ANGOLA'S FIRST COMPETITION REGIME: LEARNING FROM EXPERIENCE

The importance of Competition regulation in merger transactions: A Reflection on the South African Competition Act and the Lessons for the Angolan Competition Commission

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

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Lisbella Patricia Guimarães Belchior

ABSTRACT

After being in a monopoly-controlled economy for decades, the Parliament of Angola finally recognised the necessity of institutionalising a Competition regime by enacting the *Lei da Concorrência n.º 5/18*, Angola's first Competition regime, which seeks to regulate Competition within the Angolan economy, and bring the country's economy in line with international best practices. In line with the Notice 2/2018 from the Angolan National Bank (BNA), commercial banks operating in Angola had until the end of the year 2018 to increase their share capital from 2.5 billion to 7.5 billion kwanzas ($35 million). This means that many banks that have a share capital below the new required minimum will have to consider alternatives, with mergers being one of them. The inclusion of this legislation in the Angolan legal system is significant as it comes at a time when the Angolan economy is expected to experience a number of corporate mergers, particularly in the banking sector. Since then, while there is still no sign of such corporate mergers taking place, the BNA has ordered the closure of two private banks, namely Banco Mais and Banco Postal on account of insufficient share capital, revoking the banking licences of the respective banks and declaring them bankrupt.

In this paper, Angola's first Competition regime is examined by considering the merger evaluation process Competition authorities of Angola will now have to consider. Without losing sight of the reality that Angola is in a development phase, the paper relies on the relatively mature South African Competition regime as a significant point of reference to assess how the legislation will impact on corporate mergers in Angola. In the first chapter, the paper systematically discusses the development of Competition regimes in Canada, United States of America and South Africa. In chapter 2, the focus is placed on the merger evaluation process in Angola prior to the enactment of the Competition regime, before turning to the new merger process and examining some of the factors that have contributed to the development of the Competition Law in Angola.

Emanating from this, chapter 3 continues with the discussion on the merger evaluation process, and provisions of the South African Competition Act, while contrasting it with the process the Angolan Competition authorities will have to follow. The chapter highlights the significance of public interest criteria in mergers, particularly in developing countries.

Chapter 4 focuses on mergers, identifying specific challenges that horizontal and vertical mergers present to an economy, suggesting that, if not regulated effectively, horizontal mergers could lead to a situation where firms are 'too big to fail', highlighting how firms often rely on mergers as a pretext to achieve a number of strategic objectives. The chapter discusses further key decisions taken by the South African Competition Tribunal and Commission as a point of reference. In addition, the chapter closes by evaluating the proposed changes to merger provisions contained in the South African Competition Amendment Bill.

The paper ends in chapter 5 by concluding that notwithstanding the divergent legal systems and jurisdictions of Angola and South Africa, the latter's merger regulation process and approach is considerably advanced and better experienced than other developing states. Given that proper regulation contributes to effective economic growth, the Competition authorities of Angola stand to benefit from the experiences of South Africa, which offers some useful recommendations to the Angolan Competition authority.

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CHAPTER 1

COMPETITION LAW

I. INTRODUCTION

A recent study by Deloitte on Competition Law in Africa reported that in the past two decades half of developing jurisdictions had adopted legislation regulating Competition.[1] An increasing number of developing countries undergoing economic reform affords recognition that Competition policy facilitates economic liberalisation.[2] Many African countries have already implemented Competition regulations, thereby recognising the value of Competition as a means of spurring economic growth, innovation and enhancing the economic well-being of citizens.[3] Although the Competition phenomenon is not new, the introduction of a Competition regime, particularly for developing states, still attracts widespread attention and interest, given the importance of a Competition regime within any economy.

The degree of success in enforcing Competition regulation in developing countries remains highly questionable, and in some African countries Competition Law is mainly dormant.[4] In examining Angola's Competition legislation, the dissertation begins by empirically sketching the foundations and origins of Competition Law, providing a general analysis of where it all began and its main aspects. From Canada, the United States and the European Union, the dissertation traces the course of the development of Competition regulation while having regard to the African context by considering the South African Competition Act.

While it is not the intention to describe a global history of Competition Law, the understanding of present-day Competition regimes' antecedents is extremely valuable. The purpose of this chapter is to enhance understanding of the circumstances in which Competition laws were created and enforced, as well as the objectives they purported to attain, so as to provide a better understanding of modern Competition policies. On a much broader note, the dissertation will also set forth the purpose of Competition policy and the indispensable role it plays in any market. In presenting the origins of

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[1] Deloitte 'Competition Law in Africa: Maximising Competitor Advantage| Consumer Value Chain Spotlight' available at *https://www2.deloitte.com/content/dam/Deloitte/za/Documents/risk/ZA_Competition_Law_in_Africa_RA_071116.pdf,* accessed on 5 July 2018.
[2] Ibid.
[3] Ibid.
[4] Ibid at 6.

Competition law, this chapter will be demonstrate why the South African Competition Act was chosen as a point of reference for Angola, as opposed to other jurisdictions. Also, considering that the significant focus of this paper (as will be seen in the chapters that follow) is on mergers, in this chapter, the main areas of Competition law are highlighted by way of an introductory outline of the concepts.

II. DEFINING COMPETITION LAW

Professors Alison Jones and Brenda Sufrin argue that the essential question any paper or book on Competition law must first address is: What is Competition law? However, before answering this question, it is critically important to differentiate between Competition policy and Competition law. Competition policy is an essential part of every economy; it is what enables the business environment to thrive, in accordance with a good set of Competition rules.[5] It is acccepted that free markets will sometimes require government intervention to improve market outcomes for consumers.[6] In these instances Competition policy acts as a regulatory tool aimed at correcting market failings by maintaining or establishing foundations that support a functioning market.[7] In its essence, Competition policy emulates free market conditions by establishing regulatory institutions and procedures or laws that allow for equal opportunities for all businesses, stimulate economic efficiency and ultimately protecting consumers.[8]

Competition Law, on the other hand, is one element of a full and comprehensive Competition policy.[9] It contains provisions or rules where vigorous – but fair – Competition guarantees and sustains a market that will result in the efficient allocation of economic resources while maintaining the production of goods and services at the lowest possible price.[10] Simply put, Competition law is designed to create a level playing field where both big and small businesses can fairly and effectively coexist.[11]

Deciding on a definition that best encapsulates the essence of Competition law has proved to be challenging and is difficult to pinpoint. However, two possible definitions by Philip Sutherland et al. and

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[5] Farouk, A. and Ghoneim 'Competition Law and Competition Policy What does Egypt Really Need?' (2002) Working Paper 0239 *Cairo University* available at http://www.mafhoum.com/press5/158E13.pdf, assessed on 11 January 2019.
[6] Minette Neuhoff et al. *A Practical Guide to South African Competition Policy and Law* (2006) LexisNexis 11.
[7] Ibid.
[8] Ibid.
[9] Competition policy includes both economic policies adopted by the government aimed at enhancing competition in the local and international markets (such as trade policy, deregulation and privatisation) and Competition or anti-trust law.
[10] Supra note 6 at 12.
[11] Ibid.

E Thomas Sullivan enable a better understanding. In the book entitled 'Competition Law of South Africa', Philip Sutherland and Katharine Kemp define Competition law as being: 'the set of policies and laws which ensure that Competition in the marketplace is not restricted in a way that is detrimental to society'.[12] E Thomas Sullivan defined Competition law as being

> . . . about public policy and ideology. It is about a market economy and limited government. It invites government intervention when market failures or externalities occur but does so only through ad hoc interdiction and without the remedy of a pervasive industrial policy or a systemic regulatory scheme.[13]

In summary, albeit on a less grand scale, the European Competition Commission expressed the following:

> Competition Law is a set of rules that ensure businesses and companies compete fairly with each other, while encouraging enterprise and efficiency, in this way creating and providing consumers with wider choice, reduced prices and improved quality.[14]

Discussing the importance of Competition and the indispensable role it holds within the development agenda of any market, the UK Government in its White paper Productivity and Enterprise pronounced:

> The importance of Competition in an increasingly innovative and globalised economy is clear. Vigorous Competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organization of production. As such, Competition is a central driver for productivity growth in the economy . . . [15]

The above definitions at first sight seem contradictory, as the same law that seeks to control and interfere with the freedom of commercial conduct does so in order to promote free Competition. This makes it a form of mischief rule that seeks to curb excessive economic power. According to policymakers, the logic behind Competition law is that if governments do not intervene, Competition would be sub-optimal with the result that markets would not operate as efficiently as they should.[16] Competition law aims to regulate economic behaviour of industries/firms. It has the potential to transform markets characterised by monopolies and cartels and move them towards market conditions

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[12] Sutherland, Philip; Kemp, Katharine *Competition Law of South Africa* (2016) 1-3.
[13] Ibid.
[14] European Commission, 'Competition', available at *http://ec.europa.eu/Competition/consumers/why_en.html*, accessed on 25 June 2018.
[15] UK Department of Trade and Industry 'Productivity and Enterprise - A World Class Competition Regime' (2001) available at *http://webarchive.nationalarchives.gov.uk/+/http:/www.dti.gov.uk/ccp/topics2/pdf2/cm5233.pdf*, accessed on 31 July 2018.
[16] Supra note 6.

that incentivise producers to expand while at the same time maximising consumer welfare.[17] In the opinion of Judge Goldberg 'The benefits of antitrust measures (Competition law) outweigh sometimes-considerable disadvantages'.[18]

III. THE MAIN AREAS OF COMPETITION LAW

Competition law cannot be viewed in isolation if one is to sensibly discuss the topic; it is therefore essential to set out the three main areas of Competition law which regulate three archetypal anti-competitive activities: Restrictive Practices (including horizontal and vertical practices); Abuse of Dominance and Mergers.

a. Restrictive Practices

i. Horizontal Practices

Considered inherently suspicious, horizontal restrictive practices are generally agreements or cooperation between competitors who have the potential to substantially prevent or reduce Competition in a market.[19] Competition law generally prohibits such conduct unless it is established that there are technological, efficiency or other pro-competitive gains.[20] The rationale for regulating agreements or interactions between competitors rests on the fact that profit-maximising competitors prefer to coordinate their commercial behaviour instead of competing vigorously with one another.[21] Co-ordination or collusion indirectly enables firms to behave in a monopolistic-type manner, by increasing prices (or reducing output) and thus earn higher profits collectively as well as individually.[22] Consequently, such conduct has a negative impact on consumers. From a financial or economic standpoint, collaborating often yields higher profits for a firm, allowing them to exert and abuse market power collectively.[23]

Section 4 of the South African Competition Act regulates the interaction between competitors.

