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Enhancing merger control to support economic growth in South Africa

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Enhancing merger control to support economic growth in South Africa

Willem Boshoff [1]

Abstract

Competition policy – and merger control in particular – is an important policy to support productivity and innovation, investment, and long-run economic growth. This paper argues that merger control, when compared to anti-cartel enforcement, has become dominated by discretionary policy preferences fuelled by the expansive 'public interest' provisions of the amended Competition Act. Drawing on theoretical and empirical evidence, the paper identifies ministerial discretion, an outsized and opaque role for public interest concerns and the introduction of "vulnerability" as factors that limit the focus of merger control on competition matters. Accordingly, the paper suggests that growth-minded policymakers should consider three sets of reforms to South African merger control. First and foremost, reforms to address political interference in merger cases by strengthening the institutional independence of the competition authorities. Second, reforms to re-establish the primacy of competition over public-interest concerns in merger review, rethinking and reducing the list of public interest provisions (potentially aligning more closely with industrial policy objectives), and strengthening the analytical basis for evaluating public interest issues. Third, reforms to clarify, and appropriately limit, the role of equity and "vulnerable group" considerations in the competition leg of merger assessments. These proposed reforms may improve predictability and support investment incentives. It would also best allow South African competition authorities to rely on emerging theories of dynamic competition and innovation, placing our regime ahead of many other international jurisdictions considering similar reforms.

Keywords: Competition policy; merger control; public interest; industrial policy; independence; time inconsistency; equity; economic growth; South Africa

JEL classification: L40; K21; O43; L52

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EXECUTIVE SUMMARY

Competition is critical to productivity, innovation, and long-run economic growth. South Africa's own experience illustrates the growth benefits of competition: the liberalisation efforts of the 1990s unleashed competition in several industries, motivating investment and producing the longest post-war business cycle expansion. However, since the mid-2000s, policy momentum has waned. Key regulated sectors such as energy, transport, and telecommunications remain insulated from effective competition. Recent OECD surveys continue to link South Africa's weak growth to limited firm dynamism and persistent regulatory barriers.

Competition policy alone cannot resolve these issues: outcomes depend equally on the broader regulatory and ownership environment. Yet competition policy – and merger control in particular - remains a key policy for supporting faster growth, because of its economy-wide reach and its relationship with corporate activity. Mergers and acquisitions are key barometers of investment sentiment and business dynamism.

The Current Challenge

Because of its unique position, much is expected of merger control – too much. Not only is it expected to protect limited competition in various markets, but South African merger control has also evolved to accommodate an increased variety of non-competition objectives – objectives that have now been elevated to take equal position with the traditional focus on competition. Indeed, the very concept of 'competition' is interpreted differently.

As I argue below, these changes have created a merger control regime that is no longer effective in promoting competition – a key driver of economic growth. While particular areas of enforcement – notably anti-cartel enforcement – have performed well by following evidence and case experience, merger control has become increasingly driven by policy preferences. And these preferences favour intervention. The share of mergers approved with conditions has tripled from the early 2000s to the late 2010s. Several mergers have also been prohibited, or recommended for prohibition, more recently, even if the total number of prohibitions remain low.

This change reflects a deeper shift in the policy "loss function": policymakers appear to have grown more concerned about the cost of approving harmful mergers than about the cost of blocking beneficial ones (including imposing remedies). The result is a regime where merger decisions are dominated by changing policy preferences rather than consistent evidence-based reasoning. Prolonged approval times, heightened uncertainty, and growing ministerial discretion have further undermined the rationality and predictability required for investment.

Accordingly, the paper proposes that growth-minded policymakers should consider three sets of reforms to South African merger control: (1) reforms to strengthen the institutional independence of the competition authorities, (2) reforms to the public-interest inquiry (i.e. its position relative to competition concerns, its scope and the analysis that underlies the inquiry), and (3) reforms to clarify the role of equity considerations in the assessment of competition.

Reform I — Strengthen Institutional Independence

The first set of reforms proposed here are aimed at addressing "time inconsistency" in merger control, which refers to policymakers' tendency to deviate from long-term commitments to advancing competition when short-term political or social pressures arise. In South Africa, broad ministerial powers to intervene in mergers on "public interest" grounds invite such inconsistency. This discretion enables short-run rent-seeking, increasing the duration of merger approval and giving rise to any number of merger conditions.

To address this, the independence of competition authorities must be significantly enhanced. Better institutional design should limit ministerial discretion and protect technical decision-making. The paper proposes:

- Legislative reform to explicitly restrict the Minister’s intervention powers;
- Structural independence, placing the competition authorities outside the Department of Trade, Industry and Competition, akin to the Reserve Bank’s autonomy;
- Transparent appointments and tenure security for senior officials; and
- Enhanced accountability, including public reporting of decisions and parliamentary oversight.

Such independence would better align South Africa with OECD recommendations on procedural fairness and ensure that competition enforcement supports long-run growth, rather than short-term political objectives.

Reform II — Re-imagine the Public Interest Inquiry

The second set of reforms concern the balance between competition and non-competition objectives in merger control. These reforms accept the importance of public interest provisions, but is aimed at improving predictability and focusing their scope on objectives that better align with that of the competition inquiry in merger control.

Since the 2018 amendments, public-interest factors—such as employment and ownership by historically disadvantaged persons—have gained equal legal footing with competition concerns. This shift has encouraged interventionism, lengthened proceedings, and reduced predictability. At the same time, the pursuit of non-competition objectives is an established principle of modern competition law.

First, the paper proposes a two-stage decision rule. Merger review should begin with a conventional competition inquiry, after which public-interest considerations should receive attention. Where no substantial competition concern is found, public-interest factors should affect outcomes only on narrowly defined grounds.

Second, the paper calls for a re-evaluation of the scope of public-interest objectives in South African merger review. The list of public interest objectives is expansive relative to many jurisdictions and suggests reconsidering which objectives are best pursued through merger control. Industrial policy objectives may receive specific attention.

Third, the paper proposes enhancing the analytical rigour underlying public interest analysis, with emphasis on merger- and market specificity and placing counterfactual analysis at the heart of the inquiry.

The goal should not be to discard public-interest considerations, but to preserve the pro-competitive function of merger control and to enhance its predictability.

Reform III — Clarify the Role of Equity and “Vulnerable Groups”

The third set of reforms address the recent judicial trend—exemplified by *Mediclinic Southern Africa v Competition Commission*—of allowing for equity considerations in the assessment of competition. This approach departs from the economics view of competition as rivalry within a market. The paper highlights the conceptual errors in the Mediclinic case and argues that the widespread adoption of equity-based competition will result in over-enforcement and deterring of pro-competitive investment.

The paper proposes separating equity from efficiency while retaining protection for vulnerable consumers:

- The competition assessment should remain grounded in standard market analysis.
- Vulnerability analysis should only arise where anti-competitive effects have already been found.

- Authorities should assess whether net harm to a vulnerable group are substantial relative to total merger effects.

