PART III
Enforcement Matters

Means and Ends in Competition Law Enforcement

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Abstract

Should competition law enforcement change its focus away from competition and measures of welfare towards broader objectives, such as greater equality, employment or economic development? The case for this is usually made solely on the basis of values: because these things are more important than narrow competition objectives. So they are, but in this article I suggest that this is not enough: it is surely also necessary to demonstrate that such an approach is effective. There is little direct evidence to support the idea that competition law is the best way to pursue such goals but there is indirect evidence, from regulatory policies, that such interventions can perversely harm the very objectives they seek to promote. Such evidence is not conclusive, but it surely places the onus on proponents of alternative ends for competition law to demonstrate that their means of achieving such ends will actually work.

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"Hell is full of good meanings, but heaven is full of good works."

Attributed to Saint Bernard of Clairvaux (1091–1153)

I. Introduction

Frédéric Jenny has always championed the broader economic, social and developmental role of competition policy. He has, for example helped to identify and publicise the effects of cartels on developing countries and their poorest citizens[1] and argued powerfully for industrial countries to remove exemptions for export cartels, rather than allowing treatment of foreigners that they would never permit for their own citizens.[2]

This interest in the broad effects of competition law is also shown in the choice of topics at the OECD's annual Global Forum on Competition which Jenny chairs: "Are Competition and Democracy Symbiotic?" (OECD 2017), "Competition and Human Rights" (OECD 2016), "Does Competition Kill or Create Jobs?" (OECD 2015) and "Fighting Corruption and Promoting Competition" (OECD 2014), just to take the latest four years at the time of writing.[3] The discussions at these events emphasised and helped to publicise the concept that competition law and policy is not merely a technical tool to be seen as enhancing economic efficiency, but can have broader dynamic and social effects.

Emphasising the broader *effects* of competition law and policy naturally leads to a question of whether competition law enforcement should explicitly seek to promote them. In recent years, especially, the scope of competition law has been criticised for failing to deal with increasing inequality and, more generally, failing to be relevant to the concerns of ordinary people.[4] Ensuing proposals for change go beyond merely *recognising* the effects of "traditional" competition law and policy in promoting wider social goals[5] and also beyond calls for the existing framework to be enforced

1 See, e.g., Marc Ivaldi, Frédéric Jenny and Aleksandra Khimich, "Cartel Damages to the Economy: an Assessment for Developing Countries" in Frédéric Jenny and Yannis Katsoulacos (eds), *Competition Law Enforcement in the BRICS and in Developing Countries* (Springer, 2016).

2 Frédéric Jenny, "Export Cartels in Primary Products: the Potash Case in Perspective" in Simon J Evenett and Frédéric Jenny (eds.), *Trade, Competition and the Pricing of Commodities* (CEPR, 2012).

3 All materials available at <www.oecd.org/competition/globalforum/>.

4 See in particular Maurice E Stucke, "Reconsidering Antitrust's Goals" (2012) 53 *BCL Rev* 551 and Lina Khan and Sandeep Vaheesan, "Market Power and Inequality: the Antitrust Counterrevolution and Its Discontents" (2017) 11 *Harv L & Pol'y Rev* 235.

5 As, for example, in Jonathan B Baker and Steven C Salop, "Antitrust, Competition Policy, and Inequality" (2015) 104 Geo LJ Online 1 or Herbert J Hovenkamp, "Antitrust Policy and Inequality of Wealth" (2017) CPI Antitrust Chronicle 1, X.

more vigorously.[6] Calls for reform are still stronger outside the specialised antitrust field, from economists and others in the media.[7]

The globalisation of competition law over the past few decades – which Frédéric Jenny has perhaps done more than anyone to bring about – has also led to discussion and examples of competition law being enforced in different ways to reflect the different circumstances and different objectives of developing countries. Some critiques of applying "Western" approaches to competition law in developing countries are mainly focused on countering a narrow "Chicago-school" approach to competition law, which is under considerable question even in the United States and does not represent the practice elsewhere.[8] Others call for a more fundamental change, in which competition law and policy is used to redress economic power imbalances affecting developing countries and within them.[9]

There is, therefore, a highly active debate about the objectives and scope of competition law enforcement. Maurice Stucke, for example, suggests that:

> The [happiness economics] literature suggests that competition policy in a post-industrial wealthy country would be more efficacious (in terms of increased wellbeing) in promoting economic, social, and democratic values, rather than simply promoting a narrowly defined consumer welfare objective.[10]

Lina Khan and Sandeep Vaheesan claim, in the context of merger assessment, that "even if divestitures could be perfectly tailored and if they preserved competition in narrow markets in every instance, they would fail to advance the citizen interest standard."[11] Longer ago, Ajit Singh argued that:

> The central point here is that the second-best framework outlined above is much too narrow for taking into account the developmental dimension. This is in part because for a developing country the purpose of competition policy cannot simply be the promotion of competition as a good thing per

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6 Following well-evidenced criticism by, in particular, John Kwoka, for example in "Does Merger Control Work: a Retrospective on US Enforcement Actions and Merger Outcomes" (2012) 78 Antitrust LJ 619.

