Competition Policy Response to State Intervention: A Competition Practitioner’s Perspective on IPAP5

By KHANYISA QOBO

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Abstract

As an industrial policy with wide-reaching state intervention proposals, the recently launched Industrial Policy Action Plan 5 provides a relevant case study to explore the interface between competition policy and state intervention. This industrial policy makes several bold recommendations related to South Africa’s competition authority; proposing new roles for the Commission to undertake as well as the strengthening of existing competition policy tools. Some of the policy issues emanating from the IPAP5 include proposals for preferential procurement practices, price monitoring and regulation by the Competition Commission, the undertaking of market inquiries and effective reporting, amongst others.

The paper will raise questions on the use of, and the re-arrangement of state institutions by Government to attain economic and public policy objectives. The paper also hopes to explore the extent to which legislation and policies can yield anti-and pro-competitive outcomes; and how competition practitioners respond to such matters.

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1 Qobo heads up the policy analysis in the Advocacy & Stakeholder Relations division at the Competition Commission. This paper is written in the author’s personal capacity.
1. Introduction

The Department of Trade and Industry has released the Industrial Policy Action Plan (IPAP) annually since 2007, making the IPAP 2013/14-2015/16 its fifth iteration (IPAP 5). The primary goal of the IPAPs is to address South Africa’s poverty and unemployment challenges through the promotion of manufacturing sectors, in a manner that will increase value-added exports and absorb labour. Towards this end, IPAP5 makes bold, interventionist recommendations for a range of government entities and stakeholders, including the Competition Commission.

The competition-related proposals in the IPAP5 are revealing of the changing landscape in the interface between regulation and competition policy in South Africa. Government’s shift towards a developmental state\(^2\) indicates a move towards greater state intervention in markets, both in the form of increased regulation in support of socio-economic goals and in terms of increased direct state economic activity\(^3\). Competition authorities have to find new ways to respond to increasing state intervention, both in markets and at the organisational level.

Competition practitioners interface with an interventionist state at two levels: the first is at the level of the market; that is clauses in policies and legislation that affect competition. The second dimension of the interface is at an institutional level- that is state attempts to re-affirm or re-design the functions of the institution at an operational level. Both dimensions of the interface or relationship of competition authorities and the state are fraught with both conflicts and complementarities\(^4\). Regulation can yield anti-competitive outcomes in markets, or facilitate anti-competitive conduct amongst firms. Equally, legislation can also facilitate greater competition amongst firms. The same can be said for institutional interventions by Government.

It is thus important that appropriate and robust tools and frameworks for engagement between the state and the competition authority are developed, so as achieve a balance between competition and other public policy objectives. In response to such, the Competition Commission has established a dedicated advocacy function to monitor, assess and respond to policy-related matters that arise in the regulatory landscape. This is consistent with Section 21 of the Competition Act (89 of 1998) which outlines that the functions of the Commission include the responsibility to review legislation and public regulations and to report any provision in such legislation or regulation that permits anti-competitive behaviour. To further

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\(^2\) A resolution of the ruling party’s (African National Congress) 52\(^{nd}\) National Conference. “Accelerating growth and transforming the economy both require an effective, democratic and developmental state… Our understanding of a developmental state is that it is located at the centre of a mixed economy. It is a state which leads and guides that economy and which intervenes in the interest of the people as a whole” (Economic Transformation, Section 8 and 9).

\(^3\) For more on ‘developmental states’, see Woo-Cummings, 1999; and on South Africa’s status as a developmental state, see chapters in Edigheji, 2010, including a contrarian view by Ben Fine.

\(^4\) See for example Roberts, Das Nair and Mondliwa 2012; or Reports to the 3\(^{rd}\) ICN Annual Conference, 2004, on the subject.
strengthen its advocacy function, the Commission’s ‘policy analysis’ unit is thus tasked, amongst other matters, with tracking and responding to legislation that has competition matters arising; conducting regular environmental analyses to provide intelligence to the institution on external risks and trends; and researching alternative solutions for policy makers in order for policy drafts to meet both competition and public policy goals.

The perspectives on IPAP5 arising herein stem from the work of this unit. The paper seeks to explore competition policy’s response to an interventionist state, through the lens of a competition practitioner’s engagement with IPAP5.

