MASTERS IN LAW DISSERTATION

Is there a place for the Public Interest Considerations in the Competition Legislation of a Developing Country like South Africa – Generally, and specifically with respect to Merger Evaluation: an Economic and Legal Analysis.

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DEDICATION:

To my parents Dr. Piercarlo Pavese and Dr. Reuva Herz, and to my sisters Dr. Yasmin Pavese and Madam Osnat Pavese, for having encouraged and provided me the opportunity to complete these many years of study, I am forever grateful. Thank you for everything…

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INTRODUCTION:

This paper examines the inclusion of public interest evaluations in competition law, generally and further specifically as it regards Merger Analysis. Reference will be made to the Competition Act[1] (the Act) and to case law- so as to graphically illustrate examples where public interest considerations have, or at least should, substantially influenced decisions made by competition authorities. The basis of this paper will be to examine whether public interest in the general sense[2] will enhance consumer welfare, and in the specific sense[3] whether its consideration enhances the stated economic goals of income and wealth distribution with the overarching goal of realising economic growth and development.

Before a definition of competition law is given, there needs to be an understanding of how this particular law functions in tandem with the national competition policy that underlies it. 'Competition Policy...lays out the parameters of the relationship between the state and economic citizens and between economic citizens themselves, in a manner somewhat akin to the way the constitution regulates the relationship between the state and the individual citizens and between individual citizens themselves.'[4]In developed countries, 'The underlying purpose of antitrust policy is to prevent monopolisation, promote competition, and achieve allocative efficiency.'[5]The need for competition law to stem from this competition policy is further explained here to be as a result of the rapid expansion of markets, both domestically - as a result of globalisation and reduction in barriers to trade, and internationally as well[6].

'National competition law can be defined as a set of rules and disciplines maintained by governments relating either to agreements between firms that restrict competition or to the abuse of a dominant position. A major objective of competition law in most jurisdictions is efficient resource allocation, and thereby the maximisation of national welfare, by ensuring that the competitive process is not distorted or impeded through the abuse of dominant

[1]Act 89 of 1998, as amended.
[2]Regarding section 2 of the Act.
[3]Regarding section 12A(3)
[4]*Competition Policy in South Africa, Where has it come from and where is it going?,* The Investment Analysts society of Southern Africa, www.iassa.com (Accessed 10November 2011)
[5]C.R. McConnell and S. L. Brue, *Economics: Principles, Problems and Policies* (McGraw-Hill), International edition, 19th ed, at 598.
[6]Ibid

positions...or competition restricting agreements between competitors that are detrimental to social welfare.'[7]

This definition, by the inclusion of "social welfare", shows that there are considerations in the competition legislation of developing countries that include considerations not only of a purely efficiency driven nature[8] – i.e.: public interest considerations, that form part of the machinery created to accomplish the mission to secure national welfare. These other considerations include the use of this specialized legislation by governments to attain national economic goals of growth, efficiency and social welfare. This is where the realm of public interest employs itself, that is to say, to have regard to the other stated needs of society at times where a certain transactions or conduct is undertaken by a firm in the market. The effects that result are dictated, by public interest, to consider external factors that are affected directly by the transaction/conduct[9]. Therefore public interest considerations are a species of legal regulation of a market that are non-efficiency motivated. This regulation is mandated by the Legislature in South Africa as per policy created by the Executive[10] and which is executed practically by the Judiciary[11].

The public interest factors are not applied in a vacuum[12]. They need to be applied regarding specific conduct or transactions. The consideration of these issues is a form of regulation of market function by Organs of State. The competition authorities do not investigate firms at random to see whether they are complying with these specific public interest standards. They are instead considered at times where conduct is reported and brought to the attention of the competition authorities, or in times where a merger is being evaluated. There exist other legislations that exist to address matters of which public interest relates to. Regarding matters that involve employment[13] and black economic empowerment[14] legislation exists with more 'teeth' that governs these matters[15].

[7]Bernard Hoekman and Peter Holmes, *Competition Policy, Developing Countries and the WTO*, (Blackwell Publishers Ltd 1999), at page 875.
[8]As per the antitrust policy of developed states defined immediately above.
[9]See Merger section below.
[10]The Minister of Trade and Industry. Herein referred to as "the Minister".
[11]Through the Competition Tribunal (herein referred to as "the Tribunal") and the Competition Appeal Court. The Competition Commission is a body akin to the National Prosecuting Authority which forms part of the Executive.
[12]As case law evidences ad nauseum.
[13]The Labour Relations Act 66 of 1995; Employment Equity Act 55 of 1998; Basic Conditions of Employment Act 75 of 1997.

Therefore the public interest tests will be engaged in times where either anti-competitive conduct by a firm in the market occurred, and/or in times where transactions between firms (sizeable enough to fulfil a Ministerial determined threshold) can be reasonably assumed to impact on the market thereby warranting its investigation. Mergers fall within the genus of these transactions, as according to the cited definition of competition law above, competition restricting practices is the overarching family to which merger transactions belong. Public interest analysis regarding any investigation into such a transaction or to conduct that is deemed anti-competitive is undertaken after the 'competition enquiry'[16] has been completed by the relevant competition authority[17].

There exists a problem with these 'non-efficiency goals' from the outset as they encompass economic considerations linking macroeconomic principles of economic growth, to microeconomic ones of efficiency, social welfare and equity. This is a complex problem as in its application, the question arises of whether the Judiciary of a country is the medium that is best suited to address these matters. This argument will augment the consideration of whether public interest should be encompassed within the ambit of competition legislation.

Some are of the opinion that public interest has no impact on competition[18] whilst others vehemently adhere to the opinion that public interest indeed has a secured reservation to a place in competition legislation. In this paper I intend to prove my hypothesis that public interest (as a form of market regulation) does indeed have a warranted and deserved place in competition legislation, whose existence is further required because of the historical and restrictive nature of political/governmental regulation of national economies of past regimes.

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[14]Broad Based Black Economic Empowerment Act 53 of 2003, that seeks to increase opportunities for previously disadvantaged South Africans to participate in the national economy. Herein after referred to as "the BEE Act".

[15]This application of other legislation regarding matters to which public interest is linked, is to be understood in terms of the rationale for the creation of these legislations. See Merger Section below for a discussion on policy rationales for these legislative enactments.

[16]Regarding matters of efficiency (which is always the subject of the first enquiry) and/or the suspected breach thereof, an investigation into whether the conduct offends this efficiency criteria by examining whether the conduct and its effects substantially lessens or prevents competition, as encoded in Section 2(a) and (b). Regarding mergers, the same analysis is undertaken, as encoded in Section 12A(1) and (2) of the Act.

[17]This procedure has not always been adhered to, as was the case in *MediCross HealthCare Group (Pty) Ltd /Prime Cure Holdings (Pty) Ltd* (11/LM/Mar05) [2005] ZACT 66.

[18]Tracy Hancock, *Public Interest Consideration Best Left to Other Agencies?* Merger and Acquisitions. PUBLISHED 02-04-2010.

In terms of these opinions, with specific reference to mergers, I view it in a different light. There are copious amounts of legal texts which state ad nauseum that public interest is not a criteria that has ever been practically used to disallow a merger that has in fact been discovered to be pro-competitive, or vice versa. In terms of this contention, I fully concur as it is evident there has never been a case which was decided solely on public interest grounds. The Judiciary has relied on findings that the public interest matters are not 'substantial' enough to offset the anti-competitive effects, even though there has been no definition in the Act of what exactly is to be regarded as such. However I do not believe that this is the area in which public interest is in reality employed.

The non-efficiency goals of the Act are to promote social and consumer welfare, in a manner that regards equity as a factor[19]. It is further deemed to be a regard that is had, in a manner that is conducted separately from the regard given to efficiency considerations. Therefore as a starting point, prohibited mergers will not be discussed, as they have been prohibited on the grounds they were found to be anti-competitive, and as stated have to date never been saved by public interest considerations. Upon examining the approved mergers, it will be seen that the approvals were subject to conditions[20]. It is in these conditions that the public interest and the goals stated in the Preamble of the Act are given a forum to be addressed and where they are realised. It is through these conditions, made with respect to a balancing act between the needs of the merged entity and the needs of the affected areas/people, that economic development, economic growth, and income and wealth distribution are furthered.

To surmise, there are three main questions addressed in this paper, namely:

(1)Whether there is any merit in the argument for free markets and against governmental regulation or whether the diametrically converse argument is to be preferred;

(2)Should the need for regulation exist, then to what degree is this market regulation desirable and practically conducted? Evidence of the practical degree of its application will be evidenced by the case law that will be discussed hereunder[21];

[19]The manner in which this is conducted in terms of the economic policies that are applicable, will be discussed below.

[20]Which I regard as being a regulation of the behavior of the players that exist within the market, and therefore of the market itself.

[21]*Shell South Africa (Pty) Ltd v Tepco Petroleum (Pty) Ltd* 66/LM/Oct01; *Mittal Steel et al v Harmony Gold Mining Company et al* 70/CAC/Apr07; and *Wall-Mart Stores Inc and Massmart Holding Limited* 73/LM/Nov10.

(3)Finally, regarding Merger transactions, should public interest be a sufficiently convincing criteria to contribute to a decision regarding whether the transaction will be prohibited, or conditionally/ unconditionally allowed? Furthermore, how these conditions are implemented, and how their importance is understood in terms of economic rationale that guides them.

CHAPTER ONE– Understanding Competition Policy

In order to enforce the social welfare goals, that are the rationale behind the creation of public interest policy, competition law is the selected mechanism for addressing such matters. Competition law is the machine employed so that the State can guide the market to work in a certain fashion, namely: The realisation of traditional goals of competition whilst simultaneously encouraging the market to function as freely and as openly as possible, according to a more beneficial and socially responsible standard. This machinery was selected as it is the one with the thinnest barrier between the Organs of State and the actual market, as it further provides for specialised forums where these two forces are able to interact. In these forums the government has the ability to regulate the markets structure and its activities, to a certain degree. The degree and need of such regulation will be understood via a comparison between two diametrically extreme forms of market systems, discussed hereunder.

The Preamble:

Competition legislation is South Africa is to be interpreted first and foremost in accordance with its Preamble, whose ideologies are to underlie the understanding of the provisions of the sections that follow it. The Preamble which makes reference to economic discriminatory practice that was perpetrated by the past regime on racial policy that permeated the political core of Apartheid South Africa.

Effectively, there were two separate economies in existence during Apartheid[22]. The economic players, able to navigate and exploit the totality of the national economy, were the minority group of the State who had at their disposal the most opportunities and capital to grow and to benefit as its exclusive participants. The majority of the nation's citizens were not afforded access to such interaction and the effects of this legally sanctioned blockade are

[22]Hartzenberg T, *Competition Policy and Enterprise Development: The Role of Public Interest Objectives in South Africa's Competition Policy*, (August 2004), at 6.

still being felt today. This segregation of a distinct and substantial sect of the population relegated them to the lower echelons of society where they were kept at a lower standard of living with no prospects of escaping and substantially hindering their economic development and growth albeit their desire to participate existed.

The wording of the Preamble was carefully selected to include descriptive and emotionally charged words such as 'unjust', to convey the severely immoral basis on which the Apartheid economic policy was enacted and surgically implemented, so as to depict to the reader the gravity of the degree of change that is now required in order to ameliorate these past 'injustices'. Within it, there is a call for effective administrative bodies to ensure the continued existence of this 'new' competition policy which in its mandate includes the promotion of enhanced mobility and access to all markets by all South Africans without political reservations. The call is for consideration to be had to the rights and needs of all participants in the market at all levels, with the ultimate goal of securing positive economic growth and consumer welfare increases by strategically encouraging greater product choice and international commercial interaction. It is from this template of interpretation that the Act will be read therefore giving the reader an understanding of the magnitude of importance that the public interest provisions are to be afforded.

The goals of the Act, are listed in Section 2, which state that the purpose of the Act "...is to promote and maintain competition in the Republic in order –

(a) To promote the efficiency, adaptability and development of the economy;
(b) To provide consumers with competitive process and product choices;
(c) To promote employment and advance the social and economic welfare of South Africans;
(d) To expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
(e) To ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
(f) To promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons...."[23]

[23]I have not included the following sub-provisions of section 2 as they are not related to the argument being made in this paper.

Sub-sections (a) and (b) include the main goals of any competition law throughout the world[24], whilst sub-sections (c) to (f) list the additional equity and distributive objectives which are a continuation of the spirit of the Preamble. More specifically, they were incorporated into the Act as defined goals in an attempt to prevent the effects of these injustices from surviving into South Africa's democratic era and thereafter hindering the progress that was and is desperately needed[25].

These public interest provisions are considered with regard to the effects that specific conduct or transactions occurring within the market would have, and are given attention (after the competition efficiency considerations have been addressed) in the form of a balancing test[26]. The public interest enquiry is to be conducted separate from the efficiency enquiry[27].

Equity concerns are further incorporated into the Preamble and the need for this will be elucidated with reference to the needs of developing countries.

The public interest provisions that are listed in section 2 of the Act will be discussed in relation to the needs of developing countries in chapter 3, so as to give substance to the argument for their existence. Regarding the discussion on mergers refer to chapter 4.

CHAPTER TWO– Economics: Market Models

There exist various market models, each with their own proponents and critics. Against the inclusion of public interest sections in Antitrust Legislation, reference will be made to proponents of the free market system, which postulate that the core nature of the market is

[24]These goals form the primary evaluation in any competition matter. Should the conduct that is being investigated be a merger, an abuse of dominance, cartel behaviour etc, be contrary to the promotion of efficiency and who offend against the competitive process through any disruption at all.

[25]This is therefore an indication that the Act has some politically charged rationale behind its creation, in that equity and justice as driving forces have been incorporated into the interpretation and therefore intended application of this legislation.

[26]Specifically regarding a merger evaluation, a determination will need to first be made as to whether the merger will 'substantially prevent or lessen competition'. Thereafter there will be an investigation based on the representation of the merging parties as well as other investigations by the Competition Commission that will evaluate whether there are any 'technological, efficiency or other pro-competitive gains' that will result as a direct consequence of the merger. This forms the competition efficiency enquiry into the specific merger transaction. The final part of the balancing test is to see whether the public interest provisions of the Act (in s12A(3)) are affected. Ideally this final analysis should be conducted regardless of the outcome of the efficiency analysis, and the result of this public interest enquiry should be regarded in the determination of the outcome of the decision to allow or refuse the transaction- in theory at least.

[27]M Brassey (ed), Competition Law, (Lansdowne: Juta, 2002), at 275. Albeit this applies to consideration of public interest in merger analysis, the same rationale applies to public interest considerations in the general sense as well.

self regulatory and as a result it will thus adjust itself and reach an equilibrium point befitting the markets needs at that time. This is said to occur as a pure consequence that free competition (and all that this entails) has on the market. Conversely, there exist arguments that in a market setting prevalent- specifically- in most developing countries, the preferred market policy regime is to be a planned market structure, or a command economy. The rationale that the protagonists of this ideology rely on is that there are other, closely linked, tangential national needs that are to be addressed through this form of legislation that is the one which is most closely suited to addressing such matters.