This approach will maintain analytical integrity, while enabling remedies to protect vulnerable group where it is appropriate. It ensures that merger control remains focused on rivalry and dynamic efficiency—the ultimate drivers of economic growth.

Conclusion

Competition is vital to economic growth. Yet South Africa's merger control has drifted from rational, evidence-based enforcement that supports competition towards preference-driven decision-making. Strengthening institutional independence, re-establishing the primacy of competition, and clarifying the role of equity will serve to strengthen the impact of merger control on competition and growth. These reforms, while politically challenging, are necessary. They will not guarantee stronger growth, but they are important components of a broader pro-competition policy environment.

A first next step is to initiate an urgent academic inquiry into the benefits and costs of the non-competition objectives in the existing merger review framework. This requires a pooling of academic effort across the country and an involvement of researchers from different persuasions, to arrive at a revamped merger control regime that can best serve competition and growth. Such a programme can usefully draw from recent developments in Europe, exploring the interlinkages between industrial and competition policy.

1. Introduction

Competition is a critical driver of innovation, investment and economic growth. Policies that support and enhance competition are therefore key to accelerating economic growth in South Africa. Competition policy is one such a policy. It it is not the only – and often not the principal – policy shaping competition in a particular market. Yet the scope and broad impact of competition policy justifies special consideration by growth-minded policymakers.

Competition policy enforcement in South Africa has been remarkably active in highlighting and targeting anti-competitive practices and in advancing awareness of competition law in business and commercial decisions. The South African merger control regime is well-established and regarded internationally, often featuring novel competition theories and with extensive attention to non-competition ('public interest') implications of transactions – at a time when these issues are receiving increased international attention. South African competition authorities are also recognised as representing some of the country's better functioning, and more efficient, public entities.

Its position of relative strength within the policy toolkit implies that competition policy can play a key role in policy efforts aimed at accelerating economic growth in South Africa. This policy paper focuses on how South African merger control, in particular, can better support fixed investment and economic growth. The paper suggests strengthening the independence of the competition authorities, limiting and clarifying the role of non-competition concerns in merger decisions and clarifying the role of equity considerations when assessing competition in merger evaluation.

To motivate these reforms, I first explain how competition and growth is related and then argue that merger control, in its current form, may not always, or optimally, support greater competition. I then propose and discuss the three sets of reforms. The arguments advanced here are necessarily summarised, as they are intended to stimulate debate and to offer a starting point for further research. They are not formulated as a criticism of the competition authorities, who have the task of implementing the law and policy directions of government. Readers should also take note that I do not not deal with strictly legal considerations, including those related to constitutional law, which may affect how South African competition policy is, or can be, enforced or reformed.

2. Growth and competition – and its link to merger control

Competition underpins the process of economic growth. A long line of economics research confirms the link between competitive pressure on the one hand and productivity and innovation on the other hand (Nickell, 1996; Blundell et al, 1999, Aghion et al, 2005;). Firms respond to competition by increasing factor productivity to lower costs. But competition may not only encourage firms to be efficient in delivering existing products and services using existing technologies. Competition, and the prospect of profit, may spur innovation: firms facing competition may develop or adapt business processes and new or improved products and services to capture profit. The relationship between competition and innovation is not linear and much research effort has been devoted to understanding under which competitive conditions firms are better incentivised to innovate (Aghion et al, 2005, Gilbert, 2006). Even so, at a macro-economic level, more competition will undoubtedly spur dynamism in an economy that has seen lacklustre growth for the greater part of two decades.

The investment and growth benefits of encouraging more competition is evident from South Africa's macroeconomic experience at the start of this century. Boshoff and Du Plessis (2020) show how a range of sectoral reforms in the late 1990s introduced competition to a host of markets in South Africa and gave rise to rising investment in the early years of the 2000s. The sustained and strong business cycle expansion from the late 1990s until 2007 was the first since the 1960s – and the only one since then – to be associated with a sustained expansion in fixed investment. Increased competition was at the heart of this period of faster economic growth.

But already in the mid 2000s, the investment and growth benefits, derived from the competition introduced by early liberalisation efforts, were waning. Research, as part of the academic effort to support the government's Accelerated and Shared Growth Initiative for South Africa ('ASGISA'), showed that many markets in South Africa continued to suffer from weak competition (see, for example, Aghion, Braun and Fedderke (2006)). Government did not expand its 1990s liberalisation efforts, failing to increase competition in key regulated industries such as transport, energy and telecommunications (for an accessible discussion of the lack of competition in regulated industries as a key competition issue, see Boshoff (2022)).

Subsequent government-initiated investigations underlined the importance of addressing limited competition. The National Development Plan (NDP 2030) cites "low levels of competition for goods and services" as a key constraint on growth (National Planning Commission, 2012). The OECD Economic Survey (2016) reached similar conclusions, pointing to high entry barriers and the dominant role of state-owned firms in network sectors as reflective of weak competition.

A more recent OECD Survey again attributes weak economic growth in South Africa to weak competition – and specifically weak firm dynamism and regulatory barriers to entry (OECD 2025, 19-23). Not only does that report reaffirm the link between weak investment and innovation on the one hand and competition on the other hand, but it also again highlights the critical role of regulatory constraints in limiting competition in many South African markets.

Government policies of various types shape competition and, hence, growth. Competition policy alone cannot guarantee greater competition in the South African economy. Market outcomes depend as much (and often, more) on product-market regulation, licensing and state ownership than on the enforcement of competition policy. The OECD Survey mentioned above (2025, Section 2.2) documents precisely such regulatory barriers in South Africa. It finds the regulatory environment for business entry to be comparatively restrictive, citing *inter alia* the complexity of licensing and permit systems and opaque public procurement processes (pp. 57-60). This evidence is complemented by the macroeconomic evidence of the impact of decades of weak or lagging regulatory reforms on competition in heavily regulated industries, including energy, telecommunications, transport and mining[2]. Adopting pro-competition policies, and not just more effective competition policy, is indeed key to supporting greater competition.

That competition is shaped by various policies other than competition policy supports a coherent approach to 'competition-enhancing' policymaking. A lack of policy coherence has long been cited as a growth constraint. For example, more than a decade ago, the National Development Plan had already set out a large number of initiatives to align different government policies and different government departments (National Planning Commission, 2012, Chapter 13). It is important that this cross-sectoral work and reform continues. This paper, focuses on a narrower question, namely what role competition policy – specifically, merger control – can play within the current policy framework of South Africa.

A focus on higher economic growth implies a special role for merger control. Investment and business expansion often occurs via mergers and acquisitions. Even where new or small businesses play a significant role in bringing innovation and constitute new business formation, scaling or expansion often involves transactions with larger corporations. The extent of mergers and acquisitions activity is a key barometer of

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[2] On telecommunications, see Hawthorne (2015); on transport, see the final report of the Transport Inquiry (Competition Commission of South Africa, 2021); on energy, see Msimango, Orffer and Inglesi-Lotz (2023).

economic confidence and subsequent performance. Merger control has a key impact on planned and actual mergers and acquisitions and, therefore, on growth.

