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Trade, Competition & Applied Economics

# The Economics of Competition Policy

## Paper for the Free Market Foundation Competition Policy Round Table

## 30 June 2011


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# 1 Introduction

It is evident from a number of indicators that the performance of the South African economy leaves a lot to be desired. In the latest IMD World Competitiveness Rankings, South Africa slid a further 8 places to 52nd out of 59 surveyed economies, while in the World Economic Forum's rankings the country fell from 45th to 54th position. The need for the economy to grow faster to absorb the high numbers of unemployed is expressed with unfailing regularity in a wide range of forums, not least by the government and trade unions. Yet, there is a need to understand more clearly why the immense potential of the South African economy and its people is not being realised. It is the purpose of this paper to contribute to a sensible debate to address the obstacles to growth, specifically by focusing attention on competition issues. Following a brief exposition of the institutional context of competition policy and practice in South Africa, we zoom in on the following:

- What is the economic rationale for competition policy?
- Competition policy relative to other policies, such as industrial and trade policy
- The practice of Competition policy: does it make economic sense? Would it encourage entrepreneurs to invest, grow their businesses and therefore jobs and the economy?
- The dilemma of dealing with the potential anti-competitive nature of government laws, regulations and conduct

Selected cases (primarily in merger control) are used to illustrate the contributions we wish to make to the debate. Focusing on cases is considered a useful methodology, since the nature of competition law and the functioning of the institutions imply that the development of competition law and policy happen mostly around cases. It is how important principles are debated and entrenched.[3]

# 2 The institutional context

In 1998 South Africa adopted new competition legislation, the Competition Act 89 of 1998, which became effective on 1 September 1999. The formulation of the 1998 Act was preceded by extensive consultations with policy makers of other countries to ensure that the best qualities of their competition legislation be incorporated into the new legislation, while taking the country's specific needs into consideration (Lewis,2000: 1). Similar to the 1998 Act's predecessor, public interest issues have been included in the Act.

[3] Unleashing Rivalry 1999-2009, Ten Years of Enforcement by the South African Competition Authorities.

## 2.1 Competition Commission

The Competition Commission ('the Commission') is a statutory body that receives its jurisdiction in terms of the Competition Act, No 89 of 1998 ('the Act') by the Government of South Africa. As such the Commission is empowered to investigate, control and evaluate restrictive business practices, abuse of dominant positions, and mergers. The main aim of such investigations should be to achieve equity and efficiency in the South African economy.

The Commission must balance issues related to competition with the broader social and economic goals outlined in the Act, such as employment, international competitiveness, efficiency and technology gains, as well as the ability of small and medium sized businesses and firms owned or controlled by historically disadvantaged persons to compete.

The Commission may negotiate agreements with other regulatory authorities, participate in their proceedings and advise, or receive advice from, any regulatory authority. This is done to ensure the consistent application of the Act across sectors[4]. However, it is not always immediately clear whether the relevant regulatory authority or the Commission itself has final jurisdiction over a given matter in a particular sector. An example of this has been the South African telecommunications sector where both ICASA (Independent Communications Authority of South Africa) and the Commission has claimed jurisdiction with resulting regulatory uncertainty[5].

The Competition Commission consists of the Commissioner and one or more Deputy Commissioners, appointed by the Minister of Trade and Industry. The Commissioner is the Chief Executive Officer of the Competition Commission and is responsible for the general administration of the Commission and for carrying out any function assigned to it in terms of the Competition Act. The Commissioner is appointed for a five-year term and is accountable to the Minister of Trade and Industry[6] and Parliament.

The Commission is made up of the following six divisions:

- Enforcement and Exemptions
- Mergers and Acquisitions
- Advocacy and Stakeholder Relations
- Legal Services

[4] See www.compcom.co.za

[5] Subsequent amendment to the Act (The Competition Amendment Act, 39 of 2000) aimed to resolve this dilemma by giving concurrent jurisdiction in such sectors, except for banking, where the Minister of Finance still has the power to over-rule the Competition Authorities (Ten Year Review Unleashing Rivalry, 2009).