(I) Free-price mechanism:

(a) The basic economics of a free market system:

'A free price system or free price mechanism ... is an economic system where prices are set by the interchange of supply and demand, with the resulting prices being understood as signals that are communicated between producers and consumers which serve to guide the production and distribution of resources.'[28]'The private ownership of resources and the use of markets and price to co-ordinate and direct economic activity characterize the market system…each participant acts in his or her own self-interest…(and) seeks to maximise its satisfaction or profit through its own decisions regarding consumption or production…'[29].

'Basic to the faith that a free economy best promotes the public weal, is that goods must stand the cold test of competition; that the public acting through market's impersonal judgement, shall allocate the Nation's resources and thus direct the course its economic development will take.'[30] Of course the national market forces will define and develop the economy, bringing with it growth and prosperity to various industries, and this force is said to be solely governed by the decisions of consumers, as evidenced by these 'signals'. The extreme application of free market systems would lead to pure capitalism[31].

Some are of the opinion that 'Since prosperity and decent employment are promoted by, and only by, real economic freedom in free market economies...'[32], that there is zero need

[28] http://en.wikipedia.org/wiki/Free_price_system
[29] McConnell and Brue, *op. cit.* note 5, at 33.
[30] *Times-Picayune Publishing Co v United States*, 345 US 594 (1953) at 605.
[31] McConnell and Brue, *op. cit.* note 5, at 33.
[32] Leon Louw, *Economic Freedom Defined*, http://freemarketfoundation.com/ShowArticle.asp?ArticleType=Publication&ArticleID=1746

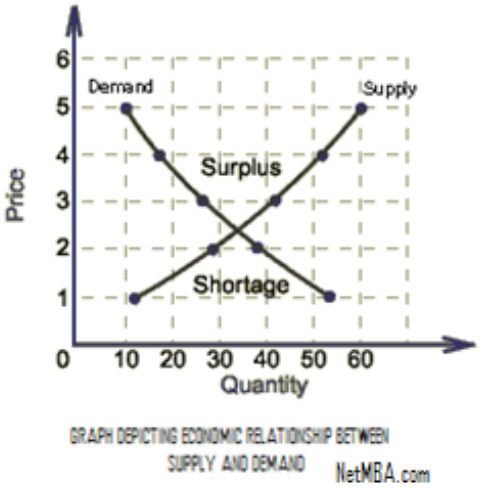
for market regulation[33]. That regardless of the surrounding circumstances that are present in any given nation, at any given time, market forces will prevail and settle the market at an equilibrium that is beneficial, and will put the growth of the economy onto the path that will result in the closest attainment of Pareto Equilibrium[34]. This school of thought believes that any state '…interference will disturb the efficient working of the market system.'[35]

The basic market model used herein focuses on Supply by Producers and Demand by Consumers. The supply will be affected solely by the amount of demand that there is for a good in the market, as there is no rationale to supply a good that has zero demand.

However the demand of a good will be determined by looking at factors of the good provided in that market. The main determining factor for the demand of the good will always be its price, in tandem with the utility that the good can provide. Further considerations would be the substitutability of the good which is closely linked with the price elasticity (or price inelasticity as the case may be) of demand function for that good. In a free market system, the factors that are considered are 'pure' and therefore free from any consideration regarding governmental regulation. Again, such regulation would include public interest considerations.

A graphical representation of the relationship between demand and supply in a market, as well as a representation of the demand curve will be provided to better understand the market forces at play in a free market economy.

[33]This is laissez-faire capitalism.
[34]Rachel Jafta & Johann van Eeden, *The Economics of Competition Policy*, Paper for the Free Market Foundation Competition Policy Round Table, (Econex) 30 June 2011, at 7, with reference to Reekie, W.D. (1999). The Competition Act, 1998: An Economic Perspective. South African Journal of Economics, 67(2): 257-288
[35]McConnell and Brue, *op. cit.* note 5, at 33.



The intersection of the curves indicates the point where the demand of a good by consumers equals the supply provided by producers, and is a representation of the point when the market is in a general equilibrium. This is a crucial point because it affects the relationship between the goods/services that a consumer demands with, in this case price, the opportunity cost the consumer is willing to sacrifice to gain the utility from obtaining the product.

The Pareto Optimum position that is desired to be reached is where the cost of producing a good is equal to the cost of the revenue received for the good. It is the point in a market where by the increase of one unit of production by one party thus increasing their position in the market, the corollary effect will not be that another party in the market is consequently worse off as compared to their situation before this additional unit was produced/consumed. 'Pareto efficiency is a minimal notion of efficiency and does not necessarily result in a socially desirable distribution of resources: it makes no statement about equality, or the overall well-being of a society.'[36]

[36] http://en.wikipedia.org/wiki/Pareto_optimum

Economically speaking, competition law aims to maintain the market at this equilibrium thereby preventing unit prices increasing and unit output[37] decreasing, in an attempt to allow for the market to attain Pareto Optimality whilst at the same time being aware of the fact that the conditions for the market will never exist for this to occur.

On the demand graph above, at price A the supplier is a price taker, which therefore means that the market is more sensitive to the needs of consumers. This therefore will be the Pareto Optimal price as the degree of harm that could be inflicted on a consumer at this point is negligible.

'...an economic market is determined in order to identify an equilibrium price....'[38] Should there be a Shortage then the Seller would increase prices and demand would decrease accordingly until a new equilibrium would be reached. However this new equilibrium would be further away from the Pareto Optimum, as there are still demands in the market for the good however due to the characteristics of the good (specifically its higher price) the consumers do not regard the opportunity cost of paying over the amount demanded by the Seller, as being equitable to the unchanging utility derived from consumption of that good. In a few words, the definition of Pareto Optimality is not fulfilled because while the seller is better off at charging this higher price and reducing output, consumers gain an ill-related cost to consumption utility from the opportunity cost they sacrifice in purchasing the good. What would solve this dilemma would be where the supplier either increases the supply of the good, or in terms of competition, where more producers would enter that market thereby increasing the price elasticity of demand in that market as a result of an increase in the substitutability of the goods and thus driving prices in the market down whilst at the same time increasing output. Therefore in a sense the public interest ground of Section 2(e) is a Regulation designed to aid market conditions to exist that mirror the requirements of a free market economy, in an attempt to attain perfect competition.

The Demand Curve graph will depict where the Pareto Optimum level of production will be for a market, assuming that it is a free market. The conditions for a free market are largely the same for when a market will be considered perfectly competitive.

[37] Quantitatively and qualitatively

[38] *Trends in South African Competition Law,* Webber Wentzel Attorneys, (14 June 2004), http://www.webberwentzel.com/wwb/content/en/page1874?oid=3111&sn=Detail&pid=1874

'A market economy will be perfectly competitive if the following conditions hold:

(i) Sellers and buyers are so numerous that no-ones actions can have a perceptible impact on the market place, and there is no collusion amongst buyers and sellers

(ii) Consumers register their subjective preferences among various goods and services through the market transactions at fully known prices. (*In addition it is a homogenous product*)

(iii) All relevant prices are known to each producer, who also knows all input combinations technically capable of producing any specific combination of outputs and who makes input-output decisions solely to maximise profits

(iv) Every product has equal access to all input markets and there are no artificial barriers to the production of any product.'[39]

(aa) The law as understood in terms of the free market system:

The Chicago Jurisprudential School states that efficiency is the only consideration that is to be had in the market. No other considerations are to be had when deciding to regulate the market. They are of the opinion that "...the law becomes less effective the more its true purpose is mixed up with other objectives."[40]

The argument of: 'Why "competition and its regulation"? Why not view competition...as the antithesis of regulation and celebrate it for that reason, as the triumph of market forces over administrative intervention.'[41] The reason for regulation, albeit skeletal regulations in terms of this schools' contentions, is that the requirements for a perfect market simply do not exist.

(i) In the real world, dominant firms exist in the market[42] whose actions are definitely felt in the market. The amount of Sellers and Buyers in the market is affected by historical and other extenuating factors.

(ii) Products are not homogenous. In markets, there may be a general function of a good. However due to innovation there are characteristics that will make a good within this narrow market segment stand out from the rest. For arguments sake let's use the example of a market for plastic bottles. They may be made of thick

[39] P Areeda & L Kaplow, *Antitrust Analysis: Problems, Texts, Cases,* (1997) 6 Para 107.
[40] M Brassey *op. cit.* note 5, at 1.
[41] *Supra* note 4.
[42] Dominance of a firm will exist in a stand alone fashion should the firm have sufficient market power by itself, however it can also result in the same effect should collusion between sellers occur. The extreme case of this dominance will be a monopoly, therefore it is able to charge prices as it sees fit.

plastic for rugged use, or thin plastic for those that are environmentally friendly. They may have screw tops, or nozzles that are mechanically controlled or pressure controlled. The possibilities are endless.

(iii) There is never symmetrical information in a market between all the producers and on the part of the consumer.

(iv) The barriers to entry for the access of a product to a market are inter-related to the issue of the number and specifically the size of certain firms in a market.

In terms of the Act, this would be in fulfilment of Section 2(a) and (b), which are purely focused on efficiency considerations and considerations that would provide the consumer with greater choices (i.e.: For there to be increased suppliers in the market as explained above). This form of 'regulation' is not contrary to the contentions of the Chicago School because it exists to aid the process of free markets, only when such assistance is needed. 'Although a free-trade stance...greatly reduces the scope for anti-competitive practices to be sustainable, it does not imply that the need for competition law disappears.'[43] Competition law here is restricted to ensuring that firms do not act in a manner that would substantially prevent or lessen competition.

It is then from this economic construction that the relevant authorities are able to investigate whether there exist excess profits, thereby providing a basal point that can be compared against to see whether a firm with market power behaving in an exclusionary and anti-competitive manner, and thereby acting in a manner that is not efficient. I am not talking here about State authorities acting as price setters in a market as this would be a drastic regulation completely at odds with the principles of a free market economy, but rather that this is a factor that could aid them to determine whether there has been a perpetration of exclusionary conduct or whether post transaction there would be too great a concentration of market power in a single entity that would avail that entity of opportunities to act in a competitively reprehensible manner. In a word, it allows State to ensure the efficiency of the market, acting in accordance with natural market function alone.

The implications that are brought due to the fact that the market will never be perfect, is that government is tasked with creating laws that will attempt to reduce the disparity between

[43]B Hoekman *op. cit.* note 7, at 883.

a Pareto Optimality and the actual reality of the market. This would be done by legislation that includes the requirements for a competitive market to be codified, and then somehow enforced. However this is obviously impossible.

The market forces of demand and supply discussed above function in terms of collecting and interpreting the market signals. Where there is a high price it would indicate that there is a shortage of supply and a surplus of demand. In terms of competition, this would attract new firms to that market sector in as it is appealing due to the high demand that exists in that market, all other factors equal[44]. Should more firms be introduced to this market[45] that would mean that the proportionate share of the market held by the already existing firms will decrease accordingly – and therefore the dominance of certain firms would be mitigated, consumers would have a greater choice of like products, product innovation would be encouraged in attempts to differentiate between competitors – thus increasing the quality of products provided, excess profits held by the already existing firms will decrease, etc. Once equilibrium between demand and supply is reached[46] then there would be no more profit incentive for the firm to continue to increase supply[47]. At this point, the consumer's needs and wants are able to be satisfied and the opportunity cost of obtaining this product and the linked utility that the consumption of this product would bring is reasonable and viable for the consumer to undertake. However these numerous and non-exhaustive benefits are only able to be realised should the market be perfect, and this understanding is related more to the genus of essential facilities as compared to its relation to general tradable products.

On the other hand, '...as resources become more scarce the price increases, which signals to consumers to reduce consumption thereby ensuring that the quantity demanded does not exceed the quantity supplied. It is in this way that the free price system persuades consumers to ration dwindling resources.'[48] This highlights the self regulating abilities of the market.

The matter of public interest is not addressed in this market system. I believe however, that the inherent failure of this market model is that it fails to take into account extenuating circumstances that are present in the market and that cannot be assumed away when using such models based on the pretence of a perfect market. This pretence does not include

[44]Barriers to entry are low; as are initial capital investment costs; resources available are not scarce; etc.
[45]Or should existing firms increase production.
[46]Graphically represented by the intersection of the 2 curves in the graph provided.
[47]*Supra* note 38.
[48]Supra note 28.

considerations of historical discrimination and the effect that it has in terms of cementing possible market players in the most disadvantageous position.

(b) Planned Economies:

The idea of this method of thinking is that 'Constraints are necessary before freedom can be achieved'[49].

'A planned economy is "an economic system in which the government controls and regulates production, distribution, prices, etc."'[50]

The reason for State intervention in the form of market regulation has numerous rationales. "The justification for central planning is that the consolidation of economic resources can allow for the economy to take advantage of more perfect information when making decisions regarding investment and production."[51]

A rationale for regulation comes from the fact that the modus operandi of firms includes primary aspirations to further their own interests- in the form of profits- within the market exclusive of any considerations that would impede the realisation of these goals. This is the ideal situation of a firm, to provide their product at cost price plus a profit percentage and to maximise their return. The reason for regulation is to reduce such actions that are contrary to the interests of the market, as the effects of exclusionary and anti-competitive conduct is borne by society, with the qualification to do so in a manner that would satisfy all parties.

These are considerations that Governments need to address because the protection of society is one of their primary tasks. It is under this guise that governments defend their stance on the adoption of this economic policy. However, the guise of beneficial outcomes is simply a mirage. It is a fleeting illusion conjured by the promises of leaders of a future Utopia, but one which has no overall intention to be allowed to materialise, at least not for society at large[52]. This is particularly true for emerging markets/developing countries that are stricken with issues of poverty, cronyism, and corruption[53].

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[49]Brassey, *op. cit* note 27, at 4, with reference to D Neven, P Papandropoulos and P Seabright *Trawlings for Minnows* (1998) 1.

[50]http://en.wikipedia.org/wiki/Planned_economy with reference to Dictionary.com Unabridged (v 1.1). Random House, Inc.

[51]Ibid.

[52]Ibid, on the discussion of The Peoples Republic of China's transition from a planned economy to a market economy.

