

What is competition good for – weighing the wider benefits of competition and the costs of pursuing non-competition objectives

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ABSTRACT:

Over the past five years, the South African competition authorities have increasingly struggled to balance a competition test with defined public interest criteria (Metropolitan, Kansai, Walmart). Other agencies (ICASA, NERSA), and government ministries more generally, have also wrestled with how competition policy might fit into wider government policies and even broader concepts of the “public interest”, including notions of equality, fairness and access. In this paper we discuss some of key events in this ongoing debate, and we anticipate some of the battles that are likely to come. Furthermore, we set out a rigorous framework and provide a review of the available research and literature to discuss the effects of competition (both positive and negative) in multiple dimensions, in order to assess how far a “pure competition” test might go in achieving a broad range of efficiency, growth, and employment objectives. Such a comprehensive and evidence based approach is essential in understanding the costs and benefits of the existing pursuit of multiple (and often apparently conflicting) objectives, and will allow decision makers to more logically assess the trade-offs that they will continue to be confronted with.

¹ Norton’s Inc and RBB Economics, respectively. This paper was written with the intention of stimulating debate and discussion on a number of novel and on-going developments in an unsettled area of policy and research both in South Africa and internationally. As such, it does not represent advice or recommendations and contains opinions and proposals in order to achieve its objective within the constraints of a written paper. This paper may not reflect the views or opinions of Nortons Inc. nor RBB Economics.

In this paper we consider the role of competition in the economy and in particular motivate and advocate a more holistic and evidence based consideration of the effects of competition on other economic objectives. We also discuss the costs of pursuing non-competition objectives through competition law. We consider that this evidence based approach is essential in assessing the merits of explicitly pursuing these non-competition objectives through competition policy measures.

The Objectives of the South African Competition Act

The Preamble to the Competition Act starts with a recognition of the historical context, and then states the central importance of credible enforcement as a prerequisite for an efficiency economy and states that competition is a means to providing better outcomes for all South Africans:

“credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy,” and “an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans.”

A focus on the efficiency benefits of competition, and then considering the wider benefits that can flow from that efficiency is consistent with pursuing a “pure competition” test.

The preamble then goes on to list a number of objectives, not only encompassing efficiency and equality of opportunity to compete, but also the regulation of “the transfer of economic ownership in keeping with the public interest”.

Chapter 1, Section 2 of the Act then sets out the purpose of the Act, which is to “promote and maintain competition”. The Act then goes on to state that the purpose of the promotion and maintenance of competition is to improve efficiency, and in addition to other direct competition objectives, such as providing customers with competitive prices and product choices and ensuring that SMMEs have an equal opportunity to participate in the economy. Two further targeted results from competition are noted: the promotion of employment (Chapter 1(2)(c)), and the promotion of a greater spread of ownership (Chapter 1(2)(f)). It is interesting that the purpose is stated as the promotion and maintenance of competition, but that the results targeted include some non-competition factors. This focus on competition, but then considering the potential wider benefits of competition is again consistent with pursuing a pure competition test.

Chapter 3 of the Act deals with merger control, and in particular notes that in addition to a competition test, a public interest test must also be undertaken. In particular:

“When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on—

- a) a particular industrial sector or region;*

- b) *employment;*
- c) *the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and*
- d) *the ability of national industries to compete in international markets.”*

Accordingly, the stated purpose of the Competition Act is to promote and maintain competition. The Act primarily hopes, by way of these objectives, to achieve efficiency related benefits that are direct results of a pure competition focus, although the Act also mentions the objectives of employment and achieving a wider spread of ownership, which may be results either directly of competition itself, or of the efficiency that results from competition. In this paper first we explore the degree to which there is tension between competition and non-competition objectives, and second we explore the degree to which the narrow or short sighted pursuit of non-competition objectives as a standalone test might actually be harmful, not only for the direct, efficiency objectives of a pure competition test, but also for less direct results of competition such as growth and employment.

What is competition?

Competition guides the incentives that all firms have to pursue profits, and enhances their incentives to provide better products, at better prices, for the good of consumers. Private companies seek profits. Companies can generate higher profits by some combination of increasing prices, selling more, or cutting costs. Even a single firm, pursuing profits, will often find it in its own self-interest to share some of the benefits of efficiencies that it achieves, or new products that it innovates, with consumers. However, a single firm will not often face a stark choice between seeking efficiencies, or lowering prices, and ceasing to exist.

In contrast, when in rivalry with others, companies pursuing profits are forced to offer consumers better bargains in order to win their custom, and stay in business. Accordingly, that rivalry, or competition, is the key ingredient which constrains profit seeking motives to heighten and enhance the potential for efficient outcomes for the good of consumers.

Competition acts as a force that improves economic efficiency, and improves outcomes for consumers.

Furthermore, competition drives a more efficient allocation of resources, resulting in lower prices and better quality products for customers. Lower prices typically result in an expansion of output. Output expansion, combined with the effect of lower prices in respect of one good or service frees up resources to be spent in other areas of the economy. The result is likely to be higher output and, most importantly for emerging economies, employment.

Competition is also likely to have a positive impact on innovation. Although nuanced, greater competition is likely to spur firms to innovate more, to keep ahead of their competitors.

The effects of competition in the market place on prices is probably the most widely discussed topic of the academic literature on industrial organization in the past century. Competition serves to reduce prices, up until the point that perfectly competitive firms, each with no price setting power, earn no economic profits.²

Economic theory and basic intuition suggest that demand for a product and its price is typically negatively related. The higher the price for a product the less that consumers wish to purchase. Increasing competition will have a positive effect on output by reducing prices and thus increasing demand for the goods in which competition has risen.

In regard to the effect of competition on employment, at the most basic level, from a static analysis of the effects of increased competition on prices and output it follows that an increased competitive environment increases demand for labour in order to be able to serve the increase in demand for output. Following a reduction in market concentration and power one should thus expect to see an increase in employment.

