Lipimile, 2006:305).

According to the Consumer Unity Trusts Society report (Consumer Unity Trusts Society, 2001:4), there are two major challenges for the Zambian Commission. Firstly, there are inadequate financial and human resources to effectively implement the law. Secondly, there is low awareness of competition law amongst consumers and businesses. However, despite these challenges the Zambian competition authorities are credited as being highly committed and dynamic (Mehta, 2003:35).

Lipimile argues that Zambia needs to improve its consumer protection laws. This is because the country lacks a comprehensive consumer protection law (Lipimile, 2006:305). Instead legal provisions for consumer protection are highlighted in various legislations including the competition law.

There appears to be an emergence of Consumer activism in Zambia. According to Mehta (2003:36), there are dedications of consumer activists in Zambia that are aimed at establishing a strong consumer group. In addition and as a result of the strong consumer activism, there is also a process aimed at implementing a comprehensive consumer protection law to protect consumers against unfair practices (Lipimile, 2006:305).

The Zambian competition structures need to be strengthened so as to be more independent. This is because the authorities cannot issue legally binding orders for violators of the Act. All the cases are taken to the courts of law by the commission for judicial determination (Consumer Unity Trusts Society, 2002:26). This implies that competition cases are exposed and determined by the usually long and costly judicial processes.

3.5 India

India's competition law first started with the Monopolies and Restrictive Trade Practices Act of 1969, hereafter referred to as the 1969 Act. It came into effect in 1970. The focus of the 1969 Act was mainly to control monopolies and preventing restrictive practices (Dhall, 2005:5). Since 1970 the Act has been through numerous changes (Agarwal, 2005:3).

Following the initiating of the Act review by the government in 1999, the new Competition Act came into effect in 2003 (Competition Commission of India, 2002:1). According to Mehta (2003:35), the new Act was drafted to reflect changes in the Indian economy. However, because of various challenges, that includes the challenge by the Indian Supreme Court of Appeal regarding the suitability of a person who should be in charge of the Competition Commission of India (CCI), the Act has not been fully enforced (Agarwal, 2005:5).

According to Dhall (2006:7) the Competition Commission of India has been devoted to studying various concepts and best practices in competition law and policy. As part of these studies the Indian authorities have set up task forces and are networking with consumer policy and law experts.

The competition act makes provision for four objectives. Firstly, to prevent anti-competitive practices. Secondly, to promote and sustain competition. Thirdly, to protect the interest of the consumers. Fourthly, to ensure freedom of trade (Competition Commission of India, 2002:2).The new competition act includes the prohibition of anti-competitive agreements such as cartels, abuse of dominance and it also regulates mergers (Dhall, 2006:7).

The 1969 Act made provision for the Unfair Trade Practices mandate which primarily carried a consumer protection responsibility. However, according to the new Act all the pending consumer protection cases will be transferred to consumer protection agencies (Mehta, 2003:37). This is because consumer

protection agencies have a far wider reach in the country than the competition authorities.

According to Mehta (2003:81), India's competition authorities have not been implementing competition law in an appropriate manner. This is so because the competition authorities were, firstly, limited in numbers and secondly, were inadequately qualified to effectively enforce the law.

India's consumer protection laws are being viewed as being revolutionary and strong. This is mainly because of the country's three tier judicial settings of having consumer courts at national, state and district levels (Srinivasan, 1999:1).

The strength of the India consumer protection laws may also be attributed to the country's strong consumer movement. According to Narayanaswamy, (1999:1) India's consumers have been organised since the mid-sixties. In addition, and as a way of promoting consumer activism, the consumer movement in India is also assisted financially by donors such as the DFID (Mehta, 2003:36).

In the interim the competition authorities have been focusing more on competition advocacy. Measures to promote competition law amongst the Indian community include the setting of an expert committee on competition advocacy. The role of the expert committee is to assist the commission to come up with a functional advocacy plan (Dhall, 2005:8). In addition the commission has also designed a competition law and policy curriculum, which it has since sent to almost 140 universities and institutions (Dhall, 2005:8).

3.6 Summary of the main lessons learnt

Both developed countries have competition policies that have been in existence for over a century, while the developing countries have only in recent years been exposed to these policies. As shown by both developed countries and also by India the adoption of effective competition laws and policies is not static. This implies that continuous research and development takes place which is informed by changes in economic conditions of a country.

The practice of adopting multiple objectives for competition policy and law is more common in developing countries. Both Zambia and India have since adopted objectives that are in line with the macro-economic challenges of developing countries. However the adoption of multiple goals is not only limited to developing countries. The Canadian Competition Act, even with its developed economy and longest service competition law in the world, still provides for multiple objectives. This is in line with other micro and macro economic objectives of the country.

Both Australia and Canada view collusion and price fixing as serious offences, which have more detrimental effects on consumers and businesses. As a result Canada's competition Act provides for both criminal and civil punishment against firms engaging in such a conduct, while Australia is also in a process of doing so.

Given the price distortions and the impact of price fixing on consumers, particularly the poor, developing countries including South Africa might also need to pay serious attention to this anti-competitive behaviour. In line with the practices in the developed countries those who are consciously engaging in collusion and price fixing should be regarded as stealing from the community. As a result there is a need to consider criminal punishment for such offences.

Both Zambia and India seem to be facing a serious challenge of resources as opposed to the two developed countries. The challenge includes inadequate skills and a lack of financial support for competition bodies. This is because unlike the two developed countries, these two developing countries have other developmental objectives that require more resources as compared to developed countries.

