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CHAPTER 1: INTRODUCTION

I The South African Competition Framework on Mergers and Public Interest

The current South African legislative framework on competition law and public interest can be attributed to the competition policy of the democratic dispensation, which formed the backdrop against which the current Competition Act[1] was drafted. The South African competition framework presents a hybrid of a pure competition assessment and public interest considerations on the impact of a transactions on competition, to which mergers are subjected to.[2] This is significant given that it is widely accepted that the primary goal of competition legislation is to promote competition in the markets with the ultimate goal of maintaining or achieving efficiencies.[3] Consumer welfare in this context is an economics analysis, largely defined in terms of lower prices for consumers, a supply of products which meet the demand of consumer at the lowest possible price, and innovation. Broadly speaking competition and consumer welfare will have been negatively impacted if the transaction has the effect of impairing consumer welfare. The proponents of pure economic analysis in competition law and therefore mergers argue that public interest is inherent in the attainment of consumer welfare in that ultimately the efficient allocation of resources in the long run can lead to the creation of jobs and increased productivity for example, and as such that pure economic analysis has the ability to deliver on equity. This however pre-supposes the existence of a level playing field for competitors and consumers through the existence of free markets.[4]

As far back as 1995 the department of Trade and Industry ("DTI") of the democratic dispensation had undertaken a 3 year consultation process with experts and various role players to develop a competition policy framework.[5] By 1997 proposed guidelines were produced, which also dealt with how competition policy could be used to contribute towards the restructure of the economy with the goal of creating a more efficient and inclusive economy with a defined approach to public interest in relation to the conduct of firms.[6] It was the view

[1] The Competition Act 88 of 1998.
[2] Fox, Eleanor 'Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia' (2000) 41(2) *HARV.INT'I. L.J* 579 at 583.
[3] Ibid at 579.
[4] OECD (2016)33 *Public interest Considerations In Merger Control* at 16 available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2016)33&docLanguage=En, accessed on 18 December 2019.
[5] OECD (2004) *Competition Law and Policy in South Africa* available at https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf, accessed on 14 December 2019.
[6] Ibid.

of the DTI that properly aligned policies, competition, and a developmental agenda could be 'mutually supporting'. Mutually supporting meant that there should be consistency of trade and industrial policy, restructuring of state assets and empowering of entrepreneurs. The promotion of competitiveness and efficiency therefore required the removal of barriers to access to the economy by historically excluded persons.[7]

Further to this the DTI guidelines found the competition law of 1979 effective at the time was deficient and lacking in certain aspects of best practice such as institutions having adequate power, and being properly aligned to the political context. While the said Act had established a competition board, the board was criticised for its passive approach, which is attributed to the fact that the board could only make recommendations on competition matters to the relevant minister but could not itself make final decisions. This is said to have significantly politicised and subordinated the role of the board. Further to that there are allegations that government tended to maintain close relations with business, and that the board tended to be more complaints based than an active regulator of the market.[8]

This criticism leveled against the competition board of the previous dispensation would therefore also influence the way the new competition authority would be structured and the powers which it would be afforded, given that the country had been well versed in the implications of political interference in the consideration of competition matters.[9]A new competition law was thus proposed.[10]

Owing to the history of the country, competition policy could not only priorities pure competition considerations of efficiency and consumer welfare, but would also have to address questions of redress, redistribution and the removal of structural barriers to entry into markets, owing to the history of the country.[11] These issues are attributable to the racially based manner in which resources were distributed, which in turn gave rise to privilege, or exclusion on racial lines in respect of all fundamental aspects of life and experience in South Africa, including

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[7] Ibid at 14.
[8] Abigail Machine, 'Public Interest Test and Merger Control in South Africa: The Walmart Case Revisited' (2014) African Antitrust and Competition Law News and Analysis available on *https://africanantitrust.com/,* accessed on 23 June 2020.
[9] Ibid.
[10] OECD op cit note 3 at16.
[11] David Lewis, *Thieves at the Dinner Table: Enforcing the Competition Act* (2013) Jacana Media (Pty) Ltd, Auckland Park, South Africa at 4.

meaningful participation in the economy.[12] In respect of competition concerns in the markets, some of the consequences of this race based distribution of resources became the rise of monopolies in respect of conglomerates owned and controlled by a few private individuals in critical areas of the economy, such as mining. Demographically, these individuals also formed part of the minority of the population.[13]

The policy document on competition therefore highlighted the need to balance both the developmental economic agenda of the country with that of competition. It further highlighted how 'public interest' needed to be properly defined in the legislation to give effect to a balance, such that the issue of competitiveness and efficiency are juxtaposed against the need to ensure that opportunities are created for historically disadvantaged people to participate in the economy of the country. The effect of this balance has manifested itself in the provisions of the Competition Act dealing with lowering barriers to entry into the economy, promoting competitiveness and most importantly for the purposes of this paper the issue of public interest.[14] The policy document on competition would seek to couch public interest as the incorporation of the interests of consumers, workers, aspiring entrepreneurs and corporate competitors as well as protecting the ability of domestic business to penetrate international markets as a growth measure of the economy.[15]

The Competition Act, 1998 was drafted through a consultative process, with the competition policy that would underpin it having been discussed by the DTI with the national economic development and labour council ("NEDLAC"), a body created to facilitate consensus amongst government, business, labour, and non-government organisations ("NGO's"). The development of the Act also included input from experts, academics, multilateral agencies, and academic institutions. The Act is said to have drawn from the example of developed countries in terms of practice including its independent institutions, the Competition Commission, the Competition Tribunal, and the Competition Appeal Court.[16]

[12] Ibid at 4.
[13] Ibid at 6.
[14] Ibid at 27-28.
[15] Ibid at 27-28.
[16] OECD op cit note 4 at 16

The Act was to have regard to the unique circumstances of South African economy, and incorporate regard to equity, such as empowerment, employment, and creation of access for small, micro, and medium enterprises. It was the view of the DTI that a competition law based on economic efficiency and applied by politically independent bodies was appropriate for South Africa, given the level of development of industrial and service sectors. As such notwithstanding the prominence of equity and political economy in crafting the law, these would not be the primary drivers in the application of the Act. Regard to them would not be driven through political channels, and decisions around them in relation to competition would be dealt with by the competition enforcement bodies, and ministers would not have powers to override and direct decisions.[17] Separation and Independence was necessary for credibility in respect of the markets.[18]

II The debate on the appropriate application of Public Interest in Mergers

The Competition Act[19]("the Act"), is said to be indicative of the characteristics of those of developing countries. It sets out a clear intent to go beyond the traditional economic competition law considerations which are centered on investigating efficiencies and the attainment or protection of the consumer welfare as indicated by its preamble as well as the provisions dealing with public interest considerations in Mergers. In line with the legislative agenda of the post-colonial and post-apartheid democratic dispensation of the country, the Act[20] is concerned with righting the wrongs of the past, and moving towards equity. The legislation is therefore said to have a 'pro-poor and pro-development learning.'[21] In making this point and by distinguishing between the likely approaches of developed v developing countries, David Lewis[22] explains that this approach by developing countries is as a result of the fact that developing countries have tended to priorities industrial policy, and have a need to target the support of selected sectors or interest groups.

According to the Organisation for Economic Co-operation and Development ("OECD"), it is generally accepted that the role of competition law in providing protection and to preservation

[17] Ibid at 17
[18] Ibid at14.16
[19] 89 of 1998.
[20] 89 of 1998.
[21] Eleanor Fox & Michael.S. Gal Drafting Competition Law for Developing Jurisdictions: Learning from Experience'(2014) at 7 available at.http://ssrn.com/abstract=2425329.28, accessed on 15 June 2017.
[22] David Lewis 'The Role of Public Interest in Merger Evaluation' (2002) International Competition Network Merger working Group at 2.

competition results in economic efficiency, such as the efficient allocation of resources in a free market. The core goal pursued by most competition authorities is consumer welfare and the promotion of free economy through the creation of efficiencies[23]. Efficiency takes on many forms including allocative efficiency and production efficiency. Allocative efficiency relates to the pricing of goods at an appropriate marginal or incremental level, such that "the marginal cost of a unit is equal to the value of such unit for consumers. The quantity produced in goods is optimal thus increasing social welfare[24]. Production efficiency is concerned with the production of goods at the lowest possible price[25], in that a firm is operating efficiently[26]. An additional form of efficiency includes Transactional Efficiency, which results in firms decreasing their costs of transacting with business partners[27]. There is therefore a school of thought that believes that competition law should not be underpinned by any other principles other than efficiency, which has the effect of bringing about welfare to consumers. Further that the inclusion of multiple objectives in competition law may potentially result in the risk of conflicts, inconsistency in application and uncertainty as well as potential interference in the work of Competition Authorities by different stakeholders to the multiple interests being protected by the Competition Authorities, including potential political interference through Government[28] or well organised private interests, as well as prospective side effects that may be anti-competitive.[29]

Efficiency also includes other elements such as static or dynamic efficiency. Dynamic efficiency includes the introduction of innovation in a market as the need for it arises. Allocative and production efficiency plus dynamic efficiency thus from what is referred to as a Total Welfare Standard. As such more broadly speaking, the total welfare standard in the pursuit of Competition is preferred by proponents that competition should be about the attainment of consumer welfare thorough the creation of efficiencies. According to this school of thought it is then unnecessary for the competition to pursue any other principles outside of

[23] OECD (2016)33 *Public interest Considerations In Merger Control* at 3 available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2016)33&docLanguage=En, accessed on 18 December 2019.
[24] Ibid at 4.
[25] Ibid at 3.
[26] Ibid at 5.
[27] OECD (2012)16 The Role Of The Efficiency Claims In Antitrust Proceedings at 6 available at http://www.oecd.org/competition/EfficiencyClaims2012.pdf, accessed on 21 February 2020.
[28] OECD (2003) 3 The Objectives Of Competition Law And policy at 2 available at http://www.oecd.org/daf/competition/2486329.pdf, accessed on 21 February 2021.
[29] Ibid.

efficiently, as this can result in consumer welfare.[30] The promotion of competition and efficiency as core competition goals, is thus believed to constitute a part of public interest, to the extent that it has the potential to result in objectives such as poverty alleviation, job creation and economic growth, which are social goals that are critical to sustainable development[31], while a competitive market can result in a de-centralizing of economic and political power[32].

South African on the other hand has been unable to limit itself to the core competition total welfare standards. This is so because such principle is premised on the existence of fee markets. South African on the other hand, having historically been a country under the institutionalised system of Apartheid which resulted in economic inequality around racial lines, concentration of wealth in the minority, a closed economy with limited access to exports. Considering these constraints, the policymakers deemed it necessary for competition policy to address these issues which are social and political goals, with the result of the current public interest provisions which have a developmental agenda, alongside the core competition goals. South Africa thus presented a unique set of circumstances requiring a focus on social and political goals[33] and for competition law to gain legitimacy[34] and representing the needs of the country including dealing with issues of employment, ownership by historically disadvantaged persons and the ability to compete internationally.[35]

The appropriateness of the co-existence under a single authority, of the traditional competition considerations, such as the test for 'substantial lessening of competition' or the 'abuse of dominance test'[36], and the public interest considerations (which may place a heavier burden on the adjudicator to exercise 'pure judgment')[37], is the source of much debate. There is however no disputing that both these aspects in some way amount to consumer welfare and are therefore relevant considerations in the interests of consumers. The concern seems to be whether they should both sit under review of the same authority, or whether public interest considerations should be excluded from competition law analysis specifically and left to the realm of the executive. Of further concern is the fitness and capacity of competition authorities and their officials to preside over the public policy considerations, in that these are more economic policy

[30] OECD op cit note 19 at 4.
[31] Ibid at 5.
[32] Ibid.
[33] Ibid at 7.
[34] David Lewis op cit 18 at 2.
[35] OECD op cit note 19 at 8.
[36] David Lewis op cit note 18 at 2.
[37] Ibid.

considerations than purely legal and technical economic tests which tend to be more established practice than the public policy concerns.[38] It has however been suggested that having regard to public policy considerations, is in fact one of the means by which competition authorities in developing countries may try to achieve credibility and legitimacy.[39] This is so given that competition authorities do not exist in a vacuum, and are accountable to the government of the day and should seek to have regard to the socio-economic conditions of the countries within which they operate.[40] In the interest of maintaining the independence of Competition Authorities however, this should be done not by seeking out political alignment or interference, but rather by making the decisions within the ambit of competition legislation.[41] A further concern around the inclusion of public interest considerations, is that given the challenges highlighted above, this has the potential to result in a lack of certainty in decision making due to the broad scope of public interest considerations, which is a known deterrents for investors, and has the potential to expose competition agencies to political pressure and interference.[42]

In providing a view on the appropriateness of the competition bodies making a finding on public interest concerns, Smith and Swan[43] for example, provide that the enforcement of public interest consideration relating to mergers is viewed as appropriate to be enforced by an independent commission rather than a political body because of the benefit of consistency in approach, coherence and thus a level of certainty, and the balancing effect of assessing through the lenses of competition analysis. This would also serve to limit lobbying by departments who would otherwise have jurisdiction to deal with the public interest considerations.

