STATE-OWNED ENTITIES AND STATE-AID AND THE EFFECT ON COMPETITON LAW

By

BIANCA IDALINA VAN WYK (PIO)

28526008

Submitted in fulfilment of the requirements for the degree

LLM (MERCANTILE LAW)

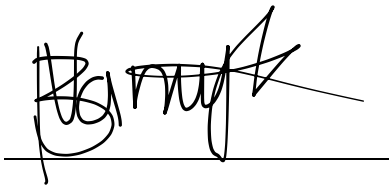
In the Faculty of Law, University of Pretoria

October 2016

SUPERVISOR: PROFESSOR CORLIA VAN HEERDEN

DECLARATION

I hereby declare that the Masters script I submit in order to fulfil the requirements for the degree, LLM Mercantile Law at the University of Pretoria is my own work and has not been previously submitted by me for a degree at any other university.



Signed: B van Wyk (Pio)

Date: 31 October 2016

SUMMARY

The South African Competition Act 89 of 1998, as amended addresses an array of principles and issues surrounding competition policy. However, it has become apparent that the Act remains silent regarding state-aid and moreover state owned entities in relation to competition law. This paper analyses the development of competition policy within South Africa and the origins of state-owned entities and state aid. The aim of this paper is to evaluate whether state-owned entities encourage, strengthen or diminish the concept and purpose of competition. Furthermore, a comparative analysis will be done between South Africa and current and previous Member States of the European Union in an attempt to decipher whether state-owned entities are efficiently regulated and utilised to promote the objectives set out in the Competition Act. Lastly, this study will include possible recommendations which are on par with global trends or models as to how state-owned entities and state aid should be administered within the Republic.

TABLE OF CONTENTS

CHAPTER 1 Historical background of competition law and more particularly integration of state owned entities

1. Introduction

Competition law has been derived from various foreign jurisdictions which have established systems and tools that have inevitably shaped competition law within South Africa.[1] Competition policy, which underlies the framework of competition law, entails "…economic policies adopted by a government in order to enhance competition in local and international markets such as trade policy, deregulation and privatisation while ensuring competition remains fair for businesses to access the relevant markets, resources and goods or services at the lowest prices."[2]

Whish remarks that "competition policy does not exist in a vacuum: it is an expression of the current values and aims of society and is as susceptible to change as political thinking generally…different systems of competition law reflect different concerns". [3] Therefore competition enforcement will inevitably be mostly informed by the history and structure of that particular economy of the country in question and policy will vary in accordance with socio-economic and political state structures.[4]

Competition law was originally derived from Roman law in the form of the *Lex Julia Annona*, during Julius Caesar's era, which essentially entailed imposing criminal sanctions to prevent monopolies.[5] The *Lex Julia* imposed a fine on any person who artificially increased the price of corn.[6] In the fourth century many industries were farmed out by state-protected monopolies and the emperor at that stage, Diocletan, failed to regulate monopolistic abuses.[7] Subsequently, the Constitution of Zeno, brought into existence by Emperor Zeno, in approximately 305 AD, condemned all monopolistic practices, rescinded all rights granted by

[1] Sutherland & Kemp, *"Competition Law of South Africa"*, Lexis Nexis Butterworths (loose leaf service issue 15), at 2-3 (hereinafter Sutherland and Kemp).
[2] Neuhoff M (ed), Neuhoff et al, *"A Practical Guide to the South African Competition Act"*, (2006) at 11-12.
[3] Whish R *et al, Competition law* 6th ed, (2009) at 19.
[4] Lewis D, *Chilling Competition* (2009) at 2-3.
[5] Lord Wilberforce *et al, The Law of Restrictive Trade Practices and Monopolies*, Sweet & Maxwell (1966) at par 106.
[6] Sutherland & Kemp at 2-5.
[7] Ibid.

previous Roman rulers and revoked imperial privileges to authorise the existence of monopolies.[8]

In the subsequent codification of Roman law, Justinian however ensured that the *Lex Julia Annona* and the Constitution of Zeno was included in the Roman precepts. Unfortunately later he, as well as other emperors, circumvented the law and created state monopolies under the management of civil servants.[9]

Roman-Dutch law also followed suit with the *crimen fraudatae annona* which considered forestalling or cornering of the markets as criminal acts.[10] Despite the fall of the Roman Empire, countries like England enacted legislation dealing with forestalling,[11] regrating[12] and engrossing[1314] during the 15th century while the Netherlands re-enacted Roman anti-monopolies legislation in the 16th Century.[15] Centuries thereafter saw the criminalisation of monopolies. However, authors commented that the legislation did not show signs of effective progression with regards to monopolies or competition law.[16]

South African competition law was fairly fragmented during the early 20th century,[17] and South Africa made its first attempt to formally introduce competition regulations in 1949

[8] See Sutherland & Kemp at 2-5. This piece of legislation was foundational in condemning resale price maintenance which essentially means an agreement between a manufacturer and a wholesaler or retailer not to sell a product below a specified price.
[9] See Sutherland & Kemp at 2-5.
[10] See Sutherland & Kemp at 2-6.
[11] Cowen D, "*Ancient* Origins of Competition Law: A survey of the law relating to control of monopoly in South Africa" (2007) Vol 20, *Advocate Forum*, at 38-41.Prof DV Cowen explains monopolies in England, namely forestalling is committed by anyone that purchases the whole supply of foodstuff, at his discretion, to sell is at a greater price or prevents provisions and commodities from reaching the open market.
[12] Regrating means the buying of corn or other dead victual, in any market, and selling it again at the same market, or within four miles of the place.
[13] Engrossing means the getting into one's possession, or buying up, large quantities of corn, or other dead victuals, with intent to sell them again. This must of course be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion.
[14] See "*Ancient* Origins of Competition Law : A survey of the law relating to control of monopoly in South African" 2007, Vol20, Advocate Forum, p38-41. Prof DV Cowen explains monopolies in England, namely forestalling is committed by anyone that purchases the whole supply of foodstuff, at his discretion, to sell is at a greater price or prevents provisions and commodities from reaching the open market. Regrating means the buying of corn or other dead victual, in any market, and selling it again at the same market, or within four miles of the place. Engrossing means the getting into one's possession, or buying up, large quantities of corn, or other dead victuals, with intent to sell them again. This must of course be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion.
[15] See Sutherland & Kemp at 2-5.
[16] Ibid.
[17] See Sutherland & Kemp 3-26.

with the Undue Restraint of Trade Act.[18] This Act was however largely criticised as it failed to provide a basis of identifiable principles and objectives to solidify competition policy and economic enhancement.[19]

Thereafter the Regulation of Monopolistic Conditions Act[20] was brought into existence, in hope of strengthening the concept of competition law enforcement.[21] In 1969, South Africa saw the first anti-competitive act criminalised, namely that the practice of resale price maintenance was declared unlawful.[22] Similar to the Undue Restraint of Trade Act, the Regulation of Monopolistic Conditions Act was criticised for being overly cautious yet ineffective in curbing monopolistic tendencies and after two decades the Mouton Commission[23] was launched to investigate further developments of competition legislation in South Africa.[24]

The Mouton Commission in 1979 recommended further developments in competition legislation as a result whereof the Maintenance and Promotion of Competition Act was enacted.[25] The first Competition Board was established to investigate vertical and horizontal restrictive practices, set out in section 1 of the Maintenance and Promotion of Competition Act.[26] The Competition Board however did not address monopolies and the abuse of dominance at this stage.

The abovementioned Act took competition policy in South Africa a step further by criminalising restrictive practices with the criminal burden of proof, being proof beyond a reasonable doubt and sanctioning it by way of a fine and/or imprisonment.[27] However, the 1979 Act also proved to be ineffective due to the high rate of anti-competitive conduct and the inexperience of the board itself.[28] Various authors including, David Lewis, the erstwhile

[18] Prins & Koornhof, "Assessing the nature of competition law enforcement in South Africa", (2014) Vol 18, Law Democracy and Development, at 136-138. Undue Restraint of Trade Act No 59 of 1949.
[19] See Prins & Koornhof, at 139.
[20] Act 25 of 1955 as amended, Act No 24 of 1955.
[21] See Sutherland & Kemp at 3-27.; Act 25 of 1955 as amended.
[22] Government Notice R.1038 published in Government Gazette No. 2442 (25 June 1969).
[23] Report of the Mouton Commission of Inquiry into the Regulation of Monopolistic Conditions Act (1978).
[24] See Prins & Koornhof, at 138-139.
[25] Act 96 of 1979 , as amended.
[26] See Prins & Koornhof, at 139.
[27] Department of Trade and Industry, "Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development",27 November 1997 at par 3.4.6 www.dti.gov.za (accessed 02 February 2016).
[28] Prins & Koornhof at 139.

Chairperson of the South Competition Tribunal, noted that despite the investigations and findings of the Competition Board there were barely any prosecutions.[29]

By 1986 the Maintenance and Promotion of Competition Act contained no clear prohibitions: despite certain practices being declared illegal i.e. resale price maintenance, collusion on prices, trading terms and market division and bid rigging there was no mention of merger control, although mergers appeared to be prevalent and on the rise. [30]

In 1994 South Africa experienced a political overhaul, with the Apartheid regime being overthrown. [31] For decades South Africa's systems and laws were established along State enforced racial discrimination thereby creating unequal access to employment and earning potential.[32] Further reform and re-evaluation of legislation pertaining to our economy and specifically, competition policy, was necessary to sanction monopolistic and anti-competitive practices to allow access to the economy to those who were previously excluded by these practices. Principles of justice, fairness and equality needed to be reflected in the political and legal spheres of South Africa as per our Constitution that envisaged a nation free from discrimination of any kind or form.

One of the mechanisms used to bring about reform was the "Reconstruction and Development Programme" (RDP)[33], which aimed to rebuild and develop the country through meeting basic needs, human resources, building the economy and bringing democracy to society and functionality of the country.[34] A "Macroeconomic Strategy" was implemented to assist the government with achieving RDP goals and objectives with growth, employment and redistribution.[35] According to Fourie the objectives of reform with regards to the economy were to "facilitate economic growth by increasing competition and guarding against

[29] Lewis D, *Chilling Competition* (2009) at 2-4.
[30] Neuhoff *et al* at 12; See also Organization for Economic Cooperation and Development (**OECD**) Peer Review, Burgeat E, *:Competition Law and Policy in South Africa,* May 2003, at 13-14.
[31] Government Gazette No 16085, 23 November 1994, Vol 353, at 7.
[32] Government Gazette No 16085, 23 November 1994, Vol 353, at 8.
[33] See Lewis, D, *Chilling Competition* at 26. Also see Government Gazette No 16085, 23 November 1994, Vol 353, at 7.overnment Gazette No 16085 23 November 1994, p7.
[34] Fourie DJ 2003, "Restructuring of State-owned Enterprises: South African Initiative"(2001) Vol 23 Issue 2, *Asian Journal of Public Administration*, at 205. www.thepresidency.gov.za/... /volume_4/.../5000055_History_of_SOEs_in_SA.pdf (accessed 12 May 2014).
[35] See Fourie DJ, (2003) at 205-206.

monopolistic behaviour, to create wider ownership in the economy, to mobilise private sector capital, to reduce state debt and to enhance the capacity and competitiveness of SOE's."[36]

As previously mentioned, competition policy within South Africa had to be re-evaluated in order to reflect the ideals of the country's new political dispensation, which inevitably, influenced the socio-economic and legal frontiers. In the midst of the new competition policy in operation, South Africa continued to pursue reform with a key focus on State Owned Entities (referred to as SOE's) to guarantee a sense of economic stability and improve the functioning of markets during the political transition. South Africa has had a long history of utilising SOE's.[37] The concept SOE is defined as a legal entity created by a government to undertake commercial activities on behalf of the owner, the government.[38] This definition includes complete or partial ownership or entities that are funded by the State.[39] In essence the state identified key services and structures that would require financial support but would inevitably be an asset to the state, and serve in the public's interest.[40]

Therefore a further differentiation must take place when considering the definition of SOE's. In the global context, SOE's are categorised as either having a commercial or non-commercial function.[41] According to the presidency's green paper on common understanding and definition of state owned entities, commercial SOE's undertake commercial activities on behalf of the South African government aiming to make a profit in the local and international markets.[42] While non-commercial SOE's are focused on improving services for citizens, with no financial goals or obligations to satisfy shareholders regarding return on investment.[43] Moreover SOE's may comprise of complete government ownership or partial ownership

[36] See Fourie DJ, (2003) at 206. Also see National Treasury of Republic of South Africa, *Budget Review 2010,* Budget Review at 9 National Treasury, Pretoria. www.treasury.gov.za (accessed 13 March 2016).
[37] Fourie DJ, (2003) at 206-207.
[38] The Presidency, "Common Understanding and definition of State-owned Entities", Green paper, at 3-4. www.thepresidency.gov.za/...3/.../A_Common_understandin_and_definition.doc (accesssed 2 September 2016).
[39] Ibid.
[40] Supra note 37.
[41] The Presidency, "Common Understanding and definition of State-owned Entities", Green paper, at 4. www.thepresidency.gov.za/...3/.../A_Common_understandin_and_definition.doc (accesssed 2 September 2016).
[42] National Treasury, National Treasury Annual Rreport 2010/2011 19/11/2010, www.treasury.gov.za (accessed 2 September 2016).
[43] See Fourie DJ, (2003) at 206. Also see The Presidency, "Common Understanding and definition of State-owned Entities", Green paper at 26. www.thepresidency.gov.za/...3/.../A_Common_understandin_and_definition.doc

wherein a private company has the state as a shareholder. These variations of state-ownership and aid within entities are necessary to understand how competition is affected in totality.