[53]Fox, Eleanor M., *Economic Development, Poverty, and Antitrust: The Other Path*, (2007). New York University Law and Economics Working Papers. Paper 102. (http://lsr.nellco.org/nyu_lewp/102)

On the matter of state owned monopolies - i.e.: Communism[54] – which is the extreme form of state regulation of markets, 'There is...widespread recognition that where, as a result of government policy, market forces do not operate and where regulation is ineffective, the services that we receive are expensive and inefficient.'[55] Should a State move from a communistic policy to a capitalistic one, extreme caution must be taken so as to allow for the transition to traumatise the market to the smallest degree. In situations where governments have reduced market regulation post recognition of the detrimental effects regulation has, they realised '…that what the retreating states left was a vacuum…that was not filled by a benign invisible hand pointing in the direction of efficient outcomes, but one that was rather filled by private concentrations of economic power, if anything less able and willing to promote economic efficiency and consumer welfare…(which resulted in) an environment that was not only extremely hard for those obliged to live and work in it, but one that was extremely unattractive to investors and, so at odds with the basic requirements for dynamic competition and economic growth.'[56]

Every firm exists to further its own position in the market. A firm that abuses its position in a way that increases barriers to entry is in line with the firm's aspirations to further itself and realise a maximum return, as with fewer competitors comes a greater percentage of market share and a greater incentive to increase a price charged beyond the acceptable level. This occurs as a result of substitutability and price elasticity of demand functions having been reduced. Regardless of the actions of the firm the harmful effect is again shouldered on society and on the consumer. Therefore regulation is important to increase the permeability and mobility of the market, according to both schools of economic thought promoting either free markets or regulated ones, state that consumers and the economy will always benefit with more competition in the market. Public interest as a regulation addresses this issue specifically in Section 2(c) and (e) of the Act.

In the past South African competition regime, 'Practically, once the (*Competition)*Board had made a ruling to the effect that an acquisition was not in the public interest, the Minister did not override that finding and would proceed to prohibit the merger.'[57]

[54] McConnell and Brue *op. cit.* note 5, at 33.
[55] *Supra* note 4.
[56] *Supra* note 4.
[57] Brassey, *op. cit* note 27, at 231.

It has been seen that both the free and the planned market models have their pros and cons. However neither is suitable in its entirety to be implemented into the economy of a developing country in a 'plug and play' fashion, especially not in the South African economy. The drafters of competition policy in South Africa realised that '…markets led o economic outcomes superior to those attainable through administrative direction of the economy; but (also) that in order to realise their considerable promise, markets had to be subject to effective regulation.'[58]

CHAPTER THREE – The Needs of a Developing Country

The situation of the economic growth of developing countries is a sensitive and elastic one. South Africa's history is distinctive in the sense that the discrimination that existed within the nation was not only sanctioned, but legally enforced by the government. When the country was liberated from the claws of institutionalised racist policy, it was deemed necessary to implement other policies to counteract the (specifically) economic discriminatory policy, whose purpose was to promote and enforce economic disparity and limit opportunities for market participation by an identifiable market segment. Even though the method of implementation of such discrimination was unique, the effects produced are not uncommon in other countries. 'High levels of concentration are common...Markets are small, consumers are not well informed of their rights, and capacity to effectively implement competition policy and law is scarce. Challenges of unemployment...as well as a history of excessive government regulation and adverse effects on competition are also common to many developing countries.'[59]

In a developing country, consumer's income is statistically lower than in developed countries[60]. As a result there is a decreased amount of national saving and increased expenditures- expenditures made with little available resources to begin with. There are broadly two types of goods in an economy:

(i) Consumption goods, which are purchased and used by consumers to satisfy their needs. Should there be any surplus in earnings post consumption of these goods, there is generally an increase in savings and investment.

[58] *Supra* note 4.
[59] Hartzenberg *op. cit.* note 22, at 4.
[60] Debraj Ray, *Development Economics*, Princeton University Press, Princeton New Jersey (1998), at 10-22.

(ii) With this capital, capital goods are bought that are then used in the increased or more efficient production and supply of further goods[61]. This increase also brings with it more employment opportunities.

The cycle grows and grows with every increase in investment and as a consequence, simplistically, economic growth and development is promoted. This vital cycle is however premised upon the requirement that there are sufficient citizens earning monies above levels that satisfy their needs in terms of consumer goods, and therefore there is a sufficient level of savings pooling from which to invest and continue the cycle through to its next progression of capital goods purchases. 'Economic growth is positive when investment exceeds the amount necessary to replace depreciated capital, thereby allowing the next periods cycle to recur on a larger scale.'[62]

At the end of the day it is the consumer who through their actions and economic decisions, further the economy and stimulate growth[63]. The Act was created to include provisions that would protect the consumer from certain kinds of harm[64] that amount to either an abuse of dominance by a firm that holds sufficient market power, or by exclusionary conduct. The effect of these conducts is that there would be an unnecessarily and unjustifiably increase in expenses incurred by the consumer, whose expense is inflicted on the consumers income thereby reducing savings equivalently. Should this regulation of such conduct of producers in the market not exist, then the result would be that firm (that for argument sake has market power and therefore whose conduct is able to have an appreciable effect on the market) would be in a position to abuse it to the detriment of the consumer. Without regulation there would further be no forum to address and prevent this oppressive behaviour, market dominance would be a high probability[65] which would then result in barriers to entry being high and market forces subsequently being sand-bagged out and prevented from engaging. Pareto optimality would never be realised, and the result would be that social welfare would be injured if not destroyed. Should the product that the hypothetical firm in question produce hold a price inelastic characteristic, the consumer will then need to

[61]Ibid at 51.
[62] Ibid, at 54.
[63]Ibid.
[64]*Competition Commission v Pioneer Foods (Pty) Ltd,* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9 (3 February 2010)
[65]This is to be understood in terms of the call from free-market system promoters which are in favour of deregulation of the market. As a result of South Africa's history and the subsequent democratic regime, regulation is vital, lest the situation as described above with reference to footnote 56 materialize.

spend more on these goods. As a result there will be less expenditure in other industries, which translates into economic growth effectively being severely retarded and as a conjoined consequence social welfare and economic efficiency will be unattainable. This is however an extreme view, which would only exist – if ever – in the short term. Nonetheless the example is useful to explain the far-reaching and damaging effects that are associated with lack of regulation regarding the conduct of firms.

Therefore the market will need to be regulated in a manner that has more goals in mind as compared to a free market economy so as to prevent harm to the consumer and further to society as a whole. There is clearly a need for regulation, as a developing country is in a position that has its origin on the back foot as it were. Such regulation however needs to exist at a point where '…the optimal amount of regulation is that at which the marginal benefit and marginal cost (of said regulation) are equal….The task is deciding on the right amount.'[66]

Factors affecting economic growth and development, and whose rationale formed part of the basis for its inclusion in public interest provisions enshrined in section 2 and 12A(3) of the Act, include matters relating to the equity and fairness. 'We cannot speak of development without a serious consideration of the problem of inequality.'[67]

Regulations in terms of mergers and the rules that state the transaction needs to be investigated upon surpassing stated thresholds is a form of preventative and forward looking market protection mechanism.

The argument against a free market system is found inherently in its characteristics that due to signals being sent by consumers and producers in the market, the allocation of resources will be generated in a manner that would have the overall effect of directing the growth path of the economy. In a developing country that has scarce resources a free market will not accurately direct the most beneficial economic growth path. Many economists that agree with free market systems argue that through efficiency, equity will eventually be reached. The problem is exactly that. Equity will be reached as theory dictates, however the time that it will materialise may be far too long. It is not plausible for a new democratic government, that has recently prevailed over a past oppressive system (be it Apartheid or any

[66]McConnell and Brue *op. cit.* note 5, at 79.
[67] Debraj Ray *op. cit.* note 60, at 169.

other oppressive past regime, with which numerous developing countries are riddled), to at that point indicate to the population that efficiency will be the main driving factor in their new economic policy and that equity shall be disregarded due to complications in its application. According to Kuznets inverted U model, what will initially result through a purely efficiency driven economic policy will be a deterioration in the economic standing of the poorest and a bolstering of such standing of the richest. Even though this will be temporary and income distribution will begin to rise once per capita levels increase beyond a certain point, this is not an argument that the population with such a history will accept. Civil unrest is almost certain to result which would collapse the economy even further. This contention would be an argument in favour of market regulation specifically in the form of public interest.

However, where there is a situation of an over concentration of regulation, where states have reduced their interference in a previously controlled market by "...withdrawing from the economy...they quickly discovered that what the retreating states left behind was a vacuum...filled by private concentrations of economic power, if anything less able and willing to promote economic efficiency and consumer welfare...."[68] This is then a testament to the fact that a decrease in governmental regulation of the previously heavily regulated market needs to be done in a fragile balance, (that is, not to interfere too much and not to leave it completely free) because the common result would be resultant inefficiencies and harm to socio-economic interest of the consumer.

Therefore there cannot be a complete assimilation of either market system into an economy because the immediate effects would be harmful, and the inherent characteristic of dominant firms in the market would be to incubate their practices in an attempt to ensure continued benefits flowing to them.

On a discussion regarding the origins of competition policy, national law reflects and addresses goals that are peculiar to that nation, "...but what they had in common was that they all responded to a growing recognition, first, that markets led to economic outcomes superior to those attainable through administrative direction of the economy; but, second that, in order to realise their considerable promise, markets had to be subject to effective regulation."[69]

[68] *Supra* note 4.
[69] *Ibid.*

Governmental market regulation in developing countries that is enshrined in its competition law policies should be aimed to increase mobility and access to the market whilst simultaneously making strides to attaining the overarching and broader goal of national economic growth and development with the idea to enhance social welfare[70].

Regulation is required in terms of varying degrees. Regarding essential facilities, "...the demand here is for stronger, more effective regulation rather than further deregulation. There is, in other words, widespread recognition that where, as a result of government policy, market forces do not operate and where regulation is ineffective, the services that we receive are expensive and inefficient."[71]

I view the Apartheid policies as being to a degree akin to a State monopoly as it were. This is seen in light of the segregation of the economic market. Whites were allowed to participate freely and to the exclusion of all other segregated people. Therefore when the markets opened and this 'state regulation' fell away, I believe that should the market have been made free and open as it was, yet further left to fend for itself and auto-correct as the proponents of Free market systems believe[72], the result may have been too similar for comfort to the resultant vacuum relating to privatization of markets as discussed above.

There are different types of market participation of course. South Africa was seen to have two different domestic markets during Apartheid which merged with democracy. Previously disadvantage people were now able to freely act as producers and consumers, however they were confronted with a difficult hurdle to overcome when it came to market participation in a role of a producer or competitor. The only means to ameliorate this predicament is through regulation. Regulation that is not focused on efficiency alone, but also to have regard to what has been termed 'public interest' so as to allow for the market to be permeated by all members of society with some market players being afforded a degree of heightened protection, ideally for a limited period- whose duration is not currently determinable. This raises questions of who will decide when this period has ended or whether it will end in stagnated steps or decisively on the fulfilment of criteria that are also to be decided without certainty. This matter will not be addressed, as the current fact is that some form of regulation in South Africa's economy is required.

[70]Fox, *op cit* note 53. This is the so called "Other Path" that the author elucidates in her article.
[71]*Supra* note 4.
[72]The Chicago School on Jurisprudential Competition thought.

The reason for the inclusion of the public interest grounds listed in the Preamble of the Act as well as in sections 2(c) and (f), as well as in 12A(3)(b) and (c), is to empower courts to aid the market in functioning in a manner that results are as near to Pareto Optimal as possible.

The problem that the economic free market model fails to take heed of is the fact that in a country where there has been rampant yet calculated discrimination against a sector of the consumers in a market, there cannot be reliance on market forces to self regulate after a political change in climate has occurred. I feel that a free market system would be efficient should all the 'players' in the market start on equal footing. Not equal in the sense that they have exactly the same resources available to them or that they have the exact same opportunities, but rather that on average these factors are at least similar.

With the history South Africa has, the position of the white minority was advantageously secured through the actions of the Apartheid government. It is not rationale or possible to believe that post 1994, previously disadvantaged people could, as a result of now being freely able to equally participate in the economy inclusive of all the benefits that such participation entails, be able to begin to participate at a competitive level. The resources that they have are no-where near those of the previously advantaged members of the market, neither is their knowledge, expertise, or accessibility to and mobility in said market.

As a result of these factors, regulation is not only desired it is inherently required. There can be no other medium to attain a satisfactory equilibrium where the constitutional principle of equality is realised. There is an argument that in time the regulation is to diminish accordingly so as not to allow for a situation where benefits of market regulation are unduly imposed in a manner that would accord an unfair advantage, and thereby defeating the principle purpose of the regulation.

However this is a matter that will need to be decided in the future, and in order to get to the place in which a decision is capable of consideration, policy previously created by government must reach a certain stage of fruition – particularly in the spheres of realising certain levels of the economic goals of development, efficiency and social welfare. "Policy statements related to economic efficiency and consumer benefits provide for flexibility in interpretation. References to adaptability and development of the economy, extend beyond an

interpretation of economic efficiency in a static welfare state, to incorporation of dynamic considerations including market entry, firm mobility and innovation."[73]

A form of regulation which has occurred recently is the enactment of the Consumer Protection Act[74] which will allow consumers to bring complaints against firms in a market for conduct that is not in line with its provisions. This has the effect of giving more power to the consumer to help State Agencies like the Competition Commission to investigate questionable conduct. This has the effect of increasing the scope and ability of government to regulate the dealings of firms so that it will ensure that this Section 2 will be better addressed.

Exemptions to the applicability of the Act are enshrined in section 10 of the Act. These apply should the stated requirements be satisfied. These exemptions provide the necessary wiggle room for courts to apply the law in matters that are not clearly black and white, which ties into the degree of regulation of the market that needs to be imposed. "A particular reason for consideration of an exemption application is 'ensuring economic stability'."[75]

Dave Lewis '...argues that the high levels of poverty and inequality need to be addressed urgently and this requires that all the country's policies be directed towards addressing these problems...'[76] . He further states that '…in a country like South Africa, while we, the Competition Authorities, may well understand the pitfalls in balancing competition and the public interest, we equally recognize that a competition statute that simply ignored the impact of its decisions on employment or on securing greater spread of black ownership, would consign the act and the authorities to the scrap heap.'[77] In an attempt to understand how Organs of State envisage the furtherance of these non-efficiency goals, development economics is a useful tool. 'Ultimately, economic inequality is the fundamental disparity that permits one individual certain material choices, while denying another individual those very same choices.'[78]

[73]Hartzenberg, *op. cit.* note 22, at 13.
[74]Act 68 of 2008.
[75]Hartzenberg, *op. cit.* note 22, at 14.
[76]Jafta & van Eeden *op. cit.* note 34, at 13 with reference to, A Lewis, D. *Competition Regulation: The South African Experience.* (2000) Paper presented at the ISCCO Conference, Taipei.
[77] Jafta & van Eeden *op. cit.* note 34, at 14 with reference to, Lewis, D. *The Role of Public Interest in Merger Evaluation*. (2002) Presented to the ICN, Naples.
[78] Debraj Ray *op. cit.* note 60, at 170.

