The Political Economy of Competition Law

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Outline

1. Background and purpose

The relationship between Competition Policy, Industrial Policy and the linkage of these policies to particular class and fractional interests is complex. Fine and Rustomjee (1996) summarize the history of these relationships in the South African context, as follows:

" [A]lthough anti-monopoly legislation has been in existence since 1955, it has never

Minster to abandon their investigation into structural linkages between businesses through inter-locking directorates and cross-holdings and focus instead on the concentration in the financial sector."[2]

Upon entering the political - and, naturally, policy - transition of the 1990's, there was a firm commitment from the democratic movement[3] and progressive intellectuals for the revamping of competition legislation. The spirit and trajectory of this transition was broadly outlined in the 1995 report of the Industrial Strategy Project (ISP). The ISP's broad *institutional* and *substantive* recommendations have in the main been followed through in the new legislation.

Institutionally, the ISP report recommended that: "The Board, effectively acting as a tribunal, should be empowered to take action on the findings of the investigative authority who should, ideally, be separated from the Board itself. This would remove competition matters from Ministerial discretion and from the hands of the police and the normal judicial authorities. A special court of appeal for competition matters should be established… rigorous definitions of anti-competitive practices… [and] the commitment of considerably greater resources to the competition authorities."

The report's substantive recommendations included strengthening the regulation of mergers, although not including the type of 'public interest' test provided for in the new legislation, and the prohibition of interlocking directorships and cross shareholdings, which in terms of the new legislation are not prohibited but are

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- The Board's composition was increased through SA Reserve Bank and Agricultural Ministry appointees to include expertise on agricultural and financial matters.

[2] Fine B and Rustomjee Z, The Political Economy of South Africa, From Minerals-Energy Complex to Industrialisation, pp. 116-7

[3] According to the RDP base document: "The RDP will introduce strict anti-trust legislation to create a more competitive and dynamic business environment. The central objectives of such legislation are to systematically discourage the system of pyramids where they lead to over-concentration of economic power and inter-locking directorships, to abolish numerous anti-competitive practices such as market domination and abuse, and to prevent the exploitation of consumers. Existing state institutions and regulations concerned with competition policy must be reviewed in accordance with the new anti-trust policy. The democratic government should establish a commission to review the structure of control and competition in the economy and develop efficient and democratic solutions. It must review existing policy

discouraged as in certain circumstances their existence triggers the presumption that firms have entered an agreement.

The report also favoured the regulation of anti-competitive conduct, with a more limited approach being taken to anti-competitive structure: "[T]hat there are no ideal industrial structures and that a competition policy that attempts to construct one is doomed to failure. For this reason we envisage that the central focus of the strengthened competition authorities would remain the *behaviour* of firms in concentrated markets.[4] In addition to their investigative and judicial functions, the competition authorities would be charged with identifying and defining forms of anti-competitive behaviour not contemplated by the legislative drafters… [E]mphasis on behaviour does not preclude the possibility of action designed to restructure markets. Persistent uncompetitive practices by a dominant firm should invite structural remedies, for example compulsory divestiture."[5]

Now, with the recent near finalisation of new Competition legislation in Parliament[6], this paper reflects upon the framework and detail of the new legislation with an eye on the following two seminal questions:

- How do various theoretical frameworks inform the new competition legislation and how will these guide practices under the new law, including the regulation of market structure, coherence with industrial and development policy and mechanisms for effective enforcement?
- Given the participation of various interest groups in the formulation of the new legislation what projections can be made as to how these groups will attempt to advance their positions through the new competition legislation?

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and institutions with the aim of creating more widely spread control and more effective competition. To that end, it must consider changes in regulation or management in addition to anti-trust measures.

[4] On this point the ISP report would seem to have missed the mark as the general practice of competition legislation entails that restrictions on forms of anti-competitive conduct (either 'per se' or governed by the 'rule of reason') would apply to offending firms regardless of the extent of concentration in their respective markets.

[5] Industrial Strategy Project: Improving Manufacturing Performance in South Africa, Joffe A, Kaplan D, Kaplinsky R, Lewis D, 1995, pp. 65-6

[6] At the time of writing, the new Competition legislation had passed through the National Assembly, and was about to be considered by the bi-cameral Parliament's second house, the National Council of Provinces.

2. Theoretical Frameworks for Competition Policy

In order to develop a theoretical understanding of the role of Competition Policy it is useful to begin with a brief outline of the intellectual streams and currents which can be found threading their way through most debates on competition and anti-trust policy. The following schools – whose differences are outlined in Table 1 - are identifiable[7]:

- the Structuralist School,
- the Industrial Policy/Evolutionary School,
- the Critical Legal Studies School
- the Chicago School,
- the Nihilist School, and
- Game Theory analysis.

The *Structuralist School* places emphasis on the interaction between market structure and collusive business practices of firms which enables them to exercise market power and persistently earn excess profits. This is based on the postulate that firms operating in oligopolisitc industries with large market share are more likely to agree or have greater latitude in co-ordinating their output-pricing policies. The Structuralists view allocative efficiency as being important but also hold income distribution and decentralization of aggregate concentration as valid objectives of competition policy. This could include an interventionist policy directed towards pursuing multiple objectives and eliminating business practices which create 'artificial' barriers to competition.

The *Industrial Policy / Evolutionary School* argues that as an economic institution, the competitive market system is founded in and has evolved away from the 19th century view of capitalism. The competitive market is no longer viewed as the most

efficient institution domestically, and even less so in the light of global competition. The experience of 20th century development is that in order to assure social economic welfare, the state must play a developmental role and guide improved performance by the market. It is argued that a closer integration of business and government is required given the technological inevitability of massive firm size. Competition policy should be implemented with caution as it has the potential to hinder domestic firms' ability to compete against foreign firms and ascend from operating in national to international markets.

