

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

Is there a role for public interest provisions in South African competition law?

Scott Havemann M.Com Economics

University of Cape Town

Supervised by Lukasz Grzybowski

ABSTRACT

The recent Wal-Mart/Massmart merger decision by the Competition Tribunal has highlighted the delicate role that the South African Competition Authorities (the Competition Commission, Competition Tribunal and the Competition Appeal Court) play between balancing public interest provisions and competition issues in merger decisions. As a result of South Africa's numerous social and economic challenges, competition policy has been identified as a key instrument in economic development. This begets the question: does the Competition Act (Act 89 of 1998 as amended) empower the Competition Authorities with adequate tools to address economic policy challenges of South Africa? And if it does not, should the Competition Act be amended to provide for such tools and what should these amendments be if any?

This paper identifies the public interest issues which arise through merger review, compares South Africa's application to other jurisdictions and analyses the benefits and costs of including them in competition law. This paper proposes the way forward for the Competition Authorities in deciding on mergers which affect public interest with possible suggestions on amendments to the policy framework to ensure efficient and effective delivery of economic development outcomes for the people of South Africa. We argue that whilst there is definitely a role for public interest considerations in merger regulation, it must be balanced with competition related concerns and complemented with other policy amendments.

Introduction

The recent decisions made by the Competition Tribunal in relation to large mergers has highlighted the use of public interest provisions in South African competition law. The competition law in South Africa provides a means in which public interest (*inter alia* employment, the ability of small businesses to become competitive and the ability of industries to become competitive) can be addressed in merger regulation. The underlying paradox however, is that South African Competition Authorities face a complex decision process whereby it needs to balance the

interests of both business and the public. This mandate can be contradictory in nature. Whilst there is a causal relationship between competition and productivity (see Backus, 2011), there is a likelihood that a mergers competitive effects will have a negative impact on those variables deemed to be public interest issues (for example, in creating efficiencies in the market place, a merged entity may remove underperforming sectors of the business i.e. through cutting of labour etc.). This process may concern competition authorities in that through driving for X-inefficiency a merger may “step on” public interest issues. Similarly, whilst merger theory has centred on the proposition that a merger may give rise to these efficiencies, one of the most enduring puzzles in modern corporate finance is why many mergers appear to lower shareholder value (see Jensen and Ruback, 1983 and Andrade, Mitchell, and Stafford 2001 for surveys of this literature). Two strands of literature have attempted to reconcile this: agency theory which attributes the negative post-merger stock performance to a principle-agent problem, and market timing theory which attributes it to an overdue correction of mispricing (Yan, 2006).

Whilst, managerial decisions and those of its board are ideally centred on maximising shareholder value, the merger process may as with some large cases in South Africa, tread on certain public interest issues. South Africa is unique in that public interest forms part of the legal process in the decision of a merger¹ and this can ultimately lead to pro-competitive mergers being declined based on their negative effects on public interest, while similarly an anti-competitive merger can be approved as a result its public interest benefits.

This begets the question as to whether the South African Authorities should be involved in public interest issues, or whether they should limit themselves to competition related matters? The question of whether state intervention in the market is advisable is up for considerable debate with two schools of thought emerging.

The first school of thought is founded on the Chicago school of anti-trust which advocates minimal state intervention in regulating markets, as information to regulate is costly and difficult to obtain and political pressures can be exerted to distort competition laws. It also advocates that policies which open up economies to international competition alleviate many concerns of traditional competition policy (Cook, 2001). In South Africa, the Competition Act has provided for the creation of three independent bodies which regulate competition, namely the Competition Commission, the Competition Tribunal and the Competition Appeal Court (CAC). The government

¹ The European Communities Merger Regulation does allow for member states to notify the European Competition Commission should any merger impede on legitimate public interest cases (see COUNCIL REGULATION (EC) No 139/2004 of 20 January 2004 available online <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF>). In the UK, the Enterprise Act (2002) gives “power to make references” to the Secretary of State if he believes that public interest is relevant to a consideration of a merger situation. However, South Africa is unique in that public interest considerations are a part of the legal process.

is allowed to make submissions to the Tribunal; however no Minister may override a decision made by the Tribunal or CAC. This removes the incentive for firms to lobby government to intervene in competition matters.

The alternative to the above school is regarded as the Harvard school of thought and proponents of this school generally advocate for greater government regulation in light of the structural background in which countries have found themselves. Developing countries have predominately promoted state-owned enterprises to such an extent that markets have been representative of large monopolies with high government regulation restricting entry into the market. South Africa's structure during apartheid was very similar: highly concentrated markets characterised by state supported enterprises dominated the market during the apartheid years. Theoretically this structure of the economy leads to conduct which incentivises firms to collude resulting in higher prices (Structure-conduct-performance or SCP paradigm). The argument for favouring increased regulation in these instances where SCP is apparent is that amalgamation of economic and competition regulation leads to less chance of firms capturing regulatory interest through industry lobbying and gives greater certainty to the public of the jurisdictional boundaries in which the policy rests.

Secondly, if the answer is that they should, the question is whether they can deal with this complex and somewhat contradictory mandate of both promoting competition while protecting public interest? The recent merger activity has catapulted this discussion with the media, economists, lawyers and the public all voicing their opinion on the matter.

This paper condenses these views on the backdrop of the economic and legal viewpoint. It provides the reader with an understanding of the implementation and interpretation of the Competition Act, as well as introducing the topic of public interest in the context of recent merger activity in South Africa which has sparked further discussion. The paper is structured as follows: the following section highlights the background of the South African competition legislation and continues by explaining the theoretical underpinning of growth through competition. We then outline the current policy and competition challenges that South Africa faces and compare them to other countries, mainly to those which share similarities in their purpose and structure such as the EU and US. We then discuss the legal framework behind competition policy with some comments on the role that public interests have and should play in the current legislation. We then provide a few proposals on amendments to current policy and end by concluding.

Background and history of South Africa's competition legislation

Competition law is one of the means by which states regulate the behaviour of players in free-market economies (Sutherland & Kemp, 2010). Competition policy is rather difficult to define as it encompasses a broad range of objectives however Motta (2004) has defined it as *“the set of policy and laws which ensure that competition in the marketplace is not restricted in such a way as to reduce economic welfare.”* Economic welfare is the predominant aspect which competition authorities attempt to pursue. However, alongside economic welfare there are a number of other aspects that are pursued, namely those of defending smaller firms, promoting market integration and fighting inflation (Motta, 2004).

Generally competition laws were introduced in countries in an effort to counter monopoly power of large firms who were controlling important sectors of the economy such as transportation and communication. In the US for example, the economies of scale that firms in key sectors enjoyed and the resultant instability in prices from price wars, lead to the first such implementation of competition policy through the Sherman Act. The European Communities followed suit shortly thereafter implementing various competition policy measures in the 1951 Treaty of Paris due to Germany's dominance in key supply inputs and the growing acceptance of free market as the only way in which to promote an efficient functioning market (Motta, 2004).

The development of competition law in South Africa followed much of the US and EU developments. The US, in 1890 at the time of the passing of the Sherman Antitrust Act, was particularly concerned with the formation of anti-competitive trusts (such as the oil trusts) and as a result anti-trust law, or competition law as it is more commonly known, was developed. The US strengthened its enforcement of the Sherman anti-trust law by enacting the Clayton Act of 1914. The Clayton Act deals with price discrimination, exclusive dealings and mergers and acquisitions regulations. South Africa followed a similar path in that the newly elected government was concerned with monopolistic and anti-competitive behaviour as a result of apartheid policies and as such the Competition Act of 1998 was passed. Before the passing of the Competition Act, there was no broad legislative framework which promoted competition and South Africa was considered to be one of the least competitive of the trading nations (Department of Trade and Industry, 1997).