By 1998 the "new and improved" Competition Act[44] came into existence. The act had numerous prohibitions including restrictive and horizontal practices[45] as well as prohibitions on abuses of dominant positions.[46] It also regulates mergers.[47] In light of its predecessors and origins the legislature, in the 1998 Act, made a deliberate policy choice to decriminalise anti-competitive practices as it proved to be ineffective.[48] This approach was applied in the case of *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and others*[49] wherein criminal sanctions were replaced with administrative penalties.

The 1998 Act made provision for a three tiered–system of competition authorities, namely the Competition Commission, Competition Tribunal and Competition Appeal Court with specific powers and functions to achieve the objectives as set out in the Act.[50] The Commission is the primary enforcer of the Competition Act and responsible for investigation of prohibited practices.[51] Upon concluding that a prohibited practice has occurred the complaint then gets referred to the Tribunal to rule on the matter.[52]

Section 2 of the Competition Act clearly and concisely sets out the purpose of the Act as follows:

a) to promote the efficiency, adaptability and development of the economy;
b) to provide consumers with competitive prices and product choices;
c) to promote employment and advance the social and economic welfare of South Africans;

[44] Act No 89 of 1998.; The Act came into effect on 01 September 1999.
[45] Sections 4 and 5 respectively.
[46] Sections 8 and 9.
[47] See Chapter 3 of the Act, section12 to 18.
[48] Ibid. Also see National Treasury of Republic of South Africa, Budget Review 2010, at 9. www.treasury.gov.za (accessed 13 March 2016); .Proposed by the Department of TraIndustry in 1997, contained in Prins & Ko
[49] See *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and others (08/CR/Mar1).*
[50] See section 19 to 21 regarding the establishment and functions of the Commission; section 26 and 27 regarding the establishment and functions of the Tribunal and section 36 and 37 regarding the establishment and functions of the Competition Appeal Court.
[51] Section 21 read with Chapter 5 of the Act.
[52] Section 27(1)(a).

d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

According to Section 3 of the Competition Act, the Act is applicable to all economic activities within or having an effect within the Republic. This would include any and every SOE within the Republic because SOE's involved in commercial activities have a direct or indirect impact on competition within the republic. Moreover the Competition Act of 1998 provides that the Act is binding on the State.[53]

According to authorities there were more than three hundred SOE's within the Republic by 1999.[54] The South African government, at this stage, was determined to address the challenges SOE's were facing. The rationale behind this was to address the immediate need to improve existing infrastructure in order to provide services at a lower cost with the highest quality thus making these services available to historically disadvantaged people groups. [55] In the long haul SOE's were to provide high quality services, infrastructure and resources to emerging markets and a developing continent, Africa.[56]

In 1999 the South African government selected four vital SOE's to restructure, due to the political history that ensured an uneven distribution of wealth and resources.[57] The following state-owned or aided entities were selected; South African Airways (SAA); Transnet; Eskom and Denel. It appears that these SOE's, in particular were the largest and contributed the most to economic and industrial sectors of the Republic.[58] Therefore the key focus will be on these commercial SOE's.

With reference to the historical overview provided it is noteworthy to mention that over the years various empires, states and regimes in many countries invested in state owned assets,

[53] Section 3(2)(c) and (d) of Act No 89 of 1998.
[54] See Fourie DJ, (2003) at at 206.
[55] Ibid.
[56] See Fourie DJ, (2003) at at206-207.
[57] See Fourie DJ, (2003) at at 214.
[58] See Fourie DJ, (2003) at 206.

businesses and instruments that were strategic in the development of their eras.[59] However, history has also proven that state-owned entities were very often linked to monopolistic practices and tendencies.[60]

In the next chapter the writer will delve into applicable legislation governing SOE's in South Africa and discuss the above-mentioned "top 4" SOE's. This will also warrant reference to the content of section 81 of the Competition Act of 1998 with applicable case law.

2. Nature and Scope of dissertation

This mini dissertation aims to illustrate the effect of state-owned entities (SOE's) and state-aid on competition within South Africa. In assessing the pros and cons of SOE's the writer will examine whether SOE's encourage, strengthen or diminish the concept and purpose of competition. A comparison between South Africa and selected members states of the European Union will be drawn for illustrative purposes. This will assist in analysing whether SOE's and forms of state-aid are sufficiently regulated and utilised under South African law to promote the objectives set out in the Competition Act.[61] Furthermore, this study will explore possible solutions and recommendation which are on par with global trends and models, as to how SOE's and state-aid should be regulated within the Republic in order not to distort competition in commercial markets.

Three (3) assumptions will be addressed: Firstly that, legislation, moreover the Competition Act does not adequately regulate the aspect of competition with regard to SOE's and state-aid within South Africa. The Constitution provides for three spheres of government[62] and confers the necessary power to formulate legislation throughout these spheres, which includes the establishment of SOE's.[63] Despite this cascading delegation, the Competition Act fails to provide adequate provisions specifically dealing with competition and SOE's and state-aid. Other pieces of legislation relevant to state-owned entities, inter *alia* the Public Finance

[59] Examples include guilds, chartered corporations Dutch- India traders, manufacturing of corn, nuclear and energy resources, petroleum and transport.
[60] Cowen D, "*Ancient* Origins of Competition Law: A survey of the law relating to control of monopoly in South Africa" (2007) Vol 20, *Advocate Forum*, at 39.
[61] Act 89 of 1998.
[62] Section 40 (1) and (2) Constitution of the Republic of South Africa No 108 of 1996
[63] Section 239 of No 108 of 1996.

Management Act will also be discussed.[64] It appears that there is no single piece of legislation that regulates SOE's and state-aid. Therefore legislation relating to SOE's and state-aid remains fairly fragmented, despite the attempts to unify legislation by enacting the Competition Act.

In light of the above the writer aims to investigate what type(s) or form(s) of regulation exist for SOE's and state-aid within the Republic. This will demand a discussion as to why the Competition Act has failed to include provisions relevant to SOE's or state aid.[65] Furthermore an explanation regarding the effect of the above and whether competition legislation should be developed accordingly will be provided.

The second assumption is that SOE's and state-aid actually work against the objectives and purposes set out in the Competition Act, despite the positive spin-offs. The Competition Act is the main piece of legislation governing competition policy within South Africa. Section 2 of the Competition the Act sets out specific objectives and purposes and this will be reviewed in order to examine whether this second assumption is correct.

This dissertation will also discuss the relevance of the powers and function of the Competition authorities and regulatory bodies in relation to SOE's and state aid.[66] Thereafter an attempt will be made to establish whether or not the Competition Commission is able to exercise its jurisdiction and authority to address SOE's that work against the objectives of the Act. A debate as to whether or not state-owned entities bring about anti-competitive effects or not, namely whether it may amount to abuse of dominance, will be embarked on.[67]

In addition, reference to various authors and the National Growth & Development Plan will assist in identifying how and why state-owned entities work against its purpose within the economy and purposes of the Act.[68]

A comparative analysis will be drawn between European SOE's and principles of state aid and South African SOE's in order to evaluate the notion that South Africa has a need to re-

[64] Act 1 of 1999.
[65] Competition Commission, Loopoo N & van Wyk N, (20132013), "State aid and competition in South Africa" Competition Commi at 2-3. www.compcom.co.za(accessed 20 May 2014).
[66] South African Competition authorities: Competition Commission and Competition Tribunal.
[67] Loopoo N & van Wyk N, (2013) at 1-4.
[68] DPE (Department of Public Enterprises,) 1999 "Press Briefing on the Restructuring of State Assets, 1999". http://www.dpe.gov.za/newsroom/Pages/Press-Briefing-on-the-Strategic-IMCC-Lekgotla-on-the-Restructuring-of-State-assets-apx. (accessed 24 June 2014).

evaluate the mechanisms and legal framework of legislation regarding SOE's and state-aid from a competition law perspective. The third assumption is based on various Authors and analysis that European SOE's and state aid principles have proven to be more successful due to adequate structures and provisions that ensure that competition remains relevant in the forefront of economic stability and development.[69] The writer will assess whether this is in fact the case when revising selective SOE's and forms of state aid within South Africa.

According to the Treaty on the Functioning of the EU (TFEU) state aid to EU SOEs is prima facie prohibited and unlawful.[70] The TFEU also clearly sets out provisions regarding state-owned entities or state-aid by categorising state aid.[71] Reference to international case law and how international competition policy regulates state aid and state-ownership is not only allowed by the South African Competition Act[72] but is also essential. State ownership or state aid will be investigated in the United Kingdom (being a previous EU member state) and Poland (being a current EU member state). Moreover, reference to international cases will also be made in order to consider South Africa's position as a developing country.

The writer will comment on the factors that influence competition policy nationally and internationally. This will warrant a distinction between developed and developing countries in order to provide a sound conclusion regarding the accuracy of the assumptions listed above.[73]

In order to arrive at a sound conclusion relevant South African case law will be referred to, not only addressing the issue of the Competition Commission's jurisdiction but also to outlay the concerns and overall effects of certain SOE's and state aid on our economy and competition within the Republic. A glimpse into South Africa's progression in Competition law and management of SOE's and state aid at present will be provided.

[69] Whish R *et al Competition law* 7th ed (2011), at 23-24.
[70] Article 107 (1).
[71] Article 107 (2).
[72] Section 1(3) states that any person interpreting or applying the Act may consider appropriate foreign and international law.
[73] Du Plessis L, Lurie J, Van Burren A. 4 & 5 October 2011.Fifth Annual Competition Law, Economics and Policy Conference "Competition legislation and policy-it is necessary in a developing economy", at 4. http://www.compcom.co.za/wp-content/uploads/2014/09/FINAL-PAPER-2011.pdf (accessed 25 April 2014).

3. Chapter Layout

The first chapter will begin the investigation by defining SOE's, inclusive of state aid, their purpose and address the applicable legislation regulating these entities.[74] This will entail referring to historic developments and particularly how SOE's were integrated into South Africa.[75]

The second chapter will take a closer look at competition policy within South Africa. A few of the state-owned entities, with reference to forms of state aid, listed in the first chapter will be further discussed in order to practically display the development and impact of these entities on competition.[76] In doing so, case law depicting the competition authorities' jurisdiction and our stance on state-owned entities will be cited.[77] This will also require a discussion on possible development of legislation and structures to efficiently manage state-aid and state-owned entities in the future. This will be done with reference to various writers opinions.[78]

The aim of the third chapter is to reflect on foreign jurisdictions and authorities in order to assess how state-aid and state owned entities are integrated and managed.[79] I will focus on the UK and Poland, and appropriate foreign case law and authorities.

The final chapter will provide conclusions and recommendations deduced from chapters 2 and 3. This chapter will address each of the assumptions listed above and conclude on whether they were in fact accurate or not. I will also draw conclusions regarding South Africa's progression in Competition law and management of state-owned entities

[74] Section 81 of the Competition Act 89 of 1998.
[75] See Fourie DJ, (20033) at 205-206.
[76] See Fourie DJ, (20033) at 206-213.

[77] South African Competition authorities: Competition Commission, Competition Tribunal, Competition Appeal Court.
[78] See Loopoo N & van Wyk N, (2013) at 1-4.
[79] Whish R *et al Competition law,* 7th ed (2011) , at 23-24.

CHAPTER 2 A South African Perspective

Loopoo and Van Wyk remark that *"*The extent of state aid in South Africa has recently attracted the attention of the media and raised the question of its impact on competition in a given market*".*[80] In order to grasp the extent and impact of state-owned entities or state aid on competition within South Africa one needs to investigate the history of SOE's, their intended purposes and address the applicable legislation that brought these entities into existence.

1. South African Legislation and Instruments

SOE's, in the South African context have been defined directly and indirectly by two pieces of legislation, namely The Public Finance Management Act[81] and the Companies Act.[82] Section 1 of the Public Finance Management Act provides a generic definition of SOE's as follows:

"…the equivalent of a state-owned-enterprise, which it refers to as "national government business enterprise" to be "an entity which:

(a) is a juristic person under the ownership control of the national executive;
(b) has been assigned financial and operational authority to carry on a business activity;
(c) as its principal business, provides goods or services in accordance with ordinary business principles;
(d) is financed fully or substantially from sources other than –

(i) the National Revenue Fund; or
(ii) by way of a tax, levy or other statutory money"

Chapter 1, section 1 of the Companies Act, provides that a "state-owned company" is an enterprise that is registered in terms of the Act as a company, and either falls within the meaning of "state-owned enterprise" in terms of the Public Finance Management Act or is owned by a municipality at the local government sphere in terms of the Municipal Systems

[80] See Loopoo N & Van Wyk M, (2013) at 1.
[81] Act 1 of 1999.
[82] Act 71 of 2008.

