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The changing strategies of large corporations in South Africa under democracy and the role of competition law

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Abstract

We assess the relationships between the strategies of large corporations, increased participation and investment in improved productive capabilities, and competition through a case study of South Africa. South Africa is a particularly pertinent case study as the economic reform process undertaken by successive democratic governments from 1994 can be understood as the application of a 'good governance' agenda, establishing independent institutions and drawing up rules, while implementing far-reaching liberalisation. The paper gives a brief background on the structure and concentration of the South African economy, and provides an overview of the competition regime. Three sectors are then examined in detail to assess the way in which firms with substantial market power, individually and in tight knit groups, resulting from their positions under apartheid prior to 1994, have responded to liberalisation and the introduction of the Competition Act of 1998. In light of the industry cases the competition regime in South Africa is critically assessed.

JEL classification: L12, L13, L41, O14, P16

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1. Introduction and background

The nature of competitive rivalry, and the power and interests of large firms and their owners, is at the heart of how countries develop. Competitive markets are also central to the thesis of North, Wallis and Weingast (2009, hereafter NWW). For NWW competitive markets allow access, while competition authorities are part of the set of institutions that ensure impersonal rules govern accumulation and enable growth. But, despite the apparent centrality of competition to their thesis, what is meant by competitive markets is not well worked out in NWW. In this paper we examine competition and the role of competition authorities in South Africa and, through this, we critically reflect on the analysis of NWW. We argue that development is fundamentally about increased participation and investment in improved productive capabilities. This is inextricably linked to the nature of competition as process. We ask why, given the apartheid legacy, has competition policy in South Africa not played a larger role in altering the development path of the economy by undermining the market power of the dominant firms and proactively working to open up access to the economy? By competition *policy* we mean the various regulations, laws and policies which set the 'rules of the game' governing firms' conduct and the ability to establish new ventures such as the provision of development finance.

Competition *law* has, however, typically been premised on what Khan (2006) terms 'market-enhancing governance' rather than 'growth enhancing governance'. By this we mean that it has been premised on neo-classical economics in assuming that liberalised markets are generally efficient such that governance should be about removing restrictions, now expanded to include discrete restrictive competition practices, rather than understanding the process of competition at a systemic level. The developments in economics in recent decades associated with game theory and imperfect information have led to recognition that the scope for strategic behaviour on the part of firms with large market shares is greater than previously understood. This behaviour can enable firms to entrench and extend their market power (see, for example, Rey and Tirole, 2006). This accords with Geroski and Jacquemin (1984: 22) who argued that dominant positions can be entrenched and 'the inequities they create become institutionalized, creating long-term problems in the performance of the economic system which cry out for policy attention'. Firms derive rewards from their established positions and not from effort or any creativity or innovation. This implies that in economies with higher levels of concentration and less robust competitive self-righting mechanisms (such as higher barriers to entry) stronger policies may be required towards abuse of dominance (Vickers, 2007). However, the implications extend further to the need to consider enabling measures as part of competition policy if the structure of markets and of power within the economy is to change (Singh, 2002, 2004).

South Africa is a particularly pertinent case study as the economic reform process undertaken by successive democratic governments from 1994 can be understood as the application of a 'good governance' agenda, establishing independent institutions and drawing up rules, while implementing far-reaching liberalisation.[2] The Competition Act of 1998 and the Competition Commission and Competition Tribunal established under this legislation are examples of this process. As we discuss in more detail below, the competition legislation was presented both as part of a standard microeconomic reform agenda to ensure liberalised markets work, and as a tool to address the market power of entrenched business which derived its power from apartheid era policies favouring the white minority.

In the remainder of this section we give a brief background on the structure and concentration of the South African economy. Section 2 provides an overview of the competition regime. In section 3 we examine three sectors to assess the way in which firms with substantial market

[2] The 'good governance' agenda has been promoted strongly by the World Bank and donors (for a critical assessment see Khan, 2006; Bayliss et al, 2011). Specifically with regard to competition, the World Bank and OECD jointly produced a model law for developing countries to adopt (World Bank/OECD, 1999).

power, individually and in tight knit groups, resulting from their positions under apartheid prior to 1994, have responded to liberalisation and the introduction of the Competition Act of 1998. Section 4 critically reflects on the competition regime in South Africa in light of the industry cases, and on the way in which NWW treat competition.

Background

The South African economy has developed against the backdrop of limited market competition, extensive government intervention and explicit exclusion of the majority of the population from participation in the economy outside of narrow delimited areas. This dates back to the colonial era, which then gave way to an apartheid economy. These pre-democracy regimes pursued policies that resulted in a dualistic economy, with a prosperous part co-existing with and exploiting a deliberately under-developed segment. These trends have persisted into the democratic era.

The logic of South African economic management in the pre-democracy era was driven by the interests of agriculture and mining. These interests depended on a set of extractive institutions to reach their aims, which included eliminating competition between black and white farmers, and also creating a class of low-skilled, cheap labour to work in the mines. Through various legal and policy instruments, competition in the political and the economic spheres was severely curtailed, especially with regards to black people, who were completely eliminated from both spheres as effective participants. Indeed, growth occurred without an increase in the broad-based capabilities required for a dynamic and technologically advanced economy. Advanced capabilities were, however, created in priority areas, such as those linked to arms and to mining supported by public institutions such as the Council for Scientific and Industrial Research (Walker and Jourdan, 2003; Fine and Rustomjee, 1996). The critical feature of the apartheid economy was the link between particular economic interests and race-based policies. The apartheid regime did coordinate an industrialising economy including making investments in public goods in the form of economic infrastructure, as per NWW's characterisation of an evolving limited access order. It also invested in learning and acquiring technologies in targeted sectors, ensuring effort in these areas and in state owned enterprises (Roberts and Rustomjee, 2009; Khan, 2006).

The growth of the economy in the 20th century was centred on the key areas of minerals extraction, energy and finance, which Fine and Rustomjee (1996) have termed the Minerals-Energy Complex (MEC). This growth was achieved by extensive planning. The most obvious is around the movement of labour, not just within the country, but from countries across the region, in order to meet the needs of mines and agriculture. There was also very extensive planning of linkages between activities (Fine and Rustomjee, 1996). For example, the linkages from energy supply to mining and basic metals production were realised through coordination by the state. Transport infrastructure was similarly planned and undertaken by the state, with the railway network serving the mines, the needs of agriculture, especially the movement of grain, and the transport of bulk commodities for industry such as cement, fuel and steel.

Particularly relevant for our study is the way in which the interests of the minerals-based conglomerates were the driving force of the linkages in a 'system of accumulation'. There was contestation between the conglomerates in the MEC, particularly between the interests of Afrikaner and English capital, which was mediated through the state. For example, the state supported the development of Afrikaner mining houses, notably Gencor, through interventions in coal procurement and mining rights (Fine and Rustomjee, 1996).

The apartheid state restricted competition across other areas of the economy, as characterise a limited access order (North et al., 2012: 13), in the form of legal cartels (for example, cement), extensive regulation (such as of agriculture), and state ownership of industries (for example, basic chemicals and steel). There were also extensive and highly differentiated restrictions on international trade influenced by industry interests (Belli et al. 1993; Roberts, 2000). While these limitations were associated with rent allocation, they were consistent with rapid growth until the mid-1970s based on the interests of the MEC, and interests in agriculture.

Ownership and control were very concentrated. The reach of the few conglomerate groups extended even further as a result of sanctions in the mid-1980s, when these groups acquired the South African operations being divested by multinationals. Six main conglomerate groupings dominated private economic activity in the South African economy until the early 1990s, namely Anglo American Corporation, Sanlam, Liberty Life, Rembrandt, SA Mutual, and Anglovaal (Table 1). These very large conglomerates were mostly closely identified with individuals and families. The Oppenheimer family built the Anglo American Corporation. The Rupert family control Rembrandt/Remgro. Liberty Life was also based on finance and insurance, run by Donald Gordon. The Anglovaal group was built by the Hersov and Menel families. The Sanlam and SA Mutual groupings were based on pension funds.

Table 1. Summary of control of JSE market capitalisation (% of total)[3]

Group	1994	1998	2002	2004	2006	2011	2012
Anglo American Corp	43.3	17.4	20.2	18.7	21.0	11.8	8.9
Rembrandt/Remgro	13.0	9.0	10.0	7.9	7.8	5.2	7.2
SABMiller			4.0	5.1	5.7	7.5	9.2
Sasol[d]	1.7	2.2	3.8	4.2	4.6	3.9	
RMB/FirstRand	0.5	4.8	4.7	4.9	3.9	3.1	3.9
Sanlam	10.5	11.1	6.3	2.7	2.3	1.2	1.4
SA Mutual/Old Mutual	9.7	8.8	12.0	4.5	5.5	2.9	3.3
Lib Life/Standard Bank	7.2	9.5	6.0	4.7	3.5	2.4	1.1
ABSA[c]				2.2			
Investec/Fedsure	0.4	3.3	1.9	0.8	1.2	0.6	0.7
Directors	7.0	14.4	7.4	5.8	6.7	8.9	9.2
Black Groups[a]		9.6	3.5	6.3	5.1	4.6	3.9
Foreign (Other)	2.2	3.9	10.1	18.5	20.8	29.8	30.0
Anglovaal[b]	3.6	0.8					
Bidvest Group		1.0	1.0	1.2	1.0	0.8	0.9
PSG							0.6
State[e]				2.2	2.0	0.2	0.1
Institutions/Unallocated	0.9	4.2	9.1	10.3	9.1	17.0	19.5

Source: McGregor's (1999, 2000, 2003, 2007, 2011, 2012) Who Owns Whom

Notes:

[a] The Black owned groups are identified as such by *McGregor's* on the basis of all those companies which have significant black influence in their ownership

[b] In 1998 the Anglovaal shareholding was split equally, giving the Hersov and Menell families each control over 0.4% of the JSE capitalisation

[c] ABSA was moved to foreign in 2006

[d] Sasol moved to Institutions in 2012

[e] The State reflects the direct state shareholding in Telkom and the growing influence of the Public Investment Commission (although the PIC stakes are generally non-controlling and hence not reflected here.