The arrival of the newly elected government, following the end of apartheid in 1994, ushered in a new era of competition policy. The extent of market power was a key issue of policy debate, with competition policy reflected in the 1994 Reconstruction and Development Programme (RDP), which preceded the Competition Act (Competition Tribunal, 2009).

The Department of Trade and Industry (DTI) guidelines for the formation of a new Competition Act, proposed harmony between driving efficiency gains as a result of increased competition whilst emphasising that public interest issues such as socio-economic injustices were equally looked at (Department of Trade and Industry, 1997). The guidelines were intended such that competition policy “...is reconcilable with national policy objectives and instruments, and that the different policy sets re-enforce each other.” The DTI’s framework provides much of the rationale for having competition policy working alongside that of established policy objectives found in the RDP as well as those of the now-defunct GEAR (Growth, Employment and Redistribution) strategy.

The arrival of the Competition Act heralded a new era of competition jurisprudence in South Africa. Mergers had to be notified before implementation and firms were given the option to blow the whistle on anti-competitive conduct through the corporate leniency policy. The result of this and other measures put in place by the Competition Act of 1998 has regulated much of the anti-competitive nature inherent in the South African economy.

The economics of competition and policy

Before we address the debate, it is important to analyse the underlying economic theory. In a perfectly competitive market, one in which there are many buyers and sellers, and none of whom represent the large part of the market, firms are *price takers*. That means that sellers of a particular product have no strategic decisions to make as these decisions do not affect the overall level of price. Social welfare is maximised as firms are equating their marginal costs to price and when marginal cost is equal to price, firms are making no profit and the resultant effect is that welfare is maximised.

When only a few firms produce a good, the impact is very different. In this market, a firm’s strategic behaviour can have drastic effect on the market price. If we took a real world example, such as Boeing and Airbus, Boeing knows that any change in its supply of commercial planes to the market will have an effect on the price. If it would like to drive down the price of planes, it would increase the supply of planes and vice versa. In imperfect competition then, firms are aware that they can influence prices. It is characterised by industries with a few major producers, and consumers view products as strongly differentiated from those of a rival firm. Economists generally view firms in these markets as being *price setters*, rather than price takers.²

² For a more complete discussion of imperfect competition see Davis & Garces (2011)

Generally the most common market structure is one of small-group oligopoly, where only a few firms are engaged in competition. Two kinds of behaviour arise in general oligopoly settings that are not captured by the model of imperfect competition. The first is collusive behaviour – either an understanding or explicit agreement between firms on costs, prices and market behaviour; and the other is strategic - generally captured by firms building up excess capacity in order to use it to deter potential rivals from entering the industry. Both are seen as having a negative impact on the welfare of consumers (Perkins, Radelet, & Lindauer, 2006).

The economic theory underpinning competition is that competition drives three things (Motta, 2004):

- i) Innovation between firms, as threat of a new entrant incentivises firms to focus on differentiating their product from a rival;
- ii) Lower prices, as firms compete for profits through price; and lastly
- ii) Efficient allocation of scarce resources.

In 1776, when Adam Smith was writing his *Wealth of Nations*, the concept of competition was familiar, and was formulated in the context of independent rivalry between two or more persons (Cook, 2001). Competition, when viewed in this way would, in the long run, eliminate excessive profits and unsatisfied demands. This view has carried through to more mathematical analysis of its effect through Cournot and Bertrand. Cournot models emphasise that the strategic variables that firms choose are their output levels. Bertrand models emphasise that the strategic variable of firm's is rather price which firms would use in order to supply the resulting demand for their products (Motta, 2004). Both models agree that competition delivers increased welfare to consumers who benefit in the form of lower prices and increased product choice.

Where markets are unable to motivate producers to operate as efficiently as possible, and competition is stifled, economists regard these as *market failures*. As the case is in South Africa, and other developing countries, monopoly or oligopoly power (where one or few sellers gain control of the market) presents with it a challenge to regulatory authorities in how to design interventions which can overcome the misallocation of resources through market failure. Whilst market failure is due to allocation of goods or services by a free market being inefficient, imperfect competition is due to the conditions of a perfectly competitive market not being satisfied. Monopolies are generally considered to misallocate resources as they use their market power to restrict output below the quantity at which marginal social benefit is equal to marginal social cost of the last unit is produced. Market failures lead to severe inefficiencies, a waste of

resources and stagnating growth in an economy. Market failures in low income countries are generally viewed as a result of weak institutions, inadequate infrastructure and segmented markets (Cook, 2001).

There is no debate between market adherents and those who favour intervention over the existence of these market failures, but there is considerable debate over their relative importance and the right policy approaches to respond to these failures. It must be noted that markets do not spare thought for public interest considerations in determining efficiency gains. In this, firms who drive efficiency can do so by lowering costs or innovating, which results in lower prices to end consumers. These strategies could have potentially negative effects on so called public interest issues, whereby chasing efficiency gains could result in job losses or removal of inefficient domestic suppliers in favour of more efficient international suppliers. These and other effects on public interest issues generally help to lay claim for those advocating state intervention, as markets cannot correct for the past social injustices and make no room for inefficiencies borne out of inefficient labour practices. Therefore, there is a theoretical argument for state intervention but the size of, and what actions to take are still contestable.

The policy challenges that South Africa faces

South Africa faces a number of challenges with regards to unemployment and inequality. A number of policy documents have attempted to steer South Africa out of the inequality borne as a result of historic factors such as colonialism and apartheid policies and towards administrating inclusive and sustainable growth. The Industrial Policy Action Plan (IPAP2) (which replaced the Growth Economic and Redistribution Policy (GEAR)) and the New Growth Path (NGP) are two cornerstone policy documents which highlight several policy plans that the South Africa government seeks to implement with competition policy in mind.

In 2010 the IPAP2 succeeded the successful IPAP and is in line with the National Industrial Policy Framework (NIPF) which sets out government's approach to industrialisation. It proposes a number of key objectives, such as diversifying the reliance on traditional commodities, promotion of more labour-absorbing services and goods and increasing participation of historically disadvantaged people. IPAP2 recognises that South Africa has been unsuccessful in raising its growth levels to that of its peers across medium and low-income countries and has a continual dependence on consumption-led sectors of the economy (DTI, 2010). This has led to large structural imbalances within the economy and this effect has been accentuated by the global financial crisis. South Africa is also struggling to build a core manufacturing and production base

and initial attempts of supporting manufacturing industries like the motor industry, have not reaped the rewards that they had promised (Flatters, 2005).

South Africa's relatively stable macro environment has also not yielded the required micro economic success. Employment is still sustained by the financial services sector and is determined to be unsustainable in the current economic climate (DTI, 2010). There is also a large skills shortage as many skilled people leave for other countries (Daniels, 2007). As such economic policy is geared towards its main aim of driving employment through a mixture of trade policy, labour policy and pertinently for our discussion competition policy.

Competition policy is one of the few successes of the South African government. Its success can be attributed mainly to the transparency of the procedures, independence of the Competition Authorities and its success in investigating anti-competitive firms. The IPAP2 devotes a section to competition policy and emphasises the need to bring about lower competitive prices to those products which are predominately relied on by the poor. The IPAP2 also outlines three main objectives for competition policy. These goals are predominately aimed at fostering competition in strategic inputs required in the downstream industries, as well as fostering competition in goods purchased by the poor and also by increasing the cost-effectiveness of the public infrastructure programme (DTI, 2010). The IPAP2 considers the role of competition authorities as focused on these goals whilst "*exercising both existing and recently established legislative powers* (DTI, 2010, p. 33)."