However, there are also more dynamic effects of increased competition, mostly due to product market deregulation, on employment. The most commonly cited mechanism by which increased competition has dynamic effects on employment is through its effect on wages. Nickell (1999) proposes a general equilibrium model in which collective bargaining, or any other profit sharing mechanism, might lead to monopoly rents being shared among workers. This suggests that at the industry level a decrease in market power should lead both to lower wages, and therefore to an increase in demand for labour, and a resulting increase in employment. The effects of a general rise in competition throughout the economy are more nuanced. Nickell concludes that according to standard union models in general equilibrium increases in product market competition should lead to both higher employment and higher wages.³ Blanchard and Giavazzi (2001) confirm this result developing a different general equilibrium model of product market and labour market regulation.⁴ Fiori et al (2007) develop yet another general equilibrium model with product market and labour market regulation, and find that increased product market competition has a positive effect on employment. In particular, they find that employment gains of increased competition are largest in economies in which bargaining power of workers is high. The intuition behind this result is that in economies where workers only have low bargaining power real wages will be close to market clearing levels, thus leaving only little room for product market deregulation to affect labour market outcomes. They test the model's predictions on harmonized panel data for OECD countries over the period 1980-2002, using dynamic model specifications, and are able to confirm that product market deregulation has produced substantial employment gains. They can also confirm that employment gains of product market deregulation were higher when bargaining power was higher initially, but that product market deregulation has led to reduced worker's bargaining power over time.⁵ The finding that product market regulation has negatively impacted employment in the OECD is

² See D Kreps, *A Course in Microeconomic Theory*, Princeton University Press [1990]

³ Nickell, Stephen (1999) – *Product Markets and Labour Markets*

⁴ O Blanchard and F Giavazzi : “Macroeconomic Effects of Regulation and Deregulation in Goods and Labor Markets“ (2000)

⁵ G Fiori *et al* : “Employment outcomes and the interaction between product and labor market deregulation: are they substitutes or complements?“ (2007)

independently supported by a number of other studies, such as Boeri et al (2000),⁶ and Berger and Danninger (2007).⁷

Innovation can take many forms: innovative technology can improve product quality, decrease production costs, or be in the form of a completely new product. A good illustration of how competition might foster cost innovation (and thereby dynamic efficiency) is given by Motta (2004). Motta considers the decision of whether to adopt a new technology that will reduce marginal costs, and shows that in his model competition can raise the incentives to innovate. In general, the reason why competition might foster innovation is because competitive markets force firms to innovate in order to remain in the market and not make losses. The reward of having lower marginal costs than one's competitors is being able to set prices just below that of the other firms' marginal costs and thus gaining all market shares until the competition has also adopted (or improved on) the innovation. Furthermore, it forces competitors that do not innovate to exit the market. A monopolist on the other hand does not gain any market share by innovating but only considers the additional profit he can gain by having lower marginal costs.⁸ While competition is not beneficial for innovation in all models,⁹ in most cases, more competitive markets create lower prices and higher output. An economy in the process of becoming more competitive should also experience higher growth (through the static increase in output). More dynamic, long-term responses of competition on growth are closely linked to its influence on innovation.

Function of competition law

Competition law exists to try and protect, enhance and promote competition.

Competition law in South Africa primarily concerns three areas:

- Merger control. Merger control seeks to prevent mergers that would otherwise lead to a reduction in competition.
- Agreements. The section of the Competition Act which deals with agreements between two or more firms refers to restrictive practices. This section attempts to prevent agreements between firms that would either reduce or impede competition.
- Single firm conduct. Competition policy seeks to prevent single firms, which are in a powerful position, from abusing that power either to exclude other competitors, or to exploit customers.

In this paper we focus primarily on merger control, and on the relationship between a pure competition test, and public interest considerations, particularly those regarding employment.

Merger control in South Africa

Once a merger has been notified, the competition authorities are required to apply two distinct tests, both of which must be passed in order for the merger to be approved: the first

⁶ B Tito *et al*: "Regulation and Labour Market Performance" (2000)

⁷ H Berger and S Danninger : "The Employment Effects Of Labor And Product Markets Deregulation And Their Implications For Structural Reform" (2007)

⁸ M Motta : *Competition Policy: Theory and Practice*, Cambridge University Press [2004]

⁹ See P Aghion and R Griffith: *Competition and Growth, Reconciling Theory and Evidence*, The MIT Press [2008]

is a “pure competition” analysis, and the second relates to public interest. In the initial competition analysis, the authorities must determine whether the merger will substantially prevent or lessen competition, and, if so, whether any technological, efficiency or other pro-competitive gains are likely to result from the merger that may offset the lessening of competition.¹⁰

The second and discrete test, is the public interest test, which requires the competition authorities to consider whether the merger can be justified on public interest grounds.

Following consideration of the merger by the Competition Commission (in respect of notified small and intermediate mergers) and the Competition Tribunal (in the case of large mergers), the relevant competition authority has three options: it must approve the merger; approve the merger subject to any conditions; or prohibit the implementation of the merger. Again, the competition authorities are vested with wide powers, particularly in respect of the implementation of conditions, which may extend beyond those aimed strictly at promoting competition, and which may, extend into the realm of the public interest.¹¹

Intervention in South African competition law

In recognition of the broader social setting of domestic merger control, rather than restraint and limitation to the classic antitrust-based legal context, the South African Competition Act gives extensive rights to third parties to participate in merger proceedings. Section 53 sets out the categories of persons who may participate in merger proceedings, which includes: the merging parties, the Competition Commission and, in certain circumstances, the relevant trade union and the Minister (originally of Trade and Industry, now of Economic Development). Furthermore, there is a broad residual category in section 53 which provides that “*any other person [may participate in merger proceedings] if the Tribunal recognises them as a participant.*”¹² Section 13A(2) of the Act requires the merging parties to forward a copy of the merger notification (excluding confidential data) on the representative of merging firms’ employees’ trade union or employee group, presumably so that the relevant union or employees’ group can decide whether or not to intervene in the proceedings.

The Tribunal has been reluctant to shut out third parties from intervening in merger proceedings, and has demonstrated a willingness to receive third-party evidence relevant to its understanding of the relevant market from customers, suppliers and competitors,¹³ and to permit the intervening party a wide scope to participate in the proceedings.¹⁴ The extensive participatory rights granted by the Tribunal to third parties have in some cases allowed the extensive pursuit of non-competition objectives. However, as discussed further below, there is a risk that the consideration of public interest issues, and in particular the effect on employment does not necessarily promote employment, viewed generally, but may in fact stifle the creation of new jobs, through focussing narrowly on the short term impact of jobs

¹⁰ Section 12A(1)(a) of the South African Competition Act.

¹¹ See J Oxenham: “Balancing public interest merger considerations before Sub-Saharan African competition jurisdictions with the quest for multi-jurisdictional merger control certainty”, *US-China Law Review*, 211. (2013)

¹² Although the Competition Tribunal Rules limit the participation of third parties to those with a “material interest” in the proceedings, the Rules are subject to the Competition Act, and since the Act does not require a third party to demonstrate a material interest, the Rules cannot impose such a requirement. See Sutherland et al. *Competition Law of South Africa*, December 2013, ch. 11.4.3.2.

