

**CML6006W LLM (COMMERCIAL LAW)**

**DISSERTATION TITLE:**

The role of the public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the competition laws of South Africa and of developing nations.

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

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## 1. INTRODUCTION

This paper considers the role accorded to, and importance of, the public interest objectives of the South African Competition Act<sup>1</sup> (the Act). The aim of this paper is not to critique these objectives or to consider what role these objectives have played in South African competition jurisprudence in the eleven years since the enactment of the Act, but to accept such objectives and specifically consider what effect has been given to them in the other provisions of the Competition Act that expressly deal with the public interest,<sup>2</sup> and to argue that the competition authorities should not be too eager to diminish the importance of these sections, but that the public interest should play an important role in the competition law of South Africa and other developing nations, and as such, that the South African competition authorities should recognise this.

Competition law was birthed in the United States of America (where it is commonly labelled as ‘antitrust law’) and has rapidly developed into a global phenomenon. The most extensive and impressive competition authorities are located in the developed countries of the world such as the United States, Japan and the European Union (which includes some of the most developed nations of the world). This paper will argue that competition law in these jurisdictions cannot be presumed to be replicated in South Africa or other developing countries of the world. South Africa’s history of Apartheid, location as an African country and status as a developing country are some factors which impinge upon its competition laws and policies, thus requiring a somewhat different stance. This paper will seek to argue that public interest objectives and considerations are more important to the competition law and policy of developing countries than to developed countries, and South Africa should not be too eager to emasculate the public interest provisions of the Competition Act.

The approach of South African Competition law is, in general, consistent with that of foreign jurisprudence<sup>3</sup>, however the Act goes further by giving public

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<sup>1</sup> Act 89 of 1998.

<sup>2</sup> Namely, sections 10 and 12A of the Competition Act.

<sup>3</sup> A brief overview of the various schools of thought on the purpose(s) of competition law and of some of the approaches to competition law in important foreign jurisdictions will be provided in Chapter 2 of the this paper.

interest considerations particular importance in the preamble of the Act and by listing a number of public interest objectives of South African Competition law in section 2 of the Act, alongside the traditional purpose of competition law, which is the enhancement of consumer welfare through, at least primarily, efficiency. The reactions of the international community to the listing of these public interest considerations as objectives in the South African Act has not been particularly favourable;<sup>4</sup> however these public interest purposes have not been amended or removed from the Act and as such, at least from the legislature's perspective, remain a crucial part of South African competition law.

Public interest considerations are accorded further importance in section 12A of the Act in relation to merger control. Section 12A(3) lists the public interest grounds that must be considered by the competition authorities in determining whether such a merger can or cannot be justified on public interest grounds. There has been a substantial amount of South African jurisprudence concerning merger control and as such, these public interest grounds have attracted significant attention from the competition authorities. This paper will examine the numerous judgments of the competition authorities and in so doing, attempt to ascertain the general policy of the authorities with regard to the importance of these grounds and further, analyse whether the approach of the authorities is the correct one, given the South Africa's context, the preamble and the stated purposes of the Act.

This paper will also consider the role of the public interest with regard to exemptions of agreements and practices from the application of the provisions of the Act.<sup>5</sup> The fulfilment of the Act's public interest objectives is expressed most vividly in merger control, however, section 10 presents a number of instances where the public interest may justify an exemption. As such, these objectives will be analysed, and it will be again be shown that the South African context is vital in understanding the application of such provisions.

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<sup>4</sup> L Reyburn (ed) *Competition Law of South Africa* (Durban: LexisNexis Butterworths, 2008) at 4-4; *Msoni t/a Minnie Cigarette Wholesalers v British American Tobacco South Africa (Pty) Ltd* 49/IR/Jul02 para 45.

<sup>5</sup> Competition Act s 10(3).

In addition, this paper will seek to analyse comparative jurisprudence, with particular emphasis on developing countries, such as Indonesia and Brazil, and will show the importance of the public interest objectives of the South African Act to South Africa. It will be argued that the competition laws of developing countries cannot and should not imitate those of the developed world, rather, the competition laws of the developed world should respond to the challenges particular to the developed world. In arguing this, this paper will consider the jurisprudence of developed nations and contrast such jurisprudence with that of South Africa and other developing nations.

Finally, this paper will argue that perhaps the balance between traditional economic-motivated competition law purposes, and public interest competition purposes in South Africa, has not been adequately achieved. The competition authorities have been too eager to glance over the importance of public interest considerations in South Africa and attempt to transform our law into that of the United States or European Union. Perhaps, instead, the public interest should be more carefully considered, not as the primary purpose of competition law, but as a relevant subsidiary purpose.

## 2. THE PREAMBLE AND PURPOSES OF THE COMPETITION ACT

Despite the rapid development of competition law across the globe, the underlying basis for competition law remains controversial.<sup>6</sup> The Chicago school advocates that efficiency alone should be the goal of competition law, and other considerations such as the public interest should not operate in the realm of competition law. Despite its influence, however, this view is not universally accepted. The purpose of many competition jurisdictions, however, including that of South Africa, is not limited to efficiency, but includes other aims.

### 2.1 Preamble

The preamble of the South African Act clearly highlights that South African competition law is not concerned with efficiency alone.

The preamble explicitly highlights the political motivations of the Competition Act,<sup>7</sup> it shows the relevance and importance of South's Africa's discriminatory Apartheid history and that such history prevented 'full and free participation in the economy by all South Africans'. Such is the background to the enactment of the statute – it is both economical and political in its motivations. The Act submits that, as a result of the prevention of full and free participation in the economy by all South Africans, 'the economy must be open to greater ownership by a greater number of South Africans' and that 'credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy'. Finally, the preamble argues that an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans'. The preamble continues to state that the Competition Act was enacted in order to:

- provide all South Africans equal opportunity to participate fairly in the national economy;
- achieve a more effective and efficient economy in South Africa;
- provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;

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<sup>6</sup> Reyburn (note 4) at 4-3.

<sup>7</sup> Organisation for Economic Co-operation and Development 'Competition Law and Policy in South Africa: An OECD Peer Review' 2003 at 18.

create greater capability and an environment for South Africans to compete effectively in international markets;  
 restrain particular trade practices which undermine a competitive economy;  
 regulate the transfer of economic ownership in keeping with the public interest;  
 establish independent institutions to monitor economic competition; and give effect to the international law obligations of the Republic.

Clearly then, the preamble recognises the importance of regulating and administering a competitive economic environment, whilst at the same time recognising the importance of redressing economic injustices of the past through competition law. Despite what many commentators may think of the preamble, it has remained unchanged and its provisions will continue to ‘be important in interpreting the Act and the entire corpus of competition law’.<sup>8</sup> The preamble does recognise the problem of inefficiency and the need to address this problem through competition law, however, the preamble goes far further by describing restrictions upon free competition as not merely ‘inefficient’ but as ‘unjust’.<sup>9</sup> This is a clear indicator that in South Africa, free and fair competition is closely linked with justice – which goes far beyond achieving efficiency.

## 2.2 Purposes

The primary and general purpose of South African Competition law is to ‘promote and maintain competition’<sup>10</sup>, this much is patently obvious from the wording of the Act. This general purpose is, however, supplemented with eight specific objectives. It is argued, and such argument is correct, that unlike some other competition jurisprudence, South African competition law is ‘intended to fulfil multifarious goals’.<sup>11</sup> The first two of these eight specified goals are amount to the ‘traditional’ objectives of competition law which are common to most competition jurisdictions, objectives (c) to (f) are concerned primarily with the public interest,

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<sup>8</sup> Reyburn (note 4) at 4-5.

<sup>9</sup> Organisation for Economic Co-operation and Development ‘Competition Law and Policy in South Africa: An OECD Peer Review’ 2003 at 18.

<sup>10</sup> Competition Act s 2.

<sup>11</sup> Reyburn (note 4) at 4-3.

whilst the new additions of objectives of (g) and (h)<sup>12</sup> are clearly not concerned with the public interest, but with competition.<sup>13</sup>

The purpose of this Act is to promote and maintain competition in the Republic in order –

- (a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;
- (c) to promote employment and advance the social and economic welfare of South Africans;
- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy;
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons;
- (g) to detect and address conditions in the market for any particular goods or services, or any behaviour within such market, that tends to prevent, restrict or distort competition in connection with the supply or acquisition of those goods or services within in the Republic; and
- (h) to provide for consistent application of common standards and policies affecting competition within all markets and sectors of the economy.

The four public interest objectives of South African competition law are concerned with the public interest, or are, what Eleanor Fox terms, ‘equity objectives’.<sup>14</sup> The importance of these four aims is evident – they are explicitly stated in the ‘purposes’ section of the Act and as such, are obviously intended, at least by the legislators, to play an important role in South African competition law. The importance of these public interest considerations must not, however, be overstated. The primary purpose of competition law in South Africa remains the promotion and maintenance of competition; that much is clear from section 2. Furthermore, in consideration of the eight particular sets of goals, it is evident that the four public interest considerations are mentioned as secondary to the goals of promoting efficiency and providing consumers with competitive prices and product choices. The position of the public interest goals in the section 2 list makes this

<sup>12</sup> Competition Amendment Act 1 of 2009.

<sup>13</sup> Competition Act s 2.

<sup>14</sup> E.M Fox ‘Equality, Discrimination in Competition law: lessons from and for South African and Indonesia’ (2000) 41 *Harvard International Law Journal* 579 at 580.

clear.<sup>15</sup> Thus, the public interest goals of the Competition Act are not accorded primacy in South Africa; rather, they are important secondary goals which should also shape South African competition law.

The section 2 list of purposes was borrowed, for the most part, from the primary competition statute of Canada: The Canadian Competition Act.<sup>16</sup> Section 1.1 of that Act states that the purpose of the Act is to:

‘to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices’.

Of the stated Canadian purposes, it appears that the only South African additions are ‘to promote employment and advance the social and economic welfare of South Africans’ and ‘to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons’. These additions indicate that, in South Africa, competition law has been specifically tailored to address public interest concerns alongside the main purpose of promoting and maintaining competition. It is only very recently that two further additions have been made to the list of section 2 purposes of the South African Act.<sup>17</sup> Whilst these additional purposes do not focus upon the public interest, it remains clear that the purposes of South African competition law are strongly aligned with the public interest.

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<sup>15</sup> M Brassey (ed) *Competition Law* (Lansdowne: Juta, 2002) at 2. The addition of objectives (g) and (h) to section 2 does not imply that these objectives are less important than the public interest objectives of the Act. Rather, it is submitted that these objectives, like those concerned with the public interest, are of secondary importance to objectives (a) and (b).

<sup>16</sup> *Canadian Competition Act* C-34.

<sup>17</sup> The *Competition Amendment Act 1* of 2009 was promulgated on August 28<sup>th</sup> 2009.

### 3. RECONCILING THE OBJECTIVES OF THE SOUTH AFRICAN COMPETITION ACT

Given the multifarious nature of the objectives of South African competition law, as listed in section 2 of the Competition Act, it remains to be seen how such objectives can be reconciled to each other. It is patently obvious that all eight objectives cannot be simultaneously fulfilled all the time and therefore a mechanism, or mechanisms, must exist to balance these objectives. It is also obvious that some objectives will, as shown in the previous chapter, commonly trump others.

The initial academic response to the inclusion of multifarious goals in the Competition Act (four of which are of a public interest nature), was far from favourable. The majority of the arguments against the inclusion of public interest goals in the Act centred on the concern that including such objectives would dilute the Act to an instrument that does not give considerable weight to traditional competition aims and issues.

One of the strongest arguments against the inclusion of public interest objectives alongside traditional objectives of competition law is that, not only may public interest objectives pull competition law in an opposite direction to that of the traditional objectives of competition law, but different public interest objectives may themselves pull in opposite directions, thus causing much uncertainty and requiring the competition authorities to engage in extensive balancing enquiries. This remains a concern of competition law in South Africa, however, it is submitted that balancing legal objectives is a common feature of much legislation and is not a definitive reason for the rejection of the public interest objectives from competition law.

A further argument made which is against the inclusion of public interest objectives in the Act is that it is inappropriate to rely upon competition policy to achieve the listed public interest objectives. Instead, it is argued, there are more suitable and effective policies and mechanisms available that can be used in achieving these objectives.<sup>18</sup> This argument is significant, though, given South Africa's specific profile as well as the effect which competition law and policy has upon the economy,

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<sup>18</sup> W Reekie Duncan 'The Competition Act, 1998: An Economic Perspective' (1999) 67(2) *South African Journal of Economics* at 283.

it is quite reasonable to rely somewhat upon competition law to contribute to achieving the listed public interest objectives. One further argument made was that including public interest objectives would simply place too large a burden on the competition authorities and result in delays and the creation of unnecessary litigation.<sup>19</sup> Practice over the past ten years has, however, shown that a consideration of the public interest by the authorities does not negatively burden their effective regulation.

Despite these arguments, it is now widely held that the explicit inclusion of such public interest objectives in the Act was a very good development of competition law in South Africa, as decisions can now ‘invoke these factors directly and transparently, rather than try disingenuously to justify actions on competition grounds when they really respond to other interests.’<sup>20</sup> Given the state of the South African economy after the collapse of Apartheid, it would be ludicrous to suggest South African competition law and policy, function independently of pursuing public interest objectives.

It remains to be discussed, however, how exactly the multifarious goals of the Act are to be reconciled to each other. To date, it appears certain that the competition authorities have attached primary weight to the achievement of the first two objectives of the Act, that is:

The purpose of this Act is to promote and maintain competition in the Republic in order –

- (a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;

This is not to say that the public interest objectives have not been advanced by the competition authorities at all, it is merely to say that case law shows the authorities according primacy to the above listed objectives.

Where substance has been given to the section 2 public interest objectives is in section 12A, concerning merger evaluation, and section 10, concerning exemptions on public interest grounds. A substantial section of this paper will address these two

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<sup>19</sup> See *Harmony Gold Mining Company Limited/Goldfields Limited 93/LM/Nov04*, where Goldfields Limited argued extensively for the importance of the public interest in the merger evaluation. Interestingly, the case, ultimately, had little to do with traditional competition issues and more to do with arguments as to the public interest.

<sup>20</sup> OECD Peer Review (South Africa) (2003) at 18.

sections and the jurisprudence relating to them, and consider how they give effect to the public interest objectives of section 2.

#### 4. PLACING THE SOUTH AFRICAN ACT IN CONTEXT

Before engaging in an analysis of South African competition law and the public interest, it is necessary to briefly describe the context within which the Competition Act was enacted and remains in force today.

South Africa's economic history is one which has been dominated and fuelled by racial discrimination. The policies of the Apartheid government ensured that the interests of whites and white-owned firms superseded those of blacks and black-owned firms. This discrimination manifested in multiple forms including land reservation for white ownership, preferential treatment of white-owned firms, monopoly concessions, and the establishment of massive state-owned enterprises which only served to perpetuate the entrenched racial discrimination.

South Africa's history of competition law began, in earnest, with the enactment of the first competition legislation in 1955, the *Regulation of Monopolistic Conditions Act 1955*<sup>21</sup> (the 1955 Act). This Act defined the criteria by which to address monopolistic conditions as 'the public interest', yet a definition of the public interest was not provided by the Act. The Act suffered from a number of shortcomings, namely, it did not expressly deal with mergers, nor did it contain express prohibitions on certain conduct and, furthermore, enforcement only took place by a Board upon the directive of the Minister.<sup>22</sup> The result was a Board with weak investigative and enforcement powers and a situation which allowed for much scope for political interference.<sup>23</sup> It was furthermore clear that the Minister would never direct investigation into State activities and as such, the State's activities would remain free from competition regulation.<sup>24</sup> Ultimately, the 1955 Act achieved very little,<sup>25</sup> however, it does represent the beginnings of competition law in South African and highlight the discriminatory nature of previous competition laws.

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<sup>21</sup> *Regulation of Monopolistic Conditions Act 24 of 1955.*

<sup>22</sup> *Report of the Commission of Inquiry into Regulation of Monopolistic Conditions Act, 1955* (1978) (the 'Mouton Commission Report').

<sup>23</sup> Reyburn (note 4) at 3-30.

<sup>24</sup> *Ibid*; Mouton Commission Report paras 116, 120-123; OECD Peer Review (South Africa) (2003) at 12.