There have been significant changes over the past two decades. As noted by Chabane et al. (2006) there has been unbundling and overseas listings, privatisation and the influence of BEE. However, groups which are identified as having significant black control have declined in recent years in terms of the share of the JSE capitalisation which they account for. Foreign controlled groups listed on the JSE have continued to increase in significance and now account for almost 30% (and, note, this excludes groups separately identified, such as SABMiller and London-listed Anglo American and Liberty Life). More recently, the importance of financialisation (or the increasing relative importance of financial instruments and the financial services sector as opposed to production in the real economy) has been recognised

[3] Control is assessed by *McGregor's* taking into account the various cross-holdings of shares that exist and may be associated with a relatively small direct shareholding in any given company.

in the economy as a whole and in the orientation of large corporations (Ashman and Newman, 2012). There are also service sectors that have increased substantially such as telecommunications and private healthcare.

Measuring concentration at the sector level is, however, very difficult if not impossible as *Statistics South Africa* cut back on its surveying of industry in favour of greater emphasis on household and labour market data. For example, there has been no census of manufacturing since the 1990s, and data by manufacturing sector on output, employment and profits are only published at the level of broad industry groupings.[4] Notwithstanding these data challenges, it appears that South African firms have broadly maintained high levels of profitability as a result of weak competition. Mark-ups (over marginal cost) earned by firms in the manufacturing sector have been found to be twice as high as that of counterparts in the United States, with these mark-ups being attributed to industry concentration (Fedderke *et al*, 2007).

The competition regime was established by the first democratic government with reference both to the need to address the concentration of ownership and control in the economy, and in the context of liberalisation and the need to ensure 'certainty' for business viewed as important for investment, that is, in terms of the returns being earned (Department of Finance, 1996). Despite there being a great diversity in competition regimes across countries (Budzinski, 2008; Gerber, 2010), South Africa followed a relatively narrow Anglo-centred tradition, drawing heavily from jurisdictions such as Canada and Australia (Roberts, 2004). This reflected networks of advisors as well as donor funding.

2. Overview of the competition regime[5]

2.1. The motivation for competition law in the context of democracy

New competition legislation was viewed by the first democratic government as an important part of dealing with the apartheid legacy, and was foreshadowed in the Reconstruction and Development Programme (Roberts, 2004). However, the Competition Act, no. 89 of 1998 was negotiated in the context of liberalisation and was referred to in the government's *Growth, Employment and Redistribution* strategy as necessary in the context of deregulated markets (Department of Finance, 1996). After an extended process of negotiation and consultation with organised business (dominated by big business in the way the constituency is composed) and labour in the National Economic Development and Labour Council (Nedlac), the Act was passed in 1998, and came into effect in 1999 (Roberts, 2000).

This tension, between addressing the apartheid legacy and the liberalisation agenda, is reflected in the combination of relatively expansive objectives of the Act with the specification of the provisions in the legislation being quite restrictive, especially regarding abuse of dominance (the provisions that address monopoly power) (Roberts, 2012). The objectives of the Act emphasize the ability to participate in the economy, including by small and medium enterprises and by historically disadvantaged persons. They also identify the need to address the legacy of apartheid in terms of concentrated ownership and control. The particular provisions of the Act relating to the tests to be done in evaluating mergers and most anti-competitive conduct specify effects-based tests, framed as whether there is a substantial prevention or lessening of competition. Mergers are also subject to a separate public interest test.

The narrow framing of specific provisions was strongly argued for by business, motivated in terms of the need for 'certainty' (Roberts, 2000). The certainty was thus in terms of the

[4] For example, *Statistics South Africa* used to publish separate data for basic metals, metal products, and machinery and equipment, while around 2000 these were aggregated together thus combining heavy upstream industries such as steel and aluminium with diverse downstream activities with a large number of firms rendering any attempt to assess concentration meaningless.
[5] This section draws from Makhaya et al. (2012), Roberts (2012a).

continued right to earn returns from the positions established under apartheid. The business constituency also strongly supported independent institutions and a limited role for the Minister in proceedings.[6] This emphasis accorded closely with the policy stance taken by the government following the sharp depreciation in the Rand in 1996 and perceived need to maintain the 'confidence' of business and international markets (Habib and Padayachee, 2000).

An effective competition policy requires that competition as a goal is infused throughout government policy. Enforcement through the law is not sufficient to challenge the inefficiency and inequity that results from lack of competition. However, competition principles feature marginally in the government's plans and policies on the economy. There is almost no mention of competition in the National Development Plan. The Plan assumes significant employment generation, especially by small businesses and entrepreneurs, without fully engaging with the barriers to entry and mobility within markets. Competition policy features in the government's Industrial Policy Action Plans, but even then it is largely seen within the context of the competition authorities and not more broadly in terms of using regulatory and policy levers to discipline dominant firms and to open up opportunities to new participants. Such measures could have included using export duties where local buyers are discriminated against compared to export customers, and building conditionalities into investment incentives and development finance. Instead regulation and state ownership in energy and transport has continued to allow favourable pricing and provision to the heavy industry interests.[7] This has only changed very recently when electricity supply constraints have led to the spotlight being placed on the special deals for large smelters. Mineral ore exporters have continued to get very favourable transport and port tariffs compared to light industry and agriculture.[8]

This suggests that competition is not sufficiently embedded in the 'economic constitution' of the country; those governing principles that guide the laws and institutions that are created in the economic sphere.

2.2. Institutions

The Competition Act of 1998 made provisions to establish the Competition Commission, whose main responsibility is investigating mergers and anti-competitive conduct, and the Competition Tribunal to rule on cases. The Competition Appeal Court was also established. South Africa is quite unusual, both in having a separate Tribunal and specialist Competition Appeal Court.

The Competition Commission makes recommendations on large mergers and refers findings of anti-competitive conduct to the Competition Tribunal for decision-making. The Tribunal members typically have a legal or economics background, and a panel of three members is formed to hear and decide on each matter apart from intermediate mergers, decided by the Commission (which decisions can be appealed to the Tribunal). The Competition Appeal Court (CAC) is a division of the High Court with judges who are specifically appointed to perform this task. Cases are heard before a bench of three judges, selected from the pool of judges who have been appointed to the Court as members or acting members. The current Judge President of the CAC, Dennis Davis, is a former professor of law.

[6] The business negotiation team was led by Michael Spicer, of Anglo-American, and Stef Naudé of Sankorp (an Afrikaner conglomerate) and a previous director general of the DTI under the apartheid regime, and represented the fifty largest corporations on the Johannesburg Securities Exchange. They are assisted by a consultant, Stephan Malherbe, who had previously worked for Anglo-American. While there were other business groups representing small business at Nedlac, these did not participate actively in the competition negotiations (Roberts, 2000).
[7] See Das Nair et al. 2014, Baloyi 2014.
[8] After an international benchmarking done in 2012/13 the Ports Regulator concluded that container charges were very substantially above the international average while port charges iron ore and coal were below the comparator and in 2013 reduced tariffs for container exports substantially while increasing tariffs for iron ore and coal exports (http://www.portsregulator.org/images/documents/GPPCS_2012_Overview.pdf.)

The Tribunal hearings are legal in nature, with discovery of relevant information, factual and expert evidence being led and subject to intense cross-examination, and extensive legal argument. While the Tribunal has inquisitorial powers, in practice the Tribunal processes have been intensely adversarial in nature. Many challenges have been brought on procedural or narrow technical grounds. In addition, the Competition Appeal Court and Supreme Court of Appeal have limited the scope of the Tribunal to inquire into aspects of conduct and to frame their decision in different terms to those of a complainant or of the Commission's referral. However, the 2012 Constitutional Court judgment in the *Senwes* case has overturned the Supreme Court of Appeal's ruling and indicated that the Tribunal does have considerable scope to determine its own process and the evidence it requires to make a decision.[9]

2.3. Structure of the Act

As discussed, the Competition Act combined expansive objectives relating to the challenges of competition in the South African economy with relatively narrow substantive provisions setting out the tests for anti-competitive arrangements which can be proscribed and sanctioned. An exception is the separate stipulation of a public interest test for mergers, with four defined public interest criteria including employment which was strongly pursued by the labour constituency (Roberts, 2000).

Objectives

The objectives of the Act were articulated in line with the broad imperative of economic transformation.[10] The purpose of the Act makes it clear that competition is valued for enhancing consumer welfare but also as a means to achieve goals related employment, the ability of small and medium enterprises to participate in the economy and increasing the ownerships stakes of historically disadvantaged individuals in the economy.

Merger provisions

The main test that the Competition Act requires is for the competition authorities to determine whether a merger will mean that competition is substantially prevented or reduced. This involves considering a range of factors relating to actual and potential competition in the relevant markets.[11]

If the merger is likely to have anti-competitive effects then it is necessary to consider whether there are any technological and/or efficiency gains that may offset this. The Tribunal is also required to consider public interest issues in all mergers, including the effect on employment, which is discussed in more detail below. The public interest examination must be undertaken, regardless of whether or not the merger is found to be likely to give rise to a substantial lessening of competition.

Horizontal coordination

Under the Competition Act (section 4(1)(b)), agreements to fix prices or other trading conditions, allocate customers, suppliers or territories, or to collude on a tender, are all illegal *per se*, meaning that no anti-competitive effect has to be demonstrated to prove a contravention. In addition to cartel prohibition, the Competition Act also covers a broader prohibition (section 4(1)(a)), relating to agreements, concerted practices, or decisions by an association of competitors that have the effect of substantially lessening or preventing competition in a market where the effect of the arrangement has to be evaluated.

[9] *Competition Commission v Senwes Ltd*, Case CCT 61/11 [2012] ZACC 6
[10] Section 2 of the Competition Act of 1998, as amended.
[11] Section 12 (A) of the Competition Act of 1998, as amended.