[6] Recent changes in central government structures have meant that the South African competition authorities now fall under the Ministry of Economic Development and are accountable to the current Minister of Economic Development, Ibrahim Patel.

- Policy and Research
- Corporate Services

The Competition Commission typically initiates investigations and then refers matters to the Competition Tribunal.

## 2.2 Competition Tribunal

The Competition Tribunal adjudicates competition matters in accordance with the Act and has jurisdiction throughout South Africa. It is independent and subject to the constitution and the law. As such, the Tribunal is expected to act impartially in all matters that appear before it[7].

The Tribunal's specific functions include the following:

- Adjudicating complaints of prohibited conduct such as restrictive practices and abuse of dominance
- Imposition of remedies
- Awarding of costs
- Granting of interim relief orders
- Authorisation or prohibition of large mergers
- Adjudicating appeals from the Commission's decisions on intermediate mergers and exemptions

The Tribunal currently consists of a chairperson, deputy chairperson, two full time members and six part time members. The chairperson chooses from among this pool of ten people in his selection of an adjudicate panel for a specific case.

Matters are referred to the Tribunal by the Commission. Decisions of the Tribunal can be appealed to the Competition Appeal Court (CAC).

[7] See www.comptrib.co.za

## 2.3 Competition Appeal Court (CAC)

Appeals from decisions of the Competition Tribunal, and reviews of decisions of the Tribunal and the Commission, are heard by the Competition Appeal Court. The CAC consists of High Court judges appointed specifically to the CAC. In a typical proceeding before the CAC, a matter is heard by a bench of three judges. The three judges selected for a particular case are chosen from the pool of judges that have been appointed as members or acting members of the CAC.[8]

In matters referred or appealed to the CAC from the Tribunal, the CAC can refer matters back to the Tribunal or make decisions on the case themselves. The CAC was originally intended to be the final court on all competition matters that did not raise a constitutional issue. However, the Supreme Court of Appeal subsequently found (in the ANSAC matter) that under the Constitution the CAC cannot be a final court of appeal. Therefore, even in non-constitutional matters, appeals can be made to the Supreme Court of Appeal[9].

# 3 The economic rationale for competition policy

Economics is about people – in households, government and the private sector - trying to make means (resources) meet ends. The reasoning is simple: because resources are scarce, one has to use them in the best possible way to reach your intended outcome/objectives. What is the role of competition in this? It is believed that competition will spur suppliers to act aptly to provide buyers with what they want at the prices and quality that they desire; if not, customers could go to their competitors. It is the absence of competition that takes away this choice. Governments around the world believe that the competitive process cannot be left to its own devices, hence the existence of competition authorities to safeguard the competitive process:

*"Competitive outcomes are about relative prices influencing decisions to consume and supply and about the returns derived by different participants through a supply chain, composed of producers, consumers and markets at different levels...competition is about opportunity to enter, expand, and reap rewards*

[8] See Competition Commission and Competition Tribunal (2009) Ten years of enforcement by the South African competition authorities. Pretoria, South Africa.

*based on effort and enterprise. Conversely, anti-competitive conduct entrenches existing positions and the rewards that they yield, and results in a lack of dynamism and growth."*[10]

The Competition Act (as amended) has as its purpose the promotion and maintenance of competition in order to achieve the following eight objectives[11]:

1. provide all South Africans equal opportunity to participate fairly in the national economy;
2. achieve a more effective and efficient economy in South Africa;
3. provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;
4. create greater capability and an environment for South Africans to compete effectively in international markets;
5. restrain particular trade practices which undermine a competitive economy;
6. regulate the transfer of economic ownership in keeping with the *public interest*;
7. establish independent institutions to monitor economic competition; and
8. give effect to the international law obligations of the Republic

Clearly, the objectives listed above show that the Competition Authorities are not only concerned with competition-related issues. The second, third, and fifth objective are standard objectives in competition legislation. South Africa's political-economic legacy provides the rationale for having included the first objective and forms the basis for including the sixth. The fourth objective is usually pursued through trade policy, but as we point out later, it turns out that both trade and competition policies are to be used to achieve industrial policy objectives[12]. The institutions referred to in the seventh, have been established. The second, third, fifth and sixth objective should be viewed as long term goals, the achievement of which requires a careful balancing act between the exigencies of the political arena and the consequences for economic sustainability.