<sup>25</sup> Reyburn (note 4) at 3-30.

In 1979, the *Maintenance and Promotion of Competition Act*<sup>26</sup> (the 1979 Act) was enacted by Parliament. The 1979 Act represented an improvement on the 1955 Act, however, whilst the public interest remained a key consideration of the Act, what amounted to as the 'public interest' remained as the interests of the elite white majority, not the general public. A Competition Board was established by the Act which was more independent than the Board of Trade under the 1955 Act, however, the Competition Board continued to primarily be constituted by white male civil servants and thus, like its predecessor, remained unable to effectively investigate and enforce against state-owned enterprises.<sup>27</sup> Thus, the reality of South African competition law, even after the enactment of the 1979 Act and its amendments, was a lack of a comprehensive and adequate competition statute in South Africa.<sup>28</sup>

In 1994, the South African political landscape underwent significant change: the African National Congress (ANC) was elected the governing party in South Africa. The ANC had set out a number of economic objectives before the 1994 elections in its Reconstruction and Development Programme (RDP) in 1994, which was echoed as the government's White Paper on Reconstruction and Development.<sup>29</sup> As part of this White Paper, the ANC proposed competition laws that were broadly aimed at the promotion of traditional economic goals through stricter laws, but also sought to serve a broader political and social purpose.<sup>30</sup>

A national census was conducted in 1996, just two years before the enactment of the Competition Act 89 of 1998. The statistics revealed by the census were not unexpected, however, the extent of some of the results were alarming. The census revealed that the population of South Africa was overwhelmingly (approximately 76.7%)<sup>31</sup> 'African/Black' and yet it was evident that most of the wealth of the country rested in and was controlled by a small white minority. Table 1 (below) and Graph 1 (below) highlight South African demographics as determined by the 1996 census.

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<sup>26</sup> Act 96 of 1979.

<sup>27</sup> Robert Legh in M Brassey (ed) *Competition Law* (Lansdowne: Juta, 2002) at 78.

<sup>28</sup> *Ibid* at 80-81.

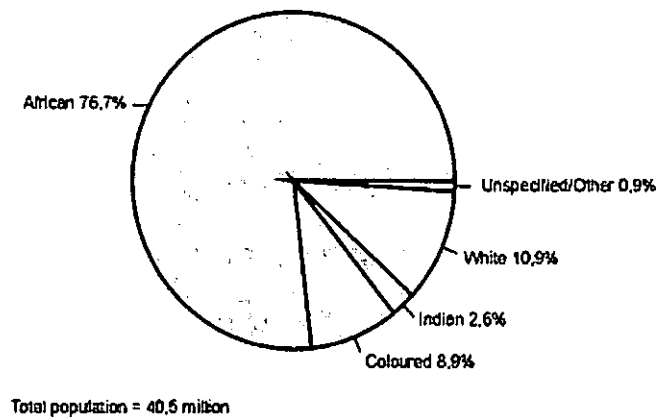
<sup>29</sup> White Paper for Reconstruction and Development (GG 16085 of 23 November 1994).

<sup>30</sup> *Ibid* chap 3.8.

<sup>31</sup> Statistics South Africa 1996 Census, 2.6.

**Table 1: Population group by province (percentages) – October 1996.**

	Eastern Cape	Free State	Gauteng	Kwazulu-Natal	Mpumalanga	Northern Cape	Northern Province	North West	Western Cape	South Africa
African/ Black	86.4	84.4	70.0	81.7	89.2	33.2	96.7	91.2	20.9	76.7
Coloured	7.4	3.0	3.8	1.4	0.7	51.8	0.2	1.4	54.2	8.9
Indian/ Asian	0.3	0.1	2.2	9.4	0.5	0.3	0.1	0.3	1.0	2.6
White	5.2	12.0	23.2	6.6	9.0	13.3	2.4	6.6	20.8	10.9
Unspecified/Other	0.6	0.4	0.8	0.8	0.6	1.5	0.7	0.5	3.1	0.9
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

**Graph 1: Percentage of the population in South Africa by population group – October 1996.**

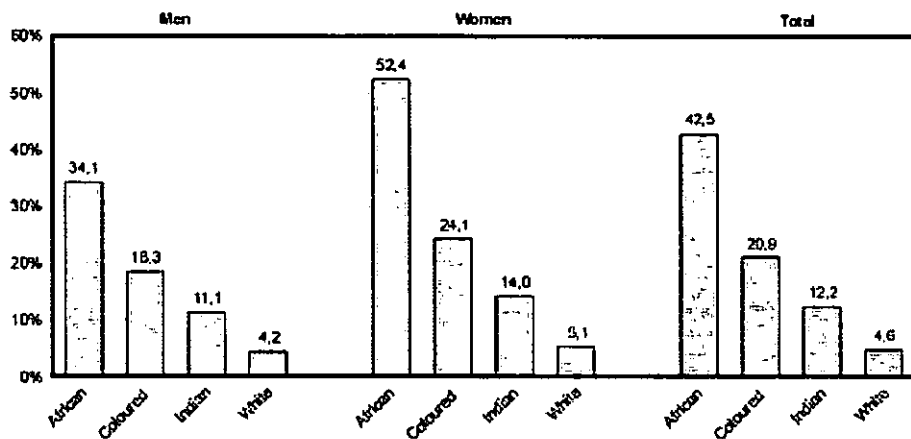
The census, see Table 2 (below), revealed that, not only was the white population a small minority of the South African population, it was also the population grouping with the highest employment percentage. The black population of South Africa, however, suffered from an unemployment rate in 1996 in the region of 42%.<sup>32</sup>

<sup>32</sup> Statistics South Africa 1996 Census 2.30.

**Table 2: Economically active population by population group amongst those aged 15 - 65 years.**

	African/ Black	Coloured	Indian/ Asian	White	Unspecified /Other	Total
Employed						
Male	3,506,509	633,417	234,583	1,060,736	46,658	5,481,903
Female	2,175,968	496,099	128,903	795,716	35,258	3,631,944
Total	5,682,476	1,129,515	363,486	1,856,452	81,917	9,113,847
Unemployed						
Male	1,810,570	141,555	29,312	45,938	12,543	2,039,917
Female	2,395,421	157,676	21,068	43,127	14,437	2,631,730
Total	4,205,992	299,231	50,379	89,066	26,980	4,671,647
Total						
Male	5,317,079	774,971	263,895	1,106,674	59,201	7,521,820
Female	4,571,389	653,775	149,971	838,843	49,696	6,263,673
Total	9,888,468	1,428,746	413,866	1,945,517	108,897	13,785,493

**Graph 2: Unemployment rates by population group and gender – October 1996.**



\* Excluding institutions

The 1996 census clearly reveals the extent of the effect of the discriminatory policies of past South African governments. It is unsurprising that, in the light of these statistics, the ANC sought to implement a new competition policy after being elected to government in 1994. The new competition policy was eventually submitted to parliament as the Competition Bill in 1998 and later enacted as the Competition Act 89 of 1998. The new Act clearly aimed at strict competition regulation so as to pursue economic goals, however, the objective of redressing the

problems of the past through competition law took shape as the public interest objectives in Section 2 and the public interest considerations in sections 10 and 12A.

## 5. MERGER CONTROL AND THE PUBLIC INTEREST IN SOUTH AFRICA

### 5.1 The approach of the competition authorities to the public interest grounds in merger evaluation

The public interest plays its largest role in South African competition law in the realm of merger evaluation. The Competition Act accords particular importance to a list of four considerations of the public interest in this regard.<sup>33</sup> The relevant section in relation to merger evaluations is section 12A.

The process for evaluating a merger by the Tribunal or Commission involves initially and, it appears from the structure of the subsection, primarily, determining ‘whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2)’. If the proposed merger is found likely to substantially prevent or lessen competition, then section 12A(1)(a)(ii) provides that the competition authorities must also determine ‘whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)’. Section 12A(1)(b), on the other hand, provides that should it be found that the merger does not substantially prevent or lessen competition, the Tribunal should nevertheless engage in an enquiry to ‘determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)’. It has been argued that section 12A(1) is not, however, formulated in the clearest of terms and, as a result, has been the subject of extensive argument and debate before the competition authorities.

In the case of *Harmony Gold Co / Goldfields Ltd*<sup>34</sup>, the Tribunal correctly concluded that the primary concern for the Tribunal in merger evaluation is a competition evaluation, not a public interest evaluation, because that is exactly what the wording of the Competition Act requires.<sup>35</sup> The proposed merger, if found to not be anticompetitive, may then either be approved on public interest grounds as well, with or without conditions; or rejected on public interest grounds, despite being

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<sup>33</sup> See Competition Act s 12A.

<sup>34</sup> *Harmony Gold Mining Company Limited/Goldfields Limited* 93/LM/Nov04.

<sup>35</sup> *Ibid* at para 41.

found to be not anticompetitive. If the proposed merger is, however, found to be anticompetitive, such a finding may be bolstered by the finding that the merger would be against the public interest, or the merger may even be approved on public interest grounds, despite it being anticompetitive.<sup>36</sup> It is for this reason that the public interest test is described by Reyburn as possessing ‘a “Janus-faced” quality’.<sup>37</sup>

In *Harmony/Goldfields*, it was argued by Goldfields that the words ‘can or cannot be justified, found in both sections 12A(1)(a)(ii) and 12A(1)(b), imply that, for a merger to be approved, it must be found by the Tribunal that the proposed merger is both not anticompetitive *and* is found to be in favour of the public interest.’<sup>38</sup> The Tribunal correctly refuted this interpretation of the words ‘can or cannot’, instead, they submitted that the words simply mean that ‘the public interest can have both adverse and benign effects’ in merger evaluation,<sup>39</sup> that is, that the conclusion on the public interest can either serve to bolster the finding of the competition analysis, or cause the Tribunal to prohibit or impose conditions on an otherwise competitive merger. The Tribunal further concluded that ‘the public interest grounds once evaluated, do not always point to the same net conclusion’ and as such the competition authority must carefully balance such grounds so as to determine the net conclusion on the public interest.<sup>40</sup> It is therefore not necessary for all the public interest grounds listed in section 12A(3) to point in the same direction before a merger is either approved, approved with conditions, or rejected on public interest considerations,<sup>41</sup> instead, a balancing exercise is necessary.

That the listed public interest considerations may not always point in the same direction is somewhat problematic for the competition authorities and as such, a procedure was advocated in an earlier case for addressing such situations. In *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd*<sup>42</sup> the

<sup>36</sup> *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 para 214.

<sup>37</sup> Reyburn (note 4) at 10-93.

<sup>38</sup> *Harmony Gold Mining Company Limited/Goldfields Limited* 93/LM/Nov04 paras 33-34; the argument by Goldfields goes as far as to say that even if the merger raises no competition problems or public interest problems, the merger must nevertheless be prohibited unless it can be shown that there is a net positive public interest gain from the proposed merger.

<sup>39</sup> *Harmony Gold Mining Company Limited/Goldfields Limited* 93/LM/Nov04 para 54.

<sup>40</sup> *Ibid.*

<sup>41</sup> Reyburn (note 4) at 10-93.

<sup>42</sup> *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02.

Tribunal was explicit in acknowledging the possibility of conflicting public interest considerations,<sup>43</sup> and as a result, advocated a three-stage approach to be adopted by the competition authorities:<sup>44</sup>

1. Each asserted public interest ground must be considered in isolation and it must be determined whether such ground is substantial.
2. If the answer to the above is in the affirmative, and there are at least two contradictory grounds, then the competition authority must attempt to reconcile the conflicting grounds.
3. If the competition authority is unable to reconcile the substantial contradictory grounds, then the grounds must be balanced and the competition authority must reach a net conclusion as to the public interest.<sup>45</sup>

This approach both reflects the language of the section and accords with notions of common sense. It is patently obvious that public interest grounds may conflict and that the same public interest ground, such as the ground of employment, may even be invoked for opposing conclusions.<sup>46</sup> The three-stage approach of the competition authorities to considering public interest grounds is acceptable and non-problematic in this regard.

The wording of section 12A(1) is not clear on the issue of whether the public interest must be considered where a merger, if found to be anticompetitive by the Tribunal, is nevertheless justified in terms of section 12A(1)(a)(i) as a result of some other technological, efficiency or other pro-competitive gain which outweighs the effect or the anticompetitive nature of the merger.<sup>47</sup> The word 'otherwise', found in section 12A(1)(b) would appear to apply only in the instance where the merger is not anticompetitive.<sup>48</sup> Despite this, the Tribunal has concluded that the public interest should be considered even where the merger is justified in terms of section 12A(1)(a)(i).<sup>49</sup> The Tribunal does not explain its reasoning, however, it appears that the Tribunal assumes that there is no sufficient reasoning for the public interest

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<sup>43</sup> *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 paras 214-215.

<sup>44</sup> *Ibid* at para 217.

<sup>45</sup> In *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 paras 221-222, the Tribunal further submitted that a balancing of public interest grounds will seldom be necessary as the 'conflict' will more than often involve public interest grounds avoiding each other 'like two vehicles bypassing each other in opposite directions on a dual lane road. They pass one another without affecting their respective opposite courses'.

<sup>46</sup> *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty) Ltd* 46/LM/May05 paras 132-133.

<sup>47</sup> *Reyburn* (note 4) at 10-93.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Harmony Gold Mining Company Limited/Goldfields Limited* 93/LM/Nov04 para 42.

evaluation not to take place simply because the merger is only justified in a competition analysis in terms of section 12A(1)(a)(i). It is submitted that this approach of the authorities is correct; it would clearly not be the intention of the legislators to have the word ‘otherwise’ cause such a consequence.

It is clear, therefore, that public interest grounds may either save a proposed merger, or prohibit it. It is further clear, however, from a number of judgments by the competition authorities, that South African competition law is not primarily aimed at protecting the public interest and as such, the competition authorities are unlikely to prohibit, based on pure public interest grounds, a merger that is not anticompetitive and even less likely to approve an anticompetitive merger, based solely upon public interest grounds.<sup>50</sup> It appears that the favoured approach of the competition authorities in the situation where the net public interest militates against the approval of an otherwise not anticompetitive merger is to approve the merger but to impose numerous conditions on such approval, aimed at protecting the net public interest. A number of such cases will be considered below.

The process of the competition authorities in merger evaluation is clearly to first conduct a competition evaluation, and only once this is complete, conduct a public interest evaluation. In the case of *Medicross/Prime Cure Holdings*,<sup>51</sup> however, the Tribunal departed from this approach somewhat. The Tribunal commenced its ‘competition analysis’ with a consideration of:

the general state of healthcare provisioning in South Africa, the policy objectives of the South African government in the realm of healthcare provision, the mechanisms whereby government intends achieving those objectives, and the place and role of the private sector...<sup>52</sup>

The Tribunal claimed that such considerations fell under the rubric of section 12A(2)(e)<sup>53</sup>, however it is plain that such considerations are more in line with the public interest than ‘dynamic characteristics of the market’.<sup>54</sup> Nevertheless, the Tribunal considered these issues in its competition analysis and found, in its very

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<sup>50</sup> Reyburn (note 4) at 10-93.

<sup>51</sup> *Medicross Healthcare Group (Pty) Ltd/Prime Cure Holdings (Pty) Ltd* 11/LM/Mar05.

<sup>52</sup> *Ibid* at para 51.

<sup>53</sup> ‘[T]he dynamic characteristics of the market, including growth, innovation, and product differentiation’.

<sup>54</sup> Competition Act s 12A(2)(e).

short public interest analysis, that there were no public interest issues relevant to the proposed merger at all.<sup>55</sup> The Tribunal concluded its segment on the South African healthcare environment, as part of its competition analysis by arguing:

It is our view, then, that this extremely fluid context, the absence of an established and stable regulatory framework for this embryonic market as well as for some related and long-standing markets (for example, pharmaceuticals), demands that we adopt a particularly cautious and circumspect approach to private interventions, such as this merger, that will inevitably impact on the development of the market under consideration. Public interest considerations impinging on the outcome of interventions in this area – be they interventions by the state, by regulators or by private market participants – are, for unimpeachably good reason, unusually intense and this also predisposes us to particular circumspection.<sup>56</sup>

Ultimately, the Tribunal did not approve the merger on the ground that it would lead to a substantial lessening of competition in the market and there were no countervailing technological, efficiency or pro-competitive and no public interest considerations in favour of approval.<sup>57</sup>

The approach of the Tribunal in the case clearly goes against the established two-stage approach adopted in earlier cases. It is unclear why the Tribunal adopted this approach in this case, as a plain reading of the Act shows no justification for including public interest issues in a competition analysis. It is surprising, in light of previous statements by the Tribunal that the public interest is of secondary importance, that the Tribunal engaged so thoroughly in public interest issues in a competition analysis, and then, rather strangely, did not engage in considering public interest issues in its public interest analysis.