If found guilty of contravening section 4(1)(a) or (b), the Competition Act allows the competition authorities to impose a financial penalty up to a maximum of 10 percent of one year[12] of a company's affected turnover. While financial penalties are not levied for first-time contraventions of section 4(1)(a), they are imposed for section 4(1)(b) contraventions, regardless of whether it is a first time or repeat contravention.

Abuse of dominance

The specific abuse of dominance provisions under section 8 and 9 of the Act explicitly stipulated effects-based economic tests (with some exceptions, such as for excessive pricing). There are also explicit pro-competitive, efficiency and technology defences for most of the abuse prohibitions. For example, price discrimination adds the provision that there must be equivalent transactions, and provides a meeting competition defence even where a likely substantial prevention or lessening of competition has been found. The prohibition on predatory pricing specifies the price must be below marginal or average variable cost.

2.4. Summary statistics

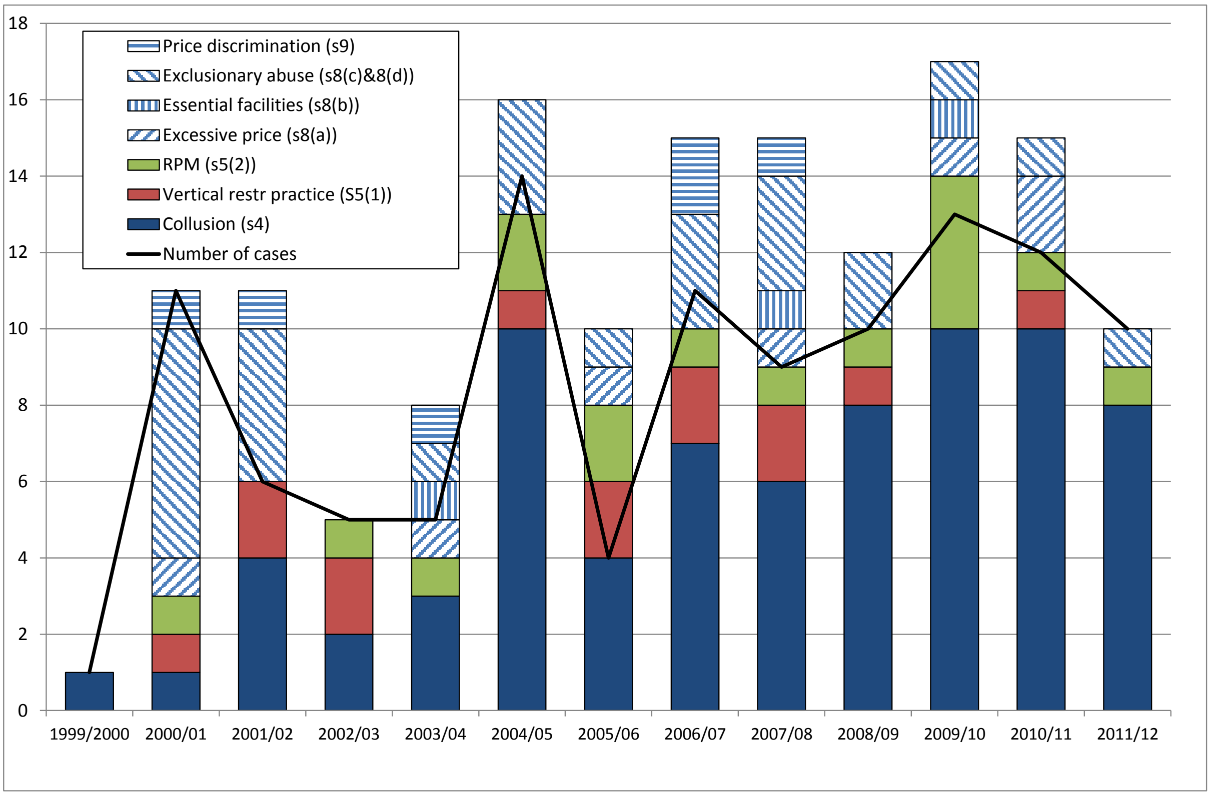
A very large part of the Commission's work in the first eight years was taken up with merger evaluation as compulsory pre-merger notification meant that a large number of deals had to be evaluated right from the commencement of operations. Since the mid-2000s, cartel enforcement increased, while the number of abuse of dominance cases referred by the Commission has averaged 1.5 per year (Figure 1). In the past five years, there has been average of 11 referrals per year. Of these, the majority have been referrals of collusive conduct covered under section 4 of the Act. In addition, there have been a very large number of cartel settlements in recent years.

For example, it might be alleged to have had a vertical arrangement (with customer or supplier) which was restrictive (under section 5), such as an exclusive supply agreement, and also have been alleged to have excluded rivals (under section 8) and discriminated between customers (covered by section 9). This reflects the fact that an entrenched dominant firm is likely to be simultaneously pursuing various strategies to protect its position and the rents it can earn.

While there was a spike at 14 referrals in 2004/05 this was when a number of horizontal coordination cases were referred relating to conduct that was not hidden but that the Commission nevertheless deemed to contravene section 4. A substantial proportion of these were also settlements, such as separately with the Board of Healthcare Funders (2 cases), the Hospital Association of South Africa and the South African Medical Association, all regarding their collective negotiation of healthcare tariffs.

[12] The relevant year is the financial year immediately preceding the referral of the final decision by the Commission to the Tribunal.

Figure 1. Referrals of complaints and settlements by the Commission to the Tribunal



Notes: [a] Private parties can also refer cases to the Tribunal where the Commission declines to do so.
[b] Section 4 relates to horizontal coordination (cartels), where a case is referred under different subsections of 4 it is only counted once; section 5(1) to vertical restrictive practices; section 5(2) to resale price maintenance; section 8 to various abuses of dominance; section 9(1) to prohibited price discrimination.
[c] The cases of abuse of dominance (under section 8 and 9) have often involved the dominant firm being alleged to have contravened more than one particular sub-section, meaning the bars can stack to more than the number of cases.
[d] Settlements are included where there has not already been a referral.

Mergers

The Commission has evaluated around 400 mergers per year most of which raised no competition or public interest concerns. Public interest concerns have in almost all cases been to do with potential job losses associated with the merger and typically this has led to the imposition of conditions limiting retrenchments and/or providing retraining and other opportunities for affected employees.

In 2011 and 2012, the assessment of three notable mergers raised other public interest concerns to do with the effect of the mergers on the development of industries and local suppliers. The Walmart acquisition of Massmart was subject to a condition providing for the development of local suppliers. The Kansai acquisition of Freeworld (a paint manufacturer) included conditions on investment to be made. The Arcelik acquisition of Defy (a local fridge manufacturer) also involved commitments to the development of local manufacturing.

Cartels

The relatively large number of cartel cases in recent years is due largely to the success of the corporate leniency policy[13] and a proactive stance to investigating areas of likely collusion (Makhaya et al., 2012). This involved the Commission, from around 2007, identifying priority sectors of the economy and, based on initial research and information gathering, initiating investigations. The uncovering of two cartels in particular, in bread and in concrete pipes, led to wider investigations as the same companies were found to be implicated in conduct in related products (Makhaya et al., 2012).

Settlements have increased sharply in recent years in terms of both number and value. In the three years from 2009/10 to 2011/12, there were 55 settlements with penalties totalling R1 830mn. These were almost all settlements of cartel cases.

Abuse of dominance[14]

Nineteen abuse cases in total have been referred to the Tribunal since 1999, an average of 1.5 per year. The great majority were referred by the Commission. A further two cases that were not referred were subject to settlements, making 21 cases in total. The Tribunal made a determination on ten while seven cases were the subject of settlements with the Commission (five after referral), one of which the Tribunal did not confirm. The remaining five cases referred are at various stages in the process of hearing.

Of the ten cases the Tribunal has decided, it has found that abuse occurred in seven (on the part of *Patensie*, *South African Airways* (twice), *Sasol*, *Mittal Steel SA*, *Senwes* and *Telkom*). However, in two of these the finding was overturned or set aside by higher courts (*Sasol* and *Mittal Steel SA*). In addition, four of the settlements (*GlaxoSmithKline & Boehringer Ingelheim*, *Sasol Nitro*, *Foskor* and *Telkom*) involved substantive undertakings. A further settlement in *Astral* included an admission under 8(c). On this basis, taking the findings and the substantive settlements, abuse of dominance was proscribed in ten cases.

The cases have involved price discrimination, excessive pricing, and exclusionary arrangements including vertical arrangements, and loyalty rebates. There have been no decided cases of predation, or tying and bundling. Most cases have involved former or current state owned companies (*Sasol*, *Mittal Steel*, *Telkom*, *SAA*, *Safcol*, *Foskor*). In terms of sectors, heavy industries (steel and basic chemicals) have been most important, following by four cases in agriculture and forestry, where there has historically been substantial state support (*Safcol*, *Patensie*, *Senwes* and *Rooibos*), and telecommunications and airlines (two each).

The various steps involved from referral to hearing and the scope for legal challenges have all meant that two to three years have typically elapsed from referral to ruling in the major enforcement cases, with appeals following.

All-in-all, under the abuse of dominance provisions current state-owned companies (including Telkom in this category given its substantial state shareholding) have been fined five times (SAA twice, Telkom twice, and the IDC-owned Foskor). No other companies have incurred a penalty, although Sasol Chemical Industries made divestitures and agreed to behavioural conditions regarding its conduct in fertilizer under a settlement reached with the Commission.