Act.[83] The Companies Act further makes a distinction between profit and non-profit SOE's.[84] In order for SOE's to obtain funding from government, SOE's are required to submit detailed activities, their funding requirements, and corporate planning, annually by 28 February.[85]

State aid regarding SOE's took the forms of actual legislation, exclusive licenses, sustained investments, financial aid and relationships.[86] It is argued by Njisane that these forms of state aid were designed to protect these firms from competition and ensure that they do not fail but also to ensure their profitability.[87]

Another instrument developed to assist the regulation and stabilisation of SOE's was the National Growth and Development Plan (hereinafter referred to as NGDP). In brief the principles on which the NGDP was founded on are; integration, sustainability, people-driven, peace and security, nation building and lastly meeting basic needs and building infrastructure.[88]

The NGDP addresses a number of key areas regarding the Republic's socio-economic and political policies. Part of the plans for reform and transformation was aimed to restructure SOE's to better assist the economy, ensure more competitiveness, reduce state debt and increase the standard of SOE's within the continent.[89] The NGDP clearly and concisely sets out the desired objectives and principles for competition policy.[90]

In short the NGDP competition policy aims to achieve distribution of greater ownership across racial lines; introduction and enforcement of strict anti-trust laws; abolishing anti-competitive practices; involving small and medium sized enterprises and preventing exploitation of the consumer market.[91] The policy also included the establishment of

[83] No 32 of 2000.
[84] Section 8 and 9 of Act 71 of 2008.
[85] Section 52 read with Schedule 2 of Act 1 of 1999.
[86] Competition Commission, Njisane Y, " Pricing conduct, State aid and the implications for industrial development in South Africa", (2015) at 3. 2015.essa.org.za/fullpaper/essa_2960 (accessed 16 October 2016)
[87] Ibid.
[88] Government Gazette No 16085, 23 November 1994, Vol 353 at 8.
[89] See Fourie DJ, (20033) at 206.
[90] Government Gazette No 16085 23 November 1994, Vol 353 at 25.
[91] Ibid.

competition authorities to monitor and further develop competition within the Rrepublic as well as to identify anti-competitive behaviour and arrive at sound conclusions.[92]

2. South African SOE's

In keeping with the main purpose of SOE's and the restructuring plans of the NGDP, South Africa has a significant number of SOE's as indicated in the previous chapter. However this dissertation will only focus on four key SOE's, namely South African Airways (SAA), Telkom, Denel and Transnet. Authors have identified these four SOE's as key role players not only in our economy but regarding the aspect of competition as well.[93] The aforementioned SOE's will be discussed in brief in order to provide a background to the history, advantages and disadvantages of SOE's and the effect on competition within South African borders over recent years, with due consideration of case law and relevant authorities.

2.1 South African Airways

SAA was formally established in 1934 when the South African government gained control over all the assets and liabilities of Union Airways.[94] Union Airways was renamed South African Airways. In April 1976 SAA operated the world's first commercial flight and to date manages and provides large numbers of national and international flights, solidifying its dominancy within the market.[95] Due to South Africa's political regime of Apartheid the 1980' and 1990's saw many countries sanction South African trade. After 40 years of sanctions and international isolation the country was re-instated as a member of the International Civil Aviation Organisation.[96] One of SAA's objectives is to support South Africa's developmental plan and commercial sustainability.[97]

In 2005 Competition authorities found SAA guilty of anti-competitive conduct, namely abuse of dominance.[98] Abuse of dominance includes firms engaging in a wide range of prohibited

[92] Whish R, *et al Competition law* 7th ed (2011), at 23-24.
[93] See Fourie DJ, (2003) at 206.
[94] South African Airways, http://www.flysaa.com/us/en/footerlinks/aboutUs/briefHistory.html. ((accessed 2 August 2016))
[95] Ibid.
[96] Government Gazette No 16085, 23 November 1994, Vol 353 at 8.
[97] Whish R *et al Competition law,* 7th ed, (2011) at 24. Ibid.
[98] Section 8 of Act 89 of 1998.

anti-competitive conduct *inter alia* "charging excessive prices for goods or services,[99] denying competitors access to an essential facility[100], price discrimination[101], refusal to supply scarce goods to a competitor[102], inducing suppliers or customers not to deal with a competitor[103], charging prices that are below cost so as to exclude rivals[104], bundling goods or services and buying up a scarce input required by a competitor."[105]

In the case of *Competition Commission and South African Airways (Pty) Ltd*,[106] SAA was found guilty of inducement specifically in terms of section 8(d)(i) of the Competition Act which prohibits dominant firms from "requiring or inducing" suppliers or customers to not deal with a competitor unless the efficiency gains can be shown to outweigh any anti-competitive effect of this action.[107] The meaning of "inducement" was provided in the *Senwes*-case[108], relying on the Black's law dictionary definition of inducement as "the act or process of enticing or persuading another person to take a certain course of action".

The facts of the case entailed that SAA was engaged in two incentive schemes with travel agents. The first was based on agents receiving commission once target sales of SAA tickets, set by SAA were met. The target was based on the previous annual sales achieved by the agent with a percentage increase.[109] The second incentive scheme was structured for employees of the agencies, who were rewarded with free international air tickets based on the achieving sales targets set by SAA.[110] The Competition Commission alleged that these loyalty rebates[111] were exclusionary, and in contravention of section 8(d)(i)[112] of the Competition Act and alternatively, in contravention of section 8(c).[113]

---

[99] Section 8 (a) Act 89 of 1998.
[100] Section 8 (b) Act 89 of 1998.
[101] Section 8 d (iii) Act 89 of 1998.
[102] Section 8 (d)(ii) Act 89 of 1998.
[103] Section 8 (d)(i) Act 89 of 1998.
[104] Section 8 (d)(iv) Act 89 of 1998. This practice is also referred to as "predatory pricing".
[105] Section 8(d)(v) Act 89 of 1998, provides for exclusionary acts that amounts to abuse of dominance.
[106] *Competition Commission and South African Airways (Pty) Ltd* 18/CR/Mar01 [2005] ZACT 50.
[107] Dr H Jenkins DH, Dr G Niels G, Noble R. "The South African Airways cases; blazing a trail for Europe to follow?", Oxera. 14 August 2009, at 2. http://www.compcom.co.za/wpcontent/uploads/2014/09/AndersonFiandeiroWhat-constitutes-inducement.pdf. (accessed 13 September 2016).
[108] *Competition Commission of South Africa v Senwes Ltd* CCT 61/11 2012 at par 160.
[109] *Competition Commission v SAA* [2005] ZACT 50, par 15 -18.
[110] Ibid at par 21.
[111] Sutherland, P. & and S. Kemp S,(2010) Competition Law of South Africa, (Service Issue 13),2010 Issue13, LexisNexis, 7-77 to 7-79, "*Inducement in this instance refers to loyalty rebates which are conditional upon obtaining a certain proportion of requirements from the dominant firm; or rebates which are linked to*

The Competition Tribunal found that these two incentive schemes constituted anti-competitive conduct based on the fact that the nature of the scheme, and not its mere existence, aimed at achieving higher market shares for SAA, which came at the expense of rivals absent substantial market growth.[114] Even if the sales were directed at the expense of fellow competitors the effect was to induce agents to sell SAA tickets and not those of competitors.[115] The Competition Commission succeeded in proving that SAA was indeed a dominant firm; the relevant agents had an incentive to move customers towards SAA (inducement) and this conduct outweighed any pro-competitive effects.[116] The Competition Tribunal ordered that SAA pay a hefty fine of R45 million rand to the Commission within 20 business days.[117] At that stage this fine was the highest penalty at the time levied by the Tribunal since the inception of the Act.[118]

Subsequent to the above matter the Democratic Alliance (DA) lodged a complaint with the Competition Commission in 2012 noting that SAA and SA Express was once again engaging in anti-competitive conduct, due to the additional five billion rand offered by the National Treasury to bail out SAA.[119] The Guarantee[120] offered by the Minister of Finance concerned the DA and they argued that the state aid provided is likely to lower operating costs of SAA and its subsidiaries than that of their competitors.[121] This would cause rivals to impose higher prices while SAA maintained low pricing facilitated by the bail-out it received from Treasury. The Department of Public Enterprise argued that state aid was necessary due to the adverse economic circumstances the aviation sector faced which impacted on job creation, tourism etc.[122] It was argued that whilst the Guarantee would be advantageous to SAA to

---

purchasing a certain product range from the dominant firm."

[112] Section 8(d)(i) prohibits a dominant firm from requiring or inducing a supplier or customer not to deal with a competitor.

[113] Section 8(c) prohibits a dominant firm from engaging in an exclusionary act, other than an act listed in section 8(d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain.

[114] *Competition Commission v SAA*, at par 146-147.

[115] Ibid.

[116] Anderson P &and Fiandeiro F, *What constitutes "inducement" in terms of section 8(d)(i)?*, Fifth Annual Competition Law, Economics and Policy Conference, 4 and 5 October 2011. http://www.compcom.co.za/wp-content/uploads/2014/09/AndersonFiandeiroWhat-constitutes-inducement.pdf (accessed 14 September 2016).

[117] *Competition Commission v SAA,* at par 344.

[118] Jenkins DH *et al,* "The South African Airways cases; blazing a trail for Europe to follow?*", 2009* at 1.

[119] Case No 2013 Jan 0007.

[120] Loopoo N & van Wyk N 2013, at 12; describes a guarantee loan as enabling SAA to obtain funding or ordinary finances by approaching financial institutions or independent commercial lenders.

[121] Ibid.

[122] Loopoo N & van Wyk N, (2013) at 12.

restore profitability it exempts SAA, as an SOE from facing consequences of poor financial performance, which its competitors would likely face in the same predicament.[123] The Commission refused to investigate this complaint based on the reason that the Commission remains a creature of statute and the Competition Act does not contain any provision governing the granting of state aid to any participant in a competitive market.[124]

An overview of the aforementioned historical developments regarding SAA reveals that there has been a substantial amount of financial input from Government over decades. In recent news the Minister of Finance has disclosed an amount of fourteen billion rand to date that has been given as a guarantee by the Treasury to SAA to assist with its sustainability.[125] The writer opines that this in itself provides SAA as a SOE with an unfair advantage to continue operating in the national and international markets in comparison to enterprises not funded or supported by the State.

2.2 Telkom

Another key role player, the South African Department of Post and Telecommunications was renamed Telkom in the 1990's. Telkom remains a state owned company (herein after referred to as SOC) that provides citizens with the necessary service of local and long distances telecommunications, pay phone services as well as international telecommunication including internet connectivity services and cellular devices.[126]

Telkom currently dominates as the sole provider of local landline telecommunications. In 2004 Telkom owned 50 percent shares in Vodacom, the cellular telecommunications company and network in South Africa. In 2009 Telkom sold a further 15 percent of its shares to Vodafone, in order to expand its offering.[127] Telkom is categorised as a semi-privatised company with 39 percent state ownership. This SOC has been trading on the Johannesburg Stock Exchange since 2003.[128]

[123] Ibid at 15.
[124] Ensor L, Visser A, "Competition Commission declines probe to SAA", Business Day Live 12 November 2012.
[125] Rossouw J, "South Africa must accept reality and unburden itself from owning a national airline", Mail & Guardian, 27 August 2016. http://mg.co.za/article/2016-08-27-south-africa-must-accept-reality-and-unburden-itself-from-owning-a-national-airline ((accessed 16 September 2016)).
[126] Fourie DJ, (20033) at 207.
[127] Telkom. http://www.telkom.co.za/history/TelkomHistory (accessed 13 September 2016).
[128] Telkom SA Limited Prospectus dated 4 March 2003.

In light of the above it is essential to discuss the aspect of competition in the telecommunications sector. The Telecommunications Amendment Act[129] regulates telecommunications policy and also addresses the aspect of competition. There are two types of competition that have been identified within the telecommunications industry. One is known as "facilities-based competition" which is described as suppliers providing clients with services using their own telecommunications infrastructure.[130] The second form identified is "service-based competition" in which service providers utilise infrastructure owned by network operators rather than using their own infrastructure, as is done in the first form of competition.[131] It is opined that facilities-based competition is seen to be more effective with regards to long-term foreign direct investment in the telecommunications sector.[132]

In 2001 the Telecommunication Amendment Act[133] provided for a second national operator to obtain the necessary license and assistance to enhance competition and private sector participation.[134] This second operator, Neotel was introduced when Telkom's exclusivity agreement ended in 2001/2002. [135] Neotel serves as direct competition to Telkom, which was operating a monopoly in the sector for decades.