Consumer protection seems to be a priority in all four countries. This is because consumer welfare is viewed as an integral part of competition policy and law. As a result all four countries' have made provisions for the consumer protection mandate.

Of the four countries, India is the one with the strongest consumer movement and best consumer protection laws and structures. Of interest is also the shift of all consumer protection responsibilities from the competition authorities to other consumer protection agencies. The argument of shifting all the consumer protection responsibilities makes sense particularly given the three-tier system, which ensures that most of the consumer concerns are addressed at all spheres of the Indian governance.

The Indian model of addressing consumer issues within the context of competition law is in contrast to the three other countries. The Zambian authorities have a specific desk allocated to consumer protection issues, while Canada's and Australia's competition authorities have a mandate to enforce consumer cases.

Although the Indian competition institutions have not been fully functional, nevertheless there has been a lot of work towards advocacy and marketing of competition policies and laws. These will in the long-run benefit the competition authorities, since there will be more vigilant citizenship who are aware of their rights against unfair business practices. In addition to the Indian authority's design of curriculum for competition law and policy, which has been sent to various institutions of higher learning, this will also go a long way in popularising these policies. Other developing countries might benefit from

adopting such an approach, because this might result in a positive multiplier effect. This includes the savings on marketing costs and building a strong awareness amongst citizens.

Access to competition authorities and institutions is also regarded as being important in Australia. This has resulted in the opening of various offices in capital cities by the ACCC. Also important is the public awareness programmes of ACCC which ensures that there is vigorous participation by the Australian community on competition issues. This ensures that competition policy is not viewed as a policy of the few.

The declaration of competition day in Zambia is also an effective tool to create awareness regarding competition policy. This might be an important lesson particularly for developing countries including where there is still a lack of awareness by both business and consumers. The inclusion of two Commissioners as representatives of consumers in the ZCC also ensures that consumers are part of the decision making process. This is also an important aspect if the broader consumer population is to participate in competition policy matters. This further ensures that there is ownership of the competition policy by the consumers.

Of the four countries, Australia is the one with strong and independent institutions. Strong institutions that are not subject to political influence are generally regarded as key to the effective implementation of competition laws and policies. Compared to the four countries, South Africa's competition institutions can be rated along with that of Australia as far as independence is concerned.

For consumers to optimally benefit from consumer regulatory agencies there is a need for all the structures involved to work closely together. In both Australia and Canada there is a close co-operation between competition authorities and consumer agencies. This provides a platform for the sharing of experiences by all involved agencies when addressing the goal of consumer welfare.

CHAPTER 4

ANALYSIS AND RESULTS IN MEASURING THE EFFECTIVENESS OF COMPETITION POLICY IN SA.

4.1 Introduction

This chapter provides for an analysis of the results of individual consumers and respective consumer bodies, namely, the Competition Commission, the Consumer Protection Division of the DTI and the National Consumer Forum. In this study the DTI Consumer Protection Division and the Council are used interchangeably to denote the same institutions. The results are from two structured questionnaires, one for individual consumers, and the other for key informants who represented the three consumer bodies. All the questionnaires were developed and recorded by the author.

Initially 120 questionnaires were prepared for individual consumers and distributed randomly in Gauteng province. There were 100 responses and this represents 83 percent of the sample, while the rate of non response was 17 percent.

The three key informant questionnaires were administered through interviews by the author. The author sourced help for the distribution of questionnaires for ordinary consumers. The author does not rule out the possibilities of the overstating or understating of certain aspects in the responses, however, all reasonable efforts were made to collect and capture data effectively without compromising any standards.

4.2 Demographic information and awareness of competition policies and laws by consumers

Table 4.1: Demographics of respondents

1	Residence	Frequency	Percentage
1.1	Urban	63	63
1.2	Rural	10	10
1.3	Rural/Urban	27	27
	Total	**100**	**100**

Source: Survey data

Table 4.1 represents the distribution of the respondents. Of the respondents 63 percent reside in the urban area, whereas about 10 percent reside in the rural areas. Exactly 27 percent of the respondents reside between the rural and urban area. The implication is that the majority of the respondents reside in urban areas.

***Table 4.2:* Awareness *about* consumer laws and policies**

2	Residence	YES	NO
2.1	Urban	40 (63%)	23 (37%)
2.2	Rural	3 (30%)	7 (70%)
2.3	Rural/Urban	12 (44%)	15 (56%)
	Total	**55 (55%)**	**45 (45%)**

Source: Survey data

Table 4.2 represents consumer awareness about consumer laws and policies. Overall 55 percent of the respondents reported to be aware of consumer laws and policies, and 63 percent of the urban respondents were aware of the consumer laws and policies, while 30 percent of the rural respondents were aware of such laws and policies. Of the rural/urban sample, only 44 percent of the respondents were aware of such laws and policies. A low 30 percent figure of the rural respondents could be attributed to a number of reasons, including but not limited to the Consumer Council's low penetration rate with such initiatives and the lack of access to newspapers and information relating to such issues.