In terms of any of the public interest provisions that are designated to regard matters of employment and securing greater spreads of black ownership generally[79], or specifically[80] so as to understand the effects that a change in market structure would have, regard is to be had to income distribution economics. It is useful in that it provides theories that can be transposed to understand how an economy is performing at any moment in time with regard to its strive to attain minimal levels of disparity across classes and overall, to highlight areas that require attention so as to attain satisfactory economic growth and development. Income distribution has been defined as a measure of '...how a nation's total GDP is distributed amongst its population...(and it) has always been a central concern of economic theory and economic policy... (Furthermore its) Important theoretical and policy concerns include the relationship between income inequality and economic growth.'[81] The arguments made were based on the use of per capita income values in varying countries and the rationale for its usage is based on particular studies that '…express the idea that per capita income is a powerful correlate of development, no matter how broadly we conceive it.'[82] 'Saving rates are severely affected at low levels of income; so is the capacity to do useful work.'[83]

A survey indicated that '...the poorest 40% of the population earn on average, around 15% - perhaps less – of overall income, whereas the richest 20% earn around half the total income.'[84] Furthermore, 'savings rates are severely affected at low levels of income; so is the capacity to do useful work.'[85] As a result of this decrease in savings, comes further harm in that poverty, malnutrition and education all take a savage beating. In order to give some useful understanding to the concept and the results that inequality brings, information about '(a) how endowments were distributed and (b) what kind of economic interaction occurred in the "previous period"…'[86] must be available. '…the goal is to see how a given past influences the future…'[87] 'It is common place to see enormous wealth coexisting with great poverty…It isn't that such inequalities do not exist in the developed world –they do- but

[79]In terms of the Section 2 understanding of it.
[80]In terms of the Section 12A(3)(b) and (c) understanding of it.
[81]http://en.wikipedia.org/wiki/Income_distribution
[82]Debraj Ray *op. cit.* note 60, at 30-31.
[83] Ibid, at 197.
[84]Debraj Ray, *op. cit.* note 60, at 22. Further, at 25, figure 2.6 on page 23 indicates the inverted U hypothesis of Kuznets, which illustrates the use of per capita income as an indicator for income distribution. This model illustrates that 'At higher levels of per capita income, economic gains tend to be distributed more equally – the poorest quantiles now gain in income share.'
[85]Debraj Ray *op. cit.* note 60, at 197, as previously mentioned at 25 with specific regard to middle income states.
[86]Debraj Ray *op. cit.* note 60, at 198.
[87]Ibid.

coupled with the low average income in developing countries, these disparities result in an outcome of visible poverty and destitution[88],

Regarding the graph depicting Kuznets hypothesis[89], it '…indicates the possibility that as economic growth proceeds, it initially benefits the richest groups in society more than proportionately… At higher levels of per capita income, economic gains tend to be distributed more evenly.'[90] Using the Tunnel Theory[91] with regard to the progress of economic development, poses a grim prospect of acceptance. Seeing as the richer segments of society benefit first and inequality will rise, post Apartheid this would mean that the suppressed members of the population will be exposed to further inequality and that they will observe previously advantaged people benefit further. The only way that this dissatisfaction can be bearable is when the hypothetical individual's levels of tolerance are high as he is of the expectation that soon he will also benefit. However, '…increased inequality may not be tolerated at all if the perceived link between the growing fortunes of others and the individual's own welfare is weak or non-existent. The greater the extent of segregation to begin with, the higher the possibility of this outcome.'[92]

'If growth and equity in income distribution are considered to be the two principal objectives of the process of economic development, the development strategy has to be devised by keeping in mind the social and political context.'[93]

There are of course other factors that contribute to the development and growth of a nation, which are factors termed human development. Matters such as the education policy of a government, life expectancy and infant mortality rates. In a country like South Africa there is not a good education system with poor literacy levels. Thereafter there is the issue of aids that plagues this country – whose incidence is increasing and which has a direct effect on life expectancy rate . This severely hampers the growth and development that is attainable by the State. Education has been deemed to be the best tool available to combat this plague. However per capita income is still closely correlated to these other factors, even though

[88] Ibid, at 18.
[89] Ibid at 198.
[90] Ibid at 25.
[91] Ibid at 200.
[92] Ibid at 201.
[93] Ibid.

'…per capita income, or even the equality of its distribution, does not serve a unilateral guarantee of success in 'human development'…(however) per capita GDP still acts as a fairly good proxy for most aspects of development…'[94]

'Recent literature in economics has emphasized the fact that investment in education and training that raises the skills embodied in labour is no less an investment. Skills may not be tangible objects like machinery, but they contribute to increased production just as any piece of machinery does. The act of training and education may be aptly termed investment in human capital.'[95] This then forms the rationale upon which most conditions regarding mergers, as they affect employment, are premised.

In terms of the ability that a South African firms have to become internationally competitive, one needs to have regard to what the comparative advantage is of this developing country. 'It is clear that, on the whole, developing countries do rely on primary product exports, whereas the opposite is true for the developed countries.' [96] This however is dangerous as such goods are traded in a highly fluctuating market and so there is not a method to foresee changes in levels of demand. This would lead to wasting of economic products[97].

There needs to be some sort of regulation of the emerging markets. This is abundantly clear. However what is also as clear is that public interest concerns needs to be incorporated into such regulation. Should the market be left alone to self regulate, the chance exists that the previously disadvantaged will remain as such and that the rich will continue to benefit from the position they once enjoyed as a result of their previously advantageous economic situatedness[98]. Each country has specific and unique national interests that are peculiar to them. Accordingly, the national interest as codified in legislation will reflect steps taken in meeting these objectives. "Major challenges to sustainable development in South Africa are employment and black economic empowerment. Explicit reference to these factors is thus to

[94] Debraj Ray *op. cit.* note 60, at 29.
[95] Ibid, at 53.
[96] Ibid, at 39.
[97] Some goods can be stored and their sale effectively postponed till such time where demand for them once again exists. However some goods are of the inherent nature that they need to be sold soon after their production. These goods will therefore pose a problem of wasting, an example of which is in the agricultural industry where products may be perishable. If the agricultural industry is a core export industry in this hypothetical state, then demand for the goods (or lack thereof) severely affects the ability for that state to attain any measure of economic growth.
[98] In South Africa such a position was, as a result of Apartheid protection, enjoyed by the white minority.

be expected in a significant area of policy and law such as competition and in some sense provides a balance of considerations in the challenge to develop a set of complimentary policies and laws to facilitate enterprise development and the achievement of broader socio-economic objectives."[99] Their achievement is aimed to be fulfilled by the public interest criteria in the Act.

CHAPTER FOUR– Mergers & the Public Interest

OVERVIEW

In terms of both anti-competitive conduct[100] and mergers[101], the two key factors that are considered before any investigation is initiated are: what is the defined market[102]; and then whether the firm has market power[103] in said market. This is classically the point of departure in any merger evaluation. However it is to be noted that this applies to the efficiency tests – the 'competition' analysis- and that in the consideration of public interest tests, the scope of same is much broader[104]. Public interest is a machine of political and economic origin, which is engaged in the niche of law that has access to powers of regulation over market activity – to some degree or another.

Mergers, sometimes referred to in terms of the genus of business activity termed concentrations, occur in one of two ways. Either two or more companies join all assets and liabilities between them respectively[105] to form a new entity, or where one company (the target company) is incorporated into another company (the acquiring company). 'Whilst a firm may build market power through unilateral conduct, the easiest way for a firm to establish or to enhance market power is by acquiring or merging with other firms.'[106] Market power and efficiencies are therefore the main incentives that drive firms to consider merging.

[99]Hartzenberg, *op. cit.* note 22, at 17.
[100]That involves section 7 abuse of dominance matters.
[101]Regarding section 12 and 12A matters.
[102]If the market is defined too widely then the effect of the merger on said market will be diminished, whilst if the market is defined too narrowly then the effect will be unrealistically magnified.
[103]Should the firm not have market power then their actions are negligible as market forces of price elasticity of demand and substitutability will be engaged to auto-correct the consequences of this conduct.
[104]However there are instances where 'competition' considerations and public interest ones overlap. Lawrence Reyburn: Philip Sutherland and Katharine Kemp *Competition Law of South Africa,* (LexisNexus Butterworths Durban) Service Issue 14 (October 2011) at 10-5.
[105]Wholly or partially.
[106]Brassey, *op. cit* note 27, at 224.

The importance of mergers is to be analysed in terms of the consequences they bring[107]. 'There must be a causal link between the merger and the anti-competitive effects on a market.'[108]In the end, the anti-competitive effects of a merger are evidenced in terms of efficiency considerations, and again – public interest is a broader consideration than the efficiency segment of the evaluation. Regardless, the same rationale holds true for the consideration of the public interest probes in a merger evaluation – namely, the effects that substantially affect the public interest need to have a connection to the transaction being evaluated. The courts have repeatedly in their '...previous decisions indicated that (they) do not exercise (their) public interest determinations in a void.'[109]

There exist three classes of mergers, namely horizontal[110]; vertical[111]; and conglomerate, '...which in that order, attract decreasing levels of concern.'[112] Furthermore these classes are subdivided into large, medium and small mergers – which in South Africa are classed as such in terms of parameters established by the Minister of Trade and Industry. Horizontal mergers are said to be the form of mergers that attract most attention and therefore scrutiny.

The subdivisions of the classes of merger being large, medium or small exist for a reason. Upon surpassing the stated thresholds[113], the merging parties will need to follow the

[107]'Merger law focuses less on anti-competitive conduct and more on the structure of the market....(with) the aim to prevent anti-competitive results' Sutherland & Kemp *op. cit.* note 104, at 8-7.
[108]Sutherland & Kemp *op. cit.* note 104, at 10-8. With reference to *Santam Ltd/Guardian National Insurance Co Ltd* 14/LM/Feb00, and a few other cited cases listed in footnote 57.
[109]*Distillers (South Africa) Ltd v Bulmer (SA) (Pty) Ltd* 2002 (2) SA 346 (CAC), para 232: With reference to *Unilever Plc and other/Robertson's Foods (Pty) Ltd and others* 55/LM/Sep01 para 43; and *Shell/Tepco* Supra note 21, para 58.
[110]Involve firms '...selling identical or similar products in the same geographic area thereby eliminating competition between the two firms... *(and)* result in the elimination of competition between competing firms.... Brassey, *op. cit* note 27, at 225. (*Word inserted*) Horizontal mergers, due to the fact that they occur within the same market segment, they have the potential to deliver efficiencies and innovation in that market that would tremendously benefit the consumer. With this benefit, the roll on effect is that the other competitors in the market will have to evolve technologically and therefore innovate their products/services in their attempts to remain competitive. This further benefits the consumer as the result, ideally, would be that the products on the market increase in range and quality to suit whatever need the consumer may harbour at that time.
[111]Their most common justification that the firm (integrating forward or backwards) is doing so primarily to fulfil '...its desire to minimise transaction costs and cure principal-agent problems.' Dr. Roger Van der Burgh & Dr. Peter D. Camesasca, *European Competition Law and* Economics: Chapter 9- Eileen Reed *Concentrations and Merger Control*, at 350.
[112]Brassey, *op. cit* note 27, at 225. Vertical mergers are said to be ones that occur in the same supply chain and are usually undertaken for efficiency rationales so that the acquiring firm can streamline its business activities and reduce costs. Conglomerate mergers are described to be mergers of firms that operate in different markets that seemingly have no connection to the competition that exists in either of the markets.
[113]As discussed in s11 of the Act.

procedural steps of the Act and notify the Commission of their intention to merge[114]. This notification[115] procedure has been created so as to firstly aid the Competition Authorities to remain involved and informed of activities of firms within markets they are tasked to safeguard (as it is impossible to constantly monitor every firms activities within the national territory) and further to aid the Competition Authorities to qualitatively focus their attention on transactions with the greatest impact. Seeing as the Commission is a government agency it has limited resources and therefore cannot afford to investigate every single matter. These thresholds apply to both efficiency tests as well as to public interest ones, as they are designed to indicate the degree to which importance is to be attributed to them in terms of their ability to noticeably affect the markets function and its structure.

Mergers have as their economic consequence a 'structural change'[116] within the defined market as there is a decrease in competition within that market segment due to one of the firm's from that market essentially disappearing. 'A concentration implies that firms integrate their operations more completely and permanently than was the case under *a* contractual setting....'[117]This fact highlights the gravity of this form of transaction. A merger cannot be undone at a later stage via judicial interference, as is the case with a cartel for example. On an examination of the economic effects that would occur should a firm exit the market for any other reason besides merging with another competitor, it will be evidenced that market forces will engage themselves and the market will find a new equilibrium following the loss of one of its producers. The loss of a producer in a market, besides the competition concerns[118], will have effects that will be felt on the different links of the supply chain involved in that market as well as on interrelated industries, society, and the nation's productivity as depicted internationally.

[114]As discussed in s13 – with regard to small mergers; and s13A - with regard to intermediate and large mergers; of the Act.
[115]As per the parameters set out in Section 13 of the Act, read together with GN 254 and GG22025 of 2 February 2001.
[116]E. Reed *op. cit.* note 102, at 349
[117]Ibid. The comparison of the effects of a merger are further extended to one between mergers and cartels. The inherent difference between cartels and mergers is that due to the core characteristic nature of cartels, they are self destructive as they are based on the trust of parties that are by virtue of this association, dishonest.
[118]The market share that was held by that firm will be distributed, albeit potentially unequally, amongst the remainder of the competitors within that market on the basis of the other firms by virtue of existing in the same market producing substitute goods. However, when a firm merges (specifically horizontally), *all* of its market share (and market power) is absorbed into the new merged entity, which then has the consequential effect that the merged entity increases its market share and power singularly, to the exclusion of all the other firms within the same supply chain link.

Note however that '...merger law "Is not, or not only, about pre-emptively preventing a merged entity from abusing its dominant position in the future; it is also about maintaining a market structure that is capable of delivering the benefits that follow from competition."'[119]However the effects of the merger in terms of public interest are more far reaching than merely loss of a player in that industry. s12A(1)(a)(ii) states the importance of public interest considerations- namely, that after the efficiency enquiry has been completed there needs to be further enquiry into the effects born from the merger that will follow.

Should the efficiency test fail it is stated that a merger can still be allowed if it is able to be '…justified on substantial public interest grounds.'[120] It was held[121] that there is a possibility that the public interest grounds can within themselves also produce opposing views, and as a result the '…net public interest effect of a merger must be determined….A procedure for dealing with such situations has been developed (*where either*): Every public interest ground asserted must be viewed in isolation to determine whether it is substantial; (*or*) If more than one contradictory public interest ground is found to be substantial, then the competition authority must attempt to reconcile them; (*or*) If no reconciliation is possible, then the conflicting aspects must be balanced and a net conclusion must be reached.'[122] It is against this backdrop of positive gains that a merger can bring (or of course the corollary negative harms) that public interest tests need to be employed in a comparative manner.