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[17] Ibid.
[18] *Silver v. New York Stock Exchange*, 373 U. S. 341, 358 (1963).
[19] Supra note 6 at 62.
[20] Ibid.
[21] Ibid.
[22] Supra note 12 at 15.
[23] Ibid.

- Section 4(1) prohibits an agreement between, or concerted practice by, firms, or a decision by an association of firms if it is between parties in a horizontal relationship.[24] However, section 4(1)(a), known as the rule of reason provision, allows competitors to justify their joint conduct by establishing efficiency, pro-competitive or technological gains.[25]
- Sub-section (i) of section 4(1)(b) prohibits 'directly or indirectly fixing a purchase or selling price or any other trading condition';
- Sub-section (ii) prohibits 'dividing markets by allocating customers, suppliers, territories, or specific types of goods or services'; and
- Sub-section (iii) prohibits 'collusive tendering'.[26]

The mentioned list of restrictive practices is, under South African jurisdiction, commonly referred to as '*per se* prohibited', in other words, prohibited outright as they almost always raise Competition concerns and thus the possibility of any redeeming virtue is highly unlikely.[27]

Article 12 of the Angolan Competition Law regulates horizontal practices.[28] Similarly to the South African Act, the Angolan Law prohibits agreements or concentration between firms and decisions or deliberations by an association of firms which have the objective or effect of restricting Competition within the market.[29] The provision lists seven practices which are restrictive and are thus prohibited.[30] However, unlike the rule of reason in the South African Act, the Angolan Competition law horizontal practices provision provides that the event of contravention, Article 12(2) places the onus on the firms to establish that their conduct does not fall under the list of restrictive practices.[31]

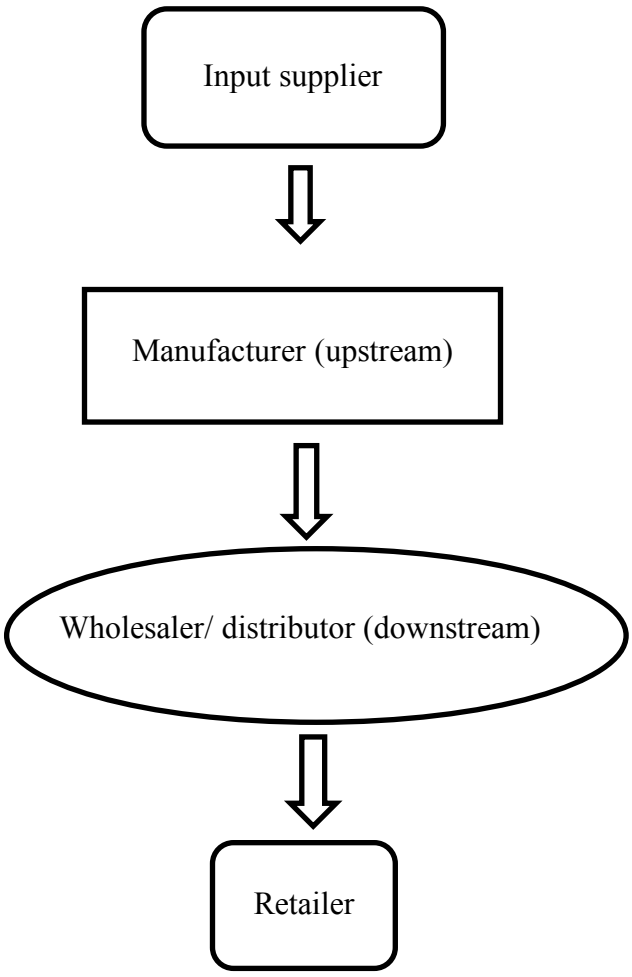
ii. Vertical Practices

In contrast to horizontal practices, vertical practices are viewed with less suspicion, given their quintessential nature for business. In the ordinary course of business, firms engage in contractual

[24] Competition Act 89 of 1998 of the Republic of South Africa.
[25] Ibid at Chapter 2, Part A, section 4(1)(a)
[26] Ibid at section 4(1)(b).
[27] Ibid.
[28] Lei da Concorrência de Angola, lei 5/18 de 10 de Maio de 2018. Competition Law of the Republic of Angola, Law 5/18 of 10 May 2018.
[29] Ibid at Article 12.
[30] Ibid at Article 12(1)(a-g).
[31] Ibid at Article 12(2).

relationships and make arrangements with parties that operate at different levels of the supply chain (as seen below in **Figure 1**).[32]

Figure 1



The economic basis for Competition law regulating vertical agreements lies in the recognition that although vertical agreements provide solutions for many of the practical problems that suppliers experience in the course of producing, distributing and selling their products, when the agreement restricts the freedom of parties to trade, it is anti-competitive and therefore must be restricted.[33] The two main categories of restrictive vertical practices include: inter-brand Competition and intra-brand

[32] Supra note 6 at 85.
[33] Ibid at 87.

Competition. Inter-brand Competition refers to Competition between suppliers of different brands and intra-brand Competition refers to Competition between resellers of the same brand.[34]

The South African Competition Act regulates vertical agreements under sections 5, 8 and 9, prohibiting agreements between parties in a vertical relationship if the agreement has the effect of substantially preventing or lessening Competition in a market.[35] Section 5(1) contains a rule of reason provision, allowing parties to raise efficiency, pro-competitive or technological gains as a defence that might outweigh the anti-competitive effect of the vertical agreement.[36] In contrast to section 4, which lists practices which are regarded as *per se* prohibited, and section 5(2) identifies the practice of minimum resale price maintenance as *per se* prohibited.

Article 13 of Angolan Competition Law regulates vertical agreements, prohibiting any such agreement that has the effect of restricting Competition in the market.[37] Contrary to the South African Act regarding the unlawful vertical practices of minimum resale maintenance, Article 13 of the Angolan Competition Law provides an extensive list of vertical practices that are prohibited under sub-sections (a)–(h). Following the same approach as Article 12(2), Article 13(2) places the onus on the firm to establish that its conduct does not fall under the list of prohibited practices.[38]

b. Abuse of Dominance

In contrast to sections 4 and 5 of the South African Competition Act and Articles 12 and 13 of Angola's Competition Law which regulate co-operative behaviour between firms, sections 7, 8 and 9 of the South African Competition Act and Articles 8 and 9 of the Angolan Competition Law regulate the concept abuse of dominance or abuse of a dominant position.

The Angolan and the South African Competition legislation (in Article 9 and section 8) define abuse of dominance, respectively. The concept of dominance or market dominance has been defined by the European Court of Justice as follows:

> The dominant position . . . relates to a position of economic strength enjoyed by an undertaking, which enables it to prevent effective Competition being maintained on the

[34] Ibid.
[35] Supra note 24 at section 5(1).
[36] Ibid.
[37] Supra note 28 at Article 13.
[38] Ibid at Article 13(2).

> relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some Competition, which it does where there is a monopoly or quasi-monopoly, but enables the undertaking, which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that Competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.[39]

Determining abuse of dominance requires examination of two main concepts, namely *market share* and *market power* (author's emphasis). Market share refers to the proportion of a firm's sales revenue to the turnover of the whole market. In the matter between the South African Competition Commission against South African Airways, the Competition Tribunal noted that in certain instances where sales revenue figures are unavailable, market share may be calculated by capacity or units sold.[40] However, to determine market share, it is necessary that the market in which the firm competes is correctly defined.

Market power, on the other hand, is defined as 'the ability of a firm or group of firms to raise prices through the restriction of output, above the level that would prevail under competitive conditions and thereby to enjoy increased profits from the action'.[41] Put differently, the elements of market power can be summarised as control of prices, ability to exclude Competition or behave to an appreciable extent independently of its competitors, customers or suppliers. Economic theory explains this conduct by a firm as having 'unilateral market power'; that is the firm's freedom to increase prices or output without the collaboration or support from its competitors.[42]

If not adequately regulated, excessive market power may result in the exclusion of even the 'equally efficient competitor'.[43] Any practice that excludes, in particular, the equally efficient competitor from the market is undoubtedly anti-competitive, as it undermines the competitive process and thus necessitates a higher level of regulatory intervention.

Section 7 of the Competition Act sets out by way of percentages how to establish when a firm will be considered dominant.[44] Section 7(a) provides that a firm which holds a market share of more

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[39] *Supra* note 22 at 34.
[40] *Competition Commission v South African Airways (Pty) Ltd (SAA*) Case 18/CR/Mar01.
[41] Bishop, S. and Walker, M. 'Economics of EC Competition Law: Concepts, Application & Measurement' (1998) *Sweet & Maxwell.*
[42] Neuhoff, M. et al. *A Practical Guide to the South African Competition Act* (2006) Lexis Nexis.
[43]. Ibid.
[44] Supra note 24 at section 7.

than 45% is considered *per se* dominant.[45] Firms that hold a market share of at least 35%, but less than 45% are dominant, unless the firm establishes that it does not have market power.[46] Likewise a firm in possession of market power but that holds less than 35% of the market is considered dominant.[47]

Although Article 8 of the Angolan Competition Law sets out what is considered a dominant position, Article 6 expands in detail on the legal requirement of a dominant position.[48] A market share of more than 50% is *per se* a dominant position.[49] Firms with a market share below 50% and which can significantly limit or impose barriers of entry into the market of competitors are also considered to be in a dominant position.[50] Article 6(3) however, places the onus on the firms to show that, irrespective of the market share the firm holds, they do not hold a dominant position. Firms must show that the market exhibits sufficiently competitive conditions and that the entrance of a significant competitor will not have a negative impact on the market.

It is evident from the above that having market share does not translate to market power; a firm can have a significant market share and not possess market power. Although it is beyond the scope of this paper, it is nonetheless worth to noting a distinctive feature of the Angolan law which is that it makes a distinction between abuse of dominance and abuse of economic dependence, setting out what economic dependence is in Article 10 and listing practices which amount to economic dependence in Article 11.[51]

c. Mergers

Generally, a merger occurs where the business or part of a business conducted by a firm or firms is transferred to another firm or firms. In layperson's terms, a merger involves the combination of two or more independent companies.[52] As the central focus of this paper, it is essential to look at the definition of mergers through the lens of the Angolan as well as the South African Competition legislation.