The *Wal-Mart Stores Inc and Massmart Holdings Ltd CT*[44] case, which will be dealt with extensively in Chapter 2 is one of the more widely publicised and seeming watershed case on the issues and seeming contradictions around treatment of public interest consideration in mergers in South Africa. The case however also served to display the capacity of the South African Authority to strike that fine balance between public interest considerations as against

[38] Fox & Gal op cit note 17 at 12.
[39] David Lewis op cit note 18 at 2.
[40] OECD (2016)10 *Public Interest Considerations in Merger Control* available at https://www.oecd.org/competition/public-interest-considerations-in-merger-control.htm, accessed on 16 December 2019.
[41] Kovacic, William 'Competition Agencies, Independence, and the Political Process' in Josef Drexl, Wolfgang Kerber and Rupprecht Podszun (eds) *Competition Policy and the Economic Approach* (2011) Edward Elgar Publishing 291.
[42] OECD op cit note 19 at 6-7.
[43] Smith, Patrick & Andrew Swan 'Public Interest Factors in African Competition Policy' (2014) *The African and Middle Eastern Antitrust Review* at 1.
[44] *Wal-Mart Stores Inc and Massmart Holdings Ltd (CT* 73/LM/Dec 10) [2011] [ZACT] 28 (31 May 2011).

the purely technical and economic competition law considerations. The balancing of such public interest enquired of a an independent competition authority, has also meant that the value judgment is made within an open and transparent environment, without fear or favour, and outside of political lobbying, bias, and possible grandstanding.[45]

III The significant role and impact of Mergers in an Economy

Mergers play a significant role in competition law, and can have far reaching consequences for the structure of an economy. Mergers have a direct impact on concentration and creation of monopolies in economies, which may hinder entry by new and smaller competitors, and may encourage unilateral abuse of dominance. By implication, Mergers can be concluded by parties who have the necessary capital at their disposal so as to enter into such transactions. In a South African context, as is the case with most developing economies, Mergers can therefore be powerful means of restructuring the economy for the continued advantage of those who are already advantaged to the exclusion and possible detriment of those who are historically disadvantaged, or excluded from meaningful participation in the economy.[46] In the long term, a merger is capable of creating 'beneficial economic growth' through increased longevity and competitiveness of a business, thereby resulting in the increase of employment.[47]

To date, the South African competition authorities have stayed clear of using the public policy impact analysis as a blank cheque to prevent a merger, notwithstanding instances where there has been a negative impact on public policy considerations. The approach has been to approve a merger with conditions, which attempts to mitigate against or remedy any negative public policy impact. The competition authority has then attempted to monitor the implementation and effect of the conditions by setting time frames and requiring updates on the conditions of such orders from time to time.[48]

[45] David Lewis op cit note 18 at 3.
[46] David Lewis op cit note 8 at 76.
[47] OECD op cit note 3 at 5.
[48] Supra note 40.

IV Certainty and Expedience in the Evaluation of Public Interest in Mergers

The opponents of the inclusion of the public interest considerations in merger review, express concern that the inclusion may burden the review process, thereby increasing the time taken to make decisions.[49]

One of the aspects that are positive about the South African legislative framework is that it sets clear steps to be followed in analysing the public interest impact of a Merger. This creates a level of certainty as to the treatment of public interest with regard.

In 2016, the South African Competition Commission published Guidelines[50] on public interest assessments in mergers. In terms of para 1.2 of its provisions, the guidelines seek to provide guidance with regard to the approach that is likely to be taken by the Commission in analysing the impact of mergers on competition and public interest considerations, including the types of information that could be requested from parties. The Guidelines[51] are not prescriptive, and recognise the need for discretion and the making of a value judgment on a case by case basis. It would appear that the Guidelines[52] are an attempt by the competition authority to respond to concerns around the alleged arbitrariness in the application of public interest evaluation in Mergers.

In the alternative public interest considerations could be excluded from the competition law considerations, such that they fall squarely within the realm of the policy makers. If this were the case, this raises questions around how this would be structured. For example would the executive exercise final authority on the public interest considerations, or make recommendations to be considered by the competition authority?

Although the focus of the debate around inclusion of public interest considerations in merger review is on developing countries, it is not only developing countries who employ public interest considerations in this manner. It is rather that in most developed countries, public interest considerations are not likely to be incorporated competition law legislation, and remain within the ambit of the executive, and tend to be invoked moderately and on an *ad hoc* basis

[49] John Fingleton, John & Ali Nikpay, 'Stimulating or Chilling Competition' (2008) in International Antitrust Law and Politics, Fordham Competition Law at 3
[50] *Guidelines on the Assessment of Public interest Provisions in Merger Regulation under the Competition Act 89 of 1998* (published in GN 309 GG40039 of 2 June 2016).
[51] Ibid.
[52] Ibid.

or in exceptional circumstances. In the UK, Germany and Canada[53] for example, separate political bodies have powers to overturn what is considered to be anti-competitive conduct outside of the competition body processes, but only in specific and defined circumstances such as national security and cross border mergers.[54] By implication, competition law considerations are allowed to proceed without having to consider public interest considerations in respect of every transaction falling within the thresholds for review.

V Balancing Public Interest

The above is an important point to consider on the face of the debate as to whether in the first place, independent entities such as the Competition Commission should be presiding over matters concerning public interest, and not the executive realm.[55] It suffices to note here that no other state institution such as the Department of Trade and Industry is able to overrule the decision of the Competition Commission on the question of the impact on public interest of a merger and the Competition Commission remains wholly independent.

The public interest enquiry is the last test to be applied in respect of deciding whether to allow a merger or not. It is therefore balanced with the purely competitive considerations, and does not seek to skew the focus of the enquiry. Other schools of thought however, suggest that the fact that the public interest enquiry is a separate one, implies that there is no balancing act. The reason for this view is because a merger which is on pure competition consideration not anti-competitive may be overturned or allowed subject to conditions centred on public interest considerations.[56] It is noted however that that to date, no merger in the South Africa legal framework has been set aside in its entirety purely on the basis of public interest provisions. As such the public interest consideration have to be significant and be directly linked to the competition questions, in order to result in the overturning of an otherwise competitive merger or to allow a merger which is otherwise anti-competitive to be approved on grounds that there are pro-public interest gains.[57]

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[53] Hodge.James; Sha'ista Goga & Tshepiso Moahloli 'Public Interest Provisions in the South African Competition Act: A Critical Review' in Kasturi Moodaliyar & Simon Robert's *The Development of Competition Law and Economics in South Africa* (2013) 2.
[54] Ibid at 14.
[55] David Lewis op cit note 8 at 109.
[56] John Oxenham 'Balancing Public Interest Merger Considerations Before Sub-Saharan African Competition Jurisdictions With The Quest For Multi-Jurisdictional Merger Control Certainty' (2013) 9 *US-China Law Review* 211at 221.
[57] David Lewis op cit note 8 at 112.

VI Conclusion

In this paper it is hoped that a case will be made that not only is the effect of incorporating public interest considerations into the realm of competition law appropriate, it is perhaps critical and a far better alternative to allowing the public interest impact of competition to be dealt with only in the realm of the executive. The position will be argued as against the backdrop of the South African frame work on Mergers in competition law, and the various case law that has been considered through the competition tribunal, as well as having regard to the application of public interest provisions in the merger control of foreign jurisdictions such as the UK and the U.S.A.

CHAPTER 2: THE TREATMENT OF PUBLIC INTEREST IN MERGERS BY SOUTH AFRICAN AUTHORITIES

I The Competition Act and the Merger Provisions

The Competition Act[58] ("the Act") deals with public interest in three sections. The preamble; Section 2 of the Act (Purpose of the Act); and more extensively in Chapter 3 of the Act (Merger Control) which is the focus of this dissertation, as well as in terms of Section 10 of the Act (Exemptions). All these sections provide a mix of traditional competition considerations as well as public interest considerations, thereby giving rise to the dual character of the legislation which is to address both pure competition efficiency issues as well as the transformation and socio-economic inclusiveness of the economy of South Africa.[59]

The preamble makes specific reference to a need to 'regulate the transfer of economic ownership in keeping with public interest'.

In Section 2 of the Act, and among the traditional competition considerations that the Act is designed to address, the provision outlines the following public interest considerations:

> *'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.'*

Broadly speaking the historic imbalances sought to be addressed by competition policy include concentration in certain sectors such as minerals; extensive state ownership; import substitution; protectionism which may exist in sectors such as agriculture; the wide gap

[58] 88 of 1998.
[59] J Staples and M Masamba. 'Fourteen Years Later: An Assessment of the Realisation of the Objectives Of The Competition Act 89 of 1998' (2012) at 5-6.
.

between poor and rich[60], employment; and barriers to entry into the markets by small medium enterprises in particular those owned by historically disadvantaged people.[61] The intention behind including public interest provisions therefore was to ensure that the competitive gains complement the broader developmental economic agenda and in the absence of level playing fields also ensure that 'small private gains' brought about through competition transactions do not have the effect of undoing or prejudicing the developmental goals and thereby resulting in 'high social costs' notwithstanding.[62]

II Public Interest Considerations, Mergers and Striking the Balance

Public interest in mergers is dealt with extensively in Section 12A of the Act, being the merger provisions, and it is through this provision that much of the jurisprudence around public interest in competition law has been prolific and has given rise to questions around the usefulness and appropriateness of the incorporation of public interest considerations in competition enquiries.[63]

In terms Section 12 (1) of the Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. Control means acquiring ownership or the ability to act as the majority in respect of shareholding or the ability to influence in a material way the policies of the target firm as though one was holding the majority share.[64] A merger can be achieved by way of a purchase of shares, an interest, or assets of the other firm, or through amalgamation or other combination.[65]

The primary motivation for such acquisition may be efficiencies such as economies of scale, which can increase profit while decreasing input costs. Mergers can also result in the amalgamation of resources and as a consequence, the loss of jobs where it is deemed necessary in order to increase efficiency.[66] The consequences of a merger which will in all likely hood

[60] Ibid at 5.
[61] James Hodge; Sha'ista Goga & Tshepiso Moahloli 'Public Interest Provisions in the South African Competition Act: A Critical Review in Kasturi Moodaliyar & Simon Robert's *The Development of Competition Law and Economics in South Africa* (2013) 4.
[62] Ibid.
[63] Ibid at 6.
[64] Abigail Machine 'Public Interest Test and Merger Control in South Africa: The Walmart Case Revisited' (2014) African Antitrust and Competition Law News and Analysis available on *https://africanantitrust.com/*, accessed on 23 June 2020.
[65] S12 of Act 89 of 1998.
[66] David Lewis *Thieves at the Dinner Table: Enforcing the Competition Act* (2013) at 76.

result in advantage for parties to such a transaction, and may even serve to drive price down thereby giving rise to consumer wellbeing in this regard, may none the less, have certain adverse effects such as keeping competitors out of a particular market, and the loss of jobs usually owing to retrenchments. Where the merger is cross boarder in nature, it may introduce new dynamics in terms of international competition or foreign competitors in a country. It will be seen for example how in the *Wal-Mart/Massmart*[67] case, the issue of global value chains and their impact on local suppliers became an issue of consideration on the question of public interest.

The merger provisions of the Act provide for a compulsory pre-merger notification regime for affected mergers. That is to say, mergers of particular thresholds in terms of assets and turnover require to be notified to the commission prior to the conclusion of the transaction. The asset and turnover thresholds is arrived at by having regard to the combined assets or annual turnover of both parties to a merger, as well as the annual assets and turnover of the firm being acquired (targeted).[68]

Mergers are classified into intermediate mergers and large mergers. Intermediate mergers must be notified to the Competition Commission which can then investigate and make a finding around granting clearance for the merger. The decision of the competition commission can be appealed with the Tribunal of the Competition Commission. Large mergers on the other hand are investigated by the Commission which must then make recommendations regarding the merger to the Tribunal, who will then hold a public hearing and make a finding regarding the merger. While it is only compulsory to notify intermediate and large mergers, section 13(2) of the Act makes provision for notification of small mergers, and the commission also has powers to investigate small mergers, even after such mergers have concluded, in the event that competition concerns should arise.[69]

Further to the compulsory requirements to notify a merger, the parties to a merger require to notify their employees and any labour unions of their organisations, so as to enable such parties to participate in the process by making representations with regard to the proposed merger. On the other hand, the Commission is obliged to notify the Minister of Trade and Industry of its

[67] *Minister of Economic Development et al and Wal-Mart Stores Inc. et al* (110/CAC/Jul11) ZACAC (9 March 2012).
[68] http://www.compcom.co.za/merger-thresholds/.
[69] David Lewis op cit note 9.

receipt of a notification of a merger. This is done with the view that should the Minister wish to make representations that they are afforded the opportunity to do so.[70] The final recourse in the process of investigating a merger and with regard to decisions made to allow such a merger, allow it with conditions or to refuse a merger, can be appealed by the parties to a merger at the Competition Appeal Court.[71]

This mechanism is both lauded and criticized in that on the one hand it enables the Competition Commission to respond quickly to undesirable competition outcomes due to a merger, and which may have an impact on public interest, prior to the merger having become effective. On the other hand this exercise is criticized for significantly delaying such transactions, in particular in respect of the public interest evaluation, which in the opinion of other schools of thoughts should not in any event find application in a competition impact analysis.

In terms of Section 12A (1) of the Act, whenever assessing whether a merger could have anticompetitive consequences, the Competition Commission or the Competition Tribunal must in addition consider:

> ‘a) *If it appears that the merger is likely to substantially prevent or lessen competition, then determine-*
>
> *i) whether the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and*
>
> *ii) ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing factors set out in subsection (3); or*
>
> *b) Otherwise, determine whether the merger can or cannot be justified on substantial public interest ground by assessing the factors set out in subsection (3)’*

In terms of s12A (2):

> *‘When determining whether or not a merger is likely to substantially prevent or lessen , the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the firms in the market after*

[70] Ibid at 75.
[71] Ibid at 76.

the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including—

(a) the actual and potential level of import competition in the market;

(b) the ease of entry into the market, including tariff and regulatory barriers;

(c) the level and trends of concentration, and history of collusion, in the market;

(d) the degree of countervailing power in the market;

(e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;

(f) the nature and extent of vertical integration in the market;'

In terms of Subsection 12A (3) of the Act, the following are the public interest considerations to be taken into account:

'3) 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 a merger will have on-

a) a particular industrial sector or region;

b) employment

c) 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.'

The effect of the structure of the provisions is such that the issue of public interest must be considered irrespective of the prior findings as to the question of whether there is likely to be the significant lessening of competition or not, and whether in the case of a finding of such anti-competitiveness, such anti-competitiveness is salvaged by the efficiency question.

Some of the descriptive words in the above provisions have undergone the scrutiny of interpretation by the courts:

In *Harmony Gold Mining and Goldfields Limited*[72], it was said that 'can or cannot' in the text of Section 12A (1) (a) (ii) meant that public interest in the consideration of a merger worked in two ways. It could have 'both adverse or benign effects' in that the consideration could serve to rescue a merger that does not pass the muster of the provision in that it is anti-competitive, or it can have the opposite effect of trumping a merger which while not having anti-competitive effects, may well be contrary to public interest, and therefore fail the merger approval test. The public interest provision therefore can either 'sanitise' (save) an anti-competitive merger or 'impugn' (override) a competitive one.[73]

It was said further in *Harmony Gold Mining*[74] *that* 'justified' meant that while consideration of competition enquiry and the public interest enquiry could lead to different conclusions, considering of the public interest considerations was not to be a 'blinkered' process but one to be undertaken with direct reference to the competition questions. It was therefore not a separate enquiry to the competition questions and needed to be balanced against them.