Reekie[13] has voiced his criticism of the Act in reference to the objectives that generally fall outside the jurisdiction of competition policy. Although Reekie recognises the importance of addressing past inequalities, he is convinced that competition policy is not the appropriate instrument to use. In essence, he argues that the most efficient use of resources (allocative efficiency) will generate more wealth creation, which would give room to use other policy measures to address the objectives of a public interest nature.

[10] Unleashing Rivalry1999-2009, Ten Years of Enforcement by the South African Competition Authorities,2009.
[11] Consolidated Act 90:2
[12] Industrial Policy Action Plan 2 (www.dti.gov.za)
[13] Reekie, W.D. (1999). The Competition Act, 1998: An Economic Perspective. *South African Journal of Economics*, 67(2): 257-288

In the period when South Africa's competition policy was being reformed, Brian Kantor[14] posed the following questions with respect to competition policy:

*"Will the policy help improve the future incomes and job prospects of the great(er) majority of South Africans? Will it help reduce what they pay in real, inflation adjusted terms for goods and services or, as important, improve the variety and quality of goods and services made available to them? Will it improve the returns on their savings and so the benefits paid out by pension and provident funds and by banks and other financial institutions?"*

One could also add whether it would entice large numbers of young South Africans to become entrepreneurs, and thus job creators, instead of job seekers. Bearing these questions in mind, we consider recent developments in the practice of competition regulation in South Africa in order to draw out the aspects that could have the opposite effect of what was intended.

# 4 Case studies

## 4.1 Unintended consequences: capture of process by competitors

The competition law makes provision for interested parties to intervene in mergers and acquisition cases on the understanding that all parties who, on sound grounds, stand to be affected by the merger[15] should be heard. This, however, may leave the door open to competitors to obstruct the smooth conduct of business by the merging parties by delaying[16] the approval process on frivolous grounds. In the normal course of healthy competition, rivals in the same market are expected to employ winning strategies, such as innovation, product/service quality and design improvements, work process efficiency improvements, improved customer and employee relations, improved delivery times, etc in order to win market share. If, however, an opportunity for 'abuse' of the merger review (or prohibited practices investigations) present an opportunity to distract rivals from doing their core business and implementing critical strategies (merger transactions often have a very short period in which it makes good sense to close the deal), the opportunistic intervener gains indirectly. Competition authorities thus need to be vigilant so as not to fall into the trap of protecting 'rent-seeking' competitors, rather than competition:

[14] Kantor, B. 1995. A Primer on Corporate Restructuring and Competition Policy in South Africa. Paper delivered at the University of Cape Town Seminar on Competition Policy, 14 September.

[15] Or in the case of small and medium-sized mergers, could 'add value' to the process.

[16] The Competition Appeal Court (in Harmony Gold Mining Company Limited and Goldfields Ltd and others (18 May 2005) held that in terms of Section 13A(3) of the Competition Act, one may not implement the merger until approval has been obtained and the acquisition of shares after the merger intention announcement would amount to prior implementation, which carries punitive sanctions (Webber Wentzel, 2010, Merger Control 2010, International Comparative Legal Guide (www.ICLG.co.uk).

*"opposition to mergers, though in theory based on worries that competition may be impaired, often in practice comes not from consumers whose interests anti-trust is supposed to defend, but from competitors faced with the prospect of a larger, more aggressive rival. Because they respond to the demands of competitors, labour unions and other well-organized groups having a stake in stopping mergers that promise to increase economic efficiency, the anti-trust authorities all too often succeed, not in keeping prices from rising, but in keeping them from falling."*[17]

Below we discuss two cases, which highlight the impact that an intervener can have. The first case serves to illustrate amongst others, the delays that can occur. The second case, however, relates to a serial intervener, who, despite harsh admonishment by the Competition Authorities, has not shied away from similar behaviour in current cases.

### 4.1.1 Primedia and Kaya FM merger[18]

The merger between Primedia and Kaya FM provides an interesting case study of the interaction between the different arms of the South African competition authorities. The case started as a standard merger proceeding before the Competition Tribunal but ended up being reviewed twice by the CAC and eventually approved by the CAC itself.

