The Walmart merger – implications for competition law in developing countries.

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This note should be read with the extracts from the decision of the Competition Appeal Court of South Africa permitting the merger between Walmart and a South African company, Massmart Ltd, which had a significant foot print in a number of African countries in the market in which Walmart is the dominant international player.

As Bakhoum and Fox (2013) have noted, developing countries are confronted with a dilemma regarding their formulation of policy En passant, it is not a dilemma which is exclusive to competition law in that, as Rodrik (2011) has noted, hyperglobalization and its propulsion of developing countries into straight jacket model of the global economy, tend to hollow out the power of the nation state. In turn, this restricts the scope of national autonomy in the formulation and implementation of economic and social policy and concomitantly impacting on the influence of democracy over the shaping of the national economic course.

To return to competition law, developing countries face pressures from the global to conform to international standards while seeking policies which fit their history, the challenges posed by the latter and domestic choices made to produce redress and change. Is it possible to reconcile international standards with the local? The specific context in which this question is posed is one that addresses the path toward growth and the development of markets which are congruent with growth but which do not simply produce a trickle for the poor but which create conditions for genuine and meaningful economic empowerment for the historically and invariably still presently disadvantaged.

The problem for developing countries in shaping competition policy in the shadow of international standards has been the distance travelled by the competition law of the two key jurisdictions - the USA and the EU over the past few decades. Whereas US anti trust had developed as response to the growth of huge trusts and corporations which controlled key infrastructure among other key components of the economy and European competition law had sought to control the abuse of power and promote democracy, the influence, initially in the USA of the Chicago school of economics and later pressure for convergence on both sides of the Atlantic has reduced the ambition of competition law increasingly to the promotion of efficiency, narrowly defined which in turn eschews judicial interference with the idea of the 'market working itself pure'. In the final analysis this can result in a justifiable attempt to deal with cartels but not much else. While the EU jurisprudence has retained the animating idea of preserving and defending the competitive process, thereby remaining a far more persuasive and attractive template for the developing world's attempts to create new competition legislation fit for specific purpose, it too has felt the cold winds of Chicago efficiency. Expressed differently, the focus upon relative economic power, its effect upon the competitive process and the related consideration of fairness has shifted from the centre of the enterprise in the two key jurisdictions (Gerber 2012).

But in developing countries like South Africa or much of Asia, economic development is key and cannot be excluded from economic and social policy including competition policy. In South Africa, the legislation sought to introduce indigenous considerations. As is evident from the Walmart judgment which accompanies this note, s12 A of the South African Competition Act includes a public interest clause which, depending upon the facts, may trump traditional competition considerations. In turn this provision follows upon s2 of the Act which sets out an objectives clause, including, apart from traditional considerations of price, quantity and consumer choice, commits the Act to promote small and medium size South African business as well as employment and regional development.

In a recent analysis of competition law and developing countries, Fox (2013) has suggested that South Africa, although confronted with restraints that affect, for example, its fellow African countries, is in a more favourable position to defend itself against world restraints because of its more developed economy and strategic importance as a gateway to the continent.

The Walmart case casts a major question over this claim, if the claim is couched in terms of fashioning an indigenous policy along the lines of ss2 and 12A of the Act. These sections enjoin the competition authority to develop a jurisprudence which is congruent with the promise of the legislation. But increasingly, national markets are not isolated but are shaped and determined in large part by exogenous pressures and constraints.

Take the Walmart case: Walmart was prepared to invest approximately $2.3b in its acquisition of Massmart - a very large investment by South African standards. The uncontested evidence before the Tribunal and subsequently the Court was that prices of the goods sold by Walmart would be lower, and in many cases significantly lower than those offered by existing firms operating in the South African market. Further, Walmart had no presence in South Africa or indeed Africa before the merger. In turn, Massmart, at the most, held 25% of certain segments of the relevant market and was smaller than the two key competitors, national chains Checkers and Pick n Pay.