7 See, e.g., Robert Reich, "Whatever Happened to Antitrust" (*robertreich.org*, 24 May 2015), available at <http://robertreich.org/post/119767465905> accessed 11/08/2018 or Paul Krugman "Robber Baron Recessions" *New York Times* (New York, 18 April 2016) A21.

8 See, e.g. Eleanor M Fox, "Economic Development, Poverty and Antitrust: the Other Path" (2006) 13 *Sw JL & Trade Am* 211, in which the "other path" she cogently supports is primarily differentiated from US antitrust policy that she argues "puts the United States on a track towards solipsism and Balkanization." Much of the "other path" she sets out seems, to a European reader at least, not so different from a mainstream competition approach.

9 See, e.g., Joseph Stiglitz, "Towards a Broader View of Competition Policy" in Tembinkosi Bonakele, Eleanor Fox and Liberty Mncube (eds.), *Competition Policy for the New Era: Insights from the BRICS Countries*. (OUP, 2017) or Ioannis Lianos and Claudio Lombardi, "Superior Bargaining Power and the Global Food Value Chain: the Wuthering Heights of Holistic Competition Law?" (2016) CLES Research Paper Series.

10 Maurice E Stucke, "Should Competition Policy Promote Happiness" (2012) 81 *Fordham L Rev* 2575.

11 Khan and Vaheesan, n 4.

> se, but to foster economic development. This would in some instances involve restriction of competition and in others its vigorous promotion.[12]

These critics disparage "narrow" objectives, usually considered to be competition itself and some rather short-term measure of welfare. However, proponents of such "broader" visions do not always distinguish between the ends of competition law enforcement and the means used to get there. It is undeniable that there are outcomes that are more important than competition and consumer welfare. The question is whether there is evidence that focusing competition law on such broader outcomes actually helps achieve them.

II. Goals, Means and Ends

Maurice Stucke has written that:

> Other than for idealists, competition policy in any democracy with reasonable pluralism cannot be reduced to a single, well-defined goal. Any antitrust policy, which seeks to promote well-being must balance multiple political, social, moral, and economic objectives.[13]

However, competition law need not take account of these factors in order to play its part in a system promoting well-being. A law can have a narrow and immediate focus while still having broad and long-term beneficial effects. Laws against theft do not provide for an assessment of the well-being or welfare effects of transferring property from its original owner to the thief (indeed, they might be less effective in promoting societal well-being if they did).

Stucke recognises this objection, noting that, for example, federal regulations on frozen cherry pie do not require any such lofty goals, but argues that antitrust law is different both because of its importance to the economy and society and because "competition" or efficiency alone as an object is clearly inadequate, as there are forms of competition that competition clearly should not and does not protect – such as child labour. However, this does not seem to answer the point. Any law is part of a system of laws, so competition law does not need to do everything. The way to prevent child labour is to have a law outlawing child labour. [14]

Means and ends can differ. A policy does not need actively to pursue a specific goal in order to achieve it. The opposite can often be true, when policies have unintended

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12 Ajit Singh, "Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions" (2002) *ESRC Centre for Business Research, University of Cambridge Working Paper No. 246*.

13 Stucke, n 4.

14 David Balto, "What the German Auto Scandal Teaches Us About the Consumer Welfare Standard" (12 December 2017) illustrates this point with reference to "Dieselgate", arguing that calls for using competition law to deal with this scandal are misguided, as environmental laws already prohibit the behaviour. Available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3086771> accessed 05/02/2018.

consequences. Interventions genuinely intended to produce good social outcomes can end up backfiring and doing more harm than good, even to the intended beneficiaries of such a policy. For example: price controls to make basic goods affordable could result in shortages of those goods; restrictions on firing workers could lead to fewer workers being hired; minimum wages to protect poor workers could increase unemployment and so on.

In all of these policy questions (particularly the last) there is vigorous debate about what the evidence tells us about the effectiveness of such policies. So there should be: these questions need to be settled with evidence of what works, not on the basis of the intentions of the policy.

Industrial organisation – the branch of economics underlying most competition policy – is particularly rife with examples of unintended consequences. For example, John Vickers has demonstrated that firms pursuing profit maximisation might make lower profits than those which ostensibly choose *not* to maximise profits by delegating power to a manager who has other interests.[15] Bruce Lyons points out that a competition authority aiming to maximise consumer welfare may achieve higher total welfare than one aiming to maximise total welfare.[16] In both cases, it is the reaction of other agents to the policy that drives the paradoxical outcome.