During July 2005, Primedia and Capricorn Capital Partners notified the Competition Commission of their intention to acquire the remaining assets of New Africa Investment Limited (NAIL). The only remaining NAIL asset, at that stage, was a 24.9% stake in the Gauteng radio station Kaya FM. Although the merger was initially cleared by the Tribunal, an intervener took the case on review (African Media Entertainment Limited (AME)). The CAC referred the transaction back to the Tribunal, who approved the merger for the second time. The decision was again taken on review by AME and it was only during late 2008 that the merger was finally approved by the CAC.

The main reason for the CAC's first decision (ie in its first judgment of 19 November 2007) to refer the matter back to the Competition Tribunal was the Tribunal's failure, in its view, to consider the aspects listed under section 12A (1) and (2) of the Competition Act. The CAC ruled that the Tribunal had to consider whether the merger would substantially prevent or lessen competition and that such an analysis requires the definition of the relevant market. The CAC's ruling referred to the Tribunal's first decision in which the Tribunal approved the merger solely on the basis of potential control post-merger. The Tribunal

[17] William F. Shughart II, 1998. The government's war on mergers, the fatal conceit of Anti-trust Policy, *Policy Analysis,* No.323, October 22.
[18] Case no. 39/AM/May06 and 68/CAC/Mar07.

had concluded that the indirect stake being acquired by Primedia would not give Primedia the ability to control Kaya FM either solely or jointly.

While the merger was eventually approved, it did raise some questions as to the extent to which a third party should be able to intervene and, thereby, postpone a merger proceeding. In the case below, we illustrate how long a competitor could delay the proceedings, exhausting all avenues right up to the Competition Appeal Court. This case also shows that the Tribunal has become more cautious in allowing participation in merger proceedings, either refusing the right to participate or limiting the scope of participation.[19]

### 4.1.2 Caxton/Naspers (2007)[20]

Any decision by the Tribunal (in respect of small, intermediate or large mergers) may be appealed (to the Competition Appeal Court) by a party to a merger, or any other person who is required to be given notice to the merger. Those who must be notified of the intended merger (and therefore must enjoy standing to appeal) include trade unions and employee representatives. It is not always immediately clear on what grounds parties are deemed to have the standing to intervene. For example, in Caxton/Naspers (2007), the former's appeal to participate more extensively in the Tribunal's hearing was rejected. The CAC's concern was that the wide scope for participation that Caxton was demanding would not allow for an orderly and expeditious hearing. The CAC allowed participation only on two matters: Naspers' ability to stop competing print media from advertising on M-Net and the bundling of its broadcast and print products to the disadvantage of competitors in the print media[21]. The short version of the facts is as follows:

On May 29, 2007, the Commission referred the merger between Naspers, Electronic Media Network and Supersport International Holdings to the Tribunal recommending that it approve the deal without conditions. The transaction would result in Naspers acquiring all of the issued share capital in M-Net and Supersport This proposed acquisition of the remaining stake of Johnnic Communications in M-Net/Supersport (35%), however, attracted an intervention from Caxton on the basis that this will allow cross-subsidisation of print media[22] (to the detriment of Caxton) and foreclosure, eg not allowing

[19] Unleashing Rivalry1999-2009, Ten Years of Enforcement by the South African Competition Authorities,2009.
[20] Case No: 23/LM/Feb 2007 (Competition Tribunal).
[21] Johncom Shareholder points finger at directors over deal with Naspers, Business Day, 14 September 2007.
[22] http://www.webberwentzel.com/wwb/content/en/page13216. accessed 23 June 2011.

competitors access to advertising on the only pay TV facilities. An accusation of bundling broadcasting and print products was also levied in Caxton's intervention[23].