2. The changing nature of state intervention in South Africa

The role of the state in markets became prominent after World War II, when nations sought to reconstruct their economies. State intervention was then deemed an imperative in order to fulfil the goals of full employment and to ease business cycles. State intervention was largely expressed as “centralised co-ordination of economic activities”, through budgetary or monetary policy, industrial policy and institutionalism. The past four decades have however seen a shift towards a neo-liberal form of economics in most Western and in some developing countries. By the late 1970s and ‘80s, many economies outside of the Soviet empire had moved to embrace economic liberalisation and privatisation drives. This was further entrenched in the free market agenda pursued by the Bretton Woods institutions in the developing world, and later re-affirmed by the apparent failure of socialism through the fall of the Soviet Union in 1990.

South Africa’s own economic development trajectory mirrored these global developments. The transition from apartheid to democracy in the late 80s and early 1990s ultimately saw the adoption of a largely neo-liberal macro-economic strategy by the new democratic Government. Faced with the need to integrate into the global economy after many decades of isolation and to attract foreign direct investment, a pragmatic response to the global and domestic realities facing South Africa was the opening of markets for trade, the de-regulation of sectors and privatisation of state-owned enterprises.

It is of interest that the Competition Commission is one of the economic institutions that were established during this context, seemingly affirming the Government’s commitment to free-market ideology. However, the Commission was formed largely as a response to a highly

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5 Chang, 2003
6 Proponents thereof argue against the intervention of states in markets.
7 That is, the International Monetary Fund and the World Bank.
9 Gelb, 1991
10 Fine & Rustomjee note the compromises that were made during negotiations for a political settlement in South Africa, including a move away from “the collectivist, potentially socialist content of the Freedom Charter” (1996: 3)
11 Growth, Employment & Redistribution (GEAR), 1996
12 The Competition Act (89 of 1998) replaced the Competition Board with the Competition Commission, Competition Tribunal and Competition Appeal Court.
concentrated, monopolised economy, whose ownership was in the hands of a few White families, stemming from the apartheid era. The primary intention behind introducing competition law was thus related to the de-concentration of markets, and thereby the transfer of wealth to previously disadvantaged groups, rather than larger market efficiency aims.\(^\text{13}\) Thus, South Africa’s pursuit of free markets in the 1990s was not wholesale, but often counter-balanced with legislation that left a role for the state or for public policy considerations\(^\text{14}\). The public interest considerations in the Competition Act, expounded upon the in next section, also bear testament to a state the sought to address broader public policy issues through the Act, rather than only narrow competition-specific ones.

The past five years however, South Africa has seen a gradual shift towards a more interventionist state, with the Government increasingly assuming a ‘market failure’ approach. Such an approach is undertaken “when the market mechanism ‘fails’ to produce the socially optimal outcome, the state…is expected to step in to correct such failures, using means such as public production, regulation of pricing, franchise bidding, taxes, subsidies and reallocation of property rights”\(^\text{15}\). When an interventionist state perceives market failure, it typically designs policies that are designed to restructure or distort markets, in order to attain a particular public policy objective. Parker and Kirkpatrick explain this as “the means by which the state attempts to affect private sector behaviour…[and] is associated with righting ‘market failures’, including ameliorating the perceived adverse consequences of private enterprise”\(^\text{16}\).

An indicator of the Government’s shift in economic orientation can be witnessed in the transition from GEAR to ASGISA\(^\text{17}\) and later to IPAP (first developed in 2007), the New Growth Path\(^\text{18}\) (launched 2010), and of late, the National Development Plan\(^\text{19}\) (2012). Each of these policies (with the exception of the NDP) have been increasingly interventionist, indicative of a gear-change in South Africa’s approach to economic development, allowing for a greater role of the state in correcting perceived market failures. The IPAP5 carries many of these market-correcting interventions, which are expounded upon in further sections.

Whether South Africa is truly a developmental state in practice, or not, will not be the subject of this paper. After all, regardless of one’s political or economic stance, the fundamental role of the Government is standard across most nations, and is aptly summarised by Vietor (2007: 2): “Government is responsible for providing security, ensuring contracts, assuming risk, managing the macroeconomy, and shaping industrial policy. Government does this by creating and sustaining a variety of institutions- political, social, and economic- through which its people function, interact and compete”. Thus policy-making and the building and support of institutions is central to the role of all Governments, with varying degrees of how these are used.