Table 4.3: Awareness about competition policies and laws

3	Residence	YES	NO
3.1	Urban	29 (46%)	34 (54%)
3.2	Rural	1 (10%)	9 (90%)
3.3	Rural/Urban	7 (26%)	20 (74%)
	Total	**37 (37%)**	**63 (63%)**

Source: Survey Data

Table 4.3 presents the number of respondents who have some knowledge about the competition policies in particular. Overall only 37 percent of the respondents are aware of the competition laws and policies. Only 46% of the respondents from the urban area are aware of the existence of the competition policies, while 10 percent of the rural respondents are aware of such existence. The overall low awareness of the respondents could be attributed to either lack of information on the recourse that consumers generally have on competition matters or alternatively poor consumer awareness programmes by the Competition authorities.

Table 4.4 Method of exposure to consumer education

4	Method	Frequency	Percentage
4.1	Newspapers / pamphlets	46	46
4.2	Television / radio	48	48
4..3	Contact teaching	6	6
	Total	**100**	**100**

Source: Survey Data

Table 4.4 presents the methodology of exposure to consumer education. A higher number of respondents received education through electronic media, specifically the radio and television. This highlights a higher reliability of electronic media by consumers as the major source of information and education. Newspaper/pamphlets with 46 percent as a source of information and education are still relatively high. Contact teaching at 6 percent is very

low, highlighting the limitations on consumer bodies to offer such programmes to consumers on a contact basis.

Table 4.5 Body offering such education

5	Category	Frequency	Percentage
5.1	Consumer council	31	31
5.2	Competition body	2	2
5.3	National consumer forum	22	22
5.4	Uncertain	45	45
	Total	**100**	**100**

Source Survey data

Table 4.5 presents the knowledge of consumers on persons or bodies offering such education as per the print or electronic media. The largest number of consumers or 45 percent are uncertain about who is in charge when such information is received or conveyed. The National Consumer Forum is most known with 22 percent compared to only 2 percent of the Competition Authorities. The consumer council with 31 percent may be attributed to the fact that the council have offices in all the nine provinces, as compared to the other two bodies which mainly operate from Pretoria. As a result most might have a contact with the consumer council either in Gauteng or any of the provinces.

Table 4.6: Benefits of consumer and regulatory bodies

6	Category	Frequency	Percentage
6.1	Yes very beneficial	46	46
6.2	No, not beneficial	30	30
6.3	Uncertain	24	24
	Total	**100**	**100**

Source: Survey data

Table 4.7 outlines consumer perceptions on the benefits of consumer bodies. Consumers with 46 percent were certain that there were benefits to be realised through the existence of such bodies. Only 30 percent of the respondents did not believe that their institutions were beneficial, while 24 percent of the respondents were uncertain of the benefits.

Table 4.7: Body perceived as being more visible and proactive

7	Category	Frequency	Percentage
7.1	Consumer council	41	41
7.2	Competition body	5	5
7.3	National consumer forum	24	24
7.4	Uncertain	30	30
	Total	**100**	**100**

Source: Survey data

Table 4.7 highlights the pro-activeness and visibility of consumer bodies as perceived by consumers. The consumer council with 41 percent was perceived as more visible and active. The competition body with 5 percent was less recognised in terms of visibility and pro-activity. The National Consumer Forum had some popularity at 34 percent while 12 percent of the respondents were uncertain of the answer or did not know. This is almost in line with the respondent's perceived knowledge of the body offering consumer programmes. However, consumers seem to be knowledgeable of the work that is being done by the National Consumer Forum.

4.3 Interview responses from consumer bodies

4.3.1 Consumer awareness programmes

4.3.1.1 Competition Commission

The Competition Commission indicated that these programmes are in existence. There are two processes to make consumers aware of the programmes: firstly, they interact with consumers and other provincial bodies through the consumer working group. This is a body that comprises of various regulators such as the Consumer Council. Secondly, there are various campaigns using both the electronic and print media to send out and educate consumers on competition matters. The commission reported that it is also making presentation to various institutions of higher learning in particular the so called historically disadvantage institutions. The Commission reported that it also has an influence on the curriculum offered in competition topics within these institutions.

The Commission further highlighted that it has a constraint of limited resources. This includes the continuous losing of skilled members of the commission to the private sector. Therefore, some of the programmes do not operate effectively. At the time of the interview the competition commission's compliance division reported that it had just lost one of its most experienced members.

4.3.1.2 DTI Office of Consumer Protection

The office of the consumer protection reported that on consumer awareness efforts they have education programmes through radio and brochures. They also reported having annual consumer awards to consumer champions. Consumer champions are institutions or individuals who have been active in promoting consumer rights. The consumer protection also reports that efforts have been made to capacitate consumer bodies through training.

However the Department raised the lack of enough resources as a major impediment on promoting consumer awareness. As a result it can not assist in funding Non Government Organisations (NGOs) or other consumer representative bodies. Instead the Department is considering engaging the lottery so as to assist with funding for consumer NGOs. Because of concurrent jurisdictions with the provincial bodies of the department, most of the active implementation is done by provincial offices and the National Department mainly co-ordinates and monitors the progress being made by the provinces.

4.3.1.3 National Consumer Forum

The National Consumer Forum reported a number of awareness campaigns that it has embarked on. The NCF has a website which was established in May 2006. By 31 December 2007 there were already 699 000 visitors to this web address. The NCF also has a monthly consumer newspaper named the Consumer Fair. The newspaper is distributed by the Amalgamated Banks of South Africa, ABSA, throughout the country and 100 000 papers are distributed every month.