How should this enforcement record be rated? If the likelihood of unilateral anti-competitive conduct was low then we would not be expecting much enforcement activity in this area. However, all the signs point in the opposite direction. We assess this in more detail below for

[13] Under the Commission's corporate leniency policy (introduced in 2004) the first firm in a cartel to come forwards to admit to the conduct and provide full information on the conduct that enables the remaining members to be prosecuted receives immunity from prosecution conditional on its full cooperation.
[14] See Roberts (2012) for a fuller review.

key sectors. In addition, while in recent merger decisions there has been attention on the ability of small local firms to participate in industries, in cases of anti-competitive conduct this emphasis has not been present, at least when the final decisions of the appeal courts are taken into account. Citing the effect on competition as being most important and not the effect on specific competitors, the CAC over-ruled the Tribunal decision on price discrimination by Sasol against Nationwide Poles. In Netstar-Tracker, the ability of smaller firms to enter the industry and the effect of rules setting up obstacles to them doing so was discounted due to there already being a few larger competitors. In the SAB case brought by the Commission, and dismissed by the Tribunal due to the decisions of higher courts, the role of smaller participants in the distribution chain was effectively dismissed. In the Sasol Nitro and Astral cases, there were ultimately settlements reached with the Commission. The different approaches adopted by the Tribunal and the CAC indicate the problems of creating two specialist bodies with effectively similar roles and legal provisions which provide extensive scope for technical legal arguments to be advanced. In general, these arguments have found greater favour in the CAC, where the Tribunal is also not able to represent itself and defend its judgements.

3. Assessment of competition and market reform in key sectors

To gain greater insight into why competition policy has not had greater impact in addressing the legacy of apartheid of the extreme concentration of economic power we discuss three important sectors in more detail. These enable us to examine the nature of competitive rivalry in reality and to reflect on the rather simplistic portrayal in NWW.

The three broad sectors are also chosen to reflect different ways in which the apartheid legacy and choices by the democratic governments since 1994 have played out. The first sector, of fuel & basic chemicals, was at the heart of the apartheid industrial project – especially in the role played by formerly state-owned petrochemicals company Sasol. The assessment of the second sector of maize-meal and wheat flour reveals changes for the white farming and agro-processing constituency which was central to the National Party. The reforms in fixed-line telecommunications are about the state-owned, then partially privatised, utility Telkom and the new business interests that invested in it.

3.1 Fuel & basic chemicals

The development of the basic chemicals industry in South Africa has been closely intertwined with the needs of mining and agriculture, and with the apartheid government's objective of reducing dependence on imported crude oil for liquid fuels (see Dobreva et al. 2005; Fine and Rustomjee, 1996; Roberts and Rustomjee, 2009). These objectives were pursued through a combination of state ownership, government support including development finance and trade protection, and regulation. This bequeathed a dominant position in liquid fuels and related chemicals products to the formerly state-owned Sasol, derived from its coal-to-liquids fuel complexes located in inland at Secunda and Sasolburg.

The first Sasol plant was established by the National Party in the 1950s using the enabling 1947 Liquid Fuel and Oil Act with IDC financing in the 1950s at Sasolburg. Following the 1973 oil price increase, it was decided to construct Sasol 2 in Secunda. A further increase in global pricing prompted the decision in 1979 to construct Sasol 3, following immediately after the commissioning of Sasol 2 at Secunda. At the same time, Sasol was partially privatised, partly in order to raise the capital required to construct Sasol 3.

Sasol employs the Fischer-Tropsch process of the gasification of coal to produce synthetic liquid fuels. The development of the technologies had a range of spin-offs, and resulted in a major industrial chemicals complex founded on organic chemicals from the processing and refining. Sasol grew to dominate the basic chemical sector and has become a major domestic supplier of liquid fuel.

Strong linkages were developed with mining in the form of explosives production and fertilizer to meet the needs of agriculture. In these products there was rivalry between Sasol and the largest mining based conglomerate Anglo-American whose subsidiary African Explosives and Chemical Industries (AECI) had been the leading explosives producer. AECI had built the first major ammonia plant in 1930 under licence from ICI. It used ammonia made from coal gasification for its explosives.

The linkages and interests mediated by the state as part of the broader system of accumulation has been characterised by Fine and Rustomjee (1996) as the Minerals-Energy Complex (MEC). The strategic goals of the apartheid state meant that it was concerned only with key industries (mining, agriculture) and key products (liquid fuels). The strategy was generally not concerned with developing competitive manufacture of downstream consumer chemicals. The extremely skewed nature of income and consumer demand reinforced this pattern and the bias to heavy upstream industrial chemicals.

There were extensive regulatory arrangements in place to support the industrial objectives of the apartheid state. The government effectively brokered an arrangement between the multinational refiners present in the country (including Shell, BP, Total and Chevron) and Sasol. Under the Sasol Supply Agreements (subsequently known as the Main Supply Agreement) reached in 1954, the other oil companies (or OOCs) agreed to purchase all of Sasol's production at import parity prices (the In Bond Landed Cost) according to their market shares in the inland market defined as the Sasol Supply Area.[15] When Sasol 2 and 3 came on stream further support for the OOCs was provided in the form of a synfuels levy, used to compensate the crude oil refiners for having to mothball a substantial portion of their refining capacity. The arrangements meant the crude oil refiners agreed to purchase all Sasol's output in exchange for a guaranteed margin at the marketing level, which Sasol agreed not to enter. Competition between fuel producers was removed in the interests of supporting the profitability of Sasol.

Until 1989, refining margins were guaranteed along with returns on marketing assets. From 1989 only the returns on marketing assets were regulated, with bulk supply prices (wholesale prices) for refined products regulated at import parity (and not directly based on rates of return).

Sasol was also supported by a dispensation where synthetic fuel producers[16] received tariff protection when crude oil prices fell below a defined floor price of $23/barrel (the level at which it was estimated they would earn a 10% return on assets). When oil prices rose above $27.7/barrel the producers had to pay back 25% of the additional revenue into the 'Equalisation Fund' until the quantum of state protection previously received had been repaid (Rustomjee, 2012).

The first democratic government reviewed the regime governing liquid fuels soon after coming into power in 1994, commissioning a report from Arthur Andersen (in 1995). There was a second review around five years later. At the same time, Government indicated its intention to change the regulatory framework, while the competition regime was viewed as an important part of addressing market outcomes. How did Sasol respond to the new political dispensation and its implications? And, what impact did the competition law have?

Sasol's main strategy to respond to actual and expected changes in regulation and protection was to consolidate its position through mergers and ensure that it continued to occupy a

[15] See Competition Tribunal decision (2006) in Sasol-Engen merger and Competition Commission referral of collusive conduct against the fuel companies, 24 October 2012.

[16] This included another, much smaller, producer of fuel from natural gas at the coast Mossgas

national champion position, indispensable for the country's security of supply. At the same time it promised to continue to invest to ensure supply met demand and to develop petrochemicals production.

There were two major mergers that Sasol pursued. While both were blocked by the competition authorities we argue that Sasol largely achieved its objectives in any event.

The first proposed merger was of Sasol and AECI's interests in ammonia, fertilizers, explosives and polymer chemicals in the second half of the 1990s. The rationale was given that AECI's facilities were aging while major new investment could only be made if world scale plants could be constructed which were not justified by the size of the South African economy. This merger was effectively blocked by the then Competition Board in 1998 as the merging parties abandoned the deal due to the onerous nature of the proposed conditions and divestiture requirements. However, AECI subsequently shut down its ammonia operations in 2000, for which it was paid by Sasol, and entered into long-term supply arrangements with Sasol instead. Sasol also absorbed the Polifin JV with AECI, which was engaged in polymers production. Consolidation in effect happened anyway.

The second industry-reshaping merger planned by Sasol was with one of the major oil refiners. This was closely related to Sasol's decision in 1998 to give the required 5 year notice to end the Main Supply Agreement in December 2003. The MSA apparently contravened the 1998 Competition Act as the oil companies were granted an exemption of limited duration.[17] The ending of the MSA meant that the other oil companies could bargain with Sasol for lower prices, given Sasol's low production costs and Sasol's poor alternatives as it did not have its own distribution and retail operations. This was evident in the bargaining games that occurred at the end of the MSA (see Corbett et al., 2011). At the time, the OOCs had excess capacity at the coast and were exporting to East African markets product which they could have sold locally had they not been required to buy all of Sasol's production.

By merging its liquid fuel business with the refining and distribution operations of Engen (the largest distributor in the country) Sasol would have a route to market for its own product without having to rely on the OOCs, and a refinery capacity at the coast (the Engen refinery). The Tribunal prohibited the merger due largely to the effect of the merger in increasing Sasol's market power through vertical integration. The former Minister, Penuell Maduna, was now with Sasol and had been intimately involved in putting the deal together, especially as Engen was owned by Petronas, controlled by the Malaysian state (Lewis, 2012). The Competition Commission at first supported the merger, and then altered its position. The same was true for the Department of Minerals and Energy who was revealed to have had their position influenced by different sides (Competition Tribunal, 2006).

While the OOCs appear to have been able to bargain for somewhat cheaper fuel for a few years, more rapid economic growth led to tighter conditions on the supply side than had been anticipated. There has thus been little effect in the medium term from Sasol not being able to merge.

A complex system of partial price regulation remains in place.[18] At the upstream level this uses a notional import parity benchmark while on distribution and marketing it has effectively guaranteed a rate of return for the industry on marketing assets of around 15%. Reviews of the IPP benchmark indicate that the IBLC formula used until 2003 was in fact higher than import prices. A Competition Commission investigation into coordination through information

[17] According to the Competition Tribunal, the MSA amounted in effect to a cartel: *"In our view and, we note again, this view is essentially uncontroverted –the South African fuel market, from the refinery level through to the level of the retail service station, was cartelised for many years. The MSA was in effect the market sharing agreement entered into by the participants in the cartel with the price of refined product based on import parity or BFP which was then used to build up to the wholesale price and the retail pump price."* (Para 122 pg 46)

[18] See Windfall Tax Report; Competition Tribunal Sasol-Engen merger decision

exchange also suggests that the oil companies were able to undermine competition between them and sustain higher prices than would otherwise have been the case (Das Nair and Mncube, 2012). The Commission referred a case of collusion against the oil companies on 24 October 2012 based largely on the companies exchanging information monthly on individual sales volumes to different customer categories by geographic area.