¹³ *Competition Commission v American Natural Soda Ash Corp* 49/CR/Apr00.

¹⁴ *Healthbridge (Pty) Ltd v Digital Healthcare Solutions (Pty) Ltd* 41/AM/Jun02.

within the merging parties, while neglecting wider effects on employment, and by escalating friction between the union and management.

This is not a trivial concern, as we observe rising intervention by and influence of third parties in mergers and the increasing significance of the public interest criterion, particularly as regards the effect of the merger on employment.

In *Anglo South Africa Capital*,¹⁵ the Competition Appeal Court advised that intervention should generally be permitted where the party seeking to intervene can establish a theory of harm or lead evidence which the Tribunal believes is not already being addressed by the Commission, and that the rights of the intervening party should generally be confined to leading evidence and cross-examining witnesses. This low threshold was applied in the *Kansai* decision, in which the DTI was granted intervention rights on the basis that it proposed the theory of harm that the take-over constituted a direct threat to the South African government's localization drive and that it may impact on employment levels.

The former chairperson of the South African Competition Tribunal, David Lewis, has acknowledged the importance of intervention particularly in respect of a young authority, which benefitted from the extra information and evidence placed before it:

"[the broad standing to intervene] is also driven by the unique quality of information and analysis that knowledgeable insiders are able to bring to inquiries as fact- and context-specific as merger inquiries. This was particularly so in the early years of the Commission's life."¹⁶

However, these benefits to intervention do not come without a cost, and particularly now that the competition authorities in South Africa have greater specialist experience and are arguably more qualified, there is an argument that there is less need for intervention than there might have been previously.

The risk of delay and abuse of the process by intervening parties might counteract the positive effects of the intervention. David Lewis acknowledges that:

"As the Commission's investigatory prowess has improved, the utility of permissive intervention has decreased and its dangers have increased concomitantly. The danger is not so much that interveners, particularly those who are competitors, will provide self-interested information and analyses, but rather that they will use intervention as a mechanism for delaying and obstructing transactions in which time is often extremely costly. Recent years have been marked by interventions that have not contributed an iota of useful insight to the adjudicators, but have simply served to harass their competitors."¹⁷

¹⁵ *Anglo South Africa Capital (Pty) Ltd & 3 Others and Industrial Development Corporation of South Africa & Another* [26/CAC/Dec02].

¹⁶ D Lewis: *Thieves at the Dinner Table*, 2012, 88.

¹⁷ D Lewis, *Thieves at the Dinner Table*, 2012, 90.

In the *M-Net-SuperSport* transaction,¹⁸ the Tribunal acknowledged that the right of corporate and other citizens to participate in administrative decisions that appear to affect their interests, are “grossly abused”.

Excessive permission of interventions on public interest grounds can cause delays and uncertainty in the merger process which can undermine the aims of the Competition Act.

Developments around the public interest in South African merger control

In this section, we discuss developments in merger analysis in South Africa and demonstrate the increasing prevalence of third party participation and public interest theories before the competition authorities. We also show that authorities increasingly approve mergers subject to conditions to protect the public interest.

*Unilever PLC/Competition Commission and CEPPWAWU*¹⁹

Three unions played a prominent role in the merger between Unilever and Robertsons which came before the Competition Tribunal in 2001. Their emphasis, unsurprisingly, was on the effect of the merger on employment, and in particular the number of potential job losses. The unions directed the Tribunal’s attention to the “*large number of job losses resulting from the merger induced redundancies. They stressed the effects these retrenchments will have on the retrenched workers, their dependents and society in general in a situation where the unemployment rate is already very high. In summary the view of the Unions is that this merger was not in the interest of broader society, but rather of the merging parties alone.*”²⁰

The Tribunal, while sympathetic to the concerns of the unions, stressed that there are alternative, more appropriate fora to deal with these concerns aside from competition law. It held:

*“the most powerful channel available to the unions to address employment related issues arising from the merger is the Labour Relations Act or private collective bargaining agreements where they exist. Although we welcome input by the unions and employees at Tribunal meetings clearly our decisions have to balance impacts on competition with employment impacts whereas the concerns of the Labour Relations Act and other collective bargaining arrangements have no such balancing requirement.”*²¹

The Tribunal did, however, impose a condition to its approval of the merger relating to employment, namely: that once the sale agreement with the proposed buyer had been concluded the merging parties must:

- Provide a summary of the effect of the proposed sale on employment on any party entitled to be given notice of the merger in terms of section 13A(2) of the Act; and

¹⁸ *Caxton and Another v Naspers Ltd and Others* (16/FN/Mar04).

¹⁹ *Unilever Plc, Unifoods, a division of Unilever South Africa (Pty) Ltd. Hudson & Knight, a division of Unilever South Africa (Pty) Ltd., Robertsons Foods (Pty) Ltd., Robertsons Food Service (Pty) Ltd. and The Competition Commission of South Africa, CEPPWAWU, FAWU, NUFBSAW 55/LM/Sep01 (“Unilever”).*

²⁰ *Unilever* at para [26].

²¹ *Unilever* at para [43].

- Consult, as soon as practicable, with the parties entitled to be given notice in terms of section 13A(2) on the employment effects of the proposed transaction.²²

That the competition authorities are not the primary forum for addressing issues of employment and other public interest variables has been repeatedly emphasised by the Tribunal. In *Distillers*,²³ the Tribunal was faced with public interest considerations which pulled in opposite directions. On the one hand, the merging parties argued that the merger would create an internationally competitive firm and would be good for the industry as a whole and therefore should be approved on public interest grounds. On the other hand, the intervening unions asserted that the job losses occasioned by the merger would be so great that they would have an adverse effect on employment, which justified the prohibition of the merger on public interest grounds.²⁴ The Tribunal described the public interest considerations in this matter as a “*policy at war with itself*”,²⁵ and held:

“Thus the public interest asserted pulls us in opposing directions. Where there are other appropriate legislative instruments to redress the public interest, we must be cognisant of them in determining what is left for us to do before we can consider whether the residual public interest, that is that part of the public interest not susceptible to or better able to be dealt with under another law, is substantial.”

Again, in *Shell/Tepco*,²⁶ the Tribunal stated:

“The role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory instruments...”

However, the competition authorities have in recent times demonstrated a renewed vigour in the pursuit of public interest goals.

Momentum/Metropolitan

The Tribunal’s analysis of the *Momentum/Metropolitan* merger²⁷ is often viewed as the starting point of the rise in public interest considerations in merger proceedings. In this matter, the Tribunal was faced with the proposed merger of two financial services firms. The merger raised no competition concerns, but did result in the anticipated loss of 1,000 jobs.