The Forum has also what it calls town meetings programmes where different areas are targeted for a face to face contact with ordinary consumers. According to the NCF this programme started in August 2007 and already there has been contact with 4200 consumers. The NCF also has a consumer education programme, which involves the use of the media to target ordinary consumers. The South African Broadcasting Corporation, in particular through Ikwekwezi FM has since allocated the NCF a daily slot on weekdays.

4.3.2 Relationship amongst the three consumer bodies

This question aims to assess if the three bodies are closely working together in ensuring that all consumer related concerns are comprehensively addressed. The question further exploits if the bodies are drawing synergies from one another in addressing consumer cases. This is in line with the argument by Buttiegieg (2005:3), that the close application of consumer and competition laws can guarantee greater protection for consumers.

4.3.2.1 Competition Commission

The Commission reported that it engages with various consumer regulatory bodies through the National Working Group. The Commission further stated that it has a relationship with other regulatory bodies such as the National Credit Regulator. However the Commission did not come out clear on how it engages with the Office of Consumer Protection, except to highlight that the two institutions are part of the National Working Forum. This is despite the bodies occupying offices in the same complex. However, the Commission reported that it has a good working relationship with the National Consumer Forum and highlighted that the NCF was invited to make a presentation during the bread case. The Commission also highlighted its good relationship with other regulatory bodies such as the National Credit Regulator.

4.3.2.2 DTI Office of Consumer Protection

As it is the case with Competition Commission, the Consumer Protection Unit responded that it has a good relationship with other regulatory bodies such as the National Credit Regulator.

4.3.2.3 National Consumer Forum

As reported by the two bodies above the NCF has a good relationship with the two bodies and other regulatory bodies such as the NCR. The body also referred to its participation in the bread case where it made a presentation to the Competition Commission as proof of a good relationship with the two bodies.

4.3.3 Prioritisation of consumer cases

4.3.3.1 Competition Commission

The competition commission reported that its priorities in investigating cases is based on sectors identified as having high degree of anti-competitive concerns. The commission has identified certain sectors such as the construction sector as having raised competition concerns. The competition further highlighted that consumers are often highly considered during investigations, both in anti-competitive cases and merger cases.

The Commission further highlighted the investigations of cartels and collusion as a priority. The Commission highlighted the Competition Commission case against Tiger Consumer Brands Limited, which was fined R98 million for fixing the price of bread as both a highlight for 2007 and a sign of its commitment in ensuring that collusive behaviour is not tolerated.

4.3.3.2 Consumer Protection Unit

The Consumer Protection Unit reported that it does not have a specific method of prioritising cases when they are reported. However the Unit reported that it had identify problematic industries and ensures that industries that continuously raise serious consumer concerns are closely monitored and prioritised on regular basis.

4.3.3.3 National Consumer Forum

The NCF reported that it has identified three areas as having major concerns for consumers: Firstly, the food, safety and security area; Secondly, the area of access to financial services; thirdly, the Health Care. Fourthly the

Telecommunications area, were identified. According to the NCF this is because most of the consumer complaints are about these industries.

4.3.4 Monitoring Mechanisms

4.3.4.1 Competition Commission

The Competition Commission does not have clear monitoring mechanisms. In the case of mergers that are approved with conditions, the Commission mainly rely on the parties to submit records showing that they have or are implementing the conditions. This is done for the specific period as imposed by the Competition Tribunal or the Supreme Court.

As reported by the commission, most of the conditions that are fully implemented and vigorously monitored are the conditions relating to employment issues. This is so because of the active involvement of the trade unions that continuously ensure that the interests of their members are not compromised. In addition the competition also relies on competitors who are likely to be affected if conditions of the approval of such mergers are not fully implemented.

However, in the cases of restrictive conducts or anti-competitive behaviour, there is no continuous monitoring of events in such industries to check if there is low impact on consumers both in terms of choice and prices. However, the commission attributes some of its failures in this area to the fact that it does not have a mandate to regulate prices. As a result there is no tangible guarantee for consumers that they will benefit from the punishment imposed on the firms both in the short or the long-run (survey data).

4.3.4.2 DTI Office of Consumer Protection

The DTI Office of Consumer of Protection reported that it does a trend analysis on regular basis of the cases investigated to determine if there is an impact on industries investigated. This assisted the Office of Consumer Protection to determine if its investigations are minimising bad conducts by firms against consumers.

4.3.4.3 National Consumer Forum

The NCF reported that it mainly uses the impact of its influence on key consumer issues and policies as its point of reference for assessing its impact on consumers. It highlighted that most of its submissions were incorporated into the National Credit Act in particular the submissions made on the conduct and functioning of credit bureaus.

4.4.4.1 International Case Studies

All three bodies reported that they refer to various countries when dealing with cases. The Commission reported that amongst others, Australia, Canada, the USA and the UK were amongst the key countries of referral. The NCF further reported that it is a member of the Forum known as the Consumer International which is an international body of consumers.

4.5 Summary of the main findings

This chapter managed to provide some insight in how consumers perceive the importance of the competition authorities and the other two interviewed bodies. There is generally more awareness of the consumer related laws and institutions in urban areas than in the rural areas. This however might be attributed to various factors, including but not limited to, access to information, level of education, proximity to the offices of the regulators and other. However, the study was limited in going into detail on these factors.

The general level of consumer awareness regarding the consumer laws appears to be low. This is despite the effort made to empower consumer about their rights. The competition authorities, in particular the competition commission need to improve its consumer awareness programme if it expects to galvanise consumer support in the implementation of competition laws and policies.