The South African Competition Act defines mergers as a process whereby one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the other

[45] Ibid at section 7(a).
[46] Ibid at section 7(b).
[47] Ibid at section 7(c).
[48] Competition Regulation of Angola, Presidential Decree N. 240/18 of 12 October 2018, Article 6.
[49] Ibid at Article 6(1).
[50] Ibid at Article 6(2).
[51] Ibid at Article 10 and Article 11.
[52] Supra note 6 at 177.

business of another firm.[53] Sharing similar characteristics but expressed differently, the newly enacted Competition Law of Angola, in Article 3(g), defines mergers *(Fusão)* as, '*operação societaria de ordem financeira e jurídica, por meio da qual duas ou mais sociedades comerciais juntam os seus patrimónios a fim de formarem uma sociedade nova'*[54] Translated as:

> [A] financial and juridical (legal) corporation, whereby two or more commercial companies pool their assets in order to form a new company. From both the definitions fundamentally, a merger involves the transfer and the acquisition of control of businesses which will have an impact on the market structure.

The likelihood of anti-competitive conduct resulting from mergers arises from mergers affording firms the ability to unduly increase their market power.[55] The critical objective of Competition law is to promote and ensure consumer welfare by encouraging healthy Competition among businesses.[56] Therefore, the regulation of mergers is necessary to ensure that in the event of a merger the structure of the economy and markets continue to function optimally. In this chapter, the legal definition of mergers is set forth; mergers in more detail will be discussed in chapter 3.

IV. ORIGINS OF COMPETITION LAW

Competition law or *Lei da Concorrência* as we know it today, originated in Canada in 1889 followed by the United States in 1890, reflecting concern with monopolies and price fixing.[57] Although the Canadian Competition Act was the first in the modern world, its lack of effective enforcement made it grossly deficient and weak,[58] allowing the United States, with the Sherman Act, to become one of the first jurisdiction to adopt a proper 'modern' system of Competition law. The Sherman Act soon became a landmark federal statute, and is still regarded by many scholars as the hallmark of Competition law.[59] Furthermore, the Act is considered as the lens through which current Competition law issues should be viewed, representing a reference point for Competition law issues.

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[53] Supra note 24 at section 12(1)(a).
[54] Supra note 28 at Article 3(g).
[55] Supra note 6 at 179.
[56] Ibid.
[57] Massimo Motta *Competition Policy* (2004) New York University of Cambridge 3.
[58] Ibid.
[59] Sherman Antitrust Act of 1890.

a. The Sherman Act

The basic reason for the introduction of the Sherman Act was to combat or eliminate the power of trusts at the time; hence it was labeled anti-trust law.[60] The Sherman Act was enacted by the U.S Congress to outlaw monopolistic business practices, at a time when big firms dominated major industries and with that were able to eliminate Competition, at the expense of consumers.[61] Congress saw the need to act, but was not clear what to do, with the result that scholars often label the passing of the Sherman Act as a 'shot in the dark'. This was because the US was essentially creating something new. The Act came at a time when antitrust (or Competition) laws did not exist and there was no concept or a general law that existed to eliminate or at least address anti-competitive practices.[62] The term 'antitrust law' had come into being when it had become a common practice for the owners of stocks (shares) held in competing companies to lessen Competition between them by transferring the stocks of trustees who then controlled the activities of those former competitors and consequently lessened Competition between them.[63] Trusts thus formed then began to dominate the market by using economic influence to gain unfair terms from their suppliers, resulting in the escalation of prices, which adversely affected the consumers.[64] This caused popular resentment, with more and more citizens demanding that the government enact measures to limit the anti-competitive conduct of big businesses.[65] With no reference model, the US Congress passed the Sherman Act to address populist political pressure by *inter alia* small firms that complained of unfair business practices adopted by their large rivals. The Act sought to change the power dynamics, by setting rules that preserved fair Competition, as stated by American scholar, Eleanor Fox: 'What mattered was getting a fair shot as an entrepreneur and having a choice and receiving a fair deal as a consumer.'[66]

Two main sections in the Sherman Act require emphasis, namely section 1 and section 2. Section 1 prohibits any form of contract combination, price agreement or conspiracy that restrains trade, prescribing imprisonment and fines for violators.[67] Section 2, declares that a firm shall not 'monopolize'

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[60] U. S. National Archives & Records Administration, 'Sherman Anti- Trust Act (1890)', 700 Pennsylvania Avenue NW, Washington, DC 20408 • 1-86-NARA-NARA • 1-866-272-6272 available at *https://www.ourdocuments.gov/doc.php?flash=false&doc=51,* accessed on 20 June 2018.
[61] Ibid.
[62] Gerber, D. *Global Competition: Law, Markets, and Globalization* (2010) New York Oxford University Press, 123.
[63] Jones, A and Sufrin, B. *EU Competition Law* 4 ed (2011) Oxford University Press.
[64] Supra note 60.
[65] Ibid.
[66] Fox, E. and Sullivan, L. 'Antitrust- retrospective and prospective: where are we coming from? Where are we going?' (1987) *New York University Law Review* 936, 944.
[67] Supra note 59 at section 1.

or 'attempt to monopolize'.[68] Whilst the Supreme Court of the United States in the *Verizon v Trinko* judgment held that 'the mere possession of monopoly power, and the concomitant charging of monopoly prices, was not only not unlawful, it was an important element of the free-market system,'[69] The Act takes a tough stance against monopolisation practices by setting penalties which include imprisonment of up to three years. While section 2 seeks to prevent unlawful monopolisation, it does not give judges *carte blanche* to order monopolists to alter their way of doing business whenever some other approach might yield greater Competition; hence it has been labelled the 'Magna Carta of free-enterprise'.[70]

Although the US antitrust law system was formulated under circumstances that are very different from those faced by Competition law systems today, the extensive experience of the United States in antitrust law is often associated or tied in with its economic success, enhancing its appeal to other nations seeking similar success.

V. THE EUROPEAN UNION COMPETITION LAW

Professor Daniel Gerber identified the essence of European Competition law in the *fin de siècle* ideas developed in Austria and Germany by the concept of ordo-liberalism.[71] Professor Gerber wrote:

> The most important [misleading assumption], and perhaps the most persistent and pernicious, is [the] widely held belief that antitrust law in Europe was merely an import from [the] United States. Indeed, many scholars believe that after the Second World War Germany copied U.S. antitrust law and transmitted it to Europe.[72]

In his work, professor Gerber sought change the popular view held by many lawyers and economists that European Competition law was an emulation of the US antitrust law. He argued that such assumption was fundamentally flawed, as Competition law in Europe was based on ideas developed in Austria and Germany.

The essence of European Competition law began to develop around the end of the 18th century in Vienna. A number of intellectuals, including Carl Menger and Eugen Bohm-Bawerk, started to explore ways in which the law could be developed to safeguard the process of Competition.[73] The ideas spread

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[68] Ibid at section 2.
[69] *Verizon Communications INC., Petitioner v. Law offices of Curtis V. TRINKO*, LLP. No. 02-682 at 7.
[70] *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610 (1972).
[71] Gerber, D. 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the New Europe' (1994) 42 *American Journal of Comparative Law* 25.
[72] Ibid.
[73] Gerber, D.J. 'Constitutionalizing the Economy: German Neo Liberals, Competition Law and the "New" Europe' (1994) 42 *American Journal of Comparative Law*, 25-84.

to Germany, and in 1923 Europe enacted its first Competition law.[74] It was criticised by scholars as lacking the strength required to withstand the pressures of economic lobbying and hostile public opinion, and it was eliminated under Nazism.[75] Despite this, a group of 'ordo-liberal' intellectuals, mainly made up by lawyers and economists, continued to secretly explore Continental and Austrian ideas on Competition law.[76] To this extent the ordo-liberal thought had a significant impact on subsequent European law, and in particular Competition Law, such as the German Law Against Restraints of Competition − GLARC − after the Second World War.[77]

European Competition Law originated in a context where financial crisis, economic depression, political violence, austerity, conditions of ungovernability and entrenched class positions of the 1920s and early 1930s prevailed.[78] The founding ordo-liberal thinkers were Walter Eucken, Franz Böhm, Alexander Rüstow, Wilhelm Röpke and Alfred Müller-Armack. They focused on finding ways to make capitalism work in a liberal economy and sought ways to define or redefine or rediscover the economic rationality of capitalist social relations.[79] The theoretical stance of German ordo-liberalism or German neo-liberalism is premised on the notion that economic freedom derives from political authority and an active state is the locus of liberal governance.[80]

Contrary to traditional thought, the ordo-liberals did not identify neo-liberalism with a weak state at the mercy of economic forces. Instead, they held the view that a weak state was tantamount to disaster.[81] They identified neo-liberalism with a state that was strong and active – 'a state that restrains Competition and secures the social and ideological preconditions of economic liberty'.[82] In its essence, ordo-liberalism holds that economic freedom unfolds within legal, social and moral frameworks, under which the state, through a responsible form of governance, is able to protect individuals from the

[74] Felice, F. and Vatiero, M. 'Ordo and European Competition Law' available at *http://www.siecon.org/online/wp-content/uploads/2013/09/Felice-Vatiero.pdf,* accessed on 13 January 2019.
[75] Ibid.
[76] Ibid.
[77] Gerber, D.J. *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (1998) Oxford University Press.
[78] Bonefeld, Werner 'Freedom and the Strong State : On German Ordoliberalism.' *New Political Economy* ISSN 1469-9923, pp. 633-656.available at *http://eprints.whiterose.ac.uk/67263/,* accessed 19 August 2018.
[79] Foucault, M. *The Birth of Biopolitics* (2008) London: Palgrave.
[80] Ibid.
[81] Supra note 79.
[82] Ibid.

homogenisation and strife that markets tend to bring about.[83] The economy could not be left to solely organise itself, given its potential to destroy its own foundation.

The European Competition law system is significant not only for being second to the system created in the United States but also because it now governs Competition in the ever-growing European Union.[84] Indeed, many of the ideas pioneered in the United States Competition law have made their way into various jurisdictions around the world, including South Africa.[85] Contrary to the premise of the Sherman Act, the EU Competition Act, with its indigenous nature, saw the need to tackle cartels, giving the European Competition law greater influence in a number of Competition Acts across Africa (in particular South Africa and Angola), Latin America and Asia.[86] The European Competition law did not markedly differ from that of Canada and the United States insofar as it was designed to regulate anti-competitive practices while maintaining competitive market structures.[87] Like most modern Competition law regimes, EU Competition law outlaws the coordination of independent undertakings where it leads to a restriction of Competition.[88] However, as discussed earlier, there are significant divergences in the underpinning philosophies of the American and European regimes. In Europe, Competition Law is seen as forming part of an 'economic constitution' which entwines social justice and is part of the political system.[89] It was embedded in the Treaty of Rome, as Competition policy was considered necessary to underpin the internal market aspects of the common market.[90] In essence, Europe's rich tradition of thought on Competition Law gives European domestic Competition and EU law a distinctive character.