Within this context, South African merger control must protect competition in those industries where broader policy problems have given rise to weak competition. At the same time, merger control must avoid the problem of intervening in mergers that do not raise competition concerns. As summarised in the next section, South African merger control has become much more interventionist over the past two decades. This is less due to a concern with competition, but because of the pursuit of several non-competition objectives under the current merger control regime. This shift is likely deterring pro-competitive mergers or otherwise raising the cost of mergers for prospective and actual merging parties. Such costs, including of weaker predictability, weaken investment incentives and harm growth.

The reforms proposed in this paper are aimed at giving primacy to competition (and economic growth) in South African merger control. Even so, I explicitly recognise that public interest considerations remain important to the broader policy framework and ought to be retained, in some revised form, in our merger control regime. Indeed, many non-competition provisions in South African merger control have a bearing on dynamic competition and innovation outcomes – issues that are increasingly receiving attention in other jurisdictions.

3. The problem with the current merger control regime

Has competition policy been effective in supporting competition in South African markets? In an earlier ERSA policy paper (Boshoff, 2025), which should be read with this paper, I analyse the comparative performance of South African competition policy over the better part of 30 years. Comparing two key areas of enforcement – merger control and anti-cartel enforcement – I find that anti-cartel enforcement has been more effective than merger control. The efficacy of competition policy is evaluated based on the extent to which adjudication decisions can be considered rational, with a rational decision being one that is consistent with the evidence at hand, extant knowledge (i.e. research and policy knowledge from previous cases) and the preferences of the decision maker. Accordingly, if the aim of merger control is to advance competition, rational merger decision would advance this aim subject to the constraints of evidence.

This section broadly summarises these earlier findings, indicating that especially merger control has become dominated by *changes* in the preferences of policymakers. As I argue below, while policy preferences are permissible features of rational policy decisions, continual changes in such preferences result in decision where the roles of other critical factors (economics evidence and case experience) are diluted: such changes result in a move away from competition-friendly, or rational, decisions.

3.1 Rational competition policy

Rational policy decisions favour those choices carrying lower expected error costs than other choices, subject to the preferences of the policymaker. Rational policy is not necessarily liberal (i.e. 'merger-friendly') policy. To understand the competing roles of case evidence and of policy preferences in rational decisions, I view decisions from a Bayesian decision-theoretic perspective (see Boshoff (2025) in which I discuss the framework at length)).

Decisions in competition policy can be viewed as decisions that reflect a weighing of alternative probabilities. In merger control, authorities compare the likelihoods of harm and of benefit, given the evidence. If the case evidence is more likely reflective of a theory of harm than of a theory of benefit, it would suggest that authorities consider blocking the merger.

Even so, the relative weights of the competing likelihoods must pass a conceptual threshold, i.e. meet a burden of proof[3], if the decision is to be rational. Two factors determine the burden of proof for a rational decision: 'prior' probabilities and the 'loss function' of the decision-maker. Prior probabilities reflect the position of the academic literature and previous case decisions on the probability of merger harm and benefit. The loss function reflects the extent to which a decision-maker is willing to accept the cost of two types of erroneous decisions: incorrectly concluding that a beneficial merger is harmful and that a harmful merger is beneficial. These error costs are not objectively determined: they are shaped by the 'losses' assigned by the policymakers.

As I have pointed in Boshoff (2025), prior probabilities and error costs "represent two competing forces in case decisions: the one, the force of economics research and case experience, and the other, the force of policy preferences." When policy preferences change over time or when they are no longer systematic, but reflect ad hoc preferences, these overpower the prior probabilities and case evidence, and render decisions less rational. I have argued in Boshoff (2025), and will argue again below, that such changing policy preferences are a big challenge for South African merger control. Merger control in South Africa has moved away from a rational policy guided by case evidence and the evolution of economics thinking, towards one where policy preferences dominate. This is particularly evident once one compares the evolution of merger control with that of other areas of South African competition policy, especially anti-cartel enforcement.

3.2 Merger control and anti-cartel enforcement are on diverging paths

Merger control remains the centrepiece of South Africa's competition regime and exerts a disproportionate influence on investment sentiment. The reallocation of resources, implicit in firms' efforts to improve efficiency and pursue innovation, may lead them to acquire assets from other firms, or dispose of such assets. And rather than dealing in assets, it may lead firms to acquire other firms, or parts of firms. These activities, which for illustrative purposes can be termed "mergers and acquisitions", therefore often represent productive economic activity and are associated with fixed investment. Merger control, which directly shapes mergers and acquisitions by large firms, is therefore a key part of the growth process.

As documented in Boshoff (2025), merger control has become progressively more interventionist. The proportion of notified mergers approved with conditions rose from about 10 percent in the early 2000s to nearly 30 percent by 2017–18 (Changole & Boshoff 2022). Morris & Boshoff (2025) show that after 2017 the probability of conditional approval increased by a further eleven percentage points, after controlling for merger type and market structure. Merger prohibitions by the Tribunal remain limited in South Africa, rising from roughly two per year in the early 2000s to about seven per year during 2015–20. The number of prohibited mergers in South Africa is significantly lower, proportionally, than the figure for the EU: prohibitions (including withdrawn mergers) represented approximately 2.8% of annual EU cases from 2002 to 2019, and 3.8% over the period 1990 to 2019 (Bernhardt 2020). Like in South Africa, merger conditions are historically far more extensively employed than prohibition (Haucap and Schmidt, 2013).

Beyond the frequency of intervention, the duration of merger proceedings has lengthened markedly, adding a further cost in the form of procedural uncertainty. Changole (2022) finds that average merger approval times have increased steadily, especially for mergers subject to public-interest review, with complex cases often extending well beyond statutory timelines. These delays raise transaction costs, prolong uncertainty for merging firms, and in some cases cause deals to lapse altogether.

[3] There may well be correlation between the 'burden of proof' I mention here and the complex legal concept of 'burden of proof'. I reluctantly include the term, as it is commonly employed in the relevant law and economics literature. I take the term to mean 'threshold', as defined by the framework.

While the rise in interventions in the early years may be linked to 'learning', the subsequent and sharp increase suggests that changes in policy preferences were key: South African policymakers have become much more concerned about the cost of inadvertently allowing a harmful merger than about the cost of incorrectly blocking a beneficial one.

By contrast, as documented in Boshoff (2025), anti-cartel enforcement has operated broadly in line with the principles of rational policy. Enforcement in this area of competition policy has remained strongly linked to policy approaches elsewhere and the broad position in the academic literature. The rise in cartel prosecution in the first two decades of modern competition policy was strongly driven by learning, while the subsequent enforcement plateau reflects both the success of the policy and the shift in focus towards more complex forms of collusion, with fewer cases.

