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**SOCIAL AND POLITICAL GOALS OF MERGERS IN COMPETITION LAW:
COMPARATIVE ANALYSIS OF THE EFFICIENCY AND PUBLIC INTEREST
PROVISIONS IN KENYA AND SOUTH AFRICA**

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ABSTRACT

A principal goal of competition law is to promote fair distribution of wealth. Fair distribution of wealth is entrusted to competitive markets since they reward efficiency, innovation, spread wealth and decentralise economic power. While competition reflects the business conduct of enterprises, it cannot disassociate from the legal and regulatory framework, barriers to entry and prevailing conditions in markets for labour, infrastructure services and other production inputs. Redistribution of wealth acknowledges competition law as a tool that can be utilised to protect those at the lower end of income distribution by reducing prices allowing a larger basket of goods and services to be purchased.

Competition law is a tool that preserves market competition to provide an environment that encourages responsive business, efficiency and serves the interests of consumers. In developing countries, competition law and policy receive particular emphasis as being crucial and key in the economic and structural reform and addressing concerns of distribution and power. Competition law in Kenya cannot ignore the wider industrial policy or socio-economic considerations in Kenya. These social and political goals of competition law are important in developing countries with poverty, great income inequality. There is need to choose a means of addressing the equitable allocation of resources that will produce the least amount of inefficiency and competition law is the right tool to achieve this.

Kenya is a factor-driven economy where the level of productivity is determined by labour, institutions, infrastructure and the macro-economic environment. Enacting the Competition Act in Kenya was a response to economic and political reform to improve the welfare, well-being and economy in Kenya. Merger analysis in Kenya would require weighing gains and losses in efficiency in order to establish whether the merger will benefit other recipients other than market participants such as consumers and producers.

South Africa has well established interpretation and implementation addressing the trade-off between public interest provisions and efficiency. Interpretation of the merger laws in South Africa illustrate engaging an exercise of proportionality required to determine how to balance the competing arguments between efficiency, welfare standards and public interest.

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DEDICATION

To Andrew and Elizabeth Gitonga.

“Africa is the world’s newest and most promising frontier of limitless opportunity”

LIST OF ABBREVIATIONS

ANC	African National Congress
CAK	Competition Authority of Kenya
CPI	Corruption Perceptions Index
ERS	Economic Recovery Strategy for Wealth and Employment Creation
GDP	Gross Domestic Product
GNI	Gross National Income per capita
ICT	Information and Communications Technology
ICN	International Competition Network
KNBS	Kenya National Bureau of Statistics
MDG	Millennium Development Goals
OECD	Organisation for Economic Co-operation and Development
SMEs	Small and Medium sized enterprises
SSNIP test	Small but significant increase in the price of the relevant product
SA	South Africa
SLC	Substantially lessening or prevention of competition
UK	United Kingdom
US	United States
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme

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CHAPTER 1

1. INTRODUCTION

1.1 Background

The British colonial rule and occupation of Kenya were important in the design and development of the Kenyan economy.¹ Kenya's pre-independence economy went through three phases: first the 'pre-colonial subsistence farming', second the 'consolidation of extraction of labour and penetration of settler farming' and lastly the 'establishment of indigenous entrepreneurs'.² During British colonial rule, land was alienated to the British settler community creating a dominant agricultural production by settler farmers but severe land shortage to the African population.³ Agriculture became dominant and the rest of economy was secondary to it.⁴ The link between the African population and the British settlers was relegated to the necessity for cheap labour from migrant workers previously accustomed to a 'self-sufficient subsistence economy'.⁵

Agriculture dominated the economy as a 'substantially self-contained enclave with few linkages with the rest of the economy' with little financial benefit and investment accruing to the country.⁶ Capital investment was provided by British banks while manufacturing supplies and implements were imported from the United Kingdom (UK) in addition to foreign proprietorship of the economy.⁷ Further, the African population were not consumers of the agricultural produce and there was only a small domestic market for manufactured goods and high priced food.⁸

In 1963, Kenya gained independence from Great Britain. Post-independence, Kenya's main economic challenge was the low degree of 'industrialisation and monetisation' since most consumer goods were previously imported from the UK by the settler community.⁹ A distinct

¹United Nations Conference on Trade and Development (UNCTAD) 'Voluntary Peer Review on Competition Policy: Kenya' available at http://unctad.org/en/docs/ditcclp20056_en.pdf accessed on 14 June 2015 at 3.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid at 4.

⁸ Ibid.

⁹ Competition Authority of Kenya 'History of Competition Policy and Law Development in Kenya' available at <http://www.cak.go.ke/index.php/history-competition.html> accessed on 14 June 2015.

feature of the post-independence government was the preference for a diverse economy supporting the existing private sector created by the settler community with major industrial enterprises constituting the government sector.¹⁰ The Government of Kenya realised the need for achieving economic sovereignty, after political liberation, by embarking on state intervention.¹¹ State intervention was characterised by displacing foreign capital and workforce, price control, consumer subsidies and extending gained command of substantial resources that drove industrial growth and inclusive economic development.¹² In order to satisfy domestic and the regional East African Community requirements, Kenya embarked on a rapid industrialisation and indigenisation of the economy by setting up import substitute industries.¹³

However, by the mid-1970s, Kenya's industrialisation programme suffered numerous challenges after the collapse of the East African Community and losing the East Africa market to imports from Asia.¹⁴ Kenyan industries now needed to cater for both the domestic market and the export market.¹⁵ Kenya responded by establishing market based incentives and regulatory structures that would direct private activity to areas of greatest benefit for all Kenyans.¹⁶ The government licensed more industries to boost domestic competition and exposed domestic firms to foreign competition by selectively allowing imports and progressively removing banned and price controlled items.¹⁷

In 1988, Kenya enacted the Restrictive Trade Practices, Monopolies and Price Control Act (Restrictive Trade Practices Act) that sought to prohibit restrictive trade practices and establish an administrative mechanism to enforce the same.¹⁸ The Restrictive Trade Practices Act was intended as a transition legislation allowing Kenya to change from a price control to free enterprise economy.¹⁹ The Act was also intended to encourage competition by prohibiting restrictive trade practices, controlling monopolies, concentrations of economic power and

¹⁰ UNCTAD op cit note 1 at 4.

¹¹ Ibid at 5.

¹² Ibid. Price control was administered under the Price Control Act of 1956 (repealed).

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid. Sessional Paper No.1 of 1986 on 'Economic Management for Renewed Growth' encouraged the change from a controlled economy to a free economy.

¹⁷ Ibid.

¹⁸ Restrictive Trade Practices, Monopolies and Price Control Act (repealed) chapter 504 of the Laws of Kenya.

¹⁹ CAK History of Competition Policy op cit note 9.

prices.²⁰ The Act further created the Monopolies and Prices Department of the Treasury which was controlled and managed by the Monopolies and Prices Commissioner.²¹

The Restrictive Trade Practices Act was not effective in regulating a free market based economy mainly because it was intended as transitional and although encouraging a free market based economy it still contained provisions on price control.²² The Act also had some notable gaps such as the absence provisions addressing abuse of dominance.²³ Further, the Monopolies and Prices Commission, which was responsible for investigation of anti-competitive behavior, was subject to the control of the Minister of Finance.²⁴ The Commission lacked authority and its role was advisory hence its reference as ‘all extent and purposes, a ministry’.²⁵

Kenya enacted the current Competition Act in 2011 in its efforts to realise economic development.²⁶ The Competition Act has three major objectives: first it seeks to promote and safeguard competition in the national economy.²⁷ Second, it has a consumer protection role which seeks to protect consumers from unfair and misleading market conduct.²⁸ Lastly, it establishes the powers and functions of the Competition Authority and the Competition Tribunal.²⁹

1.2 *Problem Statement*

With the advent of the Competition Act of Kenya, this paper first asks, what underlying principles would inform Kenya in implementing and interpreting the Competition Act? According to Fox, developing countries can either choose a ‘foundational perspective’ founded on liberalisation and free enterprise or one that centrally factors in the lack of transparency,

²⁰ Preamble to the Restrictive Trade Practices, Monopolies and Price Control Act.

²¹ Ibid s 3.

²² S 35 of the Restrictive Trade Practices Act gave the Minister of Finance power to fix maximum prices for the sale of any goods.

²³ UNCTAD op cit note 1 at 61.

²⁴ S 3 (2) Restrictive Trade Practices Act.

²⁵ UNCTAD op cit note 1 at 61. Under section 30 of the Restrictive Trade Practices Act, the Commissioner evaluated applications for mergers for the purpose of formulating a recommendation to the Minister.

²⁶ Competition Act Number 12 of 2010 commenced on 1 August 2011.

²⁷ Preamble to the Competition Act.

²⁸ Ibid.

²⁹ Ibid.

blockage and political control of markets, and empowers people economically to independently assist themselves.³⁰

Choosing a foundational perspective based on liberalisation and free enterprise is an easier way out being ‘a path well-travelled’ and offers clear simple rules with less intervention and discretion by officials.³¹ In this case, a developing country is motivated to adopt competition laws of other jurisdictions which have an established history of implementation and interpretation.³² Foundational perspective that takes into account of transparency, empowerment and political independence of markets are more complicated.³³ This foundational perspective views competition policies for developing nations in a wider context by accounting for factors such as wealth distribution, weak competition institutions, barriers to trade and financial constraints.³⁴

Secondly, this study asks whether Kenya can balanced the trade-off between promoting long term production and dynamic efficiencies and wider social and political goals.³⁵ There are two main views on the goals of competition law. The first is the ‘strict constructionist’ view where the legislature’s goal for enacting competition law is simply to increase economic efficiency.³⁶ The second view is the ‘populist’ view, where legislature passes competition laws to further social and political goals.³⁷ The support for pro-competition policies is attributed to its distributional consequences.³⁸

The strict constructionist view states that distributional issues are multi-dimensional, complex and are better addressed through other more suitable policy instruments such as taxation, labour law or institutional support for small businesses.³⁹ Further, this view acknowledges that pursuing non-efficiency objectives can prove counterproductive since in the

³⁰ Eleanor M Fox ‘Economic Development, Poverty, and Antitrust: The Other Path’ (2007) 13 *Southwestern Journal of Law and Trade in the Americas* 101 at 103.

³¹ *Ibid* at 104.

³² Michal S Gal & Eleanor M Fox ‘Drafting competition law for developing jurisdictions: learning from experience’ (2014) *New York University Law and Economics Working Papers* paper 374 at 5.

³³ *Ibid*.

³⁴ *Ibid*.

³⁵ Gal & Fox *op cit* note 32 at 56.

³⁶ Robert H Lande ‘Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency)’ [1999] 50 *Hastings Law Journal* 959 at 961.

³⁷ *Ibid*.

³⁸ Richard S Markovits ‘An Ideal Antitrust Law Regime’ (1985) 64 *Texas Law Review* 251 at 267.

³⁹ Philip Sutherland & Katharine Kemp *Competition Law of South Africa* (2014) at 1-67.

long term, market power efficiency standard is more likely to lead to positive results in non-efficiency objectives of competition law.⁴⁰

Proponents of the populist view advocate that competition policy should not be assigned a myopic view lacking a broader social and political objective.⁴¹ Instead the purely economic goals of competition law as properly defined should embrace most requirements of a progressive competition policy being the ‘unity between the pragmatic substance of [competition] which is its economic goals and the law’s animating spirit-its social and political foundations’.⁴² Therefore the pursuit of the properly defined economic goals of competition law will also advance the social and political goals of the law.⁴³

Income distribution occurs when there is a shift in either consumer surplus or producer surplus.⁴⁴ Equity objectives are ‘value judgements’ political in nature making them more uncertain than efficiency objectives.⁴⁵ When government intervenes directly to reallocate resources through equity objectives in its efforts to improve income distribution it can create unintended inefficiencies.⁴⁶ This issue raises a ‘trade-off’ between social and political goals of competition law and efficiency.⁴⁷ Intervention by the government ‘has the potential to change incentives for firms’ that ‘distort choices and sacrifice efficiency’.⁴⁸ Conditions imposed because of public interest objectives raise costs to efficiency, economic welfare and income distribution both within and beyond the related markets.⁴⁹ There is need to offset efficiency benefits against costs associated with potential for government intervening in mergers through the public interest considerations.⁵⁰

⁴⁰ Paul S Crampton ‘Alternative Approaches to Competition Law Consumers’ Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals’ (1993) 17 *World Competition* at 85.

⁴¹ Joseph F Brodley ‘The Economic Goals Of Antitrust: Efficiency, Consumer Welfare, And Technological Progress’ [1987] 62 *New York University Law Review* 1020 at 1021.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Willem Boshoff, Daryl Dingley & Janine Dingley ‘The Economics Of Public Interest Provisions In South African Competition Policy’ available at <http://www.compcom.co.za/wp-content/uploads/2014/09/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf> accessed on 31 August 2015 at 14.

⁴⁵ *Ibid.*

⁴⁶ *Ibid* at 16.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid* at 21.

‘Equity objectives are important in a society which has such great income inequality’ therefore there is need to ‘choose a means of addressing the equitable allocation of resources that will produce the least amount of inefficiency’.⁵¹ According to Hanke, ‘intervention and control of the economy by governments is as old as the existence of human beings [while] the concept of public interest is as old as the political philosophy of government intervention’.⁵²

1.3 Overview of merger considerations.

1.3.1 Kenya

In determining a proposed merger⁵³ the Competition Authority of Kenya applies the standard test on the likelihood of the proposed merger to prevent, lessen competition or restricts trade and result in any undertaking acquiring or strengthening a dominant position in a market.⁵⁴ However, there are additional factors the Authority must consider, these are:

- i) the extent to which the proposed merger would be likely affect a particular industrial sector or region;
- ii) employment;
- iii) ability of small undertakings to gain access or be competitive in any market;
- iv) ability of national industries to compete in international markets.⁵⁵

These social and political goals in merger review are borrowed from the public interest considerations under section 12A of the Competition Act of South Africa.⁵⁶ The public interest considerations in reviewing proposed mergers under the Competition Act of South Africa are:

⁵¹ Boshoff et al op cit note 44 at 22.

⁵² Michael Hantke-Domas ‘The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?’ (2003) 15 *European Journal of Law and Economics* 165 at 166.

⁵³ S 2 of the Competition Act defines mergers as ‘an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover’.

⁵⁴ S 46 (2) (a) and (b) of the Competition Act of Kenya. United Nations Conference on Trade and Development (UNCTAD) Model Law on Competition United Nations New York and Geneva 2010 available at http://unctad.org/en/Docs/trbpconf7d8_en.pdf accessed on 14 June 2015 ch VI p II. The Model Law proposes the prohibition of mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical or conglomerate nature that substantially increases the ability to exercise market power above competitive levels the resultant market share will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firm.

⁵⁵ S 46 (2) (d) to (g) Competition Act of Kenya).

⁵⁶ Competition Act of South Africa number 89 of 1998.

- ‘ i) a particular industrial sector or region;
- ii) employment;
- iii) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
- iv) the ability of national industries to compete in international markets.’⁵⁷

1.3.2 South Africa

South Africa’s public interest considerations are peculiar since they depart from the standard economic evaluation of likelihood to substantially prevent or lessen competition or acquiring or strengthening a dominant position in a market. These public interest considerations were informed by the need to create a competitive and efficient economy that allowed access and participation of the historically disadvantaged population.⁵⁸ At the end of Apartheid and the inception of a democratic South Africa under the African National Congress (ANC) government, there were calls to privatise the economy as a solution to the centralised state controlled economy.⁵⁹ However, the ANC changed its approach to privatisation and advocated for a stronger competition law upon realisation that privatisation may lead to assets landing in control of the white minority.⁶⁰

The government sought to develop a competition policy that would derive both the benefits of the competition policy and broader government development policies.⁶¹ The government believed that competition and development were not contradictory objectives but mutually supportive if properly aligned.⁶² Alignment would be achieved through synchronising varying domestic and international development tools by aligning both industrial and trade

⁵⁷ Ibid s 12 A (3).

⁵⁸ Organisation for Economic Co-operation and Development (OECD) ‘Competition Law and Policy in South Africa: An OECD Peer Review’ OECD Global Forum on Competition Peer Review: Paris, 11 February 2003 available at <http://www.oecd.org/competition/globalforum/GlobalForum-February2003.pdf> accessed on 14 November 2014 at 16.

⁵⁹ Ibid at 11.

⁶⁰ Ibid.

⁶¹ James Hodge, Sha’ista Goga & Tshepiso Moahloli ‘Public-interest provisions in the South African Competition Act: A critical review’ Competition Policy, Law and Economics Conference 2009 available at <http://www.compcor.co.za/wp-content/uploads/2014/09/Public-Interest-Provisions14-August-2009-2.docx> accessed on 14 November 2014 at 4.

⁶² Ibid.

policy and competition law with government policies that sought to redress the legacy of racial distortions.⁶³

2. METHODOLOGY

This dissertation uses a comparative study of the merger laws in South Africa and Kenya. The scope of the comparative analysis includes analysis and interpretation of the Competition Acts, judicial decisions and guidelines from Kenya and South Africa.

The aim of the comparative analysis is to identify strengths and challenges of merger analysis under the Competition Act of Kenya and to make recommendations for guidance and reform.

2.1 Need for this study

Developing countries in Sub-Saharan Africa are undergoing structural and economic reform. These reforms include the enactment of competition laws. Developing countries either resort to enacting laws based on their social, economic and political characteristics or transplanting established laws from other jurisdictions. Although the benefit and limitations of developing countries using transplants from developed countries has been widely explored, there is a chasm on transplants from fellow developing countries specifically with income distributional goals. Further, although there are several well established model competition laws from years of research and development, there is need to inquire whether these model laws fit into the context of developing countries.

The link between competition laws and developing countries is an area that has been explored by some scholars. The study of competition laws and developing countries has been carried out by generally analysing developing countries. Such generalisation looks beyond the geographical location and emphasises on common economic characteristics of developing countries. This study will explore the use the interpretation of efficiencies and public interest provisions in South Africa in order to develop a better understanding on how the Competition Authority of Kenya can balance between the benefits of efficiencies and social and political goals in merger review.

⁶³ Ibid.

2.2 *Objective of the study*

The objective of this study is to analyse the efficiency and public interest provisions under the Competition Act of Kenya, to identify weaknesses, comment on proposed reforms and make recommendations that will be used as a guidance and tool for reform.

2.3 *Limitations of the study*

This study analyses merger considerations in competition law and not competition policy. Competition policy encompasses the wider government measures that influence the degree of competition in a country's market including trade policies and privatisation programmes.⁶⁴ Although there are a number of references to competition policy, this study will be directed at the narrower scope of competition law. It will be beyond the capacity and scope of this study to address efficiencies, social and political goals of competition policy.

Although the Competition Authority of Kenya is inchoate, it determined on a small number of mergers since its formation. However, these cases are neither reported nor accessible for purposes of analysis. This study will rely on guidelines issued by the Competition Authority of Kenya on mergers.