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\(^{13}\) Lewis, 2012; Hodge, Goga and Moahloli, 2012
\(^{14}\) Fine & Rustomjee, 1996.
\(^{15}\) Chang, 2003, 47
\(^{16}\) Parker, D. & Kirkpatrick, C., 2004
\(^{17}\) Accelerated & Shared Growth Initiative of South Africa, 2006
\(^{18}\) A policy aimed at employment creation and the enhancing of growth through infrastructure and people (skills) development.
\(^{19}\) A long-term blueprint or strategy that South Africa should follow, reaching to economic and social sectors of the nation.
3. The role of competition policy: complementing socio-economic objectives

The Competition Commission plays an important role in the development of the South African economy, through its mandate of promoting, and maintaining fair competition in markets. This mandate is carried out through investigations, market inquiries, merger control and evaluation of restrictive practices and abuse of dominant positions. Through an effective competition regime, a range of transformative goals can be achieved, including the promotion of new entrants in markets as barriers to entry are removed or addressing anti-competitive conduct that may limit the expansion and growth of firms.

Competition policy can also unlock industry potential to generate exports, as more players compete and production efficiencies are pursued. It also widens choices for consumers, both with regards to products and prices. Through effective merger control, there is also mitigation against greater concentration of ownership, thus allowing for more players to participate in the economy. Through public interest considerations in merger control and the effective use of exemption provisions, there can be a prevention of job losses and the promotion of small businesses and those owned by previously disadvantaged groups. In all, an effective competition regime can lead to overall fairness and efficiency of markets, leading to economic growth and development.

The above-mentioned public benefits of competition policy are also captured in law, through several provisions in the Competition Act (89 of 1998). Section 12A (3) of the Act states that public interest considerations should be one of the measures used in merger assessments. This means that in addition to a competition assessment, mergers must also be evaluated on the basis of the merger’s impact on employment, on small businesses, on a particular industrial sector or region, and on the ability of national industries to compete internationally. This provision effectively enables the Commission to approve a merger, which may have failed the competition standard, but pass the public interest standard.

In addition, the Section 10 of the Act allows firms who contribute to a defined set of public objectives to apply for exemption from prosecution for anti-competitive conduct. The defined public objectives relate to the “maintenance or promotion of exports; promotion of the ability of small businesses or firms controlled or owned by historically disadvantaged persons, to become competitive; change in productive capacity necessary to stop decline in an industry; or the economic stability of any industry designated by the Minister, after consulting Minister responsible for that industry”\(^\text{20}\).

As such, although the primary objective is to promote competitive markets, competition policy does share a common purpose with the objectives of industrial policy. This is summarised by Roberts\(^\text{21}\) in that “\textit{competition policy and [interventionist] industrial policy should be viewed as}

\(^{20}\) Section 10(3)(b), Competition Act, 89 of 1998

\(^{21}\) Roberts, 2010: 225
complementary. Dynamic competitive rivalry is a central concern of both, especially with regard to its role in inducing dynamic efficiency, technical progress and investments.”

4. South Africa’s Industrial Policy Strategy

IPAP5 re-iterates the logic of government’s pursuit of economic growth through manufacturing growth- a common thread in previous iterations. Citing manufacturing as a driver of growth in other countries, IPAP5 makes the case that there is a store of value to be unlocked in South Africa’s productive sectors. As a country endowed with raw materials, there is opportunity to create long value chains, from raw materials to finished products. In addition, due to forward and backward linkages to downstream and upstream industries, manufacturing development interventions, where successful, are likely to have multiplier effects on other sectors. This is an economic view consistent with Kaldor’s growth laws, making a positive link between manufacturing sector growth, GDP growth and non-manufacturing sector growth.

IPAP5 acknowledges the current design of the South African economy and the drivers of growth: a negative balance on the current account due to import-led and credit (and consumption)-led growth. Despite this, or perhaps because of it, the IPAP5 adopts a multi-pronged approach to industrial policy, applying trade policy, competition policy, institutionalism, economic and other instruments at the state’s disposal to reach its industrial policy goals. One of Government’s goals expressed in IPAP5, for example, relates to the need to beneficiate primary resources, so as to take advantage of South Africa’s global standing as the country with the largest mineral reserves by creating and exporting finished products. The recent ‘Mineral and Petroleum Resources Development Bill, 2013’ is an expression of this goal.