NEHAWU, a trade union representing about 6% of the employees intervened in the merger proceedings and sought prohibition of the merger, alternatively conditional approval with no job losses, on the ground that the anticipated loss of employment was a “*substantial*” public interest ground. NEHAWU argued that the merging parties had failed properly to justify the need for any job losses and had not substantiated their proposed retrenchment figure of 1,000 jobs.²⁸

The merging parties had made an initial proposal to the Competition Commission to limit the number of merger-related job losses to 1,000 in the first three years following the

²² *Unilever*, para [13] of the Conditional Approval.

²³ *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* (08/LM/Feb02).

²⁴ *Distillers*, para 212-213.

²⁵ *Distillers*, para 214.

²⁶ *Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd* (66/LM/Oct10) at para 58.

²⁷ *Metropolitan Holdings Limited and Momentum Group Limited* 41/LM/Jul10 (“*Metropolitan*”).

²⁸ *Metropolitan* at para 63.

implementation of the merger and to provide support and training to employees together with redeployment wherever possible. Despite the fact that the Competition Commission had accepted these undertakings, and that the relevant trade union represented only a small fraction of the workforce, the Competition Tribunal was willing to extensively address the regulation of labour on the basis that it was in the public interest to do so.

The Tribunal upheld NEHAWU's arguments and approved the merger subject to the condition that, with the exception of senior managers, no merger-related retrenchments were to take place for a period of two years from the merger.²⁹ It also rejected the merging parties' proposal around reskilling and redeployment and held that such "soft" initiatives are largely ineffective in addressing redundancy concerns.

*Kansai Paint / Freeworld Coatings*³⁰

In *Kansai*, the merging parties were faced with opposition by government on public interest grounds. *Kansai* involved the hostile takeover by Kansai (a coatings manufacturer) of Freeworld (a manufacturer and distributor of decorative and performance coatings). The Department of Trade and Industry (DTI) made a number of submissions to the Commission in respect of the transaction. In particular, it argued that the takeover constituted a direct threat to government's localisation initiative since Freeworld was the only local manufacturer of automotive coatings supplied to the domestic automotive industries. DTI also raised concerns regarding the effect of the takeover on employment levels, black economic empowerment and the impact of the takeover on innovation markets and fording direct investment.

The Competition Commission found that the takeover gave rise to no competition concerns approved the takeover subject to a number of wide-ranging welfare and public interest conditions including a prohibition on merger-related retrenchments for a period of three years; a condition ordering Kansai to divest of Freeworld's entire automotive coating's business; a condition that Kansai continue to manufacture decorative coatings for 10 years and invest in research and development with respect thereto; that Kansai implement a BEE deal within two years of the takeover and that Kansai establish an automotive coatings manufacturing facility in South Africa within five (5) years.

Kansai, dissatisfied with the divestiture conditions imposed, referred the matter to the Competition Tribunal for consideration. The DTI applied for formal intervention in the proceedings, although subsequently withdrew its application when the Commission undertook to present its concerns to the Tribunal. Thereafter, the parties entered into negotiations and the matter was settled.

²⁹ The relevant condition reads:

“64.1 MMI Holdings, the merged entity, shall ensure that there are no retrenchments in South Africa resulting from the merger for a period of 2 (two) years from the effective date of the proposed transaction.

64.2 The condition in 1 shall not apply to “senior management” as set out in the table on page 242 of the record and defined in Annexure J: Maximum number of potential retrenchments in respect of skilled employees of the combined merged entity”: Level: Senior Management to Metropolitan’s supplementary documentation filed at the Tribunal on 01 October 2010.

64.3 Metropolitan and Momentum must circulate the condition in 1 and 2 above to all their employees within 7 days of the date of this order.”

(See *Metropolitan Holdings Limited and Momentum Group Limited 41/LM/Jul10*, 19 para 64 ff.)

³⁰ *Kansai Paint Co. Ltd. and Freeworld Coatings Ltd. 53/AM/Jul11*.

Nevertheless, the Commission's decision in *Kansai* remains instructive as it demonstrates the vast and unpredictable effect that government departments can have when they involve themselves in merger proceedings on public interest grounds, particularly as regards the imposition of conditions by the competition authorities.

Wal-Mart/Massmart

Perhaps the seminal case pertaining to the public interest criteria in merger proceedings in South Africa, and undoubtedly the most political, was the merger between *Massmart Holdings Limited and Wal-Mart Stores Inc.*³¹ The merger proceedings involved the intervention of nine parties – five trade unions (“SACCAWU”, “COSATU”, “FAWU”, “NUMSA”, and “SACTWU”), the South African Small Medium and Micro Enterprises Forum (“SMMEF”), and three government ministries (the Minister of Trade and Industry (“DTI”); the Minister of Agriculture Forestry and Fisheries (“DAFF”); and the Minister of Economic Development (“EDD”).

The intervening parties all sought in the first instance to have the merger prohibited. Their primary argument pertained to the effect of the merger on imports into South Africa, and the concern that the merger would result in a move in procurement away from local producers towards foreign low cost producers located in Asia. This shifting of procurement, it was argued, would result in employment losses, have a negative effect on small and medium sized South African businesses, and result in the stifling of domestic industries.

Having received extensive submissions on the purported public interest theories of harm, the Competition Tribunal approved the merger subject to various conditions, including the establishment of a procurement fund to assist local suppliers. Notwithstanding the submissions of the nine intervening parties, the Tribunal was at pains to emphasise that it was only concerned with merger-specific considerations, warning: “*Our job in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction.*”³² The Tribunal furthermore issued a word of warning, stating: “*we step carefully into shop floor issues lest we forget our purpose as a competition regulator.*”

The three Ministers were dissatisfied with the outcome in the Tribunal and took the matter on appeal to the Competition Appeal Court. The Competition Appeal Court again approved the merger, but held it gave rise to significant public interest which ought to have been addressed in the conditions attached to the Tribunal's approval. It held:

“[T]he introduction of the largest retailer in the world to the South African economy may pose significant challenges for the participation of South African producers in global value chains which, as the evidence indicates within the retailing sector, is dominated by Wal-Mart. Failure to engage meaningfully with the implications of this challenge posed by globalisation can well have detrimental economic and social effects for the South African economy in general and small and medium sized businesses in particular.”

As a result, the Competition Appeal Court partly upheld and partly supplemented and modified the conditions imposed by the Tribunal. In doing so. it sent a clear message that

³¹ W Boshoff *et al* “The Economics of Public Interest Provisions in South African Competition Policy”, 1 (3).