The National Consumer Forum seems to be playing a vital role in empowering consumers with relevant knowledge about their rights. This is highlighted by

both the level of recognition by consumers, and the amount of work the forum does on consumer awareness programme.

While the level of consumer movement in South Africa is generally being viewed as being weak, the level of participation and victories scored by the NCF on behalf of ordinary consumers is bound to benefit both consumers and the regulatory bodies positively. This is so because once, consumers realise the value of favourable decisions taken by the regulators, as a result of the NCF participation, more consumers will also have faith that these regulatory bodies do add value to their lives.

The commission's approach to target the institutions of higher learning in particular previous disadvantaged institutions is well in line with the practice in other countries such a India. This is a good effort in ensuring that the knowledge of competition law also reaches marginalised communities, since most students from these institutions are from rural communities. Hopefully some of the students will also make an effort of empowering their communities about their rights regarding unfair business practices in this way.

The formation of the National Working Group is also a good initiative. However, this does not imply that the competition authorities should only focus on the group for a working relationship. For logistical purposes it also makes sense for the two bodies, namely, the Competition Commission and the DTI Office of Consumer Protection, to have an effective relationship. This is so because there will also be an overlap on some of the cases received by the two institutions. As a result, this will provide a platform for sharing experience on some of the major problematic industries. In addition the two bodies share an office complex, so it should not be difficult to have regular interactions.

CHAPTER 5

SUMMARY OF THE MAIN FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The aim of the study was to understand how competition policies and laws, through perception and handling of consumer related cases, have been affecting consumers. This included the conducting of interviews to understand how the competition authorities, in particular the Competition Commission, have been performing consumer awareness programmes. This was done with the view of determining how the commission has been rallying consumers to fully understand their rights against businesses that are violating the Competition Act.

Secondly, the study evaluated the relationship between the Competition Commission, the DTI Office of Consumer Protection and the National Consumer Forum. This was done to determine if there is a coordinated effort in ensuring that the goal of consumer interests is comprehensively prioritised.

Thirdly, the study aimed to assess the impact of consumer awareness of the competition policies and laws on consumers. The assessment was benchmarked against the awareness of consumers of both the DTI Office of Consumer Protection and the National Consumer Forum. This was further done to understand if consumers view these laws and bodies as having an impact on them.

5.2 Impact of competition laws and policies on consumers: management and interview assessment

It is the finding of the study that there is a commitment on the part of the competition authorities that consumers benefit from the application of the law. This is despite the limited resources of the competition authorities. The

handling and management of cases demonstrate that there has been an effort to ensure that consumer related concerns are considered when dealing with both restrictive practices and mergers.

South Africa's competition authorities' vigor and independence in handling of cases was also demonstrated. South African competition institutions are therefore comparable to some of the best in world. South Africa's competition institutions appear to be better than that of Canada, India and Zambia, both in terms of structure and influence from political authorities. The investigation and punishment of SAA for contravening the competition act also supported the view regarding the independence of the competition authorities.

There is, however, a need for the Commission to improve its monitoring mechanism. This will go a long way to ensure that there is evidence of the relevant impact of the competition policies on all affected parties, including consumers. The reliance of the Commission on parties to provide evidence on cases limits the Commission's ability to fully understand the detailed dynamics of various industries.

While the competition authorities have demonstrated some commitment to dealing with collusive behaviour and cartels, there is still room for improvement. Strong messages still needs to be send to those cheating consumers by fixing prices, that such a conduct will be seriously punished. This is in line with the practices in developed countries, which includes both Australia and Canada. They have since put cartels and collusive behaviour at the centre of their investigations.

5.3 Relationship with other consumer and consumer regulatory bodies

The finding of the study is that there is a weak relationship between the Competition authorities and the DTI Office of Consumer Protection. The relationship between the competition authorities and other regulatory bodies, in particular the DTI Office of Consumer Protection, is very important. This is so for various reasons. Firstly, the relationship between the Commission and

consumer protection agencies will ensure that the two agencies draw synergies from one another when dealing with consumer agencies. The practice is in line with other developed countries such as Australia and Canada who have since put competition law at the centre of consumer related issues.

Secondly, with the competition authorities only having office in Pretoria, an effective relationship might ensure that through the consumer provincial offices other programmes of the competition authorities are spread amongst the wider South African community. Given the limited resources and a low level of consumer activism in South Africa, any comprehensive approach by all the relevant consumer bodies might be highly effective.

The current weak working relationship between the two agencies does not make much sense. This is because both bodies do not only share an office complex, but also because the commission is part of the DTI group. Whilst, the formation of the National Working Group of the consumer regulators is a welcomed initiative, this does not provide an excuse for the two regulators not to have an effective working relationship.

The other body that seems to be at the heart of consumer protection is the National Credit Regulator. All the bodies interviewed reported having a good and working relationship with the NCF. In general South Africa has comprehensive consumer protection legislation which compare with the best in the world. This is in contrast to some of the developing countries, including Zambia, which still needs to implement comprehensive consumer protection legislation.

The NCF participation with various bodies and regulators need to be complimented. Despite, its limited resources the body seems to be committed to ensure that the consumer voices are represented in various forums. The input the body make cannot be emphasised, as enough was the case in the bread fire against Tiger brands.

