

**THE ROLE OF SECTION 12 A (3) OF THE COMPETITION ACT TO BRING INTO EFFECT THE OBJECTIVES OF THE ACT OF ADDRESSING SOCIAL AND ECONOMIC PROBLEMS AND PAST INEQUALITIES THROUGH THE PUBLIC INTEREST ASSESSMENT IN MERGER PROCEEDINGS.**

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**I do hereby declare that I have read and understood the regulations governing submission of a Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.**

Signed by candidate

**Martin R Mgiba**

16/05/2015

**Date**

**DEDICATION**

To My family and all my friends who have supported me during this task of researching and writing.

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## ABSTRACT

The advent of our constitution necessitated a drastic re-evaluation of our aspirations as a young democratic state. Formal equality had to be accompanied by substantive equality. Substantive equality could only be achieved by a total revamp of our economic policy and framework, which was designed to benefit the white minority. The government quickly realized the fact that our competition jurisprudence had a significant role to play in bringing about economic and social reform. The challenge however was that the economy inherited was littered with monopolies. As a result in 1995, the South African government embarked on a project to review competition policy and the process was concluded in September 1998 when Parliament passed the Act into law.

The Act introduced new provisions, including the consideration of public interest in merger regulation. The inclusion of public interest in the Act was motivated by the need to address the socio-economic inequalities arising in society. Competitiveness and development was seen as mutually supporting objectives.

It was recognised that a small economy like South Africa, may be concentrated and therefore any merger and acquisition activity can create further concentration and social disparities if left unchecked. Mergers may lead to the shedding of jobs, especially where they are driven by cost saving and efficiency goals. Hence, it was recognised as being important that merger regulation consider the preservation of jobs where these arise as a result of the merger. In an economy with high unemployment rates, it would not serve the public interest to encourage or allow further job losses. Hence the inclusion of section 12 A 3 of the Competition Act which made it mandatory to consider public interest considerations in merger proceedings. This paper seeks to evaluate if competition authorities have carried out their mandate of addressing socio economic issue in merger processing through section 12 A (3).

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**LIST OF ABBREVIATIONS**

dti	Department of Trade and Industry
EDD	Economic Development Department
IDC	Industrial Development Corporation
OECD	Organisation of Economic and Community Development
CAC	Competition Appeals Court
IPL	International Procurement and Logistics
SACCAWU Union	South African Commercial, Catering and Allied Workers
DME	Department of Minerals and Energy

## 1. Introduction

South Africa is often regarded as a success story of the development and enforcement of competition law and policy in developing countries. South Africa's law and policy illustrate that it is possible to find a balance between the core focus on efficiency and broader public interest objectives which are of particular concern to developing countries.<sup>1</sup> As a result South Africa has become a model to be followed by other developing countries. There is an explicit inclusion of efficiency-plus or broader development objectives in competition law and policy.<sup>2</sup> Many competition lawyers and economists argue that the primary objective of competition law regimes is to promote economic efficiency<sup>3</sup>. Eleanor Fox echoes the same sentiments, she suggests that competition law, or antitrust law is typically a tool to preserve market competition in order to provide an environment that will encourage the efficiency and responsiveness of business and serve the interests of consumers<sup>4</sup>. The concept of efficiencies gives much greater importance to economic analysis. Furthermore greater importance is given to market power. It can be relied upon as a justification for an otherwise anti-competitive merger<sup>5</sup>. An anti-competitive merger would be approved if it could show that it will contribute to the improvement or promotion of technological or economic progress. This is captured in section 12 A (a) (i) of the Competition Act:

*'Section 12 A (a) (i) if it appears that the merger is likely to substantially prevent or lessen competition, then determine –*

*(i) 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*

<sup>1</sup> <http://www.npconline.co.za/> Competition Policy Review Trudi Hartzenberg, TRALAC 2003 18 September 2014

<sup>2</sup> Ibid

<sup>3</sup> Damien Geradin, Efficiency Claims in EC Competition Law and Sector-specific Regulation, Paper prepared for the first workshop on comparative competition law. The evolution of European Competition law- Whose regulation and what regulation file:///C:/Users/libuse/Downloads/SSRN-id617922.p

<sup>4</sup> Eleanor M. Fox, Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia, 41 Harvard International Law Journal 579 (2000)

<sup>5</sup> Ibid

*result or is likely to result from the merger, and would not likely be obtained if the merger is prevented’;<sup>6</sup>*

According to a survey at the Organisation of Economic and Community Development (OECD<sup>7</sup>) global forum, most developed countries show a shift away from the use of their competition laws to promote broad public interest objectives and focus instead on creating a framework for achieving the efficient use of resources and protecting freedom of economic activity in the market. In addition, public interest objectives usually fall within the mandate of a government minister or political decision-making body.<sup>7</sup>

In developing countries, however, developmental goals often play a prominent role alongside the promotion and maintenance of competition, and the right to consider public interest concerns frequently vests in the country’s competition authorities. It is against this backdrop that South Africa, as a developing country, should be considered. South Africa’s political history and economic background have also had a definitive influence on its competition policy.<sup>8</sup>

Eleanor Fox states that:

*‘South Africa’s competition law does so as a result of the vast political changes in post-Apartheid society. In light of the decades of heinous, pervasive discrimination against the black majority of the population by the white minority, the new South African law and policy mandates pervasive action to redress economic imbalances throughout society.’<sup>9</sup>*

Public interest objectives are clearly articulated in South Africa’s competition law. This paper will look at the use of Section 12 A (3) of the competition Act to bring into effect the objectives of the act to address social and economic problems of the past through the public interest assessment in merger proceedings. The primary focus of discussion of this paper will be the Wal-Mart merger.

<sup>6</sup> Competition Act no 89 of 1998

<sup>7</sup> [http://www.bowman.co.za/FileBrowser/ArticleDocuments/CompetitionLaw\\_SG\\_3\\_of\\_2012](http://www.bowman.co.za/FileBrowser/ArticleDocuments/CompetitionLaw_SG_3_of_2012), accessed on 14 November 2013

<sup>8</sup> Ibid

<sup>9</sup> Eleanor M. Fox, Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia, 41 Harvard International Law Journal 579 (2000)

## **Breakdown of this paper**

The dissertation will consist of five chapters and the content will comprise of the following:

1. Chapter 1: will set out the introduction and will explore the history and the purpose of section 12 A (3) of the Competition Act and the Public interest criteria contained therein.
2. Chapter 2: Will look at the application of the criteria by exploring the relevant case law.
3. Chapter 3: Will look at the criticisms that have been levelled against the competition authorities in their application of section 12 A (3).
4. Chapter 4: Will evaluate whether or not section 12 A (3) is achieving its original purpose of addressing social problems of the past through the public interest assessment in merger proceedings.
5. Chapter 5: Will be a comparative analysis and final remarks.
6. Chapter 6: Will make final remarks, recommendations and then proceed to conclude the discourse.

### **1.1 The History and the background of the South African Competition law policy and framework**

South Africa has an economic legacy of state ownership protection, import substitution and economic isolation (as a result of sanctions), combined with strong property rights and well-developed markets that differentiate it from other developing countries. In addition, South Africa's history of racial discrimination had the effect of inter alia holding down the costs of labour for industries and shielding white farmers and businesses from competition which concentrated ownership in the hands of the white population. As a result of these factors, product markets and capital ownership in South Africa were highly concentrated in the past. In certain aspects, South Africa has a well-

developed market economy, but there is also a need to reduce concentration in a number of markets, transform patterns of central ownership, and close the gap between a wealthy minority and a substantial majority that operate in a far less developed economic environment. Consequently, competition law performs a dual role in South Africa – in addition to stimulating competition and achieving market efficiency it also aims to be an instrument of economic transformation and address “the historical economic structure and encourage broad based economic growth .<sup>10</sup>

Under apartheid, a very small number of conglomerate groupings effectively dominated the economy, with estimates that companies controlled by the Anglo American Corporation accounted for 43 percent of the JSE’s capitalization<sup>11</sup>. The high levels of market concentration and related competition challenges are largely due to the legacy of apartheid policies, which protected major corporations and built several important industries under state ownership, including Sasol and Iscor (now Arcelor Mittal SA)<sup>12</sup>. Trade protection was extensive, disparate, and the result of company lobbying. Most agricultural markets were regulated by control boards, while there was a government sanctioned cement cartel until 1996.

The Mouton Commission in 1977 acknowledged the importance of competition issues and prompted the passing of the Maintenance and Protection of Competition Act in 1979 and the establishment of the Competition Board. However, this legislation made little impact on South Africa’s competition problems. Following the end of apartheid, addressing the extent of market power became a key issue of policy debate, with competition policy reflected in the 1994 Reconstruction and Development Program, ultimately foreshadowing the Competition Act of 1998. While ownership concentration has declined substantially over the past 15 years, patterns of merger activity, along with prohibited practices cases, suggest that many markets are highly concentrated and that there has been vertical integration in many supply chains. This is notable in particular markets, such as food, construction, important intermediate industrial products including steel, primary chemical feedstock, and telecommunications. Recent studies have also

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<sup>10</sup> *ibid*

<sup>11</sup> *Ibid*

<sup>12</sup> *Ibid*

highlighted negative outcomes from low levels of competition in the form of high price mark-ups, which correlate with low productivity and employment growth.<sup>13</sup>

## 1.2 Objectives of the Act

South Africa's competition policy objectives as set out in the preamble and section 2 of the Act are broad and take into account a variety of concerns. The preamble refers to the political background and motivations for the Act, including policies of equity, distribution and efficiency. It also states that the Act seeks to address past practices such as apartheid, which led to excessive concentration of ownership and control, inadequate restraints on anti-competitive trade practices, and unjust restrictions on full and fair participation in the economy. In addition, the Act recognises that liberalising trade and inviting foreign investment is an important factor in promoting competition. Thus it includes among its objectives the expansion of opportunities for South African participation in world markets and the role of foreign competition in South Africa as well as the creation of a capability and environment for South Africa to compete effectively in international markets.<sup>14</sup>

### 1.2.1 Objectives of the Act which speak to more developmental objectives include:

- The promotion of employment and the advancement of the social and economic welfare of South Africans;<sup>15</sup>
- Ensuring that small and medium enterprises have an equitable opportunity to participate in the economy;<sup>16</sup>
- Promotion of a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons and to provide all South Africans with an equal opportunity to participate in the economy;<sup>17</sup> and
- Regulation of the transfer of economic ownership in keeping with the public interest.<sup>18</sup>

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> Section 2 (c) of the competition Act no 89 of 1998

<sup>16</sup> Section 2 (e) of the Competition Act no 89 of 1998

<sup>17</sup> Section 2 (f) of the Competition Act no 89 of 1998

Thus, the Act contains objectives focused at promoting a competitive economy and objectives that focus on furthering developmental goals and the public interest. The Competition Act of 1998, which came into force on 1 September 1999, reflected the commitment of South Africa's first democratic government to strengthen the competition regime in the context of the country's highly concentrated economy.<sup>19</sup>

### **1.3 The need for Competition authorities to play a part in transforming the economy**

In 1999, the then Minister of Trade and Industry, Mr Alec Erwin, emphasised the pivotal role that the competition authorities were to play in transforming "an economy inherited in 1994 that was rigid, protected, locked up in inefficient institutions, highly monopolised and concentrated". The high levels of concentration were evident in the patterns of ownership and control of companies listed on the Johannesburg Securities Exchange (JSE)<sup>20</sup>.

### **1.4 The advent of section 12 A (3)/ Public interest considerations in mergers**

Public interest considerations of the Act were a response to a specific set of historical and economic circumstances and were designed to encompass a wide-range of objectives, including certain objectives that speak to public interest and developmental aspects. The application of public interest objectives is relevant in relation to merger review proceedings, as this process involves a public interest aspect<sup>21</sup>.

Since the promulgation of the Competition Act, 89 of 1998 ('the Competition Act'), and its coming into effect in September 1999, mergers (defined as the acquisition or establishment of control by one or more firms over the whole or part of the business of another firm)<sup>22</sup> that meet the prescribed monetary thresholds must be notified to and

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<sup>18</sup> Ibid

<sup>19</sup> <http://www.comptrib.co.za/assets/Uploads/Reports/unleashing-rivalry.pdf>, accessed on the 14 November 2014

<sup>20</sup> Ibid

<sup>21</sup> Ibid

<sup>22</sup> Section 12 (1) (a) of the Competition Act no 89 of 1998

approved by the South African competition authorities before they may be implemented.

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South African merger control has developed in leaps and bounds in sophistication, and international trends and norms are very closely ascribed to by the South African competition regulators. That said, South African merger control is also uniquely South African, in that analysis of both classic competition issues (the negative effect of a transaction on competitive conditions weighed against the efficiencies arising therefrom) and public interest issues (notably the impact of a transaction on employment) are called for by the statute.<sup>24</sup>

In summary, the provisions of s 12 A envisage three separate but interrelated inquiries, namely

1. Whether or not the merger is likely to substantially prevent or lessen competition;
2. If the result of this inquiry is in the affirmative, whether technological, efficiency or other pro-competitive gains will trump the initial conclusion so reached in stage 1 together, with the further consideration based on substantial public interest grounds, which in turn, could justify permitting or refusing the merger; and
3. Notwithstanding the outcome of the enquiries in 1 or 2, the determination of whether the merger can or cannot be justified on substantial public interest grounds.<sup>25</sup>

The legislature sets out specific public interest grounds in s 12 A (3):

*“(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 that the merger will have on –*

- (a) a particular industrial sector or region;*
- (b) Employment;*
- (c) The ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive;*

<sup>23</sup> Section 11 (1) (a) of the Competition Act no 89 of 1998

<sup>24</sup> Ibid

<sup>25</sup> Section 12 A (3) of the Competition act no 89 of 1998

*and*

*(d) The ability of national industries to compete in international markets.”*<sup>26</sup>

In every merger, the competition authorities are required to consider “whether the merger can or cannot be justified on substantial public interest grounds” by assessing the effect that the merger, once implemented, will have on: (i) a particular industrial sector or region; (ii) employment; (iii) the ability of small businesses to compete; and (iv) the ability of national industries to compete in national markets. These considerations are designed to advance the developmental objectives incorporated in the Act of employment creation, economic transformation, and the development of small and medium-sized businesses<sup>27</sup>. Section 12 A (3) limited the scope of public interest by defining in detail the grounds on which public interest could be considered. By detailing the public interest the Act creates structure and provides a filter for the public interest analysis.<sup>28</sup>

Section 12 A (3) carries with it a lot of historical implications, in that it seeks to address the competition imbalances of the past and seeks to bring about societal reformation through its consideration of public interest provisions. Section 12 A (3) which deals with merger proceedings is pragmatic and inclusive of all stakeholders such as unions, employees, members of the community, etc. Such a provision is both necessary and impressive in that it is in line with the purport and the spirit of the constitution which seeks to create an environment that is based on equality (formal and substantive), dignity and freedom.

### **1.5 Competition authorities carry out their functions independently**

The Competition Act placed the responsibility for public interest decisions at the hands of independent competition authorities. This has limited the scope for political interference. In addition, this particular feature reduced the likelihood that processes

<sup>26</sup> Section 12 (A) (3) of the competition act no 89 of 1998

<sup>27</sup> Ibid

<sup>28</sup> Authors: James Hodge, Sha'ista Goga, Tshepiso Moahloli, PUBLIC INTEREST PROVISIONS IN THE SOUTH AFRICAN COMPETITION ACT- A CRITICAL REVIEW, Competition Policy, Law and Economics Conference 2009, <http://www.compcor.co.za>, accessed on 19 November 2014

could be derailed through lobbying that might occur if political bodies had the discretion to overturn rulings on the basis of public interest considerations. This is especially true given the transparency and public nature of the competition processes defined by the Act. It is suggested that by allowing the same body to assess the competition and public interest aspects it allows for a weighing up of the relative merits of both aspects of the case. This particular feature allows the competition authorities to carry out their functions and responsibility without fear, favor and prejudice. The likelihood of impartiality is increased.<sup>29</sup>

### **Conclusion**

This chapter has discussed a brief overview of the history of South Africa's competition law policy. It has further set out to state the developmental objectives of the Act. Furthermore it has introduced Section 12 A (3) of the competition Act and it has explained the role that it plays in bringing about redistributive justice for those who were previously marginalised. The public interest inquiry in the Act creates a structure and provides a filter for the public interest analysis. From the above discourse it is apparent that public interest considerations of the Act were a response to a specific set of historical and economic circumstances and were designed to encompass a wide-range of objectives, including certain objectives that speak to public interest and developmental aspects.