³² *Walmart/Massmart*, 110/CAC/Jul11, 111/CAC/Jun11 (9 March 2012) at para [32].

the competition authorities take their section 12A duty to weigh the public interest very seriously:

“Manifestly, competition law cannot be a substitute for industrial or trade policy; hence this court cannot construct a holistic policy to address the challenges which are posed by globalisation. But the public interest concerns set out in s 12 A demand that this court gives tangible effect to the legislative ambition.”³³

Ministerial involvement

The pattern described above, and further anticipated shifts in policy, may be driven by wider government policies. Accordingly it may also be instructive to consider ministerial involvement in South African merger control, given the history of increasingly close engagement. Minister Ebrahim Patel, the current minister of Economic Development of South Africa, has played an important role in pursuing so called “non-competition”, or “public interest”, considerations. In 2009 that the South Africa Competition Commission’s portfolio status changed from Department of Industry, to the Economic Development Department, coincidentally the same year that Minister Patel was appointed the Minister of Economic Development. Minister Patel has been involved in many of the highest profile cases involving public interest considerations.

Minister Patel was appointed as the General Secretary of the South African Clothing and Textile Worker’s Union (SACTWU) in 1999, and is also one of the founding members of the Congress of South African Trade Unions, South Africa’s biggest trade union.

In 2003, Minister Patel represented SACTWU³⁴ during the *Daun et Cie AG and Kolosus Holdings Limited* merger proceedings.³⁵ During the Tribunal hearing, Minister Patel argued for the imposition of three public interest conditions: first, that the same levels of employment prior to the proposed merger should be maintained, second, that the merger parties maintain the pre-merger level of wages and employment conditions; and third, that the Tribunal impose a condition that would oblige the merged entity to continue its membership of the applicable industry-wide centralised collective bargaining system.³⁶ The Tribunal did not, however, impose these conditions.

In 2004, SACTWU made submissions during the proceedings in the *Bid Industrial Holdings (Pty) Limited and G. Fox & Company (Pty) Limited 58/LM/Aug04* merger which led the merging parties to provide an undertaking that no unionised employees would be retrenched for a period of 18 months from the effective date as a result of the merger.³⁷ However, SACTWU sought that the Tribunal impose a condition precluding the merging parties to retrench any employees for 24 months post the date of the approval of the merger. SACTWU could not proffer up any evidence that the merger itself would lead to retrenchments of certain individuals and it failed to show that the merger would lead to retrenchment of employees. The Tribunal accordingly did not impose any condition on the transaction.

³³ *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc and Another* 110/CAC/Jul11, 111/CAC/Jun11, p. 97 para 154.

³⁴ At that time, Patel was General Secretary of SACTWU

³⁵ 10/LM/Mar03

³⁶ *Ibid* para 122 and 123

³⁷ *Ibid* para 19

Two years later, Minister Patel, on behalf of SACTWU, again intervened in a merger between *Edgars Consolidated Stores and Rapid Dawn*.³⁸ SACTWU intervened based on Edcon's alleged procurement policy. In an interesting parallel, given the developments to come, Minister Patel compared Edcon to Wal-Mart in the United States claiming that Edcon, like Wal-Mart, was focused on increasing its imports, thereby impacting negatively on employment in the domestic clothing and footwear industry.³⁹ SACTWU also raised concerns regarding employment but did not propose an employment specific condition. SACTWU proposed a condition of a cap on Edcon's purchases of imports, or at least in the target firm.⁴⁰ The Tribunal did not, however, impose any condition on the merger stating that "SACTWU's concerns about cheaper imports cannot be cured by the imposition of a merger condition on a single firm. It is a sector wide phenomenon and must be addressed at that aggregated level with the appropriate instruments".⁴¹

The following year, SACTWU again attempted to impose a condition on merging parties in the *Pepkor Limited and Manrotrade Four (Pty) Ltd*⁴² matter to cap the merging parties' purchases of imports in order to avoid possible job losses. The Tribunal did not impose this condition, citing the same reasons as in Edcon.

Interestingly, in 2008 it was indicated to the Competition Commission in the *Hosken Consolidated Investments Ltd and Seardel Investment Corporation Ltd 82/LM/Jun08* transaction that some job losses may occur, but due to the fact SACTWU was the largest shareholder in Hosken and represented the majority of the employees of Seardel, SACTWU did not ask for conditions to be imposed. The Tribunal was also satisfied that SACTWU would see to it that any issues regarding employees will be addressed in a responsible manner.⁴³

Minister Patel's intervention in the *Walmart/Massmart*⁴⁴ and *Kansai Paint/Freewold*⁴⁵ in his capacity as the Economic Development Minister has been well documented in various articles and papers and is regarded, locally and internationally, as some of the more striking examples of government intervention in merger proceedings. Due to the intervention of, *inter alia*, Minister Patel in his capacity as the Economic Development Minister, conditions were imposed on the merging parties in the *Walmart/Massmart* merger as discussed above.⁴⁶

Due to Minister Patel's intervention and negotiation with the merging parties in the *Kansai Paint/Freewold* merger, the Competition Commission not only imposed condition relating to competition concerns, but also conditions relating to employment, industrialisation and black economic empowerment. Patel commented that government was "encouraged by Kansai's approach and the fact that it took to heart the government's New Growth Path (NGP) strategy".⁴⁷

³⁸ *Edgars Consolidated Stores (Pty) Ltd and Rapid Dawn 123 (Pty) Ltd 21/LM/Mar05*

³⁹ *Ibid* 26

⁴⁰ *Ibid* 29

⁴¹ *Ibid* para 31

⁴² 06/LM/Jan06

⁴³ *Ibid* para 9

⁴⁴ 73/LM/Nov10

⁴⁵ 53/AM/Jul11

⁴⁶ *Ibid* para 108-10. See also <http://www.economic.gov.za/downloads/walmart-massmart-merger>.

⁴⁷ http://www.iol.co.za/business/news/sa-is-open-for-foreign-business-patel-says-1.1059849#.U_StrPmSySo

Minister Patel's willingness to use competition policy as a mechanism to address public interest issues is not confined to merger regulation. In a matter in which the South African Competition Authorities imposed one of the biggest fines on a firm for cartel activity in South Africa,⁴⁸ Minister Patel attempted to allocate R 250 million of the fine to establish a so called Agro-processing Competitiveness Fund in order to "*increase employment in the agricultural sector*".⁴⁹ Due to legal barriers it was not possible and the whole fine was paid to the National Revenue Fund.