5.4 Impact of competition laws and policies on consumers: perception approach and assessment

The perception analysis is mainly based on the responses received from the responses on the questionnaire by the individual consumers. Based on this, it is the finding of the study that the competition authorities or institutions have not done much to support consumers. Of the 100 questionnaires analysed only 5 percent of the respondents view the competition authorities as being more active in promoting consumer interests. Although the competition authorities are not consumer bodies per se, this figure is low by any standard for a body that claims to be championing consumer interests. There is a need for a more robust consumer awareness programme so that the public may understand the importance of competition policy in their lives. South African competition authorities may learn from countries such as Australia that have allocated resources to ensure that consumers and the public in general are active in competition and consumer related issues. The case of resale maintenance in the auto mobile industry informed and made consumers aware of the value added to the standard of living by the competition authorities.

There is also a need by the competition authorities to conduct more awareness programmes in rural areas where knowledge of competition policies appears to be very low. Greater co-ordination amongst consumer bodies may assist in reaching out to more consumers; this will also go a long way in addressing the problem of limited resources. However in the medium to long run a more coordinated consumer protection framework which empowers the competition authorities and other consumer bodies will assist in creating more interest and awareness from consumers.

The competition authorities need to be more visible when sending out the message to the public regarding their achievements. Only 2 percent of the respondent identified with the competition authorities consumer education programmes as compared to 31 percent which recognises the education programmes of the National Consumer Forum. While, it can correctly be argued that the competition commission is not primarily a consumer protection body, however as demonstrated with the resale maintenance case study, an

informed consumer will likely have a huge positive effect on its work. As a result a positive perception and relevance to consumers is important.

Bibliography

Agarwal, A. K. 2005: "Competition law in India: Need to go slow and steady", Ahmedabad: Indian Institution of Management

Ball, T. 2005: "Intellectual Property and Competition Law", http://www.mallinicks.co.za/news_cases_text.asp?id=13, accessed 28 February 2007

Bhojani, S. 2007: "Abuse of Dominance/Misuse of Market Power-Discussion Exercise", Paper presented at the Africa Regional Training Workshop: Competition Policy and Law Implementation, Pretoria, 15-17 February 2007

Bishop, S, & Walker, M. 1999: The Economics of EC Competition Law: Concepts, Application and Measurement. London, Sweet & Maxwell,

Buttigieg,E. 2006: "Synergy between Consumer Policy and Competition Policy", Bank of Valletta Review, No. 33, spring

Chakravarthy, S: 2007. "Dominance, Market Power and Abuse of Dominance" paper presented at the Africa Regional Training Workshop on Competition Policy & Law Implementation, Pretoria, 15-17 February 2007

Chetty,V. Hartzenburg, T. & le Pere G, 2004: "Competition Law and Policy in South Africa: Case Studies, performance and implications", 7-Up project, Phase II Country Report, IGD Occasional Paper no 43 of 2004

Colander,D.C: Macroeconomics, 4th Edition. http://ec.boisestate.edu/syllabi/sp02/Lo...

Competition Bureau of Canada, 2008:" About the Acts", http://www.competitionbureau.gc.ca/epic/site/cbbc.nsf/en/h_00148e.html, accessed 4 February 2008

Competition Commission of India, 2002: "Public awareness on competition law & policy", http://competition-commision-indianic.in,

Competition Commission of India Presentation on Overview of Competition Law and Policy by Vinod Dhall, Member to Confederation of Indian Industry Regional Councils, March, 2006, http://www.competition-commission-india.nic.in/speeches_articles_presentations/8-Presentation%20to%20CII,Mar06.pdf

Competition Commission South Africa, 2004:"Responses to the Questionnaire on the Canadian Treatment of Efficiencies", 20 December 2004

COMPETITION TRIBUNAL., 2000: *In the Large Merger Between JD Group Limited and Ellerine Holdings Limited*. Case No. 78/LM/Jul00. Pretoria: Competition Tribunal, South Africa. [Online]. Available: http://www.comptrib.co.za/decidedcases/doc/78LMJUL00.doc

Commission, South Africa. [Online]. Available: http://www.compcom.co.za/resources/Media%20Releases/MediaReleases%202003/Jul/Med%20Rel%2034%200f16%20Dec%202003.asp

Consumer interest competition law Zambia,2002: http://66.102.9.104/search?q=cache:FV530mZeYJ:www.Consumer Unity Trusts Society international.org/Zambia.do..., accessed on 05 April 2007

Consumer Unity Trust Society, 2001: "Competition policy in Zambia",

Consumer Unity Trusts Society, 2002: "7-UP Country Paper on the competition regime in Zambia http://66.102.9.104/search?q=cache:FV-53OmZ-eYJ:www.Consumer Unity Trusts Society - international.org/Zambia.do...accessed on 5 April 2007

Cooper, Russel J. & McLaren, Keith R. & Wong, Gary K. K., 2001: "On the empirical exploitation of consumers' profit functions in static analyses," Economics Letters, Elsevier, vol. 72(2), pages 181-187, August.

Das, T. & Kumar, U., 2001: "Competition Policy & Law Made Easy: Monographs on Investment and Competition Policy # 8", CONSUMER UNITY TRUSTS SOCIETY International, India

David C. Colander, Macroeconomics, 4th Edition. http://ec.boisestate.edu/syllabi/sp02/Lo...