However, in allowing A.C. Whitcher (Pty) Ltd (not a party to the merger) to bring an intermediate merger on review, the CAC indicated that such a third party has the necessary standing to bring the merger to review.[24]

After Caxton, the intervener, had finally exhausted all avenues in its quest to have the merger prohibited, the Competition Tribunal finally approved the merger unconditionally on 8 October 2007. The process took from February to October 2007. In administrative time, this is perhaps not an exceedingly long period, but from a business imperative point of view, it is excruciatingly long, given the resources in time, brain power, and money tied up in the process, not to mention that once a strategic decision to commit to a merger has been taken, it is best followed through sooner rather than later. There are all sorts of concerns if time is wasted, eg the impact on the companies' share price, the impact on morale and motivation of employees in merging firms, and on the work processes and productivity.

The disadvantages from an efficiency point of view are therefore twofold: 1) third parties continue to intervene, eg, despite limited success, and reprimands by the Competition Authorities to the effect that the behaviour borders on abuse of the institutions' proceedings for commercial purposes, Caxton continues to intervene[25] with confidence and vigour, distracting the parties to the merger from their core business and running up legal costs; 2) Inconsistency in granting permission to participate in merger proceedings creates unwanted uncertainty.

## 4.2 Static remedies in a dynamic world

The Act allows for mergers to be approved unconditionally, prohibited or approved conditionally. In the event that a merger is approved conditionally, it is usually on the basis that the merger will have anti-competitive effects and the remedies attached to the approval are aimed at mitigating these effects.

In recent application of their discretion, however, the competition authorities seem to have been swayed by the idea expounded by the DTI[26] that competition policy, like trade policy, should serve the interests of

[23] In an earlier process of acquiring the minority shareholding (not that held by Johnnic) Caxton was also an intervening party. (Caxton/Naspers 2004).

[24](Webber Wentzel, 2010, Merger Control 2010, International Comparative Legal Guide (www.ICLG.co.uk).

[25] See for example, the Competition Commission's press releases regarding current mergers (such as Paarl Media/ Natal Witness as well as Paarl Media and Primedia@Home(www.compcom.co.za).

[26] See for example the DTI's Industrial Policy Action Plan (IPAP2 (2010)

government's industrial policy. This argument is elaborated on further in the two cases (below) where the DTI was an active participant in the proceedings. We present these two cases with the purpose of exploring whether the remedies would be likely to have the desired outcomes in a dynamic, globally integrated economy and to highlight the incentives or disincentives that might be created by these decisions.

### 4.2.1 Kansai Paint/Freeworld Coatings

This case concerns the hostile takeover (via the stock market) of Freeworld Coatings (Freeworld) a leading manufacturer and marketer of decorative and automotive coatings in Southern Africa) by Japanese group, Kansai Paint (Kansai). Kansai is one of the largest paint manufacturers in the world.[27] The rationale for the bid was, amongst others, to use the investment as a foothold into the African market.

In October 2010, Kansai acquired its initial stake in Freeworld from private equity firm Brait,[28] and then made a bid to acquire the remaining shares at R12 per share. The board of Freeworld opposed the takeover on the grounds that the timeline proposed by Kansai did not leave shareholders ample time to make an informed decision and that the merger would present anti-competitive concerns. The latter relates to the fact that both firms are active in the market for automotive and decorative coatings, which implies that the merger would strengthen concentration in these market segments. There was also a concern that a forum for collusion would be created through Freeworld's joint venture with Du Pont, a multinational automotive coatings manufacturer.

The South African Department of Trade and Industry intervened in the process as an interested party, requesting the Competition Commission to prohibit the merger on the grounds explained above. It further argued that the takeover represents a direct threat to the government-supported localisation drive. Freeworld is the only local manufacturer of automotive coatings supplied to Original Equipment Manufacturers (OEMs).[29] The exact threat is not obvious from the DTI's reasoning: why it would suddenly be attractive for Freeworld, under new ownership, to stop supplying to the OEMs is not explained.

The DTI emphasised the 'keep it local' nature of Freeworld's operations, describing it as contributing to a uniquely South African product development and commercialisation with an exemplary record regarding black economic empowerment. Lest one would think that these arguments, and the insistence on

[27] Mark Allix,2011. SRP rejects Freeworld Appeal on Kansai Bid, Business day, 18 February (online).
[28] 'Japan's Kansai owns 69 pct of Freeworld' Reuters, 3 February 2011.
[29] This relates to the DTI's support programme for the motorindustry (see www.dti.gov.za).

conditions if the takeover was not prohibited, indicate a protectionist and inward-looking stance, the DTI stated:

*"On the contrary, the DTI is doing everything possible to encourage inward investment, especially in relation to the production sectors of the economy where higher levels of competition, local production and innovation are vital ingredients in government's drive to address the structural weaknesses of the economy and to work closely with the private sector to reverse the decline of South Africa's industrial base, global competitiveness, exports and employment."*[30]

We return to several elements of this statement after discussing the details of this case.