The NGP aims at alleviating most of the structural imbalance in the economy by creating sustainable employment opportunities. It seeks to address amongst other things the "continued economic concentration in key sectors, permitting rent-seeking at the expense of consumers and industrial development" (2010, p. 5). It seeks to add on where the Reconstruction and Development Programme left off in terms of driving long-term development and growth. Its main aim is to create five million jobs by 2020 and has highlighted a number of labour absorbing sectors and key job drivers which can aid in this goal. The NGP has also boldly stated that it needs various policy packages aimed at both micro- and macro-economic sections of the economy in order for it to function properly.

Competition policy forms part of both the IPAP2 and the NGP underlining the priority that both documents afford it in changing the economic landscape and correcting the structural imbalances within the economy. The IPAP2 recommends that competition policy has a role to play in correcting the concentrated supply of certain strategic inputs, lowering the cost of so-called 'wage

goods' and other products purchased by the poor and creating a cost-effective public infrastructure program (EDD, 2010).

Similarly, the NGP outlines the role it foresees competition policy playing in reducing unemployment and increasing output and investment. The EDD has outlined a number of measures that competition policy should play and it is of particular interest to our discussion to highlight these. The NGP has stated that “[m]ore consideration should be given to mandating public interest conditions on proposed mergers, particularly in respect of employment and prices” and that “[c]ompetition authorities should involve trade unions more, as provided for in the Competition Act. Unions should develop their capacity to share information and insights on employment issues in mergers and acquisitions” (2010, p. 19).

The combination of these proposals by government leads to the question: how far should competition policy and the authorities that implement it be pressurised to correct structural imbalances within the economy? And is the mandate of the Competition Authorities too broad or too narrow when dealing with market failures? And lastly, is the South African's government's prescription of what to investigate and what should be done in merger regulation advantageous to the economy? Before answering these questions it is important to understand the legal framework which provides the tool of implementing competition policy

The legal framework on which competition policy rests

South Africa's Competition Act is a legal document which provides a tool to implement competition policy. It is comprised of two main chapters which regulate firms' behaviour; Chapter 2 deals with prohibited practices and Chapter 3 with merger control. The preamble of the Competition Act provides much of the industrial objectives set out in policy documents. The preamble specifically stipulates that:

The people of South Africa recognise:

That apartheid and other discriminatory laws and practices in the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anticompetitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.

That the economy must be open to greater ownership by a greater number of South Africans.

That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.

That an efficient, competitive economic environment, balancing the interests of the workers, owners and consumers and focussed on development, will benefit all South Africans.

An elaboration of objectives and purposes of the Competition Act is specified within the preamble of the Competition Act as follows³:

- a) *to promote the efficiency, adaptability and development of the economy;*
- b) *to provide consumers with competitive prices and product choices;*
- c) *to promote employment and advance the social and economic welfare of South Africans;*
- d) *to expand the opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;*
- e) *to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and*
- f) *to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons⁴.*

These goals link up to economic goals as mentioned above. The NGP advocates providing 5 million jobs by 2020. It also stipulates that employment be centred on driving employment opportunities for the previously disadvantaged, as well as focussing on micro enterprises.

Public interest objectives in the Competition Act

The public interests are incorporated within the Competition Act in Section 12A (3), and relate only to exemptions and merger regulation. The exemption provisions apply to any firm who engages in an agreement or practice which would ordinarily be restricted by the Competition Act. Such a practice would be a restrictive horizontal or vertical practice or an abuse of dominance. The Competition Act allows for exemption of such practices if it contributes to any of the

³ Section 2 of the Competition Act

⁴ Preamble of the Competition Act

objectives outlined in the Competition Act⁵. These objectives are: 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 an industry designated by the Minister, after consultation with the Minister responsible for that industry. Notable exemptions that the Competition Commission has received include code-sharing agreements between SAA and Qantas airline.⁶

The second area of South African Competition law in which public interests feature prominently is in merger regulation and the topic of discussion for our paper. For the purpose of the Act, a merger occurs when one or more firms establish direct or indirect control over the whole or part of the business of another firm⁷. Those mergers which breach a predetermined threshold, as determined by the Competition Authorities, need to be notified. Mergers can be classified as small, intermediate or large depending on thresholds determined by the Competition Commission.

When assessing a merger, the Competition Commission or Competition Tribunal must determine whether the merger will likely to have an effect on a specific industrial sector or region, employment, the ability of small businesses to become competitive or on the ability of historically disadvantaged persons to be competitive. These are termed the “public interest grounds” around which much debate is centred. Public interests grounds must be considered *regardless* of the competitive effects of the merger. Theoretically, as mentioned this means that a pro-competitive merger can be declined if there are sufficient public interest grounds that are negatively affected. Similarly, an anti-competitive merger can be approved if there appears to be a positive effect on public interest as a result of the merger.

Of the public interest grounds, employment has received the most attention. Before approving any merger, the Competition Authorities must consider any input from affected employee groups or trade unions. The Competition Act requires that trade unions and / or employee groups affected by the merger must be notified. This is achieved through the parties to the transaction serving to such trade unions or employees the notification of the merger before serving it to the

⁵ Section 10 of the Competition Act

⁶ Government Gazette, Notice 461 of 2009. SAA applied for an exemption from section 4(1)(b)(ii) of the Competition Act 1998 in respect of a commercial and code sharing agreement with Qantas in respect of the South Africa-Australia route. This was, in fact, an application exemption for an agreement that was previously approved until 30 June 2002. The grounds for the exemption application were that the agreements are required to attain two objectives namely for the maintenance or promotion of exports, and in respect of a change in productive capacity to stop decline in an industry (sections 10(3)(b)(i) and (ii) of the Competition Act 1998). Based on the information made available to it the Commission was of the opinion that both the code share agreement and the commercial agreement were required to contribute to the objectives set forth in section 10(3)(b)(i) and (iii).

⁷ Section 12 of the Competition Act

Competition Authorities. A merger cannot be registered with the Commission if no service has been affected on trade unions or employees where applicable (Chetty, 2005).

As a result, the legal framework under which the Competition Authorities are mandated to act is geared towards assisting in the policy objectives decided by government. Employment receives widespread attention in the IPAP2 and the NGP and therefore has received much attention in Competition Authorities' view on mergers. There are numerous benefits to having an integrated law and policy approach to deal with the problems that South Africa faces.

Benefits of public interest provisions in competition law

Mainly, merger regulation (as defined in the Competition Act) is used as a filter for those transactions which are deemed to have a negative effect on public interest issues (with employment being one). It also provides trade unions the right to submit their concerns with regards to a transaction and its effect on employment. Although South Africa is unique in that public interest plays a vital role in merger proceedings, other jurisdictions are increasingly aware of including public interest provisions in decisions relating to competition. Complex monopoly provisions in the UK outline that the Competition Commission (which replaced the MMC) when investigating reports of monopoly situation, must report on whether it operates against the public interest (Hay, 1997). Similarly, the US and the EU, following the economic crisis saved troubled firms by permitting mergers that were anti-competitive in the defence of public interest. Employment is receiving widespread attention and competition policy in South Africa is considered an effective means of addressing it.

Notwithstanding the context of South Africa, this paper has mentioned the policy documents which are cornerstone to South Africa's economic recovery namely the IPAP2 and the NGP. Underlying these documents is the need for driving of employment and protecting those workers whom already are employed. A competition policy which is void of this would not be "*reconcilable with national objectives and instrument*" as mentioned in the DTI's framework for competition policy. The benefits of creating a common goal for national and competition policy are numerous yet principally they aid government's objectives by focussing several governmental entities into one policy approach.