Similarly, it is perfectly possible that a competition authority seeking to promote employment through its decisions may reduce aggregate employment; it is possible that an industrial policy that restricts competition to promote investment will result in less investment; and it is possible that a competition policy focused on long-term dynamic considerations may result in a less dynamic economy. I do not suggest that these perverse outcomes necessarily will arise from such approaches. Rather, the debate needs to be about evidence of effectiveness, not about intentions.

Ideally, one would measure outcomes. Do jurisdictions applying competition policy to promote investment achieve faster growth than those that do not? It will be very hard to obtain definitive answers but as experience builds up of the effects of different regimes, perhaps some clues will emerge. Competition authorities pursuing such different goals might also evaluate case-by-case outcomes through *ex post* studies of cases decided on grounds other than competition or incorporating remedies designed to achieve non-competition goals.[17]

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15 John Vickers, "Delegation and the Theory of the Firm" (1985) 95 *The Economic Journal* 138.

16 Bruce R Lyons, "Could Politicians Be More Right than Economists? A Theory of Merger Standards" (2003) EUI RSC Working Papers 2003/14.

17 In an annex to its *Reference Guide on Ex-post Evaluation of Competition Agencies' Enforcement Decisions*, the OECD has compiled a list of 135 published *ex post* studies of competition enforcement decisions, which includes information on the variables examined in the study. As far as I am aware, none looked specifically at public interest or other non-standard outcomes, although a few considered innovation and quality outcomes (one in health care). Available at <www.oecd.org/daf/competition/reference-guide-on-ex-post-evaluation-of-enforcement-decisions.htm> accessed 11/08/2018.

In the absence of evidence specifically on competition law enforcement intervention, however, it is nonetheless possible to consider evidence from other forms of intervention. For example, the effects of imposing job-retention conditions on firms when they merge might be similar to the effects of regulations making retrenchments harder in other business circumstances.

III. Promoting Employment through Merger Decisions: Is There Evidence That it Works?

Of all the types of competition law intervention, merger control is particularly sensitive to the goals of each jurisdiction's competition law because competition authorities are typically required to articulate the *effects* of that merger and explain how any intervention they impose or recommend relates to those expected effects.

Almost all jurisdictions now have some kind of competition test (Substantial Lessening of Competition or Substantial Impediment to Effective Competition) but the way additional considerations might come into play varies widely. Fortunately, as in so many areas of competition law and policy, Frédéric Jenny has chaired an OECD Competition Committee discussion of the topic, and the subsequent publication helps collate and summarise this complex picture.[18]

The OECD's background paper for this discussion lists "public interest" objectives such as: industrial development, protecting employment, stable provision of energy, stability of the banking system and – most widespread of all – national security. Ariel Ezrachi has listed many more, leading him to characterise competition law as a "sponge", citing "the ability to stretch or narrow its application and harness it, at times, to protect a wide range of social goals."[19] The institutional frameworks vary still more: decisions on competition and public interest grounds are sometimes taken by different bodies.

Many of these criteria are non-economic in nature, raising issues beyond the scope of this paper. A commonly applied economic criterion (other than competition and consumer welfare) is the promotion of employment. The South African merger regime is particularly frequently cited in this regard but it is by no means unusual: several other countries in Africa, as well as France, Korea, Israel and others, explicitly identify employment as a public interest consideration.[20] Furthermore, many more

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18 OECD, "Public Interest Considerations in Merger Control" (14 June 2016) DAF/COMP/WP3/M(2016)1/ANN5/FINAL, available at <www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm> accessed 11/08/2018.

19 Ariel Ezrachi, in the gloriously titled paper "Sponge" (2016) 5(1) *Journal of Antitrust Enforcement* 49.

20 See OECD (2016) n 18 and also Patrick Smith and Andrew Swan, "Public Interest Factors in African Competition Policy" (2014) The African and Middle Eastern Antitrust Review, available at <https://africanantitrust.files.wordpress.com/2013/12/public-interest.pdf> accessed 11/08/2018

countries have more vague public interest objectives such as "benefits to the economy as a whole" (Germany), "general interest reasons" (Netherlands) or the development of the national economy (China), which have on occasion been interpreted to include employment.[21]

In several of these regimes, such considerations come into play only rarely. In Germany, for example, parties to a merger prohibited by the competition authorities can appeal for ministerial authorisation which overrides that prohibition. However, only nine such authorisations had been issued between 1973 and 2016, only three of them unconditional, out of over 200 prohibited mergers.[22] In March 2016, for example, the German Minister of Economic Affairs cleared a merger in the supermarkets sector that the Bundeskartellamt had prohibited, finding that it would lessen consumer choice in several regional and municipal markets. The Minister stated "when weighing the public interests of job security and maintaining employee rights against the restraints on competition found by the FCO, it was clear for me: the public interests outweigh the restraints on competition."[23]