The analysis of these transactions has as a unique characteristic the fact that it is carried out before the transaction or the effects thereof actually occur[123]. 'Based on the information and the data available prior to a concentration, competition authorities need to project its impact on a given market structure, which will only become fully established after the transaction has been implemented.'[124] The events that will occur as a factual cause to the merger therefore need to be considered and ascertained using reasonable foresight based on economic and empirical evidence[125]. 'Antitrust authorities must predict the future by looking

[119]*Distillers/Bulmer* Supra note 109, at 358, referred to Sutherland & Kemp *op. cit.* note 104, at 8-8.
[120]S12A(1)(a)(ii) and s12A(1)(b) of the Act.
[121]*Harmony Gold Mining Co/Gold Fields Ltd* 93/LM/Nov04, and *Distillers Corporation (SA) Ltd/Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 at par 214-217.
[122]Sutherland & Kemp *op. cit.* note 104, at 10-93 and 10-94 respectively, as confirmed in Supra note 121, Para 219.
[123]*Medicross/Prime Cure Holdings* Supra note 17, at 62ff.
[124]E. Reed *op. cit.* note 102, at **349**
[125]Some jurisdictions utilise economic formulae to ascertain the effects that mergers would have on the competition within that market. One of these formulae is the Herfindahl–Hirschman Index**.**

at the past and current situations in a market. Research and economic tools are useful for making these predictions, but they never create absolute certainty and adequate data sometimes will not be available.'[126] The evaluation of this form of common business activity, I view to be a regulation of the market by Organs of State. Whether I feel it to be a necessary regulation, will be illuminated to the reader below after consideration of the reasons for aforementioned regulation.

Mergers form an integral part of everyday economic activity. As a result of this they cannot be classed and dealt with as a per se prohibition that are listed in section 4(1)(b) of the Act. This is regardless of the fact that the effects of the merger may well be such for which this per se prohibition was designed to protect against. It was for this reason that mergers are no longer regarded as a per se prohibition in the antitrust legislation of the United States of America, whereas in the past this species of transaction was in fact forbidden[127]. Mergers are transactions that can, broadly, either have as a sine-qua-non of their conclusion: a beneficial result due to the efficiencies they produce; or a detrimental result due to the harm they cause. It is for the existence of these efficiencies that a merger cannot be a per se prohibition as benefits to society would be foregone should mergers be disallowed outright. In the old antitrust legislation of the United States of America, the prohibition of this form of transaction was too heavy a regulation of the market's activities. This was an example of regulation devised to protect the goals of the antitrust legislation however in application the reality was that it worked against the attainment of these goals. Whenever there are decisions being made by people who are not aware of the intentions, but moreover the effects of certain conduct, the consequence can rarely be desirable.

Section 12A(3) of the Act lists the public interest criteria that are to be regarded in times of the evaluations and the disputes regarding such transactions. It reads as follows:

[126]Sutherland & Kemp *op. cit.* note 104, at 10-6. This shows that the forward looking analysis of the consequences of a merger is not an exact science, and therefore this form of regulation is in essence an educated guess on what the result of the merger will be. With such guesses, there is an inherent flaw that the predictions are incorrect and therefore the decision to allow or prohibit the merger could then also be the incorrect decision. This is not a consequence that can be reversed and therefore the decision on the matter is considered cautiously. As was stated in *Medicross/Prime Cure Holdings* Supra note 17, '…the competition authority must still justify its findings on the facts before it.'

[127]http://en.wikipedia.org/wiki/Sherman_Antitrust_Act.

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

(a) A particular industrial sector or region;
(b) Employment;
(c) The ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
(d) The ability of national industries to compete in international markets.'

Each of these factors will be analysed in depth below, referring to economic rationale behind the inclusion of these specific public interest criteria, and to case law in order to see how the Judiciary has had regard to the application of these criteria.

There is a need to disclose all information by the merging parties to the competition authorities so that a specific determination can be made. Further the competition authorities sometimes require additional assistance and there are provisions or the Minister to intervene in merger matters and make representations to the court. Generally speaking should the competition authorities have minimal information asymmetry regarding the relevant aspects of the merger, they would therefore be in a position to rule more fairly and speculate less[128]. Reluctance to be forthcoming with all relevant information is however the norm, as by withholding certain information from the courts could have the possibility to secure future untold profits. The safeguard to this however lies in criminal regarding matters of perjury and fraud, with delictual matters relying on the doctrine of estoppel should for example an affected party suffer harm due to some or other aspect of the transaction. The point is that this is a dynamic field of law with effects of such transactions being far reaching and touch on a multitude of issues which have forums to address any issues that arise. With full disclosure, the amount of conditions placed on the entity, which are deemed to be a form of regulation of the markets, would be more accurately representative of the needs of society that the judgement of the Judiciary will affect, and therefore aid government to attain a degree of regulation that is not too little, not too much, but is just right.

[128] *Mondi Ltd and Kohler Cores and Tubes/Competition Tribunal* [2003] 1 CPLR 25 (CAC) 33.

(a) A Particular Industrial Sector or Region:

First and foremost, there needs to be an examination of the wording of the subsection. 'The term "industrial sector" should be interpreted widely to include any sector of economic activity.'[129] This therefore highlights the recognition that a concentration transaction has far reaching effects[130] that are not isolated to the specific market[131] in which the merging firms operate.

To understand the effects that a merger will have on a sector of the market there obviously needs to be an investigation done on the structure of that market niche and the environment in which it exists. The market determination methods used to indicate market power of a firm that are used in South Africa include analysis' that use Concentration Ratios and the Herfindahl-Hirshmann Index, that are based on the structure of the market in relation to the number of competitors that function within that market[132]. However, the public interest factor in s12A(3)(a) refers to having a broader regard to the effects of the merger on an industry and/or region, and does not specifically deal with the market within which the firms exist because the efficiency test covers this determination sufficiently.

In *Iscor Ltd/Saldanha Steel (Pty) Ltd*[133], it was held that should the merger be prohibited the resultant adverse public interest effects would be egregious[134]. Saldanha Steel was a firm that was notoriously in financial difficulty as a result of global market fluctuations and conditions which were further compounded by domestic trade policy alterations[135]. The fact that the firm provided the fiscal injection required to stimulate economic growth and development in the region placed the Tribunals consideration of the merger in a precarious position[136]. 'There is evidence that the Saldanha Steel plant is a vital part of the town's economic life. If the plant was to be shut down…for a period this would not only have a substantial impact on the employees of the plant who would be retrenched, but also on all the

[129]Sutherland & Kemp *op. cit.* note 104, at 10-95.
[130]Specifically where the transaction is incidental to other industrial sectors and region's.
[131]Which is understood to be at any point in the supply chain of the same industry.
[132]Sutherland & Kemp *op. cit.* note 104, at 10-17.
[133]67/LM/Dec01 at par 143-147.
[134]As was the case in *Tiger Brands Ltd/Langberg Foods International Ashton Canning Co (Pty) Ltd,* 46/LM/May05 at Para 142, where it was evidenced that '…Ashton is heavily dependent on the canning firms since it is an economically troubled area that offers little hope for unskilled labour.' The unskilled labour came mainly from seasonal workers that were employed by the thousands in the area for this industry. The merger would affect employment which would therefore affect the surrounding region.
[135]Ibid, Para's 17-35.
[136]Ibid, Para 144.

firms and individuals in the West coast region whose livelihoods are so dependent on the plants functioning.'[137] This then indicates that this public interest criteria has regard for firms that exist not within the same supply chain. Saldanha Bay is situated within a the deepest and sheltered South African bay in the Western Cape[138] and is therefore perfect for a port to be operational there safe from the dangers of open waters. The local economy is strongly dependant on the steel industry and the harbour[139], and the development of the region into the modern harbour that it is today was as a result of the steel industry and the necessity to export steel from Sishen in the Northern Cape[140]. One of the biggest industries in South Africa is the production of steel from iron ore, which is connected directly to Saldanha by the Sishen-Saldanha Railway Line[141]. As a result, Iscor built a railway line to Saldanha where it set up a production plant to refine the ore into a final product that could be sold domestically or exported and as a result of the geographic situation of the plant[142], transportation costs are reduced and more jobs were created. This therefore stimulated the economy in the region from the production plant, the port, the transportation industry, and the shipping industry and all the intermediaries that it entails, to name but a few. Should this merger not have been approved the local economy may well have collapsed and the area may well have been reduced to idle capital. This would not only have impacts on the local economy but further on the steel industry as transportation costs would have increased to deliver the goods to other areas for exportation. This increase in production costs would have a negative impact on the ability of this vital South African industry to remain internationally competitive.

In *Harmony Gold Mining Co Ltd/Gold Fields Ltd*[143], the merger was to take place in a sector of industry upon which the South African economy relies heavily, that is to say the gold mining sector. It was alleged by an economic expert witness[144] that the merged entity would fail as a result of the poor management that the acquiring firm has suffered and that the risk posed to the economy was therefore 'systematic' and great. However this was held to be an extreme and improbable result that was consequently disagreed with. The opinion of the Tribunal was that should the merger occur then the 'stronger' target company could actually have a beneficial effect on the 'weaker' acquiring company and this would therefore help

[137] Ibid, Para 145.
[138] http://ports.co.za/saldanha-bay.php
[139] http://en.wikipedia.org/wiki/Saldanha_Bay
[140] http://ports.co.za/saldanha-bay.php
[141] http://en.wikipedia.org/wiki/Sishen-Saldanha_Railway_Line
[142] Which is the areas comparative advantage.
[143] 08/LM/Feb02
[144] Ibid, at para 63, whose 'expertise' was in Para 74-75 rejected by the Tribunal.

attain a positive public interest result[145]. This was therefore in effect an argument in favour of the merger as opposed to against it. In addition, should the merged entity fail as alleged probable by this expert, it was stated by the Tribunal that the assets would be sold off in liquidation proceedings as is the case in normal business activity, and bought up at a discounted rate which would then in all probability be used in the same industry and the economy in this market segment would continue to function[146]. It was held that there are market forces, in the form of stakeholders and interested parties of an entity, which would engage themselves to not idly stand by whilst the firm is 'driven into the ground'[147]. This therefore shows that the public interest tests cannot be used, as the target firm desired, to circumvent the natural and positive application of market forces in an attempt to attain a preferred judicial and binding decision. Public interest is by definition a regulation of the market for the overarching non-efficiency goals that are stated to possess the force of law. However this is not an instance of a command economy where organs of state dictate in which manner a market will function based on its own, unjustifiable, opinion.

In *Tongaat-Hulett Group Ltd/Transvaal Suiker Bpk*[148], there was a proposed merger in the sugar production industry. This industry is said to be extremely volatile as it is a residual market that is heavily regulated due to the fact that world prices are customarily below the average production cost of the sugar, as incurred in the producing countries[149]. It was held in terms of the public interest analysis that the merger would not have a substantial pro-competitive or pro-public interest impact on the industry. The firm[150] that was wanting to merge into the acquiring firm[151] averred that its exit from the market would provide for the creation of smaller firms because THS states that it intends to sell 8000Hectres of land. This intended sale of the land is stated as being directed specifically to previously disadvantage individuals, and so would aid in the economic development of the regions concerned and their respective local communities as well[152]. 'However these benefits are not sufficiently substantial to countervail the negative impact of the merger on competition, nor is it at all clear that they will not occur in the absence of the merger… the merger will have no impact, one way or another, on the ability of South African firms to play a positive role in the

[145]Ibid, at para 71.
[146]Ibid, at para 64.
[147]Ibid, at para 73.
[148]83/LM/Jul00 par 39-41.
[149]*Tongaat-Hulett/Transvaal Suiker* Supra note 148, para 18.
[150]The firm cited TSB
[151]the firm cited THS
[152]Mpumalanga.

region.'[153]

In *Nasionle Pers Ltd/Education Investment Corporation Ltd*[154], the proposed merger was to occur in the education industry that is held to be a core industry that is profoundly important and linked to the development of the nation. The Tribunal held '…we are bound to accord the education sector a stature reserved for few others….there is no question that the impact of monopolistic practices in the private education sector will reverberate more powerfully on the economy and society than would similar practices in most other sectors.'[155]Conditions were imposed onto the merging parties to protect this industry. Of the conditions that relate to this subsection is that a divestment of an identifiable segment of the merged entity occur, so as to stabilize the existence of competition within this important market and prevent possible abuses[156]. Furthermore the new company will be required for a period of two years to aid the Department of Education in discovering and aiding in the implementation of schemes to improve capacity in public education[157].

In the large merger in *Wal-Mart Stores Inc/Massmart Holdings Limited*[158], one of the conditions that were imposed was 'the merged entity must establish a program aimed exclusively at the development of local South African suppliers, including SMEs, funded in a fixed amount of R100 million to be contributed by the merged entity and expended within three (3) years from the effective date of this order. This program will be administered by the merged entity, advised by a committee established by it and on which representatives of trade unions, business including SMMEs, and the government will be invited to serve. The merged entity must report back to the Competition Commission annually, within one month of the anniversary of the effective date, about its progress. In addition the merged entity must establish a training programme to train local South African suppliers on how to do business with the merged entity and with Wal-Mart.'[159]

This condition is an indication of how the Tribunal considered the possible effects that the merger would have on the industrial sector and region. It is an attempt to blunt the trauma that would be felt from the merger, having regard in its assessment of the known past

[153]*Tongaat-Hulett/Transvaal* Supra note 148, para 114.
[154]45/LM/May03
[155]Ibid, Para 47.
[156]Ibid, at Para 52.
[157]Ibid, at Para 55.
[158]73/LM/Nov10
[159]73/LM/Nov10 Order of Court, at Para 3.

practices of Wal-Mart, namely that it is a corporate giant with international sourcing connections that are second to none. The ability that Wal-Mart has to procure products from abroad was a cause for concern that was raised at both the Tribunal and the Appeal hearings. It is an illustration of the fact that efficiencies brought through a merger as a result of procurement of goods of a certain quality and at a lower price are attractive as it boosts consumer welfare in terms of choice available and at a price cheaper than normal. However it is further an illustration that there are problems with such efficiencies that are in conflict with other needs of a state, namely the protection of the local economy and the local industry. To blunt the effects that this merger would have on local suppliers, the condition incorporates a fiscal investment in the region which is to be used in a manner that improves the industry and allows capital for a degree of innovation so as to remain competitive. Furthermore there is a sub-condition that suppliers are to be afforded training from Wal-Mart so as to be capable of trading with the entity. Consumers are to benefit from such transactions in their capacity as such, therefore increasing their utility per unit of consumption and further with a wider range of choices so as to maximize said utility in the consumption being in line with their individual preferences. However, looking at the bigger picture for a moment, local producers would suffer as their product would essentially be exposed to international competition, where perhaps other States have better comparative advantage in producing those items. There are however other safeguards in place that exist to protect the possibility that goods are imported at unfair prices[160].

(b) Employment:

The basis for the inclusion of this is the same for the rationale used to include this public interest goal in section 2(e) of the Act. Namely, to ameliorate wealth and income distribution throughout the nation.

Unemployment rates are of serious concern to government as they have a direct link to the productive efficiency of a nation, as labour is one of the nation's most key resources[161]. Unemployment has numerous consequences, of which a strong link has been established

[160]GATT 1994, Article VI – The anti-dumping provisions which need to have their criteria proved before their enforcement.
[161]McConnell and Brue *op. cit.* note 5, at 26.

empirically to connect this status to an increase in the levels of crime and vagrancy[162]. Crime and vagrancy affect the economy negatively and is a massive problem in South Africa. Economic growth and development is severely stunted by these activities and is therefore prevented from growing at a positively steady pace. As a result, employment levels are of concern to government and should therefore be incubated from forces that could possibly affect its levels negatively. Currently the reported unemployment levels in South Africa is quoted at 25%[163], while some of the poorer regions of the country report higher levels of unemployment[164]. 'With unemployment or productive inefficiency, the economy would produce less…'[165].