In the case of *Anglo American and Kumba Resources*[75], it was established that use of the words '*otherwise*' in Section12A (1) (b) of the Act meant that the public interest enquiry would be undertaken irrespective of whether the finding in terms of considering the competition factors in Section 12A (2) revealed that the merger was likely to be competitive or anti-competitive.

In *Distillers Corporation and Stellenbosch Farmers Winery*[76] and in *Shell and Tepco*[77], it was outlined by the Tribunal that there was no clarity on what was meant by the words 'substantial' as the word preceding the use of the words 'pubic interest' in the merger provision. It appears from the conclusion of these cases that this is a matter that turns on its own facts and must be assessed on a case by case basis.[78]

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[72] *Harmony Gold Mining Company Limited and Goldfields Limited* (93/LM/Nov04) [2005] ZACT (18 May 2005) para 54.
[73] Hodge *et al* op cit note 4 at 7.
[74] *Harmony* supra note 15 para 76.
[75] *Anglo American and Kumba Resources* (46/LM/Jun02) para 138.
[76] *Distillers Corporation and Stellenbosch Farmers Winery* (08/LM/Oct/Feb02) [2003] ZACT 36 (18 June 2003) .
[77] *Shell* and *Tepco* (66/LM/Oct 01) [2002] ZACT 13 (22 February 2002) para 38.
[78] Hodge J *et al* op cit note 4 at 8.

In *Shell and Tepco*[79] the tribunal held that:

> *'Considerable caution should be exercised when the competition authorities use public interest as a basis for their intervention, particularly when competition is unimpaired and when the only historically disadvantaged investors whose interests are directly affected expressly reject the Commission's interventions. 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 Charter itself immediately spring to mind. 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.'*

As such, the role of competition authorities is to adjudicate on the impact on public interest as it stemmed from the merger, and not go further in wanting to impose invasive conditions on the commercials of the merger, which fell into the realm of other legislative instruments and authorities.

In *Distillers Corporation and Stellenbosch Farmers Winery*[80] the Tribunal held that:

> *'Where there are other appropriate legislative instruments to redress the public interest, we must be cognisant of them in determining what is left for us to do before we can consider whether the residual public interest, that is that part of the public interest not susceptible to or better able to be dealt with under another law, is substantial.'*

This is to say that the Competition Tribunal would not consider a matter where a mechanism better placed to deal with it already exists elsewhere. With reference to employment issues for example, legislation which already deals with those aspects would need to be exhausted first, and the tribunal would concern itself with matters arising as a result of the merger which cannot adequately be dealt with by such employment legislation for example.[81] It would appear the tribunal recognised the need to exercise a degree of deference and not define the ambit of its powers too widely on this question and to maintain the principle of merger specificity, such

[79] *Shell* supra note 20 para 58.
[80] *Distillers* Supra note 19 para 237.
[81] Hodge J *et al* op cit note 4 at 8.

that the assessment on public interest is used to address only matters stemming from the merger and wider policy concerns.[82]

In terms of deference, as set out in *Metropolitan Holdings/Momentum Group*[83] the Tribunal pointed out that this did not mean taking on a "hands off" approach, but meant that the discretion provided by the Act in dealing with public interest should be exercised only when appropriate to do so, and within the intended ambit of the competition lens.

III Wal-Mart and Massmart Merger

The Wal-Mart and Massmart merger remains one of the watershed cases in displaying both the treatment of public interest considerations in mergers as well the conflict and challenges that face the competition authorities in this regard.

(a) Before the Tribunal

In March of 2011, in the matter of *Wal-Mart Stores Inc and Massmart Holdings Ltd*[84], the Competition Tribunal conditionally approved a merger between Wal-Mart (the primary acquirer) and Massmart (the target firm). Wal-Mart was an international firm and the largest retailer in the world, while Massmart was a South African wholesaler and retailer with a significant footprint and which was listed in the stock exchange. The nature of Massmart's business was such its primary target market were low income earning consumers in South Africa.[85]

There where intervening parties to the matter, namely unions (SACCAWU, NUMSA and FAWU) as well as ministers for Trade and Industry, Agriculture Forestry and Fisheries as well as Economic Development.[86]

Upon doing its competition analysis in terms of Section 12A (1) of the Act, the Tribunal made a finding that the merger was not anti-competitive. The two firms were not competitors as Wal-

[82] *Walmart Stores Inc and Massmart* (73/LM/Dec10) [2011] ZACT 28 (31 May 2011).
[83] *Metropolitan Holdings Limited and Momentum Group Limited* (41/LMJul10) [2010] ZACT 87 (9 December 2010).
[84] *Walmart* supra note 25.
[85] Ibid at para 7-11.
[86] Willem Boschoff; Daryl Dingley and Janine Dingley, 'The Economics of Public Interest Provisions in South African Competition Policy' at 4 available at http://www.compcom.co.za/wp-content/uploads/2014/09/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf, accessed on 14 November 2015.

Mart at the time had a minimal presence in South Africa.[87] In order to complete the enquiry however, and in keeping with the required application of Section 12A (1) of the Act, the Tribunal considered whether in terms of Section 12A (1) (b), read together with Section12A (3) of the Act, the merger can or cannot be justified on public interest grounds.[88]

The Tribunal concluded that there were indeed some public interest impacts stemming from the merger. This is with specific reference to Section 12A (3) (a)-(c) of the Act on the impact on a particular industrial sector or region; employment; and the ability of small business or firms controlled, or owned by historically disadvantaged persons to become competitive.[89]

On the question of impact on employment, while the unions who had joined in the proceedings, expressed concern that there would be significant job losses following the merger, the Tribunal found that the expansionist ambitions of Massmart were such that is was more likely that in due course jobs would in fact be created. The Tribunal none the less accepted an undertaking by the merging parties that there would be no merger specific retrenchments for a period of two years after the merger.[90]

The unions further raised concern that 574 workers had been retrenched prior to the merger and alleged that these retrenchments were related to the merger. In this regard the unions proposed a condition that either these workers were reinstated or re-employed, or failing which the said employees should get first preference for re-employment when the opportunities arise. The Tribunal found that merger specificity on this question had not been proven, but an undertaking by the merging parties to prioritise such agreed upon number of retrenched workers for re-employment when opportunity arose, was accepted none the less.[91]

The unions further raised issues with regard to collective bargaining structure between the union and Massmart and required that this should change to enable the unions to have a centralised collective bargaining structure. The Tribunal held that this request would amount to the creation of new rights, as the current structure did not exist prior to the merger and was therefore not merger specific nor falling within the public interest realm set out in the Act.[92]

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[87] *Walmart* supra note 25 para 26.
[88] *Walmart* supra note 25 para 27.
[89] *Minister* supra note 10 para 12.
[90] *Walmart* supra note 25 para 39.
[91] *Minister* Supra note 10 at para 17.
[92] Ibid para 136.

The final public interest issue raised both by the unions as well as the ministers, concerned the issue of procurement, thereby raising a question of the impact of global value chains on domestic producers and retailers. What was alleged in this regard was that in so far as Wal-Mart was an international company which procured its goods internationally, the possible impact was that there would be a shift in purchasing from South African manufacturers in favour of foreign Asian manufacturers who could provide goods at far cheaper prices. This would have an impact on the ability of small and medium sized producer's ability to compete and would therefore have the potential to result in job losses. The Competition Tribunal found that the concern while valid, needed to be weighed against the established gains from the merger, which were that there would be creation of employment and secondly there would be driving down of price and therefore that the persons set to benefit, were in fact the low income earning consumer. In this regard the finding was that the issue of low prices was therefore 'no less compelling'.[93]

There were certain procurement conditions sought to be enforced by the unions to try and address the matter. The Tribunal found it could not enforce these to the extent that the evidence before them did not enable them to quantify what values or quantities were sought to be maintained in terms of local procurement. There was potential for such procurement conditions to unduly burden Massmart to the extent that such restraints would not apply to its competitors. Further to that there appeared to be strong considerations that imposition of such procurement presented a danger that South Africa would then be in breach of some conditions of its international trade agreements.[94]

Proposed conditions in the end were therefore found to be complex and imprecise. In their stead the Tribunal accepted the proposal by the merging parties to rather set up a fund to value of R 100 million, over a period of 3 years to be used towards the development of local South African suppliers including Small and Medium sized Enterprises ("SMMEs").[95]

(b) The appeal: Minister of Economic Development et al and Wal-Mart et al

The matter was then heard on appeal and a judgment handed down on 9 March 2012. The ministers had brought the matter for review, citing, and certain irregularities in the way

[93] Ibid at para 17.
[94] *Walmart* supra note 25 para 73.
[95] *Minister* supra note 10 para 17.

evidence was disallowed and certain aspects concerning cataloguing. The review proceedings were dismissed.

The matter then turned on the appeal by the unions. They alleged that Tribunal had failed to take proper regard of the unique and nuanced spirit of Act in so far as it deals with public interest. The Tribunal appeared to have leaned too heavily on the traditional competition considerations of consumer wellbeing and producer surplus, and did not pay enough attention to the broader imperatives of the act which are linked to broader economic policy, and which are to do with redress of the economic exclusionary practices of the past.

Council for the merging parties however contended that going beyond the established standard of consumer wellbeing would present great difficulties in the implementation of the Act, as the standard of 'social welfare' would prove difficult to achieve beyond the ambit of consumer and producer surplus. That is to say, the tools for a calculation of the broader societal welfare flowing from a transaction were difficult to calculate and such technical resources were not easily at the disposal of a competition authority for example.[96] It remained uncertain therefore what weight should be given to public interest in relation to consumer welfare and producer surplus.

The court however held the view and in agreement with the unions that the Act did enjoin that a balancing exercise be established between the traditional competition law measures of welfare and public interest. The issue of such proportionality thus would rely heavily on evidence that is placed before the court and the extent to which such evidence allows for there to be a weighing up of issues. The court further held that the requirement by the Act that the public interest considerations be substantial, meant that those factors in particular on the back of a merger that is not otherwise anti-competitive, would have to be considerable, and cause a real threat to the public interest considerations listed in the Act in order to justify the setting aside of such merger.[97]

The court held that it was clear from the record and evidence before it that the low income consumer would benefit from the merger. There was also undisputed evidence to suggest SMMEs could potentially benefit from the merger by accessing Wal-Mart global value chains. While the court could accept that a balancing act needed to be exercised between the gains

[96] *Minister* supra note 10 para 99.
[97] Ibid para 113.

from the merger and the potential losses for SMMEs, it did not appear on the evidence before the court that a different conclusion could be reached that would skew the view of the Tribunal that merger shouldn't have been approved, rather any prospective loss in this regard could be mitigated against.[98]

On the question of the union's requirement that the structure in so far as they relate to collective bargaining within Massmart should be changed, the court confirmed that this was in fact an interest and not a right. Competition law was not the appropriate instrument to address these considerations.[99] It became clear therefore that the court was applying its residual principles established in *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd*[100], that it would avoid examining a public interest matter for which there was provision elsewhere in law and in respect of the appropriate body to address the matter. The Tribunal would only concern itself with dealing with excess matters not already dealt with in other law, and only matters stemming directly as a consequence of the merger, so as to avoid determining matters falling outside of their scope and for which they would not be required to provide expertise on.

On the question of the retrenched workers it was held that the fact that the said retrenchments happened prior to the merger was not sufficient to argue that they were not merger specific. It was sufficient to found some sort of correlation between retrenchments and an intention to enter into such a transaction as this merger. On the evidence before it the court therefore found that the said retrenchments were related to the merger and therefore ordered the reinstatement of such workers.[101]

Of most significance in the finding of the court, was the question of the impact of the merger on procurement and therefore the ability of SMMEs to compete in terms acting as suppliers to merged entity. The court held that a finding on that hinged on an understanding of global value chains. Global value chains include the overview of all the activities or inputs that are required in order to bring a product from the point of its creation, including all inputs in between, until the point it is delivered to the final consumer and is eventually disposed of. The evidence before the Tribunal was therefore not enough for it to have simply accepted the proposal of the merging parties without properly interrogating the impact.[102] In this regard the court ordered

[98] Ibid para 118.
[99] Ibid.
[100] *Shell* supra note 20 para 58.
[101] *Minister* supra note 10 para 145.
[102] Ibid para 155

further investigation and ordered the commission of a study on the impact of such global value chains and recommendations around means and ways to assist and to ensure that SMMEs in South Africa continue to compete in the supply chain to the merged entity and for the development of a mechanism designed to empower SMMEs against any negative impact.[103]

(c) Judgment on the commissioned study and investment fund[104]

Pursuant to the appeal the merging parties were required to commission a study and propose a tangible structure in respect of which SMEEs would be empowered to deal with the impact of global value chains brought about by the merger and tangible steps to empower SMMEs against any negative impact brought about as a consequence of the merger between parties could be mitigated against.

In its judgement relating to the findings of such study on 9 October 2012, the court expands on the interpretation of Section 12A (3) of the Act in so far as it relates to public interest in mergers that are not anti-competitive.

The court found that the competitive gains need to be balanced against prospective public interest issues. As the key public interest issue concerning this hearing was to do with impact by global value chains resulting from the merger and their impact on SMMEs and loss in terms of competition and employment etc., the court noted it was important to distinguish between industrial policy and the public interest as set out in the Act. Industrial policy was broad and designed to deal with all aspects concerning the impact of globalisation on the South African economy for example.[105]On the back of a merger which presented a benefit in respect of the public good through consumer welfare, the role of the public interest provision was to ensure that the wins exceed the loss, and therefore that the harm is less than the gain. The balancing effect therefore lay in militating against harm or risk (in this case being prospective loss of jobs through loss of income by such suppliers).[106]

The court re-iterated once again that the role of Section 12A (3) of the Act was not to substitute industrial policy which is linked to macro-economic considerations. The role of Section 12A

[103] Ibid para 172.
[104] Ibid.
[105] Ibid.
[106] Ibid.