The *Critical Legal Studies School*, whose arguments are often Marxist in origin, view competition policy in terms of class interests, requiring that the economic calculus should explicitly included an analysis of who wins and who loses as a result of the operation of competition policy. A difference between the stated and real objectives of competition policy is perceived as competition policy operates to legitimize the exploitation of the powerless. Even where it is acknowledged that competition laws are enacted in the broad public interest, the frequent failure to implement these laws is questioned. This failure is perceived to be in the interests of those who benefit from the existing distribution of wealth and power. And, the way that competition policy has been administered is merely to perpetuate the power of big business (the establishment) at the expense of common man.

The *Chicago School*, which has evolved largely in reaction to the Structuralists, argues that collusion is expensive to maintain and is therefore unlikely to be a widespread occurrence in business. There is one unequivocal goal for competition policy – the pursuit of economic efficiency. Most alleged collusive and exclusionary practices by firms are viewed as being motivated by the pursuit of economic efficiency, which will result in the maximization of consumer welfare. Failure to foreground and encourage such pursuit of economic efficiency distorts the basic

[7] This material is drawn from a technical paper prepared by Dr Shyam Khemani for the OECD Secretariat entitled "Objectives of Competition Policy" (Saffe/CLP (92)2) (March 1992), p6. This paper draws from the Audretsch's work "The Four Schools of Thought in Anti-trust Economics" (1985).

intent of competition policy. Therefore, the Chicago School puts forward puts forward a minimalist approach towards the administration of competition policy.

The *Nihilist School*, drawing from the Shumpeterian and broader Austrian position, rejects the neo-classical economic and theoretical underpinnings of competition policy. As an alternative to the perfect competition model, a market rivalry model in terms of competition for profits is advanced. In face of imperfect or incomplete information, it is postulated that entrepreneurs can realize greater profits than their rivals if they constantly strive to introduce new goods and services and/or adopt superior production techniques by successfully exploiting existing and future market conditions. Increased firm size and concentration is held reflective of superior skill, foresight and management and not as indicative of entry barriers and exclusionary practices, particularly as with the unfolding of time what in the short-run appears to reflect a monopoly situation may in the longer run lead to a wholly competitive situation. On this basis the Nihilist School advocates a complete dismantling of competition policy.

The tools of *Game Theory* enable an analysis of the competition policy implications of the strategic conduct of firms attempting to strengthen their market positions, either through weakening or tacitly colluding with their competitors. Game theoretic analyses of commercial practices can equip competition policy to deal with the likelihood of tacit collusion amongst oligopolies who repeatedly face-off against one another, given that over-time it would not be in the interests of any party to be regarded as a rule breaker, and to develop an approach to complex strategic interactions between market actors, such as, undesirable predatory behaviour, raising rivals costs, reducing rivals revenues, and the manipulation of connected markets.

Table 1: Treatment of Competition Policy by various theoretical schools

School	Theory of competition	Nature of intervention on competition matters
Structuralist	Concentrated structure increases potential for abuse of market power and for anti-competitive conduct, leading to excess profits and negative consequences for consumers (as outlined in the SCP – Structure Conduct Performance - model)	*Multi-pronged competition policy:* Competition policy can be designed to pursue multiple objectives concerning structure and conduct, including: • Erosion of high degrees of concentration, • Allocative efficiency sensitive to questions of wealth distribution • Elimination of anti-competitive and abusive business practices
Industrial Policy / Evolutionary	Competition – or the competitive market system - is not the most efficient institution for maximizing development and welfare. Close industrial policy integration is required between state and market planning.	*Competition policy subordinate to industrial policy:* Competition policy – if it simply regards 'big as bad' - can hinder the ability of domestic firms to compete on international markets.
Critical Legal Studies	Market competition serves as a tool for perpetuating existing wealth and power relations. Competition can be regulated to benefit a greater number of people, but it is not done in such a way as to fundamentally challenge powerful interests.	*Class-sensitive competition policy:* It is necessary to analyse the design and implementation of competition policy in order to identify: • who benefits and who loses as a result of the policy • how failure to enforce laws benefits powerful interests • how the manner of enforcement benefits certain class interests • how the existence of competition policy is used to legitimize the exploitation of the powerless

Table 1 (cont):

School	Theory of competition	Nature of intervention on competition matters
Chicago	The market will prevail over concentrated structures. In general, competition for profits will mean that monopolies are temporary as the entry of competitors into profitable markets will erode concentrated markets more effectively than government intervention.	*Minimalist, contestability-based competition policy:* Competition policy should have a minimalist approach with key focus on the extent of 'contestability' of markets. Anti-monopoly rules eased on the basis of the theory that if a market is contestable then a monopolist will forestall competition by setting prices as if it were operating in a contestable market.
Nihilist	In reality, there is no such thing as perfect information or perfect competition, competition consists of rivalry between entrepreneurs. Size and market concentration are held to be reflective of superior skill, foresight and management and not as indicative of structural entry barriers or exclusionary practices.	*No competition policy:* Competition policy is regarded as unnecessary.
Game Theory	Based on understanding of strategic competition among oligopolists, it asserts: • the likelihood of tacit collusion increasing amongst oligopolies who repeatedly face-off against one another, and • that tougher competition between firms may itself cause higher concentrations (as lower prices could force out marginal producers and make prospects of entry less attractive)	

It would probably be safe to say that no particular theoretical school, or framework, provides a blue-print for South Africa's new Competition Law. Theoretical coherence is more likely to be the product of academic endeavour than of political processes. And the new Competition legislation is very much the product of the latter, being influenced by a combination of factors, including:

- 'guiding principles' negotiated between representatives of business, labour and government;
- lobbying by various interest groups – particularly from large business interests - through the Parliamentary process;
- the vision and personality of the Minister responsible;
- the skill and bent of Departmental officials and legislative drafters; and
- more generally, the law-makers' various interpretations of the needs of the South African economy based on an analysis of current economic performance and the lessons of international experience.

Nonetheless, it is possible to detect the strains of various theoretical schools running through the new legislation and to consider how the more eclectic use of the various tools of analysis offered by these theoretical schools could enhance the effective implementation of the new competition framework.