Thirdly, the benefit of having the Competition Authorities facilitate debate on this issue is that they are an independent and transparent means of ensuring that all parties get their fair say. Provided that the government does not interfere with the proceedings the decision reached by the Competition Authorities can be generally agreed upon based on their level of independence and

inclusion of all parties affected. However, independence is not the only cornerstone to success – transparency is too. Generally, the authorities in South Africa are widely respected for their transparency in application of merger regulation.

Including public interests also serves another function, mainly that of indirectly affecting firm's decision and management processes. Although no data can be gathered on firm's strategies, it can be safely assumed that including public interest in competition law forces firms engaged (or potentially engaged) in mergers to address the public interest considerations of their proposed transaction. From a game theoretic point of view, the success of a merger that would affect public interests would be higher if firms addressed these concerns in their submission to the Competition Authorities. This raises the awareness of firms responsibilities in terms of the Competition Act and the public interest enshrined therein and improves dialogue between the merging parties and labour unions.

Lastly, the South African Competition Authorities have on several occasions attached conditions on to mergers that may have the effect on public interest issues. For example, In the Metropolitan/Momentum merger⁸ the Competition Tribunal imposed a condition that a moratorium on all merger related retrenchments exist for a period of two years (excluding senior employees). The decision to impose conditions was seen as a more effective way of mitigating the public interest issues (namely that of employment concerns) than outright refusal of the merger.⁹

Costs of including public interest in competition law

Whilst there are numerous benefits mentioned above, including public interest provisions can be costly. We highlight some of these costs below:

The first cost of including public interest in competition law is that there is a distinct trade-off between long run efficiency and short-run benefits. We imply by this, that public interests are predominately a short run effect and correcting mergers for their effect on employment in the short run is traded off for the potential positive benefits that a merger may have in terms of driving efficiencies in the long run. This trade-off is difficult to quantify as mergers may have long-run efficiencies but when and for how long is normally uncertain, whereas the short run benefits of protecting and promoting public interests are often quantifiable and are observable to the media, public and politicians. This trade-off is a cause for concern for including public interest in competition law as long-run efficiencies borne out of a merger may indeed surpass those

⁸ Competition Tribunal of South Africa, *Metropolitan Holdings Limited and Momentum Group Limited*, Case no: 41/LM/Jul10, October 2010.

⁹ *Ibid.* para 117

negative effects which may occur in the short run – increased competition may bring about lower mark-ups and with it lower prices to consumers. However, how to measure the long run benefits as opposed to the short-run costs are indeed very difficult to do and governments can be forgiven for choosing to focus their attention on attaining short run benefits which are observable to their constituents.

An additional cost is that firms may be operating at a less efficient level than what they could be as a result of a stringent merger regulation. This drives up average total cost and could result in firms operating at higher levels of their marginal revenue curves. This in turn drives up price and such a situation is similar to a monopolist pricing. This bears with it inefficiencies in lowering demand and raising prices.

So how does South Africa compare with other jurisdictions in terms of regulating public interest that arises from mergers? Internationally public interest considerations are not included in competition law, yet there is a growing trend of competition authorities (especially that of the European Commission) to include a brief overview of the public interest effects on a proposed transaction in competition decisions. Public interest however, does play a more pertinent role in regulation of foreign direct investment. Canada, the United States and Australia all have various guidelines which regulate foreign direct investment. Canada for instance reviews investments into the country and proposes to encourage investment which “*contributes to economic growth and employment opportunities*”¹⁰. Any foreign direct investment above a certain threshold and triggers a review which must pass a “net benefit test.” The investment is reviewed by the particular Minister and is approved based on passing the net benefit test (Holden, 2007). It is interesting to note that more than 1600 applications have been approved with only two being declined (Morphet & Konstant, 2011).

In Australia the process is similar in that reviews of an investment are triggered automatically should they pass a threshold. The review process is intended to ensure that any foreign investment is in the national interest. Unlike Canada, Australia first defines what would be contrary to the national interest and then the onus is placed on the Australian government to find reasons to reject a proposal (Holden, 2007). These provisions are considered a “negative test.” The Foreign Investment Review Board under the Foreign Acquisitions and Takeovers Act of 1975 carry out reviews of this nature (2007, p. 6). The United States remains completely liberal of foreign direct investment however; the United States President may block foreign acquisition if it is believed to threaten national security (2007, p. 9). Most industrialised countries including

¹⁰ Investment Canada Act, http://strategis.ic.gc.ca/epic/internet/inica-lic.nsf/en/h_lk00071e.html

Germany and Norway have some form of foreign acquisition review system in place (Jacobs & Coolidge, 2006, p. 2).

Generally it is within countries rights to regulate their markets; however the key difference is that South Africa bestows this responsibility on its Competition Authorities rather than on Foreign Investment Review Board (as in Australia) or a Minister (as in Canada). Morphet and Konstant (2011) propose two key benefits of this framework namely that the merger process is ultimately a very public one which ensures that all views are aired, allowing for timely discussion from all interested and that the body who is contemplating the public interest levels are also analysing the competition effects. This is beneficial in that an overall impression of the competition related issues are used to inform their decision on the public interest issues that may arise in a merger. Although this paper is not intended to analyse which framework is best, it must be said that this combination has worked well over the last decade of the South Africa Competition Authorities. However, it must be said that this does raise the administrative burden on the Competition Authorities especially when assessing a large scale, highly publicised merger such as the Wal-Mart/Massmart merger. Costs for Wal-Mart to run proceedings cost almost R400 million for the merging parties and consisted of a review of the transaction for several months by the Competition Authorities. This presents a significant burden of time and energy on a regulatory authority.

There are further arguments that although regulation is somewhat necessary to regulate business interests, government has to understand that overstepping its mandate can have potentially disastrous effects on business confidence. If it appears that government, through the Competition Authorities are pushing their own mandate, it can possibly scare away potential foreign direct investment which could be debilitating for efforts to address those public interest issues it so strongly advocates.

The last cost of including public interest issues are that companies seeking to invest in South Africa are buoyed by a level of certainty and predictability apparent in foreign markets. The inclusion of a wider scope for the Competition Authorities to judge on public interest issues does lead to difficulties in interpretation and the real possibility that decisions and rules they enforce may unintentionally conflict with one another (Morphet & Konstant, 2011). This bodes with it a level of uncertainty for investors and provides difficulty for the Competition Authorities to weigh up competition benefits with the potential negative effects on public interest. For example, what level of competitive benefit would one would require to justify 100 job losses in one industry? How would this be compared to an industry where 1000 jobs are lost in relation to a merger? Determining the competitive benefits can be a seemingly impossible task however Competition

Authorities are mandated with providing consistent and rational decisions in determining their decisions. A delicate balancing act is thus always in play and the Competition Authorities are in no doubt being accused on both sides of having failed to achieve the correct balance.

We now look at the three mergers which have highlighted this delicate balancing act.

Wal-Mart/Massmart merger

The recent decision by the Competition Tribunal, which is currently under appeal, on the Wal-Mart/Massmart merger has led to several questions being asked of the Competition Authorities and their application of the public interest provisions apparent in section 12A(3) of the Competition Act. The merger application was brought forward to the attention of the Competition Authorities when shareholders of Massmart voted in favour of the proposed merger on 18 January 2011. The Competition Tribunal then approved the merger subject to conditions¹¹ on June 2011. The trade unions, led by the Congress of South African Trade Unions (COSATU) has launched an appeal to the decision and it is currently under review at the Competition Appeals Court.

This deal has to some extent highlighted the opposing views on the role of public interest in competition law. On the one hand, the proponents to the deal advocated that little to no public interest effect would be apparent as the acquisition of an existing South African company with its capital outlay would require only several “tweaks” to make it run more efficiently. It was common cause throughout the case that competition was not a concern to the Authorities, however, due to significant public concern the case was predominately argued on its public interest issues.