2.4 *Overview of Chapters*

This study will consist of four chapters. Chapter one has introduced a background into the development of the Kenyan economy and legislation on competition law. This chapter has discussed the foundational perspectives considered by developing countries when enacting competition law and balancing the trade-off between promoting efficiencies and distributional goals of competition law. Lastly, this chapter has outlined the research questions, the scope of

⁶⁴ Simon J Evenett 'Links Between Development and Competition Law in Developing Countries' United Kingdom's Department for International Development available at https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCEQFjAAahUKEwiR45Lk4cbHAhVH2xoKHQhBCNE&url=https%3A%2F%2Fwww.alexandria.unisg.ch%2Fexport%2FDL%2F22249.pdf&ei=_7LdVdHnBMe2a4iCoYgN&usg=AFQjCNHRuY_2m2W5U2VuuZJ9fz1sdrBWzA&sig2=aLL5Oecb0eRNDmqHx1Dfc accessed on 14 June 2015 at 4.

the dissertation and the need for this study justifying this comparative study between Kenya and South Africa,

Chapter two discusses the recent economic, social and political reform policies that led to the reform and enactment of the Competition Act of Kenya. Further, this chapter analyses the economic, social and institutional characteristics and challenges in Kenya and their effect on the factors of production, level of productivity and conducting business in Kenya. Lastly, this chapter will look at the effect of these characteristics on merger law.

Chapter three discusses income distribution goals of mergers through analysing efficiencies and public interest provisions of merger law in South Africa and Kenya. This chapter will briefly reviews literature on the role of efficiencies in promoting resource allocation. It also analyses the types of efficiencies and the different welfare standards applied in merger review. Thereafter, this chapter will discuss efficiencies, public interest inquiry and conditions as tools for preserving benefits of mergers in anti-competitive mergers under both Kenya and South Africa.

Chapter four will conclude this study and offer recommendations on reform of the Competition Act of Kenya.

CHAPTER 2: ECONOMIC, SOCIAL AND INSTITUTIONAL CHARACTERISTICS OF KENYA AND THE EFFECTS ON MERGER LAWS

1. INTRODUCTION

Competition is defined as the rivalry between commercial enterprises which respond to consumer demand through innovative processes and products that lower prices and increase quality.⁶⁵ While competition reflects the business conduct of enterprises, it cannot disassociate from the ‘legal and regulatory framework, barriers to entry and exit, and prevailing conditions in markets for labour, land, finance, infrastructure services, and other productive inputs’.⁶⁶

The purpose of this part of the thesis is twofold: first, to illustrate that the enactment of the Competition Act in Kenya was a response to economic and political reform to improve the welfare, well-being and economy in Kenya. Secondly, to discuss the economic, social and institutional conditions that affect the factors of production, level of productivity and conducting business in Kenya.

Competition law is a tool that preserves market competition to provide an environment that encourages responsive business, efficiency and serves the interests of consumers.⁶⁷ The foundations of competition law are traced to developed countries. In developed countries, competition law is an efficiency instrument focusing on the aggregate consumer or total wealth and is ‘applied with the assumption that markets increase aggregate wealth’.⁶⁸ In developing countries, competition law and policy receive particular emphasis as being crucial and key in the economic and structural reform.⁶⁹ In developing countries, competition law addresses ‘concerns

⁶⁵ Mark Dutz & R Shyaman Khemani ‘Competition Law and Policy Challenges in South Asia’ (2007) World Bank available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2008/09/22/000333037_20080922013058/Rendored/PDF/452810WP0Box334059B01PUBLIC1.pdf accessed on 21 June 2015 foreword.

⁶⁶ Ibid.

⁶⁷ Eleanor M Fox ‘Equality Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia’ (2000) 41 *Harvard International Law Journal* 579.

⁶⁸ Fox op cit note 30 at 110.

⁶⁹ Michal Gal ‘The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing Countries’ (2004) paper 10 *New York University Law and Economics Working Papers* 20 at 23.

of distribution and power'.⁷⁰ This chapter is premised on the argument that competition law in Kenya cannot ignore the wider industrial policy or socio-economic considerations in Kenya.

This chapter is concerned with the business environment which firms operate in Kenya. The first part will look at the recent economic, social and political reform policies in Kenya that led to the reform and enactment of the Competition Act. The second part will look at the economic, social and institutional characteristics and challenges of Kenya. The third part will look at the effect of these characteristics on merger laws.

2. RECENT ECONOMIC REFORM INITIATIVES IN KENYA

2.1 Economic Recovery Strategy 2003-2007

In 2002, the Kenyan economy was confronted by low economic growth, high unemployment rate and a large percentage of the population living in poverty.⁷¹ To ameliorate these challenges, the Kenyan government initiated a five year Economic Recovery Strategy for Wealth and Employment Creation (ERS) plan.⁷² This plan focused on four pillars: first, strengthening macro-economic stability by improving revenue collection, restructuring expenditure and adopting a monetary policy that supported economic growth.⁷³ Secondly, strengthen and improve governing institutions by reforming public administration.⁷⁴ Thirdly, rehabilitate and expand physical infrastructure to reduce the cost of production of goods and encourage competitiveness of locally produced goods.⁷⁵ Lastly, access and exploit the human capital of the poor to create a well-educated and healthy population that will enhance productivity and overall performance of the economy.⁷⁶

Most notably, the ERS emphasised the need to competition law reforms.⁷⁷ The ERS recommended addressing challenges undermining the effectiveness of the Restrictive Trade

⁷⁰ Fox op cit note 30 at 110.

⁷¹ Ministry of Planning And National Development 'Economic Recovery Strategy for Wealth and Employment Creation 2003 – 2007 available at <http://siteresources.worldbank.org/KENYAEXTN/Resources/ERS.pdf> accessed on 21 June 2015 at ix.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid at xi.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

Practices Act and the lack of harmony between sector regulatory laws and competition law.⁷⁸ Further, the ERS recommended enhancing the autonomy of the competition authority and allocating adequate finances to build the human resource capacity of the competition authority.⁷⁹ According to the ERS ‘the formulation and implementation of the competition law will take cognizance of the special regional and preferential interests of the country’.⁸⁰

At the end of its term, the ERS was quite a success. Kenya benefitted from an economic growth of more than 6 per cent in 2007 from 0.6 per cent in 2002 and a reduction of poverty from 56 per cent in 2002 to 46 per cent in 2006.⁸¹ However, the current Competition Act was not enacted during this term.

2.2 Kenya Vision 2030

At the end of the ERS term in 2007, Kenya embarked on a 25 year long term plan known as Kenya Vision 2030.⁸² Vision 2030 sought to create ‘a globally competitive and prosperous country with a high quality of life by 2030’ by transforming Kenya into ‘a newly-industrialised, middle-income country providing a high quality of life to all its citizens in a clean and secure environment’.⁸³ Vision 2030 is anchored on economic, social and political governance pillars.⁸⁴ The economic pillar aims to ‘achieve an average economic growth rate of 10 per cent per annum and sustaining the same till 2030 in order to generate more resources to meet the Millennium Development Goals’.⁸⁵ The social pillar seeks to ‘create a just, cohesive and equitable social development in a clean and secure environment’.⁸⁶ The political pillar aims to ‘realise an issue-based, people-centered, result-oriented and accountable democratic system’.⁸⁷

⁷⁸ ERS op cit note 71 at 15.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Office of the Prime Minister Ministry of State for Planning, National Development and Vision 2030 ‘Sessional paper No. 10 of 2012 on Kenya Vision 2030’ available at <http://www foresightfordevelopment.org/sobipro/download-file/46-1263/54> accessed on 17 June 2015 at ii.

⁸² Ibid.

⁸³ Ibid at ii.

⁸⁴ Ibid at ii, iii & iv.

⁸⁵ Ibid. The Millennium Development Goals are eight development goals by the United Nations that seek to eradicate extreme poverty and hunger, achieve universal primary education, promote gender equality, reduce child mortality, improve maternal health, combat HIV AIDS and malaria, environmental sustainability and create global partnership for development by 2015, as found in United Nations ‘Millennium Development Goals’ available at <http://www.un.org/millenniumgoals/> accessed on 20 June 2015.

⁸⁶ Vision 2030 op cit note 81 at ii-iv.

⁸⁷ Ibid.

The Vision 2030 pillars are anchored on first, economic objectives that strengthen the foundations of macroeconomic stability.⁸⁸ Secondly, institutional objectives of the Vision 2030 include continuing governance reforms, human resources development and public sector reforms that will create efficient, motivated and well-trained public service.⁸⁹ Thirdly, infrastructural objectives include improving infrastructure, generating more energy and increasing efficiency in energy consumption and using science, technology and innovation to raise productivity and efficiency levels.⁹⁰ Fourthly, the social objectives of Vision 2030 include enhanced equity and wealth creation opportunities for the poor and creating secure living and working environment.⁹¹

It was during the Vision 2030 that the review of the previous competition laws was fast-tracked and the current Competition Act was enacted.⁹²

3. ECONOMIC, SOCIAL AND INSTITUTIONAL CHARACTERISTICS OF KENYA

3.1 *Economic Characteristics*

3.1.1 *Economies Generally*

Economies in the world are generally divided into three main categories: ‘factor-driven, efficiency-driven and innovation-driven’.⁹³ A factor-driven economy is the first stage of economic development and its salient feature is based on its ‘factor’ endowments which include unskilled labour and natural resources.⁹⁴ The level of productivity for factor-driven economies is determined by ‘a healthy and literate workforce, well-functioning public and private institutions, well-developed infrastructure and a stable macro-economic environment’.⁹⁵ Kenya is classified as a factor-driven economy.⁹⁶

The second stage of economic development is the efficiency-driven economies where

⁸⁸ Vision 2030 op cit note 81 at ii-iv.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Competition Authority of Kenya ‘Annual Report 2012/13’ available at http://www.cak.go.ke/index.php?option=com_docman&view=docman&Itemid=530 accessed on 29 January 2015 at 8.

⁹³ World Economic Forum ‘The Africa Competitiveness Report 2013’ World Bank available at http://www3.weforum.org/docs/WEF_Africa_Competitiveness_Report_2013.pdf accessed on 15 June 2015.

⁹⁴ Ibid at 6.

⁹⁵ Ibid.

⁹⁶ Ibid.

countries develop efficient production processes that increase product quality.⁹⁷ The level of productivity is determined by ‘higher education and training, efficient goods and services market, frictionless labour markets, developed financial markets, the ability to make use of latest technological developments and the size of the domestic and foreign markets available to the country’s companies’.⁹⁸ South Africa is an efficiency-driven economy.⁹⁹

The last stage of development is the innovation-driven stage characterised by high wages and high standards of living where the level of productivity is determined by competing in ‘producing new and different goods using the most sophisticated production and business processes and innovation’.¹⁰⁰ Innovation-driven economies include Germany, United Kingdom, and United States.¹⁰¹

The rationale behind the classification of economies is to illustrate the different factors that determine the level of productivity and competition in different economies in the world.¹⁰²

3.1.2 *The Kenyan Economy*

There are two main economic indicators. First, the Gross National Income per capita (GNI) threshold is an ‘indicator of economic capacity and progress’ which measures the relationship between well-being such as poverty and economic variables.¹⁰³ Secondly, the Gross Domestic Product (GDP) which gauges the total gross value of goods and services produced locally in an economy within a specific period of time.¹⁰⁴

GNI is preferred in assessing a country’s competitiveness. Although GNI ‘does not completely summarise a country’s level of development or measure welfare it has proved to be a useful and easily available indicator that is closely correlated with other non-monetary measures

⁹⁷ World Economic Forum op cit note 93 at 6.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid

¹⁰¹ Ibid at 6.

¹⁰² Ibid at 19.

¹⁰³ Ibid.

¹⁰⁴ The World Bank ‘GDP (Current US \$)’ available at <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD> accessed on 20 June 2015.

such as the quality of life'.¹⁰⁵ GNI relates to consumer's purchasing capability and in extension the potential of competition.¹⁰⁶ Further, levels of GNI may be influenced by resultant increased productivity, efficiency and enhanced innovation.¹⁰⁷ Conversely, low levels of GNI may indicate low levels of competition.¹⁰⁸ The limitation to using GNI is that it may undervalue low income economies which have many informal and subsistence sectors.¹⁰⁹ According to the World Bank, countries are classified into low, low-middle, upper-middle and high income based on their level of GNI per capita.¹¹⁰ The low and middle income countries are collectively referred to as developing countries.¹¹¹

As at 2014, Kenya had a GNI per capita of US\$ 1 280 while its GDP was US\$60.94 billion.¹¹² Kenya is classified as a low-middle income economy.¹¹³ Kenya's GDP has projected a rise from 5.4 per cent in 2014 to between 6 and 7 per cent from 2015 to 2017 making it 'one of the fastest-growing economies in Sub-Saharan Africa' and the ninth biggest economy in Africa.¹¹⁴ The main sectors that drive the Kenyan economy are agriculture, manufacturing, wholesale and retail trade.¹¹⁵

¹⁰⁵ The World Bank 'Why use GNI per Capita to Classify Economies' available at <https://datahelpdesk.worldbank.org/knowledgebase/articles/378831-why-use-gni-per-capita-to-classify-economies-into> accessed on 14 June 2015.

¹⁰⁶ Gal & Fox op cit note 32 at 11.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ The World Bank 'Why use GNI per Capita to Classify Economies' available at <https://datahelpdesk.worldbank.org/knowledgebase/articles/378831-why-use-gni-per-capita-to-classify-economies-into> accessed on 14 June 2015.

¹¹⁰ The World Bank 'How Are The Income Group Thresholds Determined?' available at <https://datahelpdesk.worldbank.org/knowledgebase/articles/378833-how-are-the-income-group-thresholds-determined> accessed on 14 June 2015.

¹¹¹ Ibid.

¹¹² World Bank 'World Development Indicators: Kenya' available at http://data.worldbank.org/country/kenya#cp_wdi accessed on 17 June 2015.

¹¹³ Ibid.

¹¹⁴ The World Bank 'Kenya among the Fastest Growing Economies in Africa' available at <http://www.worldbank.org/en/news/press-release/2015/03/05/kenya-among-the-fastest-growing-economies-in-africa> accessed on 17 June 2015. Africa Economic Outlook 'Kenya 2015' available at http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2015/CN_data/CN_Long_EN/Kenya_GB_2015.pdf accessed on 17 June 2015 at 4.

¹¹⁵ Kenya National Bureau of Statistics (KNBS) 'Economic Survey Report 2015 Highlights' available at http://www.knbs.or.ke/index.php?option=com_phocadownload&view=category&download=719:economic-survey-2015&id=16:economic-survey-highlights&Itemid=563 accessed on 17 June 2015 at 43.

3.1.2.1 Agriculture

Agriculture is the ‘mainstay of the Kenyan economy’ and contributes about 27 per cent of the share of the GDP.¹¹⁶ More than one-third of the produce from agriculture is exported and accounts for more than 65 per cent of the total exports from Kenya.¹¹⁷

3.1.2.2 Manufacturing

The manufacturing sector contributes approximately 10 per cent to Kenya’s GDP.¹¹⁸ The manufacturing sector in Kenya is ‘fragmented’ and constitutes a number of broad sub-sectors led by food processing, beverages and tobacco, refined petroleum products and textiles, apparel, leather and footwear.¹¹⁹ Majority of these manufactured goods are basic products as opposed to skill-intensive products such as pharmaceuticals.¹²⁰ Most manufacturing firms in Kenya are family owned and operated.¹²¹

3.1.2.3 Wholesale and Retail Trade

Although the trade sector contributes an estimated 10 per cent to Kenya’s economy and is described as a key sector in the economy of Kenya being ‘the link between production and consumption’.¹²² Once streamlined, the trade sector has ‘the potential to lower the cost to consumers and to intermediate producers’.¹²³ This sector is predominantly informal, characterised by trade in agricultural perishable goods primarily produced by smallholders.¹²⁴

¹¹⁶ Ibid. Vision 2030 op cit note 81 at 44.

¹¹⁷ Ibid.

¹¹⁸ Economic Survey Report op cit note 115 at 43.

¹¹⁹ Vision 2030 op cit note 81 at 71.

¹²⁰ Ibid at 70.

¹²¹ Ibid.

¹²² Ibid at 63.

¹²³ Ibid.

¹²⁴ Ibid.

3.1.3 Economic Challenges

3.1.3.1 Barriers to trade

Barriers to trade undermine the potential of competition by distorting the trading system by creating an unfair trading environment that does not support businesses in accessing markets.¹²⁵ The wholesale and retail trade sector faces challenges of multiple license requirements and failure to access external markets.¹²⁶ The manufacturing sector also faces a number of barriers to trade such as high input costs, expensive and poor quality raw materials, rising labour costs, unreliable and expensive energy costs.¹²⁷ Agricultural sector faces poor access to credit, high costs of inputs such as fertilizer and seeds.¹²⁸ Further, there is decline in productivity in the agricultural sector due to high cost of inputs and taxation through municipal levies, poor livestock husbandry, limited extension services, over-reliance on rain fed agriculture, absence of markets and limited use of technology and innovation.¹²⁹

Kenya's tax revenue to GDP ratio is currently at 20 per cent which is relatively high compared to other developing countries and in the East African region.¹³⁰ However, Kenya's tax regime remains complex and cumbersome with uneven and unfair taxes, low compliance, narrow tax base with very high rates and rates dispersions with respect to trade.¹³¹

Barriers to trade in Kenya create unfavourable environment for conducting business and high business costs.¹³² The manufacturing sector heavy regulation has led to complex and overlapping business and investment registration.¹³³ Further, weak negotiations on international and regional trade agreements impede the ability of Kenyan firms to compete internationally.¹³⁴

¹²⁵ Gal & Fox op cit note 32 at 9. Common Fund for Commodities 'Basic Facts 2009-2010' available on http://www.common-fund.org/fileadmin/user_upload/CFC_downloads/BF_Eng10.pdf accessed on 15 June 2015 at 7, 8.

¹²⁶ Vision 2030 op cit note 81 at 27.

¹²⁷ Ibid at 71.

¹²⁸ Ibid at 27.

¹²⁹ Ibid at 47. ERS op cit note 71 at 23.

¹³⁰ African Economic Outlook op cit note 114 at 5.

¹³¹ ERS op cit note 71 at 5.

¹³² Vision 2030 op cit note 81 at 27, 72.

¹³³ Ibid.

¹³⁴ Ibid.

Weak enforcement standards and tax laws have resulted in dumping of low quality imports and counterfeit goods into the local market impeding competition.¹³⁵

3.1.3.2 Inflation

Inflation is the annual percentage change in the Consumer Price Index which is defined as the ‘measure of the weighted aggregate change in retail prices paid by consumers for a given basket of goods and services’.¹³⁶ Kenyan’s economy is susceptible to inflation due to increase in the cost of several food and non-food items outweighing the cost of energy products such as electricity and petroleum.¹³⁷ Inflation influences the volatility and inconsistency in the pricing of goods and services.