However, case law provides an explanation as to why the second national operator may not be as effective in addressing contraventions of competition law, particularly monopolistic and anti-competitive behaviour. In the first case of *Competition Commission v Telkom*[136], the Tribunal found Telkom guilty of contravening sections 8(b) [137] and 8(d)(i) of the Act by not supplying access to an essential facility to Value Added Network Service Providers and inducing customers not to deal with its competitors.[138] The Tribunal imposed an administrative penalty of four hundred and fourty-nine million on Telkom.[139]

---

[129] No 64 of 2001.
[130] Fourie DJ, (20033) at 207-208.
[131] Ibid.
[132] Fourie DJ, (2003) at 207.
[133] Telecommunications Amendment Act No. 64 of 2001.
[134] Section 32B of Act 64 of 2001; provides for the application and qualification of the second national operator.
[135] Government Gazette No 35255,. 13 April 2012, No 308, at 34 and 40. *ICT Policy Colloquium Discussion Document.*
[136] 11/CR/Feb04.
[137] Sections 8(b) prohibits a dominant firm to refuse to give a competitor access to an essential facility when it is economically feasible to do so.
[138] Aproskie J,Hendiksz M,Kolobe T, "State-owned Enterprises and Competition: Exception to the rule", Genesis

In the second case of *Competition Commission v Telkom*[140], the Competition Tribunal found that Telkom was guilty of "margin squeeze".[141] Over the period 26 June 2005 to 19 July 2007, Internet Solutions (Pty) Ltd, the internet division of Multichoice Subscriber Management Services (Pty) Ltd, Verizon (Pty) Ltd and the Internet Service Providers Association submitted five complaints against Telkom to the Competition Commission for investigation.[142] The Tribunal found Telkom's conduct in contraventions of sections 8(c) and 8(d)(iii).[143] Telkom admitted to charging excessive prices and engaging in margin squeeze and was ordered to pay an administrative penalty of two hundred million rand, with an agreement regarding future conduct.[144]

In light of the abovementioned cases it is concluded that the Competition authorities have shown a willingness to regulate SOE's anti-competitive behaviour but the questions begs as to whether this is enough to steer away from relying too much on the notion of SOE's acting in public interest rather than levelling the playing field for competitors across the board.[145]

2.3 Denel SOC Ltd

The third SOE to be discussed is Denel SOC Ltd that comprises of aerospace, security and defence technology. Denel was established in 1991 and was incorporated as a private company in 1992. It is owned solely by the South African government and the Minister of Public Enterprise is responsible for appointing a board of directors to attend to the executive functioning and day to day management of the SOC.[146] It has been reported that Denel is

---

Analytics.6 September 2014, at 11.

[139] Ibid.

[140] *Competition Commission v Telkom* [2013] ZACT 62.

[141] Margin squeeze; occurs when a vertically integrated firm that is dominant in the supply of essential upstream inputs sets prices at the upstream and downstream levels such that the margin between these prices is insufficient for a downstream competitor to cover its costs.

[142] *Competition Commission v Telkom* [2013] ZACT 62 at par 2.1.

[143] Sections: *8(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; 8(d)(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract.;*

[144] [2013] ZACT 62 at par 6;: Telkom undertook to implement transparent transfer pricing essentially creating wholesale and retail separation of the incumbent, non-discriminatory pricing as well setting prices of certain products to cover the associated costs in order to not engage in a margin squeeze.

[145] Aproskie J *et al*, "State-owned Enterprises and Competition: Exception to the rule?, (2014) at 12. See also Fourie DJ, (2003) at 205-206.

[146] Denel, http://www.denel.co.za/about-us/company-profile (accessed 16 September 2016).

one of South Africa's largest SOEs with the most diverse industrial capabilities, technological advancement and extensive infrastructure.[147]

In 2000 Denel controlled approximately 50 percent of the turnover in the defence industry.[148] By 2007 the South African government had provided financial support in the amount of three point five billion rand worth of recapitalisation.[149] This amount was only accounted for over a three year period. The South African government is of the view that Denel must continuously move towards globalisation "to ensure adequate capital injection, increased access to overseas markets, a broader product range and increased capacity utilisation within its manufacturing facilities".[150]

Besides the dominance displayed in the aerospace defence and technological sectors within the country, Denel has been involved in a number of mergers, company take-overs and procurement of assets.[151] In 2015, the Competition Tribunal approved a large merger between *Denel SOC Ltd and BAE Systems Land Systems SA (Pty)*[152], wherein it was found that the merging parties had minimal market share and with the presence of other competitors the merger, in itself, would not substantially prevent or lessen competition in the armoured combat vehicle industry.[153]

With due regard to Denel's prominence and increased national interest within various markets, the case of *AEC Electronics (Pty) Ltd v The Department of Minerals and Energy (DME)*[154] will be discussed. AEC Electronics (Pty) Ltd, lodged a complaint against the Department of Minerals and Energy with the Commission alleging that DME's was abusing its dominant position in terms of section 8(b), (c) and (d)(ii)[155]. The DME's approval was

[147] Radebe, J, 2000. "Denel Restructuring and Announcement of Preferred Strategic Equity Partner", at 1-2. http://oldgov.gcis.gov.za/speeches/2001/0109181245p1001.htm (accessed 20 October 2016).
[148] Department of Public Enterprise, "An Accelerated Agenda Towards the Restructuring of State Owned Enterprises: Policy Framework" (2000) Government Printer, Pretoria, at 2. www.thepresidency.gov.za (accessed 16 September 2016).
[149] Department of Public Enterprise 2007/2008,. DPE Annual Report, 2007/2008, at 14. www.gov.za/sites/www.gov.za/files/dpe%20annual%20report.pdf (accessed 16 September 2016).
[150] Department of Public Enterprise 2000 at 149. See also Denel http://www.denel.co.za/about-us/company-values (accessed 16 September 2016).
[151] Department of Public Enterprise 2007/2008. DPE Annual Report, 2007/2008, at 15.
[152] *Denel SOC Ltd and BAE Systems Land Systems SA (Pty)* Case No 019638. (Competition Tribunal: Merger and Acquisitions).
[153] Ibid at par 13-14.
[154] *AEC Electronics (Pty) Ltd v The Department of Minerals and Energy* 48 CR June 2009.
[155] Section 8(d)(ii) prohibits a dominant firm from refusing to supply scarce goods to a competitor when supplying those goods is economically feasible.

required for the sale of certain products to the industry and it was alleged that such approval had not been forthcoming or in one case was given only temporarily, whilst approval had been given to rivals who have been able to enter the market.[156]

The Commission responded by issuing a certificate of non-referral to the Tribunal, as investigations proved that the approval was not withheld *mala fide* but in fact the DME did not approve products but merely monitoreds the quality thereof. [157] The complaint was referred directly to the Tribunal and upon perusal of the legal papers there was no substantiation or evidence regarding the allegation.[158] The Tribunal was prompted to address a point of law on two grounds; one, whether the Competition Act has any application to State action such as that of the DME; and two, whether it is competent for the Tribunal to grant the relief sought by AEC Electronics (Pty) Ltd in its Notice of Motion.[159]

It was found that the Tribunal does not have jurisdiction to adjudicate on matters relating to the exercise of public powers.[160] Furthermore the Act prohibits anti-competitive practices by firms participating in markets and in this instance the DME, aAn organ of state or functionary as defined in the Constitution[161] does not have a turnover or assets or shares in a particular market and is not considered to be a "firm" for purposes of the Competition Act.[162] It was emphasised that the Act is only applicable to the State, when it acts through the medium of a firm, such as a SOE or SOC.[163]

2.4 Transnet

The fourth and final SOE to be investigated is Transnet, South Africa's largest freight transport company responsible for transporting tons of goods via pipelines, ports and rail

[156] 48 CR June 2009 [2010] ZACT 12 at , par 3.
[157] 48 CR June 2009 [2010] ZACT 12 at, par 6.
[158] 48 CR June 2009 [2010] ZACT 12 at, par 8.
[159] 48 CR June 2009 [2010] ZACT 12 at, par 11.
[160] 48 CR June 2009 [2010] ZACT 12 at, par 18.
[161] Section 239 of the Constitution of the Republic of South Africa Act 108 of 1996: *an organ of state means— (a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution— (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.*
[162] Loopoo N & van Wyk N, (2013) at 4. Section 1 of Act 89 of 1998 provides the definition of a firm as including a person, partnership or trust. The most common variety of respondent under these provisions will be a private of public company.
[163] Section 81 of Act 89 of 1998.

services.[164] Transnet is also a holding company and is responsible for SAA, Petronet (pipelines), Portnet (ports), Spoornet (national rail), Metrorail (urban commuter rail), Freight Dynamics (road freight), Autopax (road passenger), and Technical and General Support Services.[165] Transnet aims to be a focused freight transport company, delivering integrated, efficient, safe, reliable and cost-effective services to promote economic growth in South Africa.[166]

This conglomerate has also been involved in alleged anti-competitive conduct in past and recent times. In the case of *Petroline RSA (Pty) Ltd v Transnet Ltd*[167] Petroline, a privately owned energy company was planning to a build a petroleum line from Maputo to Gauteng which meant it would be in direct competition with Transnet's existing liquid fuel pipelines running from Durban to Gauteng.[168]

The National Energy Regulator of South Africa (NERSA) granted Petroline a licence to build the desired pipeline. However at the same time Transnet had applied for a licence to build a new multi-products pipeline which NERSA also granted.[169] Petroline lodged a complaint with the Commission alleging that its profitability and viability was affected by the subsidy granted by the National Treasury to assist Transnet with the building of the new multi-products pipeline.[170] Furthermore it was alleged that there was an unusual and favourable tariff decision taken by NERSA, in granting the licence.[171] Petroline sought to prove that Transnet was a dominant firm in the liquid fuel pipeline market and that it had contravened sections 8(c), 8(d)(iv)[172] and 9(1) of the Act.[173]

Petroline argued that at that time it was the only a competitor in the liquid fuel pipeline market and had invested over a hundred million rand into building the pipeline before they forcibly abandoned their endeavours.[174] At this point it was clear once again that the Competition Authorities could not challenge or review the subsidy provided by the National

[164] Transnet, http://www.transnet.net/AboutUs/Overview.aspx (accessed 16 September 2016).
[165] Fourie DJ, (2003) at 211-212.
[166] *Supra* note 164.
[167] Case No 2011 May 0059.
[168] Loopoo N & van Wyk N, (2013) at 15.
[169] Case No 2011May0059. See also Loopoo N & van Wyk N, (2013) at 15.
[170] Case No 2011May0059. See also Loopoo N & van Wyk N, (2013) at 15.
[171] Case No 2011May0059. See also Loopoo N & van Wyk N, (2013) at 15.
[172] Section 8(d)(iv) prohibits a dominant firm from selling goods or services below their marginal or average variable cost(also referred to as predatory pricing).
[173] Section 9(1) prohibits price discrimination by a dominant firm.
[174] Case No 2011 May0059. See also Loopoo N & van Wyk N, (2013) at 15.

Treasury or NERSA, as it fell outside their jurisdiction. NERSA and the National Treasury justified the subsidy and restructuring of the tariff methodology adopted for Transnet, which inevitably was lower and more favourable for Transnet to proceed with building the new pipeline.[175]

Although the Competition Authorities could not address the glaring anti-competitive conduct, namely that the state aid provided gave Transnet an unfair advantage, that led to massive financial losses for Petroline and ultimately securing a monopoly market for Transnet to thrive in, NERSA's decision could be taken on review in the High Court of South Africa.[176]

In July 2016[177], the Commission initiated an investigation against Transnet for excessive pricing in contravention of section 8(a) of the Competition Act and exclusionary practices in contravention of section 8(c) of the Competition Act, in the provision of port services.[178] The South African Port charges were alleged to be much higher than the global standard, as well as indications that Transnet was giving preferential treatment to certain customers to the exclusion of others.[179] The allegations are still undergoing investigation and the Commission needs to assess whether or not Transnet has contravened the Competition Act. Upon recent research it appears that the outcome is still pending however the writer hereof is of the inclination that because Transnet operates nearly three quarters of all Africa's rail network and most of the ports in Africa's most industrialised economy the suspected higher port charges may be classified as excessive pricing under the Act and therefore amounts to anti-competitive conduct, by excluding competitors from the market.[180]

3. Conclusion

Section 81 of the Competition Act provides that, "this act binds the state" however there are no explicit sections providing measures to regulate state aid that evidently plays a role in affecting competitors and in essence the fundamental principles of competition law. Hence

[175] Ibid.
[176] Loopoo N & van Wyk N, (2013) at 16.
[177] Nicolaides G, "SAs Competition watchdog probes Transnet overpricing", Eye Witness News, July 2016. http://ewn.co.za/2016/07/07/SAs-competition-watchdog-probes-Transnet-over-pricing (accessed 16 September 2016). (Outcome still pending).
[178] Competition Commission, Statement on the decisions of the Competition Commission,7 July 2016. http://www.compcom.co.za/wp-content/uploads/2016/01/CCsa-1.pdf (Statement on the decisions of the (accessed 16 September 2016).
[179] *Supra* note 177.
[180] Supra note 177.