Recently, it was announced that Minister Patel is seeking to draft amendments to the Competition Act in order to give authorities a bigger arsenal to act against dominant firms who are allegedly contravening the Competition Act by way of excessive pricing practices.⁵⁰ The amendments would shift attention to "regulating industrial organisation"⁵¹ which may mean that the Competition Authorities would have the power to break up dominant firms. It is not yet clear whether the Competition Authorities would have the power to break up dominant firms even in circumstances where the dominant firms are not contravening the Competition Act. The amendments may also provide the Competition Authorities with the power to develop a so called "*soft version of pricing regulation*"⁵². In this vein, Minister Patel has described with approval the Competition Commission settlement with Sasol Chemical Industries Limited,⁵³ where Sasol was found guilty of cartel activity and the settlement agreement included a structural remedy of divestiture.

Minister Patel has also made statements confirming his commitment to use competition policy in order to execute government industrial policy strategies. Most recently, Minister Patel mentioned that government would require competition authorities to promote economic transformation "*not as a by-product of, but an explicit objective of competition policy*".⁵⁴

Conclusion

Recent developments in merger analyses by the South African competition authorities demonstrate an increasing influence of trade union involvement, third party interventions (including the intervention of government Ministers) and an increasing prevalence of public interest theories of harm in merger proceedings. This development has coincided with the appointment of Ebrahim Patel as Minister of Economic Development, and Minister Patel has been involved in several of the highest profile cases pursuing such objectives. Minister Patel has emphasised his commitment to move away from "*competition fundamentalism*" and to "*harness the power of competition to the broader developmental needs of society*".⁵⁵

It is particularly at junctures like this, when new policy directions are being debated, that a reconsideration of the potential costs and benefits of alternative courses of action could be most helpful – considering the likely impacts on competition, and also on wider public interest objectives including growth, employment and innovation. We have not seen a comprehensive assessment of these costs and benefits. There is evidence that a focus on

⁴⁸ *Competition Commission vs Pioneer Foods (Pty) Ltd 15/CR/Mar10*

⁴⁹ <http://m.iol.co.za/article/view/s/9/a/30337>

⁵⁰ <http://www.bdlive.co.za/business/2014/08/11/patel-reworks-competition-act-against-excessive-pricing>

⁵¹ *Ibid*

⁵² *Ibid*

⁵³ *Competition Commission vs Sasol Chemical Industries Limited 31/CR/May05*

⁵⁴ <http://africanantitrust.com/2014/07/23/patel-not-mincing-words-diluting-competition-law-factors-in-mergers/>

We would like to express our gratitude to Hendrik Krog for his assistance in researching this section of the paper.

⁵⁵ Minister Patel 'Competition Policy within a developmental framework—Some reflections. Remarks at the competition lawyers' Breakfast hosted by the Law Society of the Northern Provinces on 3 November 2011.

pure competition might also deliver significant benefits to the stated public interest factors, and many concerns have been raised that a dilution of focus away from a pure competition test may result in significant costs, not only through a direct impact on competition, but on the cost, uncertainty, and transparency of the competition review process.

The three pillars of merger control

The benefits of merger control are: the ability to prevent anti-competitive mergers; promote pro-competitive mergers and to sanitise (remedy) mergers to balance the risk of anti-competitive mergers. In addition, a developed merger regulatory regime has the benefit of deterring anti-competitive conduct.

The merger control process is not without costs (both to the merging parties and to society more generally). Thus, even when the merger assessment is the correct one, the merger process takes time which can result in lost opportunities, and the loss of managerial focus (the cost of which is particularly evident in an environment such as South Africa in which skilled senior management is a scarce resource). The merger process is also costly both in respect of the direct costs to the merging parties and in terms of the uncertainty or risk which arises from the merger control process.

The International Competition Network has set out the three pillars of successful merger control⁵⁶ as follows:

Timing: Mergers should be assessed as quickly as possible and the merger control regime should result in as little disruption as possible to underlying competition in the market for corporate control – this concern over timing is not simply the parties' preference for quicker procedures, but rather that merging parties are often vulnerable to unexpected timing delays, and the fixed timetable of the investigatory process can place make parties additionally vulnerable, in particular if there is uncertainty about the tests that they face;

Costs: The direct (i.e. merger filing fees) and indirect costs (including time and effort spent preparing and defending the merger) should be kept to a minimum; and

Certainty: More than anything, corporate dealmakers and their counsel now desire predictability. Unfortunately, the proliferation of merger-control regimes into far-flung geographies, using different notification thresholds, procedures, and substantive standards, has rendered predictable outcomes the exception rather than the norm. Mergers should be objectively analysed in terms of established methods of inquiry which are appropriate to the analysis. This yields reasonable predictability of outcomes for parties in an otherwise risky transaction, a quality increasingly required in today's fast-paced commercial market realities, where bidders for desired assets may face stiff competition from other potential buyers vying for the same target.

⁵⁶ These are carefully set out in the *Guiding Principles For Merger Notification and Review*, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf>; and *Recommended Practices for Merger Notification Procedures*, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

Certainty has an even broader importance than merger control, in that investment is heavily dependant on minimising uncertainty. Particularly longer term investments depend crucially on having the security and confidence in the rule of law operating over the longer timeframe, to allow upfront risky investments. This need for confidence, security and certainty is repeatedly referenced by investors.

The US automotive entity, General Motors, recently stated that while it remains committed to South Africa, it will not be investing any more capital or creating any new jobs due to labour instability. The automotive giant's Africa president, Mario Spangenberg warned that foreign companies were becoming increasingly concerned about labour instability in SA, and stated that *'The reality is SA cannot expect multinationals to invest here as part of a social responsibility project'*.⁵⁷

Anglo American CEO Mark Cutifani has noted: *"Mining is about real estate and security of tenure — that is, if you threaten ownership, you threaten everything. We must remove uncertainty and that means the state must stop threatening ownership. Once you stop threatening ownership, you will set a starting foundation for new investment."*⁵⁸

This is particularly important in a developing country context. Capital is more mobile than ever, such that countries compete as investment destinations. This affects both foreign and domestic investments. Investors prefer certainty and predictability, and investment will be reduced where there is a perception of an ad hoc approach to policy implementation. While it has been said that public interest considerations are particularly important in a developing country context, it may be more correct to say that certainty and predictability are particularly important in a developing country context, precisely because uncertainty and a perception of ad hoc application of policy (in particular the pursuit of narrow conceptions of the public interest), might actually dissuade (both local and foreign) investment. Encouraging those investments, which lead to improvements in the very public interest aspects that are ostensibly the focus of the narrower tests, might be the most effective way of promoting the public interest. As noted above, promoting a pure competition test is itself inherently supportive of growth and employment, such that any departure from this test is likely to cause some harm to growth and employment. In addition, the added uncertainty that might come about from a narrow or unpredictable pursuit of these non-competition factors, might perversely cause the greatest harm to employment (comprehensively understood), and growth.