The main argument brought forward by the trade unions consisted of three main spheres which we have condensed. Firstly, retrenchments were made before the merger by Massmart, which according to the unions, was done so in order to entice Wal-Mart into a deal to merge and this trend was likely to follow should the merger be approved. Secondly, the merger would, according with Wal-Mart’s anti-union policy, remove the right of employees to form trade unions. Lastly, the issue of local procurement and the effect that Wal-Mart’s global procurement policy would have on local suppliers already consigned to Massmart was raised.

The arguments that the council for Wal-Mart put forward to each of these concerns was that –

- i) the retrenchments before the merger were as a result of Massmart combining two stores into one larger store which serviced the same area. Following the merger the net effect would be a *gain* on employment, not as the trade unions were implying a net loss. The

¹¹ These conditions will be laid out

Tribunal tended to agree with the merging parties on this point, however, noticing that employment opportunities would arise in the future attached to its decision that the 503 previously retrenched workers would be given first priority to any employment opportunities that arose as a result of the merger. It also attached to its condition a moratorium on merger related retrenchments for a period of two years.

- ii) Although Wal-Mart's general policy was an outright refusal to engage with trade unions, it had in unionised markets where it operated, accepted unions were a part of doing business in that country. It also maintained that in the UK, where it operated, there was "a *healthy relationship with unions*."¹² The Tribunal in consideration of the trade unions argument attached to their approval the condition that trade unions be recognised for 3 years by the merged entity.
- iii) Lastly, on local procurement, the merged entity argued that its effect on local procurement would be minimal as a result of the high costs involved and that any attempts at limiting the procurement to local suppliers would violate international trade law. The Tribunal agreed with this, however, imposed conditions that Wal-Mart provides for a fund that empowered small business and suppliers.

The merger brought with it an interesting self reflection from the Tribunal who in their decision remarked that "*[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 transaction. This narrow construction of our jurisdiction has not always been appreciated by some of the intervenors who have sought remedies whose ambition lies beyond our purpose. It is not our task to determine whether those ambitions are legitimate public policy goals; only whether they lie within our powers.*"

The Tribunal has been bombarded with concerns voiced by Ministers and Trade Unions on the costs that approving such a transaction would have on the economy. At the forefront of this argument, is the costs to local producers whom it is alleged will be sidelined for imported and cheaper goods. Such an argument however, is purely unsupported and indeed speculative. A more competitive retail sector, which a merger of this magnitude is sure to promote, can only provide consumer with cheaper goods and especially as the IPAP2 puts it foster "competition in goods purchased by the poor." Similarly, the retail sector is concentrated with the retail giants Shoprite Holdings, Pick 'n Pay and Spar having a commanding 60% market share of the retail industry. Such a merger can only promote and facilitate competition and improve consumer welfare. It is interesting to note that Wal-Mart expressed concern as to the regulatory burden that it encountered in filing for such a merger in South Africa and argued that this did not bode well for future FDI in the country (PMG, 2011).

¹² See the transcript of the judgment to the case pg. 22 available online at <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACT/2011/41.html&query=walmart>

Kansai/Freeworld Merger

The Kansai/Freeworld merger (decided in 2011)¹³ was another merger where public interest effects were up to considerable debate. The merger was slightly different in application for the Competition Tribunal to that of the Wal-Mart case in which Kansai Paints Company Limited (“Kansai”) prepared a hostile takeover of Freeworld Coatings Limited (“Freeworld”). Kansai is a Japanese paint manufacturing company and is involved in the Original Equipment Manufacturers (“OEM”) automotive coatings industry, which it delivers through an independent distributor to Toyota. The transaction gave rise to possible horizontal overlap in activities as Freeworld, through DuPont, is also active in the manufacturing of automotive OEM coatings and is supplies all OMEs in South Africa.

The merger raised some possible competition problems but of relevance several public interest concerns were raised as well to the Tribunal. The DTI intervened in the merger based on its concern that the merger would result in an increase in concentration as well as representing a direct threat to a government-supported localisation drive. The DTI proposed that due to the merger Kansai was unlikely to utilise the manufacturing facilities of DuPont and as a result may lead to an underinvestment in R&D in South Africa’s only manufacturing automotive OEM coatings.

As a result the Commission attached to its decision that there would be no retrenchments for a period of three years, that Freeworld would continue manufacturing all proprietary coatings for a period of ten years, that there would an establishment of an automotive coatings and manufacturing facility in South Africa within five years, and that the merged parties invest in SA research and development in decorative coatings and implement a BEE transaction in two years (Competition Commission, 2011).

These conditions are inherently to protect a state supported sector and invariably tread on the feet of business practice of the merging party. It also purveys to international investors that the DTI are inward looking and promote a very protectionist stance towards investment especially that of a sensitive industry. Although the arguments that the DTI brought forward were valid, the economic principle behind bringing in new entrants would not necessarily lead to an underinvestment in local firms but rather a more competitive environment in which to work under. The weighing up of local interests with that of international investment is surely a difficult one that the Competition Authorities are tasked with. This merger, alongside that of Wal-Mart, is unfortunately endangering South Africa as being labelled a difficult place to invest in.

¹³ South African Government Gazette, Notice 885 of 2011

Momentum/Metropolitan merger

The Metropolitan/Momentum merger (2010) involved two local financial firms in a large merger, that of Metropolitan Holdings Limited and Momentum Group Limited¹⁴. The merger involved no competitive concerns yet raised considerable employment losses, in the region of 1000 estimated job losses as a result of the transaction. The Tribunal held that the merger may be approved however subject to conditions that a moratorium be placed on merger related job losses for a period of two years.

The case was a litmus test for the Tribunal in its application of the public interest issues under which it was mandated. The merger presented with it no competition related problems with the only concern being the effect that the merger would have on employment. In its decision, the Tribunal identified the following in its decision process:

- i) that a rational process had been followed in determination of the number of jobs lost i.e. that the reasons for the job reduction and number of jobs proposed to be shed be rationally connected; and
- ii) that the public interest in preventing employment loss is balanced by an equally weighty, but countervailing public interest justifying the job loss and which is cognisable under the Competition Act.

The Tribunal found that there was no connection between the number of job losses to be shed (estimated at 1000) and an argument for a potential public interest gains proposed by the merger. The decision to shed a “substantial” amount of jobs was found during the merger process to be arrived at through an arbitrary manner and was not done in order to promote increased cost savings to the consumers but rather to maximise shareholder value (Competition Tribunal, 2010).

The case raised significant concerns as there was no doubt that public interests issues were affected; no clarification was given on what the Tribunal viewed as “substantial.” There is no clear indication either in the Competition Act or competition policy as to what substantial public interests are and this gives way to confusion and inconsistencies in application of the Competition Act. Clarification on threshold bands would perhaps give companies greater indication of what the Tribunal views as a substantial loss of jobs.

It also begs the question of who the Tribunal views as “public,” as in this case the public consisting of Momentum shareholders were certainly going to be better off at the expense of the employees, however, is this not driving efficiency in a predominately capitalistic system which is in place in South Africa? Or do the implications of workers and workers rights exceed those of

¹⁴ For more information on the decisions for this merger see the press release under the Competition Tribunals website at <http://www.comptrib.co.za/publications/press-releases/metropolitan-and-momentum-9-december-2010/> accessed 2012/01/17

shareholders and companies rights? Or as George Orwell (1945) eloquently puts it: “[a]ll animals are equal, but some animals are more equal than others.” Of course, this rudimentary comparison does not suggest that in the context of South Africa, shareholders should be given free reign at the expense of their employees, but rather it highlights the difficulty in using a cost/benefit approach to public interest issues. This question as to who the Tribunal would view the public is general and not specifically related to this merger.