The most prominent jurisdiction in which employment considerations feature explicitly in the assessment of mergers is undoubtedly South Africa. Promotion of employment is one of the objectives of the Competition Commission of South Africa, which reports the net saving of jobs in its annual report (48,403, in 2016).[24] However, this is unlikely to represent the true effects of its work. In one sense, the figures may well be an underestimate. Competitive markets generally promote employment, so all of the CCSA's work that protects and promotes competition, including deterrence, probably increases employment. On the other hand, the effect of its direct interventions to save jobs is likely to be overstated, because it only takes account of the immediate effects. This is not so different from metrics reported by other competition authorities on an annual basis, seeking to estimate the consumer harm – mainly through higher prices - that would have resulted had they not taken the actions they took.[25] However, there is no a priori reason for believing that consumer benefits will be outweighed by losses elsewhere, while interventions to preserve jobs may indeed have this perverse effect.

Competition authorities in many jurisdictions have taken decisions in which employment considerations affect the outcome, but South Africa stands out for how

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21 See n 18. There are many instruments that can be used to block or amend a merger. If the list is expanded to include approval processes for foreign investment, then still more countries would be on it: Canada, for example, which considers employment effects from foreign purchases only, under the Investment Canada Act.

22 See Germany's contribution to OECD (2016) n 18.

23 As reported in Fried Frank, "Antitrust & Competition Law Alert" (21 March 2016).

24 Competition Commission of South Africa, "Annual Reports" <www.compcom.co.za/annual-reports/> accessed 11/08/2018.

25 See discussion of the approaches and difficulties in John Davies, "Outcome Assessment: What Exactly are we Measuring?" (2018) 116(1) *De Economist*.

transparently these matters are assessed and reported.[26] Guidelines have been published on how they are to be assessed.[27] Furthermore, the Competition Commission requires the Competition Tribunal's agreement to take action against a merger and that decision can be taken to the Competition Appeal Court. In some cases, government and civil society bodies have intervened in these proceedings.

From the records of these interventions, it is clear that the South African competition authorities have considered the employment effects of mergers in two quite distinct ways: direct effects on merging parties and wider economic effects.

Of these, conditions directly seeking to prevent job losses from the merging parties have been the most common. For example, in *Momentum/Metropolitan*, merger-related job losses were the subject of discussion both in the Competition Commission's investigation and then at the Competition Tribunal.[28] NEHAWU, a union, argued that the limit of one thousand job losses agreed by the Competition Commission was insufficient and the tribunal imposed conditions essentially preventing any job losses, with the exception of senior managers, for two years. The South African authorities frequently impose such conditions, along with retraining and other employment-related measures, as conditions for approval of mergers.

However, the case most frequently cited as an exemplar of the South African authorities' interest in employment matters – *Walmart/Massmart* – was unusual in that most of the potential job losses arose *indirectly*. This was a transaction in 2011 in which Walmart, the US-based retailer, sought to take over a chain of supermarkets in South Africa.[29] The Competition Commission recommended that the merger be approved without conditions but the tribunal, after hearing opposition from unions and the minister, imposed conditions. The tribunal's decision, in turn, was appealed to the Competition Appeal Court, which modified the conditions, strengthening several of them.

The merging parties submitted that there would be no direct job losses as a result of the merger. This was disputed at the tribunal, as Massmart may have laid workers off in 2009 and 2010 anticipating Walmart's interest. The court ruled that these workers should be reinstated. However, the main point of contention, at the tribunal and then on appeal to the Competition Appeal Court, related to indirect effects.

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26 "Having these proceedings occur in a competition tribunal rather than in a minister's office made an important difference in the way the arguments were framed and presented, and increased the transparency of the process": Harry First and Eleanor Fox, "Philadelphia National Bank, Globalization, and the Public Interest" (2015) 80(2) ALJ.

27 Competition Commission of South Africa, "Guidelines for the Assessment of Public Interest Provisions in Mergers" (2016) <www.compcom.co.za/guidelines-for-the-assessment-of-public-interest-provisions-in-mergers/> accessed 11/08/2018.

28 *Metropolitan Holdings Limited and Momentum Group Limited* case no 41/LMJul10, discussed in Boshoff, Dingley and Dingley (2015) "The economics of public interest provisions in South African competition policy" <www.compcom.co.za/wp-content/uploads/2014/09/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf > accessed 11/08/2018.

29 And in the region: the Namibian Competition Commission also assessed the merger and also imposed employment-related conditions.

Post-merger, Massmart would be likely to buy more from suppliers outside South Africa, using Walmart's established low-cost supply chain. If demand for local production fell, objectors argued, then local producers would lay off employees and employment would fall. For their part, the merging parties argued that lower prices from a more efficient supply chain would create jobs. Both sides relied on economist expert witnesses who presented the results of models attempting to quantify, to some extent, the effect of the merger on employment.