3.1.3.3 State Participation in Commercial Activities

The Government of Kenya participates in various commercial activities ranging from utility services such as oil refineries, electric power generating companies to commercial enterprises such as banks and hotels.¹³⁸ The challenges emerging from state participation are mainly the overlapping jurisdiction of sector regulation, high demand for public resources to maintain these commercial activities and limiting private ownership of enterprises in the Kenyan economy.¹³⁹

¹³⁵ Vision 2030 op cit note 81 at 27, 72.

¹³⁶ Kenya National Bureau of Statistics ‘Inflation’ available at http://www.knbs.or.ke/index.php?option=com_phocadownload&view=category&id=8:consumer-price-indices-cpi&Itemid=562 accessed on 17 June 2015. According to the KNBS the ‘price changes are measured by re-pricing the same basket of goods and services at regular intervals, and comparing aggregate costs with the costs of the same basket in a selected base period Price data for constructing the indices are collected by KNBS through a survey of retail prices for consumption goods and services’.

¹³⁷ Economic Survey Report op cit note 115 at 13.

¹³⁸ Privatisation Commission of Kenya ‘Approved Privatization Programme’ available at http://www.pc.go.ke/index.php?option=com_docman&task=doc_download&gid=17&Itemid=540 accessed on 18 June 2015.

¹³⁹ These are the benefits of privatisation under as provided under section 18 of the Privatization Act Chapter 485C of the laws of Kenya. The preamble of the Privatization Act provides that it is ‘An Act of Parliament to provide for the privatization of public assets and operations, including State corporations, by requiring the formulation and implementation of a privatization programme by a Privatization Commission to be established by this Act and for related purposes’.

3.1.3.4 Informality

The wholesale and retail trade sector in Kenya is pre-dominantly informal.¹⁴⁰ The informal sector is the source of income for those who fail to access formal employment and is dominated by trade in perishable agricultural goods.¹⁴¹ The informal sector is driven by supply chain challenges in the formal sector and high demand for goods due to lower prices compared to the formal sector.¹⁴² The supply chains from producers to distributor and consumers are ‘highly fragmented and involve millions of small producers and arbitrage traders’ resulting in an unpredictable delivery of output by producers.¹⁴³

Informality results in a number of challenges to the government such as low tax revenue due to failure to pay income taxes and difficulty in collecting taxes from the large number of informal traders.¹⁴⁴ Further, informality has the potential of distorting markets when analysing labour employment and produce marketing data.¹⁴⁵

3.1.3.5 Lack of Competition Culture

In developing countries, there is a notable lack of sufficient awareness on the economics of competition.¹⁴⁶ Competition in developing countries may not be compatible with the prevalent business culture.¹⁴⁷ In assuming levels of risk in the market, jurisdictions accustomed to planning and control from intense governmental involvement in the economy might be reluctant to rely on market dynamics by random private enterprises.¹⁴⁸

In its Annual Report for the year 2013/2014, the Competition Authority of Kenya cited the lack of a competition culture in Kenya as one its main challenges.¹⁴⁹ According to the Authority, the lack of a competition culture has contributed to distortions in some markets such

¹⁴⁰ Vision 2030 op cit note 81 at 63.

¹⁴¹ Ibid at 63-4.

¹⁴² Ibid at 66.

¹⁴³ Ibid at 65-6.

¹⁴⁴ Ibid at 64.

¹⁴⁵ Ibid.

¹⁴⁶ Maher M. Dabbah ‘Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime’ (2010) 33*World Competition* 457 at 470-71.

¹⁴⁷ Ibid.

¹⁴⁸ Gal & Fox op cit note 31 at 19.

¹⁴⁹ Competition Authority of Kenya ‘Annual Report 2013/14’ available at <file:///C:/Users/user/Downloads/CAK%20Annual%20Report%20%20final%20print%202013-2014.pdf> accessed on 11 September 2015 at 50.

as professional agencies.¹⁵⁰ These distortions were aggravated by support through legislation which is enforced by government agencies.¹⁵¹

3.2 *Institutional Characteristics and Challenges*

Institutions determine the ‘legal and administrative framework within which individuals, firms, and governments interact to generate wealth’.¹⁵² Kenya faces the challenge of poor governance resulting in institutional failure in leading sectors. Agricultural institutions lack a comprehensive legal framework to guide formulation of consistent policies and also face poor governance in the cooperative associations.¹⁵³ Further, institutional failure is caused by lack capacity by the private sector to take over previous government functions after trade liberalisation programmes.¹⁵⁴

Under the global competitiveness report, the main challenge in doing business in Kenya was corruption.¹⁵⁵ The Corruption Perceptions Index (CPI) measuring ‘the perceived levels of public sector corruption worldwide’.¹⁵⁶ Kenya ranks highly at position 145 out of 175 countries in being the least corrupt.¹⁵⁷ Corruption is attributed to poor management in the public sector, excessive discretion in government, appointments of incompetent public officials, political interference and lack of professionalism in public administration.¹⁵⁸

The notable institutional challenges faced by the Competition Authority of Kenya are the inability to satisfy the demand for skills development for existing staff, budgetary constraints and undeveloped systems to manage financial and human resources.¹⁵⁹

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Professor Klaus Schwab (ed) ‘Insight Report The Global Competitiveness Report 2013–2014’ World Economic Forum available on http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf accessed on 15 June 2015 at 4, 5.

¹⁵³ ERS op cit note 72 at 23.

¹⁵⁴ Ibid.

¹⁵⁵ World Economic Forum ‘Global Competiveness Report 2014/2015’ available at http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf accessed on 19 July 2015 at 238.

¹⁵⁶ Transparency International ‘Kenya’ available at <http://www.transparency.org/country#KEN> accessed on 19 June 2015.

¹⁵⁷ Ibid.

¹⁵⁸ ERS op cit note 71 at 8.

¹⁵⁹ CAK Annual Report 2012/13 op cit note 92 at 32.

3.3 *Social Characteristics and Challenges*

3.3.1 *Poverty*

Poverty is defined as ‘lack of income and productive resources sufficient to ensure sustainable livelihoods; hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increased morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments; and social discrimination and exclusion’.¹⁶⁰ Poverty has two main elements: the lack of income and inaccessibility to social services.¹⁶¹

According to the United Nations, poverty is ‘intensified by unemployment, labour market inequalities, an unequal distribution of power, and by limits on political participation’.¹⁶² Poverty in Kenya is quite high and estimated between 34 and 42 per cent of the population lives in poverty.¹⁶³

3.3.2 *Labour and the Youth*

The informal sector holds the largest share of employment at 82.7 per cent of the total employment rate.¹⁶⁴ Although labour is a major contributor to output growth, labour in Kenya faces two main challenges: high unemployment rate and low productivity.¹⁶⁵ Kenya faces a high unemployment rate estimated at 12.7 per cent.¹⁶⁶ Labour in Kenya also faces low productivity as a result of poor education and skill levels.¹⁶⁷

¹⁶⁰ Hassan Qaqaya & George Lipimile (Eds) ‘The Effects of Anti-Competitive Business Practices on Developing Countries and their Development Prospects’ United Nations Conference On Trade And Development available at http://unctad.org/en/docs/ditccplp20082_en.pdf accessed on 14 September 2015 at 210-11.

¹⁶¹ Ibid.

¹⁶² Ibid at 212.

¹⁶³ The World Bank ‘Kenya Overview’ available at <http://www.worldbank.org/en/country/kenya/overview> accessed on 19 June 2015.

¹⁶⁴ Economic Survey Report op cit note 115 at 34. According to United Nations Development Programme ‘Kenya’s Youth Employment Challenge’ available at [http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/Kenya_YEC_web\(jan13\).pdf](http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/Kenya_YEC_web(jan13).pdf) accessed on 28 August 2015 at 12, a formal job is defined as having ‘a larger probability of providing full-time, year-round employment and better earnings than an informal or traditional job.’ In some instances, a formal job ‘might also provide employment benefits such as health care and paid holidays, which is not the case with informal jobs’.

¹⁶⁵ ERS op cit note 71 at 33.

¹⁶⁶ UNDP op cit note 164 at 5. Unemployment rate is calculated by linking the number of unemployed people to the economically active population within the pool of those employed.

¹⁶⁷ ERS op cit note 71 at 33.

The youth are disadvantaged and have weak connection to employment as compared to the general population.¹⁶⁸ The youth who constitute approximately 38 per cent of the population of Kenya between 15 and 35 years are regarded as the age where ‘much of the human capital is formed’.¹⁶⁹ However, the rate of unemployment for the youth is very high and the youth form 80 per cent of the unemployed.¹⁷⁰ Youth unemployment in Kenya is caused by ‘slow or declining economic growth, rapid population growth, poor dissemination of labour market information, skills mismatch, structural reforms, and high costs of labour’.¹⁷¹ The youth in Kenya have a higher dependency rate due to the high rate of unemployment, limited skills and lack of resources and opportunities.¹⁷²

3.3.3 *Inequality*

Low agricultural productivity, poor governance, ethnicity and dependence in economic growth based on ‘capital-intensive’ sector including commodity trade drive inequality in Africa.¹⁷³ Inequality here refers to ‘horizontal inequality’ characterised by exclusion of certain groups from actively participating in society both socially and economically.¹⁷⁴ An illustration of the effect of inequality is access to capital. The poverty-struck population has no access to security and eventually credit creating insecurity over property rights leading to social and political conflicts and undermining investment.¹⁷⁵

Under the income Gini coefficient which measures ‘the deviation of the distribution of income among individuals or households within a country from a perfectly equal distribution’ where a value of 0 represents absolute equality, a value of 100 absolute inequality Kenya scores 47 where the global average is approximately 40.¹⁷⁶ Kenya has a high level of inequality from

¹⁶⁸ Deon Filmer & Louise Fox ‘Youth Employment in Sub-Saharan Africa Development Series’: World Bank available at <https://openknowledge.worldbank.org/bitstream/handle/10986/16608/9781464801075.pdf?sequence=1> accessed on 15 June 2015 at 1.

¹⁶⁹ Vision 2030 op cit note 81 at 138.

¹⁷⁰ UNDP op cit note 164 at 16.

¹⁷¹ United Nations Development Programme ‘Kenya National Human Development Report 2009 Youth and Human Development: Tapping the Untapped Resource’ available at http://hdr.undp.org/sites/default/files/kenya_nhdr_2009_en.pdf accessed on 20 June 2015 at 38.

¹⁷² ERS op cit note 71 at 139.

¹⁷³ United Nations ‘The Millennium Development Goals Report 2014’ available at <http://www.un.org/millenniumgoals/2014%20MDG%20report/MDG%202014%20English%20web.pdf> accessed on 15 June 2015 at 20, 21.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ United Nations Development Programme ‘Human Development Reports: Income Gini Coefficient’ available at

the large and poor population who are less educated, skilled and unable to access social services and employment opportunities.¹⁷⁷

4. EFFECTS OF CHARACTERISTICS ON MERGER POLICIES

In designing ideal merger laws, a jurisdiction must balance between ‘push and pull of optimal merger design’.¹⁷⁸ The push factor is the motivation to transplant the merger laws from another jurisdiction regardless of any similarities with the followed jurisdiction.¹⁷⁹ The main impetus for push factors are mainly the success of the merger laws in the followed jurisdiction, liberalisation of international trade as a response from globalisation and international cooperation or as a condition for financial aid or regional trade agreements.¹⁸⁰ Pull factors occur when a jurisdiction designs its merger laws based on its distinct characteristics including socio-economic and enforcement conditions.¹⁸¹ Pull factors consider the level of economic analysis, legal and practical tools in collecting information and the legal weight of experts in the decision making process and in extension the political effects of such decisions.¹⁸²

Designing an ideal merger law necessitates balancing the competing push and pull factors.¹⁸³ This paper will delve into the pull factors considered in designing merger law by analysing the preceding characteristics of Kenya on designing merger laws.

4.1 *Simplicity*

Human and financial resource constraints coupled with a low level of economic sophistication from market participants can primarily influence merger laws in two ways.¹⁸⁴ First, merger laws should be fairly simple to apply.¹⁸⁵ Simplicity is achieved through adopting clear legal presumptions with respect to the economic effects of mergers.¹⁸⁶ This will benefit

<http://hdr.undp.org/en/content/income-gini-coefficient> accessed on 20 June 2015.

¹⁷⁷ ERS op cit note 71 at 31.

¹⁷⁸ Michal S Gal ‘Merger Policy for Small and for Micro Economies’ available at <file:///C:/Users/user/Downloads/SSRN-id2202718.pdf> accessed on 15 June 2015 at 1.

¹⁷⁹ Ibid at 3.

¹⁸⁰ Ibid at 2, 3.

¹⁸¹ Ibid at 3.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Gal & Fox op cit note 32 at 49.

¹⁸⁵ Ibid at 50.

¹⁸⁶ Ibid.

technically deficient competition authorities by clarifying and predicting decision making.¹⁸⁷ Such legal presumptions affect the level of complexity of the law, burden of proof, level of transparency and even the number of prohibitions to be applied.¹⁸⁸

Generally mergers can be reviewed before execution ('ex ante') or investigated subsequently after taking place ('post ante').¹⁸⁹ Merger laws may be simplified through application of ex ante review.¹⁹⁰ Ex ante merger review is beneficial to markets with participants with a low level of sophistication since there is no obligation on the merging parties to solely carry out the analysis.¹⁹¹

4.2 *Merger Notifications*

Kenya faces the challenge of lacking adequate human and financial resources in competition analysis.¹⁹² Competition agencies try to achieve 'optimal deterrence' which 'entails prohibiting anti-competitive conduct and allowing neutral or pro-competitive conduct'.¹⁹³ Human and financial resource constraints can lead to erroneous decisions in achieving optimal deterrence.¹⁹⁴ Such errors can be either 'false negatives' where the narrow application of regulations fail to capture anti-competitive conduct or 'false positives' where the wide application of regulations prohibits pro-competitive conduct.¹⁹⁵ These errors are due to the inability of the competition authority to use information correctly and misapplication of rules due to the inability to perform economic and legal analysis despite having access to information.¹⁹⁶

Merger review based on ex ante notification can be resource consuming since the authority must review all mergers meeting the threshold.¹⁹⁷ This creates extensive burden on other areas of enforcement assuming the authority has one pool of enforcement resources for its

¹⁸⁷ Ibid.

¹⁸⁸ Ibid at 27.

¹⁸⁹ Richard Whish *Competition Law* 4th Ed (2001) at 729.

¹⁹⁰ Gal & Fox op cit note 32 at 50.

¹⁹¹ Ibid.

¹⁹² CAK Annual Report 2012/13 op cit note 92 at 32.

¹⁹³ Michal S Gal, 'When the Going Get Tight: Institutional Solutions when Antitrust Enforcement Resources are Scarce' [2010] *Loyola University Chicago Law Journal* 417 at 434.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid at 434, 435.

¹⁹⁷ Ibid at 436.

other activities.¹⁹⁸ Therefore, competition authorities in developing countries need to create a more efficient enforcement system by limiting the scope of merger review.¹⁹⁹

Limiting merger review is achieved through: first, placing a minimum threshold to ensure mergers with insignificant economic effects are not reviewed.²⁰⁰ Secondly, mandatory merger notifications can be abolished but allow the authority to break down a merger if it subsequently proves anti-competitive.²⁰¹ Thirdly, a voluntary system of notification can be adopted where a competition authority has the power to investigate and apply remedies on anti-competitive mergers post-merger.²⁰² Lastly, merger review can be subject to notifications from mergers falling within a ‘corridor’ between a minimum and maximum threshold.²⁰³ The maximum threshold in a ‘corridor’ restricts reviewing mergers of a certain threshold involving international and foreign companies with such excessive turnovers that would seldom be dropped merely by not clearing with the developing country’s competition authority.²⁰⁴

4.3 *Transparency and discretion*

Corruption is prevalent where there are low levels of transparency and wide discretion on individual decision makers.²⁰⁵ Merger laws should set clear parameters that limit discretion and ensure transparency allowing third parties to establish how decisions are made.²⁰⁶ Further, in order to avoid corruption, merger review should be determined by a ‘college of decision makers’ rather than an individual.²⁰⁷ Noting the high rate of corruption and the role of courts in propagating it, it is advisable for new competition tribunals to appoint new judges in place of using existing court system.²⁰⁸

¹⁹⁸ Gal op cit note 193 at 436.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Gal & Fox op cit note 32 at 51.

²⁰³ Gal op cit note 193 at 436.

²⁰⁴ Ibid at 437.

²⁰⁵ Gal & Fox op cit note 32 at 52.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid at 25.

4.4 *'Weight of wider industrial policy or socio-economic considerations'*²⁰⁹

Industrial policy or socio-economic considerations in mergers are wider factors not related to competition that are beyond merging parties or markets and usually entail trade-offs.²¹⁰ These considerations include employment, financial stability, 'protection of national champions' and 'increasing the ownership status of historically disadvantaged persons'.²¹¹

In developing jurisdictions 'the goal of promoting long-term production and dynamic efficiency should be centre stage, even at the cost of some harm to allocate efficiency in the short term'.²¹² In order to promote long-term production, competition law may require combining competition and cooperation in addition to maximising competition concerns.²¹³ Cooperation involves government support for rationalised and efficient production where markets are not sophisticated.²¹⁴

Competition law can be a tool for incorporating long-term inclusive growth as an 'important promise of the market system'.²¹⁵ Competition law allows access to social services previously in the control of the state and ensures fair market play which encourages trade, generates employment and reduces inequalities.²¹⁶

CONCLUSION

The Kenyan economy is a factor driven economy characterised by high barriers to trade, predominant informality and state participation. The low economic growth is related to low productivity and a high unemployment rate from labour which is a major contributor to output growth. Low productivity is attributed to poor education and skill levels while unemployment on the other hand is attributed to a growing population amidst slow economic growth and high costs of labour. Poor education and skill level are linked to poverty which denies the access social services and employment opportunities. Whichever way you look at it, these cross-cutting issues

²⁰⁹ Gal & Fox op cit note 32 at 56.

²¹⁰ Ibid at 57.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid at 56.

²¹⁵ Ibid.

²¹⁶ Qaqaya & Lipimile op cit note 160 at 212.

illustrate how economic growth is proportional to social welfare and wellbeing. These cross-cutting issues influence the design of the merger laws specific to the Kenya's challenges. This design can incorporate the institutional challenges by countries to enable an accurate and cost efficient review of mergers.

Competition law is imperative in the economic and structural reform in Kenya and must take into account these wider socio-economic issues in Kenya in order to regulate mergers under the prevailing market conditions in Kenya.

CHAPTER 3: REDISTRIBUTION OF WEALTH THROUGH MERGERS: COMPARATIVE ANALYSIS OF EFFICIENCY AND NON-EFFICIENCY PUBLIC INTEREST PROVISIONS IN THE COMPETITION LAWS OF KENYA AND SOUTH AFRICA

1. INTRODUCTION

This section of the thesis examines wealth redistribution through efficiency and public interest provisions of merger law in South Africa and Kenya. The preceding part illustrated Kenya's social, economic and institutional challenges and their influence on developing the Competition Act of Kenya.