The other major threat to Sasol has been a change in the taxation and/or regulatory regime. This was most obviously in the form of the mooted tax on possible 'windfall' gains made by Sasol from the apparent stepwise shift up in world oil prices. The task team established by National Treasury recommended such a tax should be pursued. National Treasury, however, rejected the recommendations of the Task Team on grounds which included the fact that Sasol had promised to invest to ensure 'security of supply' and development of petrochemicals. In particular, Sasol had undertaken to pursue the Mafutha project, of a large new coal to liquids plant in the Waterberg. Having headed off the possible windfall tax, Sasol has made clear it will not pursue Mafutha without very substantial participation and support from the state. It is also very sensitive to assumptions about the valuation of carbon given the high levels of CO_2 that are produced in the synthetic fuels operations.

Sasol's continued hold over supply of fuels in the inland market in particular has been reinforced by their position as joint owner in the exploitation of the Mozambican gas discovered in the Pande/Temane region and in the pipeline delivering it to Secunda. The pricing of the gas has been subject to maximum regulation, for the first ten years from 2004 to 2014, with the volume weighted price not to exceed an average price of selected European countries, while individual customers can be charged up to a maximum determined as the price of their alternative energy source (including the cost of physically switching to gas). This latter provision is effectively the monopoly price in any case as it is the maximum price that Sasol would have to offer in order to attract the individual buyer to switch to natural gas. The new natural gas feedstock coming onstream from 2004/5 has underpinned Sasol's growth.

The case of fuel and basic chemicals highlights the danger of equating competition with the absence of constraints. Instead, liberalisation of restrictions may well mean consolidation under the largest firm, especially where it is able to leverage off its existing advantages.

Competition law has not proved a very effective answer to the challenges of entrenched dominant firms. This is at least partly because competition law should not be viewed separately from the wider set of measures to regulate the economy. While the two very large planned mergers by Sasol were blocked by the competition authorities and provide insights into Sasol's business, ultimately similar outcomes (consolidation under Sasol) were achieved in any case through industry shifts and restructuring.

Under apartheid it appears that the industry was disciplined by the key interests it had been developed to serve, namely mining and agriculture, as these are powerful constituencies. The mining industry for which explosives production had been developed was at the heart of the economy. The main explosives producer, AECI, was also a subsidiary of the largest mining house, Anglo-American. The interests of large commercial agriculture were also very influential, and until the 1980s fertilizer was subject to regulation which ensured the interests of farmers were protected.

3.2 Milling of maize and wheat[19]

We analyse the conduct and arrangements of firms in the wheat and maize milling value chains, including links to poultry, storage and bread baking, against the context of the far-reaching liberalisation of agricultural markets. The historical arrangements under apartheid supported the participation of white farmers through collective and regulatory arrangements.

[19] Draws from Chabane et al. (2008).

The state intervened extensively in agriculture and food production (see Bayley, 2003; Edwards et al. 2009). Marketing and prices were governed by 'Control Boards' for almost all products. Subsidised finance was allocated on a large-scale through the state-owned Land Bank. Additional support for white farmers was channelled through agricultural co-operatives with extensive financing of silo storage facilities, processing and packaging facilities and railway infrastructure. This system of support was ended in the 1990s and we assess how a narrower group of historical insiders with their roots in the limited access arrangements under apartheid responded.

After the Union of South Africa was established in 1910 a comprehensive system of support for white farmers was developed. This included the establishment of the Land and Agricultural Bank, and the passing of the Co-operative Societies Acts of 1922 and 1939 and the Marketing Act of 1937. A range of supportive measures included the provision of agricultural finance, extended land tenure, the securing of input supply, and the provision of marketing services for white farmers. The Marketing Act put in place a system of controls which effectively regulated the movement, pricing, quality standards and marketing supply of the majority of agricultural production in South Africa. The Act also made provision for the establishment of a wide range of marketing parastatals. Control boards were established which were effectively single channel marketing schemes with the main aim of the stabilisation of prices of agricultural goods as well as the reduction of marketing margins between producers and consumers. These arrangements supported white farmers and, indeed, responsibilities were in many cases delegated to the large farmer co-operatives. In addition, an important component of support was subsidised finance for the acquisition of machinery. There were direct subsidies to commercial farmers through the provision of capital, credit extension under the Agricultural Credit Act of 1966, and loan finance through co-operatives and by the state-owned Land Bank (Edwards et al., 2009). The mechanisation of field crops in particular underpinned big declines in agricultural employment from 1975.

In the 1980s there were moves to de-regulate and trade was somewhat liberalised. However, the control boards remained in place. The first democratic government which took office in 1994 rapidly went about removing state regulations and continuing the liberalisation which had been started under the former regime. The control boards were swept aside in the Marketing of Agricultural Products Act, No. 47 of 1996. And, under the trade liberalisation programme, quantitative trade restrictions on agricultural products were converted to tariffs and reductions were made in the tariffs themselves. The South African Futures Exchange (SAFEX) was set up for the trading of agricultural commodities.[20] The co-operatives rapidly converted into private companies and consolidated into large agro-processing concerns, commodity traders, and suppliers of farming requisites (Bernstein, 2012). A new strengthened competition regime, under the Competition Act of 1998, was viewed as the main tool to correct market outcomes post-liberalisation (Department of Finance, 1996).

The withdrawal of the state in the 1990s represented a dramatic change in the environment for commercial agriculture. However, while the state's role had been extensive its impact was far from uniform. Calculations by Edwards et al. (2009) found assistance varied considerably over time and products. In particular, the assistance was concentrated in field crops led by maize. This reflected the influence of maize farmers as a constituency in the National Party governments under apartheid.

The liberalisation did indeed usher in far-reaching restructuring of the agricultural sector. The number of farmers has fallen by around 25% since 1996, with consolidation to form even larger farms at the already high levels of mechanisation (Tregurtha et al., 2010). There has also been a shift in patterns of production, with the area planted with crops such as maize and wheat falling overall as lower yielding land was no longer planted following the ending of the

[20] This is now the Agricultural Products Division of the Johannesburg Securities Exchange.

regulated prices guaranteed to farmers.[21] Agricultural employment is around 40% lower than the mid-1990s.

Liberalisation of far-reaching regulation in the interests of white farmers does not mean that access is opened-up to black farmers. Instead, the ending of the marketing arrangements and liberalisation of trade meant high levels of volatility in commodity prices linked to movements in international prices and exchange rates. This was anticipated, although it was suggested that use of hedging and derivative instruments by farmers would dampen the impact of volatility somewhat (LAPC, 1994). In practice it has meant an influential role for large trading groups, such as the diversified agriculture corporations formed of the privatised co-operatives and multinationals.

To reinforce the observation that open access competition is not the absence of regulation, from 2006 to 2010 extensive cartel conduct was revealed by processing companies including maize millers, wheat millers and bread producers. There was also collusive conduct and exclusionary behaviour on the part of grain storage companies.[22]

The main milling and baking companies, Tiger Brands, Premier Foods, Pioneer Foods and Foodcorp/Ruto Mills have their origins either in former co-operatives (as for Pioneer and Foodcorp) or as subsidiaries of large conglomerates (in the case of Premier Foods). For example, Pioneer Foods was formed from the former Sasko and Bokomo co-operatives. Maize milling is less capital intensive than wheat milling and as a result, there is also a range of small and medium producers, unlike in wheat milling. These smaller producers are regionally located, with their own brands, or making house brands of the major supermarkets and cash & carry chains. There were both national and regional arrangements to collude in maize meal while the wheat flour arrangements were essentially limited to the main national producers.

It is important to appreciate that the industry participants maintained a set of close relationships from the end of the control boards. In essence, industry bodies in the form of the National Chamber of Milling and the Chamber of Baking were established when the sector was liberalised. These organisations provided a forum for regular interactions and communication through which a common understanding about how to organise the industry was maintained. Detailed information was collated on sales by product category, specification, pack size, geographic region and customer channel on a monthly basis. Cost data were also collected and shared.

As reflected in the documents setting out the referral of the cases by the Competition Commission to the Tribunal,[23] as well as settlements reached with several parties, the wheat flour arrangements of the four major millers effectively involved setting prices and dividing markets. There was coordination on national pricing, including price increases, and trading conditions including maximum allowable discounts. Meetings were also held in the main regions, such as Gauteng and KwaZulu-Natal, typically with a rotating chair. These meetings maintained stability in the regions and also allocated particular customers, such as independent bakeries.

As there was a large proportion of the bread market not covered by the cartelists, such as the in-store bakeries of the major supermarket chains, it was important to agree which participant would supply the flour. The flour suppliers also discussed how to deal with customers who were attempting to use their size to play off different suppliers against each other to get discounts.

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[21] Department of Agriculture, *Abstract of Agricultural Statistics 2009*, and Competition Tribunal (2009) Competition Commission v Senwes, Case 110/CR/Dec06.
[22] See Annual Reports of Competition Commission South Africa, various years.
[23] Founding Affidavit of Avish Kalicharan 15 March 2010 (wheat milling). Founding affidavit of Avish Kalicharan 31 March 2010 (white maize milling referral). See also Annual Report of Competition Commission 2010.

Given that flour is the main cost to baking bread, coordinating on the flour price could in theory ensure that the potential supra-competitive rents in the value chain are earned at this level and there would be no need to also coordinate at the level of bread baking. It may be that the coordination in bread-baking simply ensured better overall management of the coordinated arrangements.

There are additional reasons why it might not be possible to appropriate all the margins at the level of wheat flour. Large independent buyers of flour are aware of the movements in the wheat price and may exert pressure on flour suppliers when wheat prices fall, such as through threatening to sponsor entry into flour milling, or possibly turning to imports of flour. In any case, it is evident that flour prices do move to an extent with the wheat price. By comparison, bread prices had a history of only increasing but never falling, indicating that margins over costs in baking are variable, and further collusive mark-ups over the flour price were earned (Chabane et al., 2008). The specific conduct regarding bread distributors also points to the ability to segment customer groups for the purpose of exercising pricing power.