Dhall S.V, 2005: competition commission of India, at Indian paint industry conference, Mumbai. http://www.competition-commission-india.nic.in/speeches_articles_presentations/speech_by_shri_vinoddhal_ipi.pdf

Edwards J, 2004: "Competition Policy, Consumer Protection, and Poverty Alleviation", Presentation to preparatory seminar for UNCTAD XI on the Role of Competition in the Promotion of Competitiveness and Development, Sao Paolo, Brazil, on the 10 June 2004

Fels A, 2002: "Competition Law and the public interest: A perspective of the Australian competition and consumer commission", Speech to Monash University Corporate Governance Forum

Fels A, 2003: " The Future of Competition Law: Occasional Paper No 6", University of Tasmania

Finance24.com 2005: Trade Law Centre for Southern Africa (SAA to pay for contravening the Competition Act)
http://givengain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_...

Fourie F C v N, 1997: "How to think and reason in Macroeconomics", Second Edition, Juta

Hartzenburg T, 2002: "G-Other Trade Topics-Competition", http://www.tralac.org/scripts/content.php?id=2769, accessed on 25 January 2007

Hurungo J, Tekere M, 2002: "Multilateral Framework for Competition Policy: Where do African Consumers stand", http://www.tradescentre.org.zw/publications/issue19.html, accessed in 21 February 2007

Holly D, "Competition Policy: Issues and Practices in Australia", http://www.ausgovindia .com/ndli/speech02.html,accessed on 13 November 2007

Ireland D, 1997: "Competition Policy and Consumer Protection
http://www.irpp.org/po/archive/oct97/ireland.pdf

Jafta R C C, 1998: "Is a South African Competition Policy keeping up with world developments?" paper delivered at the Annual Legislation & Policy Review Conference, Randburg, 9 November 1998

Kain K, Kuruppu I & Billing R, "Australia's National Competition Policy": Its evolution and Operation

Kaira T, 2007: "A Practical Guide to Competition Law- the concepts of Dominance and Monopoly", paper presented at the Africa Regional Training Workshop on Competition Policy & Law Implementation, Pretoria, South Africa

Kaira T, 2007: "Mergers & Acquisitions vis-à-vis Competition Law and Policy- Key Issues", paper presented at the Africa Regional Training Workshop on Competition Policy & Law Implementation, Pretoria, South Africa

Kampel K, 2005: "Competition Law and SMEs: Exploring the Competitor/Competition Debate in a Developing Democracy", Trade and Industry Monitor

Khemani S, 1995: "Competition Law: The scope of competition law", http://www.hku.hk/hkcer/articles/v31/rkhemani.htm, accessed on 24 April 2007

Kwinter R E, 2005: "Changes to Canadian Competition Law", http://library.findlaw.com/2005/Jun3/246534.html, accessed on 24 April 2007

Konings, Jozef & Van Cayseele, Patrick & Warzynski, Frederic, 2001: "The dynamics of industrial mark-ups in two small open economies: does national competition policy matter?," International Journal of Industrial Organization, Elsevier, vol. 19(5), pages 841-859, April

Kovacic W E, 2004: "Achieving Better Practices in the Design of Competition Policy Institutions", in Remarks before the Seoul Competition Forum, Seoul, Republic of Korea

Legh R, & Dinhley D, 2004: "Competition Law", Competition Policy Perspective: Does South Africa need Competition Policy suited to its Developing Economy? Competition SG 3/2004, Siber Inc CC, Bowman Gilfillan Inc

Lewis D, 2004: "Role of Civil Society in Cooperating with National Competition Authorities", INSCOC Workshop, Geneva

Lewis D, 2000: "Competition Regulation: The South African Experience", paper presented to ISCCO Conference, Taipei

Lipimile G K, 2006: "Competition regimes in the world: A civil society report", CONSUMER UNITY TRUSTS SOCIETY

Mail & Guardian online, http://www.mg.co.za/article/2005-12-05-saa-to-pay-r45million-fine

Martin J, 2002: "The relationship between competition authorities and sector regulators, particularly with respect to abuse of dominant positions: The case of Zambia", ZCC

Mehta P S, 2003: "Friends of Competition: How to build an Effective Competition Regime in Developing and Transition Countries", CONSUMER UNITY TRUSTS SOCIETY International, India

Mehta P S, 2002/03: "Competition policy in developing countries: An Asia-Pacific Perspective", CONSUMER UNITY TRUSTS SOCIETY

Mehta P S, 2007:"Needed, a water policy that taps private sector", CONSUMER UNITY TRUSTS SOCIETY C-CIER, http://www.Consumer Unity Trusts Society -ccier.org/ccier-arFeb07.htm, accessed on 16 May 2007

Mohr P, Fourie L and associates, "Economics for South African Students", Second Edition, van Schaick Publishers

Mouton, D.J., Benadé, D.v.d.M., Bräsler, D.G., Emdin, S., Fransen, D.G.,Morrison, W.L., Paxton, D.G., Pretorius, W.S., Ridsdale, F.J.,Weyers, J.L. and Scribante, G.S., 1977: Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act, 1955. Pretoria: Government Printer, South Africa, RP 64/1977.