Initially, the EU Competition law served two objectives: the maintenance of competitive markets and the imperative of single market integration, with the primary focus of preventing anti-competitive practices from undermining the achievements of the single market.[91] This is what set the EU Competition policy apart from any other system of Competition law, whether in the member states, the United States or elsewhere. However, with time, the above objectives were reformulated by conceptualising Competition and market integration to serve a common end, as opposed to advancing a

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[83] Ibid.
[84] David J Gerber 'The Origins of European Competition Law in Fin-de-Siècle Austria' (1992) *American Journal of Legal History* 405.
[85] Ibid.
[86] Supra note 12.
[87] Ibid.
[88] Damien Geradin, Anne Layne-Farrar and Nicolas Petit *EU Competition Law and Economics* (2012) Oxford University Press, United Kingdom 105.
[89] Supra note 84.
[90] Ibid.
[91] Ibid.

single market. More recently, the European Union Competition policy has been swept by a wave of modernisation, undergoing major reform, moving away from the ordo-liberal stance and placing it in line with the modern economic thinking on efficiency and consumer welfare. As expressed by economist Mario Monti, in a speech in July 2001:[92]

> '. . . [T]he goal of Competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of Competition in the common market. Competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumer.'[93]

The European Competition laws, both in substance and in their procedural framework, in particular Articles 101 and 102 of the Treaty of the Functioning of the European Union (hereinafter TFEU), have had a significant influence on the style, direction, and content of Competition laws of new jurisdictions. Articles 101 and 102 of the TFEU prohibit practices that restrict Competition in the EU internal market.[94] Similar to section 1 of the Sherman Act, Article 101 TFEU, in a three-pronged provision, prohibits cartels and other agreements that have the potential to disrupt free Competition in the European economic areas of the internal market. First, Article 101(1) holds that 'agreements between undertakings, decisions by associations of undertakings and concentrated practices' which restrict Competition and may affect trade between Member States are 'incompatible' with the treaty (sections a-e). Second, Article 101(2) provides that agreements incompatible with Article 101(1) are null and void. Third, Article 101(3) TEFU provides an exception, restraining or limiting the application of Article 101(1) in respect of agreements that bring a positive net contribution to consumer welfare by improving the production or distribution of goods or promoting technical or economic progress.

The European Commission adopts a policy of prevention with regard to infringements, preferring to issue fines to deter parties from engaging in unlawful practices. Undertakings which infringe the above-mentioned provisions of Article 101 may have a fine imposed by the European Commission of up to 10 per cent of its worldwide annual turnover.[95] The EU however, does not possess the power to impose prison sentences, the sole authority for which rests with the European Court of Justice (ECJ).[96]

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[92] M. Monti 'The Future for Competition Policy in the European Union' (2001) Merchants Taylors Hall, London available at *https://www.europa.eu.int/comm/Competition/speeches/index_speeches_by_the_commissioner.html commission/,* accessed on 17 July 2018.
[93] Ibid.
[94] Ibid.
[95] EU Commission, 'Fines for breaking EU Competitiontion Law' (PDF). Official Website of the European Union, available at *http://ec.europa.eu/Competition/cartels/overview/factsheet_fines_en.pdf,* accessed on 14 January 2019.
[96] Ibid.

In such cases, provided that it is not contrary to EU law, member states must enforce their individual domestic Competition law. The commission plays a quasi-judicial role in the area, subject to appeal to the ECJ.[97]

Article 102 TFEU (formerly Article 82 of the Treaty establishing the European Community)[98], on the other hand, governs abusive conduct by dominant undertakings within the internal market, prohibiting any conduct that is incompatible with the internal market and which impacts negatively on trade between between member states.[99] The primary objective of the provision is to regulate monopolies which limit Competition in private industries and have the potential to produce outcomes that are unfavorable to consumers.[100]

The relevant section sets out a list of conduct (from a-d) that would amount to abuse. This includes:

a) imposing unfair purchase or selling prices directly or indirectly or limiting production;
b) limiting production, markets or technical development to the prejudice of consumers;
c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations whic*h,* by their nature or according to commercial usage, have no connection with the subject of such contracts.

[97] Ibid.
[98]European Commission, 'Changes after the entry into force of the Treaty of Lisbon' (1 December 2009) , available at *http://ec.europa.eu/Competition/cartels/overview/factsheet_fines_en.pdf,* accessed on 14 January 2019.
[99] Ibid.
[100] Ibid.

Whilst a European practitioner may identify similarities in the South African or Angolan Competition Acts, both countries have not simply ‘copied-and-pasted’ EU law at the expense of ‘local’ needs and circumstances. As will be evidenced below, both countries have adjusted Competition law to fit the past and present context of each country.

VI. COMPETITION LAW IN SOUTH AFRICA

a. Background

South Africa's Competition policy has undergone significant reform, moving from a system characterised by autarky and high concentration of economic power in the hands of a minority to one that is inclusive of all South Africans. The new Competition policy promised to correct the faults of the old system and promote policy goals of economic efficiency, employment and empowerment, 'recognising that an efficient, competitive economic environment which balances the interests of workers, owners and consumers and which is focused on development, would benefit all South Africans'.[101] The South African Competition Act 'hit the ground running' in 1998 with the primary objective of promoting and maintaining Competition.[102] Supplemented by set of six goals as set out in section 2, it places economic efficiency at the centre of the first goal involving the efficiency, adaptability and development of the economy.[103] The second goal is to provide consumers with product choices at competitive prices, acknowledging that the social and economic welfare of South Africans rested on employment/economic based policy.[104] The remaining four goals highlight public interest concerns by enhancing opportunities for South Africans to participate in world markets (and to recognise the role of foreign Competition), ensuring an equitable opportunity for small and medium-sized enterprises to participate in the economy.[105] In essence, the intention was to promote a greater spread of ownership, by increasing the ownership stakes of historically disadvantaged persons.[106] The Act articulates public interest objectives alongside the goal of economic efficiency. In drafting the Act, South African policymakers recognised that a robust Competition law would only be politically possible if the law specifically addressed public interest concerns, emphasising the importance of explicitly taking into account the challenges entrenched by the previous era of political and economic control.[107] The introduction of public interest criteria is one of the most novel changes of the South African Competition Act (to be addressed in detail in chapter 4).

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[101] Supra note 24 at section 2.
[102] Trudi Hartzenberg 'Competition Policy and Practice in South Africa: Promoting Competition For Development' (2006) 26(3) *Northwestern Journal of International Law & Business* volume 26 (3) Spring, available at *https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?Article=1639&context=njilb,* accessed on 3 August 2018.
[103] Supra note 24.
[104] Ibid.
[105] Ibid.
[106] Ibid 2 (c-f).
[107] Supra note 102.

South Africa has the second strongest economy in Africa, after Nigeria.[108] Amongst the Sub-Saharan countries that have implemented a Competition law regime, South Africa notably did not just enact the legislation but has effectively created an organised structure of enforcement. According to the World Economic Forum's Global Competitiveness Report, 'They [South Africa] have shown themselves to be an independent authority that comes to its own conclusions, and these are not political conclusions.'[109] Furthermore, South Africa has been ranked in the global top 10 for the effectiveness of its Competition policy and its anti-monopoly policy.[110] This indicates that the legislation and its procedural enforcement has been effective and in line with world standards.[111] Despite the apparent difference in Angola and South Africa's legal systems, South Africa's Competition policy, in the context of being a developing country, serves as a benchmark or model for Angola. That will certainly help Angola, as a new Competition player, to keep pace with the more sophisticated regimes of Brazil, China, India and Singapore.

[108] International Monetary Fund ' Sub-Saharan Africa: Domestic Revenue Mobilization and Private Investment' (2018) International Monetary Fund, Publication Services.
[109] World Economic Forum 'Global Competitiveness Report'(2018) available at *http://www3.weforum.org,* accessed on 11 July 2018.
[110] Razina Munshi 'South Africa in Global top 10 for Competition policy*', Business Day (*18 September 2013) available at *https://www.businesslive.co.za/bd/companies/2013-09-18-south-africa-in-global-top-10-for-Competition-policy/,* accessed on 11 July 2018.
[111] Global Competition Review *https://globalCompetitionreview.com/edition/1001119/gcr-100-18th-edition*, accessed on 11 July 2018.

CHAPTER 2

ANGOLA

I. INTRODUCTION

The last chapter discussed the evolution of the Competition Law phenomenon. Despite great similarities in the core principles and goals, there is no single model and there are many factors that influence and motivate the design and origination of Competition legislation into a country's jurisdiction.[112] Countries face the challenge of balancing the urge to adhere to established laws and following their efficient, effective and sophisticated regimes[113] with the desire to create their own 'masterpiece', legislation that is unique and fitting to the peculiar characteristics of their jurisdiction.[114] Eleanor Fox and Michal S. Gal, in their research paper, examine the process of drafting Competition law for developing jurisdictions,[115] asserting that law is not generated by outsiders who say 'we have this law and you should too'; instead, they emphasise that legislation should respond to the contextual problems of the particular jurisdiction.[116] While a country may follow others on some aspects of the law, they noted that 'a ready-made suit might look very beautiful on the hanger and might be very well made, but it might not fit'. [117] The analogy, suggests that it is essential for a country to design a Competition law that responds to the needs of the jurisdiction, including trade ties and the effectiveness and level of sophistication of its enforcement system.

Angola and South Africa have contrasting legal systems. Angola, a former Portuguese colony, inherited a legal system that is civil law based.[118] Legislation forms the primary source of law; it does not follow binding precedents, and judgments are primarily based on legislation.[119] In contrast, South Africa has a legal system that is a hybrid or a unification of distinct legal systems, with its origins in

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[112] Gal, M. *Merger Policy for small and for Micro Economies more Pros & Cons of Merger Law,* (2012).Swedish Antitrust Authority
[113] Fox, E. and Gal, M. 'Drafting competition law for developing jurisdictions: learning from experience' (Law & Economics Research Paper Series Working Paper NO. 14-11, (2014) *New York University School of Law*.
[114] Ibid at 2.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Paula Rainha *Republic of Angola- Legal System and Research* (2007) (Hauser Global Law School Program, 2007) available at *http://www.nyulawglobal.org/globalex/Angola.html,* accessed on 10 August 2018.
[119] Ibid.

Europe and Great Britain.[120] Its authority lies primarily in Roman-Dutch law, which is itself a blend of indigenous Dutch customary law and Roman law.[121] Despite this apparent distinction, similarities can be found in the core principles and goals of the Competition legislation. In common with most African jurisdictions, Angola has implemented Competition laws which include South Africa's characteristic public interest element in merger evaluation into its jurisdiction, (This will be discussed later in the dissertation).[122] Adopting the public interest test was a shift from the Portuguese legal system − n Angola's primary source of reference when structuring its legislation. With that said, both countries, have tailored their legislation to their unique contexts.