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<sup>29</sup> Ibid

## Chapter 2

### Application of the criteria

#### 2. Introduction

Chapter 2 will outline and evaluate the application of the Section 12 A (3) criteria in merger proceedings by presenting how it has been interpreted by the Competition authorities. Although public interest objectives are articulated in South Africa's competition law, their exact interpretation comes with the development of the competition jurisprudence, as the case law amplifies and clarifies the provisions in the Competition Act.<sup>30</sup>

Section 12 1(b) of the Competition Act states that whenever required to consider a merger, the Competition Commission or Competition Tribunal must determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)<sup>31</sup>

‘Otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)’

Section 12 A (3) states that: [“When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –

- (a) a particular industrial sector or region;
- (b) employment;
- (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
- (d) the ability of national industries to compete in international markets.<sup>32”]</sup>

<sup>30</sup> Trudi Hartzenberg, Competition Policy Review Page 2 , TRALAC 2003 <http://www.npconline.co.za/> accessed on 18 September 2014

<sup>31</sup> Competition Act of 1998 (Act No. 89 of 1998)

<sup>32</sup> Competition Act of 1998 (Act No. 89 of 1998)

## 2.1 The use of the word ‘otherwise’

The use of the word ‘otherwise’ has been interpreted by the Competition Tribunal as meaning that an evaluation of public interest must be undertaken whether the competition analysis has a positive or negative outcome<sup>33</sup>. In the merger between Anglo American and Kumba Resources<sup>34</sup> the Tribunal found that ‘the use of the word ‘otherwise’ in section 12A(1)(b) means that the public interest evaluation must still be undertaken by the Competition Tribunal, regardless of the outcome of the section 12A(2) ‘competition’ analysis.<sup>35</sup>The Tribunal has further stressed that the Act requires that all mergers must first undergo a competition evaluation and then be assessed on public interest grounds. This is so because even if a merger has failed the competition test, in that it substantially lessens competition, it can still be approved on the public interest test, if its anti-competitive effects are outweighed by its positive impact on the public interest. Similarly, a merger that has passed the competition test can still fail the public interest test and be prohibited. This means that a merger which does not substantially prevent or lessen competition may have conditions imposed upon it or may be prohibited because it impacts negatively the public interest. The application of section 12 A (3) can be summed up in the case Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Limited whereby the Tribunal argued that public interest factors can operate either to redeem an anticompetitive merger or impugn a merger deemed not anticompetitive.<sup>36</sup>

## 2.2 On what constitutes substantial

The only considerations that have to be given are those of a substantial nature. Even though this requirement has been qualified and the public interest issues have been restricted to those provided in the act, it still poses a challenge to decide when public

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<sup>33</sup> Authors: James Hodge, Sha’ista Goga, Tshepiso Moahloli, PUBLIC INTEREST PROVISIONS IN THE SOUTH AFRICAN COMPETITION ACT-A CRITICAL REVIEW Competition Policy, Law and Economics Conference 2009, <http://www.compcom.co.za>, accessed on 19 November 2014

<sup>34</sup> Case no. 46/LM/Jun02

<sup>35</sup> Ibid

<sup>36</sup> Competition Tribunal, Case no 08/LM/FEB02

interests are trivial especially where they have been raised<sup>37</sup>. The Act does not only require the Tribunal to assess public interest, but s 12 A (1) (b) requires that the public interest grounds should be ‘substantial’. However, the Tribunal argues that the Competition Act does not provide further guidance in determining what constitutes ‘substantial’ public interest.<sup>38</sup> In the merger between Distillers Corporation and Stellenbosch Farmers Winery the Competition Tribunal noted that ‘the legislation offers no criteria as a yardstick. In addition, they note in para 38 of the Shell-Tepco ruling that the Act ‘does not otherwise guide us in balancing the competition and public interest assessments except insofar as section 12A(1)(b) requires that the public interest grounds should be substantial’.

The Tribunal stated in Distillers Corporation and Stellenbosch Winery

*“How many jobs must be lost before one has grounds for substantial public interest? The legislature wisely does not seek to answer that for us, nor can we assume that it should be a uniform figure for all merger- it would depend on the context.”<sup>39</sup>*

## **2.2 The tribunal is only concerned with the residual public interest.**

Given the lack of guidance as to what constitutes substantial public interest, the Tribunal’s approach is therefore to focus on ‘residual public interest or that part that is not susceptible to or better able to be dealt with under another law, is substantial’. In practice the Tribunal has applied this to both historically disadvantaged persons and employment.<sup>40</sup>

In the Shell and Tepco merger, the Tribunal noted that its role is secondary in matters where there is already legislation. In paragraph 58 the Tribunal stated that

<sup>37</sup> Abigail Machine, Public interest and merger control in South Africa: The Walmart case revisited. Article submitted to the Department of Law at the University of Cape Town. <http://africanantitrust.com>. accessed on 18 January 2014

<sup>38</sup> Authors: James Hodge, Sha’ista Goga, Tshepiso Moahloli PUBLIC INTEREST PROVISIONS IN THE SOUTH AFRICAN COMPETITION ACT-A CRITICAL REVIEW Competition Policy, Law and Economics Conference 2009, <http://www.compcor.co.za>, accessed on 19 November 2014

<sup>39</sup> Ibid

<sup>40</sup> Authors: James Hodge, Sha’ista Goga, Tshepiso Moahloli, PUBLIC INTEREST PROVISIONS IN THE SOUTH AFRICAN COMPETITION ACT-A CRITICAL REVIEW Competition Policy, Law and Economics Conference 2009, <http://www.compcor.co.za>, accessed on 19 November 2014

*'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.'*<sup>41</sup>

This point was further emphasized in the Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery group Limited merger, where the Competition Tribunal argued that the 'parliament has in many instances enacted legislation that deals quite specifically with the issues referred to in section 12 A (3). In this case they note that 'employment is no exception'. The Tribunal argued other legislation and institutions they create are 'better placed and resourced to deal directly and effectively with issues' and that would only intervene in cases where merger-specific losses were 'so adverse that no other law or regulator can remedy them'.<sup>42</sup>

The Wal-Mart merger however seems to somewhat contradict and override the said assertions in that it took on responsibilities that many are of the view that they should have been considered by other fora. Many are of the view that the employment considerations in Wal-Mart should have been considered by the labour Court. This is further discussed in chapter 3 and 4 of this paper,

### **2.3 Certain industries that are excluded jurisdiction of the competition authorities**

It should be noted that South Africa has excluded certain industries from the ambit and jurisdiction of the competition authorities. In a proposed merger between of 2 major banks, Nedcor-Stanbic merger, the court ruled that the Competition Act did not apply if an industry was subject to regulation<sup>43</sup>.

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<sup>41</sup> Ibid

<sup>42</sup> Ibid

<sup>43</sup> Competition Law and Policy in South Africa, An OECD (Organisation for Economic Co-OPERATION and Development Peer Review, Substantive Issues: Content of the competition law Page 30

## 2.4 Public Interest analysis linked to its competition inquiry

In *Harmony Gold Mining Company Limited v Goldfields Limited*<sup>44</sup> Where The hostile take-over bid of Gold Fields Limited by Harmony Gold Mining Company Limited was conditionally approved. The Tribunal stated that the fundamental question to be answered in any public interest enquiry is whether the merger cannot be justified on public interest grounds.<sup>45</sup> The Tribunal established that, in theory at least, the competition authorities could reach a conclusion regarding the approval of a merger on public interest grounds that was not the same as the conclusion reached on consideration of the competition issues. It was further submitted that

*‘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. It was also established that 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.’<sup>46</sup>*

Thus, Harmony instructs us that ‘a blinkered approach’ should not be applied to the public interest inquiry and that the Tribunal’s public interest mandate is linked to its competition analysis.<sup>47</sup>

## 2.5 Public interest evidential burden

In *Harmony/Goldfields* it was also stated that when a substantial public interest concern has been raised, the merging parties bear the burden of justification. This means

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<sup>44</sup> [2005] 2 CPLR 484 (CT)

<sup>45</sup> Ibid

<sup>46</sup> Ibid

<sup>47</sup> Ibid

that the evidential burden shifts to the merging parties to rebut the net conclusion that a merger may not be justifiable on substantial public interest grounds<sup>48</sup>.

## 2.6 Black economic empowerment

Black economic empowerment (BEE) has featured significantly in some merger hearings. It is generally invoked when the merging parties argue that any anti-competitive effects of their proposed merger are mitigated by its promotion of BEE. However, in the merger between Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd<sup>49</sup> in 2001, the Commission opposed a merger where a black-owned firm sold a struggling wholly owned subsidiary to Shell in exchange for a minority shareholding in Shell's distribution arm. The Commission recommended prohibition of the transaction on the grounds that it undermined BEE. However, the Tribunal approved the transaction because it found that there was no purpose to preventing the merger in order to keep a failing firm on life-support merely because it satisfied the BEE criterion. The Tribunal also pointed out that the owner of the target firm was itself a BEE entity that had decided that its best commercial course lay in selling its subsidiary.<sup>50</sup>

In *Kansai v Freeworld*<sup>51</sup> the public interest conditions imposed on the merging parties by the Commission and confirmed by the Tribunal included that: (i) Freeworld must conclude a Black Economic Empowerment ("BEE") equity transaction within two years of the clearance date and (ii) Freeworld must continue to manufacture all proprietary coatings currently manufactured in South Africa together with any complementary products for a period of ten years from the clearance date and continue to maintain and expand its current decorative and refinish automotive coatings operations in South Africa.

The 'dti' made submissions to the Commission in respect of the merger and also applied for and was granted leave to intervene in the request for consideration proceedings (in respect of the divestiture condition imposed by the Commission) before

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<sup>48</sup> Ibid

<sup>49</sup> (66/LM/Oct01) [2002] ZACT 13 (22 February 2002)

<sup>50</sup> Ibid

<sup>51</sup> 53/AM/JUL11,109

the Tribunal. Even though the 'dti' ultimately withdrew from the request for consideration proceedings on the basis that the Commission would sufficiently represent its concerns, the dti's influence can be felt in the conditions imposed (the DTI's policies include promotion of economic transformation and local manufacturing)<sup>52</sup>.

Let it be noted that merger control may be used to promote statutory policies of general interest. One of these is expanding the business ownership stakes of historically disadvantaged persons<sup>53</sup>.

## **2.7 Public interest analysis as it pertains to employment considerations.**

The proposed\_Bonheur 50 General Trading (Pty) Ltd/Komatiland Forests (Pty) Ltd merger was blocked in 2004,<sup>54</sup> partially to address the likely job losses of about 1,200 workers, while the\_Multichoice Subscriber Management (Pty) Ltd/Tiscali (Pty) Ltd<sup>55</sup> merger in 2005 resulted in the imposition of conditions to limit job losses. A significant number of mergers have been approved with conditions aimed at minimising job losses. A novel condition imposed on the merger between Tiger Brands Ltd and Ashton Canning Company Ltd and Others<sup>56</sup> in 2005, ensured that the merged entity fund skills training for retrenched seasonal farm workers in the Ashton community. As yet, the competition authorities have not prohibited a merger based solely on public interest grounds, but have made their decisions with reference to limiting the negative impact of mergers.

Metropolitan Holdings Limited and Momentum Group Limited<sup>57</sup> is a landmark case in that it establishes the principle of connecting the relationship between job losses and efficiencies. The Tribunal conditionally approved the acquisition of 100% of the issued ordinary share capital of Momentum by Metropolitan. The Tribunal first assessed the competitive effects and concluded that the merger was unlikely to substantially prevent or lessen competition in any relevant potential market. The merger did however

<sup>52</sup>Robert Legh, Jessica Staples and Magalie Masamba, Competition Law Sibergramme 3/2012, 02 October 2012, SG 3/2012, <http://www.bowman.co.za>, 14 November 2014

<sup>53</sup>Ibid

<sup>54</sup>80/AM/OCT04 [2011] ZACT 53 (25 July 2011)

<sup>55</sup>(72/LM/Sep04) [2005] ZACT 23 (20 April 2005)

<sup>56</sup>(46/LM/May05) [2005] ZACT 82 (23 November 2005)

<sup>57</sup>Case 41/LM/Jul10

give rise to one public interest consideration, namely the loss of employment. Both firms were active in the broader financial services market. The merging parties submitted that the merger may lead to up to approximately 1000 job losses as a result of redundancies and the need to improve efficiencies in the post-merger entity. The Tribunal approved the merger subject to a limited moratorium on retrenchments for two years with terms that clarified the conditions on the merged entity.<sup>58</sup> The parties sought to dispel concerns around these potential job losses by submitting that there was a plan to redeploy, retrain, offers of early retirement for affected staff members; natural attrition and business growth as mitigating factors. This, according to the parties, would reduce the number of potential job losses to 1000 from the earlier envisaged 1500 job cuts.<sup>59</sup>

The Tribunal's factual assessment revealed the importance of clearly articulating how the envisaged employment loss figures were determined and how these are linked to expected public (and not private) efficiencies post-merger.<sup>60</sup> The Tribunal found that the parties were unable to show 'a rational connection between the efficiencies sought from the merger and the job losses claimed to be necessary.....' There was a recognition, however, that this more considered approach to justifying job losses is only reserved for mergers where expected losses are of significant magnitude.<sup>61</sup>

It is the Tribunal's view that any negative impact on public factors cannot be arbitrarily arrived at without establishing a clear connection between the envisaged negative impact and whatever claimed efficiencies. Further, the Tribunal emphasized that while a negative impact on employment may be clearly connected to a particular claimed efficiency this does not discharge the parties of their duty to show that the employment losses can be justified for a reason that is public in nature to offset the public interest in preserving jobs as a result of the merger.<sup>62</sup>

The Tribunal also tackled the issue of a joint and concerted effort between merging parties and labour unions in addressing employment losses as a result of a

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<sup>58</sup> Ibid

<sup>59</sup> Ibid

<sup>60</sup> Njisane, Y. 201, The rise of Public Interest: Recent high profile mergers, Public Interest Law Gathering, 1 – 24, Page 7, [www.africanlii.org](http://www.africanlii.org), accessed on 15 May 2014

<sup>61</sup> Ibid

<sup>62</sup> Ibid

proposed merger. This, the Tribunal considered necessary in merger proceedings given that the Act makes provisions for special rights granted to labour<sup>63</sup>.

## **2.8 The assessment of mergers that may impact on national champions and a particular sector and region.**

Iscor Limited and Saldahna Steel (Pty) Limited<sup>64</sup> merger gives insight into the Tribunal's views on how to assess mergers that may impact on national champions and a particular sector and region.<sup>65</sup> This merger involved the acquisition, by Iscor Limited, of the remaining fifty percent shares owned the Industrial Development Corporation (IDC) in Saldahna Steel. Iscor, at the time, was a major player in steel production in South Africa. Saldahna was a state-of-the-art mill that was to supply the export market from the port of Saldahna. This particular acquisition entailed a change from joint to sole control by the acquiring firm. This move was brought about by a number of facts, chief amongst them being that the target firm stood the risk of failing and consequently implying significant losses for the two shareholders invested in the firm. The Tribunal's assessment of the competitive effects of the acquisition concluded that the failing firm concerns outweighed the loss to potential competition that would arise from the transaction.<sup>66</sup>

The Tribunal stated that a public interest analysis ought to be carried out despite the outcomes of the competitive effects analysis, the Tribunal proceeded to evaluate the impact of the acquisition on public interest. They found that if the merger was not approved it would have had adverse effects on public interest.<sup>67</sup>

The evidence presented before the Tribunal indicated that the Saldahna Steel plant was a crucial part of the town's economic life and that its closure would not only affect its employees given the resulting of employment but also all the firms and individuals whose livelihood depended on its functioning. Given the small size of the

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<sup>63</sup> Ibid

<sup>64</sup> Case no: 67/LM/Dec01

<sup>65</sup> TN Njisane, Y. 201, The rise of Public Interest: Recent high profile mergers, Public Interest Law Gathering. 1 – 24, Page 7, [www.africanlii.org](http://www.africanlii.org), accessed on 15 may 2014

<sup>66</sup> Ibid

<sup>67</sup> Ibid

region and its dependence on a small number of industries, the effect of the plant closure, according to the Tribunal, would be devastating. Furthermore, the Tribunal noted the firm's contribution to community development through its social programs that contributed to the upliftment of the region.<sup>68</sup> Given this, the Tribunal found that indeed the public interest favours the approval of the acquisition.

The Tribunal proceeded to examine the impact of the acquisition on 'the ability of national industries to compete in international markets' or commonly referred to as national champions. In assessing this public interest, the Tribunal largely relied on evidence presented to it by the Department of Trade and Industry, the custodians of industrial and trade development. This aspect of the merger indeed highlights the issue of competition policy being part of a suite of economic instruments used by government to achieve its economic development imperatives<sup>69</sup>.