South Africa has a very large unskilled labour force. Employment allows for a forum in which skills are able to be learned and for these skills to be applied. Employment offers the channel through which households are able to have the tools to improve their standard of living and through which further educational opportunities could be availed to the next generation so that their subsequent lives will be improved. This is of course in the scenario where income is utilised in this manner. Labour is an important factor of production, and the skills held by the labour force are an indication as to what the potential ceiling of economic growth is at any given moment. With more skilled labour, productive efficiency rises. However 'With unemployment or productive inefficiency, the economy would produce less…'[166]. Therefore levels of employment are to be fiercely protected and unemployment levels are to be combated and constrained from growing. However in terms of this public interest criteria, 'In many cases, the problem of job losses can be addressed by imposing conditions.'[167]

[162] http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=108423, Steven D Levitt, *Alternative Strategies for Identifying the Link Between Unemployment and Crime*, Journal of Quantitative Criminology, Vol. 17, No. 4, December 2001, (2001) Plenum Publishing Corporation, at 377.

[163] http://www.statssa.gov.za/keyindicators/keyindicators.asp as per the third quarter of 2011, and previously it has been hovering around this level for a few years. This level of unemployment has been compared similarly to the levels of unemployment that existed in the United States of America during the time of the Great Depression.

[164] http://www.fin24.com/Economy/SA-unemployment-rate-among-worlds-highest-20110504, quoting Mpumalanga as having levels of 42.5%.

[165] McConnell and Brue *op. cit.* note 5, at 29. Refer to production possibilities curve at same, for a graphical illustration of this.

[166] McConnell and Brue *op. cit.* note 5, at 29. Refer to production possibilities curve at same, for a graphical illustration of this.

[167] Sutherland & Kemp *op. cit.* note 104, at 10-97 with reference to *Cherry Creek Trading 14 (Pty) Ltd/Northwest Star (Pty) Ltd* 52/LM/Jul04, Para 17-22; and *Multichoice Subscriber Management (Pty Ltd/Tiscali* 72/LM/Sep04 at par 82.

The public interest in merger evaluation regarding employees, is centred mainly on procedural rights '…allowing employees to receive timeous information about mergers that often affect them deeply.'[168] However there is another benefit to this public interest application in that it affords competition authorities to '…protect levels of employment through conditions…(as there is) a powerful link between direct employment loss and a restructuring initiative like a merger…'[169]. Only employment that is proved to be affected by the merger transaction will be considered in terms of this subsection, be it job losses or jobs saved[170].

In *Tongaat-Hulett Group Ltd/Transvaal Suiker Bpk*[171], it was averred by the merging parties that the merger would result in the creation of 3000 additional jobs as a direct result of the sale of portions of arable farm land that was at the time being used by TSB for the cultivation of sugar cane[172]. However as stated above[173], it is unsure that this would not have occurred regardless of the transactions existence. Should the merger not have taken place then the additional result would be that the target firm would fail, as per the parties allegations, and there would arise an opportunity for its assets and operations to be procured by other interested parties. This could be either other firms, or new firms. Particularly in the areas where the target firms properties are situated, either another firm would purchase it and therefore employment opportunities would be created, or previously disadvantaged persons could enter the market through buying the property in addition to securing employment[174].

In *Harmony Gold Mining Co Ltd/Gold Fields Ltd*[175], there was a concern regarding the loss of jobs as a result of the merger with particular attention paid to the different consequences that arise from retrenchments to the class of the skilled labour force and the unskilled labour force. The Tribunal, upon a recommendation of the Commission that was

[168]Sutherland & Kemp *op. cit.* note 104, at 10-96.
[169]Ibid, with the latter quote originating in *Daun et Cie AG/Kolosus Holdings Ltd* 10/LM/Mar03 at par 126.
[170]Sutherland & Kemp *op. cit.* note 104, at 10-97. *Schumann Sasol (South Africa) (Pty) Ltd/ Price's Daelite (Pty) Ltd* 23/LM/May01 at Par 76 where it was stated that it is unknown that PD will fail and should it do so the employees positions may be protected as a result of new entrants buying out portions of the failed company and restoring a percentage of these jobs. Further it was held that should the merger be allowed that it would relocate PD to Sasolburg and this would result in the retrenchment of the current employees.
[171]83/LM/Jul00 par 39-41.
[172]*Tongaat-Hulett /Transvaal Suiker* Supra note 148, Para 113.
[173]Ibid, Para 114.
[174]In terms of s5(f) of the BEE Act, previously disadvantaged people are able to apply to have government aid them in their economic endeavours. This therefore limits the amount of risk that they will be exposed to and further, through their business plan being assessed, their prospects of success is increased.
[175]08/LM/Feb02

further revised, imposed a condition that the retrenchments would be limited to a certain amount. Furthermore, interestingly, the retrenchments were to be effected solely in managerial and supervisory categories. This is interesting as it is this group of employees that will be able to procure other employment positions with a greater ease than unskilled labour[176]. This order therefore had the effect of satisfying the need of the merged entity to reduce production costs by removing employee's that generally earn higher salaries[177] than unskilled labour and further forced the entity to streamline its operations as its business practice already is known to do[178]. The Tribunal stated that it is not interested in the decisions the acquiring firm makes in terms of running its business activities, but merely stated that should the firm make decisions to retrench, that it would be limited to the conditions imposed on the merger. Simultaneously, the needs of unskilled labour that would find it more difficult to secure other employment will be kept in their positions[179]. A further consideration is that the firm with a void in its managerial echelon would now have to increase the skill level of some of its lower echelon employees in order to fill this gap as it is unlikely that the firm would fire people already employed in these positions and thereafter hire others to fill them[180]. It is uncertain whether this occurred however the mere possibility of it indicates a further beneficial outcome to the transaction. In addition the affect that a merger has on employment is limited to exactly that, namely as a factual cause of the merger. The Tribunal is not concerned with job losses that occur in an industry that is following the general trend that exists, which is to say that this public interest criterion is not applicable to usual business trends in an industrial sector but is limited to considerations of effects related to a merger transaction[181].

The discussion regarding skilled and unskilled labour is a common one. In *Tiger Brands Ltd/Langsberg Foods*[182], where the Commission '…sought to impose a condition on the merger in respect of employment loss, the gist of which is that the merging parties should set

[176]Ibid, at par 83 and 91, due to their 'marketable skills'.
[177]Ibid, at Para 77.
[178]Ibid, at Para 81.
[179]Ibid, at par 89, which states the dangers of retrenching unskilled labor forces as this could very well result in long-term unemployment.
[180]In addition this would be contrary to the Labor Legislation in South Africa.
[181]*Harmony Gold Mining/Gold Fields* Supra note 121, Para 87.
[182]Supra note 134.

up a training fund that would not only benefit the retrenched workers but any other member of the Ashton Community.'[183]

In *Telkom SA Ltd/TPI Investments (Pty) Ltd*[184], a condition for the proposed merger was that employees would not be retrenched for a stated period[185]. Due to the nature of the telecommunications industry as discussed in the case, technological innovation is frequent and therefore there is the possibility that some employees will become redundant. Due to the fact that the effects of the merger sometimes materialises well after the conclusion of the contract, this condition provides a degree of job security to the employees of the merged entity whilst simultaneously possibly not being too great of an imposition on the merged entity itself. Further a condition was imposed stating that the obligation to not retrench any employees for the stated period discussed above, could be enforced individually by the employees themselves, which therefore gave employees the right to enforce this obligation[186]. Furthermore, a condition was imposed stating that as a result of the merger the new entity that was formed to merge with Telkom had no assets and therefore there was a concern that should the enterprise fail the employees would be left without any recourse to claim what may be due to them at such time. As a result the condition imposed to protect the interests of the employees further, was that the employment obligation was extended to bind the shareholder of the firm[187]. The time constraint that was imposed onto the merger also has the direct benefit to the employee that they will within that stated time be in a position to exploit the opportunity to receive more marketable skills from the merged entity.

In *Liberty Group Ltd/Capital Alliance Holdings Ltd*[188], there was a concern that the parties had not informed the employees of the possible worst case scenario in respect of retrenchments that could be a result of the merger. The Tribunal ordered the parties to consult

[183]Ibid, Para 132. This is an indication that in the event of retrenchments, particularly of unskilled workers, in an attempt to ameliorate the common result suffered by unskilled laborers risk of long term unemployment, an investment is often requested to increase their skills and therefore aid them in making themselves more marketable as was discussed in *Distillers* Supra note 121.
[184]81/LM/Aug00.
[185]Ibid, Para 40, and further at Para 42 referring to employees that are directly connected to the transaction as there was a worry that should Telkom outsource some of its functions that retrenchments would occur within the firm as was historically evidenced to have occurred.
[186]Ibid, Para 41. This gave the employees the right to enforce the obligation where generally a court in the absence of this obligation being a condition of the transaction, may not interfere with this matter as it would be an unwarranted interference y the courts of the administration of the business activities of a firm. This gave further protection to the employees than the avenues that are always available to them in terms of labour legislation that applies to their relationship to their employers.
[187]Ibid, Para 43.
[188]04/LM/Jan05

with the employees in order to afford them the right to raise any concerns they harboured regarding the merger. This is an indication that the competition authorities enforced the right to representation of employees that were clearly affected parties to the transaction and provided them a forum in which to raise their concerns in order for these matters to be considered before a decision was made on the outcome of the proposed merger.

The failing firm rationale was invoked in *Tiger Brands Ltd/Langberg Foods*[189], in an attempt to illustrate that '…Ashton will, sans merger, fail and that Langberg Food International would scale back its purchases.'[190] It was proposed by the parties that should the merger not occur then the effect on employment would be severe, as compared to the job cuts that would occur should the merger be approved. However in order to use the failing firm rationale for the merger, the firms need '…to show that there is no more preferable buyer for the merging firm, (and) under the public interest they need to show that no one else would be willing to buy Ashton if it failed.'[191] This could not be demonstrated by the parties' evidence[192]. In addition, both the aggressive negotiating tactics of Ashton during merger discussions and its consideration to buy LFI should the merger not be allowed indicated that the firm was not in a position of financial distress as represented. In fact it was found that as a result of failing to convince the Tribunal of the failing firm, it was then uncertain that any jobs would be lost should the merger not occur, but conversely jobs would be lost should it be approved[193]. In order to offset the harm to public interest, the Tribunal approved the merger subject to the condition that a sum of R2 Million would be invested to be used by the unskilled employees who lost their jobs as a result of the merger[194]. This figure as disputed by the merging parties as being too high and that it would prevent the emergence of the efficiencies that are expected to be a result of the merger. The Tribunal held that this was

[189]Supra note 124.
[190]Ibid, Para 135.
[191]Ibid.
[192]ibid, Para 136.
[193] Ibid, Para 137-143. Specifically Para 143 states that the merger will result in unskilled laborers losing their employment and therefore due to their lack of skill will find it difficult to secure alternative employment, the merger was held to '…have a substantially negative effect on employment and hence the public interest.' As opposed to the scenario that occurred in *Food and Allied Workers Union/The Competition Commission, McCain Foods and Heinz Frozen Foods* 17/AM/Mar01 at Para 30, where it was held that '…the employment consequences of prohibiting the transaction are likely to be more severe than the consequences of approving the transaction'
[194]*Tiger Brands/Langberg Foods* Supra note 124, Para 150-151, where a further subsection of the condition was that the monies would be available only to unskilled laborers who ideally would use their portions of this lump sum to receive training in some or other industry and therefore increase their opportunities to secure alternative employment. These funds are available solely to former unskilled employees whose retrenchment is 'merger specific', to the exclusion of management employees as they have a more marketable set of skills.

incorrect as the potential elucidated by the parties of the merged firm would be able to handle the monetary investment that is the condition for approval. In *Distiller's*[195]the merged company offered a reasonable package that was well beyond what the legislation regarding the matter dictates, as well as surpassed the previous practices of both of the merging firms[196]. This offer was further accepted practically unanimously. This situation is contrasted with that in *Trident Steel (Pty) Ltd/Dorbyl Ltd*[197], where it was stated that should the target firm not be allowed to merge with the acquiring firm that it would have to scale back some of its operations which would then result in many more jobs lost as compared to the small amount of managerial jobs that would be lost as a result of the merger being approved.

In *Unilever/The Competition Commission of South Africa*[198], it was stated that the number of potential job losses that were foreseeable as a result of the merger were not to be construed as substantial as there is the possibility that conditions could be imposed to offset the effects of these job losses[199]. Furthermore the tribunal held that the information regarding job losses was not to be understood as per the allegations of the merging parties that it is information of the privileged kind, which therefore means that employees not party to unions had no right to access such information[200]. The right to this information is more procedural than anything else, as employees whose status as such will be affected by a transaction are afforded a right to make representations in terms of this effect they are exposed to. The timing that such information is divulged is of supreme importance. This is regarding the fact that merger analysis is done prospectively. It will then be moot to divulge information after a decision on the matter has been already made. Regardless, it was stated categorically that '…the most powerful channel available to the unions to address employment related issues arising from the merger is the Labour Relations Act or private collective bargaining agreements where they exist.'[201] The problem that befalls competition enquiries into public interest is that there are requirements to balance interests from both sides. In terms of Labour laws, there exist no such requirement which then avails a better suited and more beneficial forum for employees and unions to address their concerns[202].

[195]*Distillers/Stellenbosch* Farmers Supra note 121.
[196]Ibid**,** Para 229.
[197]89/LM/Oct00 at Para 93
[198]Supra note 100.
[199]Ibid, Para 36.
[200]Ibid, Para 37-40.
[201]Ibid, Para 43.
[202]Ibid. This balancing act is the norm. In *Lonmin Plc/Southern Platinum Corp* 55/LM/May05, at Para 13-15 it was stated that should the merger not be allowed then the job loss would be three times higher than if the merger

In *Wal-Mart/Massmart*[203] merger, one of the conditions that were imposed was that the entity not be allowed to retrench people for a period of 3 years after the completion of the transaction[204]. This is good because it allows the employees to gain skills from this international retail giant. Further there was the concern that Wal-Mart has a reputation for de-unionising the workforce. This is not something that needs to be worried about in a public interest analysis during a merger evaluation as there are other legislations with enough teeth that are there and able to deal with this matter better than the competition authorities.

(c) The ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive:

This criteria of the public interest tests that form part of the merger analysis as well as a general goal of competition law as listed in section 2 of the Act, I believe, is an attempt to rectify the injustices of the past through the use of income distribution economics. Preferential treatment has been afforded to previously disadvantaged persons that own or control firms, which is in line with the Black Economic Empowerment provisions that filter through various legislations.