'*Lei da Concorrência',* Law 5/18 published on 10 May 2018, marks a significant step in the development of effective market governance for Angola – its first move towards developing Competition legislation that positioned the country in line with international standards, as well as other African jurisdictions. A study by Deloitte in Africa, found that Algeria, Burkina Faso, Egypt, Kenya, Malawi, Morocco, Senegal, South Africa, Tanzania, Tunisia, Zambia, Zimbabwe and Swaziland had not only enacted Competition legislation but also had in place competent, active and fully functional regulatory bodies. [123]

In line with the discussion in chapter 1 on the drafting or design of Competition laws, this chapter begins by examining the possible factors that motivated the introduction of Competition law in Angola, highlighting the key factors that drove the introduction of the legislation. This is followed by, an explanation of essential concepts of Competition law, in particular when discussing mergers. Thereafter, the chapter examines the Angolan companies legislation (*Lei das Sociedades Comerciais*), in order to analyse the merger process that existed in Angola before the enactment of the Competition Law, addressing whether the existing merger process took into account the impact such transactions would have on the Angolan market as well as the effect on market power dynamics. The chapter closes by introducing the merger process under the Angolan Competition Law and highlighting the changes corporations in Angola now have to follow when deciding to merge.

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[120] Thomas, PhJ; Van der Merwe, CG. and Stoop, BC. *Historical Foundations of South African Private Law* (2006) Lexis Nexis7.
[121] Ibid.
[122] Reitz, D 'African Competition Law Developments', (2009) .
[123] Deloitte 'Competition Law in Africa: Maximising Competition Advantage consumer value chain spotlight' *(*2016) available at *https://www2.deloitte.com/content/dam/Deloitte/za/Documents/risk/ZA_Competition_Law_in_Africa_RA_071116.pdf,* accessed on 12 August 2018.

II. THE DEVELOPMENT OF ANGOLA'S COMPETITION REGULATION

From the discussion above, it is evident that many scholars recognise or have at least considered that various factors influence the decision of developing countries like Angola to adopt Competition regulation . There are indeed many factors, such as those sketched below, that have potentially led to the introduction and drafting of Angola's first Competition legislation.

The 27-year civil conflict in Angola, destroyed physical and human capital, undermining the state's ability to function optimally.[124] Since the cessation of hostilities, Angola has been considered one of the fastest-growing economies in the world and the country continuously works towards improving its governance by implementing macroeconomic policies that foster growth.[125] According to statistics released by the World Bank, (Doing Business 2019 report), Angola has an estimated GDP of US$124.2 billion, with a growing population of 29 784 193.[126] Angola is a low to middle-income country.[127] Based on its GDP Angola ranks fifth amongst the wealthiest economies in Africa, and is the Sub-Saharan region's second largest oil exporter.[128] Famously known for its diamonds and oil, the country has huge gas reserves as well as extensive mineral resources; however, the Angolan economy is primarily centred on oil, making it one of the top oil producers in Africa.[129]

The Global Competitiveness Report (2018 edition), compiled by the World Economic Forum shows Angola making its way up the ranks; after three years of absence, Angola occupies 137th position, (140th place in the 2014 edition).[130] Notwithstanding this, of the Sub-Saharan African countries that were analysed, Angola still ranks last.[131] This is noteworthy, because investment is attracted to regions where direct competitors are located. Further, the degree of competitiveness establishes the attractiveness of economies for investment by investors, entrepreneurs and funders.[132] In its generous efforts to find

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[124] International Monetary Fund '2018 Article IV Consultations with Angola' IMF Country Report No. 18/156 (2018).
[125] Ibid.
[126] World Bank 'Doing Business 2019: Angola' World Bank Group Flagship Report 16 ed, available at *http://www.doingbusiness.org/content/dam/doingBusiness/country/a/angola/AGO.pdf*, accessed on 18 January 2019.
[127] Ibid.
[128] International Monetary Fund 'Regional Economic Outlook: Sub-Saharan Africa Domestic Revenue Mobilization and Private Investment' World Economic and Financial Surveys (2018).
[129] Ibid.
[130] Klaus Schwab, 'The Global Competitiveness Report' (2018) *The World Economic Forum* available at *http://www3.weforum.org/docs/GCR2018/05FullReport/TheGlobalCompetitivenessReport2018.pdf*, accessed on 18 November 2018.
[131] Ibid.
[132] Akiules Neto, 'A PRIVATIZAÇÃO como oportunidade e a BOLSA como seu meio natural', (Privatization as an opportunity and Stock market as its natural environment) available at *https://www.linkedin.com/pulse/privatização-como-oportunidade-e-bolsa-seu-meio-natural-akiules-neto/*, accessed on 18 November 2018.

solutions to all problems, the Angolan State has often had to take on overlapping roles, including that of an entrepreneur. This has often resulted in the state simultaneously being the main (if not sole) shareholder of a number of distinguished national companies and consequently the most valuable client for large investors.[133] It has been suggested that, this is the *de facto* reason for the financial system, banks and stock markets targeting primarily state funding.[134]

Despite the above, Angola presents a stark paradox; while oil and diamonds are the pillars of the country's wealth they are also the reason for its poverty.[135] Despite being a land of rich potential, only a few have benefited from the country's valuable resources.[136] It exported its oil and concentrated major part of its efforts on its precious minerals, ignoring other vital sectors.[137] Thus, Angola was hit hard by the mid-2014 decline in oil prices, the pain of which is still felt today, given the lack of development of other vital sectors.[138] As the fiscal resources continue to shrink with rising debt, high inflation levels, slowing private sector credit/extension and severe shortages of foreign currency, the extent of recovery has been limited.[139]

In response to the oil price shock, the Angolan Government has committed itself to mitigate the impact and stabilise the economy.[140] Attention has been directed at needed reform, as part of its effort to improve its governance, and the 2017 election of a new president marked a necessary step towards helping regain confidence in the country's image.[141] The Administration of President João Lourenço is committed to economic diversification and fiscal belt-tightening, with emphasis on non-oil sectors to offset the drop in revenue and exports.[142] The objectives of the new administration can be summarised as follows:

1. Implementing policies aimed at restoring macroeconomic stability such as the macroeconomic stabilisation programme (MSP) to enable fiscal consolidation, greater exchange rate flexibility,

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[133] Ibid.
[134] Ibid.
[135] Munslow, B. 'Angola: the politics of unsustainable development' (1999) 20(3) *Third World Quarterly* Taylor & Francis Group (1999) available at *https://www.jstor.org/stable/pdf/3993321.pdf,* accessed on 9 August 2018.
[136] Ibid.
[137] Supra note 132 at 4.
[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] International Monetary Fund 'Angola: Road to Economic Reform' (2018)
[142] Ibid.

reduction of public debt-to-GDP ratio, and ensuring effective implementation of anti-money laundering legislation.[143]

2. Fostering growth in the private sector by improving the business environment.[144] In order to address monopolistic practices in key sectors like telecommunications and cement production, the government approved a framework to regulate Competition − the Competition Law, as well as a Private Investment Law to remove barriers of entry for foreign direct investment.[145]

These policies and the commitment of President Lourenço's administration seek to change the nation's narrative, by nudging the country in a positive direction.[146] The policies emphasise the dire need to diversify the country's economy, open the market to new and eager players and strengthen the capacity of the domestic production by putting in place measures to facilitate this.[147] At a press conference marking the first 100 days in office, President Lourenço said: 'It is about fixing situations that were proving to be harmful to the public interest.'[148] The statement is in line with the main goal of any Competition law regime, which is to ensure that consumers have access to the widest range of the best products at competitive prices − maximizing consumer welfare. Notice 2/2018 by the Angolan National Bank (BNA), is indicative of government efforts to restructure the economy –linked to the final factor that propelled the launch of the Competition Act.[149] The notice included the words: 'The authorities are also trying to clean up Angola's financial system. Most banks in Angola are, in fact, not banks in the normal sense.'[150] The notice declared that, commercial banks operating in the country had until the end of 2018 to increase their share capital from 2.5 billion to 7.5 billion kwanza (US$35million).[151] Banks with share capital below the new required minimum would have to consider other alternatives to continue in the market; and mergers would become an attractive alternative. The action by the central

[143] Ibid.
[144] Ibid.
[145] Ibid.
[146] Kindiger, M. 'President Lourenço's economic reforms are making Angola attractive' *BusinessDay* (2018) available at *https://www.businesslive.co.za/bd/opinion/2018-02-16-president-lourenos-economic-reforms-are-making-angola-attractive/,* accessed on 09 August 2018.
[147] Deloitte Angola, "Banca em Análise: Governance da Banca Angolana Desafios e Oportunidades' (2018) available at *https://www2.deloitte.com/content/dam/Deloitte/ao/Documents/financialservices/Bancaemanalise/Deloitte_BA2018_Completo-Digital-v09.pdf*, accessed on 15 October 2018.
[148] President João Lourenço speaking at a press conference held on the 8th of January 2018, marking his first 100 days in office, available at *https://www.bloomberg.com/news/Articles/2018-01-17/-terminator-lourenco-proves-he-s-no-one-s-puppet-in-angola,* accessed on 9 August 2018.
[149] Banco Nacional de Angola (BNA) noticia 2/2018.
[150] 'President João Lourenço sees himself as an Angolan Deng Xiaoping' statement by Carlos Rosado de Carvalho, editor of *The Economist*, available at *https://www.economist.com/middle-east-and-africa/2018/12/01/president-joao-lourenco-sees-himself-as-an-angolan-deng-xiaoping,* accessed on 18 January 2019.
[151] Supra note 147.

bank is a strategy for national banking institutions to gain greater solidity by improving the prospects for stabilisation of the inflation rate and the international reserves.