(3) of the Act was limited to minimising risk which flows directly from the transaction and not to substitute industrial policy.[107]

(d) Learnings from Wal-Mart and Massmart

The *Wal-Mart and Massmart*[108] case offers a great mirror, reflecting on the issues that arise in the debate concerning how public interest is dealt with by competition law authorities, and what the points of contentions are. This is evident in the manner in which the government through its Ministries participated and engaged in the matter. The ministry was seen as attempting to engage the merging parties directly over matters it perceived to arise from the merger, in that it appeared that by the time the merger was approved, the Ministries were busy attempting to engage the merging parties and to influence the conditions to the merger. In other words its initial response was not to follow the usual processes of making representations to the competition body, thereby allowing that body to adjudicate what as in fact a competition specific issue before it.[109]

There appeared to be tension between the two bodies, and a level of distrust in that the government arm would have preferred to hold greater power and influence over the public interest question in the matter. As such it may be that if the system worked differently and the power to decide to allow or disallow the merger on public interest grounds lay with the government then the merger, while raising no particular anti-competitive considerations may have been set aside none the less, or the parties may have been subject to more draconian conditions which may from a business perspective have made it a less desirable to pursue a merger of this nature.[110]

Notably the case also illustrated the tension between public policy and the question of public interest with reference to the Act. It would appear that the Ministries intervention was rooted in a need to pursue broader economic policy considerations in that their approach is criticised for having sought to enforce 'industrial policy 'and not so much public policy which is interlinked to competition, as intended in the Act.[111] Further the approach seemed to focus on

[107] Ibid.
[108] Walmart supra note 25.
[109] Willem Boschoff; Daryl Dingley & Janine Dingley, 'The Economics of Public Interest Provisions in South African Competition Policy' at 11 available at http://www.compcom.co.za/wp-content/uploads/2014/09/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf, accessed on 14 November 2015.
[110] Ibid.
[111] Ibid at 12.

either disallowing the merger or imposing conditions absent a proper consideration of the competition questions. The fact that the South African Act clearly marries pure competition considerations and public interest considerations enabled the competition authorities to take a balanced view, which does not confuse broader industrial policy with public interest as intended by the Act. The Act was designed to deal with those considerations set out in the Act in so far as the flow as actual and real consequences of a merger transaction.[112]The intention it would seem was not to parachute the whole economic policy onto a competition transaction.

Much of the considerations of the Ministries were trumped due to a lack of sufficient evidencing and an over-reliance on the broader economic policy considerations and little regard for competition ones. The conduct of the Ministry in the matter is viewed as indicative of the prospective danger that could arise if after competition law is established, the power to determine public interest in relation to such competition considerations is left in the hands of the executive.[113] The unintended consequences may be that emphasis is skewed more towards trumping competition on the basis of overarching public interest considerations which may not be tested as against competition gains.[114]

The contradiction created is that pro-competitive gains which may be good are potentially ignored.[115]In this case the potential skewing of matters was balanced by the insistence of the competition authority that there be clear evidence before it of the threat of harm to SMMEs and prospective job losses, and further that where the harm was there, but was significantly less than the benefits of the merger, that the conditions be applied in a manner that mitigates such harm but not in a manner that trumps the whole transaction.

(e) Weight of public interest in the Act[116]

It came through in *Wal-Mart/Massmart* [117]that while the Act, sets an ambitious task for itself in requiring consideration of public interest; such task must be fulfilled by the competition body. It is therefore out of kilter with the act to place extensive value only on the traditional competition considerations such as consumer and supply surplus (notwithstanding that these tend to be easier to measure). It is necessary to enter into an exercise of considering the broader

[112] Ibid.
[113] Ibid at 11.
[114]David Lewis op cit note 9 at 138.
[115] Hodge J *et al* op cit note 4 at 12.
[116] 89 of 1998.
[117] *Minister* supra note 10 para 98.

social good. As a result the consideration of public interest must be a balancing act and not one where consumer supplier wellbeing seeks to trump public interest of vice versa. That balancing act derives its roots from a requirement that the consumer wellbeing should not happen at the cost of the greater social good.[118]

That having been said, it is necessary for the identified public interest to be substantial. That is, to hold weight in respect of the detriment that could arise if the public interest is not considered. This however cannot be achieved without the proper fulfilment of the evidentiary burden. That is to say a competition body cannot make a finding on this without facts and figures that are ascertainable.[119]

Not only this, but even where the public interest component is not considered to weigh against allowing a merger, the existence of public interest considerations should not be ignored, and the competition body should do what it can to ensure (whether by way of imposing conditions) that the existing considerations are in fact addressed.

In the appeal court judgment dealing with the order to establish an investment fund to empower SMMEs, the appeal court emphasised however that the role of public interest in the Act should not be construed broadly as a substitute for industrial policy which must deal with broader economic issues of the country. The role of public interest was contained to the ambit of the Act specifically to deal with public interest as it flows directly from competition considerations. Caution therefore needed to be exercised not to attempt to fix all industrial policy issues that arise as that is neither the intention nor design of public interest in the Act.

(f) Balancing of competition and public interest and technical analysis

What became evident in cases such as *Wal-Mart/Massmart*[120] is that economic efficiency is ascertainable in the evidence that is led. It is difficult terrain to establish what must be measured in order to compare public interest and economic efficiencies (which may be evidenced to result in lower prices and job creation in the long run).[121]

[118] Ibid para100.
[119] Ibid.
[120] Ibid.
[121] Hodge J *et al* op cit note 4 at12.

It would seem that whereas economic efficiency may be measured, public interest is a question of value judgment in respect of which it is feared, may result in a level of arbitrariness if not well managed and applied with restraint.[122]

There are suggestions therefore, that the value of public interest considerations to a merger situation should also be based on basic economic principles and modelling.[123] This appears to be easy enough to achieve with ascertaining loss or creation of jobs, as through experts in *Wal-Mart and Mass-Mart*[124] and cases such as *Metropolitan Holdings Limited and Momentum Group Limited CL*[125], the Tribunal was able to establish the measure of job loss in relation to the efficiencies sought to be benefited. Precedent was set where it became necessary to show that the job losses sought to be justified as against efficiencies are in the public interest, so that the job loss was less of harm than the gain sought to be obtained by the public via the loss. There had to be a rational connection therefore between the loss of jobs and the efficiency gain for the benefit of the public.

In *Wal-Mart and Massmart*[126] the court ordered that there needed to be an in depth study and analysis done of global value chains and their impact before conclusions could be drawn on prospective loss of income and jobs in local producers, further that the said loss needed to be balanced against the gains to the consumer.

The reality however is that the economic efficiencies (being allocation of resources on the supply side and price on the consumer side) are proved and arrived at through economic models and quantification. This raises the question of how public interest is measured so that a balancing act is not an arbitrary comparison of different matrix, being efficiency and equity (a broader moral question).[127]

It is suggested in this regard that economic modelling could provide a framework from which public interest could be quantified or modelled. This is so because in the first place the departure point at arriving at the conclusions around efficiency is the ring-fencing of the specific market that is impacted by a particular competition transaction.[128] This is the use of

[122] Boschoff .W *et al* op cit note 29 at 16.
[123] Hodge. J *et al* op cit note 4 at 12.
[124] *Walmart* supra note 25.
[125] *Metropolitan* supra note 26.
[126] *Walmart* supra note 25.
[127] Boschoff. W *et al* op cit note 29 at 25.
[128] Fox, Eleanor & Michael.S. Gal, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' (2014) at 24 available at http://ssrn.com/abstract=2425329.28, accessed on 15 June 2015.

the partial equilibrium.[129] This is for example contrary to the fact that some public interest provisions or considerations are not market specific and have a wider ambit (such as sector or region). Having regard to this, an analysis of impact on public interest may need to be analysed from what in economic terms is known as a general equilibrium perspective which means looking at the ripple effect of the consequences stemming from a single sector into the broader economy. From an economic perspective, where the equilibrium is modelled on a single sector, it can then present incongruence when compared to and balanced against a public policy concern which is set based on a more general equilibrium which considers a wider ambit in the market.[130] Furthermore if the public interest considerations are not as technical and thoroughly investigated then once could not properly establish the extent of the impact on the social good, which problem gives rise to a gap where the competition authority is left to its own devices to make a value judgment.[131]

The implications of seeking to introduce economic modelling on the public interest question, is that competition authorities must be stretched further, and subjected to the analysis of complex and technical modelling, which implies greater time spent on the technical consideration of a merger. [132]This can be even more unsustainable in developing country contexts where skill and resources are said to be lacking. It can also be unsustainable for the parties seeking to merge as it increases the burden on their part in making a case for impact on public interest, this can hamper appetites to engage in mergers and raise costs.[133]

Further to this the requirement of further technical representations means the development of the rules for the submission of such evidence and discovery processes, which as we saw in *Wal-Mart/ Massmart*[134] can open one up to further challenge on the basis of review of processes, which implies further delays.

There is also suggestion that there may be constraints to defining public interest provision in a rigid manner in competition law instrument. This is to say that where public interest provision are well defined as is the case in the South African Competition Act[135], the consequences is that they are cast in stone, and may not cater for the changing demands of an economy. That is

[129] Boschoff. W *et al* op cit note 29 at 25.
[130] Hodge. J *et al* op cit 4.
[131] Boschoff. W *et al* op cit note 25 at 25.
[132] Ibid at 29.
[133] Fox & Gal. M op cit note 70 at 24.
[134] *Walmart* supra note 25.
[135] 89 of 1998.

to say the pressure to apply public interest to the detriment of competition derives its roots from what is important in the economic conditions of a country at a particular moment, which means that application of public interest in order to maintain its legitimacy as a public policy tool in competition law, must be capable of meeting such changes. The suggestion therefore is that dealing with public interest in a competition law instrument may hamper the required flexibility in this regard.[136]

Having regard to the above, once sees that an attempt to properly and technically engage the balancing of public interest and competition considerations proves that much more challenging than simply employing an either or approach, where whenever public interest is identified a decision is simplified to a question of whether the public interest is substantial so that it overrides the competition transaction, or simply ending the enquiry at the level of having established that the transaction is not anti-competitive and therefore that no public interest enquiry is necessary.[137] In dealing with the balance question in *Walmart*, regard was also had to *Harmony*[138], where the Tribunal had held that the public interest considerations are considered in relation to the competition considerations:

> *'This prioritisation of the competition inquiry explains the use of the word justification in the public interest test. The public interest inquiry may lead to a conclusion that is the opposite of the competition one, but it is a conclusion that is justified not in and of itself, but with regard to the conclusion on the competition section. It is not a blinkered approach, which makes the public interest inquiry separate and distinctive from the outcome of the prior inquiry. Yes, it is possible that a merger that will not be anti-competitive can be turned down on public interest grounds, but that does not mean that in coming to the conclusion on the latter, one will have no regard to the conclusion on the first. Hence section 12 A makes use of the term "justified" in conjunction with the public interest inquiry. It is not used in the sense that the merger must be justified independently on public interest grounds. Rather it means that the public interest conclusion is justified in relation to prior competition conclusion.'*[139]

[136] Hodge. J *et al* op cit note 4 at 13.
[137] Ibid at 12.
[138] *Harmony* supra 15.
[139] Ibid para 76.

The evidence led in *Walmart*[140] by the expert for the Ministers pertaining to the extent of impact on public interest as it pertained to job losses as a result of the changes in procurement from domestic to international as a result of the merger, further displays the inherent complications in striking such balance, as even though an attempt was made to provide quantitative evidence on prospective job losses, such evidence was dismissed to the extent that it was said to be marred in assumptions that couldn't necessarily be proven.

According to Smith and Swan[141] the balancing effect is necessary as it may be self-defeating not to consider the net effect of a merger by only focussing on the positive or negative, and not evaluating these issues in relation to each other, such even in a situation where a merger could result in job losses in short term, but positive gains in the future, the merger is assessed on that basis, although recognising that in developing contexts in particular positive net effects could still result in vulnerable groups of people being negatively impacted which is contrary to public policy. In addressing the issue of evidence required in relation to public interest it is also very difficult to achieve as at times there is not a clear way of achieving the balance between competition and public interest factors. Often the positive impact on public interest, in cases relating to employment may be more long term and not yet considered or measured by the merging parties, whereas the negative short term impact is more clearly evidenced. This then can lead to remedies provided on the basis what is considered to be the clear evidence as opposed to undefined future positive impacts.

IV Guidelines on the Assessment of Public Interest Provisions in Mergers

The Commission has in recent years issued the Guidelines on the Assessment of Public Interest Provisions in Merger Regulation ("the Guidelines").[142] The purpose of the Guidelines is to provide a general methodology to be followed by the Commission[143], as well as provide guidance on the type of information which may be required by the Commission in assessing public interest considerations in mergers. This however, would not diminish the discretion of the Commission to consider each matter on its own merits on a case by case basis.[144] The Guidelines aim to respond to a number of issues, including that parties to a merger, at times

[140] *Walmart* supra note 25.
[141] Smith, Patrick & Andrew Swan 'Public Interest Factors in African Competiton Policy' (2014) *The African and Middle Eastern Antitrust Review* at 3.
[142] *Guidelines on the Assessment of Public Interest Provisions in Merger Regulation* (published in GN 309 GG 40039 of 2 June 2016).
[143] Ibid at 4.
[144] Ibid at 28.

would fail to provide sufficient information to enable the commission to make informed decisions.[145]

To the extent that the Guidelines are prepared in terms of section 79 of the Act, they are not binding on the discretion and interpretation of the Act by the Competition Commission, the Competition Tribunal or the Competition Appeal Court.[146] It is noted in the Guidelines that "the Commission may approve the merger without conditions, with public interest conditions, or prohibit a merger on public interest grounds".[147]

Having regard to the public interest considerations as set out in section 12A (3) of the Act[148], section 6 of the Guidelines provides for a general approach to assessing public interest provisions. In terms of this provision the steps to be followed in respect of each of the public interest provisions include having regard to the following:

- determining the likely effect of the merger on the listed public interest grounds;
- determining whether such effect is merger specific, in that there is in fact a causal link between the effect and the merger;
- determining whether the effect is substantial;
- where the merger has been found to be anti-competitive or not in terms of the initial enquiry in terms of section 12A(1), determine whether the public interest impact can justify an anti-competitive merger or determine whether negative public interest impact can be justified, and may result in the approval of a merger with or without conditions; and
- considering possible remedies to address any substantial negative public interest effect.

Where an effect is not merger specific, the enquiry into such effects will cease, and by the same token where an effect is found to be merger specific, but is not substantial, such enquiry into the impact will also cease.

In the case of an initial negative competition impact finding, the commission will consider what the negative competition impacts are, and if there are public interest impacts, the commission will consider if there are positive public interest impacts, and whether the claimed positive public interest impact is both merger specific and substantial enough as to justify an anti-

[145] Ibid at 3.
[146] Ibid at 5.
[147] Ibid at 4,
[148] 89 of 1998.

competitive merger. The parties in this instance, would be provided with an opportunity to substantiate for any substantial positive effects on public interest.

In the case of an initial positive competition impact, the commission will consider whether there is any impact on public interest considerations. If the public interest impacts are found to be positive, the enquiry will cease, and such a merger is likely to be approved.