Why did the cartel margins not attract new entrants? In the wheat value chain, bread-baking is probably the activity with lowest barriers and scale economies. However, a bakery must source it wheat flour from its largest rivals. Customer allocation as part of coordination ensures that small independent bakeries are going to be squeezed on their main input cost. These obstacles may be reinforced by arrangements with large retailers such as category management and slotting allowances where the big, vertically integrated, bakeries are able to command the best shelf space.

In addition, in bread-baking the Commission found unilateral power in some local markets. One integrated miller and baker (Pioneer) had engaged in predatory behaviour in terms of pricing its main product and by introducing a 'fighting brand' to exclude small independent bakeries that had set up in individual towns.[24]

The bigger point is that there are diverse ways in which entrenched producers can exclude and undermine smaller actual and potential participants, especially where these participants will best be able to enter in one area or one product. The theory of contestable markets suggests that this is not material as an entrant can simultaneously enter multiple levels and across the country if necessary. This, however, assumes perfect information and efficient capital markets, neither of which is remotely plausible.

In milled white maize meal extensive collusion was also identified. On 31 March 2010, the Commission referred a case of collusion in the supply of milled white maize against 17 respondents. Of these five firms have admitted the conduct and obtained conditional leniency or settled with the Commission.[25] At first sight it appears similar to the conduct in milled wheat flour and, indeed, many cartel meetings covered both products. However, there are important differences in the number of participants in maize and in the significance of regional and local dynamics.

As set out in the Commission's referral there were meetings at regional and national level. There were designated chairpersons for regional meetings and outcomes from these meetings were reported back to those responsible at the national level. Cartel meetings happened at a range of venues over 1999 to 2007, including church halls, hotels, corporate boxes at rugby and cricket grounds. Regional producers often chaired the regional meetings, even though national producers would also be present in the form of their regional managers.

The incentive to cheat on arrangements was strong given the large number of producers and the possibility of discounting in non-transparent ways and to specific customer channels.

[24] See Competition Tribunal, case number 15/CR/Mar10, Competition Commission vs Pioneer Foods (Pty) Ltd, 30/11/2010, available at http://www.comptrib.co.za/cases/consent-order/
[25] Premier Foods, Tiger Brands, Pioneer Foods, Keystone Milling, Carolina Rollermeule.

Meetings thus followed up on deviations from agreements. The meetings also discussed when and by how much to implement price increases. Arrangements were bolstered by information exchange through the National Chamber of Milling on sales by province, by pack size and customer channel, enabling each firm to identify its own share and in which area it may have been eroded (although not specifically by which other firm).

The South African experience points to the fact that liberalisation does not equate to greater participation due to 'freeing up' markets. Rather, the incumbents' advantages can be entrenched. In some areas these advantages coupled with the risks accompanying large lumpy investments are precisely why the investments were supported by the state or made under state ownership. This was the case in grain silos, as also in the key inputs into fertilizer. It now appears naïve to think competition in liberalised markets will sufficiently discipline the market power of these firms and tight oligopolies well able to coordinate.

The consolidation and increased vertical integration that followed liberalisation further made entry more difficult. While these trends were likely associated with improved efficiencies the implication of the high levels of concentration is that development of important sectors are determined by the decisions of just one or two firms. These firms effectively 'govern' value chains (Kaplinsky, 2000). While the firms wish to improve the efficiency of the chains as a whole they are also concerned to protect their position and the exertion of it to earn rents.

The focus on market reform appears to have been at the expense of understanding the realities of market power within value chains and what is required for firms to enter and build capabilities. The latter implies attention to access to finance, advisory services, support for research and product development, as well the state's role in the provision of necessary economic infrastructure for new firms.

3.3 Telecommunications privatisation and regulation

The process of privatisation and regulation of fixed line telecommunications broadly followed the orthodox recommendations of privatisation with an independent regulator, such as were strongly promoted by the World Bank (Makhaya and Roberts, 2003). The outcomes point to the flaws in this approach at different levels. The incumbent has been able through various means to entrench its position and stifle growth of services such as value added network services. We examine how and why the regulator apparently could not address these issues, including the wider questions about the interests and incentives at work.

The South African fixed line telecommunications utility, Telkom, was incorporated in 1991 as a state-owned enterprise governed by the Department of Posts and Telegraphs.[26] Telkom offers a range of telecommunications services, namely: infrastructure provision; fixed-line voice services; fixed-line data services; telephone directory services through Trudon Group; wireless data and other Internet services through MWEB Africa; and quite recently mobile voice services.

The democratic government adopted a policy of 'managed liberalisation' in the sector. The Telecommunications Policy White Paper, issued in 1995, set out parameters for telecommunications sector reform as they related to privatisation, access to telecommunications and regulation. The White Paper envisaged the creation of an independent sector regulator and included a time-table for liberalisation, which was replaced by ministerial discretion over the mechanisms of introducing competition in the sector (Horwitz and Currie, 2007).

In spite of ambivalence about privatisation in the political and policy-making community, the privatisation of Telkom was presented as solution to attract investment and to assist a

[26] As per the Post Office Amendment Act 85 of 1991, before this telecommunication services were provided by the department itself.

financially ailing state-owned enterprise. This led to the implementation of a key initial reform in the shape of the partial privatisation of Telkom, with a 30% stake sold to a consortium (Thintana) comprising of Malaysia Telecommunication and SBC Communications as 'strategic equity partners'.[27] The rationale was that these partners would drive the upgrading of Telkom's operations and technologies. While only having a 30% stake, they had extensive control through the shareholders' agreement.

The privatisation to these entities coincided with the extension of Telkom's monopoly in voice telephony for five years from 1997 to 2002. This was justified by the imposition of universal service obligations.[28] The monopoly period was also seen as necessary for Telkom to prepare itself for the onslaught of competition. The independent industry regulator was to monitor Telkom's compliance with the requirements as well as enforce price regulation.

Under the Telecommunications Act, regulation was conducted through the imposition of a price cap on a basket of Telkom's specified services, including: installations; prepaid and postpaid line rental; local, long distance and international calls; fixed-to-mobile calls; public payphone calls; ISDN services; Diginet product and the Megaline product. A similar cap applied to a sub-basket of those services provided to residential customers, including leased lines up to and including lines of 2 Mbps of capacity and the rental and installation of business exchange lines. This regulation did not preclude Telkom from exercising discretion within key segments of the baskets, and there was a wide range of unregulated value added services.

The regulatory institution, the South African Telecommunications Regulatory Authority (SATRA) was thus established in an environment that was not conducive to its independence. It also faced constant battles with Telkom, as the incumbent sought to interpret its exclusivity provision in a manner that extended it to market segments which it was not intended to cover. In a well-documented and highly litigious episode, Telkom sought to extend its exclusivity to the provision of Internet services, arguing that private internet service providers were intruding on its monopoly rights (Horwitz and Currie, 2007). SATRA ruled against Telkom, and the matter was then taken up to the Pretoria High Court, which ruled in favour of Telkom on procedural grounds. A similar battle over exclusivity would ensue over the private data networks offered by Value Added Network Service (VANS) providers. According to the Telecommunications Act of 1996, VANS were required to lease backbone facilities from Telkom. However, Telkom went further than this and argued that the services they provided over these leased lines, were also within the bounds of its exclusivity. This debate would eventually become the subject of an investigation by the Competition Commission, as discussed below.

Competition was effectively delayed by a further five years to 2007, while Telkom was run on strong private incentives intent on maximising the value of their equity stake (as both Thintana and the state were looking to sell their shares). The government's ownership stake in Telkom, coupled with its de facto concurrent regulation of the sector, clouded its incentives in the sector. Government looked to maximise the value of its stake in Telkom, especially in the period towards the sale of shares in an initial public offering.

In 2002, invitations were issued for interested companies to apply to offer the services of a second national operator. After a protracted process, Neotel was licensed in December 2005. The process was slowed down by a lack of interest from many international operators, who were discouraged by the prevailing perception that the South African regulatory regime was flawed (Horwitz and Currie, 2007). Neotel launched its services commercially in August 2006,

[27] SBC is an American company spun out of the AT&T stable.
[28] It should be noted that by the end of the period of exclusivity, there was a net decline in fixed line and internet penetration (see Makhaya and Roberts, 2003).

and commenced services in 2007. The effective private Telkom monopoly had lasted for a full decade.

The introduction of competition in voice telephony, in the form of the second national operator, was much anticipated by Telkom. In its Form 20F filing to the United States Securities and Exchange Commission (SEC) for 2008,[29] Telkom identified the emergence of competition in fixed line services in South Africa as a risk factor and outlined various strategies to protect its market share. These strategies include measures to build customer retention through entering into long-term contracts with the large corporate and business customers using volume and term discount plans. Bundled products were also enhanced to lock-in customers.

Competition in voice telephony could, in theory, also emerge from value-added network service providers using Voice over Internet Protocol (VOIP), but this process was vexed by legal challenges from Telkom, which sought to protect its monopoly over voice services. The Telecommunications Amendment Act of 2001 provides for some measures that are, in theory, beneficial to competition. These include the fact that the second network operator (and licensees in under-serviced areas) is allowed to use VOIP for voice telephony, number portability and carrier pre-selection. Geographic number portability allows customers to retain their telephone number when they switch voice service providers, thus eliminating some of the inconvenience of switching. Geographic number portability became effective on May 2009 for corporate customers, and on April 2010 for household customers.[30] Carrier pre-selection, which allows a customer to pre-dial a code so as to select an operator before making a call, is yet to be implemented.