The Department of Trade and Industry's arguments centered on the acquiring firm being able to expand its productive capacity in order to better compete with much larger firms in the international market. Further the Department of Trade and Industry argued that were Iscor to become a lower cost producer, this will be to the benefit of the downstream steel industry thereby making Iscor's customer competitive as well. While wary of this argument the Tribunal nevertheless approved the transaction noting that this was not a subject they ought to make a pronouncement on for the purposes of the merger before them.<sup>70</sup>

Indeed while acknowledging that the acquisition embodied anti-competitive effects given its removal of Saldahna as a potential competitor to Iscor, the failing firm defense raised by the parties outweighed these potential effects. Further the public interest also necessitated the approval of the merger as a prohibition would have resulted in even dire consequences.<sup>71</sup>

## **2.9 Wal-Mart Stores Inc v Massmart Holdings Ltd<sup>72</sup>**

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<sup>68</sup> Ibid

<sup>69</sup> Ibid

<sup>70</sup> Ibid

<sup>71</sup> Ibid

<sup>72</sup> [2011] 1 CPLR 145 (CT)

The merger between Wal-Mart and Massmart is an example of a transaction where the public interest inquiry occurred even though the merger raised no competition concerns. The Tribunal confirmed in *Wal-Mart v Massmart*:

*“One of the unusual features of the Competition Act, 1998 (Act 89 of 1998, as amended) (‘the Act’) is that despite the fact that a merger may raise no competition concerns, it may still be susceptible to prohibition, or approval subject to conditions, on public interest grounds.”<sup>73</sup>*

On 27 September 2010, Massmart announced that Wal-Mart intended to acquire a controlling interest in Massmart by virtue of an acquisition of 51% of the ordinary share capital of Massmart. The Economic Development Department (“EDD”) took a particular interest in the *Wal-Mart v Massmart* transaction. After Wal-Mart’s announcement of the merger and notification to the Commission, the Economic Development Department appointed an expert panel to conduct research on the implications of the proposed merger, which reported that owing to the size and international exposure of Wal-Mart, the transaction would impact on employment, the welfare of local manufacturers, and small businesses<sup>74</sup>. The Economic Development Department engaged directly with the parties and, on failing to obtain any binding commitments from them, ultimately intervened in the Tribunal proceedings. During the proceedings, the “EDD” made submissions on the impact of the proposed transaction on procurement and expressed the concern that the transaction would result in a shift away from the merged entity purchasing the products of South African manufacturers to the products of low cost foreign (particularly Asian) producers.

The transaction between Wal-Mart Stores Inc of the United States (‘Walmart’) and South African retailer Massmart Holdings Limited (‘Massmart’) was conditionally approved by the Tribunal during May 2011. The Tribunal held that it was common cause that the merger did not raise any competition concerns, in that Wal-Mart did not compete with Massmart in South Africa and its only presence in this country was its procurement arm of IPL which did no more than purchase South African produce for an

<sup>73</sup> Ibid

<sup>74</sup> Robert Legh, Jessica Staples and Magalie Masamba, *Competition Law Sibergramme* 3/2012, 02 October 2012, SG 3/2012, <http://www.bowman.co.za>, accessed on 14 November 2014

export market. Accordingly, the Tribunal found that the transaction did not prevent or lessen competition in any of the markets in which Massmart operate. The entire dispute therefore turned on what was described by the Tribunal as ‘one of the unusual features’ of the Competition Act 89 of 1998 (“the Act”), that is the public interest concerns as set out in s 12 A of the Act. In particular, s 12 A (3) read together with s 12 A (1) provides that the initial consideration of the merger must consist of an examination of whether the merger is likely to substantially prevent or lessen competition by an examination of the factors set out in s 12 A (2). Once that enquiry has been completed, and if it then appears that the merger is likely to substantially prevent or lessen competition, a determination must be made whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than the losses and thus offset the effects of the prevention or lessening of competition that has already been found to exist pursuant to the initial enquiry. Further, and irrespective of the findings in relation to these considerations, the Competition Commission or Tribunal must consider whether the merger can or cannot be justified on substantial public interest grounds. The Tribunal found that, given the ambitions of Massmart to expand, the merger may well expedite expansion and new jobs would be likely to be created more quickly. Hence it concluded:

*“On balance, retrenchments are, post-merger, a possibility, but the more likely scenario is that either the workforce size will remain constant or will expand.”<sup>75</sup>*

Whatever the disputes between the commitments of the merging parties and the concerns expressed by the unions, the Tribunal was satisfied with the undertakings given by the merging parties that there would be no retrenchments based on the merged entity’s operational requirements in South Africa, resulting from the merger, for a period of two years from the effective date of the transaction, were sufficient to meet any objection that could justifiably have been raised on the available evidence. The argument was raised both by the Ministers and the unions that the result of the merger would be a significant shift in purchasing away from South African manufacturers towards foreign

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<sup>75</sup> Ibid

low costs Asian producers, which would in turn have a significant impact upon small and medium sized businesses within South Africa and a further consequent loss of jobs.

Having analysed this evidence, the Tribunal concluded that, notwithstanding a legitimate concern which had been raised with regard to the effect of the merger upon local producers and jobs, the possible consequent job losses had to be weighed 'against the consumer interest in lower prices and job creation at Massmart. Since the evidence is that the likely consumers, who will benefit most from the lower prices associated with the merger, are low income consumers and those consumers without any means of support of their own, thus the poorest of South Africans, the public interest in lower prices is no less compelling'.

The Tribunal then turned to the conditions which had been sought by the unions, in particular certain procurement conditions. The Tribunal found that in order to impose procurement conditions, there would be a need to determine the local procurement levels of Massmart pre-merger and then hold it to this level for some period in the future. It held that 'this all sounds fine at the level of principle, but... founders when we get to the level of detail'. The Tribunal further held that it would be extremely difficult to establish the amount of locally produced product supplied which is actually produced locally. Further, there was no rational basis for determining the period in which the procurement conditions should operate. In addition, the proposed conditions, in the Tribunal's view, would create an unjustified symmetry; that is the merged entity would be the only firm subjected to this restriction, while its rivals would be free to procure globally. In addition, the procurement condition would be impermissible as it would render the country in breach of trade obligations under several international trade agreements to which South Africa was a party. In the result, the Tribunal found that the remedies proposed by the unions were far too complex and imprecise.

It held that the proposal of the merging parties to establish a programme aimed exclusively at the development of local South African supplies, including small and medium size enterprises and funded in the fixed amount of R 100 million to be contributed by the merged entity over a three year period, was both appropriate, proportional and enforceable.

The merging parties initially sought the unconditional approval of the proposed transaction (which transaction was widely accepted to yield no competition law concern), the Tribunal opted to impose conditions (offered voluntarily by the merging parties) to its approval intended to protect certain specified public interest considerations, in particular employment and the ability of small, historically disadvantaged businesses to compete effectively.

Notwithstanding the decision of the Tribunal, which included conditions deemed to adequately address the potential impact on the aforementioned public interest considerations, SACCAWU, a trade union that had originally intervened in the Tribunal proceedings, sought and was granted leave to appeal the decision of the Tribunal to the CAC on the basis that the merger would be to the detriment of public interest and the Ministers of Economic Development, Trade and Industry and Agriculture, Forestry and Fisheries (collectively 'the Ministers') sought to review and set aside the decision of the Tribunal.

In its consideration of the appeal, the CAC indicated that the arguments raised by SACCAWU were insufficient to require the prohibition of the merger. While it was unable to conclude with a degree of precision the public interest benefits to which the merger would give rise, it stated that the pro-competitive benefits likely to result from the merger would countervail any alleged anti-competitive effect thereof. Notwithstanding the foregoing, the CAC required the merging parties to reinstate 503 employees, which SACCAWU had argued were retrenched to incentivise the conclusion of the merger. In addition, the CAC requested greater clarity from the merging parties pertaining to the establishment and development of a programme to support local South African suppliers.

The Tribunal imposed an undertaking (tendered by the merging parties) that the merging parties would establish a programme for the development of South African suppliers including small and medium enterprises for a fixed amount of R100 million, to be contributed and expended within three years of the effective date of the order. On appeal before the CAC, the CAC amended this condition to impose an obligation on the parties to commission a study by three experts (to be appointed by the trade unions, the

government and the merging parties) to determine the most appropriate means and mechanism by which local South African suppliers could be empowered to respond to the challenges of the merger. When the inquiry was done and the court was satisfied with the inquiry, it altered the order of the development fund and ordered that a sum of R200 million be effected towards development of the small scale businesses and that the operation should run for a period of five years. This was the final judgment passed on 9 October 2012.<sup>76</sup> The progress of this development fund is discussed in chapter 4.

**There are two very important principles that were stated in Wal-Mart that should be appreciated when carrying out a public interest analysis, namely that:**

### **2.9.1 Firstly, Public interest considerations must be merger specific**

A further consideration is that the public interest must be merger specific. Expressed in less technical language, unless the merger is the cause of the public interest concerns, we have no remit to do anything about them<sup>77</sup>. Tribunal commented that

*'Our job [as the Tribunal] in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction'.<sup>78</sup>*

The competition authorities have traditionally taken the view that despite the diverse objectives included in the Act, the public interest provisions of the Act ought to be narrowly interpreted;<sup>79</sup>

### **2.9.2 Secondly, The role of the competition Authorities is to protect existing rights as opposed to creating new rights**

This was expressed in the following quote:

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<sup>76</sup> Abigail Machine, Public interest and merger control in South Africa: The Walmart case revisited. Article submitted to the Department of Law at the University of Cape Town. <http://africanantitrust.com>, accessed on 18 January 2014

<sup>77</sup> Ibid

<sup>78</sup> [2011] 1 CPLR 145 (CT)

<sup>79</sup> Ibid

*‘Whilst in this case protecting existing collective rights is a legitimate concern that our public interest mandate allows us to intervene on because we are protecting existing rights from the apprehension that they may be eroded post-merger, we must be careful how far down this path we go. Protecting existing rights is legitimate, creating new rights is beyond our competence.’*

## **2.10 When public interest factors may lead to opposing conclusions**

It should be noted that public interest consideration may lead to conflicting conclusions. In Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Limited<sup>80</sup> the Tribunal noted that there may be instances where public interest factors may lead to opposing conclusions. By way of example, the Tribunal averred that a negative employment effect may be countered by a positive effect on a particular region in that in order to keep a factory open may require that substantial jobs be lost. Other instances include a situation where the merger is required to save a failing firm; in order to be competitive cost reductions in the form of job cuts are required; and a lower cost base, which will result in lower prices for consumers, can only be achieved by job cuts<sup>81</sup>. A similar view was echoed in the Harmony Gold matter where the Tribunal also noted that it is possible that public interest factors do not point to the same conclusion<sup>82</sup>.

By way of example a merger could give rise to employment losses (negative effect) whilst creating a national champion (positive effect). Therefore there is an intrinsic requirement that the Tribunal perform a balancing act of these conflicting factors before reaching a net conclusion on public interest. The Walmart/Massmart matter builds on this and pits negative public interest effects against consumer welfare enhancing outcomes arising from a merger. Indeed there was an agreement by all parties concerned that there were cognizable consumer welfare effects arising from the merger in the form of lower prices that would affect the most vulnerable of consumers. What

<sup>80</sup> Case no. 08/LM/February 2002, 19 April 2001

<sup>81</sup> Willem Boshoff, Daryl Dingley & Janine Dingle, The economics of public interest provisions in South African competition policy, 6th Annual Conference on Competition Law, Economics and Policy, 6 & 7 September 2012, <http://www.compcom.co.za>, Accessed on the 14th of November 2014

<sup>82</sup> [2005] 2 CPLR 484 (CT)

then of these potential consumer welfare enhancing effects when pitted against a negative impact on public interest? Indeed it seems to me that the balancing act required necessitates a strict application of the law on the facts of the case and most importantly raises the issue of merger-specificity as a guiding principle in the assessment of public interest as applied in the competition evaluation<sup>83</sup>

### **Conclusion**

This essay has endeavored to display how section 12 A (3) is applied in merger proceedings as it relates to public interest factors. It has explored its role in championing the rights of employees, creating national champions, the protection of particular industrial sector or region and the protection of small businesses and previously disadvantaged individuals. This paper also explored the meaning of the word 'substantial' found in section 12 A (1) (b). It was stated that the Competition Act does not guide us in balancing the competition and public interest assessments except insofar as section 12 A (1) (b) requires that the public interest grounds should be substantial. Furthermore, from the above discussion we can deduce that section 12 A (3) can operate either to redeem an anti-competitive merger or impugn a merger deemed not anti-competitive. It was also stated that a public interest analysis ought to be carried out despite the outcomes of the competitive effects analysis. This makes the public interest provision a peremptory provision which has to be adhered to at all costs. Furthermore it was stated in the case law discussed that the public interest analysis is not a blinkered approach, which makes the public interest inquiry separate and distinctive from the outcome of the prior inquiry. A further consideration is that the public interest must be merger specific. It was further stated that the purpose of section 12 A 3 is to protect existing rights and not necessarily creating new rights. The competition authorities rightly stated that such a feat is beyond their competence. It is further interesting to note that the competition authorities are unlikely to prohibit a merger that is not anti-competitive, on public interest grounds. It is suggested that the most important effect of

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<sup>83</sup> Hodge J, Goga S, Moahloli T, PUBLIC INTEREST PROVISIONS IN THE SOUTH AFRICAN COMPETITION ACT- A CRITICAL REVIEW, Competition Policy, Law and Economics Conference 2009, <http://www.compcom.co.za>, accessed on 19 November

the public interest criteria has been that the authorities frequently approve mergers subject to conditions that promote public interest.

## Chapter 3

### **The criticisms that have been levelled against public interest evaluation in a merger.**

#### **3. Introduction**

Section 12 A (3) of the Competition Act has been the subject of much academic debate from competition law experts. Chapter 3 will lay out some of those criticisms and then proceed to do an evaluation of same. It will then proceed to give an opinion on whether or not the criticism is valid. It must be noted that the Wal-Mart merger will form the crux of our discussion in this chapter.

#### **3.1. Taking public interest too far: Wal-Mart**

The competition authorities are mandated by the empowering provision to protect existing public interest rights and not to seek to create rights. If the Competition authorities seek to create rights that were not present before the merger then they have exceeded their jurisdiction. The Wal-Mart/Mass-Mart merger has come under considerable criticism for over stepping their powers in that they sought to protect one of the union's rights as the main union representative.

*“The merged entity must honour existing labour agreements and must continue to honour the current practice of the Massmart Group not to challenge SACCAWU’s current position, as the largest representative union within the merged entity, to represent the bargaining units for at least three (3) years from the effective date of the transaction”<sup>84</sup>*

It is submitted that this condition does raise serious concerns. It requires further exploration of whether the competition authorities' mandate to consider employment

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<sup>84</sup> (Minister of Economic Development and Others v Competition Tribunal and Others; South African Commercial, Catering and Allied Workers Union v Walmart Stores Inc and Another [2012] 1 CPLR 6 (CAC) ('Minister'), para 172 in para 2.1.3 of the CAC order)

issues during the merger review process extends to imposing a condition of this nature<sup>85</sup>. The Competition Act specifically excludes from its ambit certain labour practices that may at face value appear to be anti-competitive, in recognition of the social importance of these practices and their value in promoting and protecting the interests of employees. Consequently, sections 3(a) and (b) specifically exclude the employment law practices of collective bargaining and collective agreements.<sup>86</sup>

*'Section 3. Application of Act*

*(1) This Act applies to all economic activity within, or having an effect within, the Republic, except –*

*(a) Collective bargaining within the meaning of section 23 of the Constitution, and the Labour Relations Act, 1995 (Act No. 66 of 1995);*

*(b) a collective agreement, as defined in section 213 of the Labour Relations Act, 1995'*

The competition authorities consider the effect of a particular merger on employment, and, in doing so, are required to bear in mind the extent to which it is appropriate for them to advance employment-related interests during a merger. It is not clear from the Competition Act or from existing case law how far the competition authorities' mandate to consider employment-related issues extends.<sup>87</sup>

With regard to the competition authorities' mandate to consider employment-related issues in terms of section 12A(3) of the Competition Act, the Tribunal has recognised that the most powerful instruments available to the unions to address any such issues that arise during competition proceedings are usually the Labour Relations Act 66 of 1995 (LRA) or private collective bargaining agreements<sup>88</sup>. The authorities' involvement should accordingly be limited to balancing the effect on competition and

<sup>85</sup> Jessica Staples, Mike Holland, Jannie Rossouw, Taking public interest too far: Walmart Stores Inc v Massmart Holdings Ltd, SA Mercantile Law Journal, 2013, Volume Number: Vol 2, Issue 1, Pages 94-106

<sup>86</sup> Ibid

<sup>87</sup> Jessica Staples, Mike Holland, Jannie Rossouw, Taking public interest too far: Walmart Stores Inc v Massmart Holdings Ltd, SA Mercantile Law Journal, 2013, Volume Number: Vol 2, Issue 1, Pages 94-106

<sup>88</sup> Ibid

employment, as this falls outside the scope of the LRA and collective bargaining instruments.<sup>89</sup>

It is submitted that the authorities erred in not applying this reasoning to the imposition of the condition that requires the merged entity to recognise SACCAWU as the largest representative trade union for a period of three years after the merger.