3. Theoretical influences on new Law

Essentially the new Competition legislation appears to be informed by a qualified version of *Structuralist* thinking, with significant influences from the thinking of the *Evolutionary* and *Critical Legal Studies* Schools. It is instructive to analyse the influences of these various schools of thought through an analysis of the new legislation under the following sub-headings: 'dominance and merger control', 'industrial policy considerations' and 'mechanisms for interest-sensitive enforcement'.

3.1 Dominance and Merger Control

The power - and the weakness - of the Structuralist approach, based on a structure-conduct-performance (SCP) causality, is in its simplicity. It posits that 'performance' - in the sense of impact on economic welfare - is determined by the 'conduct' of firms - such as how firms behave in setting prices - which in turn is determined by the 'structural' characteristics of the market.

In particular, inferior performance is predicted in markets that match the neo-classical models of monopoly, oligopoly or monopolistic competition. Although firms in such markets may be *productively efficient* (avoiding wasteful use of factors of production in producing a given product), the level of output is unlikely to meet the requirements of *allocative efficiency* (producing a distribution of resources across the economy correctly reflecting effective demand, the 'right' goods in the 'right' quantities). This arises because firms in such markets possess a degree of market power in that can set prices and behave relatively independently of their competitors, customers or suppliers.[8]

A number of weaknesses have been pointed out with the SCP approach. Some of these will dealt with in outlining the Evolutionary features of the new Law below,

but it is pertinent here to reflect on the following aspects of the Chicago School's critique:

- Consumer welfare does not depend on price alone, but also on product variety, quality and innovation, and there is little evidence that less concentrated markets necessarily foster better performance on all these counts.
- In terms of contestable market theory, contestability (usually dependent on the extent to which entry requires 'sunk costs') is a more important aspect of market structure than concentration. As such, even highly concentrated industries will be forced to price 'competitively' if they face the discipline of potential 'hit and run' entry.
- The SCP model ignores the important feed-back mechanism in that market structure/concentration is itself a result of competition. In terms of this analysis firms in concentrated industries earn higher profits not because they wet higher prices, but rather because they are more efficient.[9]

Despite these criticisms, government policy, has continued to assert that "intervention to counteract the exercise of market power is necessary. Most analysis shows clearly that mergers and inter-firm agreements can indeed cause significant welfare losses. Studies of industries with market power have also confirmed that concentrated market power is a widespread phenomenon and that it is attributable, in large part, to anti-competitive conduct. Competition policy aimed at curbing such abuses of market power will thus directly improve economic efficiency in a static sense." [10]

An analysis of the new Competition legislation reveals its Structuralist influences, as certain key aspects of the law are premised on the basic SCP causality, which asserts a link between market concentration and the potential for anti-competitive or abusive conduct. The policy implication of this framework, which finds resonance in the new

[8] Ferguson et al: "Industrial Economics" (1994), pp15
[9] The 1997 World Investment Report on "Transnational Corporations, Market Structures and Competition Policy" (sourced from UNCTAD) (p125-126)
[10] DTI discussion document on "Industrial Policy and Programmes in SA" (1998).

legislation, is that “performance can be improved by actions designed to influence the structure of particular markets."[11]

The new legislation does not advance an unqualified version of the SCP model, where dominant firms are deemed inevitably to have a negative impact on economic performance. The law qualifies the model, in the sense that firms who dominate the market - or which through merger activity may begin to dominate the market - are presumed to have the potential to abuse their dominance in such a manner that will impact negatively on economic welfare.

As outlined in Table 2, mechanisms are included in the legislation which are designed to (a) prevent abuses of dominance by dominant firms, and (b) place controls on merger processes in order to regulate the emergence of new concentrations.

[11] Ferguson et al: “Industrial Economics” (1994), pp16-17

Table 2: Competition law's regulation of dominant firms, merger control and restrictive practices

	Definition	Prohibition / Regulation	Possible Justification	Penalty	Exemption
Abuse of Dominance	A firm (above a certain annual turnover) is dominant in market if: • > 45% of market • between 35% and 45%, unless no market power • < 35% but has market power	• Charging excessive prices • Refusal of an essential facility • Engage in an exclusionary act (incl. Requirement not to deal, forcing purchase of unrelated goods) • Price discrimination	• None • None • Outweighed by technological, efficiency or procompetitive gain • Reasonable and specific conditions (e.g. perishable goods, sequestration)	For abuses of dominance various penalties apply, incl. • Interdicts • Ordering access to an essential facility • Fines (max.10% of annual turnover) • Forced divestiture [Possibility of civil actions are provided for.]	Conditional or unconditional exemptions are possible if: • Promotes exports • Promotes historically disadvantaged persons • Promotes stability or stops decline in industryRustdicdivn P(actccen) Tj726.5175 TD /F5 9.75 T actcc beutwenl competingfirms whichn esses ocompetitoin

Table 2 (cont):

Merger Control	• Merger entails: Acquisition of control through purchase of shares or amalgamation with competitor, supplier customer or other person • Notify Comp. Commission and trade union: If combined annual turnover is above large or intermediate threshold set by Minister	Prohibit or conditionally approve mergers that: • Will 'substantially prevent or lessen competition' • Are not justified on 'public interest grounds'	• 'Competition' grounds, incl: - strength of competition in market, - probability of competitive behaviour e.g. import levels, ease of entry, likelihood of market power • 'Public interest' grounds, incl.: - state of industrial sector/region - employment - small business and historically disadvantaged - ability of national industry to compete internationally	• Fines for: - Failure to give notice of a merger - Proceeding despite prohibition, without following conditions, or without approval • Forced divestiture - require sale of shares pursuant to prohibited merger - declare related agreements void	None, except automatic exemption for mergers below the threshold

(a) A number of key challenges face the new Competition authorities with regard to the effective regulation of abuses of dominance by dominant firms. Some of these challenges include:

Firstly, the question arises as to what constitutes a dominant firm. Regulations are required to determine the annual turn-over threshold above which a firm can be considered dominant. If above that threshold, a firm will only be considered dominant if its share in a market is greater than 45% of market, or if its market share is between 35% and 45% it can show that it does not exert market power, or if even though it has less than 35% of a market it can be shown to exert market power. In interpreting whether a firm has 'market power' account will be taken of "the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers."[12] It would be advisable that the new Competition Authorities develop guidelines, or a practice note, for the consistent application of this 'dominance test'. As the interpretation which is given to this dominance test will to a significant degree determine the extent of the impact which the new legislation is likely to have on South Africa's relatively concentrated industrial structure.[13]