III. UNDERSTANDING THE MARKET

As we move closer to the heart of this paper, namely how a proposed merger impacts or affects Competition, an understanding of specific concepts relevant to the market is required. As defined in chapter 1, the market share or market power a firm holds is central to a competitive process. However, the degree of market power is what distinguishes a monopoly from an oligopoly. The objective of any Competition policy should be to establish a market that is perfectly competitive. In reality Competition is an imperfect concept, and a perfectly competitive market is a hypothetical market construct.[152] In an ideal market a diversity of firms sell the same product with sufficient buyers; there are no barriers to entry and market participants are well informed and as a result are able to make rational decisions to maximise self-interest, utility and profits.[153] Market prices or market conditions are not influenced or dictated by an individual firm; instead, the individual firm is a price taker (the industry dictates the price),[154] producing the best possible outcome for consumers and society.[155] Under this form of market structure, Competition authorities rarely concern themselves (there is no need for government regulation), given that there are essentially no risks of an individual firm dictating the prices, nor having the potential to exclude Competition.[156]

The opposite of perfect Competition is 'monopoly', characterised by one player selling or providing a unique product or service that usually has no close substitutes.[157] The monopolist is the sole seller of a commodity.[158] The strength of a monopolist lies in his ability to dictate prices combined with the possibility of securing control of all the close substitutes, without the fear of frightening away his customers.[159] The opposition to monopolies or monopolists lies in the ability to secure revenue by limiting output, coupled with the ability to exclude Competition and behave largely independently of its

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[152] Economics Online 'Perfect Competition' available at *https://www.economicsonline.co.uk/Business_economics/Perfect_Competition.html, accessed on 22 January 2019.*
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Economics Online 'Monopoly' available at *https://www.economicsonline.co.uk/Business_economics/Monopoly.html,* accessed on 22 January 2019.
[157] Ibid.
[158] Ibid.
[159] E. A. G. Robinson *Monopoly* (1941) Cambridge University Press, Nisbet & Co. Ltd 5

competitors, customers or suppliers. It is the exercise of unilateral market power to the detriment of consumers.[160] As illustrated above, the existence of monopolies only becomes problematic when the monopolies cement their dominance by deliberately excluding competitors (particularly equally efficient competitors) from the market. This gives them the freedom to create boundaries that limit and undermine the object of Competition Law and policy.

In Oligopoly Theory*[161],* James Friedman provides a convenient way to understand an oligopoly, by comparing the number of firms on the supply side of the market and the number of firms on the demand side. If the number of firms is less on the supply side with a very high number on the demand side, it implies an oligopoly**.** Oligopolies are strategically linked to one another, in which 'the best policy for one firm is dependent on the policies being followed by each rival firm in the market'.[162] Oligopolistic markets require regulatory intervention due to the imbalance by which an oligopoly has the ability to control prices, exclude Competition or generally exercise unilateral market power.

On these terms, the Angolan market, although dominated by monopolies, demonstrates certain aspects of an oligopolistic market in the markets for petroleum products, telecommunications and air transportation. However, the strong presence of monopolies in the Angolan market is irrefutable; their expansion has been rapid, dominating and dictating the market flow by holding extensive market power. Many industries in Angola are predominantly controlled by the same players, with the unreasonable exclusion of other players. Monopolies are one of the major imperfections of the Angolan market, restricting its potential. The need to control and limit the market power held by monopolies has been the major determining factor that has driven the urgent need for legislation to regulate Competition.

The Angolan Competition Law is an attempt to regulate monopolies and to prevent excessive use of monopoly power as well as any other form of anti-competitive conduct. Regulation requires greater transparency in relation to monopolistic agreements and profit rates. Ultimately, it is necessary for monopolies to justify their actions before an authority so as to curtail the excessive use of monopoly power. This would be a step in the direction of attaining the attributes of a perfectly competitive market.

The above concepts are central to Competition law and in particular to mergers, as mergers require consideration of the effect of the proposed transaction on the market, including whether the transaction would result in the creation, increase or and abuse of market power. However, the orthodox

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[160] Supra note 42.
[161] Friedman W. *Oligopoly Theory* (1983). Cambridge University Press, Cambridge London
[162] Ibid.

method of merger evaluation can be obfuscated by asymmetries in information ie whether a merger would result in the formation of unilateral market power, or whether a market was monopolist or oligopolist − as a monopoly requires closer supervision given that it possess more market power than an oligopoly with few competitors. Finally it is necessary to ask whether the vital objective of Competition law, namely lower prices and a concomitant increase in consumer welfare, would be undermined by the proposed transaction.

IV. MERGER: LEI DAS SOCIEDADES COMERCIAIS

a. Background

Since its independence Angola has undergone significant transformation, particularly within its economy. The previous commercial legislation, (Commercial Code of 1888 and the Private Limited Companies Law of 1901) had become outdated and impotent.[163] The Commercial Companies Law of Angola, also known as Lei das Sociedades C, was introduced with two objectives: first, to revise and modernise the previous legislation that regulated commercial companies − the principal private players in the economy − and bring it in line with international standards.[164] Secondly, to recognise the important role played by private enterprises in the development of the national economy, within the context of economic liberalisation and fair market Competition.[165] The Commercial Companies Law placed the Angolan commercial legislation in line with modern standards and practices by incorporating a series of principles which were previously regulated by the commercial code and by making provision for the commercial activities of those economic agents that were not included in the previous Act.[166] The law makes provision for new concepts and aspects that relate to all companies and establishes rules and regulations that are specifically applicable to them.[167]

Prior to the legislation, the merger process in Angola was regulated according to the commercial company law.[168] The Commercial Company Law is analogous to the South African Companies Act,

[163] Diário da Republic de Angola Commercial Companies Law No. 1/04 Chapter IX Article 102(1), translated version available at *http://www.osall.org.za/docs/Angola%20-%20Commercial%20Companies%20Law%201%20of%202004.pdf,* accessed on 17 August 2018.
[164] Ibid.
[165] Ibid.
[166] Ibid.
[167] Ibid.
[168] Ibid.

which regulates the activity of companies.[169] With regard to mergers, both the Angolan and the South African legislation are intended to provide an equitable and efficient system for amalgamations and mergers of companies.[170] In the South African Companies Act mergers are regulated under Chapter V, which deals with fundamental transactions, takeovers and offers.[171] In contrast, the Angolan companies legislation makes provision for mergers under chapter IX, mainly in Articles 102 to 117.[172]

b. Merger Process: Lei Das Sociedades Comerciais

Article 102(4)(a) of the Act lays out the foundation of how a merger can take place.[173] A merger can occur by the overall transfer of the assets held in one company to the other, as well as by the transfer of parts or stakes or shares to the shareholders.[174] Alternatively, a less complicated merger takes place by transferring the overall assets as well as the allotment of parts or stakes or shares to shareholders of the merged companies and incorporating a new company.[175] Article 103 deals in essence with the merger agreement (what the 'merger project' should contain), setting out the terms and means by which the merger is effected.[176]

Article 104 is centred on the monitoring of the merger by the auditing body of the respective companies, whose task is to supervise the 'merger project'.[177] In the event that the company has no auditing body, the law directs the management of each company to submit the merger project to an independent accountant or auditor for examination.[178] The submissions or findings of the auditing body are essential to the process and have far-reaching effects, since they must show grounds for and address the adequacy of the proposed merger and whether the swap ratio of the shareholdings is reasonable.[179] For this to be achieved the Act gives the auditing body the power to demand from the participating companies any data or document it deems necessary.[180]

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[169] Companies Act & Regulations of South Africa No. 71 of 2008.
[170] Ibid.
[171] Ibid.
[172] Supra note 173 at 102 to 117.
[173] Supra note 173 at Article 102 (4a-b).
[174] Ibid.
[175] Ibid at Article 102(4)(b).
[176] Ibid at Article 103(1) (a-n).
[177] Ibid at Article 104(2).
[178] Ibid at Article 104(3).
[179] Ibid.
[180] Ibid at Article 104(5).

In terms of Article 105(1), the approval of a merger is subject to the approval of the shareholders of the participating companies, who have to pass a resolution (in terms of Article 107 consent is required by all affected shareholders) at the shareholders' meeting.[181] Further, the law instructs that the notice of the shareholders' meeting must be published in a widely read newspaper within the areas where both of the companies' registered offices are located.[182] Upon obtaining the requisite approval, the managements or boards of the respective companies are required to publish the resolution approving the merger within a period of 15 days after the shareholders' meeting. Creditors of the participating companies, who have unsettled debts with the company, have 30 days following the publication of the merger resolution to contest the merger on the grounds of prejudice to their rights, which would impede the signing of the merger deed and the registration thereof.[183]

Ultimately, provided there is no objection, opposition or no waiting period/condition imposed on the proposed merger and the aforementioned period has lapsed, the management or board of the companies may proceed to sign the merger deed and register the same in the commercial register. The registration of the merger in the commercial register brings the merger process to an end[184]: The merged companies become extinct and their rights and obligations are transferred to the new company. The shareholders of the extinct companies become or are declared shareholders of the new company. [185]

c. Evaluating the merger process

From the process examined above, it is evident that the merger process does not require any further approval or make the transaction subject to any form of external confirmation or evaluation. As long as the merging parties adhere to the steps stated above, they can proceed to merge and register the new company. A merger is more of an internal affair or concern of the companies, determined and considered mainly by shareholders, auditors and accountants. The merger process in Angola before the Competition legislation, was mainly characterised by a 'tick-box' approach. No cognisable Competition considerations were involved. There was no evaluation of the impact of the transaction on market power and market structure. The process also failed to ask whether the merger impeded the effective functioning of the market, the consequences for employment or consumers and whether the merged

[181] Ibid at Article 107(2).
[182] Ibid at Article 105.
[183] Ibid at Article 110 and Article 111.
[184] Ibid at Article 114.
[185] Ibid.

company would occupy a dominant position, possibly resulting in a single firm dominating the market. Would the company become a monopoly? If so, would the merger potentially exclude even an equally efficient competitor? Most importantly how would the proposed merger impact the consumer?

The critical premise of Competition law is the recognition that the lack of a structured market will result in single-firm domination of markets.[186] According to David Lewis, former Competition Tribunal (SA) chairman, the principal function of Competition enforcers is to guard against 'exclusionary conduct', that is, unilateral conduct of the dominant firm that could (as a result of the merger) reproduce its dominance not through 'competition on the merits' but rather through the exclusion of actual or would-be competitors from the market.[187] Although Angola had status in the field of competition legislation, the lack of the Competition regulation impaired the market, and more specifically consumers. The Competition Act was the missing ingredient for an efficient market.

V. MERGER PROCESS: LEI DA CONCORRÊNCIA

The newly enacted Competition Law (*lei da Concorrência*) No. 5/18 sets out principles and rules that safeguard sound and well-balanced Competition between economic entities.[188] In line with the stated intention of South African Competition regulation, the Angolan law also seeks to achieve a more effective and efficient economy by restraining trade practices that undermine Competition in the economy.[189] Emphasising that the regulation of Competition is *'indispensavel'* − indispensable in ensuring an environment that allows micro, small and medium players to participate in the national as well as commercial platforms.[190] Further, the law recognises that by encouraging Competition amongst local businesses, consumers will benefit positively.[191] Consumers will be enabled to select the quality and variety of goods and services they desire. In so doing, the law places the Angolan economy in line with international standards. Similarly, the Angolan Constitution proclaims fair Competition as one of the prerequisites of financial, fiscal and economic organisation.[192]

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[186] Lewis, D. 'Exploitative Abuses - a note on the *Harmony Gold v Mittal Steel* excessive pricing case'.
[187] Ibid.
[188] Supra note 28.
[189] Ibid.
[190] Ibid.
[191] Ibid.
[192] Constitution of the Republic of Angola.