The experience in merger control and anti-cartel enforcement therefore suggests two alternative paths for enforcement. One path characterises competition policy that evolves based on changes in economic evidence and experience from previous cases. Another path characterises competition policy that evolves based on unsystematic changes in the preferences of policymakers. This divergence is critical for this paper, as the second path cannot optimally support economic growth in South Africa: adherence to the primacy of economics insights and research is particularly important in ensuring that pro-competitive mergers are not discouraged or, if they are permitted, burdened with conditions that do little for economic growth.

This raises the question of reform. How might one enhance merger control in particular to better promote competition and hence economic growth? These are complicated and large questions, which a single paper or author cannot deal with in any substantial or unbiased way. Even so, I will propose three key reform areas for South African merger control, in the hope that further research might shed light on the appropriate direction that each can take. The three reforms proposed in the following sections are: first, strengthen the independence of the competition authorities; second, reform the public interest leg of merger control; and, third, clarify the role of equity considerations in competition assessment of merger cases.

4. Pro-growth reforms I: Strengthen the independence of the merger control regime

Competition policy is effective only if its enforcement is predictable[4]. Uncertainty, and hence low predictability, is not an unavoidable feature of competition policy. Rational, and hence, predictable policy is the result of a choice: as argued earlier, it is one that allows for a rational consideration of competing costs and benefits, the available evidence, guidance from research and past cases, and a proper and stable accounting for policymaker preferences. It is also one that is explicitly cognisant of the various costs of erroneous decisions. The absence of rational policy is not the result of an uncertain environment within which the policy is applied.

An important reason for the absence of rational competition policy, as in many other areas of policymaking, is suboptimal institutional design. A first set of proposed reforms might therefore entail efforts to strengthen the institutional design of South African competition policy. I propose institutional reforms that aim to significantly strengthen the independence of competition authorities. To this end, this section explores the problem of "time inconsistency" in our current merger control regime and why greater independence of the competition authorities is key to addressing such time inconsistency.

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[4] This condition holds for all areas of economic policymaking. There is widespread acceptance in monetary policymaking that policy predictability is a central prerequisite for low and stable inflation (Clarida and Gertler, 1999; Taylor, 1993). The revitalised debate around fiscal rules, which relate to policy predictability in the fiscal policy arena, offers a further example (Alesina and Perotti, 1996).

4.1 The problem of time inconsistency

Time inconsistency – a concept developed by Kydland and Prescott (1977) and later refined by Barro and Gordon (1983) - describes a scenario in which the optimal policy response before events unfold (i.e. the *ex ante* policy) differs from the policy response that would be considered optimal once the events have occurred (i.e. the *ex post* policy).

It is a common problem that arises when policy has multiple and conflicting goals, an issue that has received particular attention in the monetary policy literature. It is critical for the public to believe that monetary authorities will act against inflation, as it affects how the public forms its inflation expectations and, ultimately, the level of inflation in an economy. Yet monetary authorities not only wish to maintain low inflation in the long run. They also wish to support economic growth in the *short* run. These dual and conflicting goals create a problem in managing expectations. Once the future arrives, monetary authorities would again be concerned about supporting growth at the time and will promise to pursue low inflation subsequently. This discretion to switch goals leads the public to discount a nominal policy commitment to low inflation in the long run. The public will expect higher inflation in future, which leads to higher actual inflation today and in the future. This "time inconsistency" undermines the efficacy of monetary policy (Kydland and Prescott 1977; Rogoff 1985). One of the principal motivations for an inflation-targeting framework, such as the one in place in this country, is that it limits the discretion of monetary policymakers in trading off multiple goals (Svensson 1997; Bernanke et al 1999).

A similar problem faces merger control. A competition authority may commit *ex ante* to allowing a proposed pro-competitive merger that would support economic growth in the future. Even so, to the extent that the authority enjoys discretion, it may also care about the short-run costs that the merger would impose on special interest groups (including those politically connected to policymakers). Once a particular transaction comes under review, these *ex post* political or social pressures may tempt policymakers to deviate from the quick approval of a merger or from unconditional approval. Protecting or advancing the interests of politically-influential or other interest groups – especially those that might be adversely affected by broader changes created by the proposed transaction - may now appear desirable. This discretion for authorities to switch between objectives undermines the credibility of the competition commitment.

4.2 Time inconsistency in South African merger control

Time inconsistency is a particular challenge in the South African context. And its cause is not the discretion enjoyed by competition authorities, but by their political overheads. The Competition Act grants the Minister of Trade, Industry and Competition a broad scope to interpret "public interest" and, on that basis, to intervene in, or appeal, merger decisions on such grounds. This discretion is, at least in part, responsible for the significant increase in public-interest-related concerns and conditional merger approvals (see Boshoff (2025) for a complete discussion).

As discussed in the next section, the increased focus on public-interest concerns in merger conditions and the increased use of such conditions are now well documented (see Changole and Boshoff (2022), Van Wyk et al (2023), Boshoff and Morris (2025), and see Boshoff (2025) for an accessible summary). The 2018 amendments accelerated, rather than initiated, the rise in public-interest-dominated merger control. Furthermore, and critically, the amendments also placed the competition and public interest conditions on equal footing, significantly increasing the discretion of high-level policymakers to engage in short-term rent seeking rather than promoting long-run growth. At worst, it allows such high-level policymakers to engage in various forms of rent extraction from corporations seeking approval for large transactions that would not otherwise raise competition concerns. South African competition law therefore creates fertile conditions for time-inconsistent behaviour.

Such time inconsistency does not show up only in a higher probability of conditional merger approval. It also shows up in the rise in the duration of merger adjudication – a matter that was recently highlighted in the Vodacom/Maziv matter (*Vodacom and Maziv v Competition Commission* [2025] ZACAC 2). Merger adjudication duration has risen consistently and is significantly higher in the case of transactions that feature public interest concerns (Morris and Boshoff 2025; Changole and Boshoff 2022).

Time inconsistency in respect of growth-enhancing merger control is an important reason for setting up a merger control regime that limits the goals that competition authorities may pursue. We return to this issue in the second set of proposed reforms around public interest. But the efficacy of such a set of rules are conditional on a first set of institutional reforms, which should limit the discretion of time-inconsistent political decision-makers.

International policy research has long highlighted the harmful role of ministerial discretion in policy processes associated with investment. Twenty years ago, the joint APEC-OECD Integrated Checklist on Regulatory Reform (though not solely dealing with competition policy) emphasised that regulatory frameworks should not allow undue discretion, but seek to promote predictability (OECD/APEC, 2005). Even in the context of policies where specific public interest concerns apply, such as in transactions that affect national security, the OECD has highlighted that investment policies must avoid arbitrary interventions (OECD, 2023a).

4.3 Independence as a safeguard against time inconsistency

Improving credibility requires narrowing ministerial discretion by improving the independence of the competition authorities. It is well recognised that delegating decision-making to independent bodies can help lawmakers avoid time inconsistency (Majone, 1997; Alesina and Tabellini, 2007). The benefits of independence is particularly well documented in the case of monetary policy (for an extensive treatment, including a South African focus, see Du Plessis et al (2024)). But even in the context of competition policy, the OECD, in its Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement, insists that enforcement must rely on independent institutions (OECD, 2023b).