In the event of a positive competition finding, but where the public interest impact is negative, the commission likewise will consider if the impact of the negative competition considerations is both merger specific and substantial. Where such negative public interest impact is merger specific and substantial, the parties involved will be provided with an opportunity to make representations and bring forth information in justification of the negative public interest impact, and in this regard make a case for the approval of the merger notwithstanding the seemingly negative public interest impact. If such arguments succeed the commission may approve the merger. In the event that the arguments in justification of a negative impact on public interest do not succeed, the commission may impose remedies, thereby approving the merger, or may refuse the merger all together depending on how substantial the public interest effects are.

Having regard to the above the approach does seem to make a concerted effort to constrain itself only to public interest matters with merger specificity and which have a substantial impact. This is relevant having regard to some of the concerns and criticism around the application of the public interest enquiry with regard to its potential to render the enquiry arbitrary.

In para 7-10 of the Guidelines, the Guidelines go on to elaborate on the application of the above steps as applied to each of the public interest impacts set out in section 12A(3) in terms of the steps followed as well as the specific information that will be required of the parties, with reference to:

> *'a) a particular industrial sector or region;*
>
> *b) employment*
>
> *c) 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.'

In setting out both the arguments to be considered, the information required as well as possible conditions which may be imposed in respect of each public interest impact, the rules go a long way bringing out certainty and logic to conditions that have been imposed on merging parties in the past, and the shape that future conditions may take.

The Guidelines however have not been without criticism. One of the criticism was the fact that while the Guidelines do provide a useful commentary on how the competition authorities go about addressing the various competition impacts and the information required, they have still failed to deal with the issue of how the balance is actually struck between competition and public interest concerns.[149]

V The Future of Public Interest Considerations in Mergers

In a post *Walmart*[150] world, the general perception is that the focus on public interest considerations in mergers is generally on the rise[151], and is a regular feature in mergers. While the commission has generally not refused a competitive merger based public interest considerations, there remain concerns that the effect of such conditions are at times quite onerous and costly.

An example are the conditions in respect set in the matters of *Coca-Cola Beverages Africa v Various Coca-Cola and related bottling operations*[152] *("Coca-Cola Bev")* and *the AB bev v SAB Miller*[153] *("AB Bev").* In the *Coca-Cola Bev*[154] matter the conditions relating to public interest considerations included some of the following conditions:[155] The Primary Acquiring Firm, Coca-Cola, remaining incorporated in South Africa with head its office also in South Africa for purposes of ensuring continued investment into the South African Economy;

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[149] David Reader 'Competition Commission of South Africa: Guidelines for the Assessment of Public interest Provisions in Mergers' (2016) University of East Anglia (UEA) & Centre for Competition Policy(CCP) available at http://competitionpolicy.ac.uk/documents/8158338/11690925/CCP+Consultation+Response+re+SA+Public+Interest_Jan2016.pdf/6651bd3e-6720-414d-b34a-0d1e86a30b3f, accessed on 28 March 2017.

[150] *Walmart* supra note 25.

[151] Marianne Wagener 'Increased Focus on Public Interest considerations in South Africa' available at www.nortonrosefullbright.com/knowedgge/publications/146232/inreased-focus-on-public-interest-considerations-in-south-africa-merger-control, accessed on March 2017.

[152] *Coca-Cola Beverages Africa v Various Coca-Cola and related bottling operations* (LM243Mar15) [2016] ZACT 68 (10 May 2016).

[153] *AB bev v SAB Miller* (LLM211Jan16) [2016] ZACT 72 (4 August 2016).

[154] *Coca-Cola* supra note 94.

[155] Ibit para 46.

Continued localisation of supply inputs as well as growth in supply of end products to the South African and African markets; Increase in BBBEE ownership from 11 per cent to 20 per cent in terms of a roll out plan over a period of 5 years; and at least a 20 per cent equity stake by a black consortium; Investment of R 400 million towards downstream enterprise development within 5 years of approval of the merger as well as business skills training; Allowing a 10 per cent of competitor beverages in coolers funded by the merging parties; R 400 million towards a fund towards enterprise development; and restraints on allowable retrenchments of employees. The final conditions were as a result of agreement between the merging parties, the minister and the trade unions, which came about as consequence of the minister having expressed discontent with the previously proposed conditions with the commission. In the end the conditions were altered by agreement between these parties and approved by the Competition Commission.[156]

In the *AB bev*[157] matter, a transaction involving the largest beer company in the world acquiring its main global South African competitor, the Tribunal confirmed conditions around public interest impact: AB Inbev was required to invest 1 billion rand over 5 years towards various programme aimed at agricultural, enterprise and societal development. The establishment of 40 Scholarships for engineering and agronomy students. In respect of contribution to local markets, AB Inbev was to maximise local production in beers and ciders, support participation of small craft beer producers, provide access to fridges and coolers, implement plans around BEE and to submit empowerment plans to the commission within 2 years subsequent to the merger. With specific reference to employment, some of the conditions included that there should be no retrenchments directly linked to the merger for a period of 5 years from the merger. The public interest impact related conditions were in addition to conditions relating to the pure economic considerations. The finding was therefore quite prescriptive on the type programmes to be implemented, funding amounts, and are perceived to have taken on a protectionist approach.[158]

What is notable in the *SAB Miller*[159] case is the approach of the parties who proactively engaged the governments in the jurisdictions impacted by the merger, including South Africa, prior to the Commission's assessment, such that the agreed upon conditions became terms in their

[156] *Coca-Cola* supra note 94 Para 47.
[157] *AB bev* supra note 95.
[158] Wagener op cit note 95.
[159] *AB bev* supra note 95 para 29.

agreements, and as such the conditions to the merger which the tribunal would ultimately approve, with intervention only if certain terms where inappropriate or disproportionate.[160] Some of the intervention for example related to employment conditions on retrenchments lasting in perpetuity, whereas the Tribunal had regard to the issue of merger specificity, which is a concept linked to time, such that retrenchments that are direct consequence of a merger would occur close to the time of a merger as opposed to other operational retrenchments, but with the amenability of the merging parties this was decreased to a period of five years to avoid setting of inappropriate precedents and arbitrage by the Tribunal. The Tribunal therefore only intervened in instances where they deemed conditions to be inappropriate or disproportionate.[161]Similarly in the *Coca-Cola Bev*[162], the parties including the Government reached consensus on the conditions to the merger and in relation to public interest considerations. Ultimately however, the Competition Commission that ultimately put the stamp of approval on the agreed upon conditions, in line with its mandate.

The perception of the Commission however, is that the enquiry into public interest considerations in mergers has not necessarily had a negative impact on competition and has the potential to assist companies to become more competitive in having benefited from some of the public interest conditions placed upon them. Further that no mergers had to date been blocked as a result of public interest impacts.[163] Essentially therefore it is to date not necessarily true that the public interest considerations are eclipsing the pure competition efficiency questions. If anything, and through the process of allowing parties to propose conditions around public interest, the Commission seeks to balance the interests of merging parties and consumer welfare.

Having regard to the approach in the *SAB Miller*[164] and *Coca-Cola*[165] case, where the Minister would appear to have taken the lead in intervening in the merger and public interest considerations even ahead of the Competition Authorities whether or not in future the approach is to enhance the role of the Minister in respect of public interest concerns.

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[160] Ibid para 29 -30.
[161] Ibid para 30.
[162] *Coca-Cola* supra note 94.
[163] Natasha Odendaal 'Competition authorities should balance public interest, competition considerations in merger decisions' available at http:/www.engineeringnews.co.za/article/competition/competition-authorities-should-balance-public interest-competition-considerations-inmerger-decisions-2015-02-06, accessed on 28 March 2017.
[164] *AB bev* supra note 95.
[165] *Coca-Cola* supra note 94.

VI Competition Amendment Act, 2018

The Competition Amendment Act, 2018 ("the Amendment Act") came into effect on 12 July 2019, although some provisions will only becoming effective at a later stage. It is said to represent the first major review of the Act, since coming into law.[166] The Amendments further entrenches the commitment of the government of the day to transform the South African economy, create redress by ensuring inclusion and access in the South African economy by small micro enterprises and historically disadvantaged persons.

In terms of its pre-amble, the purpose of the amendment act, amongst others is:

> *'to introduce greater flexibility in the granting of exemptions which promote transformation and growth; to strengthen the role of market inquiries and merger processes in the promotion of competition and economic transformation through addressing the structures and de-concentration of markets; to protect and stimulate the growth of small and medium businesses and firms owned and controlled by historically disadvantaged persons while at the same time protecting and promoting employment, employment security and worker ownership; to facilitate the effective participation of the National Executive within proceedings contemplated in the Act, including making provision for the National Executive intervention in respect of mergers that affect the national security interests of the Republic;'*

Section 12A (1) above has subsequently been amended by the Competition Amendment Act, 2018 to read as follows:

> *"Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and if it appears that the merger is likely to substantially prevent or lessen competition, then determine—*
>
> *(a) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result*

[166] Network Reporter 'Competition Amendment Act Changes Begin' *The Mercury* 22 July 2019 available at https://www.iol.co.za/mercury/network/competition-amendment-act-changes-begin-29378849, accessed on 15 June 2020.

from the merger, and would not likely be obtained if the merger is prevented; and

(b) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

(1A) Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).'

Section 12A (2) has been extended to include the following additional enquiry:

'(h) whether the merger will result in the removal of an effective competitor;

(i) the extent of ownership by a party to the merger in another firm or other firms in related markets;

(j) the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors; and

(k) any other mergers engaged in by a party to a merger for such period as may be stipulated by the Competition Commission.'

Section A12 (3), the specific public interest provision has been amended to include assessment of the following impact in addition:

'(c) the ability of ***small and medium businesses****, or firms controlled or owned by historically disadvantaged persons,* ***to effectively enter into, participate in or expand within the market;***

(d) the ability of national industries to compete in international markets; and

(e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.'

Overall the changes relating to mergers are intended to clarify that the competition authority must at all times consider the impact of public interest on all mergers notified, and further that there is an even greater emphasis made on the need to assess the impact of mergers on market concentration, transformation, and the ability of both small and medium enterprises, in

particular those owned by historically disadvantaged persons to enter and participate meaningfully in the economy.[167]

While not yet effective in law as at the date of writing, the new section 18A introduces national security as a public interest consideration in relation to a merger involving an acquiring foreign firm. The Amendment Act requires such a merger to be notified both to the new committee to be established by the President and to the Competition Commission. The final decision on whether such merger has an impact on public interest in such instance lies with this committee. This would appear to be a carved out separate process around public interest where the Minister has full control of the decision to approve a merger, contrary to the usual position taken which was to place all decisions around mergers within the jurisdiction of the competition agencies. According to the minister, the provision has been incorporated after comparative analysis of its use by various jurisdictions, as well as having regard to the obligations of the National Executive as conferred by section 198 of the Constitution of the Republic of South Africa to protect national security.[168]

The Competition Commission participates in such designated foreign acquisitions, if requested to give input on the matter, otherwise the commission may only consider the merger after it has undergone assessment for impact on public security by the committee, and only if such a merger has not been prohibited. Only thereafter can the Competition Commission can proceed to consider the impact on competition and public interest.[169] For the first time therefore in the merger analysis regime, one sees a dual authority in the assessment of public interest in respect of mergers. The overall impact that this will have on the process remains to be seen however.

The amendments overall appear to enhance the role of the minister in respect of public interest, both through the inclusion of the national interest requirement, but also incorporating the right of the Minister to appeal a decision on a merger in terms of section 17(1)(c) of Act, as amended, where the minister had participated in the proceedings at the Competition Commission or the Competition Tribunal.[170]

VII Conclusion

[167] Minister of Economic Development 'Overview of Competition Amendment Bill, 2018, A New Deal For Economic Transformation And Inclusion' Presentation to Select Committee 9 October 2018 at 50.
[168] Ibid at 51.
[169] Ibid.
[170] Cranville, Lara 'Competition Amendment Bill Signed into Law' 13 February 2019 available at https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Competition/Competition-alert-13-february-competition-amendment-bill-signed-into-law.htm, accessed on 12 December 2019. .

The emphasis on public interest assessment in mergers is therefore increasing and the amendments would appear to represent a continued commitment in the policy position to a public interest impact assessment within a merger enquiry, and therefore the Competition Commission as a body capable of performing this balancing act in the pursuit and attainment of the ideals of competition policy such as ensuring transformation of the South African Economy, creating access, inclusion and protection of small and medium business in merger assessment".

On the other hand, there appears to be a move towards greater intervention by the Minister in respect of the public interest considerations, which has been seen since the Walmart case, and through the abovementioned cases such as *Coca-Cola*[171] and *Sab Miller*[172], where the Minister is seen brokering the public interest conditions relating to the merger prior to the Competition Commission having the opportunity to assess the mergers, thereby rendering the Commission as a type rubber stamping body.

The Competition Amendment Act, would therefore appear to legitimate the increased intervention of the minister and thus seemingly move away from a 'single authority institutional model' whose purpose was to ensure 'consistent application and legal certainty'.[173] In any event if not to take away from the question of consistency and legal certainty, the public interest assessment mergers will not become more simplified or less onerous an enquiry, and will possibly involve even more pronounced interventions by the minister. It is therefore going to be important for parties to mergers to consider the measures that they will propose to put in place so as not to have a negative impact on public interest considerations.[174] The guiding principles for the Competition Commission such as merger specificity and the Guidelines to public interest considerations to merger enquires will become even more important if arrangements with the Minister as to appropriate measures to protect the public interest may end up being concluded outside of the competition process in order to ensure that the appropriate balance continues to be struck in respect of the need to enable parties to achieve their commercial aspirations while doing what is necessary not to breach the public interest considerations as they are defined in the Act.

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[171] *Coca-Cola* supra note 94.
[172] *AB bev* supra note 95.
[173] OECD (2016) 1 *Summary of Discussion of the Roundtable on Public Interest Considerations in Merger Control* at 3 available at https://one.oecd.org/document/DAF/COMP/WP3/M (2016)1/ANN4/FINAL/en/pdf accessed on 8 February 2020.
[174] Wagener op cit note 93.