The *Medicross/Prime Cure Holdings* was, however, taken on appeal<sup>58</sup> and the Competition Appeals Court (CAC) reiterated the traditional two-stage approach<sup>59</sup>: firstly, a competition analysis must be conducted in terms of section 12A(2), whereby the competition authority must determine whether the merger is likely to substantially prevent or lessen competition. The CAC concluded that the word ‘likely’ had its prime meaning in ‘probability’ and ‘materially’ meant

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<sup>55</sup> *Medicross Healthcare Group (Pty) Ltd/Prime Cure Holdings (Pty) Ltd* 11/LM/Mar05 para 244.

<sup>56</sup> *Ibid* at para 71.

<sup>57</sup> *Ibid* at para 245.

<sup>58</sup> *Medicross Healthcare Group (Pty) Ltd v Prime Cure Holdings (Pty) Ltd* (55/CAC/Sep05) [2006] ZACAC 3.

<sup>59</sup> *Ibid* at para 19.

'substantially',<sup>60</sup> this much is obvious. The second stage of the two-stage approach is a public interest analysis in terms of the grounds listed in section 12A(3).<sup>61</sup>

The CAC found, in no uncertain terms, that the Tribunal was incorrect in its consideration of public interest issues in its competition analysis;<sup>62</sup> instead, the CAC found that the Tribunal should have considered these issues in a secondary public interest analysis:

[T]hese issues should have been of no relevance to the first stage of its enquiry which needed to examine the evidence relating to the proposed merger's impact upon competition. These public interest considerations would have been more appropriately considered during the second phase in terms of section 12A(3), as the need to consider public interest grounds is a separate and subsequent enquiry to that of the primary determination.<sup>63</sup>

The Tribunal's decision in *Medicross* introduced some confusion into the law, however, the CAC's judgment on the correct approach to merger evaluation has brought the necessary clarification and rectified the patently incorrect Tribunal judgment.

The approach of the competition authorities to merger evaluation and the public interest is now relatively clear. The two-stage approach is both logical and accords primary importance to the principle aim of competition law, the promotion and maintenance of competition. The considered cases reveal that the competition authorities must be, and have been, firstly and primarily concerned with issues of competition, and only subsequently are the authorities to consider issues relating to the public interest. This is not to say that the public interest is insignificant, it is only to say that issues of the public interest are of secondary importance to issues of competition. It must be emphasised again, however, that the preamble and purposes of the Competition Act reflect the history and context within which the Act operates. To some extent, the South African Act seeks to redress economic injustices of the past, and as such, the public interest must play an important role in competition law in this country and must be carefully considered by the relevant competition authorities. Nevertheless, the established two-stage approach is, it is submitted, the

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<sup>60</sup> *Medicross Healthcare Group (Pty) Ltd v Prime Cure Holdings (Pty) Ltd (55/CAC/Sep05)* [2006] ZACAC 3 para 19.

<sup>61</sup> *Ibid* at paras 19-22.

<sup>62</sup> *Ibid* at para 24.

<sup>63</sup> *Ibid* at para 23.

correct approach for the South African competition authorities to adopt. It remains, now, to consider how the authorities have interpreted and applied the listed public interest grounds in section 12A(3), and to assess whether the approach of the authorities adequately reflects the purposes of section 2 of the South African Competition Act.

## 5.2 The public interest grounds in merger evaluation

It is now clear that competition authorities must first conduct a competition evaluation and subsequently, a public interest evaluation. Section 12A(3) of the Act lists four public interest grounds which must be considered by the competition authorities when evaluating a merger. The competition authorities must consider the effect 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.

It is important to note that sections 12A(1)(a)(ii) and 12A(1)(b) make use of the words ‘*substantial* public interest grounds’ (my emphasis), thus, the public interest grounds in any particular case will have to have a substantial, or significant, effect if they are to lead the competition authorities to a conclusion that is opposite to that of the competition analysis. This of course must be the conclusion if primacy is to be attached to the competition analysis.

It would appear from the case law that the section 12A(3) list of public interest grounds is a *numerus clausus* of grounds, although this has never been explicitly stated by the Competition Tribunal or Competition Appeals Court.<sup>64</sup> It would nevertheless be absurd for the competition authorities to suggest that there are further unexpressed public interest grounds to consider in the delicate realm of merger evaluation. It is also clear that this list of public interest grounds is not identical to the public interest purposes listed as part of the objectives section in section 2, though, it is clearly very similar in wording and in substance.

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<sup>64</sup> Reyburn (note 4) at 10-94.

### 5.2.1 The effect the merger will have upon a particular industrial sector or region

The first public interest ground that the Act requires consideration of is the effect the merger will have upon ‘a particular industrial sector or region’.<sup>65</sup> The Tribunal is clearly of the view that the words ‘sector or region’ are used by the legislature as such words are broader in meaning than the word ‘market’, and that this is so as to allow for a wider range of issues to be considered in the public interest analysis:

The legislature’s use of the word sector here as opposed to the use of the word market, the word used in section 12A(2), is instructive. Clearly the legislature intended that in undertaking the analysis of the public interest, the competition authorities were to have regard to some sphere of economic activity, wider than the mere relevant market, the traditional tool of analysis of pure competition law issues.<sup>66</sup>

As regards the word ‘industrial’, Reybrun argues that this word should be ‘interpreted widely to include any sector of economic activity’.<sup>67</sup> In the case of *Nasionale Pers*,<sup>68</sup> the Tribunal, when considering a merger in the education sector, did exactly as suggested by Reyburn, and interpreted the words ‘a particular industrial sector’ broadly to encompass issues of education,<sup>69</sup> even though the education sector is by no means an *industrial* sector. The Tribunal considered education to be a particularly important sector of the South African economy. Apartheid policies had left many people ‘unprepared for further education or the world of work’, and as a result of South Africa’s historical context, the Tribunal was very careful in considering the merger in question.<sup>70</sup>

In *Anglo American Holdings Ltd/Kumba Resources Ltd*,<sup>71</sup> the Tribunal was chiefly concerned with the section 12A(3)(c) public interest ground, but did entertain Anglo’s argument that, post-merger, Anglo would invest heavily into Kumba, and

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<sup>65</sup> Competition Act s 12A(3)(a).

<sup>66</sup> *Industrial Corporation of South Africa Ltd v Anglo-American Holdings Ltd* 25/LM/Jun02 and 46/LM/Jun02 para 43.

<sup>67</sup> Reyburn (note 4) at 10-95.

<sup>68</sup> *Nasionale Pers Ltd/Education Investment Corporation Ltd* 45/LM/Apr00.

<sup>69</sup> *Ibid* at paras 24, 47.

<sup>70</sup> *Ibid* at para 24.

<sup>71</sup> *Anglo American Holdings Ltd/Kumba Resources Ltd* 46/LM/Jun02.

that this would be in the public interest.<sup>72</sup> Reyburn argues that, whilst the Tribunal did not express under which public interest ground such argument was considered, it is probable that it was considered under the ground of ‘the effect the merger will have upon a particular industrial sector or region’.<sup>73</sup> It is submitted that such interpretation may be adopted, however, the Tribunal dealt so briefly with the issue, it is difficult to draw firm conclusions from its judgment in this regard.

In the case of *PSG Investment Bank/Real Africa DuroLink*,<sup>74</sup> the Tribunal considered a potential merger between two banks. As part of its public interest analysis, the Tribunal considered the harm that may result should Real Africa DuroLink (RAB) exit the market.<sup>75</sup> Again, it was not stated which public interest ground such considerations fell within, however Reyburn argues that it concerned the effect the merger would have upon a ‘particular industrial sector’.<sup>76</sup>

It appears that the Tribunal has not produced significant jurisprudence regarding section 12A(3)(a), however, it is clear that the Tribunal is wary of expressing exactly what section 12A(3)(a) entails. The Tribunal’s apparent willingness to consider the issue of education and the history of education in South Africa indicates that the Tribunal is willing to, as the Act does, look to South Africa’s past when approaching competition issues. Such an approach may not be necessary in each and every instance of competition law in South Africa, however, at least in the case of *Nasionale Pers*, it was the correct approach to take. The same approach as in *Nasionale Pers*, it is submitted, may potentially be relevant in mergers which may substantially affect other public interest issues such as public healthcare and housing, although, admittedly, such issues do not necessarily play as important a role as education in redressing the economic injustices of the past which resulted in a large portion of the population having more limited access to good income earning opportunities.

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<sup>72</sup> *Anglo American Holdings Ltd/Kumba Resources Ltd* 46/LM/Jun02 at paras 141-144.

<sup>73</sup> Reyburn (note 4) at 10-95.

<sup>74</sup> *PSG Investment Bank Holdings Ltd/Real Africa Durolink Holdings Ltd* 31/LM/May01.

<sup>75</sup> *Ibid* at paras 8-9.

<sup>76</sup> Reyburn (note 4) at 10-96.

Section 12A(3)(a) is framed and interpreted by the Tribunal in more general terms than the other public interest grounds listed in section 12A(3). It is submitted that the Tribunal is correct in interpreting this ground widely so as to consider issues which are not strictly listed in section 12A(3), but are very much in the public interest. This is not to say that the Tribunal is given a free license to include any public interest issue when considering a merger, it is rather to say that in particular cases, certain other public interest issues may be considered in terms of the more generally-framed ground of section 12A(3)(a).

The Tribunal's approach to section 12A(3)(a) in *Nasionale Pers* reflects how this public interest ground should be interpreted and applied in the future. The approach is in line with section 2(c) of the Act, that is, 'to promote employment and advance the social and economic welfare of South Africans' (my emphasis) and in line with the preamble which recognises Apartheid policies as causing 'unjust restrictions on full and free participation in the economy by all South Africans'.

### 5.2.2 The effect the merger will have upon employment

Secondly, the competition authorities must consider the effect the merger will have upon employment.<sup>77</sup> This public interest ground is an extremely important ground of the public interest in South Africa. The South African context is one which exhibits a very high rate of unemployment amongst the general population. In 1996, the national rate of unemployment was estimated at 40%<sup>78</sup> (whilst 42.5% of black South Africans were unemployed at the same time). The drafters of the Competition Act sought to use the new Act to address this high rate of unemployment. Since 1996, and through a variety of means, methods and policies, the national unemployment rate has decreased dramatically to an estimated 37% in 2001<sup>79</sup> and an estimated 21.7% in 2008.<sup>80</sup> These figures clearly indicate an improvement in employment levels, however, when the present unemployment rate

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<sup>77</sup> Competition Act s 12A(3)(b).

<sup>78</sup> Statistics South Africa 1996 Census. Census results available at <http://www.statssa.gov.za> [accessed 05 July 2009].

<sup>79</sup> Statistics South Africa 2001 Census. Census results available at <http://www.statssa.gov.za> [accessed 05 July 2009].

<sup>80</sup> CIA World Factbook (South Africa). Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> [accessed 05 July 2009].

of 21.7% is compared to the unemployment rates of developed nations,<sup>81</sup> it becomes clear that unemployment remains a significant hurdle in South Africa and one that still warrants much attention.

The problem of unemployment is not faced to the same extent in the developed nations of the world;<sup>82</sup> however, amongst developing countries, and especially those in Africa, it is a concern of the highest importance.<sup>83</sup> Unemployment has many side-effects, including higher crime levels and an increase in harmful drug use, and it is no surprise that a society would actively seek to curb a high unemployment rate. Furthermore, the long history of oppression by the Apartheid government that resulted in a high unemployment rate amongst the black population, led employment to become more than a mere economic concern, it has become a concern that is intimately linked with freedom and democracy in South Africa. It is for these reasons that, when drafting the Competition Act, the drafters did not simply seek to copy the legislation of other competition jurisdictions, rather, the drafters of the Act sought to incorporate developed competition rules and make additions to such rules so as to specifically and uniquely tailor South African competition law to suit South Africa. The list of purposes in section 2, for example, was incorporated from Canadian law and additions were made to it, one such addition being the section 2(c) purpose of promoting employment. It is submitted that the competition authorities of South Africa cannot consider the public interest ground of employment in merger evaluation in the same manner as the competition authority of some other developed country may do, instead, the South African competition authorities should pay particular attention to the South African context and recognise that the public interest ground of employment is a crucial consideration in merger evaluation in South Africa.

Despite the obvious importance of employment in the South African context, the South African competition authorities have expressed their reluctance to interfere

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<sup>81</sup> CIA World Factbook (Global Unemployment Ranking Order). Available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2129rank.html> [accessed 05 July 2009].

<sup>82</sup> The Canadian unemployment rate, for example is estimated at 6.1%, whilst the unemployment rate of the United States of America is an estimated 7.2%. The unemployment rate of the European Union is estimated at a slightly higher, 7.5%

<sup>83</sup> The average unemployment rate on the African continent is estimated as high as 21.35%.

too much in employment issues at large when evaluating mergers.<sup>84</sup> Instead, engaging with a host of employment issues such as wages, working conditions and collective bargaining,<sup>85</sup> the Tribunal has held that its role in considering the public interest ground of ‘employment’ is secondary to that of those institutions specifically designed for, and having the expertise to deal with, the protection of employment interests such as these:

[I]t is incumbent on an un-elected, administrative tribunal, principally charged with defending and promoting competition, to approach its public interest mandate with great circumspection. We derive some comfort from the knowledge that each of the elements of public interest that we are obliged to consider are protected and promoted by legislation and institutions specifically designed for that purpose – hence, the merged entity would not be able to alter unilaterally employment conditions and agreed bargaining arrangements. While this cannot provide the basis for us shying away from tough decisions, it does place our own role in these matters in correct perspective. At most, our role is ancillary to these other statutes and institutions; it is supportive of their general thrust and should, by and large, not be employed as a substitute for, and in order to second-guess, these other interventions.<sup>86</sup>

The Tribunal has concluded that the most important rights accorded to employees by competition law are procedural: ‘the right to timeous information with respect to the potential employment impact of a merger’.<sup>87</sup> Section 13A of the Act provides that, to ensure that the public interest ground of employment is adequately considered, parties to an intermediate or larger merger must notify the Competition Commission of such potential merger.<sup>88</sup> Furthermore, notice of such potential merger must also be given to ‘any registered trade union that represents a substantial number of its employees’<sup>89</sup> or ‘the employees concerned or representatives of the employees concerned, if there are no such registered trade unions’.<sup>90</sup> A large or intermediate merger will not be implemented until such time as the merger has been approved by the Commission, after conducting both a competition and public interest analysis. The ground of employment is thus accorded special importance by section 13A of the Act, by ensuring employees and their trade unions and/or

<sup>84</sup> *Unilever Plc v Competition Commission Ltd* 55/LM/Sep01, *Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd* 66/LM/Oct01, *Distillers Corporation (SA) Limited/Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02.

<sup>85</sup> *Daun et Cie AG/Kolossus Holdings Ltd* 10/LM/Mar03 para 125.

<sup>86</sup> *Ibid* at para 124.

<sup>87</sup> *Unilever Plc v Competition Commission* 55/LM/Sep01 para 43.

<sup>88</sup> Competition Act s 13A(1).

<sup>89</sup> Competition Act s 13A(2)(a).

<sup>90</sup> Competition Act s 13A(2)(b).

representatives are aware of the potential merger, and have the opportunity to make submissions to the authorities regarding the merger and its impact upon employment.