Competition authorities have found it increasingly difficult to enforce authority and establish jurisdiction in cases where SOE's are recipients of state-funding or "bail outs", despite the adverse effect on competition and perpetuation of monopolistic trends.[181]

The writer hereof notes that in light of the abovementioned SOE cases and complaints that it is evident that this defeats the purposes of the Act as set out in section 2. There are definite lacunae in our legislation that fails to address various forms of abuse of dominance that is hinged on state-aid and control of entities. Public interest and economic viability appears to be the driving theme behind justifying anti-competitive conduct and thus limiting the jurisdiction of the competition authorities to efficiently contain anti-competitive behaviour by SOE's.

The next chapter aims to evaluate foreign jurisdictions and authorities regarding state aid and SOE's in comparison to South Africa's current stance on SOE's and competition law. Although the next chapter emphasises European principles and legislation on state-aid (which is extended to SOE's and private or public institutions), the writer deems it relevant to consider this aspect in relation to South African SOE's and consideration by the legislature to address the governance of state-aid in the various forms it presents itself.

[181] Loopoo N & van Wyk N, (2013) at 3.

CHAPTER 3 The European Perspective on SOE's

In order to obtain a global perspective of SOE's, how they are managed and integrated, this chapter will focus on Member States of the European Union and relevant case law. As discussed in chapter one, the concept of competition law and many South African competition provisions were either derived from or influence by European sources.[182] Hence it would be beneficial to track the developments and challenges regarding European competition law stance in respect of SOEs and the concept of state aid to assist with drawing similarities and differences alike.

1. European legislation and Instruments

Competition policy within the European Union (EU) has been established by single market integration.[183] The Treaty of Paris[184] came into effect in 1952 and was the first indication of the move towards integration.[185] Integration of markets essentially means that barriers of trade are removed in order to facilitate free movement of goods and services while assisting with expansion of national markets across borders.[186]

One of the main instruments currently governing and monitoring competition in the EU is the Treaty on the Functioning of the European Union[187] (TFEU) formerly known as the Rome Treaty of 1957.[188] Another functional instrument in the European community is the Treaty on the European Community (Treaty on the EC) which was ratified in 1992.Article 3 of the Treaty on the EC provides for the activities of the European Community which are founded on effective competition and market integration.[189] These two pieces of legislation, as amended and consolidated by the Treaty of Lisbon will be referred to simultaneously as they are often used in conjunction with respect to EU matters.[190] Article 87(1) of the Treaty on the EC declares state-aid irreconcilable with the market integration, however like the TFEU, the

[182] Sutherland & Kemp, "Competition Law of South Africa", Lexis Nexis Butterworths (loose leaf) 2-22 Issue 15.
[183] Loopoo N & van Wyk N, (2013) at 4.
[184] Sutherland & Kemp at 2-23; signed on 18 April 1951.
[185] Sutherland & Kemp at 2-23.
[186] Whish R et al Competition law, 7th ed (2011) at 23-24.
[187] The Rome Treaty of 1957 was renamed TFEU on 1 December 2009. See Loopoo N & van Wyk N, (2013) at 5.
[188] In terms of Article 87(1) of the Treaty of EC *Member States are defined as ministries, central, regional or local governments and their departments as well as councils and municipalities.*
[189] Nicolaides P *et al,* State aid policy in the European Community" Principles and Practice, 2nd ed (2008), at 2.
[190] The Lisbon Treaty signed by Member States on 3 December 2007, and entered into force on 1 December 2009, is the latest Treaty enforced however competition policy remains unchanged and merely endorses competition rules.

Treaty on EC provides for minimal exceptions wherein state-aid is allowed and strictly controlled.[191]

More specifically, EU Competition law is outlined in Articles 101 to 109 of TFEU.[192] These provisions include anti-competitive behaviour within internal markets, abuse of dominant positions *inter alia* affecting Member State trade, powers conferred to authorities, integration and consideration of national laws, state aid and taxation provisions.[193]

In terms of Article 13 of the TFEU (Title III), the competition authority within the EU is the European Commission with the power and responsibilities to impose penalties, investigate mergers and state aid, develop policy and legislation, institute action against infringements, conduct sectoral inquiries and adopt block exemptions.[194]

More specifically, Articles 107 to 109 lists provisions relating to state-aid within internal markets and/or involving Member State trade. According to the TFEU state aid is *prima facie* prohibited and unlawful in terms of Article 107(1).[195] The reason for this is that state-aid may distort competition and work against the objectives of single market integration.[196] However Article 107 (2) provides for certain exclusions wherein state aid is considered lawful and acceptable within internal markets, this will be discussed further in the chapter.

Article 107 (3) TFEU provides possible considerations when assessing compatibility of the particular form of state-aid in order to allow it or not. The EU Commission has the sole discretion to make this decision.

In assessing the provisions relating to state aid as set out in TFEU it is noted that the instrument does not provide a definition as to what state aid is or comprises of.[197] Loopoo and van Wyk remark that at first glance this may pose an enormous challenge regarding enforcement of the relevant provisions especially because there are no guidelines or

[191] Nicolaides P *et al,* State aid policy in the European Community Principles and Practice, 2nd ed (2008), at 9.
[192] Chapter 1 of Title V11 of Part Three of TFEU.
[193] Whish R et al Competition law, 7th ed (2011), at 49-50.
[194] Whish R et al Competition law, 7th ed (2011), at 53.
[195] Article 107 (1) TFEU: "*Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*"
[196] Nicolaides P *et al,* State aid policy in the European Community Principles and Practice, 2008 2nd ed, at 5.
[197] Loopoo N & van Wyk N, (2013) at 7.

indicators of how to identify state-aid.[198] They however point out that it appears that the absence of a definition of state-aid was intentional, as the authors of the TFEU concluded that providing a clear definition would in fact assist Member States to disguise forms of state-aid.[199]

State-aid is thus generally described as "an advantage" given to an organisation that the organisation would not ordinarily have access to had it not been for state intervention. State-aid can loosely take the form of grants, loans, tax breaks, the usage or sale of state assets at no charge or prices less than the market value, monetary contributions or resources etc.[200] Thus in order to determine whether assistance by the state is considered to be state-aid the "private investor principle"[201] is applied. The European Commission uses the behaviour of a private investor in the same circumstance as a yardstick to establish whether state-aid is present or not.[202]

The "private investor principle" has a two pronged approach with the European Commission needing to prove five elements to uphold a contravention.[203] The five elements regarding the classification of State-aid will be discussed in order to ascertain the onus on the European Commission and the intricacy of State-aid across the continent.

Firstly, State-aid must be granted by a Member State or through State resources.[204] The definition of State-aid is derived from Article 87(1) of the Treaty of EC; "Member States are defined as ministries, central, regional or local governments and their departments as well as councils and municipalities". It is implied that the TFEU relies on the above mentioned definition. While State resources is clearly defined in the case of *Sloman Neptun Schiffahrts AG v Seebetriebstrat Bodo Ziesemer*[205] as public or private bodies of funds created or assigned by the State and which resources belong to the State or controlled by the State. The state-aid provided may be through the State, an agent of the State or private enterprise

[198] Loopoo N & van Wyk N, (2013) at 6.
[199] Loopoo N & van Wyk N, (2013) at 6-7.
[200] Ibid. See Department for Business Innovation & Skills, State Aid: A Basic Guide, at 4 & 9. https://www.gov.uk/guidance/state-aid. (accessed 18/09/2016). Also See Loopoo N & van Wyk N, (2013) at 6-7.
[201] Nicolaides P *et al,* State aid policy in the European Community Principles and Practice, 2nd ed (2008), at 23. See Loopoo N & van Wyk N, (2013) at 6-87.
[202] Ibid.
[203] *Supra* note 201 at 9.
[204] Article 107 (1) of TFEU.
[205] [1997] ECR 1-887, par 19.

controlled by the State, the distinction is of no consequence as long as the State resource iis identified and the transferral of the resources is from the State.[206]

The second element that must be proven is that State-aid favours a certain undertaking or production of certain goods.[207] The case of *Italy v Commission*[208] assisted with defining an "undertaking" in light of Article 107 of the TFEU. An "undertaking(s)" can be classified as a self-employed professional person, a partnership, a private company, a group of companies or a public company fully or partially owned or controlled by the State.[209] Therefore recipients of state aid must be undertakings which are natural or legal persons engaging in economic activities[210] and due to the state aid received, causes discrimination against those firms or entities not in receipt of state aid.[211]

It is important to mention that advantages of a regulatory nature are excluded from Article 107(1) of the TFEU[212] as well as economic activities that do not per se have a market that it operates within because the activity in itself is exclusive to the capability of the State.[213]

Thirdly, the Commission is tasked with proving whether or not state-aid or resources distorts or threatens the aspect of competition.[214] In terms of Article 87(1) of the EC the test applied in order to determine whether there is distortion of competition is not strict. Any form distortion, however small the disturbance or distortion enables the Commission to act upon it. Thus Nicolaides remarks that one could say that this test is focused on the effects of state-aid and not public policies or quantities of state-aid provided.[215]

---

[206] *French Republic v Commission* [2002] ECR I-4397.
[207] Loopoo N & van Wyk N, (2013) at 8.
[208] [1991] ECR I-1433.
[209] Ibid.
[210] *Christian Poucet v Assurances Generales de Frace and Caisse Mutelle Regionale due Languedoc Roussilon* [1993] ECR I-00637 and *Italy v Commission [1998] ECR I-03851 at par 38,* describes economic activity in a European context of offering goods and services within a defined market.
[211] Loopoo N & van Wyk N, (2013) at 8. See also Wishlade FG,2003, "Regional State Aid and Competition Policy In European Union", at 11.
[212] *French Republic v Commission* [2002] ECR I-4397. See also Nicolaides P *et al,* State Aid Policy in the European Community Principles and Practice, 2nd ed (2008), at 17.
[213] Loopoo N & van Wyk N 2013, at 8.
[214] *Regione Autonoma Friuli Venezia Giuila v Commission* [2011] ECR II-1169 found that if state aid has an appreciable affect on trade it is likely to distort or threaten competition.
[215] Nicolaides P *et al,* State aid policy in the European Community Principles and Practice, Nicolaides P *et al* State aid policy in the European Community" Principles and Practice Chapter 1: The Concept of State Aid, 2nd ed (2008) at 41-44.

One manner in which competition can be distorted or threatened is if state aid strengthens the position of an undertaking in comparison with other undertakings competing within the same market or trade.[216] The question authors have resorted to is what would be the competitive position of the recipient in the absence of state aid, and if such position would mean that the undertaking would be worse off than its rival competitors then it can be said that the state-aid distorts competition by giving the recipient an unfair advantage.[217]

This leads to the fourth characteristic the Commission needs to establish, namely whether state-aid gives the recipient "an advantage" that it would have not otherwise had. The Commission applies the "private investor principle", as previously mentioned, in order to confirm whether the recipient is experiencing an economic advantage solely due to the state aid. The onus of proof is on the public entity to prove that it acts as a private investor, with the sole aim to make a profit.[218]

The final aspect is whether state aid affects trade between Member states.[219] State aid is presumed to affect trade unless it is *de minimus* or the market is only affected on a national level, and not between trade of Member State in markets, or the state aid that is far removed from the European community with no indirect impact on the common market.[220]

Thereafter, once the European Commission has established these five characteristics the assessment of "compatibility" is done in terms of Articles 107 (2) and (3) TFEU.[221] According to Article 107 (2) the following are compatible with the internal market:

(a) "aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;…"

Nicolaides explains that this means that state-aid provided must not be to individuals linked to their employers.[222] Therefore state-aid is acceptable when the beneficiaries are financially

[216] *Phillip v Morris Commission* [1980] ECR 2671 and *Belgium v Commission* [1986] ECR 2263 at par 22.
[217] Nicolaides P *et al,* State Aid Policy in the European Community Principles and Practice, 2nd ed (2008) at 40.
[218] Ibid at 25.
[219] Nicolaides P *et al,* State Aid Policy in the European Community Principles and Practice, 2nd ed (2008) at 10-11.
[220] Ibid at 37.
[221] Loopoo N & van Wyk N, (2013) at 6.
[222] Nicolaides P *et al,* State Aid Policy in the European Community Principles and Practice, 2nd ed (2008) at 44.

needy or from lower income groups such as children, the elderly, disabled persons, the poor and people living in remote or underdeveloped areas.[223]

(b) "aid to make good the damage caused by natural disasters or exceptional occurrences; …"

The European Commission has held that there must be direct link between the natural disaster or exceptional circumstances and state-aid provided[224] Therefore Member States must declare when, why and what instance state-aid is considered to be provided, for approval by the Commission.[225]

(c) "aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point."

The writer is of the view that this essentially means the European Commission has made concessions with regards to the need for state intervention wherein certain events or circumstances may lead to social, economic, political or event structural upheaval in particular areas i.e. Germany in this instance. However, the Commission has the discretion to call for state aid to come to an end as it deems fit.