Mermelstein et al (2014),⁵⁹ have recently published a paper discussing modelling of optimal merger policy when considering dynamic effects of merger control. They find that the ability for an authority to commit to a particular enforcement strategy can lead to a significant welfare improvement, and that antitrust policy can greatly affect firms' optimal investment behaviour.

⁵⁷ Cindy Preller "GM to stay – but SA must sort out labour", The Herald (South Africa), 21 Aug 2014, <http://herald.newspaperdirect.com/epaper/showarticle.aspx?article=31deb105-f3a4-4daa-b837-d5789f109469&key=d9ZLlxMtO4PTXCNM%2bIcIvQ%3d%3d&issue=81472014082100000000001001>, accessed on 21 August 2014.

⁵⁸ Allan Seccombe, "Under-pressure mining industry goes to indaba", Business Day, 11 August 2014, 05:49

⁵⁹ B Mermelstein et al : "Internal Versus External Growth in Industries with Scale Economies: A Computational Model of Optimal Merger Policy", CEPR Discussion Paper No. DP9943 (2004)

The pursuit of non-competition objectives, in particular the extensive pursuit of these objectives, as experienced recently in South African merger analysis, places at risk each of these pillars. The increasing involvement of third parties in merger proceedings, together with the analysis of each of those third parties' theories of harm can result in considerable delays in the analysis and finalisation of merger proceedings. They also greatly increase the indirect costs of the merger, and erode certainty in the merger process.

As noted above, timing in the merger control process is particularly sensitive for merging parties. Anxious to ensure that the merger investigation period is kept to an absolute minimum, and while each of the merger parties is effectively open to unrestricted scrutiny by the Competition Commission and Tribunal, some recent examples of Government Ministries extracting non-competition conditions highlights the vulnerability of merging parties negotiating against uncertain standards, within a time constrained environment. Any potential for abuse of this vulnerable position, and "hold-up" of the parties, would be of significant concern.

The result of the foregoing is an unpredictable landscape of merger control in South Africa. Merging parties cannot be certain in advance what the stance of government will be in respect of the proposed merger, and cannot adequately predict which conditions might be considered necessary.⁶⁰ This erosion of certainty and predictability in the merger landscape has the potential negatively to affect foreign investment and business dealings in South Africa⁶¹. As noted above, capital is mobile, and any additional uncertainty, or costs in the investigatory process that are not justified by anticipated benefits (such as greater competition or efficiency), will act as a deterrent to investment.

The impact of current developments in merger control

Extensive considerations of public interest grounds can cause delays and uncertainty in the merger process and fundamentally undermine the aims of the Competition Act.

Interventions almost inevitably lead to a longer duration of the merger approval process – both in terms of the period leading up to the hearing and the hearing itself. Opposed mergers in South Africa can be protracted and lengthy affairs involving extensive discovery, in which merging parties are obliged to "open up" on the whim of third parties (who may be their competitors). Furthermore, if any party (including an intervening party) is dissatisfied with the outcome, the possibility exists to take the matter on appeal to the Competition Appeal Court.⁶²

The additional delay caused by the merging parties having to justify the merger on purported public interest grounds raised by one or more interveners is problematic because the timing of merger analyses is of critical importance – particularly when the merger affects more than

⁶⁰ Lesley Morphet, Andrew Konstant *Heal the World Competition Law and Public Interest Issues*, p. 3.

⁶¹ The recent large merger between *AgriGroupe Holdings (Pty) Ltd and AFGRI Ltd* clearly demonstrates the lack of certainty in the merger control process. In that matter, the parties sought to negotiate conditions with the respective Government Ministry prior to the Tribunal adjudicating on the matter: <http://africanantitrust.com/2014/03/07/worrying-trends-in-relation-to-south-african-merger-control-sa-governments-abuse-of-process-continues-unabated/>

⁶² See for example the *Massmart / Wal-Mart* decision.

one jurisdiction and requires analysis by more than one competition authority. As Whish and Wood state in their report on merger cases in the real world:

*“... even where all agencies began their reviews contemporaneously, which is a rare occurrence, the lengthy review process of some agencies and the lack of a fixed endpoint by others both created cost and uncertainty for the merging parties.”*⁶³

Foreign direct investment can bring significant benefits, some of which will have a concomitant positive impact on employment such as establishing new production capacity or expanding existing capacity; transferring skills to alleviate the structural or skills mismatch causes of unemployment; and improving production processes to increase competitiveness and demand for local products.⁶⁴

Ironically, then, wide-ranging investigations focussed on narrowly considered public interest factors may have the opposite effect to that intended by decreasing pro-employment foreign investment. The effect is likely to be particularly strong in relation to start-ups and initial investment in South Africa as burdensome and interventionist merger control might make initial investments less likely.⁶⁵

The lenient intervention policies currently favoured by the authorities may also negatively affect the independence of the authorities. Sections 3 and 20 of the South African Competition Act guarantee the independence of the competition authorities. However, where there is uncertainty around what factors the competition authorities may take into account and whose views the authorities will be prepared to listen to, institutional trust may be lost.

In effect, competition authorities are mandated to consider complex social, economic and industrial policy with no specialist expertise in these areas and with no political mandate to do so. As Boshoff sums up: one of the problems with the South African regime is that *“the competition authorities are not elected officials with a mandate from the electorate to decide on public policy issues.”*⁶⁶ This causes him to conclude: *“Public policy should rather be determined by the government”*.⁶⁷

Perhaps the most obvious result of the current policy is that, where there is intervention on public interest grounds, there are more likely to be conditional approvals of mergers, with conditions relating specifically to the public interest concerns raised. As Smith and Swan acknowledge:

“Perhaps inevitably, public interest factors can be seen as ripe for remedies. This has the potential to lead to significant inefficiencies, not only in preventing mergers that are pro-competitive (but employment-reducing in the short run), but also even in raising the costs

⁶³ Whish, R., and Wood, D., (1994) “Merger cases in the real world: a study of merger control procedure”, OECD, Paris.

⁶⁴ See with reference to other opinions Romeo Kariga, Jabulani Ngobeni and Mfundo Ngobese, Is South Africa a good investment destination? A relook at conditions in merger cases, 3, available at: <http://www.compcom.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/Is-South-Africa-a-good-investment-destination-22.08.2012-F.PDF>.