According to Sutherland and Kemp:

'Although it is never stated that the main goals of competition law is to promote a fair distribution of wealth, one of the major reasons why the economy is left to competitive markets is because it is accepted that they distribute wealth fairly. Markets that operate properly reward efficiency and innovation, spread wealth and decentralize economic power. However this will not always be the case in unequal societies or developing economies.'²¹⁷

This part will engage with the interpretation of both the efficiency and social and political goals of competition law that: first, competition authorities in Kenya will have to accommodate considerations beyond the economics of competition.²¹⁸ Secondly, the legislature was correct to envisage competition as an effective tool to achieving social and political goals. However this benefit is not likely to occur in all instances therefore creating a necessity for public interest consideration to strengthen the benefits of mergers.²¹⁹ It is argued through interpreting South African merger law that although efficiencies may be a long-term key to achieving social and political goals of competition law there is room to effectively derive these goals from public interest provisions in merger. Including social and political objectives through public interest concerns can supplement the benefit of fair distribution of wealth in Kenya. Lastly, this chapter will illustrate the divergence and conflicts of conflating public interest and efficiencies in mergers.

The first part will briefly review the relevant literature on the role of efficiencies in promoting resource allocation. The second part will analyse the efficiency defence in mergers once mergers are found anti-competitive. This part will look at the type of efficiencies and

²¹⁷ Sutherland & Kemp op cit note 39 at 1-67, 68.

²¹⁸ Ibid at 1-56.

²¹⁹ Ibid.

thereafter examine the different welfare standards in mergers. Thereafter, this part will delve into a comparative study of interpretation of efficiencies in Kenya and South Africa. The second part will look at the public interest inquiry in mergers. This part will analyse the equity, social and political objectives of competition law. The last part will analyse merger remedies as additional tools for competition authorities to fix anti-competitive effects of mergers while preserving benefits such as efficiencies.

2. WEALTH DISTRIBUTION THROUGH SOCIAL AND POLITICAL GOALS OF COMPETITION LAW

The promotion of competition is necessary as a more efficient means of allocation of resources in an economy as compared to other means.²²⁰ In extension, improving resource allocation in an economy can be an effective way of improving the average standard of living of the population.²²¹ The economic goal of competition policy seeks to increase ‘the material welfare of society through the instrument of inter-firm rivalry’.²²² This goal has been described as having both ‘an end result and a preferred means by which that result is to be achieved’.²²³ The end result is to enhance the aggregate social wealth referred to as the economic efficiency which is constrained by consumers receiving an appropriate share of the wealth through consumer welfare.²²⁴ Competition law changes the incentives of business firms ‘to ensure that the pursuit of private profit more fully promotes social welfare’.²²⁵ An important aspect of competition welfare is therefore economic efficiency. An effective competition law must reconcile the aggregate interest in maximising social wealth through efficiency with consumer interests through consumer welfare.²²⁶

According to Brodley, in assessing the key efficiency goals for competition policy and in the consequent allocation of resources among these goals, a competition authority must consider their importance and legal measurability.²²⁷ Importance of efficiencies means ‘the relative

²²⁰ Crampton op cit note 40 at 56.

²²¹ Ibid.

²²² Brodley op cit note 41 at 1023.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid at 1024.

²²⁶ Ibid at 1035

²²⁷ Ibid at 1025, 1026.

contribution a particular type of efficiency makes to increases in social wealth over time and across the whole economy'.²²⁸ Legal measurability refers to the 'ability of courts to determine whether a particular transaction will increase social wealth and to measure roughly its magnitude'.²²⁹

There is a wide consensus that competition authorities should not be engrossed in the short term effects of merger but place considerable emphasis on dynamic and long term aspects of competition.²³⁰ Social and political objectives such as inequality, income distribution and the ability of domestic firms to compete internationally are important long term approaches to competition.²³¹

3. THE EFFICIENCY DEFENCE

Economic efficiency refers to 'a decision or event that increases the total value of all economically measurable assets in the society or total social wealth'.²³² The 'efficiency defence' recognises the important role of merger control which is facilitating the attainment of efficiencies.²³³ However, jurisdictions differ in their approaches to efficiencies in mergers. This difference is based on two views. First, there is a general view that efficiency gains are more likely to be achieved in competitive markets.²³⁴ Here the purpose of competition law is to ensure that competitive markets allocate production and consumers purchase products in an efficient manner.²³⁵ Secondly, some jurisdictions recognise the possibility of alternative ways of attaining efficiencies besides preserving competitive markets.²³⁶

In practice, competition authorities analyse mergers in a 'two-step' approach where the likelihood of substantially lessening or preventing competition by a merger precedes analysing

²²⁸ Ibid at 1026.

²²⁹ Ibid.

²³⁰ Sutherland & Kemp op cit note 39 at 1-60.

²³¹ Ibid.

²³² Brodley op cit note 41 at 1025.

²³³ Mfundo Ngobese & Linda Chung 'The Role of Efficiencies In the South African Merger Control Regime' (2009) 126 *SALJ* 141.

²³⁴ Ibid.

²³⁵ Philip Sutherland 'Steel and Propane: The Efficiency Defence And Horizontal Mergers' (2008) 128 *SALJ* 331 at 342.

²³⁶ Ngobese & Chung op cit note 233 at 141.

the efficiencies from the merger.²³⁷ Efficiencies in merger analysis are relevant where a merger is found anti-competitive.²³⁸ Where the effects of the merger are found pro-competitive, no further inquiry is made and the merger is approved.²³⁹ The rationale for this two-step approach is first, competition authorities will only undertake analysing efficiencies when necessary since it is difficult to identify and quantify efficiencies.²⁴⁰ Secondly, only the parties to the merger have better access to information pertinent to an efficiency claim.²⁴¹

3.1 Types of efficiency

There are four categories of efficiencies. First, dynamic efficiencies are efficiencies in innovation that develop efficient production processes, introduce new products, use resources, product and service quality.²⁴² Dynamic efficiencies are difficult to analyse because they are difficult to calculate, verify and generalise because the presence of market power can either promote innovation or hinder it.²⁴³ Innovation through dynamic efficiency is described as being the ‘most important determinant for long-term economic growth’ and that ‘innovation and diffusion of new products and technologies’ is one of the significant results that effective competition should realise.²⁴⁴

Secondly, production efficiencies are economic cost saving efficiencies in production processes that allow firms to produce more or better quality output from the same amount of input.²⁴⁵ Savings in cost of production through economies of scale and specialisation are first efficiencies in purchasing, distribution, advertising, capital raising, complementary resources and research and development.²⁴⁶ Secondly, savings derived from transaction costs through

²³⁷ Organisation for Economic Co-Operation and Development ‘Competition Policy and Efficiency Claims in Horizontal Agreements’ available at <http://www.oecd.org/competition/mergers/2379526.pdf> accessed on 14 July 2015 at 5.

²³⁸ Ibid.

²³⁹ Ibid at 5.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ OECD op cit note 237 at 6. Sutherland op cit note 235 at 339,343.

²⁴⁴ Wolfgang Kerber ‘Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law’ available at <http://poseidon01.ssrn.com/delivery.php?ID=793116004073123022101024081115005099122022037016006065077117015005124010095117002027000061119043019059124097017019065112114096027053058076046008024092066090089025061037116000074094093103119115098126103086025109029096122096025096118122083094089081&EXT=pdf> accesses on 28 August 2015 at 5.

²⁴⁵ Ibid.

²⁴⁶ Sutherland op cit note 235 at 339-40.

integrating previously external functions.²⁴⁷ Lastly, savings derived from the transfer of superior production techniques and knowledge.²⁴⁸

Thirdly, pecuniary efficiencies result from merged entities gaining greater bargaining power and lower input costs.²⁴⁹ Although they are easier to measure compared to other efficiencies, they ‘are not considered real savings in resources and are less favoured’ and ‘should not form the basis of an efficiency defence’ because they only ‘lead to a redistribution of resources’.²⁵⁰

Collectively, allocative efficiencies are realised through allocating existing stock of goods and productive output through the price system to purchasers who are willing to pay or to forego other consumption.²⁵¹

3.2 *Welfare Standards*

Economic welfare is the measure that aggregates the welfare of different groups of market participants in an economy.²⁵² These different groups of market participants are measured in two main categories, consumers and producers through analysing consumer, producer and total surplus.²⁵³ Consumer surplus is the difference between what consumers collectively pay for a product in a market and the value that each consumer is willing to pay over the actual price.²⁵⁴ Producer surplus is the difference between the price that producers collectively receive for their products in a market and the sum of the producers' respective cost in the increase or decrease in making one extra unit of a product at each level of output.²⁵⁵ Total surplus is ‘the sum of producer surplus and consumer surplus’.²⁵⁶ Welfare standard is the welfare that a competition authority seeks to maximise when balancing the aggregate welfare of

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid at 340.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² An Renckens ‘Welfare Standards, Substantive Tests, and Efficiency Considerations in Merger Policy: Defining the Efficiency Defense’ (2007) 3 *Journal of Competition Law and Economics* 149 at 152.

²⁵³ Ibid at 154.

²⁵⁴ Crampton op cit note 40 at 56.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

consumer and producer surplus.²⁵⁷ This part will assess the different types of welfare standards and how these standards relate to efficiencies.²⁵⁸

3.2.1 *Total Surplus Standard*

The total surplus standard ‘does not consider consumer or producer interests’ it merely measures the ‘total gain by society’ against the ‘total loss by society’ and if positive the merger will be approved.²⁵⁹ Under the total surplus standard, the weight to consumers and producers is considered equal therefore shifting a rand from consumers to producers has ‘neutral effects’ on a merger.²⁶⁰ A merger can be approved where consumers were worse off post-merger than pre-merger and the merger results in gains to the producers that outweigh losses to consumers or the merger resulting in price increase or harmful effects to consumers.²⁶¹

Under the total surplus standard, the purpose of competition law is not to promote efficiency but ‘the promotion of competition does not take place at the expense of efficiency, especially as efficiency also forms the rationale for the promotion of competition’.²⁶² The rationale behind the total surplus standard is that ‘money is circulated in the economy, it is irrelevant who holds it, as money is of the same value in anyone’s hands producers could be consumers on the next level’.²⁶³ Further, under the total surplus standard the efficiencies may be beneficial to consumers in a different market to the relevant market where the anti-competitive effects of the merger are felt.²⁶⁴

This standard requires calculating a range of possibilities regarding ‘the elasticity of demand for the relevant product and the anticipated price increase’.²⁶⁵ This standard is difficult to apply since it involves calculating of a range of probabilities whose values are unknown.²⁶⁶

²⁵⁷ Renckens op cit note 252 at 153.

²⁵⁸ The price standard is also considered as a type of welfare standard where a merger is prohibited if it results in post-merger price increases. However, as highlighted by Reckens op cit note 252 at 155, it is uncertain whether efficiency gains are considered in mitigating the effect on prices. Therefore, this paper will not analyse this standard since its core focus is on benefits from efficiency gains.

²⁵⁹ Ngobese & Chung op cit note 233 at 142.

²⁶⁰ Ibid.

²⁶¹ Ibid. OECD op cit note 237 at 6

²⁶² Sutherland op cit note 235 at 349.

²⁶³ Ngobese & Chung op cit note 233 at 142.

²⁶⁴ Ibid at 143.

²⁶⁵ OECD op cit note 237 at 6.

²⁶⁶ Ibid.

The Competition Tribunal of Canada used the total surplus standard in interpreting merger review under the Competition Act of Canada.²⁶⁷

In *Commissioner of Competition v Superior Propane Inc.*, the Competition Tribunal of Canada applied the total surplus standard in merger review.²⁶⁸ According to the Tribunal, when market power results in price increase of a product, allocative efficiency is reduced since consumers acquire less of the product and switch to lower valued substitutes.²⁶⁹ Productive efficiency is also reduced because output falls and economic resources are diverted to the producing substitutes due to less consumption of the product.²⁷⁰ An increase in the product price means loss in consumer surplus as compared to paying under competitive prices.²⁷¹ Loss in consumer surplus is first realised by the firm and its shareholders in the form of increase in profits.²⁷² The Tribunal interpreted such loss as ‘not a social loss, but rather a redistribution of gains from the merger; real resource use is not affected by this transfer of income’.²⁷³ Loss in consumer surplus may result in ‘deadweight loss’ which is a social loss consisting of ‘the remaining loss of consumer surplus, beyond that realised by the shareholders in the form of increased profits’.²⁷⁴ This deadweight loss measures ‘the allocative and technical inefficiency caused by the exercise of market power and represents the economic effect of the merger’.²⁷⁵

Under the total surplus standard ‘efficiencies need only exceed the deadweight loss to save an anti-competitive merger’.²⁷⁶ According to the Competition Tribunal of Canada, the total surplus standard ‘addresses solely the effects of a merger on economic resources’ and not ‘whether shareholders will be better off at the expense of consumers, but rather whether the economy gains more resources than it loses through the transaction’.²⁷⁷ The Tribunal preferred the total surplus standard because the Competition Act of Canada was not concerned with

²⁶⁷ Sutherland op cit note 235 at 348. Section 96(1) of the Competition Act of Canada states as follows: ‘The Tribunal shall not make an order under s 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.’

²⁶⁸ *The Commissioner of Competition v. Superior Propane Inc.* 2000 Comp. Trib. 15 para 423.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Ibid para 424.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid para 425.

²⁷⁵ Ibid.

²⁷⁶ Ibid para 427.

²⁷⁷ Ibid para 430.

distributional concerns in mergers and it allowed predictability in merger review.²⁷⁸ The Tribunal interpreted the underlying purpose of the Competition Act of Canada as maintaining and encouraging competition in order to promote efficiency.²⁷⁹ The statutory means of achieving this purpose was through encouraging competition while the desired end was efficiency.²⁸⁰ In case of a conflict between competition and efficiency, the later will prevail allowing an anti-competitive merger to be approved.²⁸¹

3.2.2 *Consumer Surplus Standard*

Under the consumer surplus standard, competition is viewed as ‘an end itself rather than a means to attainment of the paramount goal of wealth maximisation’.²⁸² The consumer surplus standard requires efficiency gains to be substantial and ensures mergers will not result in wealth transfer from consumers to producers leaving consumers worse off post-merger than pre-merger.²⁸³ Efficiencies must be substantial to enable profit maximisation not resulting in price increase post-merger.²⁸⁴ However, this standard not only focuses on price reduction post-merger, it also accounts for non-price benefits.²⁸⁵ Under this standard a merger is prohibited once found anti-competitive and cannot proceed by merging parties showing that efficiencies outweigh the resultant anti-competitive effects.²⁸⁶ Efficiencies under the consumer surplus standard ‘must be shown to reverse the anti-competitive effects likely to arise without them’.²⁸⁷

Under the consumer surplus standard, the competition authority is concerned with the likelihood of achieving the claimed efficiencies, failure of which the economy will be burdened

²⁷⁸ *Commissioner of Competition v. Superior Propane Inc.* supra note 268 para 432-33.

²⁷⁹ Ibid para 412. S 1.1 of the Competition Act of Canada provides ‘the purpose of this Act is 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.’

²⁸⁰ Ibid para 412.

²⁸¹ Ibid.

²⁸² Crampton op cit note 40 at 62.

²⁸³ Ngobese & Chung op cit note 233 at 145.

²⁸⁴ Ibid.

²⁸⁵ Ibid at 147.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

with an anti-competitive merger.²⁸⁸ The higher the level of concentration of the relevant market the greater the concern of achieving efficiencies or if achieved not passing to consumers.²⁸⁹ In analysing efficiencies, the recommended approach is the ‘sequential approach’ where a low concentration level is assumed for mergers that do not pose competitive concerns and there is no need for taking efficiencies into account.²⁹⁰ With a high concentration level, the assumption is efficiencies will not be taken into account and mergers will not be approved if it is anti-competitive.²⁹¹ Where a merger falls between these concentration levels, efficiencies are determined on a factual basis where they can only impact if the anti-competitive effects of a merger are limited but significant to require that the merger be prohibited if no efficiencies were to result.²⁹² In the consumer surplus standard there is need for exercise of discretion by competition authorities to determine the threshold which efficiency gains will not be considered since it may be difficult to agree on such.²⁹³

A consumer surplus standard is driven by ‘the protection of competition, and not the achievement of distributional goals’.²⁹⁴ The consumer surplus standard is used by the European Commission Merger Guidelines.²⁹⁵ Under the European Union guidelines on horizontal mergers, the European Commission recognises the benefits of effective competition as including innovation.²⁹⁶ The Commission prevents mergers from depriving consumers of the benefits of effective competition through firm’s significantly increasing market power.²⁹⁷ The Commission interprets increase in market power as referring to producer’s market power and including ‘increase prices, reduce output, choice or quality of goods and services [and] diminish innovation’.²⁹⁸

²⁸⁸ Ibid at 148.

²⁸⁹ Ibid at 147.

²⁹⁰ Ibid at 148. The other approaches are a ‘cases-by-case’ approach which although being the most accurate method, it is the most costly and time-consuming. The other approach is general presumption approach, which uses indicators such as HHIs or market shares.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid at 151.

²⁹⁴ Ibid at 150.

²⁹⁵ Ibid at 146. European Commission ‘Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03)’ available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN) accessed on 28 August 2015.

²⁹⁶ European Commission op cit note 295 para 8.

²⁹⁷ Ibid.

²⁹⁸ Ibid.

3.2.3 *Balancing Weight Standard*

The balancing weight standard considers the distributive effects of mergers where the benefit to producers is compared to the loss suffered by consumers.²⁹⁹ This benefit to producers is attributed to greater efficiency and redistribution from consumers.³⁰⁰ The loss suffered by consumers is attributed to both the redistribution of surplus to producers and the inability of consumers to purchase a product due to price increase and reduction in output produced resulting from market power increased by the merger.³⁰¹ A balancing weight is attached to the loss to consumers that balances it with the benefits of the merger to producers.³⁰² The weight to consumers is measured ‘by society or should reflect social attitudes toward equity among different income classes’.³⁰³ The competition authority will thereafter determine whether the weight attached to the interests of consumers is equal to or greater than the balancing weight, if so then the merger should not be allowed on efficiency grounds.³⁰⁴

The balancing weight standard is premised on the distribution effects of a merger that gives greater weight to consumers.³⁰⁵ The standard has been criticised as presuming that consumers are a homogenous group and does not consider other related markets in the merger.³⁰⁶

The Appeal Court in Canada applied the balancing weight approach in reversing the appeal from Canadian Tribunal judgement in *Canada (Commissioner of Competition) v. Superior Propane Inc.*³⁰⁷ In *Canada (Commissioner of Competition) v. Superior Propane Inc.* the Appeal Court interpreted the effects of preventing or lessening competition under subsection 96(1) as not exclusively focusing on the objective of the promoting competition where loss is restricted to deadweight loss.³⁰⁸ The Appeal Court interpreted the effects of preventing or lessening competition as including the ‘other statutory objectives to be served by the encouragement of competition that an anti-competitive merger may frustrate, such as the ability of medium and small businesses to participate in the economy, and the availability to consumers

²⁹⁹ Sutherland op cit note 235 at 349.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid at 350 quoting *Commissioner of Competition v Superior Propane Inc* (2002) 18 CPR 4th para 422-427.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Ibid.