This economic debate was unavoidably complex. The background paper written for the OECD's 2016 Global Forum on the links between competition and employment presents some of this complexity.[30] The author, Victor Norman, notes that competition, efficiency and lower prices should cause increased output, and increased output is likely to result in more jobs – but warns as well that this "Econ 101" version of reality is highly simplified and stylised. Even when considering employment effects at the level of an individual firm, labuor demand cannot be assumed to work in a similar manner to demand for any other input, for example because firms, even without any market power, might pay workers more than a market-clearing rate in order to motivate and retain good workers.

At the economy-wide level, effects become still more complex. Competition, cost savings and greater efficiency lead to higher incomes and lower prices for industries in which technological progress is possible, leading to a shift in employment towards other parts of the economy where such progress is less possible (services, for example). Wage differentials, investment and foreign trade can all be affected. Whether overall aggregate employment rises or falls will depend on the state of unemployment and indeed what type of unemployment it is. The "unemployment rate" in an emerging economy such as South Africa is likely to have a very different meaning – and certainly different causes and cures – to an "unemployment rate" in a richer industrialised country.

This complexity alone should caution us against seeking to promote employment through merger control or any other competition law enforcement. There is no reason to believe that, for example, 10 jobs lost as a result of a merger will increase aggregate employment by 10. The phrase "macro is hard" is sometimes heard among economists, intended to convey the difficulties created for prediction by unintended consequences and feedback loops in the national economy.

The *Walmart/Massmart* case would make an excellent *ex post* study which could provide some evidence on how such effects on employment play out in practice. In the absence of direct evidence on the effects of mergers and remedies on unemployment, we need to look at the effects of similar policies, such as restrictions on shedding jobs in other circumstances. There have been a great many studies of the effects of restrictive employment laws and regulations, but overall there seems

30 OECD (2015) n 3.

to be a strong consensus that restrictions on employment flexibility cost jobs.[31] Changes in labour market institutions have been found to explain about 55% of the rise in European unemployment from the 1960s to the 1990s,[32] while differences in labour market flexibility could explain 14% of the difference between unemployment rates in the US and France.[33] Studies of changes to laws in developing countries such as Colombia[34] and India[35] find fairly consistently that the effect of greater employment protection is to reduce employment, albeit with different effects on different social groups. An extensive survey of the literature relating to labour regulation in developing countries concluded:

The main finding is that developing countries with rigid labor regulation tend to have larger informal sectors and higher unemployment, especially among young workers. Some studies also find that rigid labor regulation results in an increase in urban poverty, fewer business start-ups, foregone benefits from other (particularly trade and licensing) reforms, and in female unemployment."[36]

This seems, therefore, to be another case of perverse unintended outcomes. Additional restrictions on firing staff are more likely to add to unemployment than reduce it. Of course, it is perfectly possible that conditions imposed on merging firms do not have the same effect as other additional restrictions on job losses. However, that is a case that has yet to be made. Merely arguing that unemployment is important does not justify such a policy, in the absence of evidence that the policy has any beneficial effect.

Furthermore, if imposing employment conditions on mergers that do not harm competition is more likely to cost jobs than to save them, then this is still more likely when an anti-competitive merger is permitted, to preserve jobs. Many studies have found that restrictions on product market competition and restrictive labour market policies are substitutes in their effects.[37] One such concludes that "increased product

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31 For further examples – and counterexamples of studies that do not find this effect – see the survey of the theoretical and empirical literature in Chapter 2 of OECD *Employment Outlook* (2013), https://www.oecd-ilibrary.org/employment/oecd-employment-outlook-2013_empl_outlook-2013-en accessed 11/08/2018.

32 Stephen Nickell, Luca Nunziata and Wolfgang Ochel, "Unemployment in the OECD since the 1960s. What Do we Know?" (2005) 115(500) The Economic Journal 1.

33 Rafael Di Tella and Robert MacCulloch, "The Consequences of Labor Market Flexibility: Panel Evidence Based on Survey Data" (2005) 49(5) European Economic Review 1225.

34 Adriana D Kugler, "The Incidence of Job Security Regulations on Labor Market Flexibility and Compliance in Colombia: Evidence from the 1990 Reform" (2000) IADB Research Network working papers R-393.

35 See, e.g., Philippe Aghion, Robin Burgess, Stephen J Redding and Fabrizio Zilibotti "The Unequal Effects of Liberalization: Evidence from Dismantling the License Raj in India" (2008) 98(4) *AmEcRev* 1397 and Ahmad Ahsan and Carmen Pagés, "Are All Labor Regulations Equal? Evidence from Indian Manufacturing" (2009) 37(1) Journal of Comparative Economics 62.