Independence of the competition authorities are not aimed at limiting political influence only. For example, it is often competitors, who foresee being 'harmed' by greater competition brought by a proposed transaction, who would seek to use ministerial discretion to affect merger adjudication. Independence is therefore broadly aimed at limiting the extent to which the work of a technical agency is influenced by any external party.

A first set of reforms may therefore entail considering amendments to the Competition Act to limit the extent of ministerial discretion and intervention in merger control. The Minister of Trade, Industry and Commerce currently holds significant influence over merger control proceedings. Specifically, the Minister may participate as an intervener in merger proceedings, making representations on the public interest effects of a merger and recommending appropriate conditions. Furthermore, the Minister may issue policy directives or regulations, which shape how public-interest-related provisions are enforced. Reforms should aim at specifying the appropriate goals in legislation and limit the extent to which the Minister enjoys such special rights.

Furthermore, a broader set of constitutional and legislative reforms are required to support independence. These should include:

- Insulating competition authorities from ministerial intervention or ministerial competition, by locating the competition agency outside of the Department of Trade, Industry and Competition, reflecting the approach taken in respect of the South African Reserve Bank.
- Explicit provisions to secure their tenure of senior personnel.

- Reforming accountability processes, including reforms to provide more information on completed mergers and the reasons associated with merger decisions, to develop independent oversight bodies (akin to the German system where one competition body is tasked with reviewing the other), and to enhance feedback and accountability processes to Parliament.

There is no necessary tension between independence and the pursuit of public interest considerations in South African merger control. Even so, as discussed next, the current public interest framework is not suitable for application in a predictable manner. Reforms to improve independence also require appropriate reforms to render the enforcement of public-interest provisions more predictable and more limited (and possibly focused) in scope.

5. Pro-growth reforms II: Reconsider the public interest inquiry in merger control

Modern South African competition law is built on the premise that all spheres of government policymaking must recognise the complex socio-economic environment and history of the country, and that this also has implications for competition policy. The variety of non-competition objectives of South African merger control reflects the overarching policy aim of transforming the economy, towards a more racially- and gender-representative one and one offering opportunities in an economy structurally different from that of the past. Even so, a growth-seeking competition policy requires rethinking the scope and position of the so-called 'public interest' inquiry in South African merger control. As I argue below, competition policy cannot properly support growth if it is not principally focused on competition.

I start by setting out briefly the evolution of the public interest inquiry in merger adjudication in South Africa and its effects. This is followed by a discussion of a set of proposals for the reform of merger control. The proposed reforms reflect that, despite the analytical and associated policy-related challenges of considering non-competition issues in merger control, a revised form of public-interest analysis in South African merger evaluation remains necessary.

5.1 Evolution of the role of public-interest concerns in merger control

From its inception, the Competition Act 89 of 1998 required merger control to balance competition and so-called public-interest concerns. The academic debate at the time reflected sharp differences among economists on the appropriateness of non-competition objectives in the competition statute (see Theron (2001) for a summary of competing views in respect of its implications for merger control).

Originally, the public interest factors listed in the Competition Act — which now requires evaluating the impact of a proposed merger on employment, the participation of small and HDP-controlled firms, its impact on specific regions or specific industries, and national competitiveness — were conceived as secondary to the competition enquiry. Early enforcement reflected this hierarchy, with public interest considerations tempering decisions through appropriate conditions (Theron, 2001, Changole, 2022).

From around 2010, authorities started to rely more heavily on public-interest considerations to shape proposed transactions, increasingly reflecting ministerial participation (discussed earlier) and a view towards using merger control for industrial policy purposes. This was particularly evident in *Wal-Mart/Massmart* (73/LM/Dec10), *Momentum/Metropolitan*(41/LM/Jul10), and *Kansai/Freeworld* (53/AM/Jul11).

The 2018 Amendments solidified this shift in enforcement approach, by expanding the list of relevant public-interest factors to include concerns around merger effects on worker ownership and HDP participation throughout value chains. The amendments to the public interest inquiry reflected a policy view that a set of explicit non-competition objectives are required to address goals related to socio-economic policy objectives, including transformation: "the public interest provisions have been amended to explicitly create public interest grounds that address ownership, control and support to small businesses and firms owned or controlled by historically disadvantaged persons" (CCSA Revised Public Interest Guidelines relating to Merger Control, 2024).

In addition to a more expansive scope for public interest, the amendments also ensured that the assessment of public interest consideration were placed on a footing equal to that enjoyed by the competition assessment. For the first time, merger control was no longer principally about competition matters. At the same time, as noted earlier, the amendments also allowed for greater ministerial intervention in merger control on the basis of these public interest concerns. As I have discussed in Boshoff (2025), these legislative changes coincide with an arguably expected and marked rise in interventionism in merger control. Drawing on large-merger datasets, Changole (2022) and Changole & Boshoff (2022) show that the probability of conditional approval tripled between 2006 and 2018, while Morris & Boshoff (2025) find that post-2017 mergers faced an 11-percentage-point higher probability of conditional approval, after controlling for other factors. This trend is reflective of a shift to a *preference-driven* model of merger control: one dominated by policy preferences and where the preferences have changed to reflect a different view of the error costs associated with merger adjudication (Boshoff 2025: 8–9). In economics terms, the "loss function" of policymakers has changed, toward over-weighting the cost of erroneously allowing a harmful merger relative to that of erroneously blocking a beneficial one. While such a rise in interventionism may also reflect other developments, public interest considerations have arguably been its primary driver.

This evolution may yet have advantages in light of the current international debate. As discussed later in this paper, there is now a push in the EU for merger control to reflect industrial policy objectives. To the extent that industrial policy objectives are relevant to South African competition policy, our competition legislation appears sufficiently flexible to support it. Nevertheless, the extent of the dual structure and special position accorded to public interest concerns implies that South African competition policy diverges sharply from the relatively narrow treatment of non-competition considerations in other jurisdictions (Changole (2022) presents a useful summary): for example, in both the EU and UK, such concerns are limited to narrow concerns (including national security or media plurality).

If South African policymakers wish to retain non-competition objectives in merger control, how can the public interest assessment be improved? I propose three reforms to the public interest framework. First, I propose re-establishing a hierarchy of objectives in South African merger control, giving primacy to competition. Second, I propose a shortened and reconsidered list of public-interest provisions, with a potentially stronger focus on industrial policy objectives. Third, I propose enhancing the public interest evaluation by requiring a merger-specific and market-based analysis, akin to that underlying the competition assessment.