³⁰⁷ Sutherland op cit note 235 at 349. *Canada (Commissioner of Competition) v. Superior Propane Inc. (C.A.)* 2001 FCA 104, [2001] 3 F.C. 185.

³⁰⁸ *Canada (Commissioner of Competition) v. Superior Propane Inc. (C.A.)* supra note 307 para 108, 112.

of a choice of goods at competitive prices'.³⁰⁹ The Appeal Court was reluctant to accept that parliament would allow an anti-competitive merger to proceed regardless of raising prices provided that its efficiencies exceeded the resulting loss of resources to the economy.³¹⁰ The Appeal Court held that the balancing weight approach was 'more reflective than the total surplus standard of the different objectives of the Competition Act'.³¹¹

3.3 Kenya

Section 46 (2) (h) of the Competition Act of Kenya provides that the Authority may base its determination in relation to a proposed merger on 'any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets'. This provision refers to the efficiency defence. However, there is no indication from the wording of the Act of a two-stage approach where efficiencies succeed the substantially lessening or prevention of competition (SLC) test. The efficiency defence can be deduced from the reference to 'technical efficiency' 'increased production' 'efficient distribution of goods or provision of services'. In addition with the reference to 'benefits likely to be derived' it is inconceivable that the Authority can assess the benefits of a proposed merger autonomous without looking at the effects of a merger.

The efficiency benefits under the Competition Act of Kenya include both dynamic and production efficiencies. These benefits such as technical efficiency, increased production and efficient distribution of goods or provision of services are arguably competition based since they can be arrived at through financial and economic knowledge. Other benefits such as research and development, technical efficiency and increased production are market specific such that only merging parties or competitors disputing the merger are privy to such information. This list of benefits is exhaustive as it does not use the words like 'including' unlike other sub sections of section 46 (2) which can be interpreted as non-exhaustive.³¹²

³⁰⁹ *Canada (Commissioner of Competition) v. Superior Propane Inc. (C.A.)* supra note 307 para 105.

³¹⁰ *Ibid* para 122.

³¹¹ *Ibid* para 160-61.

³¹² S 46 (2) (b) of the Competition Act of Kenya reads 'the extent to which the proposed merger would be likely to result in any undertaking, *including* an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market' section 46 (2) (c) reads 'the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any

The Authority has also issued guidelines on the general analysis of mergers.³¹³ The Authority in its guidelines acknowledges that ‘horizontal and non-horizontal mergers may lead to pro-competitive effects owing to efficiencies that are realised by the mergers’.³¹⁴ Efficiencies, under the guidelines, include both production efficiencies from production, distribution and marketing activities and dynamic efficiencies from greater innovation yields by combining investment in research and development.³¹⁵ The Authority acknowledges that dynamic efficiencies are the most difficult to verify.³¹⁶ According to the merger guidelines, the Authority considers three effects of efficiencies. First, whether the evidence on efficiency is sufficient to negate any findings of substantial lessening of competition of the merger.³¹⁷ Second, whether the claimed efficiencies are likely to prevent a substantial lessening of competition.³¹⁸ Lastly, the Authority considers whether the efficiencies result in consumer benefits over a reasonable period of time that would not have accrued without the merger.³¹⁹ The guidelines place the onus of presenting the evidence of an efficiency claim on the merging parties.³²⁰ Once the evidence is presented, the Authority considers whether the claimed efficiencies are likely to result in the merging parties ‘acting pro-competitively, to the benefit of consumers, in the post-merger market’.³²¹ According to the guidelines, efficiencies are determined on a case-by-case basis must be verified, merger-specific and must demonstrate benefits to consumers.³²²

detriment which would be likely to result from any undertaking, *including* an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market’.

³¹³ Competition Authority of Kenya ‘Consolidated Guidelines on The Substantive Assessment of Mergers under the Competition Act’ available at <file:///C:/Users/user/Downloads/Merger%20Guidelines.pdf> accessed on 7 August 2015.

³¹⁴ Ibid para 187.

³¹⁵ Ibid para 188.

³¹⁶ Ibid para 195

³¹⁷ Ibid para 196.

³¹⁸ Ibid para 197

³¹⁹ Ibid.

³²⁰ Ibid para 200.

³²¹ Ibid.

³²² Ibid para 201.

3.4 South Africa

Section 12A (1) (i) of the Competition Act of South Africa provides that where a merger is likely to substantially prevent or lessen competition, the Competition Commission or Tribunal must then determine:

‘whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented’.

The South African approach to efficiencies was analysed by the Competition Tribunal in *Trident Steel Limited/ Dorbyl Limited*.³²³ The Tribunal first noted that the efficiency provision at the time was adopted from section 96 (1) of the Canadian Act.³²⁴ Section 96 (1) of the Canadian Act was further interpreted as ‘a merger can both lessen competition and create efficiencies and that a proper enforcement policy should seek to maximise overall efficiency in the economy’.³²⁵ The Tribunal further noted that section 96 (1) of the Canadian Act was influenced by US economist Oliver Williamson’s hypothesis known as the Williamson trade-off.³²⁶

The Williamson trade-off argues that ‘cost efficiencies would be far greater than social losses resulting from increased economic power...a relatively small cost reduction would offset a relatively large price increase thereby making society indifferent to the merger’.³²⁷ The Williamson trade-off has been linked to the total surplus standard.³²⁸ The court held that the ‘trade-off’ applied in South Africa and did not address this issue any further.³²⁹ In determining whether a merger can be justified based on dynamic or production efficiency, a major concern is the conflict between production or dynamic efficiency and allocative efficiency.³³⁰ The Williamson trade-off seeks to balance increase in production efficiency and allocative

³²³ *Trident Steel (Proprietary) Limited/Dorbyl Limited* Case No.: 89/LM/Oct00.

³²⁴ *Ibid* para 42. The Tribunal quoted section 96 (1) as ‘The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.’

³²⁵ *Ibid* para 42.

³²⁶ *Ibid*.

³²⁷ *Ibid* at 42-3.

³²⁸ OECD op cit note 237 at 6.

³²⁹ *Trident Steel/Dorbyl Limited* supra note 323 at 48.

³³⁰ Sutherland op cit note 235 at 343.

inefficiencies in a merger.³³¹ According to the Williamson trade-off, a merger may lead to welfare loss by increasing market power and allocative inefficiency in the form of a dead weight loss and on the other hand, the merger may achieve a welfare gain by increasing production efficiency.³³² According to the Williamson, economic calculation often shows that welfare gain through production efficiency will exceed the loss by allocative inefficiency.³³³

In Trident Steel Limited/ Dorbyl Limited the Tribunal addressed analysed efficiencies under five issues:

- (1) The onus of establishing the efficiency gain?
- (2) The types of acceptable gains?
- (3) How the offset or trade-off between the competitive loss and the efficiency gain is calibrated?
- (4) Whether the gain needs to be passed on to the consumer?
- (5) Whether the efficiency is merger specific?³³⁴

This paper will conflate these issues into four as follows:

3.4.1 *Onus*

According to the Tribunal, the onus of establishing the efficiency defence rests on merging parties.³³⁵ This is because identifying and quantifying post-merger efficiencies at the pre-merger stage is difficult.³³⁶ Further, the parties to the merger compared to the competition authorities, are best placed to provide information on efficiencies.³³⁷

3.4.2 *Whether the efficiency is merger specific?*

The tribunal interpreted the words ‘would not likely be obtained if the merger is prevented’ to mean the efficiencies must arise as a result of the merger.³³⁸ The efficiency defence fails ‘if the efficiencies could come about through some other legal arrangement or

³³¹ Kerber op cit note 244 at 4.

³³² Sutherland op cit note 235 at 344.

³³³ Ibid.

³³⁴ *Trident Steel/Dorbyl Limited* supra note 323 para 49.

³³⁵ Ibid para 51. According to the Competition Tribunal, Canada and US also follow rest the onus on the merging parties.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ *Trident Steel/Dorbyl Limited* supra note 323 para 76.

organisational form that is not a merger, or if one of the firms could achieve a claimed efficiency on its own could arise from a legal arrangement or organisation form that is not a merger'.³³⁹

3.4.3 *Whether the gain needs to be passed on to the consumer?*

The Tribunal recognised that a merger proves anti-competitive where 'there is wealth transfer from consumers to producers'.³⁴⁰ According to the Tribunal, the issue of 'credibility of the claims that efficiency gains will be passed on' is pertinent.³⁴¹ It criticised the requirement of passing on efficiency gains as a prerequisite to an efficiency defence as 'a price control remedy' that 'it is not appropriate for the regulator to become a price setter'.³⁴² However the Tribunal found that:

'We propose the following test – where efficiencies constitute “real” efficiencies and there is evidence to verify them of a quantitative or qualitative nature, evidence that the efficiencies will benefit consumers, is less compelling. On the other hand, where efficiencies demonstrate less compelling economies, evidence of a pass through to consumers should be demonstrated and although no threshold for this is suggested, they need to be more than trivial, but neither is it necessary that they are wholly passed on. The test is thus one where real economies and benefit to consumers exist in an inverse relationship. The more compelling the former the less compelling need be the latter'.³⁴³

The Tribunal adopted an inverse relationship between real economies and benefit to consumers in determining whether the benefit of the efficiency should pass through to the consumer. According to the Tribunal, where efficiencies are “real”, evidence that it benefits consumers is less compelling.³⁴⁴ However evidence of a pass through to consumers is required where the efficiency 'demonstrates less compelling economies'.³⁴⁵ The issue is the type of efficiencies that fall within 'real' and 'demonstrates less compelling economies'.³⁴⁶

The Tribunal referred to real efficiencies as being dynamic efficiencies and production efficiencies ranging from plant economies of scope and scale to research and development

³³⁹ *Trident Steel/Dorbyl Limited* supra note 323 para 76.

³⁴⁰ *Ibid* para 68.

³⁴¹ *Ibid*.

³⁴² *Ibid* para 75.

³⁴³ *Ibid* para 81.

³⁴⁴ *Ibid*.

³⁴⁵ *Ibid*.

³⁴⁶ *Ibid*.

efficiencies that might not be achieved without a merger.³⁴⁷ The Tribunal interpreted the efficiency provision under the Competition Act of South Africa as differing with the Canadian Act due to the inclusion of the words ‘technological or other pro-competitive gain’.³⁴⁸ It applied the *eiusdem generis* interpretation of the words ‘technological gain’ to mean dynamic efficiencies while ‘other pro-competitive gain’ to constitute real economies which does not include ‘mere pecuniary gains’.³⁴⁹ The Tribunal justified the dynamic nature of competition law in South Africa with reference to the purpose of the Competition Act of South Africa under section 2 (a) which is ‘to promote the efficiency, adaptability and development of the economy’.³⁵⁰ Efficiencies ‘demonstrates less compelling economies’ can be interpreted to include pecuniary efficiencies or efficiencies that would ‘result in a mere redistribution of income from the customers, suppliers or employees to the merged entity’.³⁵¹

3.4.4 *Measuring the trade-off*

The Tribunal interpreted the Competition Act as requiring efficiency gains to be ‘greater than’ and ‘offset’ the anticompetitive effects as ‘presupposing a weighing process which suggests that efficiencies must be capable of measurement as opposed to broad speculative assertions’.³⁵² The Tribunal adopted a two-step approach to analysing efficiencies in mergers as: first, verify efficiency gains quantitatively and thereafter establish how the efficiencies trade-off against loss to competition.³⁵³ The second step is analysing the likelihood of efficiencies.³⁵⁴

In verifying efficiencies, the Tribunal has been criticised as simplifying the process from the more established total and consumer surplus standards to a formulaic and flexible approach.³⁵⁵ The Tribunal referred to the total surplus standard as ‘formulaic’ where ‘one to approach the problem as an economist would do in a classroom demonstrating Williamson’s

³⁴⁷ *Trident Steel/Dorbyl Limited* supra note 323 para 81.

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid* para 78.

³⁵⁰ *Ibid* para 78.

³⁵¹ *Ibid* para 81.

³⁵² *Ibid* para 63.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ See Sutherland op cit note 235 and Ngobese & Chung op cit note 233.

trade-off'.³⁵⁶ According to the main advantage of using this approach is that efficiencies and losses to competition are quantified and calculated therefore upon substantiating the numbers 'the outcome is definitive'.³⁵⁷ However, the problem with this approach is that losses and gains are difficult to calculate since they are not always quantified and measured by the same units.³⁵⁸ Further, market power effects may result in price increase by other firms understating the loss to consumers.³⁵⁹

The flexible approach on the other hand 'the competition adjudicator relies on its discretion rather than an equation'.³⁶⁰ The competition authority can only exercise its discretion under the flexible approach once a formulated policy approach has been established to guide it in its evaluation.³⁶¹ The Tribunal noted that this approach created some uncertainty since parties may not know in advance whether their claims of efficiency will be accepted.³⁶² The Tribunal settled for the flexible approach which although it conceded 'may be criticized for giving the competition authority too much discretion at the expense of business certainty' it found that the formulaic approach 'permits an approach so clinical and rigid that it would reduce the proper exercise of a discretion to a matter of calculus'.³⁶³

3.5 *Analysing the appropriate welfare standard in Kenya*

As noted above the *Trident Steel/Dorbyl Limited* approach has been heavily criticised. However, it can be justified to some extent. First, efficiency is a 'defence' by the merging parties after a proposed merger is found anti-competitive. The merging parties have the onus of providing the information and evidence to support their efficiency claim which the competition authority is not privy to. Surely a competition authority must have some discretion in verifying and the assessing the likelihood of the efficiencies once a merger is found anti-competitive. Secondly, as previously shown in the analysis of the welfare standard of efficiency, these

³⁵⁶ *Trident Steel/Dorbyl Limited* supra note 323 para 63.

³⁵⁷ Ibid para 65.

³⁵⁸ Ibid.

³⁵⁹ Ibid para 65.

³⁶⁰ Ibid para 66.

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ Ibid para 82.

standards are premised on the goals of competition law in the different jurisdictions. Although a jurisdiction may have transplanted merger provisions, the competition policy and goals of competition law may differ on the welfare standard. Such balance between the goals of competition and efficiencies under merger review are preferably left to the discretion by a competition authority since merging parties are less likely to have distributive agendas when finalising merger agreements.

However, such a flexible approach can be difficult to apply in Kenya. Developing countries, like Kenya where corruption is prevalent, discretion on competition authority should be avoided since there is a likelihood of false negatives in jurisdictions where corruption is prevalent. The analysis of efficiencies must be subject to the goals of competition law of the jurisdiction. These goals can inform the type of welfare standard to be applied.

According to the Competition Act of Kenya, the object of the Act is to ‘enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Kenya’.³⁶⁴ The goal of the Act is to:

- ‘(a) increase efficiency in the production, distribution and supply of goods and services;
- (b) promote innovation;
- (c) maximise the efficient allocation of resources;
- (d) protect consumers;
- (e) create an environment conducive for investment, both foreign and local;
- (f) capture national obligations in competition matters with respect to regional integration initiatives;
- (g) bring national competition law, policy and practice in line with best international practices;
- (h) promote the competitiveness of national undertakings in world markets.’³⁶⁵

The object of the Competition Act is to enhance the welfare of the people of Kenya. This reference although inextricably includes consumers, can also be interpreted as referring to the society as a whole. The legislature would have simply referred to the object of the Act as ‘enhancing consumer welfare’ noting that the preamble of the Act provides that it is ‘an Act of

³⁶⁴ S 3 Competition Act of Kenya.

³⁶⁵ Ibid.

Parliament to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct...'. This is the first reference to 'people of Kenya' amidst the numerous references to consumer protection. This paper argues that the object of the Act is inclined towards a total surplus standard. Further, the goals of the Competition Act are inclined on either promoting efficiency under section 3 (a), (b) and (c) or promoting competition under section 3 (e), (g) and (h). Only section 3 (d) refers to protecting consumers. Although there is no indication of hierarchy of achieving goals under the purpose section, the goals of maximising efficient allocation of resources, increase production efficiency and promoting dynamic efficiency are quite predominant and can be deduced from an economic calculation. Specifically, the goal of maximising efficient resource allocation points to a total surplus approach. Further, there is no reference to distributional goals under the purpose section.

The merger guidelines by the Competition Authority, on the other hand, are more inclined to supporting a consumer surplus standard where the emphasis is on whether efficiencies result in consumer benefits. These guidelines dwell on one among eight of the goals under section 3 (d) which is to protect consumers. According to the guidelines, efficiencies must demonstrate benefits to consumers.³⁶⁶

Mergers acknowledge the two main effects of anti-competitive increase in prices post-merger as the transfer of wealth from consumers to producers and reduction in allocative efficiency.³⁶⁷ The transfer of wealth from consumers to producers represents a decrease in society's absolute wealth while allocative inefficiency represents redistribution of wealth.³⁶⁸ The Competition Authority of Kenya is therefore balancing consumer welfare and promoting efficiency. The tension in the goals of the Competition Act of Kenya is to increase and promote dynamic and production efficiencies versus maintaining allocative efficiency. The goals of the Competition Act of Kenya do not leave any room for distribution goals.

³⁶⁶ CAK Merger Guidelines op cit note 313 para 201.

³⁶⁷ Lande op cit note 36 at 75.

³⁶⁸ Ibid

There is a general consensus that dynamic efficiencies are the most important among efficiencies.³⁶⁹ However, the guidelines by the Competition Authority of Kenya lay more emphasis on production efficiencies. This paper submits that this very correct and commendable. The foundations and development of competition law has been documented and argued from an anti-trust and European Union perspective. As mentioned in the previous chapter, US and UK are an innovation-based economy where the level of productivity is determined by producing new and different goods using the most sophisticated production and business processes and innovation. On the other hand, Kenya is a factor-driven economy where the level of productivity is determined by labour, public and private institutions, infrastructure and a stable macro-economic environment.

4. PUBLIC INTEREST

Public interest is confined to political discourse where ‘judicial interpretation of public interest constitutes a limitation of the legal scope of government’s intervention in the economy, and provides the judiciary with a rhetorical base for resolving questions of political economy’.³⁷⁰ Arguably, public interest considerations in competition law might not be efficient in allowing redistribution of income.³⁷¹ Public interest as a tool for redistribution may result in ‘distortions induced by the redistribution itself’.³⁷² Such distortions may arise from ‘tax upon consumers for the benefit of producers’ in the presence of conflict between small-producer welfare like small medium sized enterprises and the goal of consumer welfare where inefficient firms may be protected overruling any considerations of efficient resource allocation.³⁷³

Public interest considerations inquire why the state would allow a ‘subservient government agency’ to engage in political discourse such as industrial policy when it can do so more directly and effectively for example through taxation.³⁷⁴ Arguably, the necessity of the state delegating redistribution to competition agencies may arise from the state’s degree of

³⁶⁹ *Trident Steel/Dorbyl Limited* supra note 323 para 55. Kerber op cit note 244 at 5.