36 Simeon Djankov and Rita Ramalho, "Employment laws in developing countries" (2009) 37(1) Journal of Comparative Economics 3.

37 See, e.g., Giuseppe Fiori, Giuseppe Nicoletti, Stefano Scarpetta and Fabio Schiantarelli, "Employment Effects of Product and Labour Market Reforms: Are There Synergies?" (2012) 122(558) The Economic Journal.

market competition reduces unemployment and that it does so more in countries with labour market institutions that increase worker bargaining power."[38]

In short, restrictive labour policies need not cost jobs if product markets are competitive, while an increase in market power is less likely to cost jobs if labor markets are flexible. The German minister's decision in *EDEKA* to approve a merger that would harm competition while imposing firing restrictions on the merging parties seems similar to the effects of strengthening both product market and labour regulation.[39] In the absence of specific evidence otherwise, this combination does seem likely to cause increased unemployment, rather than to save jobs as he had presumably hoped.

Of course, there are other reasons to impose conditions on the speed and conditions with which any workers are retrenched. The fact that restrictive labour laws lead to some increase in unemployment does not mean that there should be no labour laws: aggregate unemployment is not the only important policy goal. Governments might seek to protect workers from the short-term disruption of a merger, if somewhat higher unemployment may well be considered to be a price worth paying for providing workers with more security. However, these more limited transitional benefits do not add up to the loftier goals that proponents of change to competition law enforcement proclaim.

Similarly, there may be political and presentational reasons to emphasise matters other than competition and welfare, to gain political support.[40] Political support for competition enforcement is usually weak and sometimes based on a misunderstanding of what it can do. If a competition authority needs to emphasise objectives that are salient to politicians and the public in order to carry out its important job, then it should surely do so. Again, however, this pragmatic point does not really support a principled argument for different goals.

IV. "If You Chase Two Rabbits, You Will Catch Neither One": Choosing the Right Instrument

Even if there were evidence that targeting competition law on objectives broader than competition itself and welfare can help achieve those objectives, it might still not be the best instrument to use. It is a fairly sound principle that a single policy instrument should not be used to attempt to achieve multiple outcomes: it is more

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38 Rachel Griffith, Rupert Harrison, and Gareth Macartney, "Product Market Reforms, Labour Market Institutions and Unemployment" (2007) 117(519) The Economic Journal.

39 EDEKA/Tengelmann B2-96/14, discussed in Fried Frank (2016), n. 23.

40 As Eleanor Fox notes in "Competition Policy: The Comparative Advantage of Developing Countries" (2016) 79 LCP 69, in South Africa "without room to account for the public interest, for example in protecting jobs and empowering the formerly excluded and disadvantaged black population, there would be no competition law; the legislature would not have enacted it."

effective to use as many instruments as there are objectives, when such instruments are available.[41]

In a merger of cigarette manufacturers, for example, one might argue that higher prices from a loss of competition would lead to a public benefit, rather than a public cost. However, in most jurisdictions the government can levy taxes on cigarettes and could therefore increase the prices paid by smokers if it chose to do so. Consequently, there is no need for merger control to take such factors into account. To do so would not only make the competition authority less effective, it would also result in less effective anti-smoking policy, because in many ways a tax will be a better-targeted instrument than a mark-up arising from market power.

A similar argument can be advanced against broadening competition law enforcement to promote investment in developing economies. For example, Ajit Singh has suggested that:

Competition would be too much if it leads to price wars, sharp falls in profits, all of which are likely to diminish the corporate desire to invest. In the real world of incomplete and missing markets, which is particularly the case in developing countries, the latter may also require government co-ordination of investment decisions to prevent over-capacity.[42]

Singh also argues that governments should take an active role in managing investment to avoid excess capacity. Simon Evenett has responded, questioning "whether restricting rivalry is the *least costly means* to obtain this intermediate objective; a claim that is not demonstrated in Singh's analysis."[43] This is surely the right question: not to ask only whether competition law and policy *can* help promote some objective, but whether it is the right and the best instrument to do so.

Trade policy provides a specific example. Competition authorities are often required to have regard to promoting exports or replacing imports.[44] However, a positive trade balance is not an unalloyed good: countries import because consumers and businesses

41 The rule is sometimes called the Tinbergen Rule after Jan Tinbergen, a joint recipient of the first Bank of Sweden Prize in Economic Sciences in Memory of Alfred Nobel, in 1969.

42 Singh, A. "Competition and competition policy in emerging markets: international and developmental dimensions." (2002), ESRC Centre for Business Research, University of Cambridge Working Paper No. 246.

43 Evenett, Simon J. *What is the relationship between competition law and policy and economic development?*. Palgrave Macmillan, 2005.