Nanda N, 2005:"Competition Policy and Consumer Protection Policy", Viewpoint for CONSUMER UNITY TRUSTS SOCIETY Centre for Competition, Investment & Economic Regulation (CONSUMER UNITY TRUSTS SOCIETY -CCIER), D-218, Bhakskar Marg, Bani Park, Jaipur, India

Narayanaswamy S, 1999: "Milestones of the consumer movement", The Hindu, http://www.hinduonnet.com/folio/fo9910/99100380.htm, accessed on 16 May 2007

Ngcobo P, & van der Meulen S, 2005: "Competition Law brief"

Ngwenya, B. & Ngonyama, G., 2004: Setting the Limits: The Effect of Minimum Resale Price Maintenance on Franchise Agreements. In: Competition News. The official newsletter of the Competition Commission. Sixteenth Edition. Pretoria: Competition Commission, South Africa: 1-2.

Nyagol B O, 2007: "Dealing with Horizontal Restraints", paper presented in the Regional Training Workshop on Competition Policy and Law", Pretoria, South Africa

OECD reviews of regulatory reform regulatory reform in Canada, 2002: "The role of competition policy in regulatory reform", OECD

OECD., 2003: Competition Law and Policy in South Africa. OECD Global Forum on Competition Peer Review: Paris, 11 February 2003. [Online]. Available:
http://www.compcom.co.za/Resources/SouthAfrica.doc

Pindyck R S. & Rubinfeld D L, 2001: Microeconomics, Fifth Edition, . New Jersey: Prentice Hall, United States of America.

Ramil Burden, Vulnerable consumer groups: quantification and analysis Prepared for the Office of Fair Trading
http://www.oft.gov.uk/shared_oft/reports/consumer_protection/oft219.pdf

Reekie, W.D., 1991: Issues in Industrial Economics. First Edition. Johannesburg: Witwatersrand University Press, South Africa.

Reksulak M, Shughart II W F, Tollison R D, 2006: "Innovation and the Opportunity Cost of Monopoly"

Republic Of South Africa Competition Act no 89 of 1998

Samuel G, 2003: "The ACCC and the Media: Our role and function" Speech to the Queensland Press Forum, Australian Competition and Consumer Commission

Sarkar S K, Sunder S, 2000: "Independent regulation and competition law", The Economics Times

Simelane,M. 2004:"Competition law aims to put consumers first, and black monopolies are as bad as any others" (On-Line). Internet http://www.sairr.org.za/wsc/pstory.htx?storyID=349

Simelane, M .2000: "Challenges for the National Consumer Forum in the 21st century (On-Line).Internet. http://www.compcom.co.za/events/speehes

Shepherd W G, 1999: "The Economics of Industrial Organization", Fourth Edition, Waveland Press Inc

Smit, C.2005: "The Rational for Competition Policy: A South African Perspective" Paper presented at the biennial ESSA conference, Durban, 7-9 September 2005

Srinivasan K, 1999:"A new era in consumerism", The Hindu, http://www.hinduonnet.com/folio/fo9910/99100060.htm, accessed on 16 May 2007

Török A, 2005: Competition policy in South Africa 1, Competition policy reform in South Africa Towards the mainstream CP model for 'transition' economies in the Third World?

United Kingdom National Consumer Council, 1995: *Charging Consumers for Social Services: local authority policy and practice*, NCC, London

Van Cayseele P, Van den Bergh R, 1999: "Antitrust Law",

Webber Wentzel Bowens, 2005: Competition Law Brief. www.wwb.co.za/

Zambia Competition Commission, No Date: "About ZCC", http://www.zcc.com.zm/about_zcc.html, accessed on 4 May 2007

Zambia Competition Commission, 2006: "The relationship between competition authorities and sector regulators, particularly with respect to Abuse of dominant positions: The case study for Zambia" Paper submitted UNCTAD's seventh session of the intergovernmental Group of Experts on competition law and policy, Geneva

APPENDIX A

Card no._____

Questionnaire

This questionnaire is aimed at collecting data and learning about the challenges to Consumer protection policies and efforts if any made by service providers to breach the gap. This is filled by consumers. The results of the questionnaire will be summarised.

Part A

Kindly answer the following questions with a cross (X)

1.	**Where do you reside?**	
1.1	Urban	
1.2	Rural	
1.3	Rural/Urban	

2.	**Are you aware of any consumer laws and policies?**	**Yes**	**No**
2.1	Urban		
2.2	Rural		
2.3	Rural/Urban		

3.	**How did you get consumer education if any?**	**Frequency**
3.1	Newspapers / pamphlets	
3.2	Television / radio	
3.3	Contact teaching	

4.	**Body offering such education**	**Frequency**
4.1	Consumer council	
4.2	Competition body	
4.3	National consumer forum	
4.4	Uncertain	

Part B

Listed below are some of the perceived degrees of benefits of these bodies. Please read through and cross the block that expresses your views.

5.	**Benefits of consumer and regulatory bodies**	Frequency
5.1	Yes, very beneficial	
5.2	No, not beneficial	
5.3	Uncertain	

6.	**Body perceived as being more visible and proactive**	Frequency
6.1	Consumer council	
6.2	Competition body	
6.3	National consumer forum	
6.4	Uncertain	

APPENDIX B

Card no._____

This questionnaire is aimed at collecting data and learning about challenges of consumer education as perceived by service bodies. This is filled by the Consumer council, Competition commission, National consumer forum, Office of consumer protection.

Questionnaire

1. Name the consumer awareness programmes in place.

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2. What is the working relationship among the three consumer bodies?

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3. What priority do consumer cases take in your organisation?

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4. How do you monitor compliance to consumer laws?

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5. How does international best practice influence your work?