In 2004, the Thintana consortium sought to sell its partial stake in Telkom. This led to the formation of BEE investment companies interested in the investment, which were then consolidated into what became known as the Elephant consortium. A leading figure in this consortium was Andile Ngcaba, the former director-general of the Department of Communications. The Elephant consortium was unable to put forward the finance required to buy Thintana out and in a deal that attracted much controversy, the government investment company, the Public Investment Commission, bought the stake in Telkom, 'warehousing' it for the Elephant consortium (Cargill, 2005). The Elephant consortium financed its eventual purchase of the Telkom stake with debt from Nedcor and Absa. Thus key ANC officials, including formerly the most senior official in the Department of Communications, came to acquire an ownership interest in the incumbent operator.

Both the regulator and the competition authorities have grappled with the entrenched position of Telkom. In other words, it is not the case that the powerful interests aligned on the side of the incumbent rendered them inactive.

SATRA (later the Independent Communications Authority of South Africa) has had to engage in extensive litigation simply to exercise its mandate. In addition to the issues of exclusivity discussed above, attempts to open up access to Telkom's infrastructure, especially the 'last mile' local loop, have also been stymied. Access to Telkom's copper infrastructure would enable other market participants to offer new and innovative services such as broadband. The local loop is that part of a network that connects the customer's premises to a local exchange closest to the customer's premises; it includes copper wires, ducts and switching centres. The local loop is a significant barrier to entry for a new entrant. In theory, at this time, Neotel possessed the formal right to access the local loop, but ICASA had not promulgated regulations to govern access. Telkom had declined to conclude an infrastructure sharing agreement with Neotel, favouring a case by case approach to managing access.

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[29] Telkom 20F filing to the US securities regulator, as filed with the SEC on July 18 2008.

[30] Between April 2010 to January 2012, only 203 613 geographic numbers have been ported. Number porting is costly for entities with multiple lines, as a R50 fee is payable for each line extension ported.

The Electronic Communications Act of 2005 makes provision for the leasing of Telkom's facilities by other parties. In 2007, a policy decision was taken to commence with local loop unbundling. According to the Ministerial Policy Directive of 2007, ICASA was given until November 2011 to publish local loop unbundling (LLU) regulations.[31] In 2010, ICASA issued regulations for general facilities leasing, but not for LLU. By 2011, ICASA had not instituted any significant steps to effect the orderly implementation of local loop unbundling, save for issuing a Discussion Paper and holding public hearings into the matter. The Discussion Paper outlined various methodologies to effect the policy directive on local loop unbundling. Telkom raised various objections to this process.

In its Findings Note,[32] issued after its hearings on LLU, ICASA found that the obligation to lease facilities applies to all licensees providing Electronic Communications Network Services. The Findings Note also sets out a timetable for fixed-line LLU, which had a numerous steps including further industry consultation and engagement, a regulatory impact assessment on the costs and benefits of the various forms of LLU, followed by market reviews, and the introduction of supplementary LLU Regulations.

In the midst of this vacuum, in December 2011, Neotel made a request to Telkom to lease local loop infrastructure at two specific sites. Neotel framed this request under the provisions of the Electronic Communications Act. Telkom rejected this approach by Neotel on the basis that the regulatory framework envisages a separate process for local loop unbundling and, in any event, Neotel had not framed its request according to the provisions of the ECA. Neotel's subsequent complaint against Telkom[33] was referred by ICASA to the Complaints and Compliance Committee (CCC).[34] The CCC[35] is a mechanism for resolving disputes. Alternatively, ICASA could impose a remedy unilaterally or negotiate with the parties to resolve a matter. The CCC issued an interim order that acknowledges that Neotel's request is legally valid and holds that Telkom's response to Neotel is inadequate. Thus Telkom has contravened Regulation 3 (2) of the ECA Facilities Leasing Regulations of 2010. However, as a matter of practicality, the CCC decided that it would be necessary for the LLU Regulations to be in place to enable the leasing of copper infrastructure.[36] The CCC instructed ICASA to develop terms and conditions consistent with Chapter 8 of the ECA within a period of three months from its decision, which was taken on 18 May 2012.

The LLU process, and the dispute between Telkom and Neotel with regards to the leasing of infrastructure, demonstrates the privileges of incumbency enjoyed by Telkom and the difficulties faced by an entrant in competing with such an incumbent.

The competition authorities, sharing jurisdiction with ICASA, have been called upon to examine the nature of competition in various cases, notably the proposed merger between Telkom and BCX[37] and the enforcement cases brought by the South African VANS Association (SAVA) and the Internet Service Providers Association (ISPA). The underlying theme behind these cases is that of the incumbent attempting to limit the impact of the second national operator's entry on its financial performance by denying it opportunities to acquire clients that would enable to achieve the scale required to become an effective competitor.

Despite findings against Telkom in these matters there has arguably been little direct impact over the past decade.

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[31] These remained outstanding in February 2014.
[32] Findings Note on the ICASA Framework for Introducing Local Loop Unbundling
[33] Under section 43(5)(c) of the ECA.
[34] The matter was heard on 16, 17 and 18 May. Case Number 59/2011 Neotel (Pty) Ltd vs Telkom SA Ltd.
[35] Established in terms of section 17A of the ICASA Act of 2000 as amended
[36] In accordance with s (44)(3)(m) of the ECA.
[37] Telkom SA Limited and Business Connexion Group Ltd. Case No: 51/LM/Jun06

In 2004 the Competition Commission referred a complaint lodged with it in 2002 by SAVA and others.[38] This case was only heard in 2011 by the Competition Tribunal and a ruling against Telkom made in 2012. At the heart of the case is the fact that Telkom's value added network services (VANS) competitors are obliged by law to lease facilities from it and also have to compete with Telkom in the downstream markets. The complaint alleged that the manner in which the incumbent provided them with facilities contravened certain provisions of the Competition Act. In 2009, the Commission referred a second similar case to the Tribunal.

The issues raised in the 2004 case had been considered by SATRA, as it relates to Telkom freezing (under the guise of exclusivity) VANS' access to facilities required for its members to offer services. On 10 September 1999, SATRA found in favour of SAVA. However, the regulator's determination was set aside by the High Court, on procedural grounds.

The lapse between the referral of the complaint to the Tribunal in 2004 and the onset of the hearings in 2011 is due to a number of legal proceedings brought by Telkom and to a much lesser degree, the Commission. Telkom challenged the jurisdiction of the competition authorities on the case. This challenge, which delayed the matter significantly, went all the way to the Supreme Court of Appeal, which rejected Telkom's arguments in November 2009. The complainants alleged that they have faced a range of pricing and non-pricing actions from Telkom that contravene various provisions of the Competition Act. In summary, during the complaint period, Telkom charged higher prices to VANS licensees and their customers to connect to its network than it charged customers connecting to its own VANS networks.

In August 2012 the Tribunal found that Telkom had abused its dominant position, through a refusal to give a competitor access to an essential facility and also through inducing customers to refrain from dealing with rivals.[39] A penalty of R449m was imposed on Telkom. It is worth noting that Telkom was granted a 'discount' to the penalty as the Tribunal pointed out to uncertainty in the telecommunications regulatory framework at the time and also conflicting government objectives, in a situation where the state acted both as policy-maker for the sector and a shareholder in Telkom. Telkom's appeal of the Tribunal ruling was dropped when it settled the second case brought by the Commission.[40] This settlement involved functional separation of Telkom's upstream and downstream activities and commitments to reductions in wholesale prices.

The actions of the state as owner have been contradictory to its aims as a reformer and economic policymaker. It has been argued that the imperatives of privatisation over-rode other equally important policy concerns such as independent regulation and competition (Horwitz and Currie, 2007). Unlike with other entities such as the transport and electricity parastatals, the government shareholding in Telkom is held by the Department of Communications which is also responsible for the policy framework. This compounds the conflict of objectives and adds to the inclination to retard the development of ICASA into a strong regulator. For example, Telkom's long battle to keep competitors from offering voice services was assisted by the Department of Communications delays in providing clarity to the extent to which value added services providers could also provide voice services.[41]

The competition authorities have been able to intervene. The two cases of exclusionary conduct have addressed ways in which the incumbent has exercised its power to undermine its rivals and harm the economy. And, blocking the proposed Telkom-BCX merger prevented the development of market competition in the telecommunications sector being further

[38] The case was brought by 21 complainants, including the South African VANS Association, the Internet Service Providers Association, AT&T Global Network Services South Africa, Internet Solutions and Omnilink.
[39] Tribunal case number 11/CR/Feb04
[40] See Competition Commission media release, 14 June 2013.
[41] Only when Altech brought a case through the courts was it confirmed that under the ECA value added network service providers can convert licences into individual electronic communication services (I-ECNS) and roll out their own networks, as there was no legal monopoly held by Telkom.

undermined. However, the difficulty of prosecuting competition cases, including the litigious tactics of respondents and the technical, industry-specific expertise required, suggests that this cannot be enough in the absence of a strong regulator and a strong competition orientation across government.

The competition authorities play an important role in as ‘doorstep institutions’ that expand access to the economy by new market entrants. However, context matters and the extent to which they can disrupt the traditional distribution of rents and transform society are dependent on the actions of other regulators and policymakers.

4. Critical assessment of the competition regime

At the heart of NWW argument is the combined importance of competition in both the economic and political spheres. Indeed, they argue (2009: 129) that ‘[b]y studying democracy in isolation of markets, political scientists have missed these forces [competitive markets] of political stability.’ By this NWW mean that competitive markets generate long-term prosperity and allow for dynamism in terms of different social groups and interests, which feeds into politics. Conversely, according to NWW, distortions such as from rent-seeking impact on relative prices which, in an economy with competitive markets, generate a response from forces in society recognising the economic costs that are imposed. We argue that this reflects a problematic understanding of competition and markets which not only fails to recognise the extent of market failures, market power and imperfect competition, but that these are intrinsic features of markets.