CHAPTER 3: PUBLIC INTEREST IN MERGERS IN THE UK

I Introduction

Mergers in the United Kingdom ("UK") are regulated in terms of The Enterprise Act, 2002 ("the Act"), which came into effect in 2003[175]. Upon coming into law the Act also established the Office of Fair Trade ("OFT") and the Competition Commission ("CC") as the two agencies for competition enforcement. The Act is said to have shifted the control of competition matters from the realm of the political and into the hands of independent agencies.[176] With specific reference to public interest considerations in competition law assessment in the UK, the concept is said to have existed between 1948 and 1998, and was a flexible concept, which included regard the protection of employment and exports, and is said to have been characterised by unfettered political discretion.[177]

Historically matters pertaining to mergers were regulated by the Fair Trade Act, 1973 (FTA), through the Office of Fair Trading (OFT) and the Monopolies and Mergers Commission (MMC) under the Director General of Fair Trading ("DGFT) .[178] In terms of the FTA the OFT could only make non-binding recommendations as to whether matters required to be referred to the MMC for review, advise on remedies and monitor undertakings made by parties. The Secretary of State did not have to give reasons as to the referral or failure to refer a matter to the MMC, although they had the discretion to publish if it had accepted recommendations made by the parties. The Secretary of State was not required to publish reasons relating to why they had either referred a matter or not, or accepted recommendations or not of the MMC, thus resulting in a broad manner in respect of dealing with public interest considerations, further to this there is said to have been little legal involvement, as the courts took a conservative approach to interfering in competition matters, and the undertakings of parties to mitigate any anti-competitive conduct were upheld. At the same time however the input of third parties was not given sufficient attention.[179]

The Act, served to place the powers to determine whether to refer a matter from the OFT to the CC in the hands of the OFT, and the assessment of competition impact and appropriate

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[175] Department of Trade and Industry 'Enterprise Act 2002: Public Interest Intervention In Mergers' (2004) at 5 available at https://www.gov.uk/government/publications/enterprise-act-2002-public-interest-intervention-in-media-mergers, accessed on 11 December 2019.
[176] Cosmo Graham 'The Enterprise act 2002 and Competition Law' (2004)67(2) *TMLR* 233 at 273.
[177] Patric Smith & Andrew Swan 'Public Interest Factors in African Competition Policy' (2014) *The African and Middle Eastern Antitrust Review* at 1.
[178] Graham op cit note 2 at 274.
[179] Ibid at 274.

remedies in the hands of the OFT and CC as opposed to ministers in the political realm. The Secretary of State however still retained their powers to refer a matter for review by the CC on the basis of public interest, which when initially defined in section 58 of the Act, and those matters not defined in the Act, which in the opinion of the Secretary of State required to be included in the list, as evidenced by the inclusion of provisions stemming from the Communications Act of 2003 ("Communications Act").[180] The Communications Act included; the presentation of accurate news; free expression; and plurality of news in newspapers; plurality of ownership in media; and compliance with standards set out in the Communications Act.

In 2014, the Enterprise Act, 2002 was amended by the the Enterprise and Regulatory Reform Act 2013 (ERRA), which came into effect on 1 April 2014, thus resulting in the abolishing and collapse of the OFT and CC, thus giving rise to the Competition Market Authority ("CMA"). The CMA is an independent body overseen by its own board which is tasked with the regulating Competition law. Its functions include the following: to investigate mergers between organisations, so as to ensure that there is no anti-competitive consequences; investigate markets where there may be competition or consumer problems; take action against businesses and individuals that take part in cartels or anti-competitive behaviour; protect consumers from unfair trading practices; encourage government and other regulators to use competition effectively on behalf of consumers.[181]

The CMA is resourced with staff with expertise ranging from administrative, law, economics, and accounting staff.[182] The CMA is therefore the equivalent of the Competition Commission in terms of the South African Competition Law Act.

II THE ROLE OF THE CMA AND THE LEGAL FRAMEWORK

CMA thus performs the two phased investigation function of the OFT and CC, in that it has a duty to gather relevant information pertaining to 'merger situations', and where there appears that merger has taken place or to take place which has, or may have the effective of lessening competition in the UK, to refer such matter for a phase 2 enquiry with the Inquiry Group of the

[180] Ibid at 278.
[181] Competition & Markets Authority (CMA) *Mergers: 'Guidance on the CMA's Jurisdiction and Procedure'* (2014) at 7available at www.gov.uk/cma., accessed on 12 December 2019.
[182] Ibid.

CMA. Phase 2 investigations are performed by an Inquiry Group, made up of at least 3 independent experts selected for each case from the existing panel of experts of the Secretary General and the CMA.[183] In terms of section 22(2) and 33(2) of the Act, the CMA must refer a matter for a phase 2 assessment if it believes that a relevant merger situation is either being created, or in contemplation and the situation may result in a merger situation, and the relevant merger situation has already resulted or will result in the substantial lessening of competition within a market in the UK.[184] The CMA need not refer a matter for a phase 2 assessment if: the market concerned is not significant or does not justify such referral; consumer welfare as a result of such merger outweighs any substantial lessening of competition or negative effects of such substantial lessening of competition; or in the case of a merger that is anticipated the process has not gone far enough, or is not likely to proceed so as to justify such referral.

In terms of section 73 of the Act, the CMA may once a matter warrants referral for a phase 2 assessment, accept undertakings by the parties to remedy, mitigate or prevent the impact of substantially limiting competition and any negative effects of it.[185]

In terms of section 22(3) of the Act, the CMA must not refer a matter for phase 2 assessment if: 1) the Secretary of State has issued intervention notice, and that intervention notice is still in force; the European Commission is consideration that the matter should be referred to it; and where the merger is complete, but the relevant merger situation is, or has been dealt with as part of an anticipated merger. [186]

Where there is uncertainty as to whether a matter should be referred for a phase 2 assessment, such matter must be referred to the Inquiry Group to make a finding on the issue.[187]

To the extent that the UK has to date been a member of the European Union, ("EU"), and is currently in the process of finalising its exit, the UK merger regime is in part subject to the jurisdiction of the EU Merger Regulation ("EUMR") where it has an EU dimension. In terms of EU merger regulation, mergers that have a Union dimension must be assessed by the European Commission, and not domestic competition authorities. In terms of article 1(2) of the EUMR, a Union dimension is regulated by the prescribed turnover threshold set out in the EUMR. Effectively a merger meeting such thresholds and having the effect of lessening

[183] Ibid at 6.
[184] Ibid.
[185] Ibid at 11.
[186] Ibid at 12.
[187] Ibid.

effective competition. Further to this the European Commission may also assess mergers that do not have Union dimension, but could be assessed by three or more member states, or where two (2) or more member states request the European Union to assess a merger. [188] In this regard however article 21(4) of the regulation allows for the UK to submit a notification requesting jurisdiction on the public interest considerations where the merger is considered to raise legitimate national interest considerations.[189]

In this regard legitimate interest is defined in article 21(4) as including national security, media plurality and prudential rules. Owing to the ultimate role of regulating competition being about the promotion of competition and consumer wellbeing, generally such requests are not taken lightly owing to the potential threat of protectionism. Further to this the scope in measures that can be taken to by a member state in mitigation of any legitimate national interest is also limited to measures that are proportionate, non-discriminatory, and necessary, in the absence of any other less restrictive alternatives.[190] The measures taken must not be protectionist in nature, and impairing of requirements such as free movement of capital and the overall operation of the EU Market.

III MERGER SITUATIONS

Merger situations, as defined in section 23 of the Act, include some of the following:

'23 Relevant merger situations

(1)For the purposes of this Part, a relevant merger situation has been created if—

(a)two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24; and

(b)the value of the turnover in the United Kingdom of the enterprise being taken over exceeds £70 million.

(2)For the purposes of this Part, a relevant merger situation has also been created if—

(a)two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24; and

[188] Ibid at 8.
[189]Bruce Lyons; David Reader & Andreas Stephan 'UK Competition Policy Post-Brexit: In the Public Interest?'(2016) University of East Anglia (UEA) & Centre for Competition Policy (CCP) at 9.
[190] Ibid.

(b) as a result, one or both of the conditions mentioned in subsections (3) and (4) below prevails or prevails to a greater extent.

(3)The condition mentioned in this subsection is that, in relation to the supply of goods of any description, at least one-quarter of all the goods of that description which are supplied in the United Kingdom, or in a substantial part of the United Kingdom—

(a)are supplied by one and the same person or are supplied to one and the same person; or

(b) are supplied by the persons by whom the enterprises concerned are carried on, or are supplied to those persons.

(4)The condition mentioned in this subsection is that, in relation to the supply of services of any description, the supply of services of that description in the United Kingdom, or in a substantial part of the United Kingdom, is to the extent of at least one-quarter—

(a)supply by one and the same person, or supply for one and the same person; or

(b)supply by the persons by whom the enterprises concerned are carried on, or supply for those persons.'

With reference to the thresholds and in terms of the Turnover Test amendment Order, 2018, the threshold of £70 million, may be decreased to £1 million in circumstances where the merger situation relates to a "relevant enterprise". A relevant enterprise is a company which is active in the in the sectors of: quantum technology; computer processing units and military and dual use goods subject to export control; and in respect of the Supply Test amendment order, 2018, where the relevant enterprise had a 25 per cent share of the supply goods and services in the UK prior to the merger, this too will trigger a relevant merger situation.[191]

In determining whether such merger which falls within the jurisdiction of the CMA, the CMA embarks on a test of whether or not the merger situation has the effect of significantly lessening competition. In making the assessment the CMA will consider mitigating factors such as efficiency; entry and expansion in the market and countervailing buyer power.[192]

Merger notification in terms of the Act is voluntary in nature, a merger is not unlawful by virtue of a failure of the parties to have notified the CMA, although this is encouraged. As such a

[191]Timothy Mclver & Anne-Mette Heemsoth 'Mergre Control in the UK (England and Wales): Overview'(2018) available at https://uk.practicallaw.thomsonreuters.com/0-500 7317?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1, accessed on 12 December 2019.
[192]Ibid.

merger may be completed prior to a clearance having been obtained, except in instances where the merger is referred for a phased 2 review. The CMA will however unilaterally intervene in the event that perceives of a merger or prospective merger to fall within its jurisdiction and to have the effect of significantly lessening competition.[193]

In respect of the phase 1 and 2 approach, the CMA can make the following findings in respect of a merger situation that is or has the potential to significantly lessen competition. The CMA in the phase 1 assessment can either provide unconditional clearance; clearance subject to legally binding undertakings (also based on the proposed undertakings of the parties); or refer the matter for a phase 2 investigation. In respect of phase 2 review, the CMA may make a finding to furnish an unconditional clearance; conditional clearance that is subject to legally binding undertakings (which have been proposed by the parties and agreed to by the CMA) or undertakings imposed by the CMA; or an outright prohibition of the merger.[194]

A decision of the CMA may be appealed at the Competition Appeal Tribunal ("CAT"). The CAT has the powers to confirm, set aside or vary a CMA decision; refer a matter back to the CMA or a sectorial regulatory; give any direction or make any decision that the CMA or a sectorial regulator would have given or taken; impose, revoke or vary the amount of any penalty.[195] Both the decisions of the CMA and the Secretary of State may be appealed in this regard.

IV Public Interest and Mergers

With specific reference to public interest considerations, section 42(2) of the Act makes provision for the Secretary of State to intervene by way of an intervention notice, in the assessment of a merger on the basis of Public interest consideration in a situation where in terms of section 42(1) (a), the Secretary of State on reasonable grounds believes a merger situation has been created or that arrangements are in progress or in contemplation which may result in a merger, and there the Secretary of State believes such merger on the basis of public interest considerations has the potential to significantly lessen competition.

As a consequence of this the CMA in terms of section 57 of the Act, has an obligation to notify the Secretary of State in instances where it believes a merger raises public interest

[193]Ibid.
[194]Ibid.
[195]Ibid.

considerations which are stated in the Act.[196] In the event that the Secretary of State does elects not to intervene, the merger will proceed to be considered on the basis of pure competition considerations without having regard to the public interest considerations.[197]

The Public interest considerations that may be raised in relation to mergers are set out in section 58 of the Act, and include:

'58Specified considerations

(1)The interests of national security are specified in this section.

(2)In subsection (1) "national security" includes public security; and in this subsection "public security" has the same meaning as in article 21(4) of the EC Merger Regulation.

(2A)The need for—

(a)accurate presentation of news; and

(b) free expression of opinion;

in newspapers is specified in this section.

(2B)The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom or a part of the United Kingdom is specified in this section.

(2C)The following are specified in this section—

(a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;

(b)the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and

(c)the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to

[196] Lyons op cit note 15 at 7.
[197] Op cit note 7 at 130.

broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

(2D)The interest of maintaining the stability of the UK financial system is specified in this section (other than for the purposes of sections 67 and 68 or references made, or deemed to be made, by the European Commission to the OFT under article 4(4) or 9 of the EC Merger Regulation).'

The effect of the intervention of the Secretary of State is such that the merger must be assessed by the CMA both in respect of pure competition considerations as well as having regard to the public interest considerations being raised by the Secretary of State.[198] Further to this while the list is currently closed, the Secretary of State may with the approval of parliament, increase the grounds of intervening on the basis of public interest.[199] The more prominent merger of Lloyds TSB and HBOS pertaining to the financial services sector, was one such instance where in response to the merger the secretary of state sought to intervene on a basis of a need to protect the UK financial system.[200] With the ground not yet enacted in law, the secretary of state issued a notice to parliament to include the existing ground on maintaining the stability of the UK financial system. The Secretary of State may also make other amendments relating to merger thresholds and fees.[201]

The Secretary of State has the option on the basis of the regulated public interest grounds to refer a matter for assessment in terms of phase 2; accept the undertakings made at the end of a phase 1 enquiry, or decide whether to impose the proposed remedies after a phase 2 assessment.[202]

Further to the above, the Secretary of State may also intervene in "special public interest" cases, which while falling outside of the merger situation requirements in terms of thresholds etc. to the extent that the Secretary of State is of the opinion that there are public interest concerns, the Secretary of State may intervene and assess such mergers, purely on the basis of the public interest considerations, and thus in the absence of any other competition considerations.

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[198] Op cit 1.
[199] Lyons op cit note 15 at 11.
[200] OECD (2016)33 *Public interest Considerations In Merger Control* at 9 available at 9http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2016)33&docLanguage=En, accessed on 18 December 2019.
[201] CMA Op cit 7 at 7.
[202] Ibid at 13.