To date, the public interest ground of employment has received significant attention from the competition authorities. Aside from arguing that the most significant rights accorded to employees are procedural, the competition authorities have been active in approving mergers, but imposing certain employment-related conditions on such approvals. The authorities may also impose employment-related conditions upon merger approval that have been agreed by the employees and employers themselves.<sup>91</sup>

In the case of *Daun et Cie/ Kolosus Holdings Limited*,<sup>92</sup> the Commission received submissions from two trade unions (SACTWU and SAFATU), arguing that the merger be approved, but with certain conditions upon post-merger employment levels and employment conditions. The Tribunal approached the issue of employment conditions with much circumspection and did not impose conditions upon the merger in this regard,<sup>93</sup> but did find that in the area of employment levels, the Tribunal had a more important role to play:

However, because of the powerful link between direct employment loss and a restructuring initiative like a merger, it is undoubtedly in this area that the legislature intended a role for the competition authorities. In contrast then with the other conditions proposed by SACTWU we are confident that the Act empowers us to stipulate conditions with respect to the scale of job loss occasioned by the merger.<sup>94</sup>

The Tribunal concluded by approving the merger, on condition that no more than 150 employees would be retrenched for 12 months post-merger, thus protecting employment.

The Tribunal is not, however, only concerned with levels of employment when considering the public interest ground of employment (although this does appear to be their primary concern). In *Distillers Corporation (SA) Ltd v*

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<sup>91</sup> *Cherry Creek Trading 14 (Pty) Ltd/Northwest Star (Pty) Ltd* 52/LM/Jul04; *Multichoice Subscriber Management (Pty) Ltd v Tiscali* 72/LM/Sep04.

<sup>92</sup> *Daun et Cie AG/Kolosus Holdings Ltd* 10/LM/Mar03.

<sup>93</sup> *Ibid* at para 125.

<sup>94</sup> *Ibid* at para 126.

*Stellenbosch Farmers Winery Group*,<sup>95</sup> the Tribunal noted that there would be a large number of job losses should the merger be approved, however, the Tribunal appears to have been more concerned with the effect the merger would have upon employment as a whole. As a result, the Tribunal paid particular attention to the question of whether retrenchment packages in this case were sufficient and whether they were properly negotiated.<sup>96</sup>

It is evident that the Tribunal is very wary of engaging too deeply with employment issues when analysing a merger. The Tribunal prefers to concern itself only with levels of employment post-merger. The Tribunal has, however, softened its stance by insisting that its concern is the ‘substantial effect on employment’<sup>97</sup> by the merger and not merely job losses. The Tribunal has further held that the effect of a large number of job losses may be ameliorated by offering adequate retrenchment packages to retrenched employees.<sup>98</sup>

In the above discussed Tribunal cases, argument largely surrounded potential job losses of unskilled and semi-skilled employees of one or the other merging parties. In the case of *Harmony Gold Mining Co/Goldfields Ltd*,<sup>99</sup> however, the Tribunal discussed job losses of skilled persons. The Tribunal was clearly of the opinion that job losses of managerial positions and skilled labour were less serious than that of unskilled and semi-skilled workers, as skilled workers are considered more marketable and more likely to obtain alternative employment should they be retrenched as a result of the merger.<sup>100</sup>

The conditions that are imposed by the authorities, however, are most often only imposed for a relatively short period of time. The authorities are aware that the nature of a merger most often results in job cuts so as to realise the potential efficiency gains. In the case of *DB Investments SA v De Beers*,<sup>101</sup> the Tribunal disagreed with the trade unions’ argument that the approval of the merger would

<sup>95</sup> *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02.

<sup>96</sup> *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 at paras 242-243.

<sup>97</sup> *Ibid* at para 242.

<sup>98</sup> *Ibid*.

<sup>99</sup> *Harmony Gold Mining Company Limited/Goldfields Limited* 93/LM/Nov04.

<sup>100</sup> *Ibid* at paras 89-91.

<sup>101</sup> *DB Investments SA v De Beers Consolidated Mines Limited* 20/LM/Mar01.

have an adverse effect upon employment The Tribunal further expressed the view that to impose long-term conditions is illogical:

It is furthermore illogical and impractical to expect employers to offer undertakings with regard to maintaining employment levels into the distant future, especially having regard to the dynamic and volatile nature of the relevant industries.<sup>102</sup>

The competition authorities, whilst seeking to balance a competition analysis with a public interest analysis, are careful not to impose, in the instance of employment, conditions which are so onerous upon the merging companies that they do damage to long-term efficiency gains and competition gains that would be achieved through the merger. It appears most common for the competition authorities to impose conditions on merger approval which ensure that no more than a stipulated number of jobs may be cut in a 12 month period. Such an approach, it is submitted, is the correct approach. To impose long-term employment conditions upon merger approval may fundamentally do damage to the merger. If the authorities would seek to impose long-term conditions, then it is submitted that it would be better for the Tribunal to reject the merger on public interest grounds.

The rejection of a merger purely upon the public interest ground is, however, unlikely. As stated previously, the authorities are reluctant to reject any merger that is not anticompetitive based upon any ground of the public interest. The authorities prefer to impose conditions upon merger approval if the merger is found to be competitive.

It is submitted that this approach by the competition authorities to the public interest ground of employment is, in general, the correct approach. Institutions such as the Labour Relations Act, Employment Equity Act, trade unions and the like, have been specifically created and designed to protect the interests of both employees and employers. It would surely be both unwise and unreasonable to expect a competition authority, which is an unelected body primarily concerned with promoting and maintaining competition, to play a primary role in issues associated with employment. True as the approach of the competition authorities may be, however, the competition authorities cannot 'shy away' from this ground. The authorities

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<sup>102</sup> *DB Investments SA v De Beers Consolidated Mines Limited* 20/LM/Mar01 at para 40.

must, in light of the South African context of unemployment, devote significant attention to the levels of employment associated with proposed mergers.

As the Tribunal has done in the past, more care must be had when a merger involves job cuts of unskilled and semi-skilled persons. Such persons, as a result of South Africa's Apartheid history, were most likely forced into such occupation as a result of limited access of movement and limited access to education. The Tribunal must be commended for its approach in this regard. It is submitted, however, that it is foreseeable that there may be mergers in the future which may lead to substantial job losses, perhaps even causing job losses in small communities and towns which are dependent on such employment. In these instances, it is difficult to imagine imposing a mere 12-month condition of maintaining employment levels upon the merger. In these instances, it is submitted, the competition authorities should not shy away from rejecting otherwise not anticompetitive mergers on public interest grounds. The ground of employment is imperative in South Africa and, in exceptional cases, the competition authorities may be required to protect the public interest for periods of time longer than 12 months.

### **5.2.3 The effect the merger will have upon the ability of small businesses or firms controlled or owned by historically disadvantaged persons, to be competitive**

Thirdly, the competition authorities must consider the effect the merger will have on 'the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive'.<sup>103</sup> Much like the public interest ground of promoting employment, this ground has particular importance in South Africa. It is common cause that the Apartheid history of South Africa led to an excessive concentration of the economy in the hands of the white population. Whilst the Apartheid regime has since ended, the results of the Apartheid economic system are still being experienced today, some fifteen years after South Africa transitioned to a democratic Republic. It is clear from both the preamble and section 2(f) of the Competition Act that one of the key functions of the Competition Act is to address this problem by promoting a greater spread of ownership in the South African

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<sup>103</sup> Competition Act s 12A(3)(c).

economy, especially amongst the historically disadvantaged portion of the population.<sup>104</sup> It is submitted that careful attention must be paid to this public interest ground by South Africa's competition authorities – it is not merely a general public interest consideration common to all societies and competition regimes; rather, it is a consideration that is particularly relevant to the South African context. Should the South African competition authorities seek, at least in some manner, to lessen and eradicate the effects of the Apartheid economic system, it is submitted that this public interest ground should be carefully weighed.

Historically disadvantaged persons (or 'HDPs') are defined in the Competition Act in the following manner:

For all purposes of this Act, a person is a historically disadvantaged person if that person -

- (a) is one of a category of individuals who, before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race;
- (b) is an association, a majority of whose members are individuals referred to in paragraph (a);
- (c) is a juristic person other than an association, and individuals referred to in paragraph (a) own and control a majority of its issued share capital or members' interest and are able to control a majority of its votes; or
- (d) is a juristic person or association, and persons referred to in paragraph (a), (b) or (c) own and control a majority of its issued share capital or members' interest and are able to control a majority of its votes.<sup>105</sup>

This definition is by no means problematic and it is clear that the Act seeks to address the interests of persons who specifically suffered under, and as a result of, Apartheid racial discrimination. It is for this reason that this public interest ground is especially relevant in South Africa. The South African situation is different to that of the United States, where the portion of the population that suffered from government-enforced racial discrimination was a small minority. In South Africa, historically disadvantaged persons constitute the overwhelming majority of the general population and, as such, their interests require special consideration.

The Tribunal has addressed this section 12A(3)(c) public interest ground in relatively few cases, though significant attention was paid to this ground in the case

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<sup>104</sup> See Competition Act preamble and s 2(f).

<sup>105</sup> Competition Act s 3(2).

of *Anglo American Holdings Ltd/Kumba Resources Ltd*.<sup>106</sup> In this case, Anglo American sought to merge with Kumba Resources and such merger was found to not be anticompetitive by the Tribunal. The Tribunal then conducted a public interest analysis in terms of section 12A(1)(b) where arguments primarily involved the public interest ground of section 12A(3)(c).

In the aforementioned case, the Industrial Development Corporation (IDC) intervened and argued that, in light of the preamble and section 2(f) of the Act, which clearly aims at promoting a greater spread of ownership in the economy, especially amongst historically disadvantaged persons, a purposive interpretation of section 12A(3)(c) should be adopted.<sup>107</sup> The IDC argued that Anglo American, a traditional firm in the mining sector, already possessed a 'lion's share of the economy' and that to approve the merger with Kumba, a strategic asset in the iron ore mining industry, would concentrate ownership in the economy in white hands and thus achieve nothing less than the exact opposite of the intent of the preamble.<sup>108</sup> As such, the IDC argued that the proposed merger should be approved, but subject to certain strict conditions so as to ensure the continued involvement of historically disadvantaged persons in the ownership and control of Kumba.<sup>109</sup>

The Tribunal did not decide whether the wide purposive interpretation of section 12A(3)(c), as advocated by the IDC, was the correct approach to be adopted, however the Tribunal did decide that the merger could not be prohibited on this basis alone. The Tribunal found that there was insufficient evidence of an alternative bid by historically disadvantaged persons, to that of Anglo American's, for control of Kumba,<sup>110</sup> and that to prohibit the merger on the possibility of a later offer from a HDP owned and controlled firm, would be pure speculation.<sup>111</sup> The Tribunal furthermore concluded that there was 'insufficient evidence to suggest that if the merger is implemented it would close the door on increasing the ownership of HDPs in Kumba'.<sup>112</sup>

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<sup>106</sup> *Anglo American Holdings Ltd/Kumba Resources Ltd* 46/LM/Jun02.

<sup>107</sup> *Anglo American Holdings Ltd/Kumba Resources Ltd* 46/LM/Jun02 at paras 147-151.

<sup>108</sup> *Ibid* at para 153.

<sup>109</sup> *Ibid*.

<sup>110</sup> *Ibid* at para 161.

<sup>111</sup> *Ibid*.

<sup>112</sup> *Anglo American Holdings Ltd/Kumba Resources Ltd* 46/LM/Jun02 para 167.

The proposed purposive interpretation of section 12A(3)(c), despite being entertained by the Tribunal, was not endorsed, on the contrary, the Tribunal chose to, rather vaguely, state that they neither endorsed nor refuted the correctness of the approach argued for by the IDC, nor did they depart from earlier decisions on the approach to the public interest grounds of section 12A(3):

It is important to note that in adopting the IDC's approach in interpreting the legislation we have done no more than to evaluate whether, if that approach was found to be the correct one, there is evidence on the record to support prohibiting the merger on the basis that on a preponderance of probabilities it would frustrate the objects of the Competition Act the IDC seeks to invoke. We have found that the evidence does not establish this. This does not mean that we endorse this approach as the correct interpretation of the Act or that we have departed from our earlier decisions on the application of the public interest. We deem it imprudent to make a decision on so difficult an issue when the outcome of such a debate would be academic given our conclusions on the evidence.<sup>113</sup>

In making this argument, the Tribunal referenced three important large merger cases where the application of the public interest was relevant.<sup>114</sup> This paper now turns to consider the judgment of the Tribunal in one of these cases, *Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd*,<sup>115</sup> in order to try to determine the approach of the Tribunal to interpreting and applying the public interest ground related to historically disadvantaged persons.

In *Shell South Africa/Tepco Petroleum*, the Tribunal rejected the argument advanced by the Competition Commission and instead chose to approve the merger between Shell South Africa and Tepco Petroleum without condition. Tepco and Shell SA sought to merge, the result of which would see Shell SA gain ownership and control over Tepco and would see Thebe,<sup>116</sup> the black economic empowerment company and controlling shareholder of Tepco, acquiring a 17.5% share in Shell SA Marketing, the post-merger company which will control the assets and trademarks of Tepco. The Competition Commission argued for the imposition of three conditions on the approval of such merger on the grounds that the merger between Tepco and

<sup>113</sup> *Anglo American Holdings Ltd/Kumba Resources Ltd* 46/LM/Jun02 at para 170, also see para 167.

<sup>114</sup> *Unilever plc/Robertsons Foods (Pty) Ltd* 55/LM/Sep01, *Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd* 66/LM/Oct01, *Distillers Corporation (SA) Limited/Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02.

<sup>115</sup> *Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd* 66/LM/Oct01.

<sup>116</sup> Thebe Investment Corporation (Pty) Ltd.

Shell SA would result in ownership and control passing out of the hands of historically disadvantaged persons. The Commission's argument thus revolved around the importance in this merger, of the section 12A(3)(c) public interest ground of protecting the ability of firms owned by historically disadvantaged persons to become competitive.

In its judgment, the Tribunal analysed each condition argued for by the Commission, individually, and found that Tepco was a small, isolated company with little chance of sustainable growth, and that ensuring the prolonged life of this company would do little to further empowerment in South Africa:

Empowerment is not furthered by obliging firms controlled by historically disadvantaged persons to continue to exist on a life support machine.<sup>117</sup>

The Tribunal further found that the merging parties eagerly sought to merge and that such merger would not result in Thebe exiting the market, rather, Thebe would acquire a 17.5% share in Shell SA Marketing, the company which would control Tepco's assets post-merger. The Commission also sought to impose conditions on the merger which would see the continued existence of Tepco in the market and Tepco's brand.<sup>118</sup> Such conditions, however, were also rejected by the Tribunal and the merger approved without condition.

The Tribunal is clearly of the view that the imposition of conditions upon mergers simply in order to prolong the involvement of historically disadvantaged persons in a particular market, especially where such a merger may be found to be not anticompetitive and commercially justifiable to such persons, steers dangerously close to the authorities overstepping their mandate and, possibly, causing damage to the very interests they are to protect.<sup>119</sup> Whilst the competition authorities are tasked with promoting competition and guarding, at least to some extent, the public interest, they are not tasked with intervening in mergers to the extent argued for by the Commission in the case of *Shell South Africa/Tepco Petroleum*.

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<sup>117</sup> *Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd* 66/LM/Oct01 para 42.

<sup>118</sup> The third condition suggested by the Commission was that the any shareholder agreement pursuant to the other conditions must first be submitted to the Commission for approval before being implemented. Such a condition, however, has little relevance to the public interest ground relating to historically disadvantaged persons, and the Tribunal was correct in dismissing this condition.

<sup>119</sup> *Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd* 66/LM/Oct01 para 58.

The public interest ground of employment, as already articulated, may cause a merger to be approved with conditions or even cause an otherwise competitive merger to be rejected in its entirety because of employment concerns (although the South African authorities are ordinarily not in favour of this approach). It is submitted, however, that the public interest ground relating to historically disadvantaged persons cannot be interpreted and applied in the same manner. The ground of employment revolves around the reality that mergers often result in job losses of persons in the employment of either of the merging firms, whereas the ground relating to historically disadvantaged persons concerns the wider community, not only the merging firms themselves.

It is submitted that this ground should largely operate as a ground to reject an otherwise competitive merger on public interest grounds or serve to approve a merger that is otherwise deemed anticompetitive (although this possibility is very unlikely, given the previous statements of the competition authorities). This ground may also operate in conditional form, but only in a manner which may facilitate the ability of other small businesses and firms owned by HDPs, to be competitive. The concern is therefore not for the merging HDP firm, but the effect such merger will have upon other HDP firms in the market.