It therefore followed that on standard competition grounds applicable to mergers as developed in the two key jurisdictions – the USA and the EU, there were no cognizable grounds to prohibit the merger. As is evident from the summation of the arguments of the parties opposing the merger (three Ministers of the national government and trade unions) much of the focus was on the applicability of public interest grounds.

A key argument turned on the detrimental effect that the merger would have on small and medium sized South African enterprises which supplied product to the relevant supermarket chains and the consequent loss of employment. In the first place, the problem in such a case concerns the evaluation of the relevant effects of the merger. How was a Court, in the absence of clear economic evidence, to weigh the clear welfare benefits of lower prices to consumers, many of whom are working class and unemployed who would benefit significantly from the lower prices of goods they were compelled to buy against the loss to welfare from the destruction of parts of the small and medium sized enterprise sector?

But even if that objective could be achieved, the international effects of the global market focused upon the possible futility of the indigenous policy as contained in ss2 and 12A of the Act. Companies like Walmart operate by way of global value chains (Giraffe 2011). Lead firms like Walmart (or Nike, Reebok, Sears, JC Penny) organize production through a chain of industries; they source their products from a global network of suppliers located in multiple jurisdictions where the lead firm can ensure low costs, satisfactory quality and proximity to its major markets. For countries in the developing world, export growth strategies or trying to ignore the impact of GVC's by, for example, prohibiting lead firms to operate in the national market becomes increasingly futile.

Thus a country like South Africa must accept that its firms which supply this kind of product (including the small and medium sized firms that so produce) should be increasingly capacitated to participate in these global value chains. Thus fostering development implies that the local industry is protected not by an uncritical invocation of the public interest factors as set out in ss2and 12A of the South African Act but rather by beginning to promote streamlined suppliers of product which forms part of the value chain.

The Walmart decision seeks to grapple with this very problem. The scope for national regulation that is at war with a global economy which is unlikely to disappear in its present form even as values chains become more decentralized as gains flow to the firms located where education and skills are better. Beyond the application of standard efficiency grounds of lower prices and greater choice, the more specifically tailored provisions of the South African legislation could hardly be invoked without careful consideration of the impact, in this case, of global value chains.

Let me conclude by a clarification: this note should not be construed as arguing that competition law has no significant impact upon economic or social development of a developing country. Manifestly, strong cartel enforcement is vital to ensure that price fixing, often of staple foods by companies who previously benefitted from state pricing boards, are eradicated. Similarly, the move to privatization requires competition law, in the form of abuse of dominance provisions to ensure that the market can operate free from unaccountable private power (which was previously unaccountable public power) (Brusnick and Evenett 2008, Fox 2007). The dominance of pharmaceutical companies and, in particular the abuse of intellectual property protection, may also require the invocation of competition law (excessive pricing, essential facility doctrine).

Some of these moves reach the very outward boundaries of competition law. However when the legislation extends to marching to the nation's own drum as is the case with the public interest considerations which applied in Walmart, then it is doubtful whether national competition law has much traction on the road to economic development; hence the argument in this note concerning the limitations of competition law for specific national choices of policy. In short, in a Walmart type case, the problems which concern the national authority are so deeply connected with the global economy that national legislation which promotes a particular form of social or economic policy is manifestly inadequate to produce the desired result prefigured in the legislation.

To cite one further example to support this point that, absent international enforcement of a standard that meets the needs of the developing world, national law may be helpless to curb the abuse, Gereffi and Ahmed (2014) have conducted a study on global value chains, global corporations and food security in certain countries in the Middle East – Egypt, Iran, Saudi Arabia, Syria and the UAE. They found that the sheer size and power of the lead firms ensures their dominance over the wheat trade. A few multinational firms dominate the input market such as seeds (Monsanto) and, similarly, a few large multinationals (Cargill) move 90% of the world's grain. It is small wonder that the authors found an increased dependence upon these corporations as imports of food by developing countries increase, thereby rendering these developing countries subject to the extended dominance of the multi nationals. Here again, absent some application of an international standard of competition law, domestic law is incapable of redressing the abuse of private power.