Another Government objective emerging in IPAP5 is the adoption of local procurement and supplier development measures by Government, in order to promote local industries. The rationale for local procurement is to increase demand (consumption) of locally-produced products or services; thereby boosting the local economy and encouraging firm entry. Other IPAP5 objectives relate to the use of development finance institutions such as the IDC to fund industrial and manufacturing projects identified therein. There are also objectives related to skills development, technology and innovation, the creation of special economic zones and regional integration, in order to create a conducive environment for economic growth. Lastly, the IPAP5 advances the use of competition policy, and the Competition Commission as an institution, to pursue some of Government’s industrial goals.

IPAP5’s multi-pronged approach is consistent with the notion of using industrial policy as a device for economic policy co-ordination. The failure of Government to co-ordinate its policies can be wasteful, particularly in the context of limited resources. Further, there is a need to harness the strategic inter-dependencies from the various policy tools (e.g. trade, competition etc.).

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22 Kaldor, N., 1966. Also referred to as Verdoon’s law

23 Chang, 2003, refers to industrial policy co-ordination within the economy.
The IPAP5 demonstrates a strong intention to align the work of the Competition Commission with that of Government. This has been advanced through provisions related to the setting of strategic priorities; the conducting of market inquiries; and the requirement to report on the work of the Commission to Government. It is acknowledged that ‘institutionalism’ is one of the tools which states can use to intervene in markets\textsuperscript{24}. This is done by establishing political and economic institutions, and developing strong institutional capabilities. Strong or well-performing economic institutions, such as the Commission, can affect the performance of economies, as partially demonstrated in an earlier section. As such, these institutions can be used by governments to shape political, economic or social exchange\textsuperscript{25}, and IPAP5’s proposals seem to be aimed at such.

The balance of the paper addresses how the Commission perceives the competition-related IPAP5 proposals, revealing how the institution can best respond to the interventionist proposals.

5. Aligning priorities: The Prioritisation of Sectors

One of the prevailing themes amongst the five iterations of the IPAP is the identification of strategic sectors for policy intervention\textsuperscript{26}. IPAP5 identifies eight industries that have been supported since 2007 for continued prioritisation, such as clothing, textiles and footwear and agro-processing. It also proposes four new sectors for intervention as Green & Energy-saving industries, Downstream Mineral Beneficiation, Upstream oil & gas services & equipment and Boatbuilding. Additionally, it hints at future Government priority sectors, areas with strong industrial potential where capabilities can be further developed. These are Nuclear, Advanced materials, Aerospace & defence and Electro-technical industries.

Equally, the Commission also undertakes the prioritisation of sectors, as part of its strategic objectives. ‘Prioritisation’ is done through the conducting of scoping exercises and by interacting with various stakeholders- Government, business and civil society. This enables the Commission to identify areas where there may be competition concerns, and to undertake focused and targeted investigations in high-impact sectors of the economy, whilst effectively managing its limited resources.

The Commission’s decision to prioritise certain sectors is informed by anti-competitive effects or outcomes exhibited in a particular sector; critical sectors where anti-competitive firm conduct would have an adverse effect on the welfare of low income consumers or a large

\textsuperscript{24} In economic terms, this can refer to the neo-classical notion of institutional primacy of the market over the state (Chang, 2003). The term is however used here in the political-economy sense, in reference to governance. In both instances however, the term reflects relations between the state and the market, and the institutions that feature in that relationship.
\textsuperscript{25} North, 1990
\textsuperscript{26} IPAP5 categorises priority industries as ‘Scale-up and broaden interventions’, ‘Qualitatively new areas of intervention’, and ‘Development of advanced capabilities’ in the IPAP5.
segment of consumers. In addition, the Commission also takes into account the general developments in the political and economic landscape, in order to better anticipate the implications of government plans and programmes for the competition authorities and for competition policy broadly. For example, a previous prioritisation process of the Commission drew on the Accelerated and Shared Growth Initiative of South Africa (ASGISA), which highlighted Government’s planned infrastructure investment drive, resulting in the Commission’s focus on bid-rigging in construction. Another example is that the Commission’s prioritisation of intermediate industrial products was influenced by the first IPAP. In preparing for its next strategic cycle, the Commission has continued in this vein, considering the issues arising in the National Development Plan, the New Growth Path and the IPAP iterations.

The principle of prioritisation and the Commission’s consideration of macro-economic policy developments are clearly areas of complementarity with the IPAP5. Although there may be variances between the sectors prioritised by the Commission and those by Government, there is clearly an intention for institutional alignment with macro-economic policy goals.