⁶⁵ Patrick Smith and Andrew Swan: “Africa: Public Interest Factors in Competition Decisions”, The African and Middle Eastern Antitrust Review 2014, 1 (3).

⁶⁶ Indeed, in the case of bank mergers section 18 of the Competition Act excludes the competition authorities’ jurisdiction.

⁶⁷ W Boshoff *et al* The Economics of Public Interest Provisions in South African Competition Policy, 1 (3).

*of employment-enhancing mergers, and thereby reducing the scope for employment creation and growth.*⁶⁸

The result of the broad intervention and public interest provisions in the South African Competition Act may lend themselves to abuse, and result in a significant reduction of transaction certainty, both from a timing and outcome perspective while increasing costs.⁶⁹ In short, they distort “*the efficiencies of a competitive outcome*”.⁷⁰ This distortion may in turn have a negative effect on foreign investment and stifle the very socio-economic aims that the public interest provisions seek to achieve – particularly as regards employment. Moreover, competition authorities do not have the expertise to formulate industrial policies.⁷¹

In the *Nationwide Poles* decision,⁷² the Competition Appeal Court referred with approval to the statement of the Korean Competition Advisory Board that:

“in a developing economy where, incipiently, economic power is not fairly distributed, competition policy must play the dual role of raising the power, within reasonable bounds of underprivileged economic agents to become viable participants in the process of competition on the one hand, and of establishing the rules of fair and free competition on the other. If these two objective are not met, unfettered competition will simply help a handful of privileged big firms to monopolise domestic markets... This will give rise to public dissatisfaction since the game itself has not been played in a socially acceptable fair manner.”

Taking this position somewhat further, Minister Patel has argued that:

*The public interest test is...important because any economic policy decision must be placed in the context of the broader welfare and employment goals of the nation. In this sense, our law is not predicated on a competition fundamentalism. Instead, it seeks to harness the power of competition to the broader developmental needs of our society.*⁷³

It is also often argued that developing economies have specific challenges, including the level of unemployment. The Competition Commissioner has argued that the Commission must play a role in this wider industrial policy:

“In a country which suffers from 35 per cent unemployment, there are increasingly calls for the authority to consider job creation and the development of local industries in its investigation and merger reviews. This is not an unreasonable call. While competition authorities should not be beholden to the government neither can they be loose cannons who claim independence without accountability. Competition policy cannot exist in isolation and each BRICS enforcer faces the need to balance competition law with its

⁶⁸ Patrick Smith and Andrew Swan: “Africa: Public Interest Factors in Competition Decisions”, *The African and Middle Eastern Antitrust Review* 2014, 1 (3).

⁶⁹ See J Oxenham: “Balancing public interest merger considerations before Sub-Saharan African competition jurisdictions with the quest for multi-jurisdictional merger control certainty”, *US-China Law Review*, 211. (2013)

⁷⁰ W Boshoff *et al* *The Economics of Public Interest Provisions in South African Competition Policy*, 1 (16).

⁷¹ Damien Geradin and Ianis Girgenson, ‘*Industrial Policy and European Merger Control – A Reassessment*’, October 3, 2011. TILEC Discussion Paper No. 2011-053, pages 28-30, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937586>.

⁷² *Nationwide Poles v Sasol (Oil) (Pty) Ltd* 72(CR)Dec03 at para 19.

⁷³ Minister Patel ‘*Competition Policy within a developmental framework—Some reflections. Remarks at the competition lawyers’ Breakfast* hosted by the Law Society of the Northern Provinces on 3 November 2011.

*government's political and economic policies. Competition authorities cannot afford to shy away from the debate.*⁷⁴

We note, for completeness, that the employment challenges facing a developing country may differ from those facing the developed world in many ways other than merely quantum – in particular the education of the population, and the prospects for re-employment of potential redundancies may present significantly different challenges.

However, a potentially more comprehensive response is that the public interest is important, and that is why the predictability of a pure competition test should be pursued, so as to maximise competition, minimise cost and uncertainty, and thereby maximise investment and employment in a country that is extensively and increasingly competing with other developing countries for scarce opportunities.

We certainly don't advocate any shyness in this debate, but rather a comprehensive debate, not targeted at a narrow conception of an individual's perspective of the public interest, but rather on the best way in which competition can serve the public interest of all South Africans. While we consider that further research should be done in this field, our contention at this stage is that competition is inherently pro-consumer, and moreover that competition is likely to have significantly positive effects on employment. Accordingly, a pure competition test is inherently pro-consumer, and pro-employment, and significantly favours the public interest of all South Africans.

At this stage we recognise that for competition authorities who are bound to focus on the evidence at hand, evidence of planned redundancies may appear more concrete and immediate than likelihoods of additional employment that might flow from greater efficiencies, or even less directly, from a more efficient and transparent merger control process, this does not make the latter effects any less real, and in quantitative terms these could be particularly significant. This is why the policy considerations, and potential statutory innovations in this area have such a strong potential to have a real effect on these public interest factors.

Any weakening of a pure competition test must imply some costs in terms of lost efficiency, or less competitive outcome, which is justified based on a party's perspective of a particular public interest factor. That loss in efficiency and less competitive outcome is very likely to have negative consequences for consumers, growth, and employment. Accordingly, the pursuit of "public interest factors" might have some component of a loss to the public interest itself. We have not seen that loss in efficiency (and resultant harm to the public interest, as comprehensively understood) acknowledged in the public debate on these policy choices;

Unbridled intervention of an undefined sort during time sensitive merger control proceedings in an effort to impose on the merger parties the obligation to perform industrial policy initiatives deters much needed investment. Any additional uncertainty in the application of merger control in particular, and competition policy more generally, is likely to act to dissuade investment, with attendant negative impacts on competition, growth, and employment. These effects are likely to significantly harm the public interest. Again, we

⁷⁴ J Oxenham: "Quo Vadis? Political Interventionism in South African Competition Law" (African Antitrust and Competition Law, 25 November 2013, <<http://africanantitrust.com/2013/11/25/quo-vadis-interventionism-in-competition-law-in-south-africa/Evidential-burden?>> accessed 18 March 2014.

have not seen the harm to the public interest caused by uncertainty acknowledged in the public debate on these policy choices.

Accordingly, while we encourage the debate on the effective means by which to improve the public interest, we consider that a pure competition test significantly serves public interest factors, such as employment; the extensive pursuit of public interest factors through competition policy may at best have additional costs for the public interest that are not currently acknowledged, and uncertainty in the application of competition policy is likely to have significant and long lasting costs to the public interest that have not been adequately considered nor analysed.