The Angolan Competition regulation sets forth laws and principles that encourage effective Competition, allowing for the natural evolution of the market and maximising consumer welfare.[193] Similar to the South African Competition Act, Chapter II, Article 7 of the Angolan Competition law sets out prohibited practices.[194] These are practices that are considered unlawful for distorting Competition or hindering the effectiveness of business, namely:

i. Abuse of the dominant position;
ii. Abuse of economic dependence;
iii. Price fixing; and
iv. Company mergers and acquisitions aimed at restricting or limiting market competitiveness.

The provisions in Chapter 3 of the Competition Law lays down mechanisms to control or prevent the concentration of companies (mergers). The law defines the 'concentration of companies' as the permanent change in total or partial control of one or more companies as a result of or as a consequence of the merger of two or more companies, or parts of a company that were previously independent.[195] Furthermore, the law now places the duty to control and approve such transactions in the hands of the Competition authority.[196] In addition, transactions that result in the attainment of a specific market share, turnover or annual turnover must be submitted to the Competition authority for approval.[197] The law does not quantify or set a specific threshold that would facilitate the conclusion that the merger of two companies exceeds or is within the specified market share. The law merely specifies that the determination thereof constitutes a normative act which is to be determined by the President of Angola.[198] Article 17(2) emphasises that the proposed transaction/act will be suspended until the Competition authority has reached a decision to approve, suspend or reject the transaction.

The discussion in this chapter demonstrates the significant impact that a good corporate law system has on the economy in general and on commercial activity in particular. It has the potential to facilitate and promote commercial enterprise and economic growth or restrict it. Given the crucial role companies play in wealth creation and social renewal, it no longer needs to be emphasised that an

[193] Supra note 28.
[194] Ibid at Chapter 3, Article 15(a).
[195] Ibid.
[196] ibid at Article 16.
[197] Ibid.
[198] Ibid at Article 17(1).

effective corporate law system and regulation is the foundation of a prosperous economy. As set out in the introduction, chapter 2 has detailed the factors that led to the formation of Competition law in Angola. Ultimately, through the examination of the merger process required for that Angolan corporations prior to the Competition Act, the Competition law will play a significant role in the Angolan legal system, particularly in how mergers will now be evaluated. In the next chapter the analysis of the merger process in Angola is expanded by contrasting the process with the one followed in South Africa and analysing the merger process of Kenya.

CHAPTER 3

MERGER EVALUATION: SOUTH AFRICA, ANGOLA & KENYA

I. INTRODUCTION

The *sui generis* aspect of the South African Competition Act lies in its approach to merger evaluation. Given its historical background South African legislators went beyond the boundaries of Competition and included a second leg to the merger approval inquiry by factoring in the importance of public interest. Notwithstanding any possible advantages of mergers, the amalgamation of firms will result in the loss of a competitive player in the market requiring control. The ultimate concern of merger control should not lie with dominance or the number of participants in the market, but instead with the harm that the amalgamation of large firms might have in diminishing Competition and prejudicing consumer welfare. Furthermore, in this chapter, focus is placed on the evaluation of mergers in the light of section 12A of the South African Competition Act and Article 9 of the Angolan Competition regulation. Thereafter key South African judgments will be analysed to determine the approach South African courts when reviewing a merger transaction, highlighting the cases in which public interest had had a material impact on the decisions of Competition authorities. The objective in this chapter is to examine how South Africa's approach to merger review can be reconciled with the traditional Competition goal of both jurisdictions. Lastly, I will consider another developing country's Competition laws, in particular Kenya's merger evaluation process.

II. SOUTH AFRICA'S APPROACH TO MERGER EVALUATION

a. Threshold

Once a transaction falls within the parameters of a 'merger', it is 'notifiable'; however it must first be determined if, and how, the transaction should be notified as not all mergers will be subject to the evaluation process based on the threshold classification.

Chapter 3, section 11(5) of the South African Competition Act limits the scope of merger evaluation by setting a financial threshold.[199] A merger can be categorised as 'small', 'intermediate' and

[199] Supra note 24 at section 11 (5).

'large'.[200] The Act allows the determination of the financial threshold to be prescribed by the Minister of Trade and Industry in consultation with the Competition Commission, and it is then published in the government gazette.[201] The threshold is based on the combined annual turnover or asset value of the acquiring and target firms. At the time of writing, the distinction between small, intermediate and large mergers was as follows:

A merger is classified as small when the combined turnover or asset values of the acquiring group and the target firm is at or below R600 million and where the target firm's turnover/asset value is below R100 million.[202] A small merger is not subject to approval by the Competition Commission and so notification is not required. The exception to this is where, within six months of implementation of the merger, the Commission is of the opinion that the merger may substantially prevent or lessen Competition or cannot be justified on public interest grounds; and where the merging parties or firms are subject to an investigation by the Commission or involved in proceedings before the Competition Tribunal, relating to prohibited practices.[203] In these circumstances the merging parties are required to notify the Commission of the transaction.[204]

A large merger is reached where the combined turnover/asset values of the acquiring group and the target firm exceeds R6.6 billion and where the target firm's turnover/asset value exceeds R190 million.[205] An intermediate merger is reached where the combined turnover/asset value of the acquiring group and the target firm and the target firm's turnover/asset value falls between these thresholds, [206] more specifically where the turnover/asset value lies between R600 million and R6.6 billion and where the target firm's turnover/asset value lies between R100 million and R190 million.[207]

In terms of the Act, both intermediate and large mergers may not be implemented until they have been approved with or without conditions by the Commission, and thus must be notified.[208] The

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[200] Ibid.
[201] Webber Wentzel, 'Merger Control' available at *http://www.webberwentzel.com/wwb/content/en/ww/ww-merger-control*, accessed on 25 November 2018.
[202] 'Amendment of the Determination of Merger Thresholds as set out in General Notice 216 of 2009' (published in GG 41124 of 15 September 2017).
[203] Supra note 242.
[204] Ibid.
[205] Ibid.
[206] Ibid.
[207] Supra note 243.
[208] Competition Commission of South Africa, 'Merger Thresholds' available at *http://www.compcom.co.za/merger-thresholds/,* accessed on 25 November 2018.

notification of mergers to the Commission is central to merger regulation,[209] as reflected in the *Competition Commission v Edgars Consolidated Stores Ltd,* in which the Tribunal held that notification was necessary to found jurisdiction and that the term 'merger' should be interpreted widely in order to ensure wide jurisdiction over mergers.

b. Section 12A

Once a merger falls within the above-stated categories (intermediate or large), irrespective of whether the merger is of a horizontal or vertical nature, an analysis into the substantive issues and effects of the proposed merger may have on the market is paramount.[210] The Act requires an analysis of the effect of a merger on Competition and consideration of the effect of the merger on public interest. The Commission may approve the merger with or without conditions, with public interest conditions or prohibit the merger on public interest grounds. The determination is first guided by section 12A which sets out that when considering a merger, the Competition Commission or Competition Tribunal is required to initially determine whether or not the merger is likely to substantially prevent or lessen Competition (by assessing the factors set out in subsection 2) and whether the merger will have a deleterious impact on Competition. The authorities must consider:

> i) Whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of Competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; [211]

To establish the above, a multi-factor enquiry is employed. Authorities are required to assess the strength of the merger by taking into account factors relevant to Competition within the specified market in order to determine the probability of merging firms acting competitively and co-operatively after the merger.[212] These factors include the consideration of, *inter alia,* level of trends of concentration, import Competition, ease of entry into the market, history of collusion in the market, tariff and regulatory barriers, the degree of countervailing power in the market and whether the merger will result in the

[209] Supra note 12.
[210] Supra note 6 at 177.
[211] Supra note 24.
[212] Ibid at section 12A(2).

removal of an effective competitor.[213] In dealing with these issues, the above authorities are required to employ a number of Competition tools to facilitate establishing the educated estimate. This will be discussed further in the next chapter.

The choice of the word 'likely' is an indication of the speculative nature of the Competition test. Establishing the precise impact a merger will have on the level of Competition in the market or its impact on consumers has been referred to as an onerous or 'back-breaking' task.[214] This view was also expressed by the Competition Tribunal in the case of *Mondi Ltd v Kohler Cores and Tubes* holding that ' . . . no amount of reliable evidence will remove the predictive or probabilistic element in merger adjudication'.[215] Considering, the inherent predictive element in the statutory design of section 12(1) (definition of merger) authorities are at least equipped to make an 'educated estimate' of the nature of a transaction, as the section provides key points to consider when determining whether the transaction is in fact a merger, how a merger occurs and whether it establishes control.[216] If it appears that the merger is likely to substantially prevent or lessen Competition, the Commission then also needs to consider whether the merger can or cannot be justified on public interest grounds:

> (ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or
>
> (b) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3). [217]

However, to this element , it is necessary to first outline the rationale behind public interest in South African Competition policy.

III. THE ROLE OF PUBLIC INTEREST IN MERGER EVALUATION IN SOUTH AFRICA

South Africa's Competition Act specifically acknowledges the importance of public interest. Having regard to its historical record of decades of discriminatory policies which caused immeasurable harm to the country's social and economic landscape, it would have been unwise for policy makers, in the wake

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[213] Burgeat, E. 'Competition Law and Policy in South Africa' (2003) OECD Peer Review, 27.
[214] Ibid.
[215] *Mondi Limited v Kohler Cores and Tubes* (20/CAC/Jun02) [2003] ZACAC 1; [2003] 1 CPLR 25 (CAC) (14 February 2003).
[216] Supra note 24, section 12(1).
[217] Ibid at s12A(a)(ii).

of constitutional democracy, to have ignored the economic and social obligations owed its people, in particular those previously disadvantaged.[218] This is reflected in the preamble of the Competition Act, which includes the following:

> The people of South Africa recognise:
>
> That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.
>
> That the economy must be open to greater ownership by a greater number of South Africans.