Such alignment can have positive implications for the competition authorities, as it allows for effective policy co-ordination. Stakeholders, such as the Commission, can better understand Government priorities and resource allocation, and can also identify overlaps in their respective areas of focus.

However, the alignment of institutional priorities with those of Government carries an equal risk of subversion of independence. It is possible that the Commission’s work agenda may be dictated to by policy makers, whose goals extend beyond competition, rather than the institution’s primary objective of uncovering anti-competitive conduct in markets and promoting a competition culture therein.

6. Towards institutional alignment: Regular Conducting Of Market Inquiries

The IPAP5 recommends that the Commission should initiate multiple Market Inquiries in strategic sectors, with a minimum of one inquiry per year, and that these sectors should be identified in consultation with Government. Consistent with the IPAP5 proposal, the Competition Amendment Act’s provisions (1 of 2009) related to market inquiries were proclaimed on the 01st of April 2013. The said provisions empower the Commission to undertake a “formal inquiry in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm”27.

Market inquiries, or market studies, as they are sometimes called, are “research projects conducted to gain an in-depth understanding of how sectors, markets, market practices are working”28. They provide a complimentary role to the enforcement work of competition authorities, as they allow for a broad probe into a market, sector or industry, without targeting

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27 Section 43A, Competition Amendment Act, 1 of 2009.
28 ICN Good Practice Handbook, p.5.
specific firms. There is a spectrum of methods in which market inquiries can be conducted, from desktop-based studies up to a formal tribunal-type of inquiry\textsuperscript{29}. A range of research methods can also be adopted by the competition authority, including private consultations or interviews, surveys, ‘mystery shopping’, data reviews or questionnaires, amongst others.

The Commission is currently in preparatory mode to undertake a market inquiry into private healthcare in the latter half of 2013. It is in the process of drafting rules and regulations, to guide the institution internally, and to consider ways of embedding of market inquiries within the institution. These organisational preparations are aimed at strengthening and readying the authority to undertake regular inquiries into complex markets in the future, as an expression of the provisions in the Amendment Act, and equally in line with the proposals in IPAP5.

However, it is worth noting that provisions in the Amendment Act empower the Commission to initiate market inquiries independently, without the requirement to consult with the Government or any other party, as the IPAP5 seeks to propose. The Commission may also undertake inquiries in response to a request by the Minister (of Economic Development), if it has reasons to believe that the market may have anti-competitive features, or to achieve the purposes of the Competition Act. Section 43B(1) states that the Commission may initiate a market inquiry "on its own initiative, or in response to a request from the Minister"\textsuperscript{30}.

It is important that the competition authority is able to assert its independence in such instances, without a perceived contradiction on its commitment to applying market inquisitorial tools that are suggested in the IPAP5. Thus once again, the directive in IPAP5 in this instance is amenable for competition practitioners and complementary to competition policy, but requires less Government control of its application. There is a need for some distance between the state and its institutions\textsuperscript{31}, especially those with a mandate over markets. This is important for the preservation of the integrity and credibility of the institutions in the course in the pursuit of their mandate.

7. Policy co-ordination: Reporting to Government on the Commission’s work

One of the key milestones identified in IPAP5 is that the Competition Commission should report on the impact that competition enforcement has had in particular markets. It is also proposed that in its reporting, the Commission should identify “appropriate complimentary measures”\textsuperscript{32} that other government departments can adopt towards the goal of increasing competition in those markets.

\textsuperscript{29} The Commission undertook the ‘Banking Enquiry’ using this methodology, whereby a panel (supported by a team of technical experts) was constituted to oversee proceedings which entailed public hearings.

\textsuperscript{30} Consistent with international best-practice, the Commission should take a range of factors into consideration before such initiation, including considering complaints or concerns from stakeholders, markets with frequent and/or high-impact\textsuperscript{30} competition-related problems that cannot be addressed through competition law exclusively, public interest and more

\textsuperscript{31} Chang, 2003, refers to different degrees of state intervention and how they can be measured.

\textsuperscript{32} IPAP5, p.53
Government’s open approach in promoting competition is certainly one that should be welcomed by competition practitioners. After all, the promotion of competition in markets cannot be attained by competition law alone, but rather through competition policy broadly, which includes a pro-competitive regulatory environment. The IPAP5 proposal presents the Commission with an opportunity to enhance the quality of its engagements with policy makers.