The reasons for such an argument are as follows: Where an HDP firm seeks to merge with a non-HDP firm and where such merger is not anticompetitive and such merger is commercially justifiable, it goes against underlying capitalist notions to impose conditions on such merger, requiring the continued existence of the HDP firm's name or brand, simply in the name of ensuring the involvement of historically disadvantaged persons in a market. Not only may the HDP firm be a perfectly willing seller,<sup>120</sup> but the merger may be vital for the HDP firm's continued existence in other markets.<sup>121</sup> Derailment of the merger may thus, far from protecting HDPs, result in more damage to the ability of historically disadvantaged persons to be competitive.

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<sup>120</sup> *Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd* 66/LM/Oct01 para 53.

<sup>121</sup> *Ibid* at para 42.

It is submitted that this public interest ground should instead operate so as to exclude mergers found to be not anticompetitive, but that are detrimental to the ability of other small businesses or firms controlled or owned by historically disadvantaged persons, to be competitive. This is currently not the approach of the competition authorities, however, it appears that this is how section 12A(3)(c) is designed to operate.

The case of *Shell South Africa/Tepco Petroleum* demonstrates that the emphasis in assessing this condition should not be upon the interests of the HDP firm which seeks to merge, but upon other HDP firms in the relevant market. It is these other HDP firms which may suffer as a result of the merger, whereas the HDP firm seeking to merge without condition should be entitled to do exactly that. The Commission further argued that what is good for Thebe may not necessarily be good for the broader South African interest, however this argument was rejected by the Tribunal by re-stating the view that:

[t]he competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an over-zealous manner lest they damage precisely those interests that they ostensibly seek to protect.<sup>122</sup>

The public interest ground of section 12A(3)(c) is not a free license for the competition authorities to intervene in commercial decisions,<sup>123</sup> instead, it operates so as to protect the ability of small businesses or firms controlled or owned by historically disadvantaged persons, to be competitive. The concern is with ensuring the South African economy is open to greater ownership by a greater number of South Africans, not forcing certain South Africans to remain in the market simply because they are historically disadvantaged. It still remains to be seen whether the courts will attach a purposive interpretation to section 12A(3)(c). Whilst this public interest ground has been interpreted in a manner which seeks to prevent HDP-controlled firms from exiting a market, it should be interpreted in a manner which assess whether the proposed merger will cause the ability of other small businesses and firms controlled by historically disadvantaged persons to be competitive, to be greatly diminished.

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<sup>122</sup> *Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd* 66/LM/Oct01 para 58.

<sup>123</sup> *Ibid* at para 50.

#### 5.2.4 The effect the merger will have upon the ability of national industries to compete in international markets

Finally, the competition authorities must consider the effect the merger will have on ‘the ability of national industries to compete in international markets’.<sup>124</sup> Unlike the grounds of employment and the ability of firms controlled by historically disadvantaged persons to be competitive, this public interest ground is not intimately linked with South Africa’s apartheid history to the extent that the historically disadvantaged community are directly affected, rather, the Apartheid regime resulted in sanctions which limited the ability of all South Africans to compete in international markets. To this extent then, this ground is important, however, it is submitted, given South Africa’s steady emergence out of the pit of Apartheid, not as important as it may have been over the past ten years. Thus, whilst this ground demands attention, it does not, it is submitted, have as important a role in South Africa today as do the grounds of sections 12A(3)(b) and (c).

The Tribunal’s approach to this ground is well articulated in *Tongaat-Hulett Group Ltd/Transvaal Suiker Bpk*.<sup>125</sup> In this case, after finding that the merger would be anticompetitive, the Tribunal assessed whether the merger could nevertheless be approved on public interest grounds. The Tribunal, in considering section 12A(3)(d), found that dominance of a local market was not necessary for the merged entity to compete internationally, instead, the Tribunal found that local competition enhances international competition.<sup>126</sup> The Tribunal is thus clearly of the view that the size of the firm is not conclusive, effectiveness is, and thus the Tribunal will not approve an anticompetitive merger where size of production and effectiveness does not increase.<sup>127</sup> The link between this public interest ground and traditional competition law concerns of efficiency, in this regard, are clear.<sup>128</sup>

This public interest ground will more likely be invoked where parties seek the approval of an otherwise anticompetitive merger. The concern in such instances is not the social welfare of employees, or ability of previous marginalised portions of

<sup>124</sup> Competition Act s 12A(3)(d).

<sup>125</sup> *Tongaat-Hulett Group Limited/Transvaal Suiker Bpk* 83/LM/Ju100.

<sup>126</sup> *Ibid* at para 116.

<sup>127</sup> Reyburn (note 4) at 10-99. As articulated earlier, the Tribunal has displayed its unwillingness to approve an anticompetitive merger, despite the force of the public interest arguments.

<sup>128</sup> Reyburn (note 4) at 10-99.

the population to compete, rather, the concern is with the international competition ability of larger firms. Such a concern must not, however, be disregarded. In the case of *Nampak Ltd/Malbak Ltd*,<sup>129</sup> the Tribunal did not decide upon the force of the public interest argument, but did concede that business with multi-national corporations was of significant importance to the merging parties.<sup>130</sup> It is possible to imagine an instance where an anticompetitive merger between a failing firm (operating in a primarily international product market) and another firm (operating in a primarily local product market) may be approved in terms of this public interest ground. It must still be noted, however, that the authorities are weary of attempts relying on the failing firm doctrine.<sup>131</sup>

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<sup>129</sup> *Nampak Ltd/Malbak Ltd* 29/LM/May02.

<sup>130</sup> *Ibid* at paras 63-65.

<sup>131</sup> See *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty) Ltd* 46/LM/May05.

## 6. EXEMPTIONS ON PUBLIC INTEREST GROUNDS

Aside from preamble, purposes section and section 12A relating to merger control, the only other express reference to the public interest in the South African Competition Act is found in section 10(3), which relates to the granting of exemptions by the Competition Commission in terms of section 10(2)(a) of certain agreements or practices that are otherwise restricted by the Act. Section 10(3) does not allow for the granting of exemptions based on the general public interest, however it does allow for the granting of exemptions based upon four narrowly circumscribed public interest objectives,<sup>132</sup> namely:

- (i) maintenance or promotion of exports;
- (ii) promotion of the ability of small businesses, or firms controlled by historically disadvantaged persons, to become competitive;
- (iii) change in productive capacity necessary to stop decline in an industry; or
- (iv) the economic stability of any industry designated by the Minister, after consulting the Minister responsible for that industry.

Unlike merger control, it is the prerogative of a firm to apply to the Competition Commission for an exemption. Furthermore, an applicant must show that the granting of an exemption is 'required to attain an objective mentioned in paragraph (b)',<sup>133</sup> or if such exemption 'contributes to'<sup>134</sup> the list of public interest objectives listed in section 10(3)(b). Even if an applicant is able to show this, however, it is still the prerogative of the Commission to grant the exemption.<sup>135</sup> Clearly, the Act envisages that in some circumstances, competition may not be the highest objective, but the public interest may be, and it is for this reason that exemptions exist. Each of these public interest grounds upon which exemptions may be granted will be briefly considered below.

### 6.1 Maintenance or promotion of exports

The first of these exemptions is that agreements or practices may be exempted on the ground that they maintain or promote exports.<sup>136</sup> This objective is similar in wording to that of the section 12A(3)(d) public interest merger

<sup>132</sup> Reyburn (note 4) at 5-83.

<sup>133</sup> Competition Act s 10(3)(a).

<sup>134</sup> Competition Act s 10(3)(b).

<sup>135</sup> Competition Act s 10(3) 'The Competition Commission *may* grant an exemption in terms of subsection 2(a) on if –' (my emphasis).

<sup>136</sup> Competition Act s 10(3)(b)(i).

consideration of ‘the ability of national industries to compete in international markets’.<sup>137</sup> Reyburn argues that the jurisprudence concerning section 12A(3)(d) may thus be relevant in interpreting section 10(3)(b)(i) in the future, and, that like the merger ground, the competition authorities will be wary of allowing this exemption at the cost of unnecessary exploitation of the local market.<sup>138</sup>

South Africa suffered from the imposition of sanctions by the international community during the Apartheid regime. One result of such sanctions was limited participation by South Africans in world markets. The Competition Act seeks to address this in section 2 by providing that one purpose of the Act is to ‘expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic’.<sup>139</sup> It appears that the public interest objective to maintain or promote exports, is aligned with this purpose of the Act, and as such, should not be too easily disregarded by the competition authorities.

Without negating the importance of this public interest objective in the realm of exemptions, it is submitted that such an exemption is not particular to South Africa nor is it particular to developing nations – it is an exemption which may be found in the competition laws of numerous jurisdictions. It is nevertheless important for developing nations, in growing their fledgling economies, to be involved to some extent in world markets. If maintaining or promoting exports will lead to large enhancements of the public interest, it thus is submitted that in developing nations, this exemption may be very important.

## **6.2 Promotion of the ability of small businesses, or firms controlled by historically disadvantaged persons, to become competitive**

The second objective is identical in wording to the public interest merger ground listed in section 12A(3).<sup>140</sup> As with that public interest ground, it is submitted that the South African context determines that this exemption ground is of particular

<sup>137</sup> Reyburn (note 4) at 5-83.

<sup>138</sup> *Ibid*; *Tongaat-Hulett Group Limited/Transvaal Suiker Bpk* 83/LM/Jul00 para 116.

<sup>139</sup> Competition Act s 2(d).

<sup>140</sup> Competition Act s 12A(3)(c).

importance. Eleanor Fox has argued that, whilst South Africa's competition law is largely reflective of well-tested principles of competition law, this public interest exemption ground represents 'unchartered territory' in competition law.<sup>141</sup>

Despite the new nature of this exemption, it continues reflect the traditional aim of competition law in that such an exemption may only be granted to the specified parties, if it aids in their 'ability...to become competitive' (my emphasis). The exemption clearly cannot be granted to parties simply because they fall within the definition of a 'small business' or 'historically disadvantaged person', rather, it may only be granted if such exemption is applied for by a qualifying party and will aid in such party, or parties, to become competitive, that is, 'more efficient and effective in the marketplace'.<sup>142</sup> Fox is unsure as to where such an exemption is likely to find application, as most anti-competitive agreements will not aid parties in becoming competitive, although she concedes that it may find application in 'the gray area within which the competitive effects of an agreement are ambiguous'.<sup>143</sup> Reyburn, however, finds that this exemption may well apply in two instances:

- Firstly, some agreements or practices may, despite being *per se* prohibited, be pro-competitive. Reyburn argues that such agreements or practices may well be exempted from the strict requirements of the Act.<sup>144</sup>
- Secondly, Reyburn concedes to Fox's argument, that anticompetitive agreements will not likely cause firms to become competitive, but argues that the standard of what amounts to a pro-competitive gain under section 10 may well not be as exacting as for section 4(1)(a). In such instances, Reyburn argues that, in such instances, the competition authorities may well allow an exemption.<sup>145</sup>

This exemption may still play an important role in South African competition law; however, its exact role is far from certain.

Despite the uncertainty as to the application of this exemption, it remains reflective of both the preamble and purposes of the Competition Act. Such an

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<sup>141</sup> E.M Fox 'Equality, Discrimination, and Competition law: Lessons from and for South Africa and Indonesia' (2000) 41 *Harvard International Law Journal* 579 at 585-586.

<sup>142</sup> *Ibid* at 587.

<sup>143</sup> *Ibid*.

<sup>144</sup> Reyburn (note 4) at 5-84.

<sup>145</sup> *Ibid*.

exemption is not, as Fox articulates, common to well-tested principles of competition law, however, it may find some application in South Africa. It is clear that this ground for exemption is specifically targeted at redressing the problems caused by Apartheid by allowing HDPs and SMEs some potential liberty in their compliance with the provisions of the Act, with the direct aim that they may become competitive in the future. It is obvious that the granting of such an exemption would only operate in the short term, as long term exemptions would most likely do more harm to competition than they would do to promote the ability of SMEs and HDPs to become competitive. Nevertheless, the application of this ground remains uncertain in South Africa.

### **6.3 Change in productive capacity necessary to stop decline in an industry**

Ordinarily, where there is a decline in demand, competition in a market will lead to the most inefficient firm exiting such market and result in a return to balance between supply and demand, and thus, efficient firms will continue to supply the demand.<sup>146</sup> This may not, however, always be the case. Where factors of production are not mobile, considerable hardship will result and exit from the market by firms will often lead to reduced competition. It is for this reason that this exemption has been designed.<sup>147</sup> The exemption allows competitors to co-operate for the purposes of reducing output, which would otherwise be prohibited under the Act, so as to stop decline in an industry. Although the Act does not specify that any requirements be met under this exemption, Reyburn suggests four prerequisites before the Commission grants an exemption based upon this ground:<sup>148</sup>

- Overcapacity must not be temporary;
- Restrictions will have to be temporary;
- An agreement will have to show clearly how the co-operating firms intend to reduce capacity. Restrictions on output are not the same as provisions to reduce capacity.

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<sup>146</sup> Reyburn (note 4) at 5-85.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid at 5-85, 5-86.

- Restrictions on competition will have to relate to the attempt to reduce capacity. Section 10 will apply only if the agreement or practice “contributes” to one of the listed objectives and the restriction is necessary to attain the objective.

This exemption ground does not seem to be particular to the South African context, or even that of developing countries. Such a provision for exemption aims to prevent decline in an industry, an issue which may be of concern not only to developing nations, but to all nations and economies. An exemption based upon this public interest objectives does not seek to address the injustices caused by Apartheid, rather, it seems to reflect the first purpose of the Act, in section 2(a), that is, ‘to promote the efficiency, adaptability and *development of the economy*’ (my emphasis). This ground for exemption appears to aid in the future development of the economy (and in turn, benefit the public interest) of South Africa by temporarily allowing illegal cartel activity which restricts output, so as to prevent decline in an industry. As argued by Reyburn, the authorities will not likely allow an exemption on this ground if there are less restrictive means by which to achieve the objective.<sup>149</sup> The recent exposure of a number of cartels operative in the South African economy, and the overwhelmingly negative reaction to such cartel behaviour by the competition authorities, academia and the media only serves to deter the Commission from allowing an exemption under this public interest ground. Nevertheless, the objective may, in some instances, lead to exemptions from prohibited practices under the Act.

#### **6.4 The economic stability of any industry designated by the Minister, after consulting the Minister responsible for that industry**

Finally, section 10(3)(b)(iv) provides that an exemption from the provisions of Chapter 2 of the Act may be granted if it contributes to the economic stability of an industry designated by the Minister responsible for that industry. It is submitted that the arguments relating to section 10(3)(b)(iii) are equally relevant in regard to this provision – it does not reflect the specific interests of South Africa or developing countries, rather it is a provision which may be common to all nations.

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<sup>149</sup> Reyburn (note 4) at 5-86.

Despite not being particular to South Africa or developing nations, the two broad approaches to this ground will be outlined below. The approaches are wide and narrow.<sup>150</sup> The wide approach, which is more difficult to justify on the wording of the provision, insists that an exemption may be granted for any agreement between competitors, if regulation is necessary to the proper functioning of the industry. In terms of the narrow approach to section 10(3)(b)(iv), however, only fluctuations in supply and demand merit an exemption. It is unclear which approach should be adopted in South Africa, however, it should be remembered that the aim of such an objective is not to protect competitors, but to contribute to the economic stability of an industry, which aids in protecting the public interest.

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<sup>150</sup> Reyburn (note 4) at 5-86.

## 7. HOW IMPORTANT IS THE ROLE OF THE PUBLIC INTEREST IN COMPETITION LAW?

Before engaging in a consideration of the importance of the public interest in competition law, it must be borne in mind that according too important a role to the public interest in competition law would in fact undermine the very purpose of competition law. Competition law does not exist to pander to considerations of the public interest; rather, its roots are in economic theory and it exists, primarily, to promote efficiency and consumer welfare. So long as the importance of the core of competition law remains intact, laws may justifiably vary, according differing levels of importance to the public interest. This section will briefly explore the role of public interest objectives in competition law and the importance of such objectives in the competition laws of South Africa and developing countries.