Secondly, it is noteworthy that the possibility of 'dominance' is not restricted to 'the leading firm' in any particular market. The implication of this is that there can be more than one dominant firm within a particular market.[14] In this regard, and with

[12] s1, Competition Bill

[13] South African corporate structure "is typical of modern capitalism, although the degree of concentration in South Africa is more acute than in other developing and industrial economies." Fine B and Rustomjee Z (ibid), p96 According to a working paper produced by Fourie et al "Towards Competition Policy Reform in South Africa" (1995) (at p6), an analysis of manufacturing industries where four or less than four firms account for approximately 80 percent or more of national sales (between 1982 and 1988) indicates that "in large tracts of the manufacturing sector a situation of clear market dominance prevails". [*Note this is a different test to the one provided for in the new legislation.*]

[14] This may have implications for the agricultural sector as, according to the South African Agricultural Unions submission to Parliament on the Competition legislation: "The criteria that… a firm must be the leading firm in a particular market before it could be dominant in that market… should be deleted, as a market is often dominated by two or three firms and their market leading positions can vary from month to month. This is definitely true in the market for virtually all of the major inputs in agricultural production."

regard to numerous other aspects of the proposed legislation, the new Competition authorities will be required to develop a guidelines which enables them to deal in a consistent manner with the definition of 'market' (no definition is provided in the law).

Thirdly, the new Competition authorities should be prepared to assert the legislation's provisions which empower the ordering of the divestiture of firms which abuse their dominance, through requiring firms or persons to sell any shares interest or assets. The legislation provides for the adoption of the divestiture remedy for abuses of dominance in situations where (1) the abuse cannot adequately be remedied in terms of another provision of the Competition Act or (2) where the abuse is substantially a repeat offence[15]. Against the background of poor competition law enforcement, it is particularly important that there be robust implementation of the divestiture provisions against repeat offenders, even in circumstances where an alternative remedy would be possible. The adoption of such an approach, in the appropriate circumstances of a repeated abuse by a dominant firm, would send out an important signal to dominant firms and would assist in building the credibility of the new Competition authorities.

(b) A number of key challenges face the new Competition authorities with regard to the effective implementation of merger control provisions. Some of these challenges include:

Firstly, the Competition Authority will be required to set a first threshold of combined turnover, or assets, above which mergers will not be subject to regulation. A second threshold will also be set, above which mergers will be considered 'large'

[15] Organised business, and parties sympathetic to them in Parliament, pushed hard for the possibility of forced divestiture to be more narrowly circumscribed. In particular, the Democratic Party proposed that the "or" be replaced with an "and", which would have had the effect of disallowing forced divestiture of repeat offenders where another fine was considered to be an adequate remedy. Also a late amendment proposed by Department of Trade and Industry officials that the second leg of the test be removed - which would have had the effect of limiting divestiture to situations of 'no adequate alternative remedy' with no special provision for repeat offenders - was rejected by the ANC majority in the Trade and Industry Portfolio Committee.

and below which they will be regarded as 'intermediate'.[16] These thresholds can apply generally, across the whole economy, or be applicable to specific industries. It will be an immediate challenge for the authority to set these thresholds at levels which will lead to the most effective control of burgeoning merger activity. This process should be guided by a commitment to ensuring that all mergers large enough to significantly impact on issues outlined in the 'public interest' review (including employment levels and the survival of particularly vulnerable sectors) are appropriately subject to the public interest test. Also detailed research will be required as to the appropriateness of setting different threshold levels for particular sectors.

Secondly, as the 'public interest' factors are to be taken into account by the Competition Tribunal (guided in part by representations by the Minister), rather than through the mechanism of a Ministerial discretion, it is important that in addition to the parties to the merger, other interested parties, such as, trade unions who have been notified of the merger and representatives of a particularly sensitive region or industry, be in a position to make representations to the proceedings in which the 'public interest' factors are taken into account. Under the initially proposed system of Ministerial review interested parties could have had direct contact with the Minister. It is important that, in terms of the approach finally adopted, the Competition authorities provide interested parties direct access to processes which are taking into account 'public interest' considerations.

Thirdly, it would appear that when 'intermediate' mergers are approved unconditionally by the Competition Commission, interested parties have no recourse to request that the Tribunal reconsider this decision, either on 'public interest' or 'competitiveness' grounds. This is likely to cause difficulties for the new Competition authorities when, for example, the authorities are approached by trade

[16] Recommendations concerning 'large' mergers are referred directly by the Competition Commission to the Competition Tribunal and the Minister, whereas the Commission itself can approve (conditionally or unconditionally) or prohibited of 'intermediate' mergers, subject to referral of conditions or prohibitions to the Tribunal. (See: Chapter 3 of the Competition Bill)

unions who have been notified of the merger on the basis of a negative public interest impact only to find that the Tribunal has no jurisdiction to consider approved

The weaknesses with neo-classical 'allocative efficiency' are well stated by Sayer[17]:

- In real economics, the allocation is influenced not merely by relative intensities of need or demand but by differences in purchasing power, and by private control over resources such as land. We could argue that (some of) these differences are unjustified, and hence that the allocation of resources across market economies is anything but efficient.
- There is a macro-economic, Keynesian objection which addresses the absurdity of claiming efficiency for an economic system which routinely fails to employ millions of workers: "The market mechanism fails to provide a means whereby workers can signal to firms that they would demand more goods and services if only they could get jobs and so have money to spend" (Levacic, 1991). In other words, while markets provide signals to which both producers and consumers can respond, there is no mechanism to reconcile the responses to people in their role as producers, where their wages appear a cost, and their role as consumers, where their wages appear as a source of revenue.
- Allocational efficiency is not the only kind of efficiency… Efficiency in production and innovation are also important… The remarkable development produced by capitalism is far from wholly attributable to capitalists choosing the right inputs and outputs according to market prices. Prices of inputs and outputs do not supply much of the information relevant to the organisation or production, the design of labour methods or the selection of management methods, and certainly little guidance in relation to investment and innovation. There are many non-market-as well as market sources of information for these matters, including imitation, and the specific know-how need for producing each type of product also requires considerable learning-by-doing.
- Allocational efficiency and innovative or dynamic efficiency may also work against one another. Transferring resources - and even enterprises - from less needed to more needed activities enhances allocational efficiency, but the associated insecurity hanging over any investments involving fundamental innovation. Reducing the mobility of capital and hence inhibiting allocational