With regards to impact assessments, the Commission regularly accounts to, and reports to Parliament (the Portfolio Committee on Economic Development) on its operations and the outcomes of its work. In addition, a detailed and audited ‘Annual Report’, is published for all stakeholders and the public to remain informed on the Commission’s work. However, there is a gap and an opportunity for the Commission to improve on the manner in which it measures the impact of its work on consumers and the general public, and how it communicates such. This is a sentiment that has been expressed in Parliament as well. In response, the Commission is in the process of developing impact assessment tools and frameworks, and has committed to undertaking regular impact assessments per annum, as part of its strategic objectives for 2014-2019.

It is evident that the IPAP5 interventions related to reporting requirements can lead to improved accountability between the competition agency, the Government and the public. It also provides an opportunity for the Commission to strengthen its organisational capabilities, through the continual development of tools for application. Further, it allows for better policy co-ordination, as Government and its institutions are abreast of each other’s work. Finally, such a proposal is an opportunity for the Commission to educate its stakeholders, including Government, so as to empower policy makers on designing policies that reflect “appropriate complementary measures”.

The quest by Government to develop a more stringent reporting culture from its institutions can however have a discomforting slant. This has been evident in some legislation introduced in Parliament, which contains provisions which further re-affirm IPAP5’s proposal of “reporting”, such as the Marketing of Agricultural Products Amendment Bill, 2013, for example. The said Bill proposes that “the Minister [of Department of Agriculture, Forestry and Fisheries] shall, subject to applicable provisions of Competition Act, 1998 (Act No. 89 of 1998), be consulted for advice during the Competition Commission’s investigations relating to mergers and acquisitions that affect the agricultural, forestry and fisheries industries and any other matter relating to uncompetitive practices in agricultural, forestry and fisheries markets, before a final decision is taken”.

In response to such, it is important that the Commission emphasises the value and importance of stakeholder consultations in the carrying out of investigations and merger assessments. Indeed, several provisions in the Competition Act promote effective stakeholder consultations,

33 Members of Parliament in the Portfolio Committee on Economic Development raised several questions on the matter, when the Commission presented its annual report (20 November 2012).
34 Gazette No. 36562, 14 June 2013
35 Section 27(2)
such as Section 13B (3) which allows for participation during merger assessments, or merger intervention at the Competition Tribunal for stakeholders who may be dissatisfied with the Commission’s decision.

In the same vein however, the Competition Act is clear on the need for institutional independence and impartiality of the Commission. Section 20 (3) further places an obligation on the state to support this by stating that “Each organ of state must assist the Commission to maintain its independence and impartiality, and to effectively carry out its powers and duties”. State intervention mechanisms through institutionalism, should thus be effected within the ambit of the Competition Act, balancing the executive control with institutional autonomy.

8. Institutional re-design: Can the Commission evolve to become a sector regulator?

The IPAP5 motivates for the need for Government to intervene in steel markets through the setting of lower prices, the limiting of exports of iron ore and in the setting of national production targets. IPAP5 specifically recommends that the Competition Act be amended to enable the Commission to undertake the role of price setting and monitoring in these markets. It states that: “To finalise amendments to the Competition Act to ensure that iron ore price concessions accruing to the primary steel industry are passed on to downstream steel users. This will include appropriate powers to determine pricing methodologies, monitor compliance and sanction non-compliance”. This proposal effectively implies that the Commission should assume the role of a sector regulator in (steel) markets.

This matter is one of concern, since performing the role of a market (price) regulator would be a challenge to the core (and current) mandate of the Competition Commission. There is somewhat of a contradiction between the competition authority’s mandate of pursuing free and fair competition in markets with one set of tools, whilst simultaneously intervening in markets through price-setting, possibly towards uncompetitive outcomes. IPAP5 does not address how such tensions and contradictions can be accommodated, nor does it explain the choice of the Competition Commission in carrying out this task.