The approach of the United States toward the objectives of competition law, after over a century of jurisprudence, is boldly clear – it is the view of the Antitrust Division that the promotion of economic efficiency and maximisation of consumer welfare, are the only appropriate objectives of US antitrust law.<sup>151</sup> In the United States then, which is arguably one of the most developed countries of the world, the public interest has no role to play in competition law. This represents the farthest view hostile toward considering the public interest in competition law, though it is not a view shared by all competition jurisdictions.

The 2003 *OECD Global Forum on Competition* provides much perspective as to the role of the public interest in various OECD and non-OECD competition jurisdictions. Prior to the Forum, questionnaires concerning the objectives of competition law and policy were issued to participating states, and the results of these questionnaires were summarised in the Note by the Secretariat.<sup>152</sup> The results of the questionnaire shed much light upon the role accorded to the public interest in developed and developing countries.

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<sup>151</sup> Organisation for Economic Co-operation and Development (OECD) Questionnaire on the Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency (United States) *OECD Global Forum on Competition 2003*. Available at <http://www.oecd.org/dataoecd/57/62/2486358.pdf> [accessed 10 November 2009].

<sup>152</sup> Organisation for Economic Co-operation and Development (OECD), The Objectives of Competition Law and Policy (Note by Secretariat) *OECD Global Forum on Competition 2003*. Available at <http://www.oecd.org/dataoecd/57/39/2486329.pdf> [accessed 25 September 2009].

Firstly, it is notable that, among OECD countries, there is a shift by competition regulators toward placing less emphasis on, and relying less frequently upon, public interest objectives, where they exist in domestic law. Furthermore, it is noteworthy that no jurisdiction has changed their law so as to insert public interest objectives into domestic law. This indicates a move back toward traditional objectives of competition law.<sup>153</sup> Secondly, however, it is evident that the shift away from using competition law to further the public interest, is a trend that is common to many jurisdictions, but only once they have achieved a certain level of economic development.<sup>154</sup> A consideration of the competition laws of developing countries, however, reveals that, particularly in the area of merger control, public interest objectives are widely embraced.<sup>155</sup> This indicates that public interest objectives are considered, at least in the realm of merger control, integral to competition law in developing countries.

David Lewis, former Chairperson of the South African Competition Tribunal, has conceded that, for two reasons, ‘public interest considerations weigh more heavily in developing countries than they do in developed countries’.<sup>156</sup> These reasons are, firstly, that it is well recognised that there is greater role to be played by targeting support to strategically selected interest groups in developing countries rather than developed countries. Secondly, the competition authorities of developing countries are engaged in ‘a very basic struggle to achieve credibility and legitimacy’.<sup>157</sup> When considering South Africa’s context, Lewis concedes that balancing competition and the public interest is not an easy task, but argues that, in light of South Africa’s socio-economic context, if public interest considerations such as employment and black economic empowerment were not at all considered, both

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<sup>153</sup> Organisation for Economic Co-operation and Development (OECD), *The Objectives of Competition Law and Policy* (Note by Secretariat) *OECD Global Forum on Competition 2003* at 3. Available at <http://www.oecd.org/dataoecd/57/39/2486329.pdf> [accessed 25 September 2009].

<sup>154</sup> *Ibid* at 4.

<sup>155</sup> *Ibid*. The list of countries which fall under this rubric include Brazil, Cameroon, Gabon, Jamaica, Kenya, Macedonia, Morocco, Pakistan, Romania, Russia, Sri Lanka, Chinese Taipei, Tunisia, Ukraine and Zambia.

<sup>156</sup> D Lewis ‘The Role of Public Interest in Merger Evaluation’ International Competition Network: Merger Working Group (28-29 September 2002). Available at <http://www.comtrib.co.za/Publications/Speeches/lewis5.pdf> [accessed 1 September 2009].

<sup>157</sup> *Ibid*.

the Competition Act and the competition authorities would be consigned to the 'scrap-heap' by the public.<sup>158</sup>

Perhaps the best summary as to the confusing role of the public interest in the competition laws of developing countries, as compared to developed countries, is provided by David Lewis when concluding his response to the *2003 OECD Global Forum on Competition* questionnaire as regards the objectives of competition law and policy in South Africa:

In summary then, developing countries will insist on seeking a balance between competition law and policy, on the one hand, and industrial policy, on the other. They will insist, in other words, on attempting to meet both sets of objectives. The overall micro-economic policy framework will be provided by an active competition policy and competition law directed at imposing market disciplines on both public and private concentrations of economic power and by an active industrial policy which will continue to be deployed as the preferred mechanism for achieving selective economic and social policy goals. Just as European farmers and US steelworkers will in occasional, though important, instances, tilt the scales against competition policy in those jurisdictions, so will pressing economic and social problems in developing countries, ensure similar compromises. The textbooks will continue to find this inelegant, but the real world demands it.<sup>159</sup>

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<sup>158</sup> D Lewis 'The Role of Public Interest in Merger Evaluation' International Competition Network: Merger Working Group (28-29 September 2002). Available at <http://www.comptrib.co.za/Publications/Speeches/lewis5.pdf> [accessed 1 September 2009].

<sup>159</sup> Organisation for Economic Co-operation and Development (OECD) Questionnaire on the Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency (South Africa) *OECD Global Forum on Competition 2003*. Available at <http://www.oecd.org/dataoecd/57/59/2486466.pdf> [accessed 10 November 2009].

## 8. COMPARATIVE JURISPRUDENCE

The approach to competition law in the developed world is without doubt angled toward efficiency and consumer welfare.<sup>160</sup> The approach to competition law in developing countries, however, need not be exactly the same. Eleanor Fox argues that efficiency remains an important goal, however, some goals may be more important (at least in the short term) than efficiency, and nations ought to have the right to tailor their competition laws to addresses these goals.<sup>161</sup> The South African Competition Act was enacted in 1998 with the past in mind and, whilst the promotion and maintenance of competition remains the primary goal of competition law in South Africa,<sup>162</sup> the public interest also plays a crucial role. It is submitted that, in light of South Africa's political and socio-economic history, the public interest plays a more important role in South African competition law than it ordinarily does in the competition law of developed nations such as the United States or the United Kingdom. It is furthermore submitted that the public interest will very often play a more important role in the competition laws of developing countries than in that of developed countries.

In 2003, the Organisation for Economic Co-operation of Development (OECD) distributed a questionnaire to the competition authorities of a number of jurisdictions. The questionnaire addressed a number of issues, including competition law and public interest objectives. Notably, of the 35 respondents, 23 jurisdictions had as their objectives of domestic competition law, not only traditional competition objectives of efficiency and consumer welfare, but also public interest objectives.<sup>163</sup>

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<sup>160</sup> There are, in general, two approaches to Competition law. The approach characterised by the United States of America is one which is primarily concerned with cartel activity. As such, the two most pressing concerns are the artificial increase in prices and the artificial restriction of output. The European approach, however, addresses these concerns and more. It is also concerned with the ability of firms to enter markets and play a role in such markets. Despite the differences in approaches, it can broadly be said that competition law in the developed world, and much of the competition law in the developing world, is aimed at efficiency and consumer welfare.

<sup>161</sup> E.M Fox 'Equality, Discrimination, and Competition law: Lessons from and for South African and Indonesia' (2000) 41 *Harvard International Law Journal* 579 at 593.

<sup>162</sup> As articulated earlier, the traditional aims of competition law are contained in the first two purposes of section 2 of the South African Act, namely, 'to promote the efficiency, adaptability and development of the economy' and 'to provide consumers with competitive prices and product choices'.

<sup>163</sup> Organisation for Economic Co-operation and Development (OECD), The Objectives of Competition Law and Policy (Note by Secretariat) *OECD Global Forum on Competition 2003*. Available at <http://www.oecd.org/dataoecd/57/39/2486329.pdf> [accessed 25 September 2009].

Of these 23 respondents, it is very important to note that 16 of whom represented transitioning or developing countries.<sup>164</sup> These statistics highlight the importance that has been accorded to the public interest in the competition laws of developing countries. Further analysis continues below so as to highlight why such importance has been accorded to the public interest in such jurisdictions.

## 8.1 South Africa

The point concerning South Africa's past has already been made – South Africa endured a history where a very small white minority exercised control over the country and the economy, to the detriment of the black majority. This national policy of racial national discrimination continued for forty years, the results of which are still being felt today. As a direct consequence, the disparity of wealth between the white minority and the black majority grew as black persons were not afforded, *inter alia*, access to the same level of education as the white minority, freedom of movement or the ability to effectively compete economically with white-owned and controlled companies. Essentially, significant access to, and influence over the South African economy was denied to black South Africans.

The Competition Act actively seeks to address some of the problems caused by Apartheid and, as a result, the South African Act does not have as its only aspiration, efficiency and consumer welfare, instead, the public interest plays an important role. Eleanor Fox, in considering the role of equality in competition law in South Africa, argues that 'until the disempowered fully participate in the economy, the efficiency potential of the nation is not likely to be realized'.<sup>165</sup> It is clearly Fox's argument that competition laws may well be tailored to suit circumstances, especially in developing countries where a portion of the population is often disempowered and denied access to the economy. The Competition Act is tailored in this manner. It seeks to provide a platform for increasing the participation by the disempowered in the economy. Whilst the public interest portions of the Act will not only operate so as to benefit the black population, the majority of benefactors will

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<sup>164</sup> Organisation for Economic Co-operation and Development (OECD), *The Objectives of Competition Law and Policy (Note by Secretariat) OECD Global Forum on Competition 2003*. Available at <http://www.oecd.org/dataoecd/57/39/2486329.pdf> [accessed 25 September 2009].

<sup>165</sup> E.M Fox 'Equality, Discrimination, and Competition law: Lessons from and for South African and Indonesia' (2000) 41 *Harvard International Law Journal* 579 at 593.

most likely be black, given that black persons constitute the majority of South Africa's population and that the Act, in some sections, specifically targets the promotion of the interests of historically disadvantaged persons.<sup>166</sup> It is submitted that Fox is correct in her assessment of the importance of tailoring the competition laws of a country to suit its context. It is foreseeable that in decades to come, the competition laws of South Africa may be modified as South Africa moves to becoming a developed nation, and dire poverty, a high unemployment rate and the unfair consequences of Apartheid become less pervasive issues.

Whilst the South African context is plain, it is not immediately clear whether the public interest should also play an important role in the competition jurisprudence of other developing nations. This paper now turns to consider the role of the public interest in two other jurisdictions, namely, Indonesia and Brazil, both of which have relatively recently implemented domestic competition laws. This paper will not engage with the competition laws of these countries in the same level of depth as that of South Africa, however, it will seek to draw conclusions between the substance of their competition laws and their contexts. A consideration of the competition laws, public interest and socio-economic and political contexts of two developed countries, namely, the United States of America and Australia, will also be undertaken.

## 8.2 Indonesia

### 8.2.1 Indonesian history and context<sup>167</sup>

To understand the context of Indonesian competition law, it is first necessary to consider Indonesia's history from the date it attained independence. Indonesia declared independence from the Netherlands in 1945, shortly after the Japanese surrender, signalling the end of the Second World War.<sup>168</sup> Sukarno was installed as the country's first president, and his first assignment was to instil in the nation the

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<sup>166</sup> See for example, Competition Act s 12A(3)(c).

<sup>167</sup> For a helpful resource on Indonesian politics, especially in regard to the policies of President Suharto, see A Schwarz *A Nation in Waiting: Indonesia in the 1990s* (Boulder CO: Westview Press, 1994).

<sup>168</sup> Despite declaring independence in 1945, Indonesia's independence was not recognised by the Netherlands until 1949.

philosophy of *Pancasila*, that is, a philosophy of national unity based upon five pillars: belief in one God, nationalism, humanity, sovereignty of the people, and social justice. Whilst the 1945 Indonesian Constitution,<sup>169</sup> which was enacted shortly after Indonesia's independence, does not expressly mention the philosophy of *Pancasila*, the philosophy is reflected in article 33 of the Constitution, which mentions the importance of co-operation, family unity and togetherness.<sup>170</sup> Since the installation of Sukarno, the principle of *Pancasila* has permeated Indonesian law, and is now recognised as the official philosophical foundation of the nation itself.

President Sukarno was succeeded by President Suharto<sup>171</sup> in 1967. Suharto too insisted upon the importance and the centrality of the philosophy of *Pancasila*. Suharto initiated 'The New Order'<sup>172</sup> in 1966, shortly before being proclaimed as President, as a means of reconstructing Indonesia after Sukarno's presidency. The New Order was characterised by a number of distinct features that are relevant to the background of the Indonesian competition laws. Firstly, Indonesia's economy was opened to foreign investors, however, Suharto's government maintained control over key financial resources and licenses and, as a result, corruption, cronyism and nepotism flourished with members of Suharto's family and government attaining significant, unmerited, wealth as a result.<sup>173</sup> Secondly, Suharto sought to assimilate the minority<sup>174</sup> ethnic Chinese-Indonesian population. In doing so, anti-Chinese legislation was passed which closed most Chinese-language newspapers, restricted Chinese religious expressions, banned Chinese-script in public places, closed Chinese-language schools and encouraged the adoption of Indonesian-sounding names by ethnic Chinese persons. Suharto's policies largely restricted the role of the ethnic Chinese population to the commercial sector, and it is in this sector where

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<sup>169</sup> Undang-Undang Dasar Republik Indonesia 1945.

<sup>170</sup> E.M Fox 'Equality, Discrimination, and Competition law: Lessons from and for South African and Indonesia' (2000) 41 *Harvard International Law Journal* 579 at 588.

<sup>171</sup> Suharto's name is also spelt 'Soeharto'.

<sup>172</sup> Or 'Orde Baru'.

<sup>173</sup> E.M Fox 'Equality, Discrimination, and Competition law: Lessons from and for South African and Indonesia' (2000) 41 *Harvard International Law Journal* 579 at 589.

<sup>174</sup> The most recent national population census was conducted by *BPS-Statistics Indonesia* in June 2000 (the next census will take place during the course of 2010). The census shows that only 0.9 percent of Indonesians considered themselves ethnic Chinese, though this figure may not be truly representative, as the census relied on 'self-identification' and many Chinese persons may have, in light of anti-Chinese sentiment by the majority, been reluctant to identify their Chinese ethnicity. *BPS-Statistics Indonesia* 2000 Census available at <http://www.bps.go.id/eng/index.php> [accessed 18 August 2009].

they excelled; forming large conglomerates, which eventually came to dominate the Indonesian economy.<sup>175</sup> The results of these policies were visited harshly upon Indonesia, and largely contributed to Suharto's downfall in 1998. Under Suharto, thirty years of strict civil liberties restriction and authoritarianism had fuelled dissatisfaction amongst the general population, culminating in the public rioting of 1997 and 1998 and calls for a truly democratic state. The East-Asian financial crisis of 1997 further contributed to Suharto's unpopularity at the time and exposed the inherent weaknesses in the Indonesian economy caused by Suharto's policies. As a result of crony capitalism and excessive borrowing, the Indonesian economy was hard hit by the 1997 financial crisis, and the Rupiah<sup>176</sup> began to free fall. The result was a loss of confidence in Suharto's presidency and policies by the domestic and international communities, whilst rioting continued throughout the country. These factors culminated in Suharto's resignation on May 21<sup>st</sup> 1998, and an end to the 'New Order'.

Shortly before President Suharto's resignation, the International Monetary Fund (IMF) was invited to bail out Indonesia's failing economy. The IMF obliged, but required a number of economic reforms before rescue monies would be provided; one such reform was the adoption of a domestic competition law by the Indonesian legislature, and Indonesia responded by promising to adopt such a competition law. A draft competition law was produced in 1998<sup>177</sup> and competition legislation (*Law of the Republic of Indonesia, Number 5, Year 1999, Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition*) was finally adopted in 1999.

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<sup>175</sup> It has been claimed that the Chinese minority controlled upwards of 70 percent of the Indonesian economy (see I Chalmers & V.R Hadiz (eds.) *The Politics of Economic Development in Indonesia* (London and New York: Routledge, 1997); G Chavez 'Outward Bound' (1997) 11(2) *Global Finance* 80.). Some scholars have, however, disputed this assertion and claimed that the market share of the Chinese minority was closer to 30 percent. See J.C.H Chai 'Ethnic Inequality and Growth in Indonesia under the New Order' *Economics Conference Monograph Series* (6) 1999 Department of Economics, University of Queensland. Available at [http://espace.library.uq.edu.au/eserv/UQ:10480/ei\\_6\\_99.pdf](http://espace.library.uq.edu.au/eserv/UQ:10480/ei_6_99.pdf) [accessed 18 August 2009].