³⁷⁰ Hantke-Domas op cit note 52 at 187.

³⁷¹ Ibid.

³⁷² Louis Kaplow ‘On the Choice of Welfare Standards in Competition Law’ available at <http://ssrn.com/abstract=1873432> accessed on 31 August 2015 at 10.

³⁷³ Eugene Buttigieg *Competition Law: Safeguarding the Consumer Interest A Comparative Analysis of US Antitrust Law and EC Competition Law* (2009) at 24, 25.

³⁷⁴ Kaplow op cit note 372 at 10.

redistribution being limited or state agencies err in redistribution through matters of ethics or politics.³⁷⁵ This argument may be applied in developing countries with socio-economic challenges such as high inequality or institutional challenges such corrupt.

Efficiency in competition law can be summarised as ‘the maximization of the value of total output’ by supplying products according to consumer preferences and minimising production costs.³⁷⁶ The ‘residual political and social goals’ after defining efficiency as maximisation of output are referred to as ‘equity objectives’.³⁷⁷ Equity objectives in competition law are mainly concerned with the ‘income redistribution’ and other policies favouring small business organizations or minority groups.³⁷⁸ The significance of the term ‘income redistribution’ acknowledges the function of competition law in protecting those at the low end of income distribution by reducing prices and allowing how ‘a larger basket of goods and services can be purchased’.³⁷⁹ Competition law also seeks to achieve income distribution without decreasing efficiency.³⁸⁰ Therefore, a merger analysis would require weighing gains and losses in efficiency in order to establish whether the merger is in the public interest.³⁸¹

4.1 *Public Interest Inquiry in Kenya*

According to section 46 (2) (c) to (g) of the Competition Act, the Authority considers the extent to which the proposed merger would likely affect:

- a) a particular industrial sector or region;
- b) employment;
- c) the ability of small undertakings to gain access to or to be competitive in any market;
- d) the ability of national industries to compete in international markets; and

³⁷⁵ Ibid.

³⁷⁶ Kenneth G Elzinga ‘The Goals Of Antitrust: Other Than Competition And Efficiency, What Else Counts?’ (1977) 125 *University of Pennsylvania Law Review* 1191 at 1192.

³⁷⁷ Ibid.

³⁷⁸ Ibid at 1193.

³⁷⁹ Ibid at 1194.

³⁸⁰ Ibid.

³⁸¹ Willem Boshoff, Daryl Dingley & Janine Dingley ‘The Economics Of Public Interest Provisions In South African Competition Policy’ available at <http://www.compcom.co.za/wp-content/uploads/2014/09/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf> accessed on 31 August 2015 at 14.

- e) result in a benefit to the public which would outweigh any detriment likely to result from any undertaking, including one not involved as a party in the proposed merger, acquiring or strengthening a dominant position in a market.

The Competition Authority has issued guidelines on the public interest inquiry for merger analysis.³⁸² Under the public interest guidelines, the Authority shall consider the extent to which a merger would affect the factors stated out under section 46 (2) (c) to (g) and includes a fifth factor as ‘salvaging of dormant and failing firm’.³⁸³ The Authority under its guidelines undertakes to expedite mergers involving failing, dormant firms or firms under receivership in order to save jobs and afford consumers choices.³⁸⁴ These public interest considerations are determined on the facts of each case.³⁸⁵

4.1.1 *Particular industrial sector or region.*

Under this provision, the Authority focuses first on ensuring stability and growth of individual industrial sectors.³⁸⁶ Secondly, the Authority may require the acquiring firm to invest significantly in research and development in the sector in order to afford consumers choices at reduced cost.³⁸⁷ Lastly, the Authority may approve the merger with the conditions on expanding capacity and products in the sector as stipulated by parties in their merger application.³⁸⁸

The public interest guidelines focus on the media sector. According to the guidelines, the Authority seeks to ‘encourage media plurality, diversity and production of local content’.³⁸⁹ The Authority achieves this through considering whether the merger affects: the strength and competitiveness of local media business, the spread of ownership or control of media businesses

³⁸² Competition Authority of Kenya ‘Public Interests Test in Merger Determinations’ accessed at http://www.cak.go.ke/index.php/status-regulations/the-competition-act-no-12-of-2010/doc_download/2-balancing-public-interest-guidelines.html on 11 July 2015.

³⁸³ Ibid para 11.

³⁸⁴ CAK Public Interest Guidelines op cit note 382 para 22.

³⁸⁵ Ibid para 12.

³⁸⁶ Ibid para 17.

³⁸⁷ Ibid para 18.

³⁸⁸ Ibid para 19.

³⁸⁹ Ibid para 20.

and the reflection of the diversity of local content in media.³⁹⁰ According to the guidelines, the focus on the media sector in Kenya is ‘aimed at supporting local production, hence increased employment, especially for the youth’.³⁹¹

Further, the guidelines provide that mergers involving ‘utility companies’ shall be considered ‘with utmost scrutiny’ under both the substantial lessening of competition and public interest considerations.³⁹² Through scrutinising mergers involving utility companies, the guidelines use public interest to ‘protect vulnerable members of the society not affected as a result of the merger’ including sectors with a high impact on the poor.³⁹³

4.1.2 *Employment*

The guidelines emphasise enhancing and sustaining employment by ensuring no substantial job losses occur as a result of mergers, salvaging failing or dormant firms and encouraging merger of media firms that will enhance local production that support youth employment.³⁹⁴ In merger considerations, the guidelines expect parties to give a definitive analysis of merger effects on employment.³⁹⁵ Parties must demonstrate that a rational process has been followed to arrive at the determination of the number of jobs lost and the employment loss is balanced by an equally weighty but countervailing public interest under the Act justifying the job loss.³⁹⁶ However, job loss can only be balanced by a countervailing efficiency argument if the efficiency is public in nature and not private interests such as benefiting shareholders.³⁹⁷

³⁹⁰ CAK Public Interest Guidelines op cit note 382 para 20.

³⁹¹ Ibid.

³⁹² Ibid para 23.

³⁹³ Ibid para 7.

³⁹⁴ Ibid para 5.

³⁹⁵ Ibid para 13.

³⁹⁶ Ibid.

³⁹⁷ Ibid para 14, 15.

4.1.3 *Ability of small undertakings to gain access to or to be competitive in any market*

Under the public interest guidelines, mergers involving small and medium enterprises (SMEs) will be expedited as a way to enhance their capacity to enter certain markets ‘in order to offer credible competition and enhance employment’.³⁹⁸

4.1.4 *Ability of national industries to compete in international markets*

This public interest consideration focuses on the export market. The guidelines support local firms being more competitive in the international market in order to ‘facilitate expansion of Kenya’s foreign exchange earnings’.³⁹⁹ Mergers relating to exports ‘will be under relatively less SLC scrutiny so long as they do not have buyer-power to distort competition to the detriment of their suppliers, especially the local ones’.⁴⁰⁰

4.1.5 *Benefit to the public outweighing the detriment*

The Authority considers whether a proposed merger would result in a benefit to the public outweighing any likely detriment from the acquisition or strengthening a dominant position in a market. Interestingly, this consideration extends to ‘an undertaking not involved as a party in the proposed merger’.⁴⁰¹ This reference may apply to conglomerate mergers under the Act.⁴⁰²

4.2 *South Africa*

The Competition Act of South Africa has social and political goals. Section 2 of the Act provides that:

³⁹⁸ CAK Public Interest Guidelines op cit note 382 para 5.

³⁹⁹ Ibid para 6.

⁴⁰⁰ Ibid para 21.

⁴⁰¹ S 46(2) (c) Competition Act of Kenya.

⁴⁰² S 41 (2) (e) of the Competition Act defines a conglomerate merger as ‘acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently’.

‘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; and
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.’

These social and political goals are reflected under section 12A (1) (a) (ii) ‘whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)’. These factors, under 12A (3), are the effect of a merger 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’.

In *Harmony Gold Mining Company Limited/Goldfields Limited*, the Tribunal interpreted the words ‘can or cannot’ as instructing that public interest can have ‘both adverse and benign effects’ and the competition authority ‘is required to balance the positive and negative outcomes and come to a net conclusion on the public interest’.⁴⁰³ Further, the Tribunal interpreted the word ‘justified’ to mean the conclusion from a public interest inquiry is not independent and must acknowledge the conclusion from the competitive effects of the merger.⁴⁰⁴ Therefore, the public interest concerns under the purpose of the Act are dependent on the competition context of the merger.⁴⁰⁵ According to the Tribunal, a merger is not in itself so ‘inherently harmful’ that failure

⁴⁰³ *Harmony Gold Mining Company Limited/Goldfields Limited* Case No. 93/LM/Nov 04 para 54.

⁴⁰⁴ *Ibid* para 56.

⁴⁰⁵ *Ibid* para 57-8. The purpose section under section 2 of Competition Act begin with the words ‘the purpose of this Act is to promote and maintain competition in the Republic in order...’ which the Tribunal interpreted as supporting its conclusion that the public interest inquiry is not independent of competition concerns.

to shown that it is beneficial to the public interest it will be prohibited.⁴⁰⁶ It is not necessary for merging parties to establish that the merger can be justified on a public interest ground all that is required is that it will not have a likely anti-competitive effect.⁴⁰⁷

This judgment affirms that a public interest inquiry differs from an efficiency inquiry. Under efficiency where a merger is anti-competitive, the merging parties can establish that there is efficiency from the merger that justifies approval of a merger. Once a prima facie substantial public interest ground has been raised the evidential burden will shift to the merging parties to rebut it.⁴⁰⁸ The rationale behind this is the merging parties are less concerned with wider industrial policy and public interest concerns.⁴⁰⁹

The relationship between efficiency and public interest was highlighted in *Metropolitan/Momentum*.⁴¹⁰ The Tribunal distinguished efficiency as a private gain compared to public interest, therefore an efficiency gain must be justified on a public ground in order to countervail public interest concerns.⁴¹¹ An illustration of a private interest is a merger resulting in job losses as cost saving measures but is a gain to the shareholders under efficiencies.⁴¹²

A public interest concern must be merger specific.⁴¹³ The public interest inquiry under the Act is not similar to the constitutional approach to public interest.⁴¹⁴ The competition authority will inquire whether the public concern is ‘sufficiently closely related to the merger’ in order to determine whether it is part of the broader merger decision-making process.⁴¹⁵ In the instance where there are several contradictory public interest concerns, each public interest ground should be viewed in isolation to determine if it is substantial.⁴¹⁶ Where there are more

⁴⁰⁶ *Harmony/Gold* supra note 403 para 60.

⁴⁰⁷ *Ibid* para 61.

⁴⁰⁸ *Ibid* para 68.

⁴⁰⁹ *Ibid* para 69.

⁴¹⁰ *Momentum Group Limited/African Life Health (Pty) Ltd* Case No: 58/CAC/Dec05.

⁴¹¹ *Ibid* para 71-2.

⁴¹² *Ibid*.

⁴¹³ *The Minister of Economic Development vs Wal-Mart Stores Inc, Massmart Holdings Limited in SACCAWU and Massmart Holdings Limited* Case No: 110/CAC/Jul11 111/CAC/Jun11 para 139.

⁴¹⁴ *Harmony/Gold* supra note 403 at 50.

⁴¹⁵ *Ibid* para140.

⁴¹⁶ *Distillers Corporation (SA) Limited/ Stellenbosch Farmers Winery Group Limited* Case Note 08/LM/Feb02 para 216,217.

than one substantial public interest concerns that are contradictory, the authority will determine whether these concerns can be reconciled or balance to reach a ‘net conclusion’.⁴¹⁷

The Appeal Court in *Wal-Mart/Massmart* adopted a holistic interpretation of the public interest inquiry under the Act.⁴¹⁸ The Appeal Court found that the Act ‘would appear to enjoin the Tribunal to initially examine the transaction within a traditional consumer welfare standard and, thereafter, to test its initial finding further in terms of the broader [public interest] inquiry as mandated in terms of s 12 A (2) read with s 12 A (3)’.⁴¹⁹ Interestingly this holistic interpretation by the Appeal Court interpreted the public interest inquiry in ‘an economic perspective that extends beyond a standard consumer welfare approach’.⁴²⁰ Arguably, this holistic interpretation of public interests complements the Tribunal’s judgment in *Harmony Gold*, that the public interest inquiry is not independent to the competition evaluation.

The Appeal Court conceded that ‘the adoption of a standard other than that of consumer welfare would significantly complicate the implementation of the Act, particularly owing to the complexity of the economic calculation of total welfare of a particular transaction, particularly if total welfare extended beyond an exclusive calculation of consumer and producer surplus alone’.⁴²¹ Further, the Appeal Court emphasised the difficulty in the economic evaluation to the ‘scarce technical resources available to the competition authorities’.⁴²²

The Appeal Court also addressed the important issue of the weight placed on public interest considerations in merger review. According to the Appeal Court, in determining the weight ‘an engagement with an exercise of proportionality is then required to determine how to balance the competing arguments’ between consumer welfare and the public interest considerations.⁴²³ The Appeal Court admitted that the proportionality exercise may not be precise due to the scarcity of technical resources available to the competition authorities and the

⁴¹⁷ *Distillers /Stellenbosch* supra note 416 para 217.

⁴¹⁸ *Wal-Mart/Massmart* supra note 413.

⁴¹⁹ *Ibid* para 97.

⁴²⁰ *Ibid*.

⁴²¹ *Wal-Mart/Massmart* supra note 413 para 99.

⁴²² *Ibid*.

⁴²³ *Ibid* para 100.

economic tools available.⁴²⁴ This proportionality exercise would allow a balance between the competing issues of consumer welfare and public interest concerns.⁴²⁵

The major concern under the weight placed on public interest is whether public interest considerations would displace consumer benefit.⁴²⁶ The Appeal Court interpreted ‘substantial’ as advocating for considerable weight must be placed on these grounds.⁴²⁷ The proportionality exercise requires sufficient evidence.⁴²⁸ In order to prohibit a merger, evidence should support that public interest concerns will ‘trump’ the benefits of the merger to consumers.⁴²⁹ Competition authorities should exercise caution not to use public interest as a basis of intervention.⁴³⁰ The role played by competition authorities in defending public interest is secondary to other statutory and regulatory instruments and are advised not to pursue public interest in an ‘overzealous manner’ destroying the very interests they seek to protect.⁴³¹ These other statutory and regulatory instruments are better placed and resourced to deal directly and effectively with the public interest concerns.⁴³² The jurisdiction of the competition authority in public interest is ‘secondary’ to other statutes and regulatory instruments and the discretion of the competition authority ‘at a high level of abstraction and generality’.⁴³³

4.2.1 *Employment*

Employment is a distinct public interest concern since it overlaps with efficiency gains and other competitive concerns most notably the failing firm defence. The departure of employment from efficiency is in the distinction between job protection and creation.⁴³⁴ Job protection is an equity objective with redistributive effects where a ‘trade off or opportunity cost of protecting a job and wealth is redistributed between the owners of capital and labour’.⁴³⁵ Job

⁴²⁴ *Wal-Mart/Massmart* supra note 413 para 99-100.

⁴²⁵ *Ibid* para 100.

⁴²⁶ *Ibid* para 102.

⁴²⁷ *Ibid* para 113.

⁴²⁸ *Ibid* para 113.

⁴²⁹ *Ibid* para 120.

⁴³⁰ *Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd* Case No: 66/LM/Oct01 para 58.

⁴³¹ *Ibid*.

⁴³² *Distillers/Stellenbosch* supra note 416 para 232.

⁴³³ *Ibid*.

⁴³⁴ Boshoff et al op cit note 44 at 18.

⁴³⁵ *Ibid*.

creation, on the other hand, is an efficiency objective that utilises underutilised labour where there is no opportunity cost to creating jobs.⁴³⁶

According to the Tribunal in *Unilever Plc /Robertson's Foods Pty Ltd*, the most powerful avenue available to trade unions to address employment related issues from mergers is either employment legislation or private collective bargaining agreements.⁴³⁷ The Tribunal dealt with the 'residual' public interest which is 'not susceptible to or better able to be dealt with under another law'.⁴³⁸ Therefore in employment, the competition authority will only intervene where the employment effects of the merger are so adverse and cannot be remedied by other law.⁴³⁹ In *Wal-Mart/Massmart* the Appeal Court emphasised that the role of competition law was not to provide legal protections to potential disputes of interest which are resolved by collective bargaining or disputes of rights protected by labour courts.⁴⁴⁰

The Tribunal in dealing with employment is not concerned with the number of jobs lost but the substantial effect on employment.⁴⁴¹ This means that the effects of a merger can be 'ameliorated by a retrenchment package and not simply job retention'.⁴⁴² Once it is established that a merger has substantial adverse effect on employment, the merging parties must satisfy two criteria. First, they must show that a rational process has been followed to connect the reason for job reduction and the number of jobs lost.⁴⁴³ Secondly, the public interest concern on employment loss is 'balanced by an equally weighty, but countervailing public interest, justifying the job loss and which is cognisable under the Act'.⁴⁴⁴ Therefore, a good efficiency argument on job loss cannot act to countervail the public interest on employment because the Act has been interpreted as distinguishing efficiency gains as private interest gains.⁴⁴⁵ This is evident from the Act requiring mergers, though justified under efficiency grounds, must still undergo

⁴³⁶ Boshoff et al op cit note 44 at 18.

⁴³⁷ *Unilever Plc /Robertson's Foods Pty Limited* Case No: CT 55/LM/Sep01 para 43.

⁴³⁸ *Distillers /Stellenbosch* supra note 416 para 237.

⁴³⁹ *Ibid* para 238.

⁴⁴⁰ *Wal-Mart/Massmart* supra note 413 para 136.

⁴⁴¹ *Distillers /Stellenbosch* supra note 416 para 242.

⁴⁴² *Ibid*.

⁴⁴³ *Metropolitan Holdings Limited/Momentum Group Limited* Case No: 41/LM/Jul10 para 70.

⁴⁴⁴ *Ibid*.

⁴⁴⁵ *Ibid* para 71.

public interest evaluation.⁴⁴⁶ Efficiency gains can only countervail the adverse effects of competition.⁴⁴⁷

4.2.2 *Effects on a particular industrial sector or region*

When determining whether a merger can be justified on public interest grounds, the effect of the merger on a particular industrial sector or region must be considered.⁴⁴⁸ The use of ‘sector’ as opposed to market permits accommodation of a wider range of issues.⁴⁴⁹ In *Nasionale Pers Limited/Educational Investment Corporation Limited*, the Tribunal observed that the educational sector was ‘a particularly important sector of the economy particularly damaged by South Africa’s past’ and that the private sector was reasonably expected to play ‘an extremely even increasingly important role’ in provision of education to those who suffered as a result of apartheid.⁴⁵⁰ The Tribunal related access of private education providers to the competitiveness of the economy and the general well-being and stability of the society.⁴⁵¹

The Tribunal in *Telkom SA Limited Acquiring Firm/Business Connexion Group Ltd* interpreted industrial policy considerations as requiring the competition authority to relate the nature of products and their role in economic growth and development.⁴⁵² The Tribunal identified the merger as taking place in a ‘pivotal segment of the ICT [information and communications technology] sector’ which has implications on the whole sector and accepted that ‘the character and effectiveness of the regulatory framework plays an important role in the development of the broader ICT sector, most specifically the telecommunications components’.⁴⁵³ The sector was found to be pivotal since many other sectors of the economy utilise its products and services as vital inputs.⁴⁵⁴ The Tribunal analysed the ICT sector and deduced that a merger sought to ‘maintain and extend [the] erstwhile statutory monopoly’ and to

⁴⁴⁶ *Metropolitan /Momentum* supra note 443 at 71.