Nicolaides remarks that the European Commission has found that in general state-aid is unnecessary when market forces are sufficient to provoke public or private companies to implement research, training and obtain investments on their own accord.[226]

Article 107 (3) states six categories of state-aid with the sole discretion placed on the European Commission to determine compatibility, namely;

[223] Ibid.
[224] *Germany v Commission* [2003] ECR I-I875 at par 80.
[225] Article 108 TFEU.
[226] Nicolaides P *et al,* State Aid Policy in the European Community Principles and Practice, 2nd ed (2008), at 48. See also Commission Decision 612/2007.

- "aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious unemployment, and of the regions referred to in Article 349[227], in view of their structural, economic and social situation;
- aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; and
- such other categories of aid as may be specified by decision of the Council on a proposal from the Commission."

In light of the above mentioned guidelines and characteristics the European Commission aspired to improve the regulation of state-aid and its effectiveness, by formulating a "balancing test".[228] The balancing test was formulated to further assist with whether state-aid is compatible with common markets. The following criterion was adopted:

- "Does state aid address a market failure or other objective of common interest;
- Is there is an incentive effect (whether the aid affects the behaviour of the recipient in a way which meets the objective);
- Does state aid lead to distortions of competition and trade; and
- Given the magnitude of the positive and the negative effects, is the overall balance positive?" [229]

As previously mentioned Member States are obligated to notify the European Commission of the application or provision of State-aid in order to afford the European Commission a chance

[227] Article 349 of the TFEU essentially identifies islands and areas, i.e. Azores, Canary Islands, Madeira etc. within the EU that may have structural, social, geographical and economical challenges and therefore the EU and Commission shall adopt specific measures aimed, in particular, at laying down the conditions of application of the present Treaty to those regions, including common policies.

[228] Loopoo N & van Wyk N, (2013) at 10. State Aid Action Plan 2005-2009.

[229] Ibid at 10-11. See Also Damien Neven *et al,* Towards a more refined economic approach in State Aid Control Chapter 4 of Part I in "EU Competition Law – Volume IV: State Aid" W. Mederer et al 2008.

to investigate compatibility or the lack thereof.[230] The failure to notify and obtain approval from the European Commission automatically categorises the state-aid as unlawful.[231] The European Commission's findings are final and it is not guaranteed that every decision would be adverse regarding confirmation that the state aid is in fact lawful.[232]

Article 109 of the TFEU does however provide for a *de minimus* rule wherein small amounts of state aid are exempted. State-aid in this instance must not exceed two hundred thousand Euros over a period of three fiscal years.[233]This is in order to relax the application of Article 107(1) and 108(3), deeming state-aid not to have an effect on trade or competition. Notification of this form of state-aid will be merely for information purposes affording the Member State twenty days to inform the European Commission.

In 2005 the European Commission established the State-Aid Action Plan[234] which has the following initiatives to strengthen state aid control, namely "less and better targeted state aid, a refined economic approach, more effective procedures and enforcement, greater predictability and transparency, and sharing of responsibility between the Commission and the Member States."[235]

This is accompanied by a two-fold test that weighs the positive effects of state aid against the negative effects in order to establish whether state-aid is contributing to social welfare and the economy.[236] The European Commission firstly makes the following enquiry:

- whether an objective of common interest has been accurately identified,
- whether state aid is an appropriate instrument for achieving the objective and
- whether the aid creates the necessary incentives and is proportionate.[237]

[230] Article 108 (3) of TFEU: *The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter the aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.*

[231] Loopoo N & van Wyk N, (2013) at 9.

[232] Ibid.

[233] Regulation 69/2001.

[234] State Aid Action Plan 2005-2009, Brussells "Less and better targeted state aid: a roadmap for state aid reform 2005–2009". http://ec.europa.eu/competition/state_aid/reform/saap_en.pdf (accessed 14 October 2016).

[235] Buelens C, Garnier G, Johnson M & and Meiklejohn R September, 2007, "The Economic Analysis of State Aid: Some Open Questions", European Economy, Economic Papers, Number European Commission Directorate-General for Economic and Financial Affairs Publications BU-1/ B -1049 Brussels, Belgium, at 3. http://ec.europa.eu/economy_finance/publications/publication9549_en.pdf ((accessed 24 June 2014).)

[236] Ibid.

The European Commission considers the procedure followed by the Member State to select beneficiaries, the characteristics of the market and the beneficiary and the amount and type of aid in order to weigh up the anti-competitive effects, if any.[238]

2. United Kingdom and Poland

In the context of the regulations governing state aid within Europe the application thereof must be evaluated from the perspective of developed countries versus developing countries with emerging markets. The United Kingdom (UK) is prime example of a developed country with a long history of SOE's, state aid and effective regulations. Poland on the other hand, will be used to specifically draw parallels with South Africa, as it is classified as a developing country with emerging markets.[239]

According to statistics of the World Economic Situation and Prospects published by the United Nations the UK is one of the major developed economies, amongst the United States France and Germany.[240] With a well rounded and established legal system, UK competition law was developed over centuries stemming from the principle of forestalling and anti-monopoly legislation.[241] It is noted that after the Second World War a more modern approach was taken to formalise legislation and policy specifically regarding antitrust agreements and monopolistic behaviours.[242]

There have been a series of UK competition laws over the years such as the Monopolies and Restrictive Practices Act of 1948, Fair Trading Act of 1973, Restrictive Trade Practices Act of 1976 and the Competition Act of 1980.[243].However the Competition Act of 1998 and Enterprise Act of 2002 repealed the aforementioned Acts and fundamentally changed the substantive provisions and governance of competition law by conforming to EC principles

---

[237] Loopoo N & van Wyk N, (2013) at 9-10.
[238] Ibid. See also State Aid Action Plan 2005-2009, Brussells "Less and better targeted state aid: a roadmap for state aid reform 2005–2009". http://ec.europa.eu/competition/state_aid/reform/saap_en.pdf (accessed 14 October 2016).
[239] Wishlade FG,December 1997, EC Competition Policy and Regional Aid: An Agenda for the Year 2000? Regional and Industrial Research Paper Series Number 25, at 47.
[240] Country Classification, "Data sources, country classifications and aggregation methodology". www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification (accessed 20 October 16).
[241] Sutherland & Kemp at 2-5.
[242] Scott A, 2009, "The Evolution of Competition Law and Policy in the United Kingdom", LSE Law, Society and Economy Working Papers 9/2009 London School of Economics and Political Science Law Department, at 1-2. https://www.lse.ac.uk/collections/law/wps/WPS2009-09_Scott.pdf (accessed 14 October 20 October 2016).
[243] Ibid.

and legislation.[244] The Competition Act has been drafted in line with Article 82 of the EC that forbids abuse of dominant positions, with provisions on state aid being one of its pillars.[245] The Act is accompanied by various bodies or authorities such as the Office of Fair Trading (OFT) to investigate any competition law discretions;[246] the Competition Commission and Competition Appeal Tribunal has decision making powers, the Secretary of State and Department of Business, Enterprise and Regulatory Reform are in charge of competition policy making;[247] and the Lord Chancellor is responsible for appointments of the Commission and lastly the Appeal Tribunal with the power to transfer matters to civil courts.[248]

Once the Competition Act was enforced the UK monitored state aid in line with the EU principles and criteria discussed above. The UK was a member of the EU since 1973 (until its exit from the EU in 2016 as discussed below) and started drawing from the EU principles thereafter to effectively deal with the area of state aid amongst others aspects of competition law.[249]

It was noted that relations between the UK and the European Commission regarding state aid policy have been seemingly the least strained amongst the European Community.[250] This was reflected in the UK government's opposition toward state intervention and in the support of the stringent EU principles governing state aid.[251] Recent cases also illustrate that the UK continues to be cautious in allowing state aid and in more cases that not, applies a strict approach in application of state aid.

In 1993 the European Commission allowed state aid granted by the UK to *SCA Aylesford,*[252] a manufacturer of newsprint. In this case the Commission concluded that the state aid did not

[244] Whish R *et al,* Competition Law, 6th ed (2009), at 59.
[245] Ibid. See also, Whish R *et al,* Competition Law, 6th ed (2009), at 672.
[246] Whish R *et al* Competition law 6th ed (2009), at 59 & 64. Note "OFT established in terms of section 1of the Enterprise Act 2002".
[247] Whish R *et al,* Competition Law, 6th ed (2009), at 62.
[248] Ibid, at 63-64.
[249] Scott A, 2009, "The Evolution of Competition Law and Policy in the United Kingdom", LSE Law, Society and Economy Working Papers 9/2009 London School of Economics and Political Science Law Department, at 15. https://www.lse.ac.uk/collections/law/wps/WPS2009-09_Scott.pdf (accessed 14 October 20 October 2016).
[250] Wishlade FG,December 1997, EC Competition Policy and Regional Aid: An Agenda for the Year 2000? Regional and Industrial Research Paper Series Number 25, at 19.
[251] Ibid.
[252] Commission Notice, O.J. C 46/5 [1993] (aid to *SCA Aylesford,* manufacturer of newsprint).

adversely affect trading conditions to an extent contrary to the common interest.[253] The Commission considered that state aid would result in an increase in the capacity of production of the firm and approximately a third of the increase in capacity, would be sold in other Member States.[254] Furthermore the state aid was limited and although the United Kingdom imported seventy-five percent of its consumption of newsprint; ninety percent of these imports came from non-member states at the time.[255]

In a recent case, *United Kingdom Gibraltar Corporate Tax Regime,*[256] the European Commission received a complaint from Spanish authorities regarding tax exemptions applicable to Gibraltar, a British overseas territory in which the UK is responsible for their international relations i.e. treaties.[257] The UK argued that the tax exemptions on passive income allowed in terms of the Income Tax Act of 2010 was not state aid in any way or form.[258] However when weighing the tax exemption against the five considerations within TFEU, particularly Article 107(1), the European Commission's preliminary findings were that the tax exemption constituted State aid and most likely distorted competition.

This was based on the fact that the tax exemption did not contribute to social welfare, provide or contribute to economic development or activities neither was Gibraltar found to be within the UK's regional aid map for the period of 2007 to 2013, as approved by the Commission under State aid N673/2006.[259] There was however uncertainties about its compatibility with the internal market and the effects of the Income of Tax of 2010 hence the Commission decided to initiate the procedure laid down in Article 108(2) TFEU.[260]

In 2016 the UK was the first member state to file notice to leave the European Union in terms of Article 50 of the European Treaty.[261] Article 50 provides for a two-year period for a

[253] Commission Notice, O.J. C 46/5 [1993] at par 7.
[254] Commission Notice, O.J. C 46/5 [1993] at par 6.
[255] Frederic YJ, "Competition and State Aid Policy in the European Community", 1994, Vol 18 Issue 2, Fordham *International Law Journal*, 1994, Article 5 Competition and State Aid Policy in the European Community, 525-551; at 554551. http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1412&context=ilj (accessed 24 April 2014)
[256] State aid SA.34914 (C/2013) — (ex 2013/NN), Official Journal of the European Union, C 369/55 public version, at 5. (http://eur-lex.europa.eu/ (accessed 18 October 2016).
[257] Ibid.
[258] Supra note 256.
[259] United Kingdom Gibraltar Corporate Tax Regime, State aid SA.34914 (C/2013) — (ex 2013/NN, C 369/55, at 15-16.
[260] Ibid.
[261] Branton, J, 16 June 2016 "Will Brexit free UK from State-aid rules". http://www.localgovernmentlawyer.co.uk (accessed 16 October 2016).

member state to exit and negotiate terms as to how they intend on relating to the EU and the rules of the applicable treaties previously signed and agreed upon. Until an exit- agreement is formed and approved by other member states the EU state aid laws would still apply in the UK and its courts. There is no precedent for the EU to follow and this adds the dimension of uncertainty for the EU community.[262]

Authors and legal analysts have explored the options regarding state aid and its development due to UK's imminent exit from the EU, termed as "Brexit".[263] There appears to be three avenues available to the UK at this stage, namely; UK's exit agreement therefore maintaining principles of state aid derived from EU treaties; or formulate new laws to govern state aid with the assistance of the World Trade Organisation which provides for minimum standards for trade and provision of subsidies[264]which is sanctionable according to EU policies alternatively the UK's reliance on the European Economic Area[265] which allows for involvement in the EU internal market without requiring states to participate in other EU policies.[266]

The writer is of the view that this in an indication of UK's progressive approach in refining competition law and successfully governing state aid within its borders. Not only has UK set an example by adapting competition policies in line with an evolving economy and society, it has also confirmed that it has a sound legal system, with structures and institutions in place to ably continue with the necessary checks and balances in the competition law arena, even attempting to do so independently from the European Community.[267]

On the other hand Poland, notably with a poorer or less developed economy as opposed to the UK, has the challenge of balancing dependency on state aid to boost its economy as well as

[262] Ibid.
[263] *Supra* note 261.
[264] Branton, J, 16 June 2016 "Will Brexit free UK from State-aid rules"; states "that Agreement on Subsidies and Countervailing Measures (ASCM) also deals with other types of subsidy which although not illegal are deemed "countervailable", which means exported goods found to be subsidised and causing injury to domestic producers in other markets may be subjected to additional tariffs (known as "countervailing duties") on entry into those other customs territories… What all the above means is that unregulated subsidies to business in a post Brexit world would likely lead to trade sanctions at the very least. This in turn means the UK would be most unlikely to move to a new regime of no regulation of subsidies/State aid."
[265] OJ No L 1, 3.1.1994, at 3; and EFTA States' Official Gazettes, at 1. www.efta.int/legal-texts/eea (accessed 16 October 2016).
[266] *Supra* note 261.Ibid.
[267] Branton, J, 16 June 2016 "Will Brexit free UK from State-aid rules". http://www.localgovernmentlawyer.co.uk (accessed 16 October 2016).

effectively monitoring its effects on competition law.[268] Poland was yet another country plagued by monopolistic behaviour and abuse of dominance within its markets and prior to 1970 had no trace of anti-monopolistic provisions within its legislation.[269] At that stage it was apparent the state itself was controlling economic activities of organisations and with a growing socialistic economic crisis, criticism of the state monopolies was unavoidable.[270]

By 1987 the Polish government adopted legislation to combat monopolistic practices and agreements.[271] There were criteria developed and penalties to assess cases however a controversial rule to grant the Minister of Finance a role as an antimonopoly authority saw a conflict of interest of regarding this role.[272] On one hand he was combating monopolistic practices and on the other, representing the state and accounting or assessing its generation of income, which was derived more often than not from state monopolies The Act of 1987 proved to be ineffective over time.