It is further submitted that the position of SACCAWU within the merged entity appears to be an issue that falls more appropriately within the scope of bargaining instruments and the Labour Relations Act and accordingly ought to be enforced in these forums instead. As such, the competition authorities went beyond their scope and intruded into employment law to an inappropriate extent in the Walmart condition<sup>90</sup>.

### **3.2 The competition authorities give effect to interests that extend beyond the scope of the Act**

It is submitted that the conditions imposed in *Kansai v Freeworld, Wal-Mart v Massmart* and *Pioneer v Pannar* give effect to interests that extend beyond the scope of the Act.<sup>91</sup> The *Pioneer v Pannar* is discussed in chapter 4 of this paper.

It is stated that the condition that called for the establishment of training and development programmes that will assist SMME's and previously disadvantaged persons in trading with Wal-Mart, while framed as falling within the ambit "*of harm to the public interest in employment, industry sectors, BEE business and small business*" is a far stretch from the listed public interest ground. It is further stated that public interest listed in the competition act are better suited to a narrow interpretation and should be considered only to the extent that they relate to competition law and in general and there is no other appropriate mechanism for pursuing such policy objectives. Certain competition law experts say that though public interest must continue to play a role in merger analysis in South Africa, the competition authorities are still required to act

<sup>89</sup> (*Unilever Plc v Competition Commission & CEPPWAWU* [2001–2002] CPLR 336 (CT) para 43).

<sup>90</sup> Jessica Staples, Mike Holland, Jannie Rossouw, Taking public interest too far: *Walmart Stores Inc v Massmart Holdings Ltd*, SA Mercantile Law Journal, 2013, Volume Number: Vol 2, Issue 1, Pages 94-106

<sup>91</sup> *Ibid*

within the scope of their powers and should not be pushed into pursuing government objectives that fall outside this<sup>92</sup>.

In Kansai/Freeworld government (Department of Trade and Industry and EDD) entered into direct discussions with the merging parties and proposed conditions, *inter alia*, in relation to employment, BEE and investment in the local industry. The competition authorities approved the merger with the above mentioned conditions. These conditions are arguably more aligned with the interests of third party interveners in the merger review process than the developmental objectives in the Act, which previous decisions have indicated ought to be interpreted with circumspection. The conditions imposed Exceed the ambit of the legislated public interest grounds contained in section 12 A (3) of the competition Act. Such an approach undermines the appropriate role of competition law and overlooks legislation and other bodies created to facilitate the achievement of these public interest objectives.<sup>93</sup>

It is submitted that such an approach from Competition Authorities is both beneficial and disadvantageous.<sup>94</sup> In that you have the objectives of the Act with regard to public interest being given effect to through the merger proceedings, however in the same regard you find that the courts often extend beyond the province of the Competition Act and into the province of other legislation. A balance has to be struck between giving effect to the objectives of the Act and stepping into the terrain of other legislation.

I am of the view that proceedings should also not be solely occupied with the interest of third party interveners. Such could have the harmful impact of hindering commercial traffic and detract foreign direct investment. The Act's objectives recognise the importance of creating opportunities for foreign investment and the imposition of onerous conditions that are likely to deter investors is counter-productive to the achievement of this objective. Many foreign investors are observing our current competition trends and we have to be cautious that we do not place undue difficulty on

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<sup>92</sup> Claire Avidon and Claudio Azzarito, Being pushed to promote government policies, Without Prejudice, February 2012

<sup>93</sup> Ibid

<sup>94</sup> Ibid

foreign investors. In February, a senior vice president at the U.S. Chamber of Commerce said on a trip to South Africa that many U.S. investors had been watching the response by the South African government to Wal-Mart's entry before deciding whether to enter the country themselves.<sup>95</sup>

A fine balance needs to be struck between the Act's developmental objectives and the need to create an environment that will be conducive to commercial expansion and direct foreign investment.<sup>96</sup> A narrow, merger-related application of the public interest provisions in the Act has previously been considered the most effective way to promote transactions that are beneficial to the economy while still protecting the public interest, thus fulfilling both the competition-related and the imposition of onerous conditions that are likely to deter investors is counter-productive to the achievement of this objective<sup>97</sup>. It is submitted that such an approach protects the public interest, thus fulfilling both the competition-related and developmental objectives of the Act.

### **3.3 Concerns that competition authorities may not be exercising their public interest mandate independently**

There is also a growing concern that the competition authorities may not be exercising their public interest mandate independently but are giving in to pressure from interveners promoting their own interests and policies. This is of great concern and such can defeat the whole purpose of the competition Act. We need all stakeholders and in particular merging parties to have a certain level of confidence in the Competition authorities<sup>98</sup>. In order to enforce and promote competition effectively, as envisaged by the Act, it is important that the competition authorities are perceived as "independent institutions to monitor economic competition". Perceptions that the independence of the competition authorities is under threat is therefore exceedingly damaging to the

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<sup>95</sup> Micaela Flores-Arroz and Vas Musca, Walmart in South Africa: The good, the bad and the ugly, 17 October 2011, <http://www.consultancyafrica.com/>, Accessed on the 18 November 2014

<sup>96</sup> Ibid

<sup>97</sup> Ibid

<sup>98</sup> Ibid Claire Avidon and Claudio Azzarito, Being pushed to promote government policies, Without Prejudice, February 2012

competition authorities' role as the enforcers of the objectives of competition policy in South Africa.<sup>99</sup>

Government's "arbitrary" intervention on the basis of its "industrialisation" objectives has raised a serious concern amongst competition experts. This is illustrated in Kansai/Freeworld. This clearly goes against the process set in place. This is clearly an irregularity on the part of the government. The government should ensure that they comply with the Act and allow for the competition authorities to perform their statutory mandate without fear of any arbitrary government intervention. In Kansai/Freeworld, government apparently pushed for a condition that required investment in decorative coatings research and development and in respect of employment, although no direct impact on employment was envisaged, government apparently insisted on the monitorium. In this case, the competition authorities agreed to conditions around the development of local manufacturing. The details of these conditions, agreed between government and the transacting parties were not part of the public record. However, an attempt to commit the firms to a particular allocation of resources, even if agreed upon, place constraints on the firms and it becomes difficult to arrange their production in the least costly method, to be productively efficient. Under different economic conditions, these arrangements may no longer be viable, forced constraints prevent the firm from responding appropriately. This mode of intervention whereby merging parties engage directly with government raises questions regarding transparency and accountability and arguably challenges the independence of the competition institutions<sup>100</sup>.

This type of arbitrary intervention was replicated in the Wal-Mart/Massmart transaction. It is said that when the deal was announced, the Minister of Economic Development established an expert panel to provide advice on the impact of the transaction. The panel apparently reported to the Minister that it was "probable that, owing to the size and international exposure of Wal-Mart, employment, the welfare of local manufacturers and small businesses would be seriously affected". According to Lewis (2012), the advice was opaque and from an administrative law perspective

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<sup>99</sup> Ibid

<sup>100</sup> Willem Boshoff, Daryl Dingley & Janine Dingle, The economics of public interest provisions in South African competition policy. 6th Annual Conference on Competition Law, Economics and Policy, 6 & 7 September 2012 <http://www.compcor.co.za>, accessed on the 14th of November 2014

inappropriate. Furthermore, it is also suggested that the Department of Economic Development also contacted the merging parties prior to the filing of the transaction as well as various stakeholders in order to solicit their views on the transaction. The Minister of Economic Development therefore created an impression that - "if you want the merger to be approved speak to the Minister" and the Minister "can leverage and hold-up the process". There was thus no systematic approach to the issues raised and no transparency in the process. Government effectively proceeded with a parallel process to the competition authorities, which is arguably an inappropriate way to conduct policy. In addition, government's fixation with foreign companies owning domestic firms as well as the impact in local procurement reflects governments "industrialisation" policy which falls outside the scope of the public interest provisions in the Competition Act. Such behavior is uncalled for and a travesty of justice. Such actions will only serve to cast aspersions over the competition process. It is important that competition law and that the competition authorities are not seen as another tool of government.<sup>101</sup>

### **3.4 Certain government ministries have been accused of being too paternalistic.**

This may be evidenced by arbitrary nature of the intervention by Department of Mineral and Energy in the merger involving shell and Tepco<sup>102</sup>. In that it was attempting to decide what was in the best interests of Thebe without proper consultation or consideration on the ultimate effects of its intervention<sup>103</sup>. It is also reported that parties often times are under political or other pressures and that most undertakings are often elicited rather than being voluntary<sup>104</sup>. This is evidenced by the Wal-Mart merger and the Kansai merger. Such acts have the effect of undermining the competition process in place and casting aspersions over the merger evaluation process.

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<sup>101</sup> Ibid

<sup>102</sup> Ibid

<sup>103</sup> Willem Boshoff, Daryl Dingley & Janine Dingle, The economics of public interest provisions in South African competition policy, 6th Annual Conference on Competition Law, Economics and Policy, 6 & 7 September 2012, <http://www.compcom.co.za>, Accessed on the 14<sup>th</sup> of November 2014

<sup>104</sup> Claire Avidon and Claudia Azzarito, Being pushed to promote government policies, Without Prejudice, February 2012

### **3.5 The question as to whether the competition authorities are the right institutions to balance welfare and public interest considerations.**

Another issue that has arisen relates to the suitability of competition authorities to deal with public interest. There is an emerging view in the South African context that suggests that public interest consideration is best left to other agencies better equipped to deal with such issues.<sup>105</sup> It is stated that a competition authority may not be the right body to balance competing considerations as it may not possess the most effective and efficient means for achieving these objectives. For example, in circumstances where a merger impacts on a remote area with high unemployment levels, the competition authorities are unlikely to be well suited to effectively evaluate the indirect and direct economic effects of the merger on the region. This particular view was supported by the Competition authorities in the Tepco merger. It was stated in the merger between Shell South Africa (Pty) Ltd ("SSA") and Tepco Petroleum<sup>106</sup> that 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 and the Skills Development Act. The competition authorities, however well intentioned, were 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.<sup>107</sup>

I do not agree with the assertion that the competition authorities are not the right institutions to balance welfare and public interest considerations. The competition authorities act in a manner that is in the ambit of their responsibility. Competition authorities are acting pursuant to an empowering provision, namely section 12 A (3), the preamble and section 2 that contains the objectives of the Act. I think that a more legitimate question to ask is whether or not they have over-stepped their jurisdiction and treaded upon the sphere of another. The competition authorities have the capacity and the competence to fulfil their statutory obligations of considering section 12 A (3). The

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<sup>105</sup> Ibid

<sup>106</sup> Shell South Africa (Pty) Ltd ("SSA") and Tepco Petroleum (Pty) Ltd ("Tepco") (Case No. 66/LM/Oct01).

<sup>107</sup> Ibid

competition authorities have shown themselves a more than competent arbiter in competition matters and public interest matters that directly impact on competition.

Furthermore there is a need to achieve uniformity of approach as it relates to mergers for the concerned stakeholders such as unions. It would prove to be a complicated process if a stakeholder had to have multiple proceedings over one matter of contention. With all its flaws, it is surely preferable to allow for the simultaneous consideration of competition and public interest issues by the competition authorities in the course of analysing a merger. As David Lewis noted in May 2002,

*'For one authority to take a decision on competition grounds, and another to take the public interest decision, would invite massive lobbying, and would lack the openness and transparency of our unified process. The single, unified forum, and the holistic inquiry that accompanies it, allows for the imposition of conditions – either to protect the public interest where a pro-competitive merger would otherwise be prohibited due to its negative impact on public interest, or to protect competition where an otherwise anti-competitive merger is approved due to its positive public interest impact. The alternative would be a bifurcated, disjointed and uncoordinated consideration of these issues'*<sup>108</sup>

David Lewis further states that allowing political organisations or other public institutions to handle public interest issues may unnecessarily result in competition issues being totally ignored out of the equation. Given the power that these organisations have for example the department of trade and industry, compared to the competition authorities, this is more likely to result in competition issues being sacrificed. It is important that policy makers or authorities applying public interest test do so in a manner which is independent from political influence<sup>109</sup>.

The competition authorities' public interest mandate is not divorced from their competition analysis: the factors are analysed with regard to one another, in a holistic

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<sup>108</sup> Ibid

<sup>109</sup> Abigail Machine, Public interest and merger control in South Africa: The Walmart case revisited. Article submitted to the Department of Law at the University of Cape Town, <http://africanantitrust.com>, Accessed on the 23 Jan 2015

inquiry, in which the competition assessment has relevance to the question of justification in respect of the public interest inquiry.<sup>110</sup> The competition authorities have to exercise great caution and discretion and always bear in mind that each public interest element is also protected by legislation and institutions created specifically for this purpose<sup>111</sup>.

The Tribunal dealt with this question in the Metropolitan/Momentum merger. It contended that the inclusion of employment considerations in a merger, albeit secondary to other statutes as was found in the Shell and Tepco, was essential given that the task competition authorities are charged with is different from statutes such as the Employment Equity Act among others. In this, the Tribunal argued that while a labour tribunal may be tasked with the determination of the operational requirements of a firm and the fairness of the process in relation to affected employees they, on the other hand, have a different mandate. This essentially involves determining whether the merger, which will give rise to the operational circumstances should have been cleared in the first place. This differs from the considerations made by labour agencies that mainly focus on the fairness of the process in relation to the affected employees<sup>112</sup>.

Abigail Machine argues that while it may be true that there is an overlap of responsibilities, it should be borne in mind as well that the socio-economic issues referred to are unique in that they are competition related, more particularly merger related. They arise within the merger considerations and therefore need to be dealt with when issues of competition are being considered. It would be inappropriate to have these issues dealt with by another authority as it means they would have to wear competition garments to understand the relationship and be able to deal with them<sup>113</sup>.

The primary predicament is that of striking the relevant balance. South Africa's competition authority needs to strike a fine balance between competition and public interest, since if the impact of a decision on employment or black ownership is ignored,

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<sup>110</sup> Ibid

<sup>111</sup> (Daun et Cie AG v Kolosus Holdings Ltd [2003] 2 CPLR 329 (CT) para 124).

<sup>112</sup> Ibid

<sup>113</sup> Abigail Machine, Public interest and merger control in South Africa: The Walmart case revisited. Article submitted to the Department of Law at the University of Cape Town. <http://africanantitrust.com> Accessed on the 23 Jan 2015

its credibility and legitimacy will come under fire<sup>114</sup>. David Lewis remarked in September 2002 in a speech to the International Competition Network Merger Working Group said that

*'The competition authorities have, in my view, succeeded in striking a balance between public interest and competition, and have not fallen prey to seductive arguments in relation to public interest issues.'*<sup>115</sup>

The public interest provisions in South African competition law are rightfully placed as they compete with the economic goal of economic efficiency<sup>116</sup>. I am in total agreement with Mr. Lewis' statement because the competition authorities have applied the public interest test with good sense, despite attempts by parties to persuade the Tribunal either to approve or prohibit a merger on disingenuous public interest grounds. The focus, quite correctly, has been on the impact of the transaction on competition.