In April 2011, the Commission approved the almost R2bn deal, with stringent conditions attached. Concerning the competition issues (concentration and the opportunities for collusion), Kansai has to divest the automotive coating business of Freeworld in its entirety, including the joint venture with Du Pont. The Commission further added several conditions which it believes will serve the public interest:

- No retrenchments for a period of three years following the merger
- Kansai will continue to manufacture decorative coatings for a period of ten years, and is required to establish an automotive coatings manufacturing facility in South Africa within five years
- Kansai will invest in South African research and development in decorative coatings
- Kansai will implement a BEE transaction within two years.[31]

### 4.2.2 Walmart/Massmart

Whereas there were anti-competitive concerns regarding the Kansai/Freeworld merger discussed above, the Walmart/Massmart merger, not yielding anti-competitive concerns yet attracting onerous conditions, presents an even more interesting case of how competition processes are employed in the interest of other policy goals, ie the public interests weigh much more than the competition issues. The matter of the 'public interest' is indeed a weighty one in South Africa and should be treated with circumspection, but with a keen insight and awareness of the potential counter-intended consequences. The former chair of the Competition Tribunal, Dave Lewis, was very explicit about the importance of the public interest considerations.

He argues that the high levels of poverty and inequality need to be addressed urgently and this requires that all the country's policies be directed towards addressing these problems[32]. In Lewis (2002: 2)[33] he

[30] Acting Director-General of the DTI, Lionel October, Business Live, 31 march 2011. (online).
[31] Competition Commission Press Release. Kansai's Acquisition of Freeworld Approved with conditions. 19 April 2011. (online).

further emphasises the importance of having included these objectives: “Hence, in a country like South Africa, while we, the Competition Authorities, may well understand the pitfalls in balancing competition and the public interest, we equally recognize that a competition statute that simply ignored the impact of its decisions on employment or on securing greater spread of black ownership, would consign the act and the authorities to the scrap heap.”

The argument, however, is not that the realities of South African society, as articulated here by Lewis, should be ignored. Rather, serious consideration should be given to the question of whether similar policies to those contained in the IPAP2, some aspects of which are here imposed on foreign investors, will now yield the desired results, when evidence from decades (since the 1920s) of similar policies suggests not. It begs the question whether a policy, designed to create an efficient and adaptable economy, should be expected to be the ‘catch-all’ panacea for everything that ails the economy? What has happened to the logic of not having more policy goals than you have instruments?

In the case of protection of domestic firms, not only against import competition, but also against foreign investors in the domestic market (an element of which occurs in both the Kansai and Walmart cases), raises the concern that market power of incumbents may be entrenched, and entrance of new businesses deterred. It is also doubtful, as we argue in more detail below, whether these measures (which in some instances will not allow adjustment to changed circumstances) would engender the ‘dynamism’ in the economy that competition policy is supposed to help foster.

## 4.3 Challenges to government laws, regulations and conduct with anti-competitive effects

An important provision in European Union competition legislation concerns the need to challenge government laws, regulations and conduct that may have anti-competitive effects. According to Vickers (2003)[34], this aspect has not received the attention that it merits, but it is a core theme in the work of the International Competition Network (ICN)[35] of which South Africa is a member. In national competition regimes, such as the UK, it is receiving more attention, including *ex ante* examination of laws and regulations to determine potential anti-competitive effects. Similar notions have been voiced in South Africa, but systematic evidence that this is happening is not readily available. On the contrary, in the light

[32] A Lewis, D. (2000). Competition Regulation: The South African Experience. Paper presented at the ISCCO Conference, Taipei

[33] Lewis, D. (2002). The Role of Public Interest in Merger Evaluation. Presented to the ICN, Naples

[34] Vickers, J. 2003. How does the prohibition of abuse of dominance fit with the rest of competition policy?, Paper for the eighth annual EU Competition Law and Policy workshop (European University Institute, Florence), 6 June.