5.2 Restoring the primacy of competition in merger assessment

My first set of proposed reforms is aimed at re-establishing competition as the principal focus of merger control in South Africa, while reconsidering the scope of the public interest provisions. To this end, I propose that merger assessment should follow a two-stage process:

- First, it should involve a competition assessment, during which a proposed merger is evaluated based on whether it is likely to weaken competition.
- Secondly, the primary assessment might be followed by a conditional public-interest-related assessment:

- If anti-competitive effects are established in the first stage, public-interest considerations may then justify conditional approval.
- If no anti-competitive effects are found, public-interest considerations may affect the outcome only on exceptional grounds and, at worst, lead to conditional approval.

A hierarchy would go a long way towards restoring South African merger control's core competition focus. It is instructive that the original intention for the inclusion of public interest provisions was not to override the primary competition analysis. The institutional and political economy of post-apartheid South Africa required all forms of legislation to reflect the post-apartheid reality and to gain legitimacy by demonstrating every policy's commitment to address the many socio-economic challenges of the country.

Nevertheless, the public interest inquiry was still given a *secondar*y position in the (then) new merger control regime. As noted by the former chairman of the Tribunal, "…[the] primacy of the competition evaluation is secured by the structure of the Act which provides that the competition evaluation is completed as the first step in the decision making process and, hence, that *the public interest test is conducted through the filter of a completed competition finding*" (Lewis (2002: 3), emphasis added). This reflected the view that the public interest provisions in competition law offers protection "*ancillary* to the protection offered by other legislation specifically directed at protecting those elements of public interest" (Lewis, 2002: 3, emphasis added). All of this served to limit the "infinitely elastic" character of public interest in the original legislation (see Lewis (2002)).

Furthermore, it is also insightful that the original intention was that the public interest provisions could, at best, lead to conditional approval – in much the same way as I suggest above: "…the principal decision – to prohibit or allow a merger – [is] taken on competition grounds with the public interest considerations possibly accounting for the imposition of conditions carefully crafted to ameliorate the negative public interest impact" (Lewis (2002: 3)).

The state of the law in 2025 will determine the specific operation of the proposed hierarchical relationship, but the intention should be to return to the original relationship described here.

5.3 Re-evaluating public interest objectives

While the proposed hierarchy would continue to allow for public interest considerations, I also propose that the number of such special protections be carefully reviewed and limited.

The EU accommodates a focus in merger assessment beyond competition, on so-called "legitimate interests", but under quite narrow conditions. These deal with public security, media plurality, and prudential rules. A focus on such concerns is subject to their compatibility with broader EU laws, which prevent non-competition aims from dominating the competition assessment (EUR-Lex 2004, Art. 21(4)). EU enforcement under Article 21(4) generally reflects this balance. Accordingly, one may argue that the EU approach preserves competition as the main objective of merger control (Jones & Davies 2014; OECD 2017).

Non-competition concerns may well feature in EU merger decisions: Jones and Davies (2014) note, for example, that EU Member States have acted to slow down merger approvals in cases where alternative objectives are being sought. These cases are limited in number. Similarly, the UK regime also allows for non-competition considerations in merger control: UK ministers may intervene on grounds of national security, media plurality and financial stability, but still subject to the UK competition agency's competition assessment (see Changole (2022) for a summary of approaches taken in various leading jurisdictions).

Even so, there is significant academic and policy debate favouring competition policy – and by implication merger control – to pursue broader objectives. The heterodox competition law literature, of which Eleanor Fox has become a leading proponent, sees the economics approach to competition plicy as limited and, therefore, argues for the pursuit of multiple objectives beyond what it calls 'efficiency'[5]. For all its other qualities, the broad thrust of this literature is not particularly hepful for the purposes of a growth-focused competition policy. Such a policy necessarily requires limiting the extent to which merger control pursues objectives other than those that can support economic growth. At best, a growth-focused merger control regime requires policymakers to identify those non-competition objectives that might best support the competition objective, and, hence, support economic growth. Objectives that are aligned with the competition objective – specifically industrial policy objectives – may be best suited for this purpose.

Within this context, the body of research spawned by the Draghi Report (2024), and the on-going review of the EU's Horizontal (2004) and Non-Horizontal (2008) Merger Guidelines, is relevant for the South African question. These EU policy developments have encouraged a debate about the role of merger control in supporting the industrial and technological competitiveness of the EU. The Draghi Report identifies under-investment in research and development and a lack of scale for emerging firms as important constraints on European competitiveness. It therefore proposes that merger control in the EU should be reformed to contribute to innovation. The subsequent debate on the nature of such reforms has relevance for South Africa: as argued earlier, innovation is a key driver of economic growth.

From one perspective, what the EU now debates, South Africa already caters for: the list of public-interest concerns in the Act include sectoral and regional competitiveness. One might even argue that the South African competition law framework is ahead of advanced jurisdictions, such as the EU, in allowing competition authorities to pursue such broader – including industrial policy – aims. Even so, compared to other public interest concerns related to employment or, under the amended Act, such competitiveness concerns have been raised in relatively few cases (see Morris and Boshoff 2025, Changole and Boshoff 2022). In light of a growth-focused competition policy, it is of critical importance for policymakers and academics to re-evaluate the scope and focus of our public-interest objectives aimed at supporting competition, including advancing innovation.

While emphasising a role for merger control in supporting innovation or selected industrial policy objectives, it is noteworthy that an important part of the European debate does not centre on adding additional objectives to merger control. Rather, the focus is on a more expansive view of competition, which, implicitly, may serve certain industrial policy objectives. The debate in the EU centres on how to advance the competition assessment in merger control to better account for dynamic considerations, including the long-run impact of proposed transactions on innovation (Petit and Teece (2021), Gilbert (2025)). It represents a different approach, and one better aligned with the emergent economics literature, in which merger control can contribute to entry and dynamism. Rather than diluting the focus of merger control to accommodate other objectives, it suggests that one should rely on the evolution of economics to drive new theories of harm that relate to issues previously considered outside the purview of 'competition'.

To the extent that South Africa can reform its merger control to allow for a rational, competition-focused policy, its regime is well placed to advance such dynamic competition assessment. In several high-profile mergers, the competition authorities have already championed dynamic theories of merger harm, related to "potential" competition and entry (Boshoff 2024). Several of these theories, considered in the light of the

[5] Seminal pieces in this literature, including those offering opposing views, include Fox (2016), Fox and Bakhoum (2019), Lianos (2020) and Dunne (2020). See Choi et al (2025) for a recent South African treatment. I thank the reviewer for pointing out this literature.

international literature on the subject, represent novel approaches to "killer acquisitions" and other potential competition concerns.

A focus on dynamic competition suggests an alternative approach to accommodating industrial policy objectives in South African merger control, while maintain the primacy of competition. An exposition of the dynamic competition literature is beyond the scope of this paper[6], but it would be important to consider whether it is an approach that the authorities may wish to rely upon more generally, or whether it is to be applied to particular industries, including digital markets, and communicated accordingly to market participants (perhaps via guidelines). In this regard, current EU policy research[7], and the supporting law and economics literature[8], is actively exploring the potential scope of dynamic competition considerations in merger control.