### **3.6 Labour's/ Unions intervention.**

Critics have also stated that labour's/ Unions intervention and the authorities support thereof perhaps reflects a socio-political approach of serving the interests of the employed (the "politically effective group") as opposed to promoting sustainable job creation in the long-run by creating efficient markets<sup>117</sup>. This may be seen by many to be a short term approach and lacking the element of sustainability. This policy approach is also criticised for interfering in efficient market outcomes.<sup>118</sup> A focus on the protection of employment, particularly where job losses are the result of efficiency-enhancing synergies between two merging firms, can often prevent a merged entity from being as efficient as it otherwise would be, resulting in less competition and knock-on effects of higher prices and less innovation. In other words, giving priority to the specified public

<sup>114</sup> Marumo Nkomo and Magdaleen Van Wyk, Public interest criteria in mergers-protectionist measures? 6th Annual Conference on Competition Law, Economics and Policy, 6 & 7 September 2012, <http://www.compcom.co.za>, Accessed on 26 November 2014

<sup>115</sup> Abigail Machine, Public interest and merger control in South Africa: The Walmart case revisited. Article submitted to the Department of Law at the University of Cape Town, <http://africanantitrust.com>, Accessed on the 23 Jan 2015

<sup>116</sup> Ibid

<sup>117</sup> Ibid Willem Boshoff, Daryl Dingley & Janine Dingle, The economics of public interest provisions in South African competition policy. 6th Annual Conference on Competition Law, Economics and Policy, 6 & 7 September 2012 <http://www.compcom.co.za>, accessed on the 14th of November 2014

<sup>118</sup> Ibid

interest categories can serve to undermine the primary competitive analysis in mergers, thus harming the broad "public interest" that competition policy aims to promote<sup>119</sup>. This is a valid point which requires definite attention from our competition authorities. The pursuit of balance is proving to be an elusive one. It is a very intricate process in that in your pursuit of benefiting the public interest you may find that your attempts have an opposite effect of actually derailing the broader public interest. These means that the Metropolitan and the Wal-Mart mergers might potentially yield an adverse return in the long term labor markets. It is submitted that the conditions prohibiting retrenchments in the short term have two potential implications for efficiency and welfare. Firstly, not allowing the merging parties to allocate their labour in the most efficient manner raises costs for the firms. Although temporary, it increases the cost of production without any gains in output.<sup>120</sup> This is a waste of resources and decreases the productive efficiency of the firm. If these costs are passed on to consumers, this raises prices, which reduces the allocative efficiency and consumer surplus benefits of the merger<sup>121</sup>; Secondly, the retrenchment or re-employment condition is essentially protecting jobs that will inevitably be lost anyway, the costs incurred in retaining redundant employees is akin to an indirect tax of sorts on the owners of the firm. As firm's profits are distributed amongst a wide range of groups, including pension funds, households, individuals and tax transfers, the distributional effect of this distortion may be far reaching.<sup>122</sup> Thus the retrenchment or re-employment conditions are protecting jobs in the short run, redistributing wealth to labour at the expense of consumers and the various recipients of rents from the firm.<sup>123</sup>

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<sup>119</sup> Article by Justin Balkin and Michael Mbikiwa ENSafrica, South Africa: Have The Competition Authorities Correctly Applied The Public Interest Test In The Competition Act?, Updated: 14 February 2014 Accessed on 17 November 2014

<sup>120</sup> Willem Boshoff, Daryl Dingley & Janine Dingle, The economics of public interest provisions in South African competition policy. 6th Annual Conference on Competition Law, Economics and Policy, 6 & 7 September 2012 <http://www.compcom.co.za>, accessed on the 14th of November 2014

<sup>121</sup> Ibid

<sup>122</sup> Ibid

<sup>123</sup> Ibid

### 3.7 Cost implications of public interest factors.

To illustrate this point we will focus on the Wal-Mart merger. In this case the merging parties agreed to an amount that is somewhere in the region of R200 million development fund to develop local suppliers. This was to address the concern of local procurement. It is submitted that from an economic perspective this could be an effective tax.<sup>124</sup> The implication is that a tax inevitably increases costs for firms, how these costs is passed on depends on a number of factors amongst other things the elasticities of demand.<sup>125</sup> Consumers may carry a disproportionately large burden of the tax.

### 3.8 Unnecessary time delays caused by Public interest factors

Some have complained about what they refer to as unnecessary delays caused by considering these non-economic issues especially where economic issues are absent, for example in the Wal-mar/Massmart merger. Longer periods are needed for proper assessment of competition factors with simultaneously conducting a public interest inquiry and analysis.<sup>126</sup>

## Conclusion

In a nutshell the criticism that has been levelled mostly on the Competition authorities as it pertains to section 12 A (3) 'is that the pendulum has swung too far in the direction of public interest'.<sup>127</sup> Furthermore it appears that the government has in the recent past over-stepped their bounds of their legislative mandate by treading on the spheres of other legislation. It was also argued that the competition authorities are not the right forum to consider public interest provisions because they do not have the necessary skill and expertise. We considered the Wal-Mart merger extensively and found that the competition authorities in fact erred by treading upon the territory of the

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<sup>124</sup> Ibid

<sup>125</sup> Ibid

<sup>126</sup> Abigail Machine, Public interest and merger control in South Africa: The Walmart case revisited. Article submitted to the Department of Law at the University of Cape Town. <http://africanantitrust.com>, accessed on 18 January 2014

<sup>127</sup> Ibid

labour relations Act and in that regard violated section 3 of the Competition Act. We also considered the competition implications of over-focusing on public interest provision and lastly the likelihood of adverse cost implications that could have a negative bearing on consumers. It appears that the criticism levelled against the competition authorities as it pertains to Section 12 A (3) is certainly valid and that more strides should be taken to ensure that a proper balance is struck and that proper forums are used to address public interest concerns. With that said the competition authorities have shown a relentless commitment to striking the right balance and budging in to aggressive lobbying from government and unions. It is submitted that the competition tribunal is still the proper forum to consider public interest issues that are merger specific.

## Chapter 4:

### **Will evaluate whether or not section 12 A (3) of the Competition Act is achieving its intended purpose**

#### **4. Introduction**

This particular chapter will evaluate whether or not the competition authorities have succeeded in fulfilling the objectives of the Act as it pertains to section 12 A (3), by analyzing the cases that have come before them.

#### **4.1 Divergent views**

There are some who hold the view that public interest is not considered adequately by competition authorities. It has been expressed that public interest has not received sufficient attention and prominence in merger evaluation in the application of the South African competition legislation, “This suggests that public interest has somewhat been a neglected step-child in treatment compared to the more attractive and accepted competition evaluation that competition authorities find comfortable”<sup>128</sup>. It was further suggested that, albeit indirectly, the application of public interest provisions embedded in the Act have not been responsive to the circumstances of the broader developmental needs of society.<sup>129</sup> However an assessment of Tribunal merger decisions from 1999 to 2009 shows that public interest has been and continues to be considered.<sup>130</sup>

#### **4.2 Early decision making by the Competition Tribunal**

It seemed to suggest that where a public interest consideration was in the jurisdiction or sphere of another governmental agency, the role of the competition

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<sup>128</sup> TN Njisane, The rise of Public Interest: Recent high profile mergers, Public Interest Law Gathering. 1 – 24, [www.africanlii.org](http://www.africanlii.org), accessed on 15 May 2014

<sup>129</sup> Ibid

<sup>130</sup> Ibid

authorities should be secondary to those agencies and statutes.<sup>131</sup> This is illustrated by the merger between Shell and black empowerment oil company Tepco.<sup>132</sup> The Tribunal dismissed the recommendation of the Commission that, inter alia, the deal be conditional on Tepco remaining an independent company, jointly controlled by Thebe and Shell. The Commission had indicated that it had included the proposed condition because by removing Tepco as an independent participant in the petroleum industry would, from a public interest perspective, hinder the 'ability of a firm controlled by historically advantaged individuals from becoming competitive'. The Tribunal analysed these proposed conditions, and reached the conclusion that they were not appropriate. The Tribunal went on to caution the Commission that it 'should be extremely careful when, in the name of supporting historically disadvantaged investors, it intervenes in a commercial decision by such as (sic) investor'.<sup>133</sup> The Tribunal concluded that the conditions constrained not only SSA as the acquirer, but also the historically disadvantaged target. To the extent that it constrained their capital raising options, it could condemn firms controlled by historically disadvantaged persons to the margins of the economy. The Department of Minerals and Energy Affairs (DME) made submissions regarding conditions to be imposed on the merging parties. In particular, it requested that the seller, Thebe, be given a right of first refusal in relation to Shell SA's upstream refining activities should it consider disposing of all or part of its investments at this level of the supply chain. The Commission argued that it had to be guided by the public interest and enforce public policy, and what might be good for Tepco might not be good for South Africa and its empowerment objectives. The Tribunal referred in this case to the Employment Equity Act, the Skills Development Act and the Petroleum Charter as the more appropriate legislative instruments and cautioned the Commission on its role in pursuing its public interest mandate in an 'over-zealous manner lest they damage precisely those interests that they seek to protect.

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<sup>131</sup> Willem Boshoff, Daryl Dingley & Janine Dingley, The economics of public interest provisions in South African policy. Paper presented at the 6th Annual Conference on Competition Law, Economics and Policy, 6 & 7 September 2012, <http://www.compcom.co.za> 26 November 2014

<sup>132</sup> Shell South Africa (Pty) Ltd ("SSA") and Tepco Petroleum (Pty) Ltd ("Tepco") (Case No. 66/LM/Oct01).

<sup>133</sup> Ibid

This decision is an indication that initially the competition authorities were reluctant to be aggressive with regard to the implementation of public interest. The effect of this case would have meant that the competition authorities are secondary to other governmental institutions with regard to public interest factors mentioned in the Act. Such a limitation would have countered the governmental objectives of attempting to use competition law as an agent of imposing public interest factors.

Anglo American Holdings Ltd ("Anglo") and Kumba Resources Ltd ("Kumba").<sup>134</sup>In its decision the Tribunal first analysed the competition effects of the transaction, and concluded that the transaction would not substantially lessen or prevent competition. The Industrial Development Corporation ("IDC") intervened in the case. This was a long-running case, in which competition and public interest issues were exhaustively examined. Insofar as public interest issues were concerned, the intervener, the IDC, argued forcefully that the merger should be prohibited on public interest grounds. Referring to the section dealing with the purpose of the Act, the IDC argued that the merger would not be compatible with the purpose set out in s2(f) of the Act, being "to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged person." The IDC argued that Kumba was a strategic asset, and that were Kumba to fall under the sway of Anglo, one would not only not be promoting a greater spread of ownership, as set out above, but one would be doing the opposite, given that Anglo already had a large share of the economy.

The tribunal declined the IDC's interpretation of the Act. The Tribunal reached the conclusion that there was insufficient evidence to suggest that if the merger went ahead it would preclude the growth of ownership in Kumba by historically disadvantaged persons. The Tribunal therefore concluded that the transaction was not against the public interest, nor was it anti-competitive, and therefore approved the merger subject to the condition that prohibited information sharing.

The early decisions on public interest might suggest that public interest was not adequately considered by the competition authorities. It might have appeared that public interest did not receive sufficient attention and prominence in merger evaluation in the

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<sup>134</sup> Case No. 46/LM/Jun02

application of the South African competition legislation. The early decision making justified the view 'that public interest has somewhat been a neglected step-child in treatment compared to the more attractive and accepted competition evaluation that competition authorities find comfortable'<sup>135</sup>.

It can be argued that the initial application of public interest provisions embedded in the Act were not responsive to the circumstances of the broader developmental needs of society. They were restricted and lacked a dynamic element to them in that they refused to be creative in addressing public interest issues. They elected rather to assume a secondary position and delegate their statutory responsibilities to other institutions which frustrated the policy of the government to utilize competition law as a change agent.

There has however been a shift. Recent merger decisions by the Tribunal have once again highlighted the importance of public interest considerations in merger analysis. The Tribunal's decisions in the Metropolitan Holdings Limited and Momentum Group Limited and notably the Wal-Mart Stores Inc and Massmart Holdings Limited highlight the resurgence of public interest in merger evaluation.<sup>136</sup> The public interest provision has come to the fore because of the cases mentioned, in particular the Wal-Mart merger.

#### **4.3 Employment Conditions**

In the period 1999 to 2009 the Competition Tribunal considered approximately 658 large mergers and although very few turned on public interest over the relevant period various public interest factors have been considered by the Tribunal.<sup>137</sup> It is also interesting to note that employment consideration accounts for the highest proportion followed by considerations of impact on competitiveness of small business (including those owned or managed by previously disadvantaged persons). Consideration of impact on a particular sector or region has largely followed a declining trend with very few

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<sup>135</sup> TN Njisane, The rise of Public Interest: Recent high profile mergers, Public Interest Law Gathering. 1 – 24, [www.africanlii.org](http://www.africanlii.org), accessed on 15 May 2014

<sup>136</sup> Ibid

<sup>137</sup> Ibid

mergers in the early 2000's.<sup>138</sup> This is to be expected in South Africa because the issue of unemployment continues to be a problem. If competition authorities are to address the broader developmental needs of society then of necessity the issue of employment will be number one on the needs. Any merger that affects the issue of employment would require the competition authorities to take action as the competition act empowers them within the ambit of their powers. As the economy failed employment consideration was once again back on the agenda. From 2008 onwards, there was an upward trend in the consideration of public interest and this coincides with the global economic recession<sup>139</sup>. This showed responsiveness by competition authorities to broader socio-economic needs of the country.

The Metropolitan Holdings Limited and Momentum Group Limited<sup>140</sup> illustrates this point. The merger gave rise to one public interest consideration, namely the loss of employment. The Competition Tribunal, without prompting from government but at the insistence of labour, was willing to extensively address the regulation of labour on the basis of it being in the public interest to do so. In this case, the merging parties initially proposed to limit the number of merger related job losses to 1000 in the first three years following the implementation of the merger. The Competition Tribunal approved the merger subject to the restriction that, with the exception of senior managers, no retrenchments should occur as a result of the merger for a period of two years from the effective date of the transaction. Moreover, it held that redundancy concerns cannot be addressed through "soft" initiatives such as re-skilling and redeployment as these conditions are, in its experience, largely ineffective. In this instance, the Tribunal responded by elevating the status of employment as a public interest issue to such an extent that even a pro-competitive merger could be prohibited if the effect of the transaction on employment in the sector is not adequately addressed by the merging parties.<sup>141</sup>

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<sup>138</sup> Ibid

<sup>139</sup> Ibid

<sup>140</sup> Case 41/LM/Jul10

<sup>141</sup> Ibid

The Walmart-Massmart merger<sup>142</sup> raised ample public interest factors. One of the factors that were raised was the issue of employment. It was argued that the effect on employment may not only be felt by those employed by Massmart, but may also extend to those whose jobs may be threatened as a result of the merger. The effects could potentially include conditions of employment and a decrease of unions' collective bargaining rights. On the maintenance of employment, the Tribunal had ordered that the merged entity must when employment opportunities become available, give preference to the 503 employees retrenched in June 2010. However, the CAC ordered that these employees must be reinstated as it found that the retrenchment of these workers was sufficiently related to the merger. Other employment related conditions imposed by the CAC included a moratorium on retrenchments based on the merged entity's operational requirements for a period of two years; and the merged entity must honour existing labour agreements and current practice of bargaining with SACCAWU (the largest representative union). This further proves that section 12 A (3) of the Competition Act is attempting to meet its objectives, in particular as it pertains to employment.

Since the Metropolitan/ Momentum merger in 2010, there has been a marked shift in the competition authorities' approach to mergers that give rise to possible retrenchments. The Commission now consistently requires parties to provide detailed information regarding the exact number and skills-level of any employees that may be retrenched as a result of a merger. It has become common practice for conditions that cap retrenchments, both in respect of number and skills-level, to be imposed, even when the number of affected employees is very low. Conditions limiting retrenchments to as little as 10 or 14 employees have been imposed in recent months.<sup>143</sup>

In addition, in the Primeprac/ Murray & Roberts merger and the Reutech/ SAAB Grintek Defence merger, parties were required to provide practical support to affected employees such as counselling, assistance with administrative issues arising from the termination of employment, and the preparation of curricula vitae. The parties in the Reutech/ SAAB Grintek Defence merger were also required to establish a R 1 million

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<sup>142</sup> Case no: 110/CAC/Jul11 & 111/CAC/Jul11

<sup>143</sup> Janine Simpson, Webber Wentzel, Recent Trends In Merger Conditions Imposed By South African Competition Authorities. Last Updated: 20 November 2013, Accessed on 17 November 2014

employee training fund. In the Glencore/ Xstrata merger, in addition to imposing a limitation on retrenchments, the parties are required to engage with affected employees and trade unions before announcing any unskilled or semi-skilled retrenchments, and to make R 10 000 available per affected unskilled or semi-skilled employee for training and re-skilling.<sup>144</sup>

#### **4.4 Assessment mergers that may impact on national champions and a particular sector and region**

Iscor Limited and Saldahna Steel (Pty) Limited<sup>145</sup> the facts of the case were previously discussed in chapter 2 of this paper. This case saw the approval of a merger which was likely to lessen competition, as a prohibition would have resulted in even dire consequences. The merger was approved based on a public interest consideration. The failing firm defense raised by the parties outweighed these potential effects. This aspect of the merger indeed highlights the issue of competition policy being part of a suite of economic instruments used by government to achieve its economic development imperatives<sup>146</sup>

The Iscor Limited merger with Saldahna steel is a clear indication that section 12 A (3) of the Competition Act is not a neglected step child that is often ignored. In this merger an otherwise failing merger or anti-competitive merger was rescued by the public interest considerations. It is clear that had the merger not been approved a whole region would have suffered loss in terms of unemployment and the loss of economic activity. It can be said that section 12 A (3) of the competition Act gives the Act a dual effect in that it facilitates 'traditional' competition and also has a developmental edge to it. Furthermore it is submitted that the decision of the tribunal to approve the merger displays the competition authorities' commitment to respond to the broader needs of society.