[17] Sayer A, "Radical Political Economy: A Critique" (1995), pp.137-9

efficiency can create a better environment for planning and innovation and lead to faster development than would otherwise be the case. Part of the reason for creating giant firms is precisely to afford the insulation from market pressure to allow long-term, major innovation. Arguably this point is borne out by the relative performance of more liberal (allocationally efficient) economies such as Britain and the USA and more organised (dynamically efficient) ones, such as Germany and Japan.

Another concern from a political economy perspective is that the neo-classical paradigm is profoundly silent about history and about power. The paradigm implies that existing resource distributions are eternal and immutable, and denies the reality of the state's ongoing role in distributing and re-distributing resources. As Pitelis expresses it: "[T]he aim of the state is seen by neo-classicals to be the maintenance of the original perfectly competitive equilibrium, the status quo… the existence of distributional inequalities (in production) in this original equilibrium by definition implies a partisan state favouring those better off in the original equilibrium."[18]

This is not a trap into which South African policy-makers are likely to fall. The new competition legislation is reflective of a broader government policy commitment to use the structures of state not - in Pitelis' formulation - in a manner partisan to 'those better off in the original equilibrium', but in a manner which will expand and redistribute resources and opportunities.

DTI policy documents confirm this, arguing that: "It is not unusual for competition policy in developing nations, to be complemented by industrial policy and development considerations. As suggested by UNCTAD in the World Investment Report: 'In the context of developing countries, flexibility in applying competition policy may be even more necessary in order not to impede efficiency, growth or developmental goals, and policy coherence should be ensured between competition policy and other policies aimed at promoting development.' The rational for this is

[18] Pitelis, C. Market and Non-market Hierarchies (1993), p.104

that the benefits in terms of increased growth, and the positive externalities that accompany development initiatives, outweigh the possible costs in terms of reduced efficiency."[19]

Even though many of the presumptions, prohibitions and regulatory provisions of the Competition legislation are informed by an underlying adherence to the basic logic of the SCP paradigm, the law's entire 'machinery' - guided by its stated purposes - is designed to provide a number of 'flexible' discretionary mechanisms which will require that 'static' competition decisions take into account the 'dynamic' imperatives of industrial development.

In a sense, competition policy is one pillar - aimed at maintaining competitive market conduct and structure - in a broader industrial policy programme. Coherence with broader industrial and development policies requires that Competition policy should be implemented in a manner which will assist in achieving the key objectives of these policies. [20]

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[19] DTI discussion document on "Industrial Policy and Programmes in SA" (1998), p.91

[20] Fine (1997) has argued that the following issues should be given the "highest priority" in the formulation of industrial policy:

- Meeting of basic needs
- Generation of employment
- Education and training
- Sectoral policy
- Infrastructural provision and measures to ensure economic and social spin-offs
- Reform of the financial system to secure finance for industry
- Monitoring and control of foreign investment flows, particularly those outward investments by the conglomerates of South African origin
- Minimum labour standards and the narrowing of wage differentials
- Macroeconomic policy
- Regional integration within South Africa and across the Southern African region
- Restructuring of state assets
- The reform of the institutions for making industrial policy so that the allocation and coordination of responsibilities across government departments is rationalised and coherent.

He has also suggested that "in relative terms… too great an emphasis has been placed on the following:
(a) Promoting a spurious business confidence, which remains elusive, constrains consideration of more effective and more certain policy-making, accords priority to a minority of opinion makers and business interests, and does not guarantee a calculable and positive return.
(b) Promoting small business which is imperative but should not be at the expense of distracting attention from policy-making for large-scale business on whose fortunes small business will probably depend more than any other single factor.

Another aspect of this coherence is the fact that inter alia conduct designed to achieve non-commercial socio-economic purposes and economic activities subject to public regulation (including 'statutory' monopolies or licensed activities) are excluded from the ambit of the new legislation. This latter exclusion is particularly important as it protects the publicly regulated aspects of the mandates of such entities as Telkom and Eskom from a competition-based challenge.[21]

The preamble and stated 'purpose' of the legislation provides a clear indication of its industrial and developmental objectives. In addition to the standard objectives of promoting and maintaining competition in order to promote efficiency, adaptability and development, and provide consumers with competitive prices and product choices, the law intends to:

- Promote employment and advance the social and economic welfare of South Africans
- Ensure that small and medium enterprises have an equitable opportunity to participate in the economy
- Promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons, and
- Expand opportunities for South African participation in world markets

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(c) Promoting privatisation, especially as a source of revenue, since this merely transfers ownership, at a cost, without otherwise formulating constructive policy.
(d) Competition policy in the absence of a broader strategy for industrial and corporate restructuring, since this merely limits the scope of operation of big business without addressing the role of economies of scale and scope.
(e) The promotion of mega-projects at the expense of ensuring their overall economic and commercial viability since these may generate foreign exchange and downstream processing but the net benefits to the economy have to be shown and made to accrue." [*own emphasis*]
Fine B, "Industrial Policy and South Africa: A Strategic View" (1997), a NIEP Report prepared for COSATU, pp. 19-20

[21] The significance of the hands-off approach to entities subject to public regulation is significant given the competition advocacy role given to agencies around the world. Particularly in Latin America where advocacy work focussed on the promotion of privatisation and questioning the existence of natural monopolies. (Source: World Bank - OECD paper - "Competition Policy in a Global Economy: A Latin American Perspective", Summary of Emerging Market Economy Forum, Buenos Aires, Argentina (1996)), pp47-48

To a significant extent, these objectives are promoted through the various 'flexibility'

Certain horizontal and vertical restrictive practices are outlawed per se, but other non-specified agreements and concerted practice are governed by a 'rule of reason'. In terms of which agreements and concerted practices between competing firms (or vertically related firms) is justifiable if the parties can show that "any technological, efficiency or other pro-competitive gain" outweighs the agreement or practice's "effect of substantially preventing, or lessening, competition in a market".