For the purposes of reform, it will be important to consider the relative costs and benefits of these alternative approaches to accommodate industrial policy objectives. A research programme investigating the complex linkages between competition policy and industrial policy would be of particular relevance here. Such a programme can usefully draw from the emerging, and often polarised, international literature[9]. Duso and Peitz (2025), from a German perspective, identify alternative policy options for advancing industrial policy objectives within the merger control framework of the EU, including ministerial override or the overturning of merger decisions by separate agencies. In light of the first proposed set of reforms, to enhance independence, it is not advisable to pursue a path that leads to multiple agencies approving mergers, for the sake of advancing industrial policy objectives. But, critically, Duso and Peitz also point out that the dynamic assessment of mergers may include consideration of innovation and investmet in selected industries (see also Federico et al (2020), Duso et al (2025)). This suggests that a broader concept of competition may offer a way to advance industrial policy objectives without sacrificing independence[10].

What is now needed is, firstly, an assessment of the success of these interventions in South Africa and their accompanying cost and, secondly, an identification of those objectives that would better serve competition and hence faster growth. This requires a deeper consideration of how industry policy objectives, on a limited basis, might support competition policy objectives in selected industries in South Africa.

5.4 Strengthening the analytical basis of the public interest assessment

A third and complementary set of proposed reforms could be to enhance the analytical rigour underlying the assessment of public-interest concerns. The competition effects of a proposed merger are assessed within defined markets using sophisticated economics reasoning. In contrast, the public-interest effects of that merger are often assessed at the macro-political level or in terms that are not necessarily tied to particular markets. In other words, the analytical rigour demanded of the competition assessment is absent from the public-interest assessment.

[6] See the work by the Dynamic Competition Initiative (www.dynamiccompetition.com), which brings together scholars in law, management and antitrust to make the case for the dynamic assessment of competition.

[7] See, for example, Maive et al (2025).

[8] See the declaration by several leading competition academics, Berqvist et al (2025).

[9] See, for example, Coyle (2024), which suggest growing recognition that supply-side changes – which often gives rise to mergers – may be of a systemic nature, requiring a decision on a particular transaction to account for the likely implications of that transaction for industrial competitiveness or other social objectives). For an alternative view, which argues that market dynamism does not suggest a larger role for industrial policy concerns in competition policy, see Evans (2025).

[10] Another challenge of a dynamic competition approach is that it may well reduce the predictability of merger review: the core challenge facing this emergent approach is how to best predict merger outcomes in changing environments (see also my comments on this problem in the WeBuyCars/MIH merger (Boshoff, 2024)).

To address this analytical misalignment, public-interest factors should be evaluated consistent with the principle of merger specificity. Critically, public interest concerns should be shown to arise from the proposed merger itself, rather than from conditions created by broader forces beyond the particular market(s).

Strengthening the merger specificity of public-interest factors would be consistent with international practice. Indeed, policy guidance from the OECD supports merger control that is considerate of non-competition factors, but which is applied in a merger-specific and transparent fashion (OECD 2016).

Implicit to the principle of merger specificity is the acceptance of counterfactual analysis and a recognition of how uncertainty is accommodated in such a counterfactual analysis. Adopting a counterfactual basis for any public interest inquiry requires the clarification of the time horizon implicit in public-interest claims. The counterfactual evaluation of a public-interest concern ought to be focused on the impact over a horizon similar to that upon which a competition counterfactual is based. While there are cases where the authorities may wish to focus on longer-term developments, these include the emerging dynamic competition concerns in digital markets, there are other markets where such a long-term view is not the focus. In any event, it is important to maintain symmetry in the horizons relevant for competition and public-interest counterfactual analysis.

The proposed reforms are not a matter of simply reducing the current list of public interest factors. Such factors may reflect legitimate policy concerns. Even so, it seems that short-term employment-related issues have dominated the public interest assessment in past cases. While it reflects policy priorities to protect employment, it also reflects the analytical ease associated with the employment-related concern. Concerns related to employment considerations and shareholding issues may be more amenable to counterfactual analysis with a shorter horizon. More detailed research would be required in this regard.

The proposed hierarchy and analytical reforms are related to a further policy question around whether there should be an implicitly positive requirement on merging parties to advance the non-competition objectives of policymakers. The current focus implies such a positive requirement. In contrast, a requirement that would see authorities consider only whether a proposed merger will result in an *adverse* effect on a chosen public interest concern is likely easier to handle analytically. In general, the evidence is still unclear as to the efficacy of positive interventions, including that of supplier development programmes. There is also a legitimate policy question about whether growth-focused competition policy should require particular supply-chain players, seeking to merge, to advance broader policies with respect to their industry. In any event, even if lawmakers prefer not to move away from an implicitly positive requirement in respect of certain public interest aims, the analytical reforms mentioned earlier are critical to enhancing the competition focus of merger control.

6. Pro-growth reforms III: Reconsider how "vulnerable groups" are to be accommodated in merger control

A third set of growth-supporting reforms relate to the treatment of equity considerations in the assessment of competition. This is a matter related to, but distinct from, the reforms proposed above in respect of public interest considerations. It relates to the assessment of competition, as opposed to the question of balancing competition against non-competition objectives (which may also reflect broader concerns with equity).

The notion of "vulnerable" consumers or groups has recently entered South African competition jurisprudence and is gaining attention in competition law investigations. As discussed earlier, while public interest factors also reflect a concern for equity, such factors are dealt with in an assessment separate from the competition assessment. The approach taken in accommodating "vulnerability" is different, with the competition assessment itself being affected.

Below, I first set out selected features of the *Mediclinic* matter, then discuss the analytical challenges and economic costs (including growth costs) of an approach that seeks to focus the competition assessment of mergers on equity issues, and finish with a set of proposed reforms.

6.1 The *Mediclinic* decision

In *Mediclinic Southern Africa (Pty) Ltd v Competition Commission and Others* ([2020] ZACC 15), the Constitutional Court upheld the Tribunal's prohibition of Mediclinic's proposed acquisition of Matlosana Medical Health Services. The Constitutional Court emphasised that competition authorities must interpret the Competition Act in light of the Constitution's values of equality and dignity. It suggested that such an interpretation implies that "competition law serves not only efficiency but also fairness and inclusion". Therefore, in the context of this healthcare merger, the Court ruled that competition authorities must consider the impact on "patients as *vulnerable* consumers in small towns whose choice and access to health care may be reduced." (*Mediclinic*, paras [111]–[117], my emphasis added).

The Court's approach did not focus on whether competition would be weakened in the relevant market. Instead, its approach implies that competitive harm can be inferred from the potential loss of access for a vulnerable group. Rather than evaluating the welfare and competitive effects at the level of the *market*, the Court focused on the welfare of a *subset* of consumers deemed vulnerable because of geography and income. The Court held that the merger threatened "patients as vulnerable consumers in small towns whose choice and access to health care may be reduced" (paras [111]–[117]). Arguably, this approach treats harm to a *subset* of consumers—defined by geography and income—as equivalent to a substantial lessening of competition.