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<sup>144</sup> Ibid

<sup>145</sup> Case no: 67/LM/Dec01

<sup>146</sup> Ibid

#### 4.5 Public interest concerns re: the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive.

It is interesting to note that the assessment of small business considerations, including those owned or managed by historically disadvantaged persons had not been raised in the many mergers considered by the Tribunal.<sup>147</sup> This was until recently, in particular the Wal-Mart<sup>148</sup> merger where the plight of small business and the previously disadvantaged was considered. The public interest concerns raised were the effects that the merger would have on employment; distribution and retail sectors; and the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive.

It was argued that the effect on employment may not only be felt by those employed by Massmart, but may also extend to those whose jobs may be threatened as a result of the merger. The primary concern was that due to Walmart's global purchasing powers, which dwarf those of Massmart, the merged firm would be able to source cheap imports, thereby diverting some of Massmart's procurement away from local suppliers to imports, and displacing local.

*"As a result and 'Given Wal-Mart's size and expertise...the proposal for a condition which would seek to enhance the participation of South African small and medium size producers in particular, in global value chains which are dominated by Wal-Mart so as to prevent job losses, at the least, and, at best, to increase both employment and economic activity of these businesses protected under s 12 A must form part of the considerations which this Court is required to be taken into account in considering a merger of this nature...This flows from the model of competition law chosen by the legislature and in particular as set out in s 12 A. It also forms part of the mandate given to the Tribunal and, on appeal, to this Court when faced with the inquiry as to whether a merger should be approved."*<sup>149</sup>

<sup>147</sup> TN Njisane, The rise of Public Interest: Recent high profile mergers, Public Interest Law Gathering. 1 – 24 Page [www.africanlii.org](http://www.africanlii.org), accessed on 15 May 2014

<sup>148</sup> Case nos: 110/CAC/Jul11 & 111/CAC/Jul11

<sup>149</sup> Ibid

The Wal-Mart deal is without a doubt the most prominent case on section 12 A (3) of the Competition Act. It showed the government's commitment to address the broader needs of society such as unemployment and the plight of small businesses. The case received widespread coverage from the media and from potential investors. Many government institutions and ministries were directly involved in the proceedings which showed a commitment by the government to employ the Competition Act as a tool to address the broader needs of society.

The outcome of the case shows the impact of section 12 A (3) because through this provision, workers that were retrenched in anticipation of the merger were reinstated and the cause of small businesses was championed and protected. Not only that but the competition authorities treaded on somewhat dangerous waters by protecting the rights of unions. This attracted much criticism and outrage from certain competition experts.

Pioneer-Pannar merger<sup>150</sup> was also another interesting case that showed the importance of section 12 A (3) of the Competition Act. In this merger the CAC held that the absence of the merger would likely see the decline and ultimately the demise of Pannar and the loss of its resources. Combining Pannar and Pioneer would however, result in an increase in competition for market leader Monsanto

The CAC's conditions of approval included that the parties had to establish an International Research and Technology Hub in SA to improve expertise in crops important to the country, and food security in Africa. Pioneer intended to invest up to R62 million by 2017. In addition, they had to be involved in spreading know-how amongst developing farmers to increase overall productivity, profitability and security. Pioneer has committed R20 million over the next 6 years to foster such partnerships and collaborations. The merged entity would also be obliged to make available the Africa genetic maize material public institutions for research and development, and to potential competitors identified by the CAC for breeding programs for use in South Africa.<sup>151</sup>

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<sup>150</sup> 113/CAC/NOV11

<sup>151</sup> Nkomo M and Van Wyk M, Public interest criteria in mergers-protectionist measures? 6th Annual Conference on Competition Law, Economics and Policy, 6 & 7 September 2012, <http://www.compcom.co.za>, Accessed on 26 November 2014

These conditions have the implication of increasing South Africa's research capacity as it pertains to agriculture and also improves expertise in the agricultural sector. This illustrates the impact of section 12 A (3) in bringing about economic reform for many South Africans and small businesses. Furthermore the CAC's conditions to the approval shows that the public interest factors in merger cases are being used more often to promote the purposes of the Competition Act especially to foster effective competitiveness of smaller firms and businesses through investment in research, education, skills and training and to maintain local industry and expertise<sup>152</sup>. The focus has gone from simply attracting foreign direct investment to what foreign direct investment can do for South Africa. Foreign direct investment in South Africa is viewed as beneficial only when it achieves certain policy aims.<sup>153</sup>

#### **4.5.1 The implications of the Wal-Mart/Massmart merger, re: small businesses**

Wal-Mart plays a large and ever-growing role in the U.S. economy. As of January 31, 2007, Wal-Mart operated more than 3,400 U.S. Wal-Mart stores along with more than 550 Sam's Club locations. Wal-Mart is the largest private employer in the United States, with 1.3 million employees, and the largest retailer in the United States. In 2004, Wal-Mart handled 6.5 percent of U.S. Furthermore Wal-Mart is the top U.S. seller of apparel, groceries, and music, among other products, and is the top retailer in most states<sup>154</sup>.

The Walmart merger has increased export opportunities for emerging South African wine markets under its developing wine programme. Wine makers have gained access into the Chinese and the US Market. According to Massmart, the 19 participating brands have sold almost 17000 bottles locally since the launch of the programme in March 2012. It is reported that all the brands are in the Makro shops and selected Game stores. Participants in this programme received consulting advice on issues such as

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<sup>152</sup> Marumo Nkomo and Magdaleen Van Wyk, Public interest criteria in mergers-Protectionist measures, Paper presented at the 6th Annual Conference on Competition Law, Economics and Policy, 6 & 7 September 2012, <http://www.compcor.co.za> accessed on 26 November 2014

<sup>153</sup> Abigail Machine, Public interest and merger control in South Africa: The Walmart case revisited. Article submitted to the Department of Law at the University of Cape Town. <http://africanantitrust.com>. accessed on 18 January 2014

<sup>154</sup> Basker Emek 'The causes and consequences of Walmart's growth' (2007) *Journal of economic perspective*, 179

customer analysis, packaging and pricing. Getting the wines from the farms to the stores was the biggest challenge and Massmart provides logistics support. Abigail Machine states that this reinforces the structure that the court sought from the merging parties to clearly indicate how they were going to work with small enterprises to ensure the development fund produced the desired results. Whilst the merger is benefitting from local procurement, the small and medium enterprises are benefitting from engaging with a global player which puts them on a global map by engaging with their products both locally and internationally.<sup>155</sup>

Furthermore Walmart commenced farming projects, contracting with farmers in the Limpopo region whereby the corporation purchases produce from these farmers, as well as providing training, mentoring and assistance with finance and business opportunities. It introduced a direct farming project in South Africa and aims to source 30% of its produce via this project, connecting some 1500 farmers to the group's value chain by 2016. This is an estimate of how the project is intended to grow but the good news is that these small businesses are already engaged by Walmart. This follows the conditions of the merger. Walmart has its foundation in South Africa which donated 100 fully equipped mobile kitchens to the 94+ school projects for Madiba, for use in under-resourced schools. It is making a commitment to making meaningful contributions to the country, which goes beyond consumer benefits.<sup>156</sup>

A programme call 'empowering women together' was established to help very small to medium sized enterprises run by women with the aim of integrating them into Walmart's supply chain. The programme was aimed at all African women from the participating countries including South Africa. An exclusive website aimed at showcasing women entrepreneurs from the nine participating countries was launched<sup>157</sup>.

In the Walmart merger the competition authorities have managed to achieve the objectives of the Act for societal development, in particular as it relates to small

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<sup>155</sup> Machine A, Public interest and merger control in South Africa: The Walmart case revisited. Article submitted to the Department of Law at the University of Cape Town. <http://africanantitrust.com>, accessed on 18 January 2014

<sup>156</sup> Ibid

<sup>157</sup> Ibid

businesses and the previously disadvantaged. The competition authorities have to be commended for this.

#### 4.6 Importance of public interest provisions

Public interest considerations weigh more heavily in developing countries than in developed countries because of the greater use of industrial policy in developing economies. It is often pointed out that a competition statute that simply ignores the impact of its decisions on employment or on securing or a greater spread on black ownership (in the case of South Africa) would greatly discredit competition authorities.<sup>158</sup> The case law that has been discussed shows that South African competition authorities have not ignored the impact of their decision on employment and redistribution of resources.

In South Africa there seems to be consensus between various interest groups that there is a need for public interest consideration in merger policy in South Africa. I concur with this view noting that the South African competition legislation was designed, by the democratically elected government of 1994, as part of a suite of policy instruments aimed at the achievement economic development imperatives and addressing the socio-economic ills deriving from previous regimes. As such there is a need for a competition policy that is responsive, as has been demonstrated, to the broader socio-economic needs of society. However the point of divergence between various interest group is the level at which public interest ought to be considered in merger proceeding. It is the view of government that public interest should be given a more prominent placing in merger review and that the Competition Act “seeks to harness the power of competition to the broader developmental needs of our society”<sup>159</sup>.

This view has been met with concern by competition practitioners and agencies alike with some warning that competition policy alone cannot be used to address the developmental needs of the country.<sup>160</sup> I agree with this view, however it has to be said that the competition policy is an important means of bringing about developmental

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<sup>158</sup> TN Njisane, The rise of Public Interest: Recent high profile mergers, Public Interest Law Gathering. 1 – 24 Page, [www.africanlii.org](http://www.africanlii.org), accessed on 15 May 2014

<sup>159</sup> Ibid

<sup>160</sup> Ibid

progress. Public interest has not yet trumped competition considerations, the approach adopted by the Tribunal has generally been both in line with the original motivation and sound practice.<sup>161</sup> Competition authorities in their application of section 12 A (3) have displayed commendable discretion and have not been led astray by zeal, though there are many who disagree with this view.

If one looks back at the body of case law since 1999, it is apparent that the competition authorities have applied the public interest test with good sense, despite attempts by parties to persuade the Tribunal either to approve or prohibit a merger on public interest grounds. The focus, quite correctly, has been on the impact of the transaction on competition, where again the competition authorities have applied a reasoned approach to the evidence before them.<sup>162</sup>

Although as David Lewis, Chairperson of the Competition Tribunal, remarked in September 2002 in a speech to the International Competition Network Merger Working Group,

*'I readily concede that public interest considerations weigh more heavily in developing countries than they do in developed countries' for a number of reasons, including firstly that 'it is widely accepted that there is a greater role for industrial policy, for targeting supported strategically selected sectors or interest grounds, in developing that in developed countries'*<sup>163</sup>.

He continued that

*'The primacy of the competition evaluation is secured by the structure of the Act which provides that the competition evaluation is completed as the prior step in the decision making process and, hence, that*

<sup>161</sup> James Hodge, Sha'ista Goga, Tshepiso Moahloli, PUBLIC INTEREST PROVISIONS IN THE SOUTH AFRICAN COMPETITION ACT-A CRITICAL REVIEW Competition Policy, Law and Economics Conference 2009, <http://www.compcom.co.za>, accessed on 19 November 2014

<sup>162</sup> Lesley Morphet Norton Rose Fulbright South Africa, South Africa: South African Competition Law And Public Interest Last Updated: 17 May 2007, [www.mondaq.com](http://www.mondaq.com), accessed on 17 October 2014

<sup>163</sup> TN Njisane, The rise of Public Interest: Recent high profile mergers, Public Interest Law Gathering. 1 – 24 Page, [www.africanlii.org](http://www.africanlii.org), accessed on 15 May 2014

*the public interest test is conducted through the filter of a completed competition finding*<sup>164</sup>.

The competition authorities have, in my view, succeeded in striking a balance between public interest and competition, and have not fallen prey to seductive arguments in relation to public interest issues.<sup>165</sup>

I am in total agreement with David Lewis's words. Competition authorities have shown an unwavering attempt to strike a balance between the traditional competition core values and the socially dynamic considerations of public interest. They have been zealous in their quest of implementing the policy of the government as per their original mandate. Section 12 A (3) is an important vehicle in striking this important balance and of late has been at the forefront in ensuring that the Competition Act achieves its social objectives. Section 12 A (3) ensures that the Act remains socially relevant and enlarges the scope of its range, because the implications of merger decisions that take into account public interest provisions have a direct effect and a more pungent influence on ordinary employees, small businesses and the historically disadvantaged. It is submitted that section 12 A (3) has the effect of balancing the competition field, albeit slightly. When public interest considerations are taken into account it means that smaller businesses stand a better chance of emerging from obscurity and thriving and thereby ensuring that they can disrupt the market and enter into different markets which will in turn increase competition, which is the primary objective of the competition Act.

Section 12 A (3) has played a pivotal role in increasing the profile of the competition authorities. It may be accused of playing to the gallery, however one cannot deny the fact that it has played an important role in the issues that affect ordinary South Africans. It is also worth noting that not all mergers turn on public interest issues. This means that public interest do not over-intrude into the realm of 'real' competition analysis. Section 12 A (3) is bringing about a paradigm shift in terms of how competition analysis is conducted. Section 12 A (3) has re-defined the way we conduct merger analysis in the South African context, because of its socially responsive nature.

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<sup>164</sup> Ibid

<sup>165</sup> Lesley Morphet Norton Rose Fulbright South Africa, South Africa: South African Competition Law And Public Interest Last Updated: 17 May 2007, [www.mondaq.com](http://www.mondaq.com), accessed on 17 October 2014

Section 12 A (3) and the cases that have applied it in reaching their decision have ensured that it resonates with the vast majority of South Africans.

As a result South Africa may be classified as a success story of the development and enforcement of competition law and policy in developing countries. South Africa's law and policy demonstrate that it is possible to find a balance between the core focus on efficiency and broader public interest objectives which are of particular concern to developing countries<sup>166</sup>

### **Conclusion**

Sixteen years after the Act has been promulgated, countless advances have been made by the competition authorities in promoting competition policy in South Africa and furthering the objectives of the Act. The competition authorities have played a pivotal role in transforming an economy inherited in 1994 that was rigid, protected, locked up in inefficient institutions, highly monopolised and concentrated. Conditions imposed by the competition authorities in recent merger approvals have raised concerns that interests advanced by third parties during the merger proceedings are obtaining undue prominence in merger consideration, and this has tainted the independence with which the competition authorities are viewed as exercising their public interest mandate.<sup>167</sup> In combination, this suggests that, at present, the competition authorities have had varying degrees of success in terms of striking a balance of promoting competition effectively and also giving effect to the public interests objectives of the Act. However one cannot question the competition authorities' commitment to fulfil their public interest obligations in terms of Section 12 A (3). The various case law that has been referred to in this chapter is a clear indication of that growing commitment to bringing about social reform through competition law.

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<sup>166</sup> Trudi Hartzberg, TRALAC, Competition Policy Review, <http://www.npconline.co.za/>, accessed on 16 October 2014

<sup>167</sup> Robert Legh, Jessica Staples and Magalie Masamba, Competition Law Sibergramme 3/2012, 02 October 2012, SG 3/2012, <http://www.bowman.co.za>, 14 November 2014

## Chapter 5

### 5. Introduction

The final chapter will consider how certain jurisdictions have included and applied public interest provisions in their competition law. This will be done by way of a comparative analysis of certain Jurisdictions that have public interest provisions in their competition policy. It should be noted that not many countries make use of competition law to achieve their social objectives. As James Hodge et al observes that in most other jurisdictions that are strong reference points for South Africa's own competition law, there is either no public interest component or the public interest decision lies outside of the Competition Authorities. It may either reside with another regulator or a Minister. The result is that the public interest decision is less a process of a careful weighing up competition and public interest effects, and rather a process of determining whether a negative public interest is substantial or not, trumping the competition assessment regardless or sometimes simply ignoring public interest in the event that it is positive.<sup>168</sup> As we have previously noted in chapter 1 of this paper that most developed countries show a shift away from the use of their competition laws to promote broad public interest objectives and focus instead on creating a framework for achieving the efficient use of resources and protecting freedom of economic activity in the market.<sup>169</sup> Competition law is often kept pure from other external considerations. This means that competition law in this instance would only deal with the traditional analysis of competition. As a result of the aforesaid this essay will only consider certain jurisdictions.