NWW believe that progress towards an open access order (OAO) involves competition eroding rents, and that this involves liberalisation and independent institutions. NWW further equate international competition with liberalisation and low tariffs, failing to recognise that countries that have industrialised and changed their export capabilities have done so through industrial policies including the use of tariff protection (see, for example, Shafaeddin, 2006; Khan, 2006). The conceptualisation of OAOs as an ideal type against which limited access can be compared is inappropriate. Instead, it is important to understand how interests are aligned with the framework of regulation and competition.

Our case studies address the nature of competition in practice. These are all in the context of changes brought about by political competition in the form of democratic government, and the entrenched interests under apartheid. The competition authorities were apparently designed as institutions to address problems of market power and the rents thereof, as independent bodies, apparently the quintessential ‘open access order’ institutions. However, what is meant by competitive markets, and the proper scope of competition authorities in supporting competition, is highly contested. The competition law and institutional regime that was adopted in South Africa reflected the contest of ideas and interests at the time. In particular, big business interests successfully argued for the need to limit the scope of the legal provisions and have checks and balances on the exercise of the powers of the authorities (Roberts, 2000). The case studies moreover illuminate how the construction of markets and the main participants reflect a country’s economic history, as well as the extent to which the competition regime altered the markets in question.

Perhaps the most obvious point from the three case studies is that liberalised markets are not necessarily competitive. There is a strong path dependency, where the markets are constructed and shaped by the previous investment decisions and state intervention and the interests working behind and through the dominant firms and the state.

The development of fuels and chemicals in South Africa was driven by strategic objectives under apartheid to reduce vulnerability to imported oil and building linkages with minerals and energy. In the maize and wheat milling value chains, the focus historically was on supporting white farmers and their co-operatives. The example of telecommunications is different in that it reflects the ability of new elite interests close to government to access opportunities for rents and how this influenced the outcomes of privatisation and regulation.

In each of the case studies liberalisation was premised on a belief in the benefits of competitive markets (and independent regulators) while the reality has been entrenched dominant firms being able to continue to defend their position through anti-competitive arrangements that replaced the state regulation and ownership that had gone before. Firms have also been able to shape the new regulatory frameworks in their favour. In the case of telecommunications, the relative impotence of the regulator is at least partly a result of the influence of Telkom. In fuel, the regulatory framework has similarly continued to ensure the profit margins of Sasol. In food, the power and influence in the value chain has moved to the firms in processing and providing agricultural inputs and services. These firms coordinated their conduct in order to increase the rents accruing to them. In effect, pro-market reforms have been adopted when incumbents understood that they would not threaten their position or could be undermined (including through collusion).

Entry is also limited. However, while NWWW (2012: 20, table 1.1) find that in South Africa entry requires political connections our industry case studies, aside from telecommunications, instead highlight the intrinsic barriers and obstacles that can be heightened by the strategic behaviour of vertically integrated incumbents. In effect, while NWWW focus on the level and nature of access to economic organisations and political organisations, our analysis points to the deeper ways in which powerful groups shape the development trajectory through shaping the evolution of industries and markets, despite apparent changes in the competition rules.

Altering the balance of power in favour of new entrants and diversified segments of the economy outside of the minerals and energy core depends partly on changing the landscape in terms of the provision of infrastructure, education and policy support. This would be part of a developmental competition policy which needs to be based on coalitions of interests if it is to achieve material changes. Liberalisation does not achieve this as the existing structure remains, whether it is railways lines, grain silos or petroleum pipelines. The provision of public goods and the extension of infrastructure that NWW view as critical to the complementarities of the elite's interests and the population at large have in South Africa instead been restricted by exactly the liberalisation which reduced the regulatory controls inherited from the last apartheid regime. The complementarity which can be realised between active competitive rivalry and infrastructure and public goods cannot be enabled by simple liberalisation. This is true also in terms of entrants, newer firms and smaller business in any given market. These firms may need assistance and support for their market access and for them to grow to be effective competitors. In a sense NWW's 'open access order' and the textbook view of (perfect) competition they adopt are both ideals and of limited, if any, assistance in understanding the real changes in power dynamics which underpins outcomes in a country.

To return to our initial question – why has competition policy in South Africa not played a larger role in altering the development path of the economy by undermining the market power of the dominant firms? And, what would be a more appropriate competition regime in an evolving economy characterised by extensive limitations on access?

South Africa could well have made different choices about the legal provisions in the Competition Act and there were interests that could have been mobilised behind an alternative agenda which gave more enabling powers to the authorities. Countries differ considerably on the weight to put on the ability of such firms to participate in 'fair' market circumstances (see, for example, Budzinski, 2008; Fox, 2003). Indeed, other countries have adopted laws with more powers for the competition authority to intervene to open up markets while South Africa limited the scope to do so as compared not only with other developing countries but also with Europe (Roberts and Tapia, 2014; Roberts, 2012, 2013).

The framing of the South African law took into account prevailing 'international best practice' in the second half of the 1990s, as expressed by institutions such as the World Bank and OECD. The big business constituency in the negotiations pressed very hard on the need not to undermine business confidence and to provide certainty, on which they largely won (Roberts, 2000). The law itself took from recent legislation in jurisdictions such as Canada, Australia and the European Union. It went further to check the power of the institutions by explicitly writing in restrictions on their discretion in exercising a "rule of reason" analysis, especially in the abuse of dominance provisions (Roberts, 2012). South Africa is also unusual in having both a separate Tribunal and specialist Competition Appeal Court. Decisions are only taken through rulings of these bodies, after very lengthy adversarial hearings. Most jurisdictions empower the authority evaluating the conduct to take a decision as part of the wider set of administrative bodies regulating firm behaviour.

There has nevertheless been effective enforcement against collusion which has led to more competitive outcomes, but the same cannot be said for tackling exclusionary abuse of dominance. Competition cases indicate that exclusion and undermining of smaller competitors is happening but the competition authorities have not been very successful in sanctioning the conduct of dominant firms, due in part to the high hurdles under the South African Act and the ability to use legal tactics to delay cases (Roberts, 2012). Greater scope to take a decision giving weight to the interests of smaller firms and entrants as well as the power to enforce such decisions would have made a material difference. At the very least, the decisions taken would have been implemented years earlier.

The competition authorities have also to a large extent been concerned with mergers and, since around 2006, with cartels. This is in the main due to the design of the legislation and the institutions. It is not due to any calculation as to the relative importance of conduct on the part of unilaterally dominant firms, as compared with collusion or mergers which remove competition between firms. Given the legacy of apartheid we argue that much greater weight should have been placed on unilateral conduct. Both cartel enforcement and mergers are premised on there being effective competition in the absence of the agreement or transaction in question. In other words, markets are assumed to generate efficient competitive outcomes in the absence of such arrangements. The abuse of dominance provisions are about addressing the legacy of existing entrenched positions, and the implications of market power that persists.

How does competition law and policy then relate to moving towards meaningful increased access (even if 'open access' is practically untenable)? It is possible that it can be an additional dimension, to those of the extension of impersonal citizenship together with the delivery of public goods by a government with expanded capacity. A country's competition laws, and the values and conventions which develop along with them, have been characterised as its 'economic constitution' (Gerber, 2010). The particular nature of the apartheid regime with economic exclusion at its centre in terms of both explicit blocks on the black population engaging in most types of economic activity and in the skewed provision of public goods meant that advantage was locked in unless a proactive stance is taken to access and entry. A reactive competition regime premised on efficient markets will have limited impact on such entrenched dominance and power. It should also be noted that competition policy and the competition regime extend beyond the law and mandate of the authorities. It includes the links with the regulatory provisions as well as the host of other laws and actions that impact on entry and effective competitive rivalry.

Decisions around an appropriate regime need to take into account the following. First, there are legal choices which determine, given the fact of well-resourced respondents, whether there will be lengthy legal proceedings before any decision can be taken. Second, competition law *and* policy needs to take a dynamic rather than static view, and to be linked with other policies (Possas and Borges, 2009; Amsden and Singh, 1994). Third, it needs to acknowledge a continued active role for the state. This particularly includes addressing obstacles to entry such as the finance needed and the externalities that exist through complementary industrial policies. For example, in South Korea industrial policy supported new activities with temporary protection from competition in the local market for infant industries (or activities) creating what can be characterised as learning rents, while firms were simultaneously forced to compete in export markets (You, 2012). The South Korean competition authorities also play an industrial policy role in actively monitoring the conduct of the large chaebols, such as the pricing and terms in subcontracting arrangements to protect the interests of smaller firms (Roberts, 2013).

There is at least one further layer of analysis. The elite, in pushing for such a framework, maximised their ability to continue to earn short-term rents by being able to delay any changes to conduct with extensive litigation. This is what has been observed in recent years as technical legal points have been taken in a large proportion of cases.[42] This is so, even though adjustment to monopoly pricing in key parts of the economy, such as fixed line telecommunications and broad band pricing, and basic chemicals, would mean a more diversified economy. At the same time, regulation and policy instruments have not been used effectively with one reason given being that the competition authorities are seized with the matters. Those sharing in the rents has, however, been widened through changing ownership of the major corporations.

Our analysis resonates with NWW in the importance of understanding access and meaningful economic participation in concrete terms. Our analysis places greater emphasis on understanding the ways in which markets work in practice and the ability of entrenched businesses to protect their positions and the returns derived from them. This, of course, may mean that political connections in the new democratic dispensation may be the only effective way to access wealth, such as through public tenders, but we would see this at least partly as the result of the failure to achieve meaningful access through a legal and institutional framework that addressed the apartheid legacy in the economy. As others have observed (Habib and Padayachee, 2000; Marais, 1998), in the lead up to the first democratic elections there was a focus by the ANC on the political process and a lack of appreciation of the requirements for economic transformation. Changing the structure of the economy requires a competition policy which actively opens up participation including through the enforcement of competition law but also through a wider set of interventions in terms of the regulatory framework, the provision of economic infrastructure, development finance and industrial policy.

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[42] See the Competition Commission’s Annual Reports for 2011 and 2012, as well as Roberts (2012a).

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