44 Azza Raslan, "Competition Policy and Inequality: Developing Countries' Perspectives" (2017) Competition Policy International, finds that "international competitiveness and export promotion" feature in 13 of the 19 countries she considers (as opposed to nine in which employment is explicitly cited). The Competition Act in Mauritius, to take one example, requires the competition authority to assess whether enterprises' "actions or behaviour … have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius." As the official responsible for enforcing this law when it first came into effect, I will confess now that I would not have had any idea how to evaluate this criterion in practice, had it been material to a case.

choose foreign products, deriving benefit from doing so.[45] If a competition authority would accept an anti-competitive merger for the sake of promoting exports, then by the same token it should accept almost any merger that results in a price rise for imported goods.

Remarkably, the New Zealand Commerce Commission was presented with almost exactly this argument, in a claim that fare increases resulting from the proposed alliance between Qantas and Air New Zealand would "benefit" the country by encouraging residents of New Zealand to holiday at home. The Commission rejected this:

The Commission does not accept the claim of Air NZ and Qantas that New Zealanders being deterred from overseas travel due to increased air fares under the proposed Alliance, by itself, can be considered, by itself, as leading to an overall benefit to the public of New Zealand. … There remains the issue of the additional welfare loss suffered by New Zealanders who are deterred from overseas travel. New Zealanders whose first preference (overseas tourism) would become too expensive under the proposed Alliance would suffer a welfare loss from having to substitute less-preferred local consumption.[46]

Increased prices for imports – or air transport – would have a similar effect to a tax on imports. These are generally regarded sceptically by orthodox economists, but that does not mean that they are outside the political toolkit. Many economists would support import tariffs in certain circumstances. Should competition authorities therefore weigh up the economic arguments for and against higher import prices when considering a merger? Almost certainly not, whatever one's views on trade policy: a competition intervention is not the best policy instrument to affect the trade balance. Should the government of New Zealand believe that it is in the country's interests for its citizens to face additional costs to travelling overseas, it has other policy instruments that it could use to achieve that goal.

A more principled, constitutional, reason for restricting competition institutions to competition matters is to avoid devolving judgements about values onto unelected institutions. In Germany, it was for the minister to decide whether the anti-competitive harm created by the EDEKA merger was outweighed by the employment benefits (on his assessment).[47] A competition authority or court has little legitimacy in trying to do the same. Of course, competition authorities do have to make value judgements, when some people are harmed by a merger and others benefit, but they try to minimise the frequency of these situations and typically seek a targeted remedy. When compe-

45 A point lost on, most notably, the 45th President of the United States, who tweeted on 2 March 2018, "When a country (USA) is losing many billions of dollars on trade with virtually every country it does business with, trade wars are good, and easy to win. Example, when we are down $100 billion with a certain country and they get cute, don't trade anymore – we win big. It's easy!"

46 *Air New Zealand/Qantas* Final Decision Commerce Commission (2003). Available at <www.comcom.govt.nz/business-competition/anti-competitive-practices/authorisations-2/anti-competitive-practices-authorisations-register/airnewzealandquantas/> accessed 11/08/2018

47 Op. cit. n 39.

tition authorities do unavoidably have to make such judgements, the benefits and the harms are at least of reasonably similar form. To weigh environmental, social or long-term developmental benefits against competition is an entirely different matter.

There may be a trade-off between independence and the breadth of a competition authority's objectives. Governments will typically be more willing to allow an institution independent scope to act if its field of action is well defined. Merger control in the United Kingdom, for example, changed from the competition authorities *advising* government on whether a merger was against "the public interest" to independently *deciding and enforcing* on "narrow" competition grounds (except in a few clearly defined exceptions).[48]

The UK Competition Commission articulated this focus in its report on Groceries, noting:

> The broader public policy issues concerning grocery retailing raised with us during this investigation include the social cohesion of urban and rural communities, the character of UK high streets, the social and health consequences of alcohol sales by grocery retailers, the impact of grocery retailing on the nation's health, the environmental impact of the groceries supply chain, working conditions among agricultural workers both in the UK and abroad, and the security of UK food supplies and the sustainability of the supply base.[49]

The Commission concluded:

> We considered [these] issues … with great care and looked carefully at their relevance to the competition issues that we are required to address. However, it is not within the CC's statutory powers to address these wider issues in their own right. These wider matters are for the relevant government agencies or departments.[50]

South African practice is often cited as an exemplar of how a development focus can change the way competition law is enforced, but in the famous *Walmart/Massmart* case, what stands out from the statements of each of the Competition Commission, tribunal and appeal court is how reluctant each institution was to delve too deeply into the very broad questions of economic policy placed in front of them.[51] Indeed, by explicitly considering public interest, by publishing guidelines and by allowing

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48 With the Enterprise Act 2002, the law formalised what had become an established practice both as regards the focus on competition and the government's deferral to the agencies' expertise.