#### 5.1 Comparative evaluation.

In foreign jurisdictions such as Canada, Australia, the USA and the EU there is no separate public interest under their law, however the competition authorities in those

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<sup>168</sup> Authors: James Hodge, Sha'ista Goga, Tshepiso Moahloli, Public interest provisions in the South African competition Act- A critical review, Competition Policy, Law and Economics Conference 2009, <http://www.compcor.co.za>, accessed on 19 November 2014

<sup>169</sup> Robert Legh, Jessica Staples and Magalie Masamba, Competition Law Sibergramme 3/2012, 02 October 2012, SG 3/2012, <http://www.bowman.co.za>, 14 November 2014

countries do not act in a vacuum and are influenced by broader public interest and political factors<sup>170</sup>. Their legal framework does not necessarily extend to a public interest analysis that is independent from a competitive one<sup>171</sup>. In the EU for instance it appreciates the fact that there may be situations in which the investigation of a merger may be justifiable on grounds of wider public interest than its detrimental effect on competition<sup>172</sup>. Article 21(4) of the EUMR appreciates that member states may have a legitimate interest in investigating a merger for reasons other than issues of competition and makes provision for the issue of a European intervention notice in such cases. A cursory look at public interest in merger regimes internationally shows that a number of countries do give credence to public interest however this is strictly limited to certain sectors.<sup>173</sup>

### 5.1.1 United Kingdom

An important feature of the merger provisions in the enterprise Act is that the secretary of state should not be involved in individual cases and that decisions should be taken by the Office of Fair Trading and the Competition Commission. Competition analysis in a normal merger cases are carried out by specialist competition authorities. Public interest consideration in mergers in the United Kingdom is primarily the domain of the Secretary of State for Trade and Industry and this is limited to the following: National security which includes public security; Plurality of media; and Stability of the UK financial system.<sup>174</sup> This clearly shows that in the UK the policy is for minimal intervention by the state with regard to the aforementioned sectors. What is to be noted is that these sectors and industries are of paramount importance to the state and to the well-being of not only the economy but the well-being of the UK.

The media is important with regard to the preserving of free and fair flow of information and as a result of its importance needs to be protected and therefore has to

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<sup>170</sup>John Campbell, Robert Lech, Charles Simkins, David Unterhalter and Jerome Wilson, Martin Brassey. Competition law

<sup>171</sup> Ibid

<sup>172</sup> Richard Whish and David Bailey, Competition law, Seventh Edition, Page 956.

<sup>173</sup>TN Njisane, Y. 2011. The rise of Public Interest: Recent high profile mergers, Public Interest Law Gathering. 1 – 24, [www.africanlii.org](http://www.africanlii.org), accessed on 15 May 2014

<sup>174</sup> Ibid

allow for the intervention by the secretary of state for Trade and industry. Media public interest considerations apply to both newspaper, broadcast and cross-media mergers and assess specific issues outlined in the Enterprise Act 2002. This assessment is conducted by the Office of Communication in partnership with the Office of Fair Trading which largely focusses on the competition effects of the proposed merger. In the case of newspaper mergers the following has to be ascertained to determine the public interest impact of the merger: The need for accurate presentation of news in newspapers; The need for freedom of expression; and The need for, to the extent that is reasonable and practicable, a sufficient plurality of views expressed in newspapers in the UK.<sup>175</sup>

The broadcasting and cross media test determines whether the following are relevant to a consideration of the merger: The need for sufficient plurality of persons with control of the media firms serving that particular audience in relation to every different audience in the UK or a particular area of the UK; The need for the availability of a wide range of high quality broadcasting that appeals to varying tastes and interests; and the need for people with control of media to have a genuine commitment to the attainment of the objectives set out in section 319 of the Communications Act 2003 such as due impartiality of news, taste and decency. It is submitted that the public interest criteria to be applied in media mergers is clear and gives guidance on what is to be considered when the relevant body conducts<sup>176</sup>

The Competition authorities' powers are limited to assessing competition issues in all mergers and if there is any 'relevant or special merger situation' then a public interest assessment will be done<sup>177</sup>. This 'relevant or special merger situation' arises where the merger may lead to two or more enterprises ceasing to exist or the creation and/or enhancement of at least a 25% share of the supply of any good or service or in a substantial part of the UK post-merger. In such situations, the Secretary of State issues a notice of intention to intervene specifying the public interest consideration to be investigated.<sup>178</sup>

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<sup>175</sup> Ibid

<sup>176</sup> Ibid

<sup>177</sup> Ibid

<sup>178</sup> Ibid

Furthermore the Enterprise Act 2002 gives the Secretary of State power to add new public interest considerations when the need arises and this is how the 'stability of the UK financial system' factor came into being in 2008. This came about as a result of the global financial crisis that started in that very same year. Having had regard to the importance of the financial services sector and how instability in this sector could have a damaging effect on the wider economy, the Act was amended to include this sector as public interest. In September 2008, Lloyds TSB and Halifax Bank of Scotland (HBOS) were allowed to merge into the Lloyds Banking Group, in a deal brokered by the UK government. For the first time since the Enterprise Act came into force in 2002, the UK government used its public interest powers to allow a merger which was opposed by the Office of Fair Trading on competition grounds (based on substantial lessening of competition in relation to personal current accounts, banking services for SMMEs and mortgages). In order for the merger to be allowed, the Secretary of State had to create a new public interest ground with the consent of Parliament. The Secretary of State used his power under section 42 of the Enterprise Act to create a new public interest ground, being 'maintaining the stability of the UK financial system' and forced the merger through on the new public interest ground without the Competition Commission having a chance to consider its implications for competition. This was done on the basis of section 45 of the Act, finding that the benefits of the merger for the stability of the UK financial system outweighed the likely anti-competitive outcomes<sup>179</sup>. The stability of the financial system is quite delicate to warrant periodical state intervention if the situation warrants such an intervention.

## 5.1.2 Asia

### 5.1.2.1 Japan and South Korea

Many jurisdictions in the Asia-Pacific also have public interest provisions or at least some form of public interest consideration in their merger control legislation. Japan

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<sup>179</sup> Andreas Stephan, 'Did Lloyds / HBOS Mark the Failure of an Enduring Economics Based System of Merger Regulation?', July 2011, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1931007](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1931007), accessed on 8 June 2013

and South Korea have also proceeded to amend their merger control legislation to enable special consideration of cross-border merger that may negatively impact on their domestic markets<sup>180</sup>.

#### 5.1.2.2 China

China has also incorporated specific provisions for public interest in their merger control regulation<sup>181</sup>. These include assessing a merger's effect on national security. This involves a certain level of protection of domestic firms from international competition should the international investment be deemed to pose likely anti-competitive effects. Further, article 27 of the Anti-Monopoly Law provides that the Ministry of Commerce (MOFCOM), China's executive agency for competition, must consider a proposed merger's effect 'on the development of the national economy'. This essentially enjoins the MOFCOM to consider industrial policy factors during merger review<sup>182</sup>.

#### 5.1.2.3 Indonesia

Eleanor M. Fox states in her article that Indonesia has included in their competition laws provisions to help bring discriminated-against or left-out majorities into the economic mainstream. Indonesia's competition law does so in light of a perception that its ethnic Indonesian majority has been prevented from business opportunities by cronyism and privileges on the one hand, and control by the ethnic Chinese minority on the other. This has resulted in the inclusion of equity objectives in their competition law. More than the competition law of South Africa, the competition law of Indonesia is infused with principles of equality of opportunity, fairness, equal treatment, and a leveling of advantage<sup>183</sup>.

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<sup>180</sup> TN Njisane, Y. 2011. The rise of Public Interest: Recent high profile mergers, Public Interest Law Gathering. 1 – 24, accessed on 15 May 2014

<sup>181</sup> Ibid

<sup>182</sup> Ibid

<sup>183</sup> Eleanor M. Fox, Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia, 41 Harvard International Law Journal 579 (2000)

### 5.1.3 Australia and New Zealand

The Australian Competition and Consumer Commission generally only considers merger-related efficiencies if they affect the competitiveness of a market. Non-competition issues are usually not taken into account by the Australian Competition and Consumer Commission when deciding whether or not to grant clearance of a merger. The majority of the issues taken into account in merger decisions are competition issues including merger efficiencies and the impact of regulation<sup>184</sup>.

Australia and New Zealand adopt a more or less similar approach to public interest during merger review. They have a process of merger ‘authorisation’ which enables firms to apply to the Australian Competition Tribunal and the Commerce Commission respectively for an approval of mergers that are deemed anti-competitive if the public benefit outweighs these. Both countries do not specify what constitutes a public benefit however the wording of the New Zealand provision is more telling in that the public benefit must be directly attributable to the transaction<sup>185</sup>.

In relation to banking Australia has adopted an approach that could be said to amount to an explicit prohibition of bank mergers.<sup>186</sup> This was occasioned by the public dissatisfaction over rising bank fees, branch closures and job losses. The Australian government has also intervened in the issue, preventing mergers between the big four banks until they can show that competition in financial services markets has increased. It is widely held that though not legislated, this view and general practice by competition authorities could be read to be protecting public interest.<sup>187</sup>

### 5.1.4 United States and Canada

Competition law, or antitrust, is often viewed as a tool to preserve market competition in order to provide an environment that will encourage the efficiency and responsiveness of business and serve the interests of consumers. The United States

<sup>184</sup> The European Lawyer Reference (Van Bael & Bellis). 2011. Merger Control. London, United Kingdom. 30

<sup>185</sup> TN Njisane, Y. 2011. The rise of Public Interest: Recent high profile mergers. Public Interest Law Gathering, 1 – 24, [www.africanlii.org](http://www.africanlii.org), accessed on 15 May 2014

<sup>186</sup> Ibid

<sup>187</sup> Ibid

designed its antitrust/competition law to procure efficiency and squeeze out older concerns of equity<sup>188</sup>.

In the United States and Canada public interest in mergers has mainly focused on mergers in the media and banking sectors respectively<sup>189</sup>. Competition authorities in both countries have no public interest burden when assessing mergers with the exception of these two sectors. Even then in the US public interest analysis is the domain of the Federal Communications Commission (FCC) under section 202 (h) of the Telecommunications Act of 1996<sup>190</sup>.

Public interest in media mergers in the US is based on the notion of freedom of speech and the press and its importance for democratic rule. As such the Act limits ownership by any firm of stations that broadcast to more than 39 % of US TV households for example. Further, the Act requires the FCC, in its periodic review of media ownership regulation must consider the three public interest goals: competition, diversity and localism<sup>191</sup>.

In Canada public interest consideration applies in bank mergers, subject to approval by the Minister of Finance, this stems from their potential effects on retail and by extension impact on consumers in general. The Minister of Finance, in determining the public interest, considers first the likely effect of a proposed merger by large banks on the prosperity and competitiveness of the national economy<sup>192</sup>. Moreover, the Minister should contemplate the increased choice of competitively priced financial services for all Canadians in every region of the country While bank mergers are allowed, legislation requires that they be subjected to a public interest assessment which compels parties to show the following: The possible costs and benefits to customers and small and medium-sized businesses, including the impact on branches, availability of financing, price, quality and availability of services; The timing and socio-economic

<sup>188</sup> Eleanor M. Fox, Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia, 41 Harvard International Law Journal 579 (2000)

<sup>189</sup> TN Njisane, Y. 2011. The rise of Public Interest: Recent high profile mergers. Public Interest Law Gathering. 1 -24.17, [www.africanlii.org](http://www.africanlii.org), accessed on 15 May 2014

<sup>190</sup> Ibid

<sup>191</sup> Njisane, Y. 2011. The rise of Public Interest: Recent high profile mergers. Public Interest Law Gathering. 1 -24.1, [www.africanlii.org](http://www.africanlii.org), accessed on 15 May 2014

<sup>192</sup> COMPETITION IN THE PUBLIC INTEREST: LARGE BANK MERGERS IN CANADA SIXTH REPORT, The Standing Senate Committee on Banking, Trade and Commerce

impact of any branch closures or alternative service delivery measures at the regional level, and any alternative service delivery measures that might mitigate the impact; and What remedial or mitigating steps in respect of public interest concerns the banks are prepared to take, such as divestitures, service guarantees and other commitments, and what measures to ensure fair treatment of those whose jobs are affected<sup>193</sup>.

The Minister permit, as being in the public interest, a merger that has been approved by and meets the conditions set out by the Competition Bureau and the Office of the Superintendent of Financial Institutions, unless there are compelling reasons to believe otherwise<sup>194</sup>. If a merger is denied, the Minister should make a statement to Parliament at the earliest opportunity to clarify the reasons for the denial.<sup>195</sup>

There is however a growing faction that wants the Minister of Finance's discretion to be removed from the merger process as a means of removing politics from the process. Instead, the process as set out in the guidelines – should take place, with proper analysis by the bodies responsible (Competition body).

The federal government reviews public interest issues, with the Standing Senate Committee on Banking, Trade and Commerce and the House of Commons Standing Committee on Finance at times requests to conduct public hearings into the broad public interest issues raised by a specific merger proposal, using the Public Interest Impact Assessment as a key input and with the benefit of input by the Competition Bureau and the Office of the Superintendent of Financial Institutions<sup>196</sup>.

#### The Public Interest Impact Assessment

The Public Interest Impact Assessment is to include the following eight element: The business case and objectives of the merger; the possible costs and benefits to customers and small and medium-sized businesses, including the impact on branches, availability of financing, price, quality and the availability of services; the timing and socio-economic impact of any branch closures or alternative service delivery measures that might mitigate the impact; how the proposal would contribute to the international

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<sup>193</sup> Ibid

<sup>194</sup> Ibid

<sup>195</sup> Ibid

<sup>196</sup> Ibid

competitiveness of the financial services sector; how the proposal would affect direct and indirect employment and the quality of jobs in the sector, distinguishing between transitional and permanent effects; how the proposal would increase the banks' ability to develop and adopt new technologies; what remedial or mitigating steps in respect of public interest concerns the banks are prepared to take, such as divestitures, service guarantees and other commitments, and what measures to ensure fair treatment of those whose jobs are affected; and the impact that the transaction may have on the overall structure of the industry<sup>197</sup>. Furthermore any additional issues required by the Minister of Finance or deemed relevant by the parties might also be included<sup>198</sup>. In essence, the Impact Assessment requires the parties to a merger proposal to explain the rationale for their proposal and the steps that could be taken to reduce any potential costs or concerns.<sup>199</sup> The Canadian public interest inquiry is highly politicized.

The merger process has been plagued with controversies. At some stage (2003-2004) the federal government refused to accept or consider the mergers of large financial institutions. The government also continues to insist on evaluating whether mergers are in the public interest rejecting the recommendation of a Senate committee that this evaluation be eliminated<sup>200</sup>.

Banks view the finance minister's authority to decide whether a merger is in the public interest as a setback for them. Furthermore top bank executives told the Senate banking committee they were concerned whether any merger could pass a political evaluation or whether the merger evaluation process served the public interest, and called for greater clarity and fairness<sup>201</sup>.

### 5.1.5 Africa

According to Oxenham Botswana, Malawi, Namibia, Swaziland and Zambia are some of the jurisdictions in Africa that include some form of public interest

<sup>197</sup> COMPETITION IN THE PUBLIC INTEREST: LARGE BANK MERGERS IN CANADA SIXTH REPORT, The Standing Senate Committee on Banking, Trade and Commerce

<sup>198</sup> Ibid

<sup>199</sup> Ibid

<sup>200</sup> Manley still has no urge to merge Manley bans bank mergers until 2004, Graham Fraser, The Toronto Star, 24 June 2003, Tuesday Ontario Edition

<sup>201</sup> Ibid

considerations as part of their competition regulation. The provisions in respect of public interest in these jurisdictions are mainly associated with the assessment of merger activity<sup>202</sup>.

In Zambia the scope of potential factors for consideration is essentially unlimited including not only unemployment, exports and international competitiveness but also socio-economic factors as may be appropriate<sup>203</sup>.

In Kenya public interest considerations include exports, promoting stability or even obtaining a benefit for the public can be used to justify an exemption for otherwise anticompetitive agreements<sup>204</sup>.

In Zimbabwe, public interest provisions also relate to promotion of small and medium sized enterprises, facilitation of indigenization and localisation of economic activities, as well as development of local brands into regional and international brands. Its provisions are similar to the ones provided for in South Africa and are shown in many of the Zimbabwean competition cases. E.g. when Pretoria Portland cement from South Africa sought to merge with Portland holding in Zimbabwe, the merger was approved with the condition that the acquiring South African company had to modernise the plant of the target in Zimbabwe and maintain it as a going concern producing cement in Zimbabwe. There was concern that although the merger generated a number of public interest benefits such as facilitating foreign direct investment and increased foreign exchange earnings, stakeholders from Pretoria Portland Cement might close the plant in Zimbabwe and supply the country from its South African Operations, hence the conditions imposed<sup>205</sup>.