[35] www.internationalcompetitionnetwork.org.

of the discussion above regarding the employment of competition policy in the service of the government's industrial policy aspirations, the question is simple: would the competition authorities really be in a position to challenge government laws, regulations and conduct that lean towards being anti-competitive?

## 4.4 Economic effects: message to entrepreneurs and investors

Those who try to understand the evolution of industries and economies have learned to appreciate not only the importance of entrepreneurs as job creators, but especially as creators of new avenues for economic growth, through innovation. Unlike the firms in elementary economics textbooks, real world entrepreneurs do not have a well-defined choice of resources and access to technology that can be freely adopted. The real world entrepreneur faces an environment that changes all the time and uncertainty is always part of the 'game'. The competitive process is therefore hardly ever smooth, but much more of a trial-and error story. Under the discipline of the market (the carrot of profit and the stick of loss) entrepreneurs compete by offering something that people are willing to pay for, ie because it has value to them (not because they feel sorry for the entrepreneur).

Bearing in mind the environment faced by real life firms, what are the concerns that may arise in the minds of entrepreneurs and investors from the practice and outcomes discussed above?

- Doubts regarding the protection of property rights
- Uncertainty, eg in the light of inconsistencies
- The weight of public interest concerns not imposed in competing investment destinations
- Exposure to undue delays in consummating mergers owing to opportunistic intervention by competitors

Being locked into employing resources (eg prohibition on retrenchments) and producing products that may no longer be profitable (as in the Kansai merger conditions above), ie firms cannot adjust, economy loses dynamism and growth.

Why is it important that an understanding of relevant and up-to-date economics underlie competition policy and practice?

The 'economics-based' approach, according to John Vickers (Office of Fair Trading, UK)[36] has strong advantages: it can align the law with its economic purpose and in an *internally consistent manner,* it can

[36] www.comphelp.co.za/Vickers, accessed 9 June 2011.

prevent form from triumphing over substance at the cost of both allowing detrimental conduct and blocking benign conduct, and it can provide clarity at fundamental, rather than superficial level (emphasis added).

# 5 Conclusion

This paper primarily aims to raise a few questions about the economics of competition policy, especially in the light of its practice in the South African context.

Essentially, it boils down to the question whether it makes economic sense, and importantly, whether it affords the South African economy the opportunity and the incentives to adjust to changes in the competitive environment, both here and globally. Such adjustment, we argue, is what a dynamic economy is all about, and what allows entrepreneurs to shift resources to new uses, unlocking the growth potential of the economy.

Through selected cases, we have raised some caveats:

- The multiple objectives to be achieved with available competition policy instruments, place the Competition Authorities in a position of having to weigh up and prioritise potentially conflicting objectives, leading to uncertainty and lobbying by well-organised pressure groups (which usually do not include the consumers' voice, given their dispersed nature);
- Participation by third parties in competition proceedings, eg in the case of mergers, although aimed at inclusivity and transparency, leave the door open to capture by opportunistic competitors, bent on delaying the process to the detriment of the merging firms, and ultimately the economy;
- The deterrent effect of onerous merger conditions that may lead to less investment and a chilling effect on the efforts of entrepreneurs to innovate and start new enterprises, and even new industries;
- It is now an open question whether the Competition Authorities will be well-placed to challenge the potentially anti-competitive effects of government laws, regulations and conduct.

Finally, the direction that the DTI and the Minister of Economic Development lately have taken with respect to competition, trade and industrial policy, suggests a lack of recognition that two opposing forces are set in motion with the optimistic view of achieving higher economic growth than the South African economy has ever experienced. That is, the notion that competition policy implementation by the Competition Authorities could unleash the forces that will result in an effectively functioning, innovative economy, with entrepreneurs creating not only new products and services, but also new industries, is

counter-acted by the fact that domestic firms that remain protected and coddled by government assistance, are deprived of the invigorating heights and challenges that the discipline of healthy competition holds.