49 Competition Commission "Final Report, The Supply of Groceries in the UK, Market Investigation" (2008)

50 *Ibid.* More pithily, the Chairman of that investigation, Peter Freeman, noted the impossibility of reconciling all of the different interests: "We are not in the business of courting popularity. Quite a lot of the arguments put to us were irreconcilable. I'm sorry if some people are unhappy … but that is life." In James Hall, "Peter Freeman Delivers a Tour de Force of Matter-of-factness" *The Telegraph* (London, 1 May 2008). <www.telegraph.co.uk/finance/newsbysector/retailandconsumer/2789273/Peter-Freeman-delivers-a-tour-de-force-of-matter-of-factness.html> accessed 11/08/2018.

51 Extensively quoted in First and Fox, n 26.

intervention by ministers and civil society in the decision-making process, South Africa arguably demonstrates the opposite of the discretionary role for competition authorities in promoting public interest that some commentators support.

To note that this should not be the job of competition authorities is not in any way to elevate competition or economic welfare above other considerations. In Robert Bork's words, the effect of emphasising these objectives is to turn competition law from "social policy" into "merely law".[52] Deciding cases on the basis of competition itself and welfare is a way of operationalising some limited and sensible prohibitions on how firms can behave, just as laws against theft prohibit certain forms of behaviour but do not seek to govern all aspects of property distribution in society.[53] Of course there are other objectives than welfare and many of them are more important, most of the time. It is perfectly legitimate for governments to – for example – restrict the growth of supermarkets for environmental and town-planning reasons, or seek to coordinate investment to avoid excess capacity if they choose to do so. It may be the job of competition authorities to advise them of any competition implications of doing so, to inform that decision, but their responsibility ends there.

Competition authorities often take these factors into account in ways other than through law enforcement decisions. If an authority has discretion in case selection, then it could focus its efforts on those sectors likely to be of particular importance to broad social and economic goals, such as staples consumed disproportionately by the poor, or infrastructure or industries considered to be important for future economic progress. It is also important for competition authorities to advocate for competitive reform and the use of competitive mechanisms in policy, when this is likely to be an effective means of promoting broader social goals.

Academics, competition authorities and international organisations such as the OECD should continue to seek to measure these beneficial effects of competition law enforcement. Competition enforcement, even focused on "narrow goals", can certainly lead to general economic and social gains[54] but the evidence base is patchy.[55] It would be interesting, for example, to examine systematically whether marginalised or excluded segments of the population have greater opportunities in a country with effective competition enforcement. It is hard to imagine a more important outcome than this.

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52 In his introduction to Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press, 1993).

53 As Lawrence White puts it, in "The Role of Competition Policy in the Promotion of Economic Growth" (2008) New York University Law and Economics Working Papers, Paper 132: "It is tempting to claim that good competition policy is the cure for everything that ails any economy. It is tempting – but it is wrong."

54 Several of the contributions to the OECD's 2013 Global Forum on Competition and Poverty discuss this point, including that of Mauritius which notes the important role competition policy plays in the government's aim of "democratisation of the economy", without any mandate specifically to favour disadvantaged groups in the law itself.

55 One important collection of contributions is a joint publication from 2016 by the OECD and the World Bank: "A Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth" (OECD, 2017) available at www.oecd.org/competition/competition-policy-for-shared-prosperity-and-inclusive-growth.htm accessed 11/08/2018.

V. Conclusion: Both Ends and Means Need Justification

As Frédéric Jenny has always strongly emphasised, it is for each country to choose its own priorities, in competition law and policy as in any other area of policy. Countries' "values" or "narratives"[56] differ; so will their economic objectives. The economic circumstances, goals and mechanisms available to developing countries, especially, will differ from those of the industrial countries. It is not the role of competition experts to tell governments what their objectives should be.

However, it surely is the proper role of experts to advise on how to design policies that work and to warn when there are reasons to think proposed policies will not. A discussion about a practical policy must be about more than values and narratives, it also needs to consider effectiveness.

We need more evidence on the effects of interventions by competition authorities to promote goals other than competition and welfare. *Ex post* studies of cases have become more widespread in recent years, so a body of evidence continues to build up on what works well and what does not in competition enforcement. This can only be good for the enforcement of competition law. We need similar studies on interventions intended to achieve other goals, evaluating both their effect on competition but more importantly their effectiveness in their own terms. The OECD is the obvious place to do this.

In the absence of such evidence, there is surely a danger that policies could be doing more harm than good. The case for broadening the goals of competition law is attractive and profoundly moral – but it is unproven. The case against such a change is not based on differing values but instead on a concern that it might not work.

56 The phrase used by Azza Raslan in "Public Policy Considerations in Competition Enforcement: Merger Control in South Africa" CLES Research Paper Series, 3/2016.