V The Secretary of State and Public Interest in Mergers

The Secretary of State is ultimately empowered to intervene in mergers on the bases of the regulated public interest grounds. The Secretary of State therefore has the final say on whether the merger may proceed having regard to the public interest concerns, or having regard to remedies that may be implemented to in order to mitigate the established the public interest considerations.[203]

(a) Phase 1 intervention by the Secretary of State

Where the State Secretary intervenes at a phase 1 level, the CMA will request third party views or comments in respect of both competition and public interest considerations, including in consulting other government departments, regulators in relevant sectors, industry associations and consumer bodies in respect of the public interest considerations. The CMA having only assessed the competition issues, will provide its report to the Secretary of State. The report contains the competition assessment, but will ultimately include the commentary received from third parties relating to the public interest considerations. Ordinarily however while the CMA is empowered provide a view and recommendations regarding the public interest considerations, such recommendation is ordinarily only provided after a phase 2 intervention. The CMA will also simultaneously advise on whether its findings are such that a matter may not be referred for a phase 2 review and that parties have indicated their interest to make undertakings.[204] The Secretary of State will ultimately take a view on the public interest considerations based on the report of the CMA. In terms of section 45 of the Act, the Secretary of State may still decide that the matter should be referred for a phase 2 assessment, in respect of the competition impact relating public interest. Such referral will occur where the Secretary of State is of the view that a merger has or may result in significant lessening of competition along with operating against the public interest or whether there is no significant lessening of competition, but the merger could serve to go against public interest considerations. The Secretary of State may also elect not to refer a matter notwithstanding that there may be a finding that the merger may serve to significantly lessen competition on the basis that there are public interest considerations that justify the merger.[205]

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[203] Ibid at 129.
[204] Ibid at 132.
[205] Ibid at 133.

In the matter of *Hystera and Sepura*[206], which related to an anticipated merger by Hystera Communications Corporation Limited, a Chinese-based global manufacturer and supplier of professional mobile ration communications systems ("PMR"); Digital Mobile Radio ("DMR"), and Police Digital Trucking and Terrestrial Trunked Radio ("TETRA") and Sepura PLC, a UK based global supplier of PMR systems and solutions, and on the back of the issue of public interest intervention notice by the Secretary of State for Business, Energy and Industrial Strategy, on the basis of the section 42(2) and section 58(1) of the Act, on the basis of the public interest ground relating to national security. In line with procedure the CMA provided a report on whether the transaction amounted to a merger situation, and would or had the potential to significantly limit competition, and further invited commentary from third parties regarding the public interest considerations set out in the public interest notification. The Secretary of State received both representations made by third parties to the CMA as well as direct representations made directly by the Home Office. In its Decision Notice issued on 12 May 2017[207], having regard to the draft undertakings made by the parties, the Secretary of State accepted such draft undertakings such that it was not necessary for the matter to refer for a phase 2 review. The undertakings served to provide assurance that sensitive information and technology is protected and to ensure that there would be maintenance of the ability of the UK in servicing and maintain radio devices used for emergency services. The parties were required to implement enhanced controls to protect sensitive information and technology from interception of sensitive information and technology and to allow access to relevant agencies including the Home Office to audit compliance in respect of security measures, as well as continued maintenance of services as required by the Home Office.

The report of the CMA following is phase 1 analysis was such that while the merger in terms of section 44(3) amounted to a merger situation within the jurisdiction of the CMA, the merger in terms of section 44(4) of the Act did not amount to a situation of substantially lessening competition with a market, as such the matter did not require to be referred for a phase 2 review. Further to this the CMA provided representations made by third parties such as the Home Office on the public interest considerations, as well as the proposed undertakings arrived at between the Home Office and the parties.

[206] *Hystera and Sepura* ME/6691/17.
[207] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/613788/sepura-hytera-decision-notice.pdf. accessed on 12 December 2019.

In the acquisition matter of *Inmarsat Plc and Connect BidCo*[208], in respect of the acquisition of Connect Bidco Limited by Inmarsat Plc, the Secretary of State for Digital, Culture, Media and Sport issued a public interest intervention notice on the basis of national security, having also consulted with the Secretary of State for Defense, the Secretary of State for Business, Energy and Industrial Strategy and the Secretary of State for the Foreign and Common Wealth Office on 22 July 2019.

(b) Phase 2 intervention by the Secretary of State

Where a matter has been referred for a phase 2 assessment in respect of public interest considerations, the CMA Inquiry Group will assess whether the merger may have the effect of working against public interest. In so doing the CMA will make recommendations as to actions that the Secretary of State or other third party stakeholders may take to mitigate any adverse impact. The final decision however on how best to respond to the merger having or having the potential to act in contrary to public interest ultimately lies with the Secretary of State.[209]

VI The S.A v UK Public Interest and Merger Assessment

In determine the suitability in approach in dealing with the question of public interest consideration, competition concerns and mergers in particular, the issues are centered around the suitability of who performs the enquiry and the extent to which public interest is imposed relative to the pure competition concerns. This is on the basis that competition considerations in appealing to economics and consumer well- being is based on some sort of a science, and is based on tangible evidence, whereas public interest considerations, in departing from the realm of policy, which may be subject to an element of subjectivity, the need to drive political agendas and short term goals which could ultimately lead to uncertainty.[210]

Notable differences between the treatment of public interest considerations in mergers in South Africa and the UK is that public interest considerations in assessing mergers are intertwined in the same test as that which considers impact on competition in South Africa at the onset the Competition Commission even before the Competition Tribunal assess the impact of the merger on public interest considerations. The ultimate remedy and decisions on the public interest considerations lies with the competition authority, although the relevant cabinet

[208]Ibid.
[209] CMA op cit note 7 at 133.
[210] Loyns, B.*et al* op cit note 15 at 6-7.

minister may intervene merely as in interested party for purposes of making representations, ultimately the determination is made by the competition authority and is binding on all parties unless reviewed appropriately.

In the case of the UK merger regime, the public interest considerations fall within the jurisdiction of the relevant Secretary of State to raise, and the ultimately decision on remedies falls within the jurisdiction of the Secretary of State. Ultimately therefore parties stick within the realm of their expertise. In both cases the grounds for public interest considerations is therefore the power to raise and determine the remedy in respect of a merger having an impact on public interest considerations is performed by the Secretary of State in respect of mergers that fall within the jurisdiction of the CMA. While the phase two analysis of the CMA considers both the competition and public interest considerations, ultimately the decision is separated and the jurisdiction of the CMA is purely on determining the existence of a relevant merger situation, and on the question of whether competition has been lessened, ultimately any matter concerning impact on public interest is a matter for recommendation to the Secretary of State and is not binding.

The UK is lauded for having limited the political power in interfering in mergers to the limited defined circumstances in the Act, as well as retaining the powers of the CMA to determine when mergers are referred, thereby limiting political interference.[211]

It is suggested therefore that up until recently the UK had taken a conservative approach to invoking the public interest notices, and as such more often than not, the majority of mergers had been decided on the basis of pure competition considerations. For the most part even when public interest notices were invoked, the matters were settled at phase 1 and the Secretary of State had accepted undertakings, thereby generally limiting the extent to which the public interest provisions would delay transactions. For the most part therefore most mergers would have been determined more on the basis of the pure competition considerations. This however was indicative of a government that had taken a particular approach to the markets and free trade, which was perhaps not under pressure to be protectionist, whereas in a South African context much like most developing countries, there is a delicate balance to be struck between the need for free enterprising and managing the structural constraints that have led to inequalities, that must be addressed from a policy perspective, as is evidenced by the reference

[211] Graham op cit note 2 at 274.

both in the pre-amble and public interest provisions of the South African Competition Act, where public interest considerations take on a socio-economic flavour and not just a national security concerns.

While not yet effective, there have been some amendments made to the South African Competition Act 89 of 1998, by inclusion of a new section 18A, which introduces national security as a public interest consideration in relation to a merger involving an acquiring foreign firm. The Amendment Act[212] requires such a merger to be notified both to the new Committee to be established by the President and to the Competition Commission. The final decision on whether such merger has an impact on public interest in such instance lies with this committee. This would appear to be a carved out process around public interest where the Minister has full control of the decision to approve a merger, contrary to the usual position taken which was to place all decisions around mergers within the jurisdiction of the competition agencies. According to the minister, the provision has been incorporated after comparative analysis of its use by various jurisdictions, as well as having regard to the obligations of the National Executive as conferred by section 198 of the Constitution of the republic of South Africa to protect national security.[213]

The Competition Commission will participate in such designated foreign acquisitions, if requested to give input on the matter, otherwise the commission may only consider the merger after it has undergone assessment for impact on public security by the committee, and only if such a merger has not been prohibited. Only thereafter can the Competition Commission can proceed to consider the impact on competition and public interest.[214] For the first time therefore in the merger analysis regime, one sees a dual authority in the assessment of public interest in respect of mergers. The overall impact that this will have on the process remains to be seen.

[212] Act 18 of 2018.
[213] Minister of Economic Development, Overview of Competition Amendment Bill, 2018 A New Deal For Economic Transformation And Inclusion, Presentation to Select Committee 9 October 2018 at 51.
[214] Ibid.

CHAPTER4: PUBLIC INTEREST IN MERGERS IN THE US ANTI-TRUST LAW FRAME WORK

I Introduction

Anti-Trust law is enforced by the Federal Trade Commission ("FTC") as well as the Department of Justice "(DOJ") which together form the Competition Agency that has jurisdiction to enforce competition law in the United States.

While the founding legislation on the regulation of Antitrust in the United States of America (U.S.A) is the Sherman Act, 1890, mergers[215] in the U.S Antitrust law ("Competition) framework are regulated by section 7 of the Clayton Act of 1914, as amended, which provides broadly for the prohibition of conduct, including mergers and acquisitions, whose effect may be to lessen competition or create monopolies. In assessing this the competition agencies focus on whether or not a merger will create, enhance, or facilitate exercise of market power.[216] A change in market dynamics in a negative fashion which would be prohibited is characterised by the ability of a merger to increase prices, result in fewer or lower quality goods or services or to lessen innovation.[217] In the case of *Brown Shoe Co. v. United States*[218], the Supreme Court had expressed that the design of section 7 of the Clayton was clearly an intention to protect competition itself and not competitors, and as such mergers were to be restrained only to the extent to which they may lessen competition. The nature of competition law in the U.S.A is that while it derives from statute is largely based in the common law through interpretation, as the legislation largely served to provide a framework only.[219]

The Hart-Scott Rodino Act ("HSR") Act of 1976, established a compulsory pre-merger notification requirement, such that all mergers falling within the ambit of the Act, must be notified prior to being effective.

The legislation regulating mergers in the U.S.A competition legal framework thus does not make provision for the assessment of non-competition considerations, such as public interest. This is underpinned by the principles that consumer wellbeing is best served by the promotion

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[215] Christopher. R, Leslie '*Antitrust Law as Public Interest Law'* (2012) 885 at 886 available at https://scholarship.law.uci.edu/ucilr/vol2/iss3/5, accessed on 17 December 2019.
[216]OECD (2016)10 *Public Interest Considerations in Merger Control at 2* available at https://www.oecd.org/competition/public-interest-considerations-in-merger-control.htm, accessed on 16 December 2019.
[217] https://www.ftc.gov/.
[218] 370 U.S. 294, 320 (1962).
[219] Leslie op cit note 1 at 888.

of competition in a free market which ultimately serves the consumer good by achieving "optimum prices, quantity, and quality of goods and services for consumers", which for purposes of competition law is ultimately serves public interest.[220] This is underpinned by the founding principles of the U.S economy being: 'Competition through free enterprise and open markets'.[221]

II Public Interest and US Competition Law

The above position has over the years been supported by scholarly literature, including the 'Chicago School', which has served to influence the approach to competition law, namely the argument that the imposition of non-competition considerations influenced by other political policy, may give rise to poor competition outcomes, as it requires the competition agencies to traverse into areas where they might not have the requisite expertise to determine such matters, and further that this may have the potential to result is lack of consistency in the outcomes of decisions made to allow or prohibit a merger. In an address to the Antitrust Asian Conference of 2014, the chairwoman of the FTC highlighted the FTC's learnings of the key features of an effective competition enforcement regime. These included how a fair and transparent investigation process ultimately led to the making of duly informed decisions; that consumer wellbeing was best served by focussing on pure competition considerations and not other economic or social goals, no matter how worthy they may be, and finally where there were instances where competition principles intersected with other important values such as intellectual property rights, a balance needed to be struck in such instances.[222]

With reference to the incorporation of non-competition considerations in competition analysis, the learnings of the FTC highlights some of the below issues:

a) The public interest considerations created challenges for the competition agency that could have the effect of resulting in poor outcomes for both companies and consumers.
b) In the FTC's experience consumer welfare was best served by focussing on competition considerations, owing to the ability of competition to result in economic growth, innovation, and the optimal distribution of resources.[223] The inclusion of non-competition considerations increases the scope to beyond needing to weigh up the

[220] OECD op cit note 2 at 3.
[221] Ibid.
[222] Ramirez, Edith 'Core Competition Agency Principles: Lessons Learned at the FTC Keynote Address' (2014) Antitrust in Asia Conference at 1.
[223] Ibid at 7.

positive and negative competition impact of the Merger in arriving at conclusion as to whether the merger is anti-competitive in a particular market to having to consider a multiplicity of factors across different markets and ultimately having to balance efficiency and equity.[224] Competition analysis is dynamic and forward looking whereas the analysis of public interest in relation to competition may be more static. By this is meant that the competition analysis has regard to the future consequences resulting from the merger such as re-allocation of resources and efficiencies that may be created in the long term, whereas in a public considerations pertaining to say employment such considerations may be ignored in a bid to save jobs in the present.[225]

c) The equity concerns which tend to underpin public interest considerations may have the effect of undermining consumer welfare considerations, in this regard she provides the example of a firm being required to maintain employment and only procure from domestic producers, which while seeking to protect public interest may ultimately have the effect of increasing the cost of doing business for the firm thereby increasing prices for consumers, while at the same time only protecting jobs and local suppliers in the short term, at the cost of a more inefficient economy in the long run.[226]

d) The impact of incorporating a wide range of factors in a competition analysis test, such as the socio-political and competition considerations, can undermine clarity and certainty in competition law, which can serve to discourage investment.[227]

e) The expertise of competition authorities lie in competition law, and may not be adequately equipped to deal with subject matter relating to the public interest considerations. As such, public interest is best to be assessed by agencies with the appropriate skill and through an appropriate regulatory mechanisms.[228]

f) In instances where governments insist that competition agencies should consider factors other than competition considerations, then the way in which the two interests are weighed up should be transparent to the parties involved and to the public.[229]

Similarity in an address at the Conference on International Antitrust Law and Policy in 2014, the Attorney General of the Antitrust Division stated the following:

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[224] Ibid.
[225] Ibid.
[226] Ibid.
[227] Ibid.
[228] Ibid.
[229] Ibid.