<sup>176</sup> The official currency of Indonesia.

<sup>177</sup> People's Legislative Assembly of the Republic of Indonesia, Draft Law of the Republic of Indonesia, Concerning Business Competition (July 1998).

### 8.2.2 The Indonesian competition Act

In many ways, the Indonesian situation, immediately prior to the adoption of competition legislation, is similar to that of South Africa – a small minority dominated the market for a significant period of time to the detriment of the majority of the population, and economic concerns for the future of the country mandated the adoption of competition law.<sup>178</sup> In Indonesia, the ethnic Chinese minority flourished through entrepreneurship, whilst thriving cronyism and corruption led to the advancement of a small minority of ethnic Indonesians, to the detriment of the majority of Indonesians. In South Africa, the White elite oppressed the Black majority and prevented them access to significant resources or market involvement, to their detriment. Furthermore, whilst not being identical, the Indonesian philosophical notion of *Pancasila* bears much resemblance to the notion of *ubuntu*<sup>179</sup> in South Africa, a value that, whilst not expressly included in the South African Constitution,<sup>180</sup> has been found by the Constitutional Court to underlie the very Constitution itself.<sup>181</sup> Further, *ubuntu* is not mentioned in the Competition Act 89 of 1998, however, the Competition Act itself is subject to the supreme law, the Constitution, and as such the notion of *ubuntu* underlies even the Competition Act.

Indonesian competition law, like that of South Africa, seeks to respond in some manner to the problems faced by the nation. This response can be seen in a number of sections of the Act that are discussed below.

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<sup>178</sup> The adoption of competition legislation in Indonesia was compulsory if Indonesia was to escape the spiral of economic decline that it faced following the 1997 financial crisis. South Africa's adoption of competition law was not forced in the same manner, though, it was recognised that if the new democratic South Africa was to emerge from the shadow of Apartheid, legislation had to be adopted which would address the issues of a market grossly dominated by White persons and made largely inaccessible to Black persons. It is therefore submitted that for both nations, the adoption of competition law was vital.

<sup>179</sup> *Ubuntu*, or, *umuntu ngumuntu ngabantu*, has been translated into English to mean 'a person is a person through other people'. It thus embodies the notions of togetherness, humanity and social justice.

<sup>180</sup> The word *ubuntu* does not appear in the final Constitution of 1996, although it does appear in the Interim Constitution Act 200 of 1993.

<sup>181</sup> In *Port Elizabeth Municipality v Various Occupies* 2004 (12) BCLR 1268 (CC) para 37, Sachs J found that 'The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.'

The Indonesian Act begins by stating in the preamble that ‘development in the field of economy must be directed toward the achievement of social welfare based on *Pancasila* and the 1945 Constitution’.<sup>182</sup> Clearly, the very beginnings of the Act show an alignment not with a competitive economy, but with achieving social welfare through ‘belief in one God, nationalism, humanity, sovereignty of the people, and social justice’.<sup>183</sup> Given Indonesia’s history and emphasis on the philosophy of *Pancasila* since (at least) 1945, it is difficult to imagine that this philosophy would not significantly pervade all aspects of Indonesian competition law. Importantly, the preamble also directly references the past economic history of Indonesia by stating that ‘there shall be no concentration of economic power in the hands of certain business actors’.<sup>184</sup> This is clearly a reference to the situation under Suharto’s presidency which saw a concentration of the Indonesian economy among government cronies and elite ethnic Chinese entrepreneurs. The preamble of the Act shows that the Act seeks to ensure such a situation does not result again, and that ‘fair and natural competition’ is maintained.<sup>185</sup> Whilst such statements of the preamble appear to show that the Act is solely concerned with public welfare, the preamble also states that it aims at ‘the growth of the economy and the functioning of a reasonably market economy’.<sup>186</sup>

A consideration of Article 3 provides further illumination as to the purposes of the Indonesian competition statute. Whilst the preamble may have seemed to favour the anti-market philosophy of *Pancasila*, the purposes of the Act appear to aim at an efficient and competitive economy:

The purpose of enacting the Law shall be as follows:

- (a) to safeguard the interests of the public and to improve national economic efficiency as one of the efforts to improve the people’s welfare;
- (b) to create a conducive business climate through the stipulation of fair business competition in order to ensure the certainty of equal business opportunities for large-, middle-, as well as small-scale business actors in Indonesia;

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<sup>182</sup> Law of the Republic of Indonesia, Number 5, Year 1999, Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, para (a).

<sup>183</sup> E.M Fox ‘Equality, Discrimination, and Competition law: Lessons from and for South African and Indonesia’ (2000) 41 *Harvard International Law Journal* 579 at 588.

<sup>184</sup> Law of the Republic of Indonesia, Number 5, Year 1999, Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, para (c).

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*, para (b).

- (c) to prevent monopolistic practices and/or unfair business competition that may be committed by business actors; and
- (d) the creation of effectiveness and efficiency in business activities.

Despite the apparent emphasis upon an efficient and competitive economy, the first purpose of the Act remains the improvement and safeguarding of public welfare, and thus the purposes section of the Act may well be interpreted as primarily favouring an interpretation that accords with the philosophy of *Pancasila* ahead of that of the market economy.

Outside of the preamble and purposes section, the Indonesian competition Act reflects many well-tested principles of competition law. Chapter III of the Act prohibits a number of types of agreements, including agreements amongst competitors to control production,<sup>187</sup> price-fixing agreements,<sup>188</sup> agreements which result in price discrimination,<sup>189</sup> agreements to fix a minimum resale price,<sup>190</sup> and agreements to divide markets.<sup>191</sup> Chapter IV of the Act is concerned with 'Prohibited Activities'. The Act addresses the issue of monopolies (and monopsonies), and prohibits activities which may result in monopolistic practices or unfair competition.<sup>192</sup> Further, the Act prohibits firms from impeding new business actors from conducting the same business as such firms,<sup>193</sup> engaging in discriminatory practices toward such business actors,<sup>194</sup> and selling products at low prices so as to force competitors out of business.<sup>195</sup> Chapter V of the Act prohibits the abuse of a dominant position by a firm (or firms),<sup>196</sup> and prohibits mergers and acquisitions which may result in monopolistic practices or unfair competition.<sup>197</sup>

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<sup>187</sup> Law of the Republic of Indonesia, Number 5, Year 1999, Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, art 4.

<sup>188</sup> *Ibid*, art 5. This provision is similar in substance to that of section 4(1)(b)(i) of the Competition Act 89 of 1998, which involves a *per se* prohibition against price-fixing.

<sup>189</sup> *Ibid*, art 6. This provision is similar in substance to that of section 9 of the Competition Act 89 of 1998, which relates to the prohibition of price discrimination by dominant firms.

<sup>190</sup> *Ibid*, art 8. This provision is similar in substance to that of section 5(2) of the Competition Act 89 of 1998, which involves a *per se* prohibition against the maintenance of a minimum resale price.

<sup>191</sup> *Ibid*, art 9. This provision is similar in substance to that of section 4(1)(b)(ii) of the Competition Act 89 of 1998, which involves a *per se* prohibition against 'dividing markets by allocating customers, suppliers, territories or specific types of goods of services'.

<sup>192</sup> *Ibid*, arts 17 and 18.

<sup>193</sup> *Ibid*, art 19(a).

<sup>194</sup> *Ibid*, art 19(d).

<sup>195</sup> *Ibid*, art 20.

<sup>196</sup> *Ibid*, arts 25-29. The prohibition on the abuse of a dominant position is also found in sections 6-9 of the Competition Act 89 of 1998.

<sup>197</sup> *Ibid*, art 28.

Fox's consideration of Indonesian competition law concludes with the statement that the Indonesian Act is 'chameleon-like' in its language and that the ambiguities in the Act can only be resolved by the Indonesian competition authorities.<sup>198</sup> On one hand, the Act appears to favour nothing less than the 'anti-market philosophy of *Pancasila*',<sup>199</sup> and on the other hand the Act strives for an efficient and competitive economy. Fox argues that the South African Act, whilst also being significantly infused with principles of equality, does not place as considerable an emphasis upon the public interest as does the Indonesian Act. The Competition Act attempts to achieve a balance between notions of fairness and efficiency in the purposes section of the Act and throughout the substantive provisions of the Act, which, 'in almost all cases allows defences based on pro-competitive and efficiency justifications'.<sup>200</sup>

It is submitted that the emphasis of the Indonesian competition Act is evidently informed by the philosophy of *Pancasila* and the economic history immediately preceding the enactment of the Act. Indonesian competition law, far from copying the competition laws of the United States of America or the European Commission, seeks to respond to circumstances, and it is for this reason that the Act is characterised as being 'infused with principles of equality of opportunity'.<sup>201</sup> Simply put, Indonesian competition law seeks to address Indonesian issues, and such issues require significant focus upon promoting the public interest. This paper does not seek to answer the question posed by Fox as to which course Indonesian competition law should adopt, rather, it seeks to show that every nation is entitled to adopt the competition laws that are tailor-made for such nation.

It is conceded that many of the circumstances faced by Indonesia are circumstances caused and created by the policies of Suharto, however, they are policies which would not easily have been adopted without significant protest in the developed world. The problems of corruption, cronyism and tension between

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<sup>198</sup> E.M Fox 'Equality, Discrimination, and Competition law: Lessons from and for South African and Indonesia' (2000) 41 *Harvard International Law Journal* 579 at 592-593.

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.*

ethnicities, which characterised Suharto's 'New Order', are problems common to many developing nations. South Africa faces similar issues as a developing nation – how to foster an efficient and competitive economy, whilst also addressing issues shaped by the past and present socio-economic circumstances. Given that the developed world is as the term implies – developed – issues such as gross poverty, the dominance of an ethnic minority over a market to the detriment of the ethnic majority, cronyism, corruption, nepotism and the like are not as pertinent as such issues are to the developing world. Indonesia is most certainly a developing country and, whilst it may not face issues identical to that of South Africa,<sup>202</sup> the issues it faces are 'developing-world' in character and, to address these problems, a competition law which places a high emphasis on the public interest may be most suitable.

### 8.3 Brazil

Another developing country relevant to this discussion which has enacted domestic competition law is Brazil.<sup>203</sup> Much like South Africa, Brazil is a developing, or transitioning, economy, and faces a number of similar social and economic problems. It must be noted that both Brazil and South Africa are neither 'developed' nations nor 'least developed' nations, and thus, by virtue of similar economic status, an analysis of Brazil and Brazilian competition law is of comparative value for South African law.<sup>204</sup>

#### 8.3.1 The Brazilian context

There are a number of similarities and differences between the challenges faced by the Brazilian and South African governments. When considering

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<sup>202</sup> The unemployment rate, for example, is only 8.2 per cent in Indonesia. When contrasted to the rate of unemployment in South Africa (21.7 per cent), it is clear that the issue of unemployment is not as significant a concern in Indonesia as it is in South Africa.

<sup>203</sup> Competition Act (Federal Law 8.884/94).

<sup>204</sup> Both South Africa and Brazil are also commonly termed 'Newly Industrialised Countries' (NICs) by various economists. Whilst there is no consensus on the requirements for such a designation, the designation is commonly reflective of a country which, whilst neither conforming to the category of 'developed' nor 'developing', is undergoing significant economic growth that places the country on the path to becoming a 'developed' nation. Other countries that are commonly designated as NICs include Mexico, India, China, (as well as Indonesia by some economists). For further reading, see, P Bożyk *Globalization and the Transformation of Foreign Economic Policy* (Aldershot: Ashgate Publishing, 2006).

employment, it is noticeable that the South African unemployment rate of 22.9 per cent is significantly higher than that of Brazil's, which is estimated at only 7.9 per cent.<sup>205</sup> Whilst this low employment rate is comparable with much of the developed world, many Brazilians are employed as low-paid labourers, and this gross income inequality in Brazil is evidenced by a high Gini co-efficient<sup>206</sup> of 56.7.<sup>207</sup> It is further estimated that 31 per cent of all Brazilians lives below the poverty line.<sup>208</sup> The economics of Brazil are comparable with South Africa. South Africa's 2005 Gini co-efficient estimate is 65,<sup>209</sup> which is higher than that of Brazil, but comparable. Further, it is estimated that up to 50 per cent of all South Africans live below the poverty line.<sup>210</sup> Whilst it is clear that the economic realities of Brazil are less severe than that of South Africa, it is clear too that Brazil faces significant socio-economic challenges that are not 'developed nation' in character.

Whilst there are many similarities, there are also clear differences. Most importantly is that Brazil does not exhibit a history of one ethnic or racial minority exercising decisive control over the economy, to the exclusion and detriment of the majority. This has been shown to inform the competition law of both South Africa and Indonesia; however, such considerations will not inform Brazilian competition law. Thus, whilst public interest considerations might play a role in competition law in Brazil, such considerations will not, for example, include seeking to advance the interests of historically disadvantaged persons.

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<sup>205</sup> CIA World Factbook (Brazil). Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/br.html> [accessed 29 September 2009].

<sup>206</sup> It is conceded that the Gini co-efficient is not a decisive tool of measurement of the political, social and economic status of countries. Whilst it may be of comparable economic and political value, many other factors, such as the size of nation, influence this value. Further, a Gini co-efficient does not measure total wealth, simply the inequality of wealth. An example of the problem with this tool is exhibited in the instance of Indonesia and the United States. The Indonesian Gini co-efficient is estimated at 39.7, which is lower even than that of the United States of America. It is patently clear, however, that the United States, as a nation, is far more developed and the population of the United States have access to far more advanced facilities than that of Indonesia. It is, nevertheless, obvious that, in general, developed nations of the world, and especially of Europe, exhibit lower Gini co-efficients than that of developing nations.

<sup>207</sup> CIA World Factbook (Brazil). Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/br.html> [accessed 29 September 2009].

<sup>208</sup> Ibid.

<sup>209</sup> CIA World Factbook (South Africa). Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> [accessed 29 September 2009].

<sup>210</sup> Ibid.

It is submitted that, particularly as a result of the poverty and economic inequality in Brazil, the public interest may play a significant role in Brazilian competition law.

#### 8.4.2 Brazilian competition law

Brazil enacted domestic competition law in 1994, earlier than both South Africa and Indonesia. After fifteen years of development, an analysis of these laws will aid in showing the value of the public interest in the competition laws of developing countries.

The precise objectives of competition law in Brazil are difficult to determine. Unlike the South African Competition Act, the Brazilian Competition Act does not list a number of specific objectives that the Act seeks to achieve, instead, the Act lists a single object, framed in very general and vague terms in article 1:

This statute sets out antitrust measures in keeping with such constitutional principles as free enterprise and open competition, the social role of property, consumer protection, and restraint of abuses of economic power.

Article 1 is clearly very different from section 2 of the South Africa Competition Act. Instead of listing specific objectives such as, ‘to provide consumers with competitive prices and product choices’<sup>211</sup> and ‘to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons’,<sup>212</sup> reference is made by article 1 to constitutional principles contained within the Federal Constitution of Brazil.<sup>213</sup> Such principles are found in article 170 of the Constitution and, whilst not exclusively applicable to competition law, such principles concern all economic activity within Brazil and significantly inform Brazilian competition law:

The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles:

- I. national sovereignty;
- II. private property;
- III. the social function of property;

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<sup>211</sup> Competition Act s 2(b).

<sup>212</sup> Competition Act s 2(f).

<sup>213</sup> Constitution of the Federal Republic of Brazil, 1988.

- IV. free competition;
- V. consumer protection;
- VI. environmental protection, including by means of different treatments in accordance to the environmental impact of products and services and their respective production and rendering;
- VII. reduction of regional and social differences;
- VIII. pursuit of full employment;
- IX. preferential treatment for small enterprises organised under Brazilian laws and having their head-office and management in Brazil.

Sole paragraph - Free exercise of any economic activity is ensured to everyone, regardless of authorization from government agencies, except in the cases set forth by laws.