In 1990 the Polish government revamped its competition policies by adopting the Antimonopoly Act of 1990 that sought to rectify certain errors of the past.[273] The Act established an antimonopoly body, called the Antimonopoly Office (later changed to the Office of Competition and Consumer Protection in 1996)[274] with vested powers to investigate and refer matters to the Antimonopoly Court in Warsaw for adjudication as well as dealt with merger control for the first time.[275] An amendment was made to the Act of 1990 which was significant in dividing tasks and competencies between authorities division of tasks and competencies between municipalities and government, introducing compliance and court procedures to all companies etc.[276]

However state aid or ownership was never intently addressed until 2000 when the Act of 1990 made the last significant amendment to include the conditions for admissibility and

[268] Wishlade FG,December 1997, EC Competition Policy and Regional Aid: An Agenda for the Year 2000? Regional and Industrial Research Paper Series Number 25, at 47.
[269] OECD, Poland: The Role of Competition Policy in Regulatory Form, at 10. www.oecd.org/poland/27067452.pdf (accessed 20 October 2016).
[270] Ibid.
[271] Office of Competition and Consumer Protection, Błachucki M, "Polish competition law :Commentary, Case Law and Texts",12th Annual Conference Warsaw, 2013, at 10. https://uokik.gov.pl/download.php?plik=13218 (accessed 20 October 2016).
[272] Ibid, at 12
[273] *Supra* note 269, at 14-15.
[274] *Supra* note 269, at 18.
[275] OECD, Poland: The Role of Competition Policy in Regulatory Form, at16. www.oecd.org/poland/27067452.pdf (accessed 20 October 2016).
[276] *Supra* note 271, at 17.

supervising of state aid for with the President of the Office of Competition and Consumer Protection vested power to supervise state aid granted to undertakings. Poland also started to align its national laws with EU principles in 2001 and with the assistance of the Office of Competition and Consumer Protection in an attempt to regulate state aid as far as possible.[277]

In the case of *Rembleszcyzna/Gustorzyn Gas Pipeline*[278] the Republic of Poland notified the European Commission of its extension and modernisation of the gas pipelines network.[279] The sole beneficiary of the measure in terms of Article 108(3) of the TFEU was Operator Gazociagow Przesylowych Gaz-System S.A which is a state-owned company controlling gas transmission in Poland.[280] This is the only gas transmission company in Poland and it has tenure until 2030 - it was also decided that a considerable amount of finances would be allowed to ensure this.[281]

The European Commission was tasked with determining whether the "finance injection" applied by the state constituted state aid in terms of Article 107(1) of the TFEU. The findings were that the funds from the EU Structural Funds, which are available to member states, is considered to be aid granted from state resources.[282] Secondly, the contribution provides additional funds for the Gaz System to cover investment and extension costs of the pipeline which it would have been liable for on its own, therefore giving the Gaz System an economic advantage future or potential competitors.[283] This was found to be an advantage that was selective in nature. Lastly, there was no competition for Gaz System at the time as it was the only gas transmission operator but it was held that it could have blocked future companies from bidding for a transmission licence and therefore the aid is likely to distort future competition.[284]

In light of the above the European Commission still found that the objectives and common interests of the operation were necessary and compatible with the TFEU in terms of Article

[277] OECD, Poland: The Role of Competition Policy in Regulatory Form, at 6 and 20. www.oecd.org/poland/27067452.pdf (accessed 20 October 2016).
[278] Case No SA.34235.http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_34235 (accessed 20 October 2016).
[279] Loopoo N & van Wyk N, (2013) at 16.
[280] Ibid.
[281] Loopoo N & van Wyk N, (2013) at 17 states "*The project was co-finances from the EU Structural Funds within the Environment and Infrastructure Operational Programme…*".
[282] Ibid.
[283] Loopoo N & van Wyk N, (2013) at 17.
[284] Ibid.

107(3). [285] Although the Polish operations ultimately would bring about growth, investment and job creation, it indicated that state measures may still have anti-competitive effects beyond the classification of undertakings.[286] Sierra remarks that one can describe it with the coined phrase "a House with Two Doors Is Difficult to Guard"[287], because on one hand states, like Poland are dependent on state aid or the state itself to fulfil socio-economic developmental objectives whilst challenged to keep the state accountable and maintaining objectives of competition policy at the same time.[288] Hence Loopoo and Van Wyk remark that the balancing act may prove to be impossible or inconsistent.[289]

3. Comparative Analysis

Upon evaluating state aid within South Africa and European countries, namely the UK and Poland, there are some glaring distinctions, challenges and further developments that can be made.

Firstly, the status of a country's economy; namely developing versus developed, plays a major role on the degree of reliance on state intervention with economic and social infrastructures. Authors have opined that developing countries have high barriers to entry with a significant amount of state aid or state-owned monopolies to combat social ills such as unemployment, weak exchange rates, corruption, lack of resources etc. as opposed to developed countries.[290] This is also accompanied by the fact that developing countries have smaller markets in comparison to their developed counterparts, with informal trading being prevalent.[291]

Moreover, the implementation of competition policies, specifically regulating state aid may not be a priority for developing countries given the mammoth task of overcoming the

[285] See Case *Gazociagow Przesylowych Gaz-System S.A*, No SA.34235, at 15. http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_34235 accessed (20 October 2016).
[286] Sierra JLB, "Minimising distortive state aid: the role of EU competition policy and developing countries", 12th Annual Conference of the International Competition Network, Warsaw, 23 April 2013. icnwarsaw2013.org/pre.../pre-icn-2a_Buendia_-_Minimizing_distortive_State_aid.pdf (accessed 23 June 2014).
[287] Ibid.
[288] Loopoo N & van Wyk N, (2013) at 19.
[289] Ibid.
[290] Du Plessis L, Lurie J, Van Burren A. 4 & 5 October 2011.Fifth Annual Competition Law, Economics and Policy Conference "Competition legislation and policy-it is necessary in a developing economy", at 3-4.
[291] Ibid.

abovementioned challenges.[292] European legislation noticeably has sets of principles and accountability mechanisms that are more established and has progressed over the years. In contrast, South Africa with a fairly established competition policy and legislative framework, has still not managed to formulate a consolidated piece of legislation specifically dealing with state aid.[293]

Without a formal piece of legislation, parliament despite some existing legislation i.e. Public Finances Management Act, still struggle to keep SOE's accountable how finances are administered, performance in the markets and whether they are achieving desired result, despite the annual budget submissions, strategic plans and reports that are already required.[294]

Another factor contributing to more efficient governance of state aid in Europe is the fact that countries subscribe to treaties that increase the aspect of accountability and transparency of operation and economic agendas, with streamlined goals that seek competitive neutrality.[295] Competitive neutrality is simply the principle of levelling the playing field for public and private businesses with the aim of enhancing economic efficiency.[296] This inevitably provides a measure of control for the state competing with private companies for resources, goods, services and market share.

4. Conclusion

Although there is a global economic down turn, Europe, has maintained the relevancy of competition law and emphasising economic freedom.[297] In light of the differences and challenges identified the final chapter of this dissertation seeks to make recommendations based on international policy assessments as well as focus on South African competition policy considerations to develop legal structures that promote, protect and enhance competition, inevitably leading to effective governance in the future.

---

[292] *Supra* note 290, at 6.
[293] Loopoo N & van Wyk N, (2013) at 3.
[294] Loopoo N & van Wyk N, (2013) at 19.
[295] OECD, Meeting of the OECD Council at Ministerial level "Maintaining a level playing field between public and private business for growth and development", Background report (2013) at 3.
[296] Ibid.
[297] Monti M (2004) "Competition for Consumers' Benefit", Speech given by the form Commissioner with responsibility for competition policy in the European Union, Amsterdam, 22 October 2004 http://www.adb.org/Documents/Others/OGC-Toolkits/CompetitionLaw/complaw040000.asp (accessed 24 April 2014). See also Du Plessis L, Lurie J, Van Burren A. 4 & 5 October 2011.Fifth Annual Competition Law, Economics and Policy Conference "Competition law in the developing world: A fish out of water?, Competition legislation and policy-it is necessary in a developing economy", at 23.

CHAPTER 4 Conclusions and recommendations

1. Introduction

South Africa's economic status may not easily be remedied given the complex political, social and economic history of South Africa and thus a greater support from external entities such as the United Nations and international trade agreements or investments may assist with the resolution of issues plaguing the nation.[298]

2. Conclusions and recommendations

The fact that our legislation remains fragmented regarding the governance of state aid gives rise to three policy questions raised by legal analysts. Firstly, it can be asked whether the Competition Act should be amended to include explicit provisions regarding SOE's and more particularly state aid. The notion of including a public interest or state action defence by SOEs in our legislation has also been raised as a consideration.[299] This essentially means the state may be exempt to a certain extent from competition policies and legislation and that it may justify anti-competitive behaviour if weighed against the public interest mandate and obligations placed on SOE's to provide goods or services for the greater population (as referred to Article 106 (2) of the TFEU).[300]

The writer hereof concedes the necessity of state aid and ownership in a developing country and hence refers to the considerations in Article 107 in the TFEU to be grafted into our existing legislation to assist with identifying state aid, critically analysing the effect on competition as well as providing instances where state-aid is an exception to the rule. The writer is of the view that there is adequate analysis in this paper that proves that our Competition Act and other pieces of legislation is lacking in regulating SOE's and ensuring SOE's adhere to competition policy objectives and desired outcomes.

The European Community has procedures and processes in place to effectively assess the effects of state aid or ownership not only on national systems but continentally. This causes

[298] Du Plessis L, Lurie J, Van Burren A. 4 & 5 October 2011.Fifth Annual Competition Law, Economics and Policy Conference "Competition law in the developing world: A fish out of water?, Competition legislation and policy-it is necessary in a developing economy", at 13-14.
[299] Aproskie J,Hendiksz M,Kolobe T, "State-owned Enterprises and Competition: Exception to the rule" Genesis Analytics.6 September 2014, at 13
[300] Ibid. Article 106 (2) of TFEU.

states to be cautious in how and when state aid is applied. This is further demonstrated by the powers conferred to the European Commission and the training of specialists to apply the rules of law on specific cases. The European precedent serves as a lighthouse of how to efficiently identify anti-competitive effects of state aid as opposed to South Africa's somewhat limited spectrum of provisions, cases and competencies.

One of the main reasons that the writer is of the view that SOE's actually work against the objectives and purposes set out in the Competition Act is due to the material error of not defining and differentiating between objectives of SOE's, that is whether the function of the SOE is mainly for economic or social welfare purposes. It has been seen that when SOE's are expected to fulfil both purposes the adherence to competition legislation is virtually unachievable. Hence the writer refers to European legislation and policies for direction and guidance for South Africa to re-think and reposition SOE's to fulfil their desired purposes while maintaining the aspect of competition.

In 2013 the OECD delved into the concept of competitive neutrality and maintaining a level playing field between actors. It was suggested that this can be achieved by sector regulation where a differentiation is made between activities that are deemed national security or strategic economic importance, and applying a balancing test.[301] This would assist policy makers and regulators on how to assess SOE's that are faced with commercial and non-commercial functions (public service obligations versus boosting economic activities).[302]

The "best practice report" was developed by the OECD identifying seven priorities for policy makers.[303] These priorities can be summarised in relation to SOE's as follows:

- "streamline SOE's either in terms of corporate form or the organisation of value chains, thus separating commercial and non-commercial objectives within the entities for transparency ;
- Ensure transparency and disclosure of cost allocation especially of public service obligation;
- Devise methods to calculate a market-consistent rate of return on business activities, SOE's to operate like comparable businesses in order to perform efficiently;

[301] OECD, Meeting of the OECD Council at Ministerial level "Maintaining a level playing field between public and private business for growth and development", Background report, 2013, at 3.
[302] Ibid.
[303] *Supra* note 301, at 4.