Similarly, exclusionary acts (i.e. acts that impedes or prevents a firm entering into, or expanding within, a market) by dominant firms are only allowed if "technological, efficiency of other pro-competitive gain" outweighs "the anti-competitive effect".

(d) Merger regulation weighing competition factors and public interest factors:

A merger can be approved even if it is likely to substantially prevent or lessen competition (based on a range of factors including: levels of competition in relevant market, probability of competitive behaviour after the merger, the actual and potential level of import competition[22], ease of entry, history of collusion, likelihood of market power, etc.) if this is outweighed by technological, efficiency or pro-competitive gains which would flow from the merger.

Furthermore, a merger can be allowed or disallowed based on the following 'public interest' grounds i.e. the effect the merger will have on:

- a particular industrial sector or region;
- employment
- the ability of small business, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
- the ability of national industries to compete in international markets.[23]

[22] It has been noted that for non-tradables, external competition can only be through FDI not through importation.

[23] Precedent for the application of such 'public interest' criteria to merger control is to be found in a number of jurisdictions. According to a World Bank study: "France, Sweden, the UK, and Australia employ

A closer analysis of these new Competition legislation's 'flexibility' mechanisms, raises the following challenges:

Firstly, it would be useful if guidelines[24] were to be developed for guiding the new competition authority through the process of granting exemptions. It is important that there be consistency of practice, for example: in specifying the length of time for which exemptions are given[25], and in ensuring feed-back mechanisms to see to it that the threat of revoking exemptions remains credible. A guideline on exemptions should include some detail on the Minister's discretion to expand the grounds for exemption on the basis of the 'economic stability' of any industry.

Secondly, guidelines should be developed to promote the consistent application of the 'rule of reason' in determining the existence of restrictive practices and exclusionary acts. In order to weigh the relative impact of 'lessened competition' and 'pro-competitive gains', guidance is needed, for example: with regard to how the various interests of consumers and producers are to be gauged and compared, and whether pro-competitive gains can be widely interpreted to take into account the various elements of the stated purpose of promoting competition, such as, employment promotion and the promotion of a greater spread of ownership.

Thirdly, and similarly, the counter-balancing of 'pro-competitive gains' against the effects of 'lessened competition' in the context of merger regulation needs to be clarified through guidelines. As should the relationship, or relative weighting,

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merger control policies motivated by public interest standards that account for a variety of factors other than competition, notably balance of payments, employment and regional development". Although the study is concerned that this approach may result in weakened merger control, it is clearly a route which a number of countries have chosen in order to assist in their economic development. World Bank Technical Paper Number 160: "The basics of Anti-Trust Policy: A Review of Ten Nations and the European Community" (Boner and Krueger)

[24] It is envisaged that the Competition Commission "may prepare guidelines to indicate the Commission's policy approach to any matter in its jurisdiction" (s79).

[25] The Bill published initially specified a maximum exemption period of five years. Business interests lobbied hard against this is in the Parliamentary process on the basis that a five year period was too short a time horizon in which to confidently plan investment.

between public interest and competition matters be more clearly elaborated. For example, merger guidelines should shed some light on the 'calculus' of public interest factors, such as, the extent to which black economic empowerment should be used to justify a merger which would be unacceptable on 'competition' grounds. Similarly, the extent to which existing employment opportunities should be protected in the context of arguments that job-shedding restructuring at one level may lead to increased employment opportunities at another level in related down-stream or up-stream activities.[26]

Fourthly, an overall guideline as to the relation between competition policy enforcement and industrial development policy should be produced. This will assist in building greater coherence which will be further assisted if policy analysts keep a close eye on the findings and determinations of the new competition authority (which will be a forum of record), as the reasoning behind these decisions will provide a unique insight into the application of industrial policy. This practical expression of industrial policy could then be analysed in terms of its effectiveness, consistency and coherence.

3.3 Mechanisms for interest-sensitive enforcement

The thinking of the Critical Legal Studies School sensitizes the analysis of competition legislation to questions of who benefits and who loses as a result of the law. It is concerned that the frequent failure to enforce such legislation tends to benefit powerful interests, and when the law is implemented the manner of enforcement also tends to favour these same class interests.

[26] COSATU consistently attempted to reformulate the employment aspect of the 'public interest' test to require that the assessment should be of the merger's effect "on reducing existing employment" (instead of merely the effect "on employment"). This was rejected on the basis of DTI's arguments that employment losses in the short-run should be accepted if the merger which causes them is likely to assist in promoting higher levels of employment in future.

The next section will analyse some of the class interests which have been at play in the competition law debate and which are likely to continue following the implementation of the new legislation. For now, it is sufficient to outline how the influences of the Critical Legal Schools' class-sensitive analysis have found some resonance in the new legislation in its emphasis on accessible, interest-sensitive processes, and in its mechanisms designed to promote accountable enforcement and promotion of the wider developmental objects of the legislation.

Firstly, the new competition law obliges parties to a merger to notify a trade union or, where there is no union, employees, of their intention to implement a merger. This was not the case under previous legislation and it is an innovation which will significantly empower workers in merger situations as they will be:

- forewarned of impending merger and related restructuring activity, and
- placed in a better position to assert their rights in the merger process, particularly in terms of the employment aspects of the 'public interest' test.

It is through placing workers interests directly on the table of the Competition authorities when they make decisions on merger activity, that the broader range of issues and interests which are effected by mergers are given life. Decisions supposedly based solely on narrow competition or efficiency grounds, are in reality decisions which will tend to favour the interests of owners and ignore the interests of workers.