6.2 The analytical problem and its economic implications

This approach entails a major – and, in my view, misguided – change in how 'competition' is to be understood in South African merger control and competition policy more broadly. In economics, *competition* is a process of rivalry occurring within a defined market; it is not an assessment of how market outcomes affect specific social groups. At worst, such a view would transform competition policy into a form of distributive industrial policy.

The altered view of competition suggested by the *Mediclinic* decision reflects analytical confusion about the scope of, and differences between, "efficiency" and "equity" in economics. Despite a popular view to the contrary, there is no necessary trade-off between the two concepts. One might have efficient markets that deliver broadly equitable outcomes and one might have inefficient markets that deliver highly inequitable outcomes. Furthermore, in economics, the efficiency concept covers various forms of surplus effects that pertain not only to firms, but also to consumers: allocative efficiency, productive efficiency, and dynamic efficiency all relate to different rents enjoyed by firms – and often consumers – and facilitated by the competitive process. It is therefore quite wrong to think of 'efficiency' merely as the productive efficiency of a firm or merged entity. It is therefore preferable to frame the issue raised in the *Mediclinic* matter as one about the trade-off between 'competition' and 'protection of specific groups' rather than as one of 'efficiency' versus 'equity'.

An equity-focused approach to competition invariably requires ignoring the impact of a proposed merger on a host of other vulnerable groups. It is indeed relatively easy to identify several other "vulnerable" groups who would benefit from a proposed merger judged harmful to any one vulnerable group. Another important consequence is that such a partial assessment does not necessarily involve a trade-off of pro- and anti-competitive effects for the *particular* "vulnerable" group. It focuses exclusively on a partial anti-competitive effect, conceived in terms of a static welfare loss. It does not require a consideration of the benefits of the transaction, including dynamic benefits, for these or indeed other "vulnerable" groups.

It is therefore not clear that an equity-based notion of competition would necessarily benefit, or otherwise protect, the poor or vulnerable broadly conceived. Beyond the vulnerable, the economic effects of a shift towards an equity-based notion of competition is likely to be particularly negative. Firms contemplating large transactions, and who would now face even greater uncertainty during merger assessment, will delay or restructure their transactions. As noted earlier, empirical and policy work on South Africa's policy uncertainty (Redl (2018); Van Wyk et al. (2024)) confirms that such uncertainty reduces aggregate investment and, hence, economic growth.

As discussed earlier in this paper, South African merger control data already reveal an increase in conditional approvals following the growing reliance on remedies designed to address group-specific considerations (Changole & Boshoff 2022). Boshoff (2025) attributes this, at least partially, to a systematic shift in the implicit loss function of enforcement: the cost of over-enforcement is increasingly under-weighted relative to the cost of under-enforcement, with predictable consequences for investment and entry. A shift to an equity-based notion of competition will further amplify this shift. Pro-competitive mergers will be increasingly deterred, with the loss in dynamic efficiencies often outweighing the static (and partial) losses on which equity-focused merger control is premised.

6.3 Proposed reforms

This paper proposes reforms to strengthen the economics basis of the competition concept, while retaining an appropriate scope for protecting vulnerable consumers. It is based on two founding economics principles. First, a concern with the net competitive effects of a merger, which necessarily includes any expected costs and benefits for particular groups of customers of suppliers. Second, a concern with separating efficiency and equity in the competitive assessment of mergers.

To this end, a first proposal is that the competition assessment in merger control should retain its grounding in standard competition economics principles. It should remain focused on assessing rivalry between firms in the relevant market and on how such rivalry is affected by a proposed transaction.

A second proposal is that, as part of the competition assessment, competition authorities may consider assessing the merger-specific costs and benefits facing groups designated as "vulnerable". Such an assessment should be triggered only if authorities already identified standard anti-competitive effects. Mergers that do not raise anti-competitive concerns are less likely to have significant equity effects in the relevant market. In contrast, mergers that are anti-competitive often result in a shift of rents from consumers to firms. In such cases it may indeed be important to consider whether the rent shift occurs primarily at the expense of vulnerable consumers. The onus should be on the competition authorities to argue that this is the case.

A third proposal is that authorities must judge whether the net effects for a vulnerable group are substantial relative to the total net effects of the merger. This proposal requires authorities to assess merger benefits (in addition to considering costs) accruing to the vulnerable group in question – and similar groups or customers: competition authorities should form a view of the total net effects for the vulnerable group. Only then can there be a consideration of its significance, which should be based on an assessment of the effects on the vulnerable relative to the total effects of the merger. There may be cases where a substantial portion of the customer base is poor, where there are adverse and specific effects for such customers, and where benefits are limited. Under these conditions, the rent-shifting due to weakened competition may occur largely at the expense of the vulnerable group. This scenario may then indeed offer grounds for intervening.

I should note that such a merger would have invited opposition from the competition authorities even in the absence of a concern with vulnerable group: it is a scenario that entails significant anti-competitive effects, even before one considers the vulnerable. Even so, to the extent that anti-competitive effects are addressed via remedies, this proposal could allow authorities to propose remedies to soften the impact of anti-competitive effects on the particular vulnerable group.

The *Mediclinic* case was not such a case. The vulnerable group in question was relatively small and the general anti-competitive effects were limited. Under the proposed reforms, there would not have been a basis for engaging in a vulnerability assessment in this case. Besides, an assessment would have shown that the net negative effects for the vulnerable group in question is small compared to the net effects of the merger. Therefore, it appears to be a case where the equity concern should not be considered 'substantial'.

The proposed reforms above may have the implicit effect of elevating the importance of arguing pro-competitive benefits. A merger that has relatively limited anti-competitive effects, but where its benefits are not clear, may attract remedies aimed at vulnerable groups: the predicted net effects of such a merger is likely to be small, which makes it more likely that a vulnerable group's harm could be found to be substantial.

7. Conclusion and a proposal

This paper has a limited remit, providing a summary of what it considers to be key shortcomings in South African merger control and suggesting three sets of reforms in broad outlines. As argued at the outset, the focus falls on this area of competition policy, given the forward-looking nature of merger control and the breadth of its impact on investment and hence economic growth. Significantly strengthening the independence of the competition authorities, establishing a clearly defined, secondary role for public-interest concerns and clarifying the role of equity considerations will all contribute to a competition- and hence growth-oriented merger control regime. The proposed reforms discussed in this paper are 'ideal' reforms: they are presented from an economics perspective and do not account for the undoubtedly complicated and politically fraught process of enacting them. They are also to be understood as necessary, but not sufficient, reforms to promote competition, considering the broader policy environment that often works against competition.

As the proposed reforms arguably centre on changes to the scope and enforcement of non-competition objectives in South African merger control, a first next step is to initiate an urgent academic inquiry into the benefits and costs of the existing framework. This requires a pooling of academic effort and an involvement of researchers from different persuasions, to arrive at a revamped merger control that can best serve competition and growth. There has already been academic attempts towards this end – see, for example, Klaaren et al (2025) – but this requires significantly more effort.

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