- Ensure transparent and adequate compensation for public policy obligations imposed of SOE's;
- Ensure SOE's operate in the same or similar tax and regulatory environments as private businesses;
- Debt neutrality and avoidance of concessionary financing of SOE's subjecting SOE's to financial market disciplines and
- Promote competitive and non-discriminatory public procurement (fair bidding processes)."[304]

The OECD has noted that there are a number of European Member States, mainly in Northern Europe, that have started implementing the above mentioned "best practice points" thus enhancing the governance of SOE's and continuing to ensure that competition remains relevant alongside economic stability and development, which South Africa can glean from.[305]

However, as remarked by Du Plessis *et al*, translating those principles into a South African context is pivotal to cater for the nation's needs, culture, economic and social dynamics.[306] Many instances show that poorly drafted legislation, due the legislature's "cut and paste approach" of foreign laws have proven ineffective, incomprehensive or inapplicable at times. Therefore a careful approach in assessing the Act's objectives and challenges in relation to foreign recommendations is important to further develop a cohesive competition policy combating anti-competitive behaviours arising from state-aid.

While South African competition authorities have shown a willingness to impose remedies on SOE's there may be a case for extending the powers of the Commission to address policies and regulations in preventing behaviour that would otherwise result in working against the objectives set out in Section 2 of the Competition Act, discussed above.[307] As indicated by Aproskie *et al* the second consideration would be whether the Competition Commission should play a greater role in *ex ante* regulation in terms of competitive effects of state policies

[304] *Supra* note 301, at 4-5.
[305] OECD, Meeting of the OECD Council at Ministerial level "Maintaining a level playing field between public and private business for growth and development", Background report, 2013, at 6-7.
[306] Du Plessis L, Lurie J, Van Burren A. 4 & 5 October 2011.Fifth Annual Competition Law, Economics and Policy Conference "Competition legislation and policy-it is necessary in a developing economy", at 25-27.
[307] Ibid.

and legislation.[308] Furthermore consideration should be given to an independent regulator assigned to state-aid cases or agreements between the Commission and sector regulators, as established in Europe (State Aid Action Plan).

The third policy question is whether broadening the remedial powers of the Competition Tribunal would address issues of legislation or regulation where anticompetitive behaviour of SOEs can be fairly characterised as the result of state action.[309] The potential benefits, costs implications of their powers and the extent to which it would be extended would need careful assessment by policy makers.[310]

3. Final remarks

Nevertheless, the writer is of the view that this may take time and at present we may have to depend on the Commission's Advocacy and Stakeholder Relations Division to participate in proceedings, raise awareness and advise government on anti-competitive effects that state-aid may have, especially looking at recent reports of SOE's inability to meet economic objectives or satisfy public interest obligations.[311] It is submitted that the aforementioned priorities and recommendations serve as a beacon of hope for future development in South African competition policy.

[308] Aproskie J,Hendiksz M,Kolobe T "State-owned Enterprises and Competition:Exception to the rule" Genesis Analytics.6 September 2014, at 11- 13.
[309] Ibid.
[310] Loopoo N & van Wyk N, (2013) at 19.
[311] Loopoo N & van Wyk N, (2013) at 20.

BIBLIOGRAPHY

1. Textbooks

1.1 Brassey M (ed), Brassey M *et al*, *Competition Law*, (2002) Juta Law, Landsdowne.

1.2 Neuhoff M (ed), Neuhoff (Smit) M. et al, *A practical guide to the South African Competition Act*, (2006) 2nd Edition, Butterworths, Durban.

1.3 Sutton A (ed), Nicolaides P *et al*, *State aid policy in the European Community; Principles and Practice*, (2008) 2nd Edition, Kluwer Law International, Netherlands.

1.4

1.4 Sutherland P & Kemp S, *Competition Law of South Africa* (2013) loose leaf, Service Issue 15, Lexis Nexis, Butterworths, Durban.

1.5 Sutherland, P and Kemp S, *Competition Law of South Africa* (2010) Service Issue 13, LexisNexis, Butterworths, Durban.

1.6 Whish R, *Competition Law*, (2009) 6th Edition, Oxford University Press.

1.7 Whish R and Bailey D, *Competition Law*, (2012) 7th Edition, Oxford University Press.

2. National Legislation

2.1 Companies Act 71 of 2008.

2.2 Competition Act 89 of 1998.

2.3 Constitution of the Republic of South Africa Act 108 of 1996.

2.4 Maintenance and Promotion of Competition Act 96 of 1979.

2.5 Management of Public Finances Act 1 of 1999.

2.6 Regulations of Monopolistic Conditions Act 24 of 1955.

2.7 Telecommunications Amendment Act 64 of 2001.

2.8 Undue Restraint of Trade Act 59 of 1949.

3. International Legislation

3.1 Competition Act of 1998.

3.2 Competition Act of 1980.

3.3 Enterprise Act of 2002.

3.4 Fair Trading Act of 1973.

3.5 Monopolies and Restrictive Practices Act of 1948.

3.6 Restrictive Trade Practices Act of 1976.

3.7 Treaty on the Functioning of the EU (1 December 2009).

3.8 Treaty on European Community (Ratified in 1992).

3.9 Regulation 69/2001

4. Case law

4.1 *AEC Electronics (Pty) Ltd v The Department of Minerals and Energy* 48 CR June 2009.

4.2 *Belgium v Commission* 1986 ECR 2263.

4.3 *Competition Commission v SAA* [*2005*] ZACT 50.

4.4 *Competition Commission v Telkom* 11/CR/Feb04.

4.5 *Competition Commission v Telkom* 2013 ZACT 62.

4.6 Competition Commission v Transnet.
http://www.compcom.co.za/wp-content/uploads/2016/01/CCsa-1.pdf
(accessed 13 September 2016).

4.7 *Democratic Alliance v South African Airways (Pty) Ltd* Case Number 2013 January 0007.

4.8 *Denel SOC Ltd and BAE Systems Land Systems SA (Pty)* Case No 019638.

4.9 *Germany v Commission* 2003 ECR I-I875.

4.10 *Italy v Commission* 1991 ECR I-1433.

4.11 *French Republic v Commission* 2002 ECR I-4397.

4.12 *Petroline RSA (Pty) Ltd v Transnet Limited* Case Number 2011 May 0059.

4.13 *Phillip Morris v Commission* 1980 ECR 2671.

4.14 *Preusen Elektra AG v Schleswag* AG 2001 ECR I-2099.

4.15 *Regione Aurtonoma Friuli Venezia Giulia v Commission* 2011 ECR II-1169.

4.16 *Senwes v Competition Tribunal* CCT 61/11 2012.

4.17 *Sloman Neptun Schiffarhts AG v Seebetriebstrat Bodo Ziesemer* 1993 ECR I-887.

4.18 Commission Notice, O.J. C 46/5 1993.
(State aid to SCA Aylesford, manufacturer of newsprint).

4.19 *United Kingdom, UK- Gibraltar Corporate Tax regime* (ITA 2010) State aid SA.34914. (C/2013)(ex2013/NN) Official Journal of the European Union C 369/55 public version p5 (http://eur-lex.europa.eu/) (accessed 18 October 2016)

5. Journal Articles & Papers

5.1 Adam M & Adler S, *Abuse of Dominance and its effects on Economic Development*, United Nations Conference on Trade and Development, Geneva New York, 2008.

5.2 Anderson P and Fiandeiro F. *What constitutes "inducement" in terms of section 8(d)(i)?* Paper presented at the Fifth Annual Competition Law, Economics and Policy

Conference 4 and 5 October 2011.

5.3 Aproskie J,Hendiksz M,Kolobe T,S*tate-owned Enterprises and Competition:Exception to the rule*, Genesis Analytics.6 September 2014.

5.4 Buelens C, Garnier G, Johnson M and Meiklejohn R September 2007, "The Economic Analysis of State Aid: some open questions", European Economy: Economic Papers, Number European Commission Directorate-General for Economic and Financial Affairs Publications BU-1 B - 1049 Brussels, Belgium (accessed 24/06/2014).

5.5 Damien Neven *et al*, "Towards a more refined economic approach in State Aid Control", *Chapter 4 of Part I in* "*EU Competition Law – Volume IV: State Aid*" W. Mederer et al 2008.

5.6 Frederic YJ, "Competition and State Aid Policy in the European Community", *Fordham International Law Journal*, Volume 18, Issue 2 1994, Article 5. http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1412&context=ilj (accessed 24 June 2014).

5.7 Fourie DJ, "Restructuring of State-owned Enterprises: South African Initiative", *Asian Journal of Public Administration*, 2003.

5.8 Hattingh D, Hodge J and Rospabe S, Development Policy Research Unit: "Impact of Privatisation and Regulatory Reform on Wage Premia in State-owned Enterprises in South Africa".

5.9 Jenkins H, Dr Niels G, Noble R, *The South African Airways cases; blazing a trail for Europe to follow*, Oxera, 14 August 2009.

5.10 Loopoo N and van Wyk N, *State aid and competition in South Africa,* Competition Commission, 2013 .

5.11 Njisane. Y, *Pricing conduct, State aid and the implications for industrial development in South Africa*, 2015. 2015.essa.org.za/fullpaper/essa_2960 (accessed 16 October 2016)

5.12 Organization for Economic Cooperation and Development (OECD), *Poland the role of competition policy in regulatory form*, 2002, OECD.

5.13 Organization for Economic Cooperation and Development (**OECD**), *Maintaining a Level Playing Field between Public and Private Business for Growth and Development: Background report*, May 2013.

5.14 Sierra JLB, *Minimising distortive state aid: the role of EU competition policy and developing countries*, April 2013.

5.15 Scott A, 2009, "The Evolution of Competition Law and Policy in the United Kingdom", LSE Law, Society and Economy Working Papers 9/2009 London School of Economics

and Political Science Law Department, p1-2.
https://www.lse.ac.uk/collections/law/wps/WPS2009-09_Scott.pdf (accessed 14/10/16)

5.16 Wishlade FG,December 1997, EC Competition Policy and Regional Aid: An Agenda for the Year 2000? Regional and Industrial Research Paper Series Number 25.

5.17 Wishlade FG, *Regional State Aid and Competition Policy in European Union*, 2003

6 Policy Documents

6.1 Department of Public Enterprise 2000. "An Accelerated Agenda Towards the Restructuring of State Owned Enterprises: Policy Framework", Government Printer, Pretoria.

6.2 Department of Public Enterprise 2007/2008. Annual Report.

6.3Telkom SA Limited Prospectus dated 4 March 2003.

7 Government Gazette

7.1 Department of Communications. *ICT Policy Colloquium Discussion Document:* Government Gazette No 35255.13 April 2012.

7.2 National Growth and Development Plan No. Government Gazette No 16085, 23 November 1994.

8 Internet sources

8.1 South African Airways official website.
http://www.flysaa.com/us/en/footerlinks/aboutUs/briefHistory.html
(accessed 02 August 2016)

8.2 Telkom official website.
http://www.telkom.co.za/history/TelkomHistory (accessed 13 September 2016)

8.3 Denel Official website.
http://www.denel.co.za/about-us/company-profile (accessed 16 September 2016).

8.4 Transnet official website.
http://www.transnet.net/AboutUs/Overview.aspx (accessed 16 September 2016).

8.5 Competition Commission official website.
http://www.compcom.co.za/wp-content/uploads/2016/01/CCsa-1.pdf
(Statement on the decisions of the Competition Commission Date: 07 July 2016)
(accessed 16 September 2016).

8.6 Branton, J, 16 June 2016 "Will Brexit free UK from State-aid rules".

http://www.localgovernmentlawyer.co.uk (accessed 16 October 2016).

9 Newspaper Articles

9.1 Ensor L, Visser A, *Competition Commission declines probe to SAA*. Business Day Live 12/11/2012 (accessed 13September 2016)

9.2 Rossouw J, *SA must accept reality and unburden itself from owning a national*, Airline, Mail & Guardian. http://mg.co.za/article/2016-08-27-south-africa-must-accept-reality-and-unburden-itself-from-owning-a-national-airline (accessed 27August 2016).

9.3Nicolaides G, *SA's competition watchdog probes Transnet over pricing*, Eye Witness News. http://ewn.co.za/2016/07/07/SAs-competition-watchdog-probes-Transnet-over-pricing (accessed 16 September 2016).

10 Speeches

10.1 Lewis D, *Chilling Competition*,2009. www.comptrib.co.za/assets/Uploads/Speeches/lewis13.pdf (accessed 28 March 2016)

10.2 Monti M, *Competition for Consumers' Benefit*, Speech given by the form Commissioner with responsibility for competition policy in the European Union, Amsterdam, 22 October 2004. http://www.adb.org/Documents/Others/OGToolkits/CompetitionLaw/complaw040000.asp (accessed 24 April 2014).

10.3 Radebe, J, *Denel Restructuring and Announcement of Preferred Strategic Equity Partner*, 2000. http://oldgov.gcis.gov.za/speeches/2001/0109181245p1001.htm (accessed 20 October 2016)