Similarly, by taking into account other 'public interest' factors, such as the interests of a particularly impoverished region or the interests of historically excluded black entrepreneurs a richer notion of 'efficient' merger regulation emerges. It is an 'efficiency' which incorporates a wider range of interests.

The

mandate[27] should be directed to empowering workers, consumers, communities in poor regions, SMME's and historically excluded entrepreneurs to articulate their interests when the authorities are taking into account 'public interest' implications. The ability of the authorities to approve mergers 'subject to any conditions' provides particularly fertile ground for a better amelioration of the conflicting interests that maybe articulated in a merger process.

Secondly, any person is entitled to lay a complaint against a firm which he or she perceives to be engaging in restrictive practice or to be abusing their dominant position. This is a wide *locus standi* provision which can be effectively used by a range of actors, including: competitors, individual consumers or consumer action groups. This opens up the possibility for increased consumer activism, which would provide an important stimulus for more effectively enforced competition legislation. Again the new Competition Authority's public awareness mandate should explicitly attempt to mobilise increased consumer awareness and activism.

Thirdly, the new legislation requires that the Annual Report of the Competition Commission should include "a statement of the progress achieved during the preceding year towards realization of the purposes of the Act". Against the background of poorly enforced competition law, this innovation is an important feedback mechanisms designed to promote more accountable enforcement of the Act.

The Annual Report provision triggers a *purposive enquiry* in that it entails a report-back, not just about the financial status of the authority as is the standard requirement of reports to Parliament, but also as to the extent to which progress has been made in achieving the wider developmental objects of the legislation, including: the provision of competitive prices and product choices, the promotion of employment, and the promotion of a wider spread of ownership. This report will enable a public cross-

[27] Section 21(1)(b)

examination of whether the new authority is being effective in implementing and achieving the objectives of the new law.

4. Competition Law and Sectional interests

A wide range of parties made submissions during the Trade and Industry Portfolio Committee's public hearings on the proposed Competition Bill. An analysis of these submissions is instructive in highlighting the various interests which at play in the finalisation of the new Competition Law. These interests, in turn, may provide an insight into how it is to be expected that different interest groups will attempt to use the new Competition legislation to advance their particular interests.

Clearly, such projections are highly speculative as while there may be some similarity between the factors at play in creating a regulatory framework and the factors which will emerge during the operation of the framework, many issues will only emerge when the new Act comes into force and will depend heavily on the effectiveness of the new authority's and on the issues which takes to be its initial priorities.

A selection of the various submissions be key constituencies - agriculture, organised business, small business, trade unions and consumers groups - is captured in Table 3. A wider range of submissions were made to the Parliamentary Committee, including in particular a significant number of individual business enterprises. The selection of the particular constituencies contained in Table 3 is based on the assumption that these constituencies represent differing sectoral interests (rather than representing a range of interests within a particular sector) and on the basis that the submissions selected where primarily those of organisations which represent large organised constituencies within any particular sector.

The headings selected in Table 3 - 'economic problems to be addressed by the new law', 'specific demands made of the new law', 'institutional issues', and 'link with industrial and development policy' - are an attempt to foreground the key policy priorities and differences which emerged for the different constituencies. The basis for this selection, is the assumption that it is these policy issues (and policy

differences) which will prove to be reliable indicators of how key constituencies will attempt to exert their interests under the new competition law.[28]

An analysis of the submissions of various key constituencies offers the following insights into their various interests and expectations for the new Competition Law:

(a) Business

Organised business has been very assertive in arguing for a widening of the basis and scope for *exemptions* for potentially prohibited practices. They have successfully argued for prior exemptions and for more flexibility in the grounds upon which exemptions may be granted. It is, therefore, to be anticipated that there will be considerable demands on the new Competition authorities to put in place effective procedures to deal expeditiously with exemption applications and that a consistent standard be applied in 'weighing-up' whether exemptions should be granted or not.

Business has opposed the commitment to using the legislation for the attainment of *broader socio-economic interests*, but there is a contradiction in their position as elements within the business constituency will be able to benefit from provisions aimed at promoting small enterprises and firms owned or controlled by historically disadvantaged individuals. It is important for the attainment of all the objectives of the new legislation that the Competition authorities retain a clear perspective on the various (and at times contradictory) interests at play within the broader business constituency. It is important that simple administrative procedures be adopted so that the Competition authority can be accessible to small and emerging businesses, it should not be a terrain for the assertion of big business interests.

[28] An effect of this selection of issues is that a number of primarily legal matters - including: the impact of the constitution's separation of powers on the institutions proposed it the legislation, the constitutionality of reverse onus situations and search and seizure provisions - which received prominence during the Parliamentary hearings are not dealt with in detail.

It is to be anticipated that, in general, business will continue to try and limit the legal space provided for a more developmentally oriented competition policy, particularly in so far as this relates to *limitations on mergers* likely to lead to job loss. Nevertheless there is also the danger that business interests (in concert with other interests) may abuse the 'public interest' aspects of merger control, for example, attempting to justify the high market concentrations on the basis that it will promote a particular region, promote black economic empowerment, or promote employment.

On the basis of that aspect of the 'public interest' test which concerns 'the ability of *national industries* to compete in international markets', it is possible if a fault line emerges between the interests of domestic and foreign capital, the Competition authorities are given the mandate to favour the former in appropriate circumstances. This could be particularly relevant if there are concerns that a particular South African industry is being targeted for predatory behaviour.

Many companies will attempt to use the *'prohibited practices'* provisions of the new legislation to assert their interests, for example, when their costs rise as a result of restrictive practices or abuses of dominance by their suppliers, or when their competitors are perceived to collude in a manner which runs contrary to their interests. If the legislation did not exclude application to acts subject to public regulation, it is likely that business interests would have attempted to challenge the practices of legislated monopolies in order to get a share of potentially lucrative markets.

(b) Labour

Organised labour has been very assertive in *promoting the developmental aspects* of the Bill as a particular element of a broader transformation of the inherited apartheid economy. Labour - informed both by a programme "to advance the interests of workers who are deeply effected by industrial restructuring and by the vision of a

more equitable and effective South African economy"[29] - has argued that competition policy should be explicitly developmental by: countering over-pricing, assisting in stemming job loss during mergers, promote SMME's, and widening patterns of ownership.