> *'We must continue to seek broad international consensus on the principle that enforcement decisions be based solely on the competitive effects and consumer benefits of the transaction or conduct being reviewed. We must ensure that enforcement decisions are not used to promote domestic or industrial policy goals, protect state-owned or domestic companies from foreign competitors, or create leverage in international trade negotiations.'*[230]

The above statement is however qualified by an acknowledgement that the extent to which it is attainable is dependent on the overall economic position and policy of a state, as points out the extent to which a state has moved from a planned market economy state to a more free market economy; the promotion of producer welfare towards consumer welfare or where state owned and private corporations have influence over the competition agencies.[231] Notwithstanding however it is suggested that even in such jurisdictions the focus should be on promoting competition and consumer welfare, as a failure to do so could deter investors for fear of a lack of certainty in the application of competition law.[232]

It is notable that in the above addresses that intellectual property is also addressed as a considerations which is separate from the competition consideration assessment, but which must be carefully balanced in such assessment. Intellectual property is distinguished from broader public interest considerations to the extent that it is viewed as complementary to competition which has as part of its outcomes, the creation and increasing of innovation. In this regard it is cautioned by the Attorney General and the Chief that jurisdiction when assessing matters pertaining to intellectual property, should limit themselves not regulating intellectual property itself as there is legislation and agencies to do this, but to stick to the competition related matters, as competition is still ultimately the goal which ultimately creates a conducive environment for innovation.[233] It is notable therefore that in this instance it is accepted that a balance can be struck between competing interests in competition analysis, and yet the same principle is not accepted where public interest considerations are concerned. Public interest considerations are therefore dealt with by the relevant government agencies that may assess a matter based on public interest or national security.[234] In such instances the relevant

[230] Bill Baer 'International Antitrust Enforcement: Progress Made; Work To Be Done'(2014) 41st Annual Conference on International Antitrust Law and Policy at 4.

[231] Ibid at 4.
[232] Ibid at 5.
[233] Ramirez op cit note 8 at 9.
[234] OECD op cit note 2 at 2.

government agency and the competition agencies work closely and consult and co-operate with the view to creating remedies that are both consistent and comprehensive.[235]

According to the OEDC, it has been expressed in the US courts in cases such as *Swedish Match*[236] that the enforcement of competition law is itself the pursuit of public interest. Further to the above in cases relating to the acquisition of U.S firm by foreign entities, which may have a national security impact, can be dealt with by the Committee on Foreign Investment in the United States ("CFIUS"), an interagency committee established in terms of section 721 of the Defence Production Act of 1950, as amended, which is chaired by the Secretary of Treasury. The CFIUS as part of its powers in this regard, may apply mitigation measures, or recommend that the president either block or suspend such a merger.[237]

The scope of the CFIUS has recently undergone review, and a new Act in the form of the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA") has been brought into law to further expand the scope of the CFIUS to include transactions which have historically fallen outside of its scope and where there are growing concerns from a national security perspective as to the exploitation of such investment vehicles by, and amongst other reforms serves to strengthen the requirements of mitigation agreements, which are imposed by the CFIUS in response to transactions falling within its jurisdiction.[238]

III The S.A v U.S Public Interest Merger Assessment

Ultimately the U.S.A and the South African competition law framework reflect a stark contract in approach regarding the public interest and competition assessments in mergers, with the US.A not even incorporating such consideration in their competition assessment, and relying on pure economic considerations, with an underlying belief that the protection of competition, in giving rise to consumer welfare has ultimately dealt with all issues concerning social justice, and leaving all other policy considerations to government agencies.

It is relevant to note however that notwithstanding this, and the exclusive jurisdiction of other government agencies outside of the competition agencies in order to co-ordinate decisions.

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[235] Ibid at 5.
[236] *Swedish Match* 131 F. Supp. 2d at 173 (D.D.C. 2000).
[237] OECD op cit note 2 at 6.
[237] 131 F. Supp. 2d at 173 (D.D.C. 2000).
[238] Summary of the Foreign Investment Risk Review Modernization Act of 2018 available at https://home.treasury.gov/system/files/206/Summary-of-FIRRMA.pdf, accessed on 12 December 2019.

CHAPTER 5: CONCLUSION

I Mergers in South Africa

The South African competition law framework in respect of mergers presents a hybrid approach incorporating both pure economic considerations that is standard in competition law analysis, as well as public interest considerations, which have their roots in the socio-economic considerations of the country. This is firmly embedded in the merger control provisions of the act, which specifically set out both the test for competition and public interest considerations. South Africa therefore follows a single authority model[239]

The political history of Apartheid led to economic inequality based on racial lines, concentration of wealth in the hands of a minority, a closed economy with lineal access to competitive exports.[240] This has been a policy concern in the South African context owing to the economic and socio-economic history of the country that saw the majority of people excluded from meaningful participation in the economy. It comes as no real surprise then that the competition enquiry into mergers includes assessment of impact on areas such as employment; the participation of persons/firms owned by historically disadvantaged persons and the ability of small firms to participate in international markets.[241]

The issue of public interest consideration within merger review is not unique to South Africa, as generally all merger review legislation is crafted within the sphere of competition policy of a country, and is reflective of the historical, political, and economic development of that country[242]. The ambit of the public interest considerations in competition law is determined by the economic imperative of that country. For example some countries such as the UK and U.S.A believe that pure economic analysis to ensure competition and efficiency. It is believed in such countries that the pure competition principles are able to bring about public interest such as job creation and equity through the economic efficiencies that arise. Under these circumstances, unlike the South African context it is not necessary to incorporate a further test for public interest considerations that directly tests for matters such as employment, ownership

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[239] OECD (2016) 1 *Summary of Discussion of the Roundtable on Public Interest Considerations in Merger Control* at 2 available at https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN4/FINAL/en/pdf accessed on 8 February 2020.

[240]OECD (2016)33 *Public interest Considerations in Merger Control* available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2016)33&docLanguage=En, accessed on 18 December 2019.

[241] Eleanor Fox 'Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia' (2000) 41(2) *HARV.INT'I. L.J* .

[242] OECD *Summary* op cit note 1 at13.

by historically disadvantaged people and small and medium enterprises, in particular where there other legislation and Ministries that are tasked with managing such aspects.[243]

II Public Interest and Mergers

Given the main and traditional purpose of competition law is to manage economic efficiencies, there arises a debate as to the appropriateness of incorporating public interest considerations into the competition law framework and under review by the competition authorities.

The key matters arising in respect of the concerns of competition authorities considering both pure economic considerations and public interest considerations in merger assessment include that:

- the spectrum of public interest considerations is broad, and there is therefore the potential to muddy the waters of competition analysis and the potential to give rise to uncertainty in decisions, as well as the burdening of the assessment with matters taking longer to resolve than would be necessary.
- the nature and complexity in evidence required and possibility to test such evidence when it relates to public interest versus the already established and measurable evidencing of pure economic considerations. For example in the *Walmart*[244] case, some of the issues proved rather complicated to try and prove.
- the suitability of competition authorities to make the assessment given their skill sets, which may not stretch far enough as accommodate the public interest considerations, which may better suited to other agencies which are already mandated to regulate some of the subject matter inherent in the public interest considerations.
- the content of the public interest considerations as being related to competition or being somewhat of a deviation to the core competition considerations.
- concerns around transparency and certainty in the assessment of a public interest impact in merger review.

In the South African context, and in order to asset its legitimacy the competition law framework has had to respond to the socio-economic conditions, in line with the economic policy priorities of the country, thereby characterized by a public interest assessment with considerations such

[243] OECD *Public* op cit note 2.
[244] *Wal-Mart Stores Inc and Massmart Holdings Ltd (CT* 73/LM/Dec 10) [2011] [ZACT] 28 (31 May 2011).

as impact on labour, the ability of small and micro-enterprises to compete, in order to deal with inclusion and income distribution within the South African context.[245]

Similarly, countries that have chosen to exclude public interest all together from the competition law assessment, such as the US, or those who have defined its parameters in competition law but have chosen to exclude it from the competition authority assessment, are countries which in their focus in economic policy have moved away from supplier pre-occupation and the need to regulate the structure of the economy, towards being able to focus on consumer ends. As such equally in such instances the stance on the positioning of public interest in competition law assessments in mergers is steered by the competition policies of those countries, whose legitimacy is not impaired by a failure to address socio-economic concerns.

III Balancing Public Interest and the Competition analysis in the South African.

The public interest considerations are clearly defined limited list in the South African Competition Act, and performed through the lense of the competition considerations. To date then the South African context has managed to strike the delicate balance in assessing mergers in relation to the competition concerns, to an extent that to date, no merger has been refused purely based on the public interest considerations. The South African system has therefore to date managed with a level of success to incorporate public interest into the traditional merger assessment, to evaluate available evidence, and to provide appropriate remedies.[246].The competition commission has ultimately maintained ultimate control over the assessment of competition, notwithstanding the need to consider public interest.

Further to this the approach has been to take a limited scope approach in relation to assessment of public interest, by considering only the matters that are merger specific; 'substantial'[247] and which do not fall to be determined under the legislation and mandate of other agencies, dealing with similar subject matter.[248]

It should be noted as well that even in instances where the assessment is separated in jurisdictions such as the UK, however to the extent that the public interest matters stem from a

[245] Ziyanda Buthelezi & Yongama Njisane 'Public Interest and prohibited conduct: juggling act?'(2014) *Without Prejudice* at 32.
[246] OECD *Summary* op cit note 1 at.
[247] OECD *Public* op cit note 2 at 8.
[248] OECD *Summary* op cit note 1 at 13.

transaction such as a merger, which falls within the realm of competition to assessment, it becomes necessary for agencies none the less to co-operate in order to co-ordinate the remedies provided, even if they hold different jurisdiction over the matter as the ultimate goal is to regulate the market in a manner that gives rise to consumer welfare.

This does appear different from the process of enabling interested parties such as the minister of economic development to intervene as an interested party and to make representations as is the case in the South African context, whose concern is ultimately considered in the assessment of the competition assessment, which is intended to look at the long-term effects on an economy, thus being less prone to making decisions based on short-term political gains.

The South Africa process is transparent, with checks and balances between the assessment of the Competition Commission and the reviews of the Competition Tribunal and the Competition Appeal Tribunal. The guidelines on what is considered when assessing impact on public interest in respect of mergers. if the US authorities are to be believed also goes a long way in bringing about transparency and a level of certainty in respect of how public interest will be dealt with.[249]

As such then even with the proponents of a separation of the public interest assessment from the competition assessment in mind, it appears South Africa has gone a long way in creating a conducive environment wherein the inclusion of the public interest requirements need not muddy the waters and give rise to uncertainty.[250] South Africa, thus being mindful of the challenges that arise when core economic efficiencies and wider public interest concerns are dealt with by same competition authority has gone a long way in mitigating the risks often advanced as a reason why these considerations should not exist within the same merger evaluation: namely that the Competition Commission is independent, the merger review process open and transparent, interested parties such as government or labour for example make representations but do not become authorities in the decision making; the list of public interest grounds is specific and closed, and there are guidelines to bring about greater certainty in the process of how public interest is assessed as against the pure competition assessment[251].

[249] Ramirez, Edith 'Core Competition Agency Principles: Lessons Learned at the FTC Keynote Address' (2014) Antitrust in Asia Conference.
[250] Fox op cit note 3 at 594.
[251] OECD (2012)16 *The Role of The Efficiency Claims In Antitrust Proceedings* at 6 available at http://www.oecd.org/competition/EfficiencyClaims2012.pdf, accessed on 21 February.

There are however cases such as the *AB bev v SAB Miller*[252] which give an indicator of the attitude of business to the question of public interest considerations and the perceived red tape associated with them, and perhaps the sense that there is a lack of certainty around them, such that now, business which anticipates that there will be a public interest impact, elect to engage the minister directly prior to even filling the merger in order to agree on the public interest related conditions. The effect of this is to almost relegate the Competition authority to a rubber-stamping authority, or one which evaluates the conditions of the minister as opposed to imposing its own. Business can however hardly be blamed for seeking out the most efficient way it could get a merger approved within suitable turnaround times.

The position of the minister has been further entrenched in the amendment to the Competition Act, with provisions that specifically providing for the minister to appeal a decision of the Competition Tribunal.

The approach of the Competition Commission is to apply the Guidelines relating to public interest and apply precedent. This gives rise to a level of certainty and consistency in the application of public interest in mergers. The approach of public interest conditions being set by the minister prior to the Competition Commission will give rise to the undermining of such process and result in further uncertainty or to conflict, since the current role of the Minister is to act as an interested party that makes representations to be considered by the Competition Commission and not for them to make the competition and public interest analysis.

Some of the criticism against having a separate public interest review of mergers outside of the competition law analysis, can render such merger susceptible to uncertainty, cause competition commissions to be susceptible to political pressure, as well as instances where mergers that would otherwise enhance economic efficiencies otherwise being prohibited due to the dominant policy position at the time.[253]

It is noteworthy that even in countries such as the UK, where public interest considerations in mergers are dealt with separately by the office of the minister, there is a specific carve out of few, yet specific matters that can be dealt with by the minister. The matters are so exceptional(national security, media plurality and prudential rules such as those relating to the

[252] *AB bev vSAB Miller* (LM211Jan16) [2016] ZACT 72 (4 August 2016).
[253] OECD *Public* op cit note 2 at 6.

financial sector)[254], that they are not a regular occurrence which means that there are few instances in which the minister interferes in merger assessments, which may service to minimize issues of political interference.[255] It is therefore submitted that for the sake of certainty, consistency and merger specificity, the minister's powers should not be increased, and they should remain an interested party that makes representation to the Competition Commission. Parliament should focus on ensuring the competition legislation remains relevant to addressing key socio economic concerns in South Africa, and the focus should be on ensuring that the Competition Commission is staffed with independent suitably qualified persons who are able to apply the law and its guidelines without fear or favour and in an expedient way which enables efficiency for parties involved.

[254] Bruce Lyons; David Reader & Andreas Stephan 'UK Competition Policy Post-Brexit: In the Public Interest?'(2016) University of East Anglia (UEA) & Centre for Competition Policy (CCP) at 9.
[255] OECD *Summary* op cit note 1 at 4.

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