South Africa was in the unique position during Apartheid in that international investment and import-export abilities were hindered as a result of many States imposing sanctions and embargoes on the country. The profits that firms were then making were then invested locally and across different industries. The repercussions of this were that the minority had a very strong hold on varying sectors of the economy which then made barriers to entry even higher. 'In *Anglo American Holdings Ltd/Kumba Resources Ltd*[205], it was suggested that this provision be interpreted widely in the light of the preamble and section 2. The apartheid economic system led to excessive concentrations in the economy, and it was one of the goals

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was allowed. The cost of production regarding employment was alleged to be 60% of the overall costs incurred, and that through the merger in order to realize efficiency goals of the firm not more than 400 employees would be retrenched. In addition to this a quarter of the retrenched employees would be ear marked for re-employment should positions become available within the entire Lonmin Group. As a result of the target firm being in dire financial straits, the tribunal ordered that the firm instead of providing a financial investment into the area as has been seen to be the common remedy, that skills training would be afforded to retrenched employees for a period of 6 months post merger. This I believe to be a remedy that accommodates both the needs of the merged entity as well as those of the affected employees in a manner that is cost effective and not unduly unfair on either party.

[203]Supra note 21.

[204]Ibid, Para 2.

[205]46/LM/Jun02 at Para 145-170.

of the Act to promote a wider spread of ownership of economic assets by a greater number of South Africans.'[206]

What this translates into is that new firms, controlled or owned by previously disadvantaged persons found it difficult to enter into these markets. This was not only as a result of the barriers to entry, but further as a result of the poor standard of education and skills that they received, coupled with the pittance income they were paid. Therefore, by and large, there were no skills to use and no capital to invest in order to enter markets. There was therefore little chance for these entities to succeed having come from this background[207].

'The Tribunal should refrain from unnecessarily restricting the business activities of firms that are controlled by black shareholders. It should not impose onerous conditions where empowerment firms dispose of assets for good business reasons.'[208] However, the competition authorities are charged with the task of protecting the competitive process, and not certain competitors. S12A(3)(c) therefore poses a difficult scenario. This is an argument regarding the lessening of barriers to entry that exist in a market, and in terms of an efficiency argument I believe it should apply generally to all small and medium enterprises regardless of the race of the persons controlling or owning them. However, in reality, this cannot be the only method to introduce previously disadvantaged persons into the economy, and in fact it is not. According to the BEE Act[209], enterprises are encouraged by law to reorganise their structure to be more representative of the population. This method of induction of this sector of the population seems to be a better option as firms which benefitted previously as a result of the laws that protected them are now incentivised to participate in a more equitable manner. Employees therefore are afforded skills training and are provided with opportunities to learn the industry they are in and become productive members of society. This is neither here nor there regarding public interest, as this is another –seemingly more suitable forum in which to address this matter. Specifically because competition law protects the competitive process, not competitors themselves- which is precisely what this section of the Acts public interest seems to promote.

[206]Sutherland & Kemp *op. cit.* note 104, at 10-97-8.
[207] Debraj Ray *op. cit.* note 60, at 235 – Inequality begets Inequality.
[208]Ibid, at at 10-97.
[209] Supra note 14.

In *Schumann/Price's Daelite*[210], it was evidenced that should the merger be prohibited then the resultant effect would be that there is a gaping hole left in the particular market. What would then happen is that the demand in the market for the product[211] would- holding all other factors equal- remain the same, whilst supply would severely drop. This would then be a perfect opportunity for the small and medium firms that remain in the market to invest in increasing production capacity, and to innovate so as to frantically scramble to secure as much of the now shelved market share that was held by the failed firm. It would be simplest for the already existing firms in the market to earn the available market share as opposed to new firms entering the market and doing so. However the latter is also a possibility as a large firm has exited the market, which then reduces the barriers to entry into the market even more. Whatever occurs, the potential for many players to enter the market, selling homogenous goods, where prices are basically known between the producers due to the simplistic nature of the good[212], these factors bode well for an argument in favor of a free market system as this market could possibly be considered quasi-perfect. It is interesting to note that without the regulation, that is, without the judicial system intervening in this merger and prohibiting it (regardless of the reason for such prohibition), the parties would have merged, and this quasi-perfect market would not have come into existence.

In *Business Venture Investments 790 (Pty) Ltd/Afrox Healthcare Limited*[213], it was averred by the parties granting loans to the acquiring Black Economic Empowered firm concerned, that the rationale for their participation in the merger was to secure this empowerment of a company owned/controlled by previously disadvantaged persons. The IDC[214] '…is a state owned national development finance institution, mandated to promote, through its financial activities, economic growth, industrial development and economic empowerment.'[215] In line with its mandate, it granted the fiscal assistance needed by the firm to effect the transaction and to aid in furthering the goals of the Act, which was in addition to the competition enquiry producing a positive result.

[210]Supra note 170, para 75.
[211]Candles in this case.
[212]23/LM/May01 at par 77, where it was held that the poorest ranks of society consume these products, and consequently this is an indication that the products need to be cheaply made; in bulk due to their rapid expenditure; and without any need for much research and development for interested firms considering entering the market.
[213]105/LM/Dec04 at para 18
[214]Industrial Development Corporation
[215]*Business Venture*/Afrox Supra note 202,para 14.

In *Engen Limited & Others/Sasol Oil & Other*[216], the fact that there were empowerment inclusions to the transaction, was not regarded in the public interest enquiry as their inclusion is not voluntary but prescribed by the petroleum industry charter[217]. Engen was already an empowered firm, and Sasol Oil was required by industry regulation to alter its constitution so as to comply with the empowerment charter that is in effect within the industry. Therefore regardless of the merger this would have to be complied with[218].

The sale of the land in *Tongaat-Hulett/Transvaal Suiker*[219] to previously disadvantaged persons from the local community, seems to not have regarded that TSB's agricultural operations are fully artificially irrigated. As opposed to the other competitors in the market that rely mainly on rain. This would then mean an increase in costs of production for the new cane growers, and so a lesser return on their production. Economically speaking this would decrease the amount of earning that would be made in the region, which would then decrease saving and investment. This would in turn decrease the buying ability to obtain capital goods and thereafter increase production, innovate, and evolve the industry. This therefore undercuts the potential that this act of corporate social responsibility could generate for the region, and renders this undertaking to be at risk of being viewed as a purely token gesture who's supposed benefits cannot be realised. It is a token gesture because it will be difficult for these growers to become competitive. They have been given a small portion of the market and may well be regarded as subsistence farmers in the extreme. The Tribunal was of the opinion that the employment that would be created would have occurred in any case, and regardless of how it would occur, the benefits that would flow from it would not be sufficient to offset the anti-competitive effects that the transaction would produce.

The merger in *Shell/Tepco*[220] was approved unconditionally, and the conditions that were recommended by the Competition Commission were heavily criticised. In said criticism, it was interesting to note that the Competition Tribunal stated that 'Empowerment is not furthered by obliging firms controlled by previously disadvantaged persons to continue to exist on a life support machine.'[221] This shows the extent to which a public interest ground, in this case referring to s12A(3)(c), is to be considered and that more importantly in this

[216]101/LM/Dec04
[217]Ibid, par 130.
[218]Ibid, para 548.
[219]Supra note 148, par 39-41.
[220]Supra note 21.
[221]Ibid, Para 42.

particular merger, where the firm owned by previously disadvantaged persons cannot withstand reasonable and usual competition within their relevant market coupled with the fact that should as a result of the merger the aforementioned firm be incorporated into another competitor firm, should competition in that market be unaffected therefore the public interest grounds are not sufficient to nullify the result of the competition segment of the enquiry. Namely that there is no substantial prevention or lessening of competition as a result of the transaction due to the fact that said firm has negligible participation in that market and equally as important, the fact that should the merger not have occurred then the result would be that the firm would foreclose in any event due to the internal shortcomings that it suffered from.

I do not believe that this public interest factor should hold much weight although the rationale for its inclusion is favourable. There are other mechanisms to secure the participation of previously disadvantaged persons in the economy that I feel to be better suited to the realisation of such rationale. Through making existing firms more representative, previously disadvantaged people are available to exploit opportunities to gain knowledge in the field the pursue, whilst simultaneously not being exposed to the risks involved with entering markets with the possibility of lacking sufficient capital or knowledge to give themselves a chance to succeed. The chance for a firm to succeed is generally the same regardless of who controls it, however being a previously disadvantaged individual could in all probability further minimise the chances you have to succeed. The Broad Based Black Economic Empowerment Act I feel sufficiently dealt with this conundrum of how to include and involve previously disadvantaged persons in the economy. Further the IDC's mandate promotes such inclusion. This provision of the Act simply does not adhere to competition policy as a result of its segmentation of ownership of juristic persons being racially based to be capable of enjoying preferential treatment. I do not feel that competition law is the medium in which to effect such favourable treatment.

(d) The ability of national industries to compete in international markets:

In most cases it has been found that there is no correlation between mergers and abilities of the firms concerned to become more internationally competitive[222]. The matter regarding a firm's ability to become internationally competitive depends largely on the comparative advantage of the industry and the firm as compared to those similar industries abroad.

[222] *Distillers/Stellenbosch Farmers* Supra note 121, at para 171; *Schumann/Price's Daelite* Supra note 170, para 74.

In *Tongaat-Hulett/Transvaal Suiker*[223] the market is heavily regulated. 'The South African sugar industry is a low cost producer, well set up to compete successfully on international markets.'[224]The Tribunal held that the trade tariffs imposed on imported goods '…insulated the South African market from foreign competition…'[225], which seems to be a justifiable regulation of the market. This is because often with international competition, comes problems of products being dumped on the South African market at prices that cannot be matched by local producers. The effect of this is that international competition undercuts the domestic firm's ability to compete in its market resulting, inevitably and in the extreme, in their exit from the market. Furthermore the parties alleged that the merger would benefit the competitiveness on the international market, however this argument failed due to the fact that the size of the merging firms were not inconsequential. 'Cost competitiveness may be considerably influenced by the size of the productive units, however the merger has no direct influence on this there being no consolidation of any productive capacity.'[226]

On the other hand, there is the problem that the new entity or the acquiring company is international and therefore will increase imports into the country. Such was the concern that existed in the Wal-Mart/Massmart merger that is currently under review from the Competition Appeal Court. This would then have the effect that the region within which the entity will operate is exposed to the risk that the demand for the local goods that they produce would decrease and therefore have negative roll on effects for the entire region.

Further there needs to be an examination into the market share of Massmart, and the competitors that are within that same market.

The public interest considerations cited above (in its enactment by the Legislature, as well as in its application by the Judiciary) are understood to be a regulation of the market by Organs of State. The purpose of the inclusion of public interest goals in legislation is "...deemed to be important to ensure longer-term balanced and sustainable growth."[227]

[223] Supra note 148, para 39-41.
[224] *Ibid*, para 115.
[225] Sutherland & Kemp *op. cit.* note 104, at 10-6.
[226] *Tongaat-Hulett /Transvaal Suiker* Supra note 148, para 115.
[227] Hartzenberg *op. cit.* note 22, at 13.

CHAPTER FIVE– Legal Considerations

There is the legal issue of the fact that it is the role of the electorate to make policy and law. However it is left to the Courts to preside on the matter that involves such considerations. This is seen to be an issue because the courts are then going to have to make decisions regarding policy considerations where they are in fact not the correct democratic forum in which to make the assertion, whilst simultaneously being the only practical forum in which these matters can be addressed. The solution to this is that the courts interpret these matters in a restrictive manner. '…it is incumbent on an un-elected, administrative tribunal, principally charged with defending and promoting competition, to approach its public interest mandate with great circumspection.'[228]

An interesting consideration would be that as stated, a balance between regulated and free markets is to be obtained, and it is within the realm of the Legislature and the Executive to determine this balance. However in the restrictive interpretation by the Judiciary of the intention and policy of these two Organs of State, the resultant decision will be created through a process that actually favours a free market economy because the carefully considered balance is vitiated to a degree by this sort of interpretation being employed. One practical view of the restrictive interpretation of the Judiciary of this competition law policy is that in substance the courts favour a free market system.

"The greater the number of objectives or constraints that a competition authority is required to take into consideration, the higher the likelihood that the focus of enforcement efforts will not centre primarily on safeguarding the competitive process."[229] The courts of a State are in no position to be price setters, and have a long history of preferring to not involve themselves with commercial decisions made between parties – especially where the parties both do not agree to what the court decides. Further, due to the fact that the parties before the

[228] *Daun et Cie/Kolosus* Supra note 169, at para 124; *Unilever/Robertson Foods* Supra note 109; *Shell/Tepco* Supra note 21; and *Distell/Stellenbosch Farmers* Supra note 112.
[229] Hoekman and Holmes, *op. cit.* note 7, at 884.

court seldom are forthcoming with required information, the court is at a further disadvantage as they cannot make a decision based on all the relevant information[230].

Regarding mergers, their implications are conducted before the merger actually occurs, where the reality is that the effects of the merger can only be ascertained after the merger has been concluded (and is thus irrevocable and irreversible), the situation is always present regarding whether the correct decision was made. The underlying purpose of merger regulation is to prevent the proliferation of anti-competitive constructions that have no efficiency justifications for their existence. Sometimes the courts are not fully equipped to be making such determinations even if they have been granted the power to do this by the legislature. Without the required expertise there is a danger that a decision will be made with the intention of safeguarding and promoting competition however where the effects of the decision in question in reality negate this goal. "This is why merger regulation is so important- rather constrain through merger regulation, the rise of structures conducive to monopolistic conduct then imagine that they can be easily controlled after the fact."[231] Merging parties desire their transaction to go through with as little delay and investigation as possible so that they could maximise their potential within that market.

Additionally, matters of exclusionary conduct perpetrated by firms are difficult to bring to trial. Parties are generally not forthcoming with information because they do not want to expose their investment to the risk of losing any possible benefits that will flow from them as a result of their decision to be completely open with the information that they have and to what their intentions are. These hurdles are put in place by the parties for competition authorities to jump over, knowing full well the limited resources that these authorities have. "The competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an over-zealous manner lest they damage precisely those interests that they ostensibly seek to protect."[232]

There is an issue in merger considerations that the transaction attempts to go through with as little hindrance as possible. Regulations even though they exist for the purpose of protecting interests that will be affected by the transaction, at the same time bring negative ramifications as a result of this delay. I do not believe that the merging parties would avoid

[230] Parties are hardly forthcoming regarding information as they seek to secure future profits that would be hampered by determinations of the court having symmetrical information.
[231] *Supra op. cit.* note 4.
[232] Hartzenberg, *op. cit.* note 22, at 28.

considering a merger as a result of these 'other' regulations as a merger has its rationale cast in the furtherance of the firm's profitability. The only negative effect that I see this regulation having is that it will take more time, as compared to the significant positive effects of increased transparency, increased protection to those members of society that require it - be it consumers or other smaller firms that could risk ejection from the market as a result of not being able to compete in that market post merger; or employees that will be affected by the merger detrimentally; or previously disadvantaged persons being prevented from expanding their economic interests and activities thus relegating them to remain disadvantaged.