This decision has highlighted that the Competition Authorities also somewhat overstepped their boundaries and acted on protecting jobs (something which the Labour Relations Act aims at addressing) by imposing a condition that no jobs would be lost for 2 years. This just extends a somewhat foregone conclusion that, should the merged entity wish to, jobs will be cut in some manner or form after the moratorium ends. In this decision the Competition Authorities did not according to its mandate aimed at promoting efficiency of the economy, or providing consumers with competitive prices and promoting employment. For the 2 year period, it has though, advanced the social and economic welfare of a select few employees of the merged entity. Yet, at what cost, it is still to be determined.

Are Competition Authorities adequately empowered to deal with development challenges?

As this paper has mentioned and the cases above have highlighted, public policy governs much of the rationale for decisions in competition policy. As the Competition Act falls under competition policy, it has been tasked with striking the correct balance between legal prescription and precedent with that of economic policy. South Africa faces rather large and daunting developmental challenges, in driving down the inequality between high income and low income parts of the population.

The paper has highlighted how this can be somewhat a contradictory mandate. It is interesting to note how explicit consideration of public interest grounds has influenced the thinking of the Competition Authorities. However, it has to be noted that the Competition Authorities have not been arbitrary in their application of the provisions of the Competition Act related to public interest. The balancing of public interest with competition concerns has been very carefully considered in all cases that have come before the Tribunal when these have issues have been raised¹⁵.

¹⁵ See for example cases which have had public interest concerns raised – ie *Unilever PLC /Competition Commission/CEPPWAWU* [2001-2002] CPLR 336 (CT) ; *DB Investments SA v De Beers Consolidated Mines Limited* [2001-2002] CPLR 172 (CT) ; *Standard Bank Investment Corp Ltd & Others v The Competition Commission & Others* 2000 (2); *Metropolitan Holdings Limited v Momentum Group Limited* [2010] Case No: 41/LM/Jul10.

Unfortunately there is relatively little data on the effect the Competition Authorities have had on employment and its policy mandate of promoting employment. Employment levels are reflective of a number of variables (such as macroeconomic stability and the like) and not just of competition, so relying on some relationship between employment and competition within the market can lead to unreliable and inconclusive results. However, it can still be argued that South Africa has achieved a very delicate balance between incorporating public interest considerations and promoting competition in merger regulation. The Competition Authorities still take the approach of looking at the competitive effects of a merger first, and treat the public interest test as a filter which is given secondary consideration (Chetty, 2005). An example of this is that generally, public interest considerations are attached as conditions to mergers rather than determined what the result of a merger will be.¹⁶

If Competition Policy is the tool with which government should be using to regulate industries dealing not only with competition issues but also public interest issues then the key issue is whether this tool needs to be strengthened. Research has shown that in the last decade of the Competition Authorities, South Africa has a highly concentrated economy, with Roberts (2004) estimating that the largest four firms in South Africa account for more than half of industry output in 46 percent of the 5 main product groupings in the country. The greater concentration of South Africa's manufacturing industries is also associated with higher mark ups (Fedderke, Kularatne, & Mariotti, 2007).

Despite this, there has been much gain in reducing industry concentration over the last decade. Reports have shown that increase in competition has attributed to higher total factor productivity growth (Aghion, Braun, & Fedderke, 2007) with an intended spinoff of increasing productivity growth and allocative efficiency (Mengistae, Daniels, Kaplan, Love, & Shah, 2010). It is not however, competition policy in isolation that has lead to these developments. Improvements in trade liberalization policies have also increased levels of competition in the market which has resulted in allocative efficiency gains similar to other developing countries.

Regardless, the Competition Authorities have had a number of high profile success stories. These have catapulted the role that competition policy can play in regulating firms' behaviour into the spotlight. The recent judgement ruling against cartel behaviour in the bread cartel, as well as judgements against large corporations such as Tiger Brands, SASOL and Arcelor-Mittal have increased demands being placed on the Competition Authorities, in light of the current financial crisis, to be more proactive in their approach to implementing competition reforms. Lewis (2009)

¹⁶ See for example the *Metropolitan Holdings Limited v Momentum Group Limited 2010 Case No: 41/LM/Jul10*

identifies three main areas of demand which can often take contradictory forms one of which is the increased demand of the regulator to giving more weight in the imposition of public interest mandates especially to those sectors within the economy that are considered vital¹⁷.

Already, we have seen all of the above being demanded from the Competition Authorities. Powerful producer and labour unions have called on the Tribunal to give considerable thought to mergers which result in adverse effects on public interest. The transferring of the Competition Commission and Tribunal's policy oversight to the EDD has brought with it an increased focus on public interest concerns. The Minister of Economic Development has called for a greater need for activist Competition Authorities and for public interest grounds to be of greater importance in merger review (Holland, 2010).

Several institutions and academics (Mengistae, Daniels, Kaplan, Love, & Shah, 2010; EDD, 2010; OECD, 2003; Hausmann, 2007) have called on amendments to be more activist in their nature and move away from a predominately "complaints driven process" to a more activist organ of state. We will now discuss the current amendments which seek to promote a more activist Competition Authority and discuss their validity.

Current amendments which seek to strengthen competition policy

The current amendments that have been drafted and are awaiting implementation in South Africa propose a more vigorous approach to competition through robust enforcement. Specifically the Competition Amendment Act of 2001 allows the Competition Authorities a means of investigating markets through a "market inquiry."¹⁸ This allows the Competition Commission, acting on its own initiative or response from the Minister, to conduct market inquiries at any time if it has reason to believe that the market is preventing, distorting or restricting competition.

The introduction of a complex monopolies provision seeks to complement the enforcement tools in concentrated markets where companies without market power adopt parallel behaviour to the detriment of competition. It seeks to empower authorities with far-reaching power to impose industry-wide structural or behavioural remedies beyond those available in the traditional toolbox.

The inclusion of complex monopolies provision follows much of the UK's attempts at reducing anti-competitive behaviour. The complex monopolies provisions of the Fair Trading Act 1973 have been used flexibly, an element which the UK Government has praised, to perform three

¹⁷ The *Kansai vs Freeworld* merger is a perfect example of this demand being placed on the Authorities.

¹⁸ Chapter 4A of the Competition Amendment Act

functions. The first is to investigate the anti-competitive conduct of professional trade associations. The second is to investigate market structures, which are linked to vertical agreements that have significant foreclosure effects; and lastly, to investigate oligopolies in beer and carbonated soft drinks market (Brent, 1993).

The proposed amendments to the Competition Act also include mandatory prison sentences for those directors or persons in management authority of a firm who cause the firm to engage in prohibited practices. It allows for the overlapping of mandates for the National Prosecution Authority and the Competition Authorities. Including criminal liability for persons who break competition law is in line with international precedent whereby Australian and UK government have used it successfully to coerce directors to cooperate with investigations rather than run the risk of imprisonment (Marks, 2011).

There is concern that South Africa's judicial system is under severe pressure and adding an economic criminal prosecution will add to its inefficiency. It also will require more work from both the Competition Authorities and the criminal judicial system in order to prosecute directors who contradict the Competition Act. The overlapping of activities that the NPA and Competition Authorities are perceived to play will require prosecutors who are well trained in the area of economics and competition law, which presents some major challenges for an economy lacking in high level skills already.