Whilst reference to these principles sheds some light on the objectives of competition law in Brazil, the precise objectives are no clearer. The principles of article 170 appear to, on the one hand, reflect ‘public interest’ goals such as employment and preferential treatment of small enterprises, and on the other hand reflect traditional market-economy goals evidenced by the emphasis upon private property by article 170. Paragraph 4 of article 173 of the Federal Constitution provides further insight into the aims of competition law and the control of economic power in Brazil:

With the exception of the cases set forth in this Constitution, the direct exploitation of an economic activity by the State shall only be allowed whenever needed to the imperative necessities of the national security or to a relevant collective interest, as defined by law.

...

Paragraph 4 - The law shall repress the abuse of economic power that aims at the domination of markets, the elimination of competition and the arbitrary increase of profits.

...

Clearly, Brazilian competition law seeks to enhance consumer welfare by repressing abuses of economic power which may result in market dominance to the detriment of consumers, elimination of competition to the detriment of consumer and the arbitrary increase of profits to the detriment of consumers. It is also clear that Brazilian competition law seeks to balance free enterprise with concerns of social justice and article 170 is reflective of this:

The economic order, founded on the appreciation of the value of *human work* and on *free enterprise*, is intended to ensure *everyone a life with dignity*, in accordance with the dictates of *social justice*... (my emphasis).

Despite considering the objects section of the Act and the referenced provisions of the Constitution, it is obvious that the precise boundaries of listed principles and objectives cannot clearly be defined.<sup>214</sup> At the 2003 OECD *Global Forum on Competition*, the Brazilian competition authorities themselves recognised the lack of clarity as to the objectives of Brazilian competition law, stating that:<sup>215</sup>

Evidently, principles are generic formulae, incapable of a clear definition of the boundaries within which their applicability will arise. For instance, it is possible to find, amongst the many clauses inserted in the statute, other legislative goals, either conditioning or mitigating the direct application of the above mentioned principles.

This paper now turns to consider the substantive sections of the Brazilian Competition Act, that is, sections 20, 21 and 54, and to consider the extent to which public interest objectives are included in the competition law of Brazil.

Articles 20 and 21 of the Act deal with all types of anticompetitive conduct, other than mergers. A consideration of these articles outlines prohibited anticompetitive conduct; however no reference is made to the achievement of any public interest goals. The South African and Indonesian examples highlighted that provisions outlining anticompetitive conduct (other than mergers) such as price-fixing, are aimed not at promoting goals of the public interest, rather, it has been assumed that conduct such as price-fixing is anticompetitive and generally harmful to the public interest. As such, specific public interest considerations and goals, such as promoting employment, do not play a role in the context of such anticompetitive conduct. Instead, the achievement of public interest goals finds its application in other arenas of competition law, and in particular, in the realm of merger control.

Article 54 of the Act concerns mergers, acquisitions and similar transactions. The article provides:

**Article 54.** Any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review.

**Paragraph 1.** CADE may authorize any acts referred to in the main section of this article, provided that they meet the following requirements:

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<sup>214</sup> Organisation for Economic Co-operation and Development (OECD) Questionnaire on the Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency (Brazil) *OECD Global Forum on Competition 2003* at 3. Available at <http://www.oecd.org/dataoecd/58/7/2485784.pdf> [accessed 25 September 2009].

<sup>215</sup> *Ibid.*

- I. they shall be cumulatively or alternatively intended to:
  - (a) increase productivity;
  - (b) improve the quality of a product or service; or
  - (c) cause an increased efficiency, as well as foster the technological or economic development;
- II. the resulting benefits shall be rateably allocated among their participants, on the one part, and consumers or end-users, on the other;
- III. they shall not drive competition out of a substantial portion of the relevant market for a product or service; and
- IV. only the acts strictly required to attain an envisaged objective shall be performed for that purpose.

**Paragraph 2.** Any action under this article may be considered lawful if at least three of the requirements listed in the above items are met, whenever any such action is taken in the public interest or otherwise required to the benefit of the Brazilian economy, provided no damages are caused end-consumers or users.

Paragraph 2 of article 54 clearly provides that otherwise anticompetitive mergers may be approved if they in the public interest or required for the benefit of the Brazilian economy, and provided that at least three requirements under Paragraph 1 are met and that end-consumers suffer no damages. This would appear to indicate the importance of public interest goals as listed in the Constitution, when considering mergers. It is submitted by the Brazilian competition authorities, however, that the exception described in Paragraph 2 has never been invoked or applied and that it constitutes nothing more than a ‘theoretical escape valve’.<sup>216</sup>

In 2001, the ‘Horizontal Merger Guidelines’<sup>217</sup> were published by the SEAE.<sup>218</sup> These guidelines indicate that, even in regard to mergers, the Brazilian competition authorities are concerned with traditional competition goals, and not the public interest, and that the public interest may have a role to play, though this role is

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<sup>216</sup> Organisation for Economic Co-operation and Development (OECD) Questionnaire on the Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency (Brazil) *OECD Global Forum on Competition 2003* at 3. Available at <http://www.oecd.org/dataoecd/58/7/2485784.pdf> [accessed 25 September 2009].

<sup>217</sup> Joint Directive SEAE/SDE No. 50 01/08/2001 Horizontal Merger Guidelines. Available at [http://www.seae.fazenda.gov.br/document\\_center/legislation/annex-7\\_guidelines\\_brazil.pdf](http://www.seae.fazenda.gov.br/document_center/legislation/annex-7_guidelines_brazil.pdf) [accessed 23 November 2009].

<sup>218</sup> Secretaria de Acompanhamento Econômico (Secretariat for Economic Monitoring).

minor and is referred to only as the ‘effect on the economy as a whole’ of the proposed merger.<sup>219</sup>

It is thus clear that, despite the escape valve of Paragraph 2 of article 54 of the Act, the Brazilian competition authorities are largely unconcerned with the advancement of public interest goals, though the authorities have appeared willing to grant consent decrees to public interest values in some circumstances, to merger approval. The state of Brazilian competition law, as regards public interest objectives, is perhaps best summarised by the Brazilian submission as to the objectives competition law in Brazil, submitted at the *2003 Global Forum on Competition*.<sup>220</sup>

Despite the fact that the Competition Act of 1994 contemplates the sheer possibility of taking into consideration arguments related to values like employment, economic development, as well as national interest to approve mergers and acquisitions otherwise deemed harmful to competition, these escape clauses have been solemnly ignored in the current practice. Notwithstanding, some Consent Decrees (‘Compromissos de Desempenho’) issued by the CADE as means of barring harmful effects of concentrations have include measures aiming at such values, although they have not been determining conditions for the clearance.

### 8.3.2 Contrasting Brazilian and South African competition laws

Evidently, whilst the objectives of Brazilian competition law are unclear, the practice of competition law in Brazil has revealed that the authorities are concerned with traditional competition law objectives, and not with those as relating to the public interest.

South African law and practices explicitly recognises certain public interest considerations in the realms of mergers and exemptions, though practically, the authorities have been reluctant to attach too significant a role to these considerations. This reluctance is also exhibited by the Brazilian competition authorities, the difference being, however, that the public interest considerations in the Brazilian Act

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<sup>219</sup> Joint Directive SEAE/SDE No. 50 01/08/2001 Horizontal Merger Guidelines at para 23. Available at [http://www.seae.fazenda.gov.br/document\\_center/legislation/annex-7\\_guidelines\\_brazil.pdf](http://www.seae.fazenda.gov.br/document_center/legislation/annex-7_guidelines_brazil.pdf) [accessed 23 November 2009].

<sup>220</sup> Organisation for Economic Co-operation and Development (OECD) Questionnaire on the Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency (Brazil) *OECD Global Forum on Competition 2003* at 4. Available at <http://www.oecd.org/dataoecd/58/7/2485784.pdf> [accessed 25 September 2009].

are not listed explicitly, but rather reference is made to general principles in the Brazilian Constitution.

The South African and Brazilian competition authorities shall similar practice in that South African authorities, though permitted to do so under law, are unwilling to approve anticompetitive mergers that nevertheless further the public interest. The same is true of the Brazilian competition authorities who, though empowered to do so under paragraph 2 of article 54, are unwilling to approve anticompetitive mergers on public interest grounds. It is further clear that both South African and Brazilian competition authorities prefer to attach conditions, or consent decrees, to merger approval where some public interest may be harmed. Though such conditions will in most cases be significant, future circumstances may arise which may require the authorities to act in the public interest, and the utter disregard of paragraph 2 by the Brazilian authorities, and section 12A by the South African authorities, may not only result in public interest objectives being undermined, but also result in significant damage to the public interest.

#### **8.4 The United States of America**

It must of course be remembered that competition law has its fullest origins in the United States of America. American antitrust law began as a response to circumstances – cartel activity by American firms led to an artificial restriction of output and an increase in the price of products – and it was to this problem that American legislators responded by enacting the Sherman Act.<sup>221</sup> It is evident then, that like all law, antitrust law began as a response to a particular set of circumstances in a particular context. Whilst competition law has progressed and developed since the enactment of the Sherman Act and whilst competition law principles have been reviewed and improved, it remains to be argued that the origins of competition law are in responding to cartel activity in the United States and, therefore, that the best competition laws for developing countries may be competition laws that responds to the particular circumstances of developing countries.

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<sup>221</sup> The Sherman Act, July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. §1-7. Further US legislation has followed the Sherman Act, however, the Sherman Act remains as the most important antitrust statute in the United States.

The American social and economic context is notably different to that of South Africa. Listed below are four key issues which differentiate the American and South African contexts. Firstly, it must be noted at the outset that the American context is one which can most certainly be described as 'developed', unlike South Africa.<sup>222</sup> Secondly, the racial demographics in American are significantly different to that of South Africa. The US African-American civil rights movement of the 1960's was a response to racial discrimination by the white majority, however, even now, approximately only 13 per cent of the US population is classified as African-American, with 80 per cent classified as white. As such, affirmative action policies and policies which seek to address raced-based injustices are considerably less important in the USA. Thirdly, the United States did not suffer from the enforcement of international sanctions, whereas Apartheid South Africa was shunned from access to international markets, thus causing considerable harm to the nation. Fourthly, the current American unemployment rate is estimated at 7.2 per cent, which is notably lower than South Africa's unemployment rate of 22.9 per cent, most of whom are black South Africans. As such, employment is not as important a concern in the United States as it is in South Africa. With such clear differences in context, it is not surprising that American and South African competition laws differ somewhat.

When one considers the various statutes enacted by the US legislators over the past century, it becomes quite clear that American antitrust law has undergone significant development. If American antitrust law has been allowed to develop, it would be unreasonable to expect that the (relatively new) South African competition laws or the new competition laws of other developing countries, to be 'perfect' from their inception. Despite the developments in competition law in the United States and European Union, such developments are most often mere reflections of prevalent economic circumstances, political climates and academic theories. Critiques of the competition law of developing countries for taking somewhat different approaches to

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<sup>222</sup> The exact set of criteria used to measure whether a country falls within the 'developed' or 'developing' category, continues to remain a contentious issue. Even the United Nations has admitted that 'there is no established convention for the designation of "developed" and "developing" countries or areas in the United Nations system. In common practice, Japan in Asia, Canada and the United States in northern America, Australia and New Zealand in Oceania, and Europe are considered "developed" regions or areas.' United Nations Statistics Division, *Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings*. Available at <http://unstats.un.org/unsd/methods/m49/m49regin.htm#ftnc> [accessed 25 September 2009].

competition law than those prevalent in the developed world, are, it is submitted, sometimes unjustified. As Hovenkamp argues, theories of economics and competition law undergo alteration over time and even the once hallowed 'Chicago school' conception of competition law now has many critics.<sup>223</sup> It must be borne in mind, therefore, that competition law, like all other law, is not static and may be adapted to the circumstances.

As articulated in chapter seven, the thrust of American antitrust law is the promotion of economic efficiency and the maximisation of consumer welfare. American antitrust law has developed to this point in time to consider these two named objectives as the only appropriate objectives of antitrust law. The trend of international jurisprudence shows that the public interest, as an objective of competition law, is becoming increasingly disregarded by the competition regulators of developed countries, such as the United States, though such public interest objectives continue to be invoked by the competition regulators of developing and transitioning countries, such as South Africa and Indonesia.

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<sup>223</sup> H Hovenkamp 'Antitrust Policy after Chicago' (1985) 84 *Mich. L. Rev.* 213 at 213.

## 9. CONCLUSION

The vital question this paper has sought to answer is: has the correct approach been struck between traditional competition goals and public interest goals in South Africa?

The role of competition law in any nation must always be chiefly concerned with the promotion and maintenance competition, for that is precisely what competition law demands. This is uncontested. Competition authorities<sup>224</sup> are, at least in South Africa's case, unelected bodies, and should be wary of transgressing their designated functions of applying the law, however, South Africa competition law does attach weight to specific public interest considerations, and as such, these considerations should be given effect to.

It has been argued that competition laws may be tailored according to a nation's context. It is for the legislators of nations to decide what form of competition law is suitable, and it would not be necessarily unreasonable for the legislature of a developing country to adopt competition laws very similar to those in force in the European Union, however, it is well within the rights of a national legislature to adopt ordinary principles of competition law, with slight adjustments to take into account the different context of that nation. A consideration of the political and socio-economic contexts of some developing nations reveals that the problems faced by and experienced in those nations, are sometimes substantially different in nature to those experienced in developed nations. Issues such as dire poverty, substantial unemployment, entrenched racism, cronyism and nepotism are most often not experienced in developed countries or at least not to the same degree as in developing countries. Such issues inevitably influence the economy of developing nations and, as such, may well influence the competition laws of developing nations.

Turning to South Africa, it is submitted that the South African Competition Act is not merely an 'antitrust statute, albeit with a public interest aspect'<sup>225</sup> and neither is it 'an unchecked vehicle for redistribution'<sup>226</sup> or a statute primarily

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<sup>224</sup> That is, the Competition Commission, Competition Tribunal and Competition Appeals Court.

<sup>225</sup> *Anglo American Holdings Ltd/Kumba Resources Ltd* 46/LM/Jun02 para 156.

<sup>226</sup> *Ibid.*

concerned with the public interest. The South African Competition Act is, first and foremost, a competition statute, however it is also intimately tied up with South Africa's past and, as such, is particularly concerned with the interests of public of South Africa. It is conceded that striking a balance between market-driven competition in an economy and consideration of the public interest, is a difficult task. The South African courts have attempted to strike this balance and have, for the most part, done so well. It must be stated, however, that the authorities have perhaps been eager to diminish the role that the public interest plays in the realms of merger control and exemptions in South Africa.

The objectives of the Competition Act are clear: whilst traditional competition goals are accorded primacy, secondary goals such as the promotion of employment and advancement of the interests of historically disadvantaged persons, apply. The fullest effect to these public interest objectives is manifest in sections 10 and 12A. It is submitted, however, that the competition authorities have, especially with regard to merger control, adopted an approach which largely ignores the public interest grounds which must be considered in a merger evaluation. Consideration of the public interest grounds of section 12A(3) is an imperative – the authorities should be willing, in exceptional circumstances, to not impose public interest related conditions upon merger approval, but possibly even refuse a merger purely based on public interest grounds. Furthermore, the importance of the public interest in South Africa, and for most developing countries, requires the competition authorities to, though in highly unlikely circumstances, approve an otherwise anticompetitive merger on the grounds that it enhances the public interest to a significant degree.

A comparative analysis has revealed that South Africa's socio-economic context and history is unique. The Indonesian context bears some resemblance, and as result, the competition laws of Indonesia are similar, placing a significant emphasis upon the public interest. Brazil too, shows that, at least from the perspective of the legislature, broad public interest objectives may trump traditional competition goals in certain circumstances. The American approach clearly cannot be transplanted to developing jurisdictions, where different social and economic challenges await competition regulators.

Returning to the original question of this paper: have the public interest objectives of the South African Competition Act been realised, the answer is neither yes nor no. Whilst imposing conditions upon mergers will often cater for the interests of the public, such conditions will sometimes be insufficient. Both the past, and the present context, requires the competition authorities to carefully weigh the public interest, though this appears to be something the authorities are wary of doing for fear of undermining the underlying traditional purposes of competition law, that is, economic efficiency and consumer welfare.

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