CHAPTER SIX– Practical Implications

'We derive some comfort from the knowledge that each of the elements of public interest that we are obliged to consider are protected and promoted by legislation and institutions specifically designed for that purpose…'[233]

In terms of the requirement to empower historically disadvantaged people in South Africa, there are other regulations besides for the Act that require compliance in order to achieve this goal[234]. Focusing on the Act however, there are cases that exist that have dealt with this. 'The role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory and regulatory instruments – in this case the Employment Equity Act, the Skills Development Act, and the (Empowerment) Charter itself spring to mind.'[235] This then shows what is confirmed by case law, that public interest is not a main or even an equal priority in competition law, as compared to efficiency. This however does not negate the fact that it is still to be considered. However the ramifications of the consideration are in practice blunted compared to the ordinary understanding of what was written in the Act.

In terms of the consideration of competition authorities of the public interest criteria listed in s12A(3)(a) of the Act, it is said that '…a competition authority should be conservative in addressing this aspect of public interest issue (and that) it is preferable for these problems to be regulated by other authorities.'[236] I do not believe this to be correct, as it

[233] *Daun et Cie/Kolosus* Supra note 169, at Para 124.
[234] BEE Act.
[235] Hartzenberg, *op. cit.* note 22, at 28.
[236] Sutherland & Kemp *op. cit.* note 104, at 10-96.

is the competition authority and the Tribunal which are the refereeing entities with the closest link between government and market regulation. These entities are able to access information and advice from varying professional fields, and further the Minister is afforded a right to appear at hearings so as to aid the court in its determination of the matter. The Tribunal and the Competition Appeal Court are not ordinary courts, they are specialized and presided over by officers who hold sufficient knowledge in these matters so as to tread satisfactorily in these waters. There is of course the probability that these presiding officers lack the degree of expertise required in a given matter, and could rule on matters with the intention of adhering to the law in a manner intended to inflict the minimal amount of harm onto society – which is the courts mandate, that is, to in fact protect society and its interests. In terms of mergers, this dilemma would be solved through a decrease in relevant information asymmetry, and this is left for the parties to comply.

In *Shell/Tepco*[237] it was stated that 'This case raises very important considerations in the interpretation of the public interest in the context of a merger assessment. While public interest concerns are explicitly incorporated into the merger assessment process, it is recognised that they should be interpreted very cautiously, and that the role of other policy initiatives in promoting those public interest objectives may be far more important than that of competition law.'[238]

It was reiterated that the importance of the public interest test in a merger analysis '...may lead to the prohibition of (or the imposition of conditions on) a pro-competitive merger. Or it may result in us approving an anti-competitive merger. Hence in balancing the public interest and competition we are obliged to consider whether a merger that passes muster on the competition evaluation nevertheless falls to be prohibited because of its negative impact on any of the specified public interest factors...'[239]

As noted in this case there is no guidance in the Act about how exactly to consider public interest, with the only qualification to said consideration being that it should be 'substantial'.[240]

The Tribunal further held in this case that it is reluctant to involve itself in commercial decision of firms, especially since doing so could lead the Judiciary as an Organ

[237]Supra note 21.
[238]Hartzenberg, *op. cit.* note 22, at 28.
[239]*Shell*/*Tepco* Supra note 21, at Para 37.
[240]Ibid, Para 38, with reference to s12A(1)(b).

of State to meddle in the business of private firms. The Tribunal expressed that it has no desire to assume such a role.[241]

Regarding the need for public interest to be included in competition legislation, and the use thereof, the Competition Commission stated that "...as a public authority it must be guided by the public interest, it must enforce public policy."[242] The Tribunal responded to this stating that where the Commission uses public interest as a basis for its intervention, that such intervention needs to be cautiously pursued. It was reiterated[243] that the public interest goals are secondary to the other Legislations that specifically exist to deal with related matters[244], and that the pursuit of the public interest criteria's should be conducted wearily "...least that damage precisely those interests that they ostensibly seek to protect."[245]

In *Mittal Steel/ Harmony Gold Mining*[246] , it was stated that 'The Tribunal does not function as an ordinary court. Competition proceedings involve the public interest, and under the Act, the Tribunal has an active role to play in protecting that interest. "As a result, the Tribunal conducts its proceedings in an inquisitorial manner, potentially calling its own witnesses, accepting evidence not normally admissible in a court of law, allowing a broad range of participants, and adjusting its procedures as it sees fit."[247]' Further this case highlighted the consideration of public interest to be secondary to the competition consideration[248]. South African competition law does not really focus on the protection of public interest and even though the courts are empowered to promote or refute a merger based on public interest considerations, in practice it has not yet happened[249].

In *Freeworld Coatings Limited / Competition Commission & Kansai Paint Company Limited*[250] there were very stringent conditions imposed on the merger as a result of the anti-competitive effects it produced, as well as the effects it had on public interest grounds[251]. The public interest effect that it had was that Freeworld Coatings was a local firm with exemplary BEE criteria. The fact that it would be taken over by a foreign entity, Kansai Paint Company

[241]Ibid, at Para 49.
[242]Ibid, at Para 57.
[243]Ibid, at Para 58.
[244]As per my discussion above regarding the LRA, BEE Act etc.
[245]*Shell/Tepco* Supra note 21, at Para 58.
[246]Supra note 21.
[247]With reference to Sutherland & Kemp *op. cit.* note 104, at 11-24, Para 11.4.6.1.
[248]At Para 41; and *Medicross/Prime Cure Holdings* Supra note 17, at Para 23; and *Natal Association of Pharmaceutical Wholesalers & Others/Glaxo Wellcome (Pty) Ltd & others* CT68/IR/Jum00 at para 64.
[249] Sutherland & Kemp *op. cit.* note 104, at 10-93.
[250]62/X/Oct10.
[251] Jafta & van Eeden *op. cit.* note 34, at 12-13.

Limited, was feared to have a detrimental effect on the '... "keep it local" nature of Freeworld's operations, describing it as contributing to a uniquely South African product development and commercialisation...'[252], and in an attempt to mitigate these effects the Competition Commission approved the merger subject to conditions that would serve the public interest, namely:

'The Commission further added several conditions which it believes will serve the public interest:

- No retrenchments for a period of three years following the merger
- Kansai will continue to manufacture decorative coatings for a period of ten years, and is required to establish an automotive coatings manufacturing facility in South Africa within five years
- Kansai will invest in South African research and development in decorative coatings
- Kansai will implement a BEE transaction within two years'[253]

The inclusion of the public interest relating to employment in this manner is not a novel method of addressing the public interest requirement[254], as the Tribunal believes that there are better and specialised institutions that are able to adequately address matters dealing with employment. On the matter of employment, there have been explicit provisions made regarding the inclusion of procedural rights afforded to employees and their trade union representatives[255]. In *Mittal Steel/Harmony Gold Mining*[256] there was the further contention that the employees that were not in executive/manager positions and who were ordinary labourers were to be protected more than their higher ranking colleagues because their prospect for employment should they lose their jobs as a result of the merger would impose a greater burden onto them.

In the party's submissions in the case of *Wal-Mart/Massmart*[257], it was not so much a consideration in the merger analysis of the efficiencies that the merger would or would not bring. There was empirical proof of the fact that Wal-Mart actually does benefit the consumer

[252]Ibid
[253]Ibid, at 13.
[254]*Daun et Cie/Kolosus* Supra note 169, at Para 125
[255]Section 13A states that in a time of a merger, employees &/or their representatives need to be informed of the merger so that the possible post merger ramifications can be addressed fairly and within sufficient time.
[256]Supra note 21.
[257]Supra note 21.

and therefore consumer welfare in the sense that its main selling point is that it sells products at reduced prices[258] and increased consumer choices[259].

However what the contention was regarding public interest in this matter was that Wal-Mart has a reputation of increasing imports into the country it enters. This would have the effect of decreasing the demand on local producers which would in turn threaten goals of growth in those domestic sectors[260]. However it was contended that the procurement of goods locally by Massmart was not as a result of its inability to procure goods internationally and enjoy the same benefits Wal-Mart does, due to Wal-Mart's massive contacts in the global supply chain[261]. The merger was conditionally approved, with conditions similar to those of the Kansai case. The decision was taken on appeal to the CAC and is currently pending.

The fear that economists have regarding matters being decided on in terms of public interest considerations is that, as in the Wal-Mart-Massmart merger, foreign investors will be dissuaded from investing in South Africa as they may be of the opinion that the conditions relating to their business that may be imposed on them are too stringent, and as a consequence they will invest elsewhere[262].

In terms of recorded opinions of major practitioners of competition law in South Africa[263], the negative effects of time delays in the implementation of decisions by firms that occurs when public interests are considered, where necessary, are negligible. This is because as these public interest have been included in the Act it forces them to be considered by all the parties. This I suppose could be regarded as the market regulating itself as it considers these matters beforehand so as to limit any potential delays to the process in question. Such action would be beneficial for all parties involved as the parties would decrease the time that is spent on the matter being scrutinized, and the competition authorities would not have to waste more time and money, of which both are in short supply, considering matters that it could get assistance in considering. However the reality is that should these interests not have been included, then they would not be regarded at all, and economic policies would be mere statements with even more limitations on their ability to be applied than presently exists.

[258]Ibid, at Para 20.
[259]Ibid, at Para 21.
[260]Ibid at Para 31-32.
[261]Ibid at Para 32-45.
[262] Jafta & van Eeden *op. cit.* note 34, at 14-15.
[263]T. Hancock, *op. cit.* note 18.

CONCLUSION

'…government plays a substantial role in the economy. It not only provides the rules for economic activity but also promotes economic stability and growth, provides certain goods and services that would otherwise be under produced or not produced at all, and modifies the distribution of income. The government is however not the dominant economic force in deciding what to produce, how to produce it, and who will get it. That force is the market.'[264]

'…competition authorities are unlikely to prohibit a merger that is not anti-competitive, or approve a merger that is anti-competitive, on public interest grounds…The most important effect of the public interest criteria has been that the authorities frequently approve mergers subject to conditions that protect the public interest.'[265] This is evidenced in *Glaxo Wellcome pls/Smithklin Beecham plc*[266] where it was proposed to the Tribunal that '…the merged firm allow competition by producers of generic drugs, which could be used to treat opportunistic infections in HIV/AIDS cases and anti-retrovirals for HIV.'[267] However the tribunal could not justify the condition based on any of the public interest grounds in the Act.

'From an economic perspective, (*competition)* policy should aim at safeguarding the competitive process so that firms are able to compete away any excess profits that may exist at any point.'[268], and further, that '...many specialists have recommended that developing countries pursue a broad based competition policy... (using) the key principle underlying an active competition policy stance is to rely on market forces to determine the allocation of productive resources, subject to the constraint of ensuring social equity objectives are realised as efficiently as possible, and that mechanisms exist through which attempts to create monopolies and exploitation of market power can be addressed.'[269] Therefore there should be a hybrid of regulation and reliance on market forces to attain a fragile balance needed to allow a market to work in a desirable manner, addressing all required goals.

There is definitely a need for public interest in competition legislation. This is because it is this legislation that deals with economic matters that are required to be regarded in specific instances. For example due to the forward looking nature of merger analysis, it can

[264]McConnell and Brue *op. cit.* note 5, at 33.
[265]Sutherland & Kemp *op. cit.* note 104, at 10-93.
[266]58/AM/May00 par 20.
[267]Sutherland & Kemp *op. cit.* note 104, at 10-94.
[268]Hoekman and Holmes *op. cit.* note 7, at 882.
[269]Ibid, at page 844.

be economically predicted what the possible effects the transaction would have on s12A(3) listed factors. This is the only legislation that allows such scrutiny over commercial decision prior to the transaction being recognised and therefore legally available to be implemented. It is true that there are other regulatory bodies that exist in South Africa, and abroad as well, that deal with the specific matters enshrined in this article. However they are only able to be mobilised once a breach of their provisions has occurred.

The forward looking ascertainment of the effects of the transaction is thus very useful, in an attempt to prevent possible and reasonably foreseeable harm from occurring, before it occurs.

Regarding the effects that the transaction would have on trade and industry, this public policy consideration is important for the ascertainment of how the conduct will affect government's economic goals of encouraging and nourishing national economic growth, efficiency and social welfare. The same rationale is true for the heightened protection of firms owned by previously disadvantaged persons being encouraged to participate in the economy and compete in the markets. I view this provision as being something akin to a handicap policy in golf, where firms that are exposed to higher risk of failure in their ability to participate in the market due to their historical economic disabilities, as it were, should be given a proportionate 'helping hand' to be able to participate fairly. However regarding section 2(e) and 12A(3)(c) respectively, the public interest is in conflict with competition policy itself. There are better means in which to secure the attainment of this goal, namely through the provisions of the BEE Act as it relates to concessions and charters formulated by the Executive to encourage/force the industries to which these acts relate to become representative.

The same rationale applies for domestic industries that are to be protected from international firms perverting said industries, thereby having the possible consequence of retarding national economic growth and the fulfilment of the other economic goals of efficiency (in the domestic and global consideration) and of domestic social welfare.

The reasons that public interest considerations exist is to account for the effect that decisions of players within the market have on the market itself and on intricately linked economic considerations of growth, efficiency and welfare.

The contentions that public interest considerations specifically hinder market functionality in terms of the delays that are involved with the consideration of these criteria, are ill founded as should the parties be prepared to disclose all relevant information prior to the hearing then the investigations regarding these criteria would be swifter, and consume less resources – both from the parties themselves that will be faced with extended periods in court and therefore the associated legal fees, as well as for the competition authorities that will not need to expend as much capital and time resources into the necessary investigation of the matter.

With regard to the matter of income and wealth distribution, 'the market system is impersonal and may distribute income more inequitably than society desires. It yields very large incomes to those whose labour, by virtues of inherent ability and acquired education and skills, command high wages.'[270] This is then a basis to repute the free market system as it does not take sufficient cognisance of the fact that in developing countries, there is a need to promote equity values especially where there has been a historical discrimination which is presently required to be rectified. It seems that the inclusion of equity issues in economic growth policy will hamper the speed at which desired growth rates will be realised. However according to Kuznets inverted U hypothesis, referring specifically to the fact that should pure efficiency be the only policy objective in realising economic growth, the advantaged will become more advantaged for a time and the disadvantaged will become more so. This time frame is not a matter of months or a few years, as economic growth is popularly discussed in terms of changes evident from generation to generation. This amelioration of wealth and income disparity will be seen in economic terms through a reduction in the gap between the Lorentz curve and the 45 degree line. Should this pure efficiency goal be followed, the result will be undue civil unrest. Historically disadvantaged people vote for representation with the hope that past injustices will be remedied and results will be evident within reasonable time. To expect the majority of South African citizens to suffer further post Apartheid, with representation of their own democratic choosing, is simply ludicrous and will never be accepted.

I believe therefore that public interest does indeed have a place in competition policy, as it is a form of necessary regulation of the market so as to guide growth and development in a manner that promotes social welfare and equity. The process may take longer however the

[270]McConnell and Brue *op. cit.* note 5, at 79.

results will gradually begin to be seen in each income bracket thus abating the frustrations of previously disadvantaged persons and further promoting a uniform equitable economic growth.

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