The matter of transforming the Competition Commission to become a sector regulator speaks deeply to fundamental questions of purpose and positioning of competition authorities within the national economic institutional framework. It is accepted that economic and political institutions are typically devised by governments for particular goals and outcomes. As such, as society transitions, so there may be a need to review institutional mandates and structures, in order to align them with changing socio-political and economic realities a country faces. Where this is the case then, it is prudent for Government to firstly, calculate the cost-benefits

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36 “Any person, whether or not a party to or a participant in merger proceedings, may voluntarily file any document, affidavit, statement or other relevant information in respect of that merger.”
37 “The Competition Commission is independent and subject only to the Constitution and the law” and that it “must be impartial and must perform its functions without fear, favour or prejudice”, Section 20 (1)(a) and (b)
38 IPAP 2013/14- 2015/16, p.126
39 North, D.C., 1990
of such changes, and the likely impact on society, on the fiscus, on the economy and on key economic and political stakeholders (domestic and international).

Secondly, policy makers should assess the capacity of the proposed (new or existing) institution in carrying out a new mandate, with regards to skills, human and financial resources and its existing mandate before making regulatory pronouncements. Practical questions of feasibility should remain at the forefront in policy making. Thirdly, it is important that policymakers consider jurisdictional overlaps with other Government agencies or departments when developing policy proposals. It is possible that there may be an existing agency or regulator that may be better positioned, or already partially carrying out the proposed mandate. Finally, Government should consider alternative policy options when pursuing a particular policy goal, either than regulation or institutional changes.

One would thus advocate for a cautionary, well-considered and exhaustive policy approach prior to the introduction of regulatory measures that may fundamentally change the purpose of an institution.

9. State intervention in scrap metals market: competition response to price setting

The principle of price-setting in the steel market proposed in IPAP5 is worth interrogating further, particularly in light of the recently introduced regulation from ITAC. The "Export Control Guidelines on the Exportation of Ferrous and Non-Ferrous Waste and Scrap 2013" gives literal expression to the objectives of state intervention in the scrap metals market (which is part of the steel value chain) set out in IPAP5, as it sets a preference price for scrap metal producers, and also controls export volumes through licensing conditions.

The ITAC regulation has elicited a range of advocacy-related complaints, sent to the Commission in the past three months. It is the view of industry stakeholders that the provisions in the “Export Control” regulations will yield to anti-competitive outcomes for two main reasons. It is argued that, in practice, the discount or preference price can lead to unequal access to export markets, as (vertically integrated) buyers may make preference price offers to rival producers, enabling their subsidiaries or affiliates to sell internationally at export prices. Another competition argument raised is that the administration of the export control (licensing) may lead to inappropriate information exchange, a basis for anti-competitive collusion.

The Commission’s response to the regulations is dictated by the Competition Act. One of the cited means to assess whether competition law should prevail over state regulation is that of

40 Ogus, 2004 identifies four main types of arrangements Governments use to effect a regulatory agency, within a wide spectrum of alternatives.
41 “Export Control” hereinafter.
42 Export Parity Price-20% discount
43 Section 5 of the “Export Control Guidelines” for example states that industry players “may meet as and when required to discuss issues specific to the administration of the price preference system”.

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determining hierarchical primacy of the legislation within the legal system. The ICN notes that “if the legal system confers upon antitrust laws a super-primary rank, antitrust laws have the legal force to prevail over conflicting regulatory measures enacted by Parliament or by the Government”. This is not the case in the South African legal framework, as the Act does not permit the Commission to pursue enforcement action against Government or to override Government policy.

Secondly, it is possible that regulation may be drafted in a manner that either compels market players to engage in anti-competitive conduct, or it may facilitate and encourage anti-competitive outcomes or conduct, as suggested by complainants of the “Export Control” regulation. In the former instance, the Competition Act’s provisions for exemption applications would be able to effectively accommodate the matter if the Government or affected firm(s) applied for such. In the absence of such, the Commission would likely engage in advocacy with the regulating entity, so as to influence the legislative provisions towards a pro-competitive stance. This is a typical response where regulation is perceived to facilitate anti-competitive outcomes or conduct. It is also common practice that the Commission would encourage or offer alternative policy proposals for the regulating entity to consider.

Finally, when evaluating whether to pursue an advocacy route in response to legislation, the Commission considers the overall purpose and objective of the policy. In this instance, the policy’s overarching goal of access to affordable and quality scrap metal supply is indisputable, particularly in the context of the processing industry being in decline, declining employment and no new entrants in the industry. From the Commission’s own experience in the scrap metals market specifically, and the steel market broadly, the need for structural change in the markets would be welcomed- a goal which Government seeks through intervention. The industry reveals deep-seated (historical) challenges, which may not be easily and solely remedied by competition law.