⁴⁴⁷ Ibid para 72.

⁴⁴⁸ S 12A (3)(a) Competition Act of SA.

⁴⁴⁹ Sutherland & Kemp op cit note 39 at 10-132.

⁴⁵⁰ *Nasionale Pers Limited/Educational Investment Corporation Limited* Case No. 45/LM/Apr00 at 24.

⁴⁵¹ Ibid.

⁴⁵² *Telkom SA Limited Acquiring Firm/Business Connexion Group Ltd* Case No: 51/LM/Jun06 para 301, 303.

⁴⁵³ Ibid para 301.

⁴⁵⁴ Ibid para 305.

‘counter the impact of deregulation [that was] public policy’s preferred mechanism for the introduction of competition’.⁴⁵⁵

4.2.3 *The ability of small businesses, or firms to become competitive*

This paper is concerned with merger provisions in the Competition Act of Kenya based on similarities with the Competition Act of South Africa. The paper will not analyse the public interest provisions on historically disadvantaged persons, as this pertains only to South Africa and is not relevant in the Kenyan context. This part will only deal with the ability of small businesses to become competitive.

In *Pioneer Hi-Bred International Inc/ Competition Commission of South Africa*, the Tribunal prohibited a merger that would not have a desirable public interest outcome.⁴⁵⁶ In this case, a small but significant increase in the price of the relevant product (SSNIP test) post-merger would have severe adverse effects on small-scale commercial and subsistence farmers who currently use it to feed their families and communities.⁴⁵⁷ The SSNIP test was used in public interest inquiry to determine the benefit of a merger to small-scale and subsistence farmers in addition to consumers.⁴⁵⁸

In *Wal-Mart/Massmart*, the Appeal Court weighed the positive effects of a merger between a domestic retail chain and Wal-Mart, a large international company, against the losses likely to be experienced by small and medium sized businesses.⁴⁵⁹ The Appeal Court noted that Wal-Mart had an efficient and well-coordinated global purchasing operation and superior

⁴⁵⁵ *Telkom SA Limited/Business Connexion* supra note 452 para 301,303.

⁴⁵⁶ *Pioneer Hi-Bred International Inc/ Competition Commission of South Africa* Case No: 81/AM/Dec10.

⁴⁵⁷ *Ibid* para 424,425.

⁴⁵⁸ According to Maher Dabbah *International and Comparative Competition Law* (2010) at 73-4, the SSNIP test determines whether a hypothetical, small percentage, permanent and relative increase in price of a product would lead consumers to switch to readily available substitutes. If it is determined that the firm can raise the price by a significant amount and still retain its customers then that market is considered worth monopolising since there are no competition constraints prices because prices could be raised profitably. However, if substitution would occur and be enough to make the price increase unprofitable due to the subsequent loss of sales, additional substitutes are included until the set of products is small enough to allow permanent increases in relative prices would be profitable. The relevant product market is identified using this set of products.

⁴⁵⁹ *Wal-Mart/Massmart* supra note 413.

infrastructure for exploiting global value chains.⁴⁶⁰ This global value chain for importing consumer goods would likely harm and exclude domestic small and medium sized producers and suppliers.⁴⁶¹ Although the Appeal Court found that there was no sufficient evidence to justify a prohibition of the merger, it set conditions that would allow small domestic producers to benefit and harness the global supply chain.⁴⁶²

4.2.4 Ability of national industries to compete internationally

In determining this public interest consideration, the Tribunal first looks at the sector where the market where the merger is taking place and its position in the South African economy. In *Telkom SA Limited/Business Connexion Group Limited*, the Tribunal found that a merger in the ICT sector had a significant impact on international competitiveness of South African firms generally.⁴⁶³ The Tribunal prohibited the merger based on its anti-competitive effect but noted such anti-competitive grounds were bolstered by the public interest concerns.⁴⁶⁴ If the Tribunal had not found the merger anti-competitive, it would have prohibited the same on public interest grounds due to given the particular nature of the relevant product and its role in economic growth and development.⁴⁶⁵

The Tribunal also looks at the level of competitiveness in the domestic market to determine whether the participating firms can compete locally. In *Tongaat-Hulett Group Limited/Transvaal Suiker Beperk*, the Tribunal was sceptical in allowing arguments that a precondition for firms to successfully compete internationally, they had to be dominant in the domestic market.⁴⁶⁶ However, the Tribunal found that in some instances economics of scale and rationalisation of production units may support such argument.⁴⁶⁷ The Tribunal was inclined to view aggressive and successful competition in international markets as associated with robust competition in the domestic market.⁴⁶⁸

⁴⁶⁰ *Wal-Mart/Massmart* supra note 413.

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid* para 164.

⁴⁶³ *Telkom SA Limited/Business Connexion* supra note 452 para 24.

⁴⁶⁴ *Ibid* para 305.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Tongaat-Hulett Group Limited/Transvaal Suiker Beperk* Case No: 83/LM/Jul00 para 115.

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Ibid.*

4.3 *Analysing the place of social and political goals of competition and distribution through the public interest inquiry in merger review*

Other than promoting the competitiveness of national undertakings in world markets, it stands out, and quite starkly, that there are no social and political goals under the Competition Act of Kenya unlike section 2 of the Competition Act of South Africa. Either this is an oversight during transplanting provisions from South Africa or simply the legislature did not intend to use competition law as a means of attaining distributional goals. We can rightfully question the necessity of the public interest inquiry under merger review in Kenya. Although it was a clear transplant from South African legislation, engaging in the development of economic policies leading to the enactment of the Competition Act illustrate that the competition policy in Kenya has similar social and political goals to South Africa.

The divergence between the public interest inquiry in South Africa and Kenya is in the words ‘whether the merger can or cannot be justified’ under the public interest inquiry in the Competition Act of South Africa. In South Africa, although the public interest inquiry is not independent of the competition analysis of the merger, more weight is placed on this inquiry compared to Kenya. In Kenya, the Competition Authority is invited to determine how a merger is ‘likely to affect’ public interest. This is quite confusing as this seems to place public interest inquiry in the same level as efficiency inquiries. The main challenge with the public interest inquiry in Kenya is conflating public interest and efficiencies.

Kenya seems to apply a wider view to public interest concerns as there is no reference to public interest concerns being merger specific. The public interest considerations have not been properly utilised and interpreted by the Competition Authority of Kenya. First the consideration on the effects of mergers on a particular industrial sector or region is quite narrow. The Competition Authority of Kenya has dwelt on the media sector and utility companies in this consideration. There is much more to this public interest consideration. The Tribunal in South Africa assesses whether a merger takes place in a pivotal sector in economic growth and development of the country. Secondly, the reference to the ability of small businesses or firms to become competitive is also misplaced and narrow. The Competition Authority of Kenya has relegated this public interest concern to a procedural issue of expediting merger process for the benefit of the merging parties. South Africa, on the other hand, has utilised this public interest

concern to protect small and local suppliers and producers in South Africa from anti-competitive effects of global supply chains. Public interest concerns are social and political goals for the benefit of distribution of wealth to the general population, using public interest to benefit merging parties is misplaced.

The Competition Authority of Kenya is not only placing efficiencies parallel to public interest considerations; it is mixing up the benefits of both efficiencies and public interests. Efficiencies either benefit the consumer surplus, producer surplus or the total surplus the benefit of public interests is beyond consumers and producers. Conflating public interest and efficiencies will likely result in false negative errors. Further, conflating public interest and efficiencies presumes that mergers are inherently harmful and this places the onus on the merging parties to establish that the merger can be justified on public interest.

The Competition Authority of Kenya must balance the competing arguments between consumer welfare and the public interest considerations. This balance should be carried out carefully not to create unintended inefficiencies and distortions in reviewing mergers. The Competition Authority of Kenya must again borrow from South Africa's interpretation of the public interest inquiry. The Authority must first determine the weight placed on public interest in the merger review. In South Africa, legislation applies a substantial test to determine the weight of public interests while the competition authorities apply a holistic interpretation to the public interest inquiry that reviews mergers beyond consumer welfare. The Competition Authority of Kenya can also use the substantial test when dealing with conflicting public interest concerns in the same merger.

5. MERGER REMEDIES

Remedies serve as an additional tool for competition authorities to fix competition problems raised by a merger while simultaneously permitting the realisation of benefits from merger such as efficiencies.⁴⁶⁹ In the absence of remedies, merger review would be 'binary' either approved or prohibited the merger entirely.⁴⁷⁰

⁴⁶⁹ OECD 'Remedies in Merger Cases 2011' available at <http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf> accessed on 30 July 2015 at 11. International Competition Network (ICN) 'Merger Remedies Review Project Report for the fourth ICN annual conference Bonn –

Merger remedies are either structural or behavioural.⁴⁷¹ Structural remedies modify the allocation of property rights in a market and include divestiture of an entire or partial on-going business assets or productive capacity, long term and exclusive licensing of intellectual property rights.⁴⁷² Divestiture is the most common type of structural remedy.⁴⁷³ Divestiture aims to preserve competition in a market post-merger by either creating or strengthening an existing source of competition through sale of a business or assets to a new or an existing competitor independent of the merging parties respectively.⁴⁷⁴ Divestiture should adequately address the expected competitive detriments and enable effective competition in the long term.⁴⁷⁵

A suitable divestiture is defined as ‘the smallest operating unit of a business (eg a subsidiary or a division) that contains all the relevant operations pertinent to the area of competitive overlap and that can compete successfully on a standalone basis’.⁴⁷⁶ A divestiture of an existing business operating on a stand-alone basis as opposed to a collection of assets or a part of a business is preferred since it minimises the risk of discouraging a suitable purchaser or allowing a suitable purchaser to operate effectively.⁴⁷⁷ A suitable purchaser should not have any significant connections post-merger to the merging parties such as any financial ties.⁴⁷⁸ A divestiture of intellectual property can either be through exclusive assignment, license, right, irrevocable or non-terminable with no continuing royalties will be structural unlike a license requiring reliance on the licensor for such as upgrades, supplies which is a structural remedy with elements of behavioural remedy.⁴⁷⁹

Structural remedies are challenged with avoiding unilateral and collusive effects post-merger. Unilateral effects are due to competition authorities ‘guaranteeing the enforcement or creation of viable firm to avoid unilateral effects’ such as dominance by the merged firm drawn

June 2005’ available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf> accessed on 30 July 2015 para 1.4.

⁴⁷⁰ Penelope Papandropoulos and Alessandro Tajana ‘The Merger Remedies Study—In Divestiture We Trust?’ [2006] *E.C.L.R.* 443.

⁴⁷¹ Massimo Motta *Competition Policy Theory and Practice* 12 ed (2009) at 265.

⁴⁷² Ibid. Katri Paas ‘Implications of the Smallness of an Economy for Merger Remedies’ (2008) 15 *Juridica International Xv* 94 at 97.

⁴⁷³ ICN Merger Remedies Review op cit note 469 para 3.8.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid para 3.10.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid para 3.9, 3.11.

⁴⁷⁸ Ibid para 3.13.

⁴⁷⁹ Ibid para 3.18.

from incentives by the merging firms to make sure the purchasing firm is not competitive.⁴⁸⁰ The competition authorities seek to avoid collusive effects post-merger from symmetry where a ‘more equal distribution of assets relaxes the incentive constraints of both the small and large firm and would help collusion’.⁴⁸¹

Behavioural remedies mainly consist of commitments guaranteeing competitors to enjoy a ‘level playing field’ by purchasing or using significant assets, inputs or technologies owned by merging parties.⁴⁸² Behavioural remedies can either remedy measures facilitating horizontal rivalry or direct control outcomes.⁴⁸³ Remedies can be placed against measures facilitating horizontal rivalry such as preventing firms from foreclosing markets and lessening competition due to their horizontal market positions.⁴⁸⁴ Remedies also use vertical integration to distort or limit horizontal competition and changing buyers’ behaviour in order to encourage competition.⁴⁸⁵ Remedies directly control outcomes by preventing exploitation of adverse competitive effects through controlling price and range of products such as price caps and supply commitments.⁴⁸⁶

Behavioural remedies are appropriate: first, where divestiture is not feasible or unacceptable risks such as absence of suitable buyers are present and prohibition is also not feasible such as in multi-jurisdictional constraints.⁴⁸⁷ Secondly, in the case where the anti-competitive effects of the merger are limited in duration due to factors such as fast changing technology.⁴⁸⁸ Lastly, where the merger has significant benefits and behavioural remedies are significantly most effective in preserving these benefits.⁴⁸⁹ Behavioural remedies require either on-going industrial regulation or consistent monitoring which is likely to engage the resources of the competition authority post-merger.⁴⁹⁰ Further, behavioural remedies that control market

⁴⁸⁰ Motta op cit note 471 at 268.

⁴⁸¹ Ibid at 147-8, 268.

⁴⁸² Ibid at 268.

⁴⁸³ ICN Merger Remedies Review op cit note 469 para 3.22.

⁴⁸⁴ Ibid.

⁴⁸⁵ Ibid.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid para 3.24.

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid.

⁴⁹⁰ Motta op cit note 471 at 269.

outcomes are likely to be burdensome to operate and monitor, lack effectiveness and increasingly lead to market distortions over a period of time.⁴⁹¹

5.1 Kenya

Section 46 (1) (c) of the Competition Act of Kenya provides that the Authority may approve the implementation of a merger with conditions. According to the guidelines on mergers, the Competition Authority may apply either structural or behavioural conditions where a merger is likely to substantially lessen competition.⁴⁹² Behavioural conditions are enabling remedies that allow effective competition and limit the potential for anti-competitive behaviour by the merged parties post-merger.⁴⁹³ Behavioural remedies are used where a structural remedy is not 'commercially practical or [also] not appropriate in the case at hand or cannot be accomplished within a specified time'.⁴⁹⁴ The choice of prescribing the type of condition depends on the degree of the substantial lessening of competition.⁴⁹⁵

The guidelines also direct conditions to remedying public interest concerns. Conditions on public interest concerns vary according to the specific public interest concern. The Authority will determine conditions on public interest concerns on a case-by-case basis and shall apply rational, proportionate and enforceable conditions.⁴⁹⁶

Generally, the objective of a remedy will be to provide practical and effective solutions to prevent likely substantial prevention or lessening of competition such as structural market changes or public interest concerns.⁴⁹⁷ The Competition Authority of Kenya ascertains a rational link between the issues of concern and the prescribed conditions.⁴⁹⁸ The Authority also acknowledges that certain remedies are costly to impose, implement or monitor.⁴⁹⁹

⁴⁹¹ ICN Merger Remedies Review op cit note 469 para 3.26.

⁴⁹² CAK Merger Guidelines op cit note 313 para 233.

⁴⁹³ Ibid para 235.

⁴⁹⁴ Ibid.

⁴⁹⁵ Ibid para 246.

⁴⁹⁶ Ibid para 244.

⁴⁹⁷ Ibid para 246.

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid.

5.2 South Africa

In South Africa, the Tribunal's guiding principle for merger remedies is that they must first 'address the competition concerns raised by the merger' and secondly 'restore the dynamic process of competition that would have existed but for the merger'.⁵⁰⁰ The Tribunal preferred structural remedies to behavioural remedies since 'they are clean, certain and objective; they deal with the substantial lessening of competition and its resulting adverse effects directly and comprehensively at source by restoring rivalry; they are void of unwanted, unintended and costly distortions in market outcomes; and they require no on-going monitoring and enforcement'.⁵⁰¹

5.2.1 Divestiture

Divestiture or structural remedies must leave the merged firm viable after the divestiture that would remedy the likely harm to competition as a result of the merger.⁵⁰² Divestiture must enable the merged firm to compete successfully against established competitors.⁵⁰³ A shorter divestiture period contributes to the impact of viability of divested assets.⁵⁰⁴ A short period for completion of divestiture eliminates competitive harm.⁵⁰⁵ The Tribunal quoted the US Federal Trade Commission that advocates for 'up-front' divestiture that reduces opportunities for interim competitive harm by expediting the divestiture process and assures that there will be an acceptable buyer for the divested assets from the beginning.⁵⁰⁶ Divestiture period issued by the Tribunal has been between 9 and 12 months.⁵⁰⁷

According to the Tribunal, 'acceptable conditions hinge critically on the viability of the divested assets'.⁵⁰⁸ The divestiture conditions must describe the assets to be divested and the purchaser.⁵⁰⁹ The prospective purchaser of the divested assets must be viable.⁵¹⁰ The prospective

⁵⁰⁰ *Pioneer Hi-Bred/Competition Commission* supra note 456 para 358.

⁵⁰¹ *Ibid* para 361.

⁵⁰² Sutherland & Kemp op cit note 39 at 10-142. *Telkom SA Ltd/Business Connections Group* supra note 452 at 281.

⁵⁰³ *JD Group Ltd/Ellerines Holdings Ltd* 78/LM/Jul00 at 36, 77.

⁵⁰⁴ *Ibid* at 38.

⁵⁰⁵ *Ibid*.

⁵⁰⁶ *Ibid* at 37.

⁵⁰⁷ *Ibid* at 38.

⁵⁰⁸ *Ibid*.

⁵⁰⁹ *Ibid*.

⁵¹⁰ *Nestle (Sa) (Pty) Limited/Pets Products (Pty) Limited* Case No: 21/LM/Apr01 para 72.

purchaser must also possess expertise, adequate financial resources and incentive to maintain the divested business as a viable and active competitor to the merging parties.⁵¹¹ According to the Tribunal, the purpose of the divestiture remedy is to facilitate entry into the market so that the market remains competitive and not to assist in creating a competitor with production capability and market share.⁵¹²

5.2.2 Behavioural conditions

A behavioural remedy should be an effective tool to deter or counteract the anti-competitive effects of a proposed merger.⁵¹³ The Tribunal in *Pioneer Hi-Bred International Inc, Pannar Seed (Pty) Ltd/The Competition Commission of South Africa* rejected use of price cap as a condition to a merger as they would ‘lead to the type of market distortions associated with behavioural remedies’ and would be more effective if accompanied by structural remedies.⁵¹⁴ Further, the Tribunal rejected conditions on licensing of breeds in a hybrid maize seed product market since it would not allow timely and sufficient new entry into the relevant market.⁵¹⁵ Behavioural conditions must be proportional to and address the competition concerns from mergers and must be logical in terms of commercial realities.⁵¹⁶

Behavioural remedies also include conditions that oblige a merged entity to develop a suitable compliance programme to ensure new shareholders of the acquiring firm understand obligations under the Competition Act.⁵¹⁷ This succeeds acquisition of a competitor firm and in light of a likelihood of an inevitable increase in prices by the acquiring firm consolidating its position in the market and financial position.⁵¹⁸

⁵¹¹ *Nestle (Sa) (Pty) Limited/Pets Products* supra 510 para 72. *Allied Technologies (Pty) Ltd/NamiTech Holdings Limited* Case No: 37/LM/Jul03 para 13-4.