Regardless of the challenges that these amendments bring, there can be no debate as to the importance that competition policy is receiving in terms of its role in advocating change in inherent market structures. There is considerable debate over what role the state should play in regulating predominately market related aspects. The challenges South Africa faces are not isolated in their application. The structural and underdeveloped competition frameworks are apparent in other developing countries and it is desirable that states should do all they can to promote conditions for pro-competitive behaviour (Cook, 2001). Donor organisations recognise the role that competition can play its success in constraining large corporations. Developing and developed countries are pushing for a wider appreciation of competition policy in alleviating market failures and protecting public interest with notable success in developing countries.¹⁹

Should Competition Authorities be mandated to include more public interest provisions?

¹⁹ Roberts (2004) notes that many countries have competition policies and have successfully influenced the behavior of large firms in pro-competitive directions. These are amongst others Argentina, Brazil, Mexico and Malaysia as well as South Africa. [This is not clear.]

The paper has analysed whether Competition Authorities *can* deal with the public interest provisions in South African competition law, however there is also a normative question of whether they *should*.

So how far should Competition Authorities go in regulating firms? If one advocates extensive regulation it can deter the promotion of competition; however if firms are not regulated, extensive market failures can exist. There is no definitive answer. It is a delicate balance that the Competition Authorities and likewise government must achieve. Increased state intervention in mergers can lead to business sentiment dropping and depending on the transaction can cause lengthy delays as Ministers, trade unions and interested parties submit their recommendations to the Authorities. This level of state intervention can lead to businesses reconfiguring their strategies towards mergers and causing foreign firms to think twice before implementing merger proceedings in South Africa, for example in the recent Massmart/Wal-Mart case transaction costs rose to just over R400m²⁰ (The Citizen, 2011). Business is also hesitant of state intervention as many perceive that government has a lack of knowledge on the sector that it intends on correcting. The imposition of public interest considerations are seen by the business fraternity as too rigid and far-reaching and potentially open to abuse which has hindered market participation²¹.

Competition policy is not the only means to deal with a structurally imbalanced economy. Other policy reforms can be considered when dealing with the structural imbalances of the economy. Strengthening of competition, can be done *inter alia*, by promoting new entrants to the market through decreasing the regulatory barriers necessary to enter the market. Government has also recognised the need for entrepreneurship in creation of new jobs and opportunities (Gordhan, 2011; EDD, 2010). Coupled with this is the competition that international firms bring to a market. The arrival of large multinationals can bring with it increased product choice, decreased consumer prices and entrenched firms are encouraged to seek cost effective solutions to deal with new entrants. The recent Wal-Mart and Kansai merger decisions were critically analysed for their extensive application of the Competition Act in using it as an instrument to drive economic policies which were considered protectionist and antagonistic to foreign direct investment.

Competition in the labour market and increasing productivity is an area where much government intervention is required in order to facilitate international competitiveness of firms. The tools provided for Competition Authorities, are inadequate to deal with labour relations and productivity

²⁰ At the time of writing this paper judgement is waiting to be heard on this case with a decision expected to be released on sometime in February 2012.

²¹ These views were expressed by the Wal-Mart CEO in a prepared submission to the Competition Tribunal in relation to the Massmart/Wal-Mart merger

levels of workers, and rightly so. Competition Authorities should remain concentrated on improving competition within the market, whilst protecting those public interests which it serves. It is only through an integrated policy approach that South Africa can rid most of the structural imbalance prevalent in the economy.

Proposed amendments to current legislation

As a result there are a number of key areas with which government should focus their attention. It is crucial that government sees promotion of market related outcomes as vital to ensuring employment and poverty alleviation. This can be done through concentrating their efforts on promoting small businesses, encouraging foreign direct investment and allowing market forces to provide for employment opportunities. Linking with this is that the South African government must continue its approach to preserving the credibility of competition policy, through advocating the independence of the Competition Authorities.

In addition a drive towards reforming state owned enterprises (SOEs) especially the energy, transport and telecommunications sectors can have considerable effect on the country's growth and redistributive strategies. Greater emphasis must be placed on these institutions as they pose a clear threat on economic growth as a result of their market dominance (Lewis D. , 2008).

Government can do more to increase competition in overly concentrated sectors, such as the telecommunications sector. Increasing competition in this sector can give rise to large positive externalities. The direct benefits of a competitive telecommunications sector are evident in literature. Sappington and Ai (2001) found that competition accentuates the positive effect on network modernization investments. The IT industry can benefit considerably from increased competitiveness and this has positive spinoffs to the economy in the form of labour productivity, Research and Development and improvement of information flow (Lehr & Glassman, 2001)

The government must also realise that application of the Competition Act is done by the courts who do not read economic policy into the Competition Act. This is a crucial understanding as to why the CAC overturned the decision by the Competition Tribunal on the Nationwide Poles/Sasol decision. This decision was overturned partly as the Tribunal read into the Competition Act the need to protect small businesses from larger corporations. However, public interest issues are prescribed only for merger regulation and do not branch into the rest of the Competition Act. If government wants economic policy to play a greater part in the Competition Act than it should amend the Competition Act to explicitly state it, rather than rely on the understanding of the Courts. Although, the judges sitting on the Tribunal are aware of the underlying policy mandate

from government, lawyers are trained in extracting the Competition Act's meaning through precedent, its wording and application.

If government would like changes to more adequately address the concerns apparent in the IPAP and NGP, there should be a dedicated push towards engineering a new Act which possesses the requirement to address these issues more directly. However, as this paper has mentioned, including public interest interests within the Competition Act can sometimes derail the exact effects government would like to address, namely those of increasing foreign direct investment and promoting competition.

The government can also work towards increasing total factor productivity ("TFP") through trade liberalization and competition policy reforms, which brings with it extensive benefits to the economy. The reforms of competition policy and trade policy have allowed for greater domestic product market competition which has improved the allocative efficiency of the domestic industry. Promoting a more activist competition policy can bring about further productivity gains as domestic producers have greater incentives for innovation (Mengistae, Daniels, Kaplan, Love, & Shah, 2010).

Lastly, there are also greater calls for promotion of micro-enterprises to absorb much of the wage labour. The competition framework already encompasses the role that Competition Authorities play in promoting and sustaining small businesses in merger regulation, however only one case has come before the Tribunal which has specifically been related to small business and this case did not deal directly with merger regulation²². This matter was initially refused by the Commission and was taken up in a personal context by the owner of the business. However, the regulatory process was too long and the resources required too immense that the small business was driven out of the market.

Competition policy needs to be more mindful of the role that large enterprises have in foreclosing small businesses from entering into a market. It also needs to be mindful that the regulatory and financial burden placed on small firms can be debilitating. Competition policy and the Competition Act need to be geared towards promoting the role that micro-enterprises have in absorbing most of the unemployment apparent in South Africa and as this paper has mentioned should concentrate on amending the Competition Act to include such provisions.

²² See Nationwide Poles and Sasol (Oil) Pty Ltd (72/CR/Dec03) [2005] ZACT 17 (31 March 2005) available online at <http://www.saflii.org/za/cases/ZACT/2005/17.pdf>

As an aside, there has been widespread debate to the amount of protection that labour is given in South Africa, both in a competition and a labour law context. With record levels of unemployment, which currently sit between 26.7 and 38.8 percent, labour regulation has a high place on the policy agenda of government. The level of perceptions of the rigidity and inflexibility of South African labour law can be attributed to the requirements for pre-dismissal procedural fairness by arbitrators and courts (Bhorat & Cheadle, 2009; Van Niekerk, 2004; Roskam, 2007). As a result procedural fairness is a matter where widespread reform needs to be enacted in order to address the high levels of rigidity that is apparent in the hiring and firing of employees.

Concluding remarks

In answering our question, we believe that public interest provisions definitely deserve a place in South African competition law. However, in going forward government needs to be cognisant of the Competition Act's ability to promote competition policy. Extending the Competition Act to deal with public interest issues that are not explicitly outlined in the Competition Act, are outside the parameters of the Courts and place on them a burden to appease governmental policy objectives when in actual fact these policy objectives are not stipulated within the Competition Act.