The fundamental question for an interventionist Government is thus about how to find the right policy tools for the policy problem, if it is indeed a policy problem. To effectively arrive at appropriate answers would require a thorough assessment of the market problems; and the likely impact of macro and micro policy tools that may be applied. From a competition perspective, one solution in the steel market could be in the form of a new entrant. With effective engagement between competition practitioners and policy makers, a range of alternative policy solutions can be found, or current policy proposals can be strengthened in a manner that both competition law and public policy objectives can be attained.

10. Competition policy response to Preferential Procurement Practices

The IPAP advances preferential procurement by public sector entities as one of its pillars in promoting local industry. The reasoning is that the local procurement of goods and services

45 Section 10, Competition Act (89 of 1998)
can lead to the promotion of local industries, the prevention of job losses and prevent total collapse of ‘at-risk’ strategic industries with competitiveness potential. Preferential procurement is a goal appearing in previous iterations of IPAP, such that the Department of Economic Development developed a Local Procurement Accord in 2011, signed by stakeholders from Government, business and the social sector. Preferential procurement is thus already being practiced by state entities in mega public sector projects related to construction, energy and pharmaceuticals, and the IPAP5 cites these as success models of this intervention.

The localisation drive by Government affects the Commission in two ways: firstly as a public entity which is a procurer of goods & services; and secondly, as a promoter of competition in the context of a localisation policy which has the potential to distort markets in an uncompetitive manner.

From a competition policy perspective, local procurement drives by governments could be viewed as potentially anti-competitive, as they restrict competition by favouring local producers over importers purely based on the geographic location of the producer and not on efficiency grounds. The resultant reduction in the number of players in a market, due to the stifling of international competitors, reduces consumer choice with regards to price and to quality. Local procurement drives could also lead to production inefficiencies, as innovation is stifled by the protectionist measures.

However, the protection of local industries and the advocating of ‘national champions’ in particular sectors are one of the tools historically and currently used by many Governments to stimulate economic growth, protect against job-losses and to create competitive advantages. Local procurement initiatives essentially generate demand or create a market, where there previously was none. This could stimulate the entry of new players into the market or the growth of small businesses, albeit local ones. In other words, local procurement policies could have a multiplier effect on the economy, through generating backward economic linkages for the benefit of South African firms.

It is understood that it is the prerogative of Government to weigh up the policy options, and where deemed to be strategic in the long run, introduce protectionist measures. From a practitioner’s perspective however, caution would be raised on the blind application of localisation laws, as these may have a counter-productive effect in the long run. In response to the IPAP5 proposal, it would thus be emphasised that ‘local procurement’ drives should ideally be limited to defined strategic industries; that the expected manufacturing gains be defined up-front; and that a time-frame during which the protection shall stand be determined.

11. Conclusion
The need for competition policy to respond to state intervention mechanisms such as industrial policy demonstrates that competition law does not exist in a vacuum, but within a complex policy environment. The paper has effectively highlighted the complex dynamic in the interface of competition policy & state intervention. The paper has sought to reveal how competition policy responds to aspects of the IPAP5. It has been revealed that IPAP5’s effect on competition policy has been at two levels: through institutional interventions, and secondly, though proposals that have a competition impact on markets.
In the former instance, it is apparent that some IPAP5 proposals are aimed at institutional re-design and re-orientation. These include proposals related to the conducting of market inquiries, reporting on impact of the Commission’s work, and extending the mandate of the Commission to regulate prices. It has been argued that such proposals have the benefit of strengthening the Commission at an institutional level, whilst improving the lines of accountability with the state and the public. However, they also pose a challenge to institutional autonomy and independence, which competition practitioners have to prudently manage.

Regarding IPAP5 competition-related proposals: it has been argued that Government legislation and policy can have both a negative or positive impact on the state of competition in markets. A case has been made however, that there are instances when competition policy can be subsumed by large public policy objectives; and the IPAP5 proposals related to preferential procurement reveal this.

Finally, it has been suggested that Government could adopt a more robust and exhaustive approach in policy making. This is the case in market-interventionist policies such as the price setting proposals in IPAP5; and equally in institutional re-engineering proposals such as the Commission’s role as a regulator.

IPAP5’s proposals on competition policy have revealed the need for enhanced communication between the Government and the Commission on policy matters. Most importantly, the IPAP5 has created an opportunity for both Government and competition authorities to harness existing tools of engagement and to develop robust frameworks that can better align competition policy with public policy objectives.
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