⁵¹² *Nestle (Sa) (Pty) Limited/Pets Products* supra note 510 para 72.

⁵¹³ *Pioneer Hi-Bred/Competition Commission* supra note 456 para 388.

⁵¹⁴ *Ibid* para 350.

⁵¹⁵ *Ibid* para 388.

⁵¹⁶ *Astral Foods Limited/The Competition Commission* Case No. 39/Cac/Feb04 para 32.

⁵¹⁷ *Main Street 150 (Pty) Ltd and Profert (Pty) Ltd and Rowan Tree 16 (Pty) Ltd* Case No: 55/LM/Oct03.

⁵¹⁸ *Ibid*.

Behavioural remedies are used so that post-merger; mergers will not escape ‘effective competition scrutiny’.⁵¹⁹ In *Business Venture Investments 790 (Pty) Ltd/Afrox Healthcare Limited* the Tribunal imposed behavioural conditions in the form of elimination of cross holdings with competitors and restrictions on sale of equity.⁵²⁰ In this case a shelf company was formed to acquire all the shares in a private health care company which the Tribunal viewed as a ‘classic conglomerate transaction’ where a new entrant entered the private hospital market through the acquisition of an existing participant.⁵²¹ The acquisition had horizontal and vertical concerns where a competitor intended to acquire holding in the target firm as a ‘passive, minority shareholder’ which was viewed as a ‘disingenuous attempt to shield from competition scrutiny the true nature of the transaction’.⁵²² The Tribunal thought it ‘prudent to ensure that the competition authorities remain involved in any subsequent attempt to dispose’ of the acquiring firm’s assets.⁵²³

In *Clover Fonterra Ingredients (Pty) Ltd /Clover SA (Pty) Ltd and New Zealand Milk Products SA (Pty) Ltd*, the Tribunal placed behavioural remedies in the case of likelihood collusion post-merger between competing firms creating a joint venture vehicle which would sell, distribute and market the relevant product in Sub-Saharan Africa countries.⁵²⁴ In this case, the Tribunal upheld approval of the merger transaction on condition that the joint venture vehicle must notify the Competition Commission and obtain approval prior to selling or distributing the relevant product within the Republic of South Africa.⁵²⁵

5.2.3 Public interest

Conditions placed on public interest concerns with regard to the nature of public interest are inclined to redistributing wealth to other recipients such as labour at the expense of consumers.⁵²⁶ An illustration is protecting jobs. In *Tiger Brands Ltd/ Ashton Canning Company (Pty) Ltd* where a merger likely to have adverse effect on employment was approved on

⁵¹⁹ *Business Venture Investments 790 (Pty) Ltd/Afrox Healthcare Limited* Case No: 105/LM/Dec04 para 71.

⁵²⁰ Ibid.

⁵²¹ Ibid para 51.

⁵²² Ibid para 36.

⁵²³ Ibid para 71.

⁵²⁴ *Clover Fonterra Ingredients (Pty) Ltd /Clover SA (Pty) Ltd and New Zealand Milk Products SA (Pty) Ltd* Case no: 92/LM/Nov04.

⁵²⁵ Ibid para 72.

⁵²⁶ Boshoff et al op cit note 44 at 18.

condition that the merged parties would place a moratorium on retrenchments and reduction of seasonal employees for a period of three years.⁵²⁷ The merged parties would also create a R2 million fund to train former and retrenched employees.⁵²⁸

The public interest condition must be merger specific.⁵²⁹ However a challenge in remedying public interest conditions may arise where the public interest concerned is affecting a sector or industry or region or SMEs. In *Edgars Consolidated Stores (Pty) Ltd/Rapid Dawn 123 (Pty) Ltd*, the Tribunal declined to allow a condition to cap the purchase of imports as opposed to local merchandise by the merged party.⁵³⁰ The Tribunal held that a cap on imports on a single company in a sector would be an advantage to competitors.⁵³¹ The concern on cheaper imports was held as not merger specific since cheaper imports could not be cured by imposing a merger condition on a single firm as the issue is ‘a sector- wide, phenomenon and must be addressed at that aggregated level with the appropriate instruments’.⁵³² However, the Appeal Court in the *Wal-Mart/Massmart* case differed from this approach. In this case it was held that ‘competition law cannot be a substitute for industrial or trade policy; hence this court cannot construct a holistic policy to address the challenges which are posed by globalisation. But the public interest concerns set out in s 12 A demands that this court gives tangible effect to the legislative ambition’.⁵³³ The Appeal Court addressed the public interest issue of exploitation of global value chains that would result in harming domestic producers.⁵³⁴

The Appeal Court declined to impose conditions on domestic content requirements or import restrictions that give rise to market distortions.⁵³⁵ The Appeal Court rejected a proposal by the merging parties to create a fund worth R100 million to establish a programme aimed at the development of local suppliers, including SME over three years.⁵³⁶ The Appeal Court found

⁵²⁷ *Tiger Brands Limited/ Ashton Canning Company (Pty) Limited* Case No: 46/LM/May05 para 151.

⁵²⁸ *Ibid.*

⁵²⁹ *Edgars Consolidated Stores (Pty) Ltd/Rapid Dawn 123 (Pty) Ltd* Case No: 21/LM/Mar05 para 31.

⁵³⁰ *Ibid.*

⁵³¹ *Ibid.*

⁵³² *Ibid.*

⁵³³ *Wal-Mart/Massmart* supra note 413 at 154.

⁵³⁴ *Ibid* at 158.

⁵³⁵ *Ibid* at 164.

⁵³⁶ *Ibid.*

that the proposed condition was accepted by the Tribunal ‘without any significant considerations of the benefits that it might achieve’.⁵³⁷

5.3 *Remedies as tools for preserving efficiencies and social political goal of mergers in anti-competitive mergers*

Remedies are an imperative the Competition Authority of Kenya can use to preserve efficiencies from mergers while to fixing anti-competitive issues. The Competition Authority of Kenya should be more inclined to use public interest to redistribute wealth to recipients such as labour as opposed to merely applying rational, proportionate and enforceable conditions. The conditions placed on mergers are the most effective tool to ameliorating the uncertainty of public interest under the Competition Act of Kenya while avoiding false negative errors.

CONCLUSION

The Competition Act of Kenya took a big gamble in incorporating a public interest inquiry in its merger review. Although social and political goals are not part of the Competition Act of Kenya unlike South Africa, there is need for such objectives noting Kenya’s challenges beyond the objective of improving the welfare of the people of Kenya. Kenya needs an avenue for income distribution beyond its other policies. Competition law can be utilised as an effective tool for this. Through promoting efficiencies Kenya can benefit in the long run in promoting social and political goals. However, these social and political goals must be streamlined through a public interest inquiry in mergers. Although public interest concerns are prone to lead to market distortions, the Competition Authority can impose conditions on public interest objectives that will allow income redistribution.

⁵³⁷ *Wal-Mart/Massmart* supra note 413 at 165.

CHAPTER 4

1. CONCLUSION

Kenya has attempted to balance the pull and push factors of designing its merger laws. The pull factors acknowledge that competition law cannot ignore the prevailing market conditions for labour, barriers to trade in its economy. These push factors have motivated Kenya to borrow the public interest inquiry in mergers from South Africa to reconcile economic growth and social and political goals in merger review. The benefit of adopting the public interest inquiry from South Africa is first: the opportunity to adopt ‘a long history of implementation, interpretation and academic discourse’ which increases legal certainty in merger review.⁵³⁸ Secondly, competition law in South Africa is also premised on social and political goals. This allows merger review to adopt a standard beyond consumer and producer surplus and the long-term distribution benefits of efficiencies.⁵³⁹

The adoption of a standard beyond consumer and producer surplus significantly complicates merger review.⁵⁴⁰ This is in addition to the technical deficiency and lack of financial resource challenges creates a likelihood of false positive and false negative errors. Further, this complicated standard can be detrimental in a country that has a predominant informal sector and less sophisticated market participants characterised with a lack of competition culture.⁵⁴¹ There is need to simplify the laws on merger review in Kenya to create certainty to market participants and reduce the likelihood of errors by the Competition Authority. Thankfully, the push factors allow Kenya to adopt legal presumptions on merger reviews from South Africa that can help in interpretation of competition law with social and political goals.⁵⁴²

The Competition Authority has taken a further step in simplifying merger review by issuing guidelines on mergers and public interest. Guidelines are generally non-binding but set

⁵³⁸ Gal & Fox op cit note 32 at 7.

⁵³⁹ *Wal-Mart/Massmart* supra note 413 at 99.

⁵⁴⁰ Ibid.

⁵⁴¹ Gal & Fox op cit note 32 at 50.

⁵⁴² Ibid.

out parameters which the Competition Authority of Kenya can exercise its discretion.⁵⁴³ Guidelines are ‘invaluable to practitioners’ and draw focus to ‘genuine competition concerns’.⁵⁴⁴

The Competition Act of Kenya was enacted as a response to both legal reform in competition law and economic, social and political reform in Kenya. The ERS initiated the call for legal reform as a result of the shortcomings in the defunct Restrictive Trade Practices Act. According to the ERS, the Competition Act would ‘take cognisance of the special regional and preferential interests of the country’.⁵⁴⁵ These preferential interests are founded on Kenya’s social and economic reform. Vision 2030, on the other hand, sought to reform Kenya socially and economically by enhancing equity and wealth creation opportunities for the poor and using science, technology and innovation to raise productivity and efficiency levels.⁵⁴⁶ Kenya has therefore tried to utilise competition law as a tool for realising long-term inclusive growth through the trade-off between the efficiencies and public interest concerns in mergers.

Kenya is a factor-driven economy with agriculture, trade and wholesale as the main contributors to the economy. Kenya faces a number of economy challenges such as high barriers to trade creating unfavourable conditions for trade and access to markets and predominant informal trade with the potential to distort markets when analysing employment and produce data.⁵⁴⁷ Institutionally, Kenya is challenged by corruption from excessive discretion, budgetary constraints and poor human resource at the Competition Authority.⁵⁴⁸ Socially, Kenya faces high poverty, youth unemployment and social inequality which exclude a large majority of the population from actively participating in society both socially and economically.⁵⁴⁹

It is trite that markets operating properly ‘reward efficiency and innovation, spread wealth and decentralize economic power’.⁵⁵⁰ However, markets must take account of the conditions which markets operate in developing countries such as Kenya. Competition law in Kenya must look beyond the economic goals of competition law and act progressively by

⁵⁴³ Martin Brassey (Ed) *Competition Law* (2002) at 245.

⁵⁴⁴ Ibid.

⁵⁴⁵ Ibid.

⁵⁴⁶ Vision 2030 op cit note 81 at ii, iii & iv

⁵⁴⁷ Vision 2030 op cit note 81 at 27, 64, 72. Gal & Fox op cit note 32 at 9. Common Fund for Commodities op cit note 125 at 7-8.

⁵⁴⁸ CAK Annual Report 2012/13 op cit note 192 at 32. ERS op cit note 71 at 8.

⁵⁴⁹ MDG Report 2014 op cit note 173 at 20-1.

⁵⁵⁰ Sutherland & Kemp op cit note 39 at 1-67, 68.

unifying the economic substance of competition law and the social and political foundations of the law.⁵⁵¹ Kenya can use the promotion of competition as an efficient means of allocation of resources that can improve the standards of living of the population.⁵⁵² Kenya must reconcile maximising aggregate social wealth through efficiencies, consumer welfare and social and political goals of merger law through the public interest inquiry in mergers.⁵⁵³

The object of the Competition Act of Kenya is to ‘enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Kenya’.⁵⁵⁴ Promoting production efficiencies complement the transition stage of Kenya’s factor-driven economy. The Act is inclined towards a total surplus approach while the Competition Authority of Kenya prescribes to a consumer surplus approach. The Competition Authority of Kenya needs to balance consumer welfare with distributional benefits of enhancing the welfare of the people. South Africa provides a good analysis of this with emphasis on the correlation between the type of efficiencies and the goals of the Competition Act as opposed to whether efficiencies will pass to consumers.

Conditions imposed for public interest concerns may have costs to efficiency, economic welfare and income distribution both within and beyond the related markets.⁵⁵⁵ There is need to offset efficiency benefits against costs associated with potential for government intervening in mergers through the public interest considerations.

Public interest is an equity objective that is residual to both legislation and in practice after determining efficiencies of a merger.⁵⁵⁶ There is a likelihood of public interest being an inefficient tool for redistribution resulting in distortions induced by the conflict between beneficiaries of public interest such as small-producer welfare, labour and the goal of consumer welfare.⁵⁵⁷ This conflict may allow inefficient firms protection and overrule considerations of efficient resource allocation.⁵⁵⁸ In developing economies such as Kenya, facing socio-economic challenges such as poverty, high inequality, corruption, the government has delegated to

⁵⁵¹ Brodley op cit note 41 at 1020-21.

⁵⁵² Crampton op cit note 40 at 56.

⁵⁵³ Brodley op cit note 41 at 1023-24, 1035.

⁵⁵⁴ S 3 Competition Act of Kenya.

⁵⁵⁵ Brodley op cit note 41 at 1023-24.

⁵⁵⁶ Elzinga op cit note 376 at 1192. *Distillers/Stellenbosch* supra note 416 para 237.

⁵⁵⁷ Hantke-Domas op cit note 52 at 10.

⁵⁵⁸ *Ibid.*

competition agencies a rhetorical base for resolving questions of political economy.⁵⁵⁹ There is need to balance the trade-off between public interest, efficiency and welfare equitable allocation of resources in order to produce the least amount of inefficiency.⁵⁶⁰

The Competition Act of Kenya does not provide distributional goals unlike section 2 of the Competition Act of South Africa. In Kenya, the public interest inquiry in merger review entails determining the ‘likelihood to affect’ of a merger while in South Africa it involves ‘whether the merger can or cannot be justified on substantial public interest grounds’.⁵⁶¹ South Africa prescribes to a substantial test approach where an assessment of proportionality is applied to determine the weight of public interests in merger review. Kenya on the other hand applies a parallel test where public interest is placed at the same level as efficiencies. The parallel test in Kenya places less emphasis on public interest as compared to South Africa.

The main issue arising with the parallel approach in Kenya is conflating public interest and efficiencies. Conflating public interest and efficiencies presumes mergers are inherently harmful and places the onus on merging parties to establish that the merger can be justified on public interest grounds. Placing the onus on merging parties this may reduce incentives of firms to merger which would ultimately sacrifice efficiency.⁵⁶²

South Africa has utilized merger remedies as tools for first addressing the competition concerns of mergers. Secondly, remedies can restore the dynamic process of competition that would have existed if the merger did not happen.⁵⁶³ Thirdly, remedies can also be used to redistribute wealth to recipients such as labour at the expense of consumers.

2. RECOMMENDATIONS

Kenya cannot afford to rely on the total surplus approach since it prescribes to a strict constructionist view where efficiencies are viewed as an end to competition at the expense of

⁵⁵⁹ Hantke-Domas op cit note 52 at 10.

⁵⁶⁰ Boshoff et al op cit note 44 at 22.

⁵⁶¹ S 12A of the Competition Act of South Africa. S 46 (2) (d) to (g) of the Competition Act of Kenya.

⁵⁶² Boshoff et al op cit note 44 at 16.

⁵⁶³ *Pioneer Hi-Bred* supra note 456 para 358.

protecting consumers.⁵⁶⁴ This approach ignores the challenges in the Kenyan economy and the objective of consumer welfare under section 3 of the Competition Act. Consumer surplus, on the other hand, views competition as the paramount end to wealth maximization with emphasis on attaining efficiencies that reverse anti-competitive behaviour. Consumer surplus does not advocate for the distribution goals of competition beyond efficiencies in mergers.⁵⁶⁵ Under the balancing weight standard, the benefit to producers from greater efficiency and redistribution from consumers is measured against the loss to consumers due to price increase and reduction of output.⁵⁶⁶ Kenya should therefore apply the balancing weight standard since it is based on the distribution effects of mergers and places greater weight to consumers.⁵⁶⁷ Therefore it would allow Kenya to maximise the distributive benefits of mergers and uphold consumer welfare under the objects of the Act.

The merger review provisions under the Competition Act must be amended first to provide social and political goals under the Competition Act. This will first allow competition authorities to apply distributional goals in merger review. These distributional goals would complement the public interest inquiry under merger review. Distributional goals would extend to recipients, other than consumers and producers, such as labour, SMEs, particular industries and sectors and national industries to benefit from competition law.

Second, the Competition Act should be simplified. Simplifying the provisions will allow certainty and permit a prescribed and clear approach that would limit discretion. Therefore section 46 (2) (c) should be deleted. The reference to ‘a benefit to the public which would outweigh any detriment’ is too wide and would subject public interest inquiry to wider consideration other than the listed employment, particular industrial sector or region, ability of SMEs to gain access or be competitive and the ability of national industries to compete in international markets.⁵⁶⁸

⁵⁶⁴ Sutherland op cit note 235 at 349. Ngobese & Chung op cit note 233 at 142.

⁵⁶⁵ Ngobese & Chung op cit note 233 at 150.

⁵⁶⁶ Sutherland op cit note 235 at 349.

⁵⁶⁷ Ibid at 350.

⁵⁶⁸ S 46 (2) (c) provides that the Authority may base its determination in relation to a proposed merger on ‘the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market’.

Thirdly, Kenya should also apply substantial test in the public interest inquiry in order to avoid conflating public interest and efficiencies. In order to reflect such a test, section 46 should be amended and separate the provisions on public interest and efficiencies under sub-section 46 (2). The Competition Act of Kenya should separate sub-sections 46 (2) (d) to (g) on the public interest inquiry from 46 (2) (h) on efficiencies in order to avoid interpreting efficiencies and public interest on the same level.

Fourthly, the Act should be amended to remove the words ‘likely to affect’ and reflect an offset or grounds for justifying a merger on both efficiencies and public interest grounds. This would align the Act with the interpretation by the Competition Authority in its guidelines on both efficiencies and public interest. The Act should be clear on whether the public interest inquiry will allow a merger with anti-competitive effects or efficiencies must outweigh anti-competitive benefits.

Lastly, the Competition Authority of Kenya must align the public interests with the economic, social and institutional challenges in Kenya. The provision to proposed merger likely affecting a particular industrial sector or region should reflect the agricultural, manufacturing, wholesale and retail trade which are pivotal sectors in the economy. Employment should also focus on the youth who form 80 per cent of the unemployed, are disadvantaged and have weak connection to the current employment opportunities compared to the general population.⁵⁶⁹ The youth are likely to benefit from job creation, efficiency, instead of job protection, a public interest concern.

⁵⁶⁹ Filmer & Fox op cit note 168 at 1.

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