## 5.2 South African Public interest provisions in merger proceedings

With the beginning of Nelson Mandela's presidency in May 1994, the government set about democratizing South Africa socially and economically. The

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<sup>202</sup> Oxenham J 'Balancing public interest merger considerations before Sub-Saharan competition jurisdictions with the quest for multijurisdictional merger control certainty' (2012) 9 US-China Law Review, 211

<sup>203</sup> Ibid

<sup>204</sup> Ibid

<sup>205</sup> Ibid

agenda for economic reform included a revised competition law. It was viewed as important to bring about democratization in the markets because of the history of inequality. In the apartheid era the markets became highly concentrated, dominated by monopolies or cartels, while a few groups, run by prominent and wealthy business leaders, controlled almost all of the country's economy. There was, and still is, extreme disparity of wealth between the white minority and the excluded black community.<sup>206</sup>

SA's competition law framework is, on the face of it, unique. It has been influenced by its apartheid history and the economic imbalances that have arisen, the drafters of the act specifically included public interest considerations within the purview of competition law and regulation in the new South Africa<sup>207</sup>. In its revised competition law South Africa now uses competition law not only to advance efficiency and consumer welfare, but also to advance the development of small and middle-sized businesses<sup>208</sup>. Furthermore it seeks to expand opportunities for South Africa's participation in world markets d) Promote small and medium sized enterprises to participate in the economy e) Give previously disadvantaged South Africans ownership right. It is trite to note that at the time the new legislation was enacted, the government was responding to contextual problems that needed to be solved.<sup>209</sup>

In South Africa section 12 A (3) of the Competition Act which deals with public interest provisions in a merger is a peremptory provision, meaning that it is not suggested that competition authorities ought to consider public interest provision. A public interest analysis ought to be conducted despite the outcomes of the competitive effects analysis. This means that it is not only considered in certain instances of convenience and then ignored when it is seen to be an inconvenience. In September 2003, in its decision and reasons in the large merger between Anglo American Holdings Limited and Kumba Resources Limited, the Competition Tribunal confirmed the above when it said that "although we have found that the merger will not lead to a substantial prevention or lessening of competition, we must still evaluate whether it can be

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<sup>206</sup> Eleanor M. Fox, Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia, 41 Harvard International Law Journal 579. (2000)

<sup>207</sup> Ibid

<sup>208</sup> Ibid

<sup>209</sup> Ibid

prohibited on public interest grounds ...<sup>210</sup>. Such a feature of the Act means that section 12 A (3) will constantly play an important role in merger proceedings. In many jurisdictions public interest considerations apply in certain instances. This makes section 12 A (3) peculiar and distinct from other jurisdictions.

### 5.3 Public interest

Public interest' can be defined as referring to the 'common well-being' or 'general welfare'<sup>211</sup>. To be more specific with regard to merger analysis, there are some common issues among the different legislative provisions of competition laws that can fall under public interest considerations. The definition comprises issues of equity/fairness, protection of small business, equality of opportunity, freedom of economic action, decentralisation of economic decision making/power, and involvement of economically disadvantaged groups and so on. This is achieved by including employment, regional development and growth of small and medium-sized enterprises (SMEs) etc., as areas of analysis.<sup>212</sup> The South African competition law contains similar considerations in the competition Act.

*'Section 12 A (3) states that: When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –*

- (a) a particular industrial sector or region;*
- (b) employment;*
- (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and*
- (d) the ability of national industries to compete in international markets',<sup>213</sup>*

<sup>210</sup> 45/LM/Jun02

<sup>211</sup> Public Interest' Issues In Competition Analysis, CUTS Centre for Competition, Investment & Economic Regulation

<sup>212</sup> Ibid

<sup>213</sup> Competition Act no 89 of 1998.

There is also an alarming difference as to what would be considered public interest in developed jurisdictions and developing jurisdictions. In developing jurisdictions like South Africa and other African jurisdictions emphasis is placed on the combating of employment through job preservation and job creation. In developed economies emphasis is placed on things like media and banking. Such a difference is to be expected because they have different socio-economic conditions and differing histories. This may be caused by the fact that these countries have different developmental aspirations which are shaped by where they are in terms of their developmental levels. South Africa has issues such as employment and wealth redistribution to address and more developed jurisdictions do not necessarily face similar challenges.

The effect that a merger will have on employment has been the most significant public interest consideration in South African merger review to date, and is currently assuming a pivotal role, particularly as trade unions, in a number of cases, have been successful in seeking to have conditions imposed to protect employment (such as a moratorium on job losses for a specific period)<sup>214</sup>.

In South Africa the issue of employment and redistribution of wealth is a major public interest consideration. My submission is evidenced by section 2 (c) of the Competition Act which states that one of the objectives of the Act is to promote employment and advance the social and economic welfare of South Africans and section 2 (f) states that one of its objectives is to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons. Issues of employment are particularly unique and more pressing in a South African and an African context than in a more advanced jurisdiction such as say the UK, Canada, United States of America etc.

Abigail Machine in her paper that was submitted to the UCT law school states that the history of South Africa makes inclusion of public interest provisions good policy sense as employment creation and black economic empowerment are major challenges to sustainable development in South Africa. She further elaborated that explicit

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<sup>214</sup> Public interest factors as part of South African merger review, Tamara Dini, The Times (South Africa) June 21, 2013 Friday Surveys Edition

reference to these factors is thus to be expected in a significant area of policy and law such as the competition act.<sup>215</sup> Lewis emphasises that in a country such as South Africa, where distributional and poverty problems are at the forefront, all social and economic policies are expected to contribute to the alleviation of these problems and competition policy is not exempt from this expectation. Thus the competition act complements the government's efforts to improve on employment issues, support promising entrepreneurs, particularly those who are from a historically disadvantaged background.<sup>216</sup>

#### 5.4 Government interference

It is noteworthy that many jurisdictions around the world permit government interference in merger proceedings, however, it is often on the basis of a national security concern and only applied in cross-border mergers. The South African Competition Act is unusual in that it has provided mechanisms to resolve conflicts between policy and competition, but has limited the discretionary component by placing the responsibility for determining whether a merger is required for public interest objectives in the hand of the independent competition authorities<sup>217</sup>. Given the potential for mergers to impact on government policy objectives, many other jurisdictions including the UK, Germany and Canada provide a mechanism for politicians to overturn otherwise anti-competitive mergers under particular circumstances. One concern is that this leaves the competition process, which should ideally be independent, open to some form of government interference.<sup>218</sup> It is submitted that political figures representing the government form part of stakeholders affected by competition issues. To be asked to judge on such matters would in most cases result in the neglect of competition issues that this particular stakeholder did not find in its favour, even though such issues enhanced other welfare issues. It is imperative that such duties be removed from the

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<sup>215</sup> Abigail Machine, Public interest and merger control in South Africa: The Walmart case. Article submitted to the Department of Law at the University of Cape Town. <http://africanantitrust.com>, accessed on 18 January 2014

<sup>216</sup> Abigail Machine, Public interest and merger control in South Africa: The Walmart case. Article submitted to the Department of Law at the University of Cape Town. <http://africanantitrust.com>, accessed on 18 January 2014

<sup>217</sup> Ibid

<sup>218</sup> Ibid

government<sup>219</sup>. It is important that for policy makers or authorities applying public interest test to apply it in a manner which is independent from political influence and is transparent. It is also essential to engage the community and keep their confidence that public interest considerations have been objectively.<sup>220</sup> It was learnt from experience that competition issues and politics could not be related if there was any intended achievement in this arena of competition law.<sup>221</sup> Furthermore, the Government forms part of stakeholder group, and it would be inappropriate or rather ineffective to ask a stakeholder to decide what is in the best interests of other stakeholders. The independent competition authorities are better off adjudicating on such issues as they are separated from any such interests<sup>222</sup>. This means that the risk of gross governmental influence is limited and that the process is most likely to be uniform and possibly predictable which can have a positive bearing on deal flow. In South Africa government may intervene in merger proceedings as a party to the proceedings through its various ministries but not as an arbiter or a direct intervention.

## Conclusion

Chapter five compared South African competition law to the competition law of other jurisdictions. What is unique about the South African competition jurisprudence is that it has a strong public interest bend and it seems quite unapologetic in its stance. It states it in the competition Act preamble, in its objectives and more specifically in section 12 A (3). Furthermore the fact that it has independent competition authorities, who consider the public interest inquiry makes it unique. It means that there is minimal government intervention. Furthermore it ensures that pure competition law principles are adhered to and not simply treaded upon in the pursuit of the public interest objectives.

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<sup>219</sup> Abigail Machine, Public interest and merger control in South Africa: The Walmart case. Article submitted to the Department of Law at the University of Cape Town. <http://africanantitrust.com>, accessed on 18 January 2014

<sup>220</sup> Public Interest' Issues In Competition Analysis, CUTS Centre for Competition, Investment & Economic Regulation, No. 8/2008

<sup>221</sup> Ibid

<sup>222</sup> Abigail Machine, Public interest and merger control in South Africa: The Walmart case. Article submitted to the Department of Law at the University of Cape Town. <http://africanantitrust.com>, accessed on 18 January 2014

## Chapter 6

### 6. Introduction

Chapter 6 is the final chapter of this public interest discourse. It will comprise of a brief overview of what was considered, it will then proceed to make a few recommendations and then finally conclude the discourse.

Section 12 A 3 seeks to re-address the imbalances of our past. This is done by ensuring that on the one hand competitiveness and efficiency are pursued, and on the other hand that the people who were previously denied an equal opportunity to participate in the economy have access to participate in the economy'.<sup>223</sup> It is often argued that the inclusion of these factors in the Competition Act leads to a paradox, in that they are often divorced from and, at times, directly at odds with the primary objectives of competition law and policy. A focus on protection of employment, for example, particularly where job losses are the result of efficiency-enhancing synergies between two merging firms, can often prevent a merged entity from being as efficient as it otherwise would be, resulting in less competition and knock-on effects of higher prices and less innovation. In other words, giving priority to the specified public interest categories can serve to undermine the primary competitive analysis in mergers, thus harming the broad & public interest & that competition policy aims to promote<sup>224</sup>.

It is submitted that in spite of South Africa's attempt to fuse public interest aspiration and traditional values of competition law it has still managed to preserve well-tested principles of competition law. This is despite the fact that these aspiration are at times in conflict with each other and they are often incompatible<sup>225</sup>. For example, mergers are prohibited if, among other things, they are likely to substantially lessen competition. The South African competition law falls generally within the range of traditional competition law whilst at same time applying a limited measure of affirmative action. It is further submitted by Eleanor Fox that the South African

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<sup>223</sup> Abigail Machine, Public interest and merger control in South Africa: The Walmart case. Article submitted to the Department of Law at the University of Cape Town. <http://africanantitrust.com>, accessed on 18 January 2014

<sup>224</sup> Ibid

<sup>225</sup> Abigail Machine op cit note 225

competition law addresses the tension between fairness and efficiency and in almost all cases allows defenses based on pro-competitive and efficiency justifications.

### **6.1.1 Competition authorities must contribute to poverty reduction and employment reduction**

In a recent OECD roundtable on competition and poverty eradication, delegates of competition authorities in developing countries argued that the ‘political stability of the competition policy authorities depends to a large extent on how they are seen as contributing to poverty reduction and employment creation. It would be risky for them to state that their only target is combatting harm to competition by producers and that the impact of their efforts on poverty or inequality is irrelevant<sup>226</sup>. Section 12 A 3 ensures that our competition law contributes to poverty reduction and employment creation. Section 12 A (3) has made a significant contribution to the plight of employees, previously disadvantaged and recently to the interests of small businesses. The Wal-Mart merger was at the center of the latter contribution. It has led to a wider interpretation of section 12 A (3) of the competition Act. The competition authorities have been a catalyst in ensuring that the interest of small businesses, employees and the previously disadvantaged are protected. The Wal-Mart merger has led to the establishment of development funds that train small businesses to be able to do business with Wal-Mart.

### **6.1.2 The role of competition authorities should be exercised with caution and restraint**

In chapter 3 we discussed the criticisms that were levelled against the competition authorities. One of the criticisms that were imputed against them was that that they are taking public interest too far and that their interpretation of section 12 A (3) is too broad. It was stated that the public interest conditions imposed in certain recent high profile mergers seem to extend beyond a narrow, merger-specific application of the public interest objectives of the Act and are increasingly reflective of the interests of third party interveners in the proceedings. This raises questions as to whether the

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<sup>226</sup> Ibid

competition authorities are finding the balance between competition and public interest considerations that is envisaged by the Act and whether their status as “independent institutions to monitor competition” is being compromised by too great a focus on the interests of third party interveners.<sup>227</sup> It should be noted again that the role of competition authorities is limited to the listed grounds in section 12 A (3) insofar as their merger specific. The term merger specific was defined in chapter 2 of this paper. In chapter 2 the paper discussed the fact that the role of competition authorities is to protect existing rights and not to create rights. This principle was extracted from the Wal-Mart/Massmart merger. Consequently it was suggested that in developing a framework by which local suppliers can participate in Wal-Mart’s global value chain, the CAC seems to have overstepped its public interest mandate in terms of the Act. As a result, concerns have been raised that the conditions imposed relating to the development of local suppliers reflect pressure from the EDD rather than the independent exercise of the mandate of the Tribunal and CAC in order to give effect to objectives of the Act.<sup>228</sup>

### **6.1.3 The competition authorities’ role in defending the rights listed in section 12 A (3) secondary to other statutory and regulatory instruments**

The Act’s objectives include economic transformation and promotion of a greater spread of ownership. However, these objectives have a narrow scope, the Tribunal having taken the view in *Shell South Africa (Pty) Ltd v Tepco Petroleum (Pty) Ltd* 66/LM/Oct01 that “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”. The Tribunal has previously held, in relation to a proposed equity ownership condition, that this would be more appropriately pursued through other mechanisms (such as the Employment Equity Act 55 of 1998, the Skills Development Act 97 of 1998 and the BEE Charter).<sup>114</sup> Therefore the interests of the dti, advanced by the BEE condition, extend beyond the intended scope of the developmental objectives of the Act and would more appropriately have been advanced

<sup>227</sup> Robert Legh, Jessica Staples and Magalie Masamba, *Competition Law* Sibergramme 3/2012, 02 October 2012, SG 3/2012, <http://www.bowman.co.za>, 14 November 2014

<sup>228</sup> *Ibid*

outside the competition.<sup>229</sup> The Competition authorities should give due regard other statutory or regulatory instruments. It should impede upon their jurisdiction.

## 6.2 The Case for Public Interest factors in Competition law.

It is submitted that the public interest provisions in South African competition law are rightfully placed as they compete with the economic goal of economic efficiency, therefore need to be balanced whenever issues concerning mergers are concerned to effectively promote the goal of competition in the country. What needs to be guarded against is the abuse of these provisions and that public interests should only come into play when they are exceptional and should be seen within the context of the primary competitive assessment<sup>230</sup>.

Eleanor Fox states that nations that use competition law for equality ends confront a distinct challenge. The law is most likely to be successful in meeting its goals to the extent that: (1) the legal rules and frameworks for analysis are clear; (2) the derogations from market-based rules are clear; and (3) decision-making is transparent and agency and court discretion is limited. She then goes on to state that the South African competition law substantially fulfills these requirements, or can easily be brought within their purview<sup>231</sup>. I am in agreement with her observation, furthermore I think South Africa is an example to other developing jurisdictions that endeavor to use their competition legislation to champion socio-economic reform in their respective economies. It must be stated that competition law has to be one of the measures that are used and not merely the sole measure to combat social inequality. Pure competition analysis should still be preserved and given its rightful place if those jurisdictions are to meet their goals.

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<sup>229</sup> Ibid

<sup>230</sup> Abigail Machine, Public interest and merger control in South Africa: The Walmart case. Article submitted to the Department of Law at the University of Cape Town, <http://africanantitrust.com>, accessed on 18 January 2014

<sup>231</sup> Eleanor M. Fox, Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia, 41 Harvard International Law Journal 579 (2000)

## **Conclusion**

Section 12 A (3) has played an important role in ensuring that our competition legislation has a greater reach to the general public. It's inclusion in our competition law ensures that it becomes relevant to the lives of ordinary South Africans. It is the application of the aspirations of our government to see that wealth is re-distributed to ensure that "ordinary" South Africans get a share of the spoils. Furthermore employees now get further protection in the case of a merger that would ordinarily result in the loss of employment. Case law that was discussed in this essay is proof that serious inroads have been made by the competition authorities to protect the jobs of many South Africans. Furthermore, it champions the cause of small businesses and also seeks to enhance national institutions so that they may compete in the international arena. In its quest to achieve these social goals our competition authorities have still maintained the 'traditional' analysis for mergers, which inquires whether or not a merger is likely to substantially lessen competition. It is submitted that the competition authorities have endeavored to strike the necessary balance and also to ensure that the merger process is apolitical and impartial. Section 12 A 3 is provision that is in line with our national aspirations and will continue to play a major role in the development of our economy. Section 12 A 3 has made a significant contribution in addressing social problems and South Africa's development goals.

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