Secondly, South Africa's contextual basis does provide for a need to include public provisions within the Competition Act regardless of such downfalls that may appear. As the Competition Authorities iron out the inconsistencies which appeared in the some cases and decrease the regulatory burden on businesses regarding mergers, both labour and business can work together towards a common goal of benefiting the economic landscape of South Africa.

Benefiting the economic landscape of South Africa cannot, this paper has argued, be done by a single policy approach. Neither can government prescribe the will of its economic policy on the Competition Act. Rather, government needs to address public interest concerns through an integrated policy approach using trade policy, labour policy and promoting broader macro-economic stability to aid in reducing the high levels of inequality and mass joblessness found in the economy.

Lastly, the Competition Authorities have so far been successful in balancing the mandate of promoting competition as well as considering public interest concerns with only a few exceptions. The independence of the Competition Authorities to not be swayed by lobbying groups is a critical aspect of the Competition Authorities in relation to their credibility in maintaining this balance. Much like the Reserve Bank prosperity is dependent on independence, the Competition Authorities should remain an independent body void of any political meddling, in order to benefit

business. Proposed amendments should seek to retain the balance between public interest issues and promotion of competition. Only by retaining credibility in maintaining a balance can competition policies and agencies be used as significantly effective tool together with many other policy and instrumental tools that need to be applied when addressing the development challenges of South Africa.

References

- Aghion, P., Braun, M., & Fedderke, J. (2007). *Competition and Productivity Growth in South Africa*. Harvard University : Center for International Development.
- Bhorat, H., & Cheadle, H. (2009). *Labour Reform in South Africa: Measuring Regulation and Synthesis of Policy Suggestions*. University of Cape Town: Development Policy Research Unit.
- Brassey, M., Campbell, J., Legh, R., Simkins, C., Unterhalter, D., & Wilson, J. (2002). *Competition Law* . Johannesburg: Juta Law.
- Brent, R. (1993). *The Meaning of 'Complex Monopoly'*. Cambridge: The Modern Law Review Limited.
- Chetty, V. (2005). The Place of Public Interest in South Africa's Competition Legislation. *ABA Section of Antitrust Law, 53rd Spring Meeting*. Washington D.C.
- Competition Commission. (2011). *Competition Commission Press Release: Kansai's Acquisition of Freeworld Approved with conditions*. Available online.
- Competition Tribunal. (2010, December 9). *OUTCOME OF COMPETITION TRIBUNAL HEARINGS*. Retrieved January 17, 2012, from Competition Tribunal : <http://www.comptrib.co.za/publications/press-releases/metropolitan-and-momentum-9-december-2010/>
- Competition Tribunal. (2009). *Unleashing Rivalry 1999-2009*. Pretoria: The Competition Commission and The Competition Tribunal.
- Cook, P. (2001). *Competition and its regulation: Key issues*. Manchester: University of Manchester .
- Daniels, R. (2007). *Skills shortage in South Africa: A literature review*. Cape Town: DPRU.
- Department of Trade and Industry. (1997). *Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development*. Pretoria.
- DTI. (2010). 2010/11 - 2012/13 Industrial Policy Action Plan (IPAP). *Economic sectors and Employment Clusters* .
- DTI. (2010). *2010/11-2012/13 Industrial Policy Action Plan (IPAP)*. Pretoria: Economic sectors and Employment Clusters.
- EDD. (2010). *The New Growth Path (NGP)*. Pretoria: Government of South Africa.

- Fedderke, J., Kularatne, C., & Mariotti, M. (2007). Mark-up Pricing in South African Industry. *Journal of African Economics* 16 (1) , 28-69.
- Flatters, F. (2005). The economics of the MIDP and the South African Motor Industry. *Paper presented at the TIPS/NEDLAC South Africa Trade and Poverty Programme Policy Workshop Johannesburg* .
- Gordhan, P. (2011, August 29). Lecture on The Economy of South Africa presented at the University of Cape Town. Cape Town.
- Hausmann, R. (2007). Final Recommendations of the International Panel on Growth .
- Hay, D. (1997). Institute. In H. Liesner, E. Graham, & J. Richardson, *Global Competition Policy* (p. Chapter 6). Institute for International Economics.
- Holden, M. (2007). The Foreign Direct Investment Review Process in Canada and other Countries. *Canadian Library of Parliament*, .
- Holland, M. (2010). *Handbook of Competition Economics*. PriceMetrics (Pty) Ltd.
- Jacobs, S., & Coolidge, J. (2006). Reducing Administrative Barriers to Investment, Lessons Learned, Foreign Investment Advisory Service. *International Finance Corporation and World Bank, Occasional Paper 17* , 2.
- Lehr, W. H., & Glassman, J. K. (2001). *Competition in Telecommunications and Economic Growth*. Boston: MIT Sloan School of Management.
- Lewis, D. (2008). *Competition law and policy in bad times*. Pretoria: DPRU Conference on Regulation.
- Lewis, D. (2000). Competition regulation: The SA Experience. *Paper presented to the ISCCO Conference*. Taipei.
- Marks, J. (2011, February 4). *Criminal prosecution of cartels leads to better civil recovery*. Retrieved September 16, 2011, from www.polity.org: <http://www.polity.org.za/article/smes-underusing-competition-acts-powers-2011-02-04>
- Mengistae, T., Daniels, R., Kaplan, D., Love, I., & Shah, M. (2010). *South Africa: Second Investment Climate Assessment Business Environment Issues in Shared Growth*. Draft.
- Morphet, L., & Konstant, A. (2011). Heal the World: Competition law and public interest issues. *The Fifth Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa and Celebration of 10 years of the Competition Act and Competition Authorities*. Johannesburg: Competition Commission.
- Motta, M. (2004). *Competition Policy: Theory and Practice*. New York: Cambridge University Press.
- OECD. (2003). *Competition Law and Policy in South Africa: An OECD Peer Review*. OECD.

- OECD. (2002). *OECD Global Forum on Competition: Contribution by David Lewis*. OECD.
- OECD. (2009). OECD Policy Roundtables: The Failing Firm Defence. *Competition Law and Policy*. <http://www.oecd.org/competition>.
- Orwell, G. (1945). *Animal Farm*. London: Secker and Warburg.
- Perkins, D., Radelet, S., & Lindauer, D. (2006). *Economics of Development*. New York: W. W. Norton & Company.
- PMG. (2011). *Parliamentary Monitoring Group*. Retrieved January 18, 2011, from http://www.pmg.org.za/search/apachesolr_search/walmart
- Roberts, S. (2004). The Role of Competition Policy in Economic Development: The South African Experience. *Development Southern Africa*, 21(1): 227-43.
- Roskam, A. (2007). *An Exploratory Look Into Labour Market Regulation*. University of Cape Town: Development Policy Research Unit.
- Sappington, D., & Ai, C. (2001). *The Impact of State Incentive Regulation on the US Telecommunications Industry*. Department of Economics, University of Florida, March.
- Sutherland, P., & Kemp, K. (2010). *Competition Law of South Africa*. Durban: LexisNexis.
- The Citizen. (2011, August 26). *Massmart cares less about debt, invests for growth*. Retrieved September 8, 2011, from <http://www.citizen.co.za/citizen/content/en/citizen/business-news?oid=220699&sn=Detail&pid=146860&Massmart-cares-less-about-debt--invests-for-growth>
- Van Niekerk, A. (2004). In Search of Justification: The Origins of the Statutory Protection of Security of Employment in South Africa. *Industrial Law Journal* 853, 25.