A key concern for labour will be to establish the potential of the merger control aspects of the new legislation to effectively *protect workers from job loss* when this can be shown to be in the public interest. It will be a great challenge to labour to develop the organisational capacity to use the new avenues provide for the legislation and it should be considered as part of the broad mandate of the new Competition authority to provide mechanisms which will facilitate the effective participation by labour representatives, particularly with regard to consideration of 'public interest' matters.

Where a merger is likely to be acceptable on 'competition' grounds, but lead to significant job losses or the further impoverishment of an already poor region, *labour and business interests are likely to be at logger-heads*, with business interests supporting the merger and labour calling on the competition authorities to prohibit the merger on 'public interest' grounds. On the other hand, in situations where a merger may be prohibited on 'competition' grounds but where jobs will be retained or generated, the potential exists for business interests party to the merger to *mobilise labour* in support of the merger. In these sorts of situations it is also anticipated that the Minister will make submissions on the 'public interest' factors. In these trying circumstances, the Competition authorities will have to devise mechanisms for making appropriate decisions while retaining credibility.

[29] COSATU submission on the Competition Bill, presented to Portfolio Committee on Trade and Industry, p.2

(c) Consumer groups

Consumer bodies do not have a

Table 3: Reflection of selected submissions on Competition Bill into Parliamentary process

Constituency	Economic problems to be addressed	Specific Demands	Institutional issues	Link with industria and development policy
Agriculture (South African Agricultural Union)	* 1980-90's market deregulation has meant firms replace 'formal market regulations with informal ones' - competition law needed to address transgressions	* No exclusion of co-operatives from operation of the Bill, as benefits of competition exist irrespective of legal form of firms * Amend purpose of law to 'promote the development of employment' and not 'employment' per se as this could serve as justification for the perpetuation of collusive practices in order to avoid job loss * The permitting of horizontal and vertical restrictive practices on the basis of 'pro-competitive gains' should explicitly spell out (1) whose gains and (2) how these gains are weighed against the negative results * Dominant firms should not be limited to 'the leading firm' as markets for "virtually all major inputs in agricultural production… is dominated by two or three firms and their market leading position can vary from month to month" * Abuse of dominance should not include 'limitation of output' as this would lead to a situation "where government, and not competition, determines economic performance"	* Majority of members of Competition Tribunal and Competition Appeal Court should have legal qualifications * Requirement that members of Tribunal must represent 'a broad cross-section of the population' is undefined and should be removed	* competition law is a necessary complement of support measure to market de-regulation in agriculture
Business (BSA)		* reject presumption of collusive agreement where firm has substantial shareholding in competitor * increase the threshold level for market dominance from 35% to 45% * prior exemptions are sought for commercially justified activities * bases for an exemption requires more flexibility e.g. to justify exemption on basis	* object to 'reverse onus' in relation to parties having to show pro-competitive gains to justify agreement or concerted practice (rule of reason) * object to search and seizure provisions	*law should focus o promoting and maintaining competition, not on development or socio-economic objectives

		of 'improved production or distribution of goods or technical progress, while allowing consumers a fair share of benefit' * strong rejection of ministerial review power in merger regulation		
Small Business (Small Business Project)	* Industrial base skewed in favour of big enterprise * Narrowed entrepreneurial base * Condoned 'corporate forbearance' and market sharing	* No preferential treatment for SME's * Competition Authority (CA) should be empowered to participate in determining trade and industrial policy * tighten Minister's powers of review/ intervention in regulating 'public interest' aspect of mergers through limiting basis for applications on this matter by 'interested parties' and requiring reasons why the public interest should be taken into account	* Authorities should be accessible to small business * Simple procedural requirements	* Trade liberalisatio cannot serve as a panacea to high levels of market concentration, internal competition measures are neede to address market power and control o distribution channel * complement restructuring of stat assets * promote de-regulation aimed at benefiting SME's
Labour (COSATU)	* racially skewed concentration of ownership * high levels of unemployment * job loss during merger activity	* competition policy should be explicitly developmental by: countering over-pricing, assisting in stemming job loss during mergers, promote SMME's * strengthen divestiture to be more likely remedy * list more per se horizontal and vertical practices * reject Ministerial discretion to extend basis for exemptions * support 5 year time cap on exemptions * support Minister and Tribunal considering public interest matters * Reject distinction between large and intermediate mergers	* Effective institutions for workers and consumers to assert their interests, through: - Annual Reports to parliament on whether objectives have been achieved - Widened locus standi and complainants recovery of costs	* fewer barrier to entry * fair prices, good service and increase variety * expansion in formal employment * promote redistribution of wealth and opportunities
Consumers (Consumer Institute)	* historical lack of enforcement of competition law	* law must explicitly promote a wider range of consumer choice (at times a variety of choices is more important than competitive prices) * should consider making directors, officers or agents personally liable for contravening prohibitions	* support independent comp. Authority, without criminal sanction * need punitive enforcement * merger thresholds should be set by Authority not by Minister	* Need complementary consumer protectio laws * assist in transfer o economic ownershi in line with public interest * assist in promotin SMME's

5. Final note

This paper has provided a walk through various key aspects of the new Competition legislation.

Its main substance is a broad overview of the theoretical issues at play in the legislation and an outline of the kinds of pressures from social actors which the new competition authorities are likely to face.

Its main use (hopefully) is in its attempt to outline some of the challenges which the new authorities will face during the 'implementation phase' of the legislation. But, it may also be of some use for those who wish to get a feel for the policy considerations, and lobbying pressures, which informed the choices reflected in the legislation.

It main challenge is to reside in the nexus between law and economics and as such it challenges both lawyers and economists to engage in interdisciplinary discourse. Just as competition law calls upon lawyers to engage with economic concepts, economists are called upon to consider how the law can be used more efficiently and appropriately in regulating economic behaviour for optimal social outcomes.