It was in light of the above that South Africa boldly decided to adopt a Competition Act which included public interest considerations. The approach sought to address the pressing need for economic redistributive justice,[219] provoking conflicting debate amongst policymakers and economists.[220] The difficulty centred on understanding how authorities could correlate public interest concerns in practice when a merger was proposed.[221] In addition, as has been emphasised throughout this paper, as the enhancement and protection of consumer welfare is the fundamental focus of Competition regulation, reconciling this objective with the public interest considerations would present difficulties for authorities.[222] Despite the apparent challenges faced in incorporating public interest considerations to the Act, policymakers insisted on creating legislation that would restore the people's confidence to participate in the economy and which would ultimately contribute to an inclusive competitive economic environment. In support of this, the chairperson of the Competition Tribunal for a decade after its founding in 1999,[223] David Lewis, pointed out that including public interest factors in merger evaluations was pivotal, more so in developing countries like South Africa and Angola, where the role of industrial policy had a weightier significance than in developed countries. Furthermore, Lewis asserted that a Competition statute which failed to take cognisance of its importance in ensuring that black ownership was promoted (salient in the South African context), or the impact the proposed merger

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[218] Nicholas Meyer, *Competition Law's Inclusion of Public Interest Considerations in Mergers and Beyond A Potential Paradox?* LLM Dissertation, University of Cape Town 2017.
[219] Yongama Njisane 'The rise of Public Interest: Recent high profile mergers' (2011) 3.
[220] Boshoff, Dingley & Dingley (2012) 'The Economics of Public Interest Provisions in South African Competition Policy' 1.
[221] Ibid.
[222] Justin Balkin & Michael Mbikiwa 'Narrow 'public interest' can harm the common good'(2014) *Business Day*, available at *http://www.bdlive.co.za/opinion/2014/03/31/narrow-public-interest-can-harm-the- common-good*, accessed on 22 October 2018.
[223] Corruption Watch 'Board Members', available at *https://www.corruptionwatch.org.za/about-us/people/board-members/*, accessed on 30 November 2018.

on employment would discredit the role of Competition authorities.[224] It would make achieving the Competition objective of enhancing consumer welfare an illusion.

It must be emphasised that, in addition to considering the impact that the proposed merger has on Competition in a relevant market, in terms of section 12A Competition authorities are required to assess whether the transaction can be justified on substantial public interest grounds.[225] According to guidelines issue by the South African Competition Commission, there are two lines of inquiry to public interest.[226] Following a negative Competition finding, in the first line of inquiry the Commission is required to consider whether there are any public interest grounds that could outweigh any negative Competition effects.[227] This means that the Commission can approve an anti-competitive merger if there are substantial public interest grounds for it to approve the merger.[228] This requires a case-by-case balancing of Competition and public interest issues in which parties must establish a substantial positive public interest effect.[229] In the second line of inquiry, following a positive Competition finding, the Commission is required to consider whether there are any substantial negative or positive public interest effects.[230] In the result, the Commission may prohibit a merger on public interest grounds or impose conditions to remedy the negative public interest effect on a merger even if the merger has a positive Competition finding.[231]

Section 12A(3) of the Act deals with the public interest considerations:

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

[224] Supra note 19 at 3.
[225] Competition Commission South Africa 'Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No. 89 of 1998' (2015), available at *http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Public-Interest-Guidelines-public-version-210115.pdf,* assessed on 5 February 2019.
[226] Ibid.
[227] Ibid at 8.
[228] Ibid.
[229] Ibid.
[230] Ibid.
[231] Ibid.

iv) the ability of national industries to compete in international markets".[232]

When analysing each of the above provisions, the Competition Commission first establishes the likely effect on public interest; second, determines whether there is sufficient causal nexus between the merger and the alleged effect;[233] third, determines whether these effects are substantial; fourth, determines whether the merging parties can justify the likely effect on the particular public interest; and finally, considers possible remedies to address any likely negative effect on the public interest.[234] In addition, the wording used in section 12A(3) is important: the choice of the word 'and' as opposed to 'or' suggests that Competition authorities must consider all public interest grounds when evaluating a merger. To repeat, a merger must always be reviewed on public interest grounds even if the merger does not have an adverse effect on Competition. [235]

Reconciling Competition law objectives by enhancing protection of consumer welfare with public interest considerations can cause conflict, given the apparent trade-off of efficiency with equity.[236] Lewis however, emphasised his support for reconciling these conflicting objectives, stating that he was 'quite comfortable with the requirement that we must balance Competition and public interest considerations'. He elaborated:

> It makes for complex decision making . . . real politiek, at least, dictates that we do not insist on eliminating either the "political economy" or distributional objectives or "the pure economy" or allocative efficiency objectives. The trick is reconciling them in practice, and this in turn, is tied up, first, with the process of building a new, broad-based constituency for antitrust and, second, with the mode of implementation of policy and regulation.[237]

In the past, Lewis's reconciliation approach was opposed by the Competition Tribunal, which favoured a deferential approach, indicating that where the public interest consideration fell within the jurisdiction of another governmental agency, the Tribunal's own role should be secondary to those agencies and

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[232] Supra note 24 at section 12A(3).
[233] Para 54-56 of *BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd* (Case:18713).
[234] Supra note 266.
[235] Wilmi Spoelstra, Master's dissertation *The Role of Public Interest In Merger Evaluation In South Africa*, (2016) University of Pretoria 16, available at *https://repository.up.ac.za/bitstream/handle/2263/57718/Spoelstra_Role_2016.pdf?sequence=1&isAllowed=y*, accessed on 15 December 2018.
[236] Supra note 259.
[237] Lewis, D, (2001) 'The Political Economy of Antitrust', Fordham Corporate Law Institute's 28th Annual Conference on International Antitrust Law and Policy at 4.

statutes.[238] The merger between *Shell* and *Tepco*, a black empowerment oil company, is illustrative of the deferential approach.[239] Allowing the merger without conditions, the Tribunal dismissed the recommendation made by the Commission that, *inter alia*, the transaction be made subject to Tepco remaining an independent company, with it being jointly controlled by Thebe and Shell.[240] The Commission's decision was in line with the Act's public interest provision, indicating that the removal of *Tepco* as an independent participant in the petroleum industry would impede the 'ability of a firm controlled by historically disadvantaged individuals from becoming competitive'.[241] In dismissing the Commission's recommendations, the Tribunal identified the Employment Equity Act, the Skills Development Act and the Petroleum Charter as the best suited legislative instruments to address the stated issues.[242] Furthermore, the Tribunal cautioned the Commission not to misconstrue its role when pursuing its public interest mandate by operating in an 'overzealous manner lest they damage precisely those interests that they seek to protect'.[243]

Balancing welfare and public interest considerations raises the salient question whether the Competition authorities are the correct institutions to do so.[244] According to Gal, allowing the Competition authority to decide on public policy issues may pose a threat to democratic values,[245] reasoning that Competition authorities are not elected officials with a mandate from the electorate to decide on public policy issues.[246] Gal noticed that in circumstances where a merger had the potential to impact a remote area with high unemployment levels, Competition authorities may not be the right body to balance competing considerations as it may not possess the most effective and efficient means to evaluate the indirect and direct economic effects of the merger on the region. For this reason, Gal emphasises that determining public policy should remain the domain of government, pointing to the specified exception of mergers between banks, in which the Act acknowledges the Competition authorities' limitation/deficiency in that area by empowering the Minister of Finance to issue a notice excluding the merger from the jurisdiction of the Competition Act.[247] The legislature thereby

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[238] Ibid.
[239] *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (66/LM/Oct01) [2002] ZACT 13 (22 February 2002)
[240] Ibid.
[241] Ibid.
[242] Ibid.
[243] Ibid.
[244] Supra note 21 at 3
[245] Gal, M, (2001) 'Reality Bites (or Bits): The Political Economy of Antitrust in Small Economies', Fordham Corporate Law Institute's 28th Annual Conference on International Antitrust Law and Policy October 25&26 at13.
[246] Ibid.
[247] Supra note 261 at 4

acknowledged that in certain circumstances the Competition authorities were not best-suited to protect the public interest.[248] More recent South African merger decisions seem to support an alternative perspective,[249] illustrating that Competition Law and its institutions may be tools used by government to enforce the public interest provisions in line with governmental objectives.[250]

As highlighted above there are various reasons that make South Africa's merger evaluation process *sui generis.* The public interest considerations are very specific and only a closed list of public interest concerns enjoy focus in the framework of South Africa's Competition policy. The merger test gives Competition authorities the discretion to allow or disallow a merger that does or does not comply with the 'substantial lessening of Competition' (SLC) test. In addition, the capacity to approve or prohibit a merger is afforded to the Competition authority and not the relevant Minister or stakeholders. The law on mergers strives to prevent abuse of market power, rather than trying to control it.

a. Merger cases involving public interest considerations: The effectiveness of merger control decisions in achieving the socio-economic goals of Competition Law.

The challenge of incorporating non-Competition objectives (as with State aid provisions in the EU) into Competition policy has been grappled with by a number of jurisdictions elsewhere.[251] However, over the past 15 years, the Competition Tribunal in South Africa has assessed numerous mergers with public interest component, which has sparked debate on the assessment standard for public interest issues. More specifically, recent high-profile merger cases include Wal-Mart/Massmart and Momentum/Metropolitan. As will be discussed in more detail below, it will become evident from the court decisions that there has not been an instance where a merger case was decided on the basis of public interest considerations alone; some mergers have been approved subject to conditions relating to public interest. When determining whether or not to approve a merger, authorities make this decision by balancing the facts and the competitive arguments of each case, considering all the relevant factors, and evaluating the advantage and disadvantages of the transaction at hand.

[248] Ibid.
[249] Ibid.
[250] Ibid.
[251] Ibid.

In a matter of the *Minister of Economic Development et al and Walmart Stores Inc. et al,*[252] the Competition Appeal Court (CAC) was confronted with the task of addressing and clarifying the uncertainty associated with incorporating public interest objectives in merger cases. Davis JP together with Zondi JA had to determine whether to approve the proposed merger between Massmart Holdings Limited[253], a South African-based globally competitive regional management group, focused on wholesale and retail business and the widely known American multinational, Wal-Mart Stores Inc. The Court conditionally approved the proposed merger upon observing that although the transaction raised no significant Competition concerns, the entire dispute turned on what was described by the Court as 'one of the unusual features' of the Competition Act, that is the public interest concerns, section 12A of the Act'.[254] The approval was given notwithstanding the intervening opposition of the South African Catering Commercial Allied Workers Union (SACCAWU), the National Union of Metal Workers of South Africa (NUMSA) and the Food and Allied Workers Union (FAWU)[255], the Minister of Trade and Industry, the Minister of Agriculture Forestry and Fisheries and the Minister of Economic Development (the "Ministers") and the South African Small Medium and Micro Enterprises Forum. [256] The reason for the opposition was centred on the fact that Wal-Mart's global procurement network and its logistical capabilities could impact imports into South Africa.[257] The Ministers argued that the proposed merger would negatively impact local producers, shifting procurement away from the local producers towards foreign low-cost producers situated in Asia,[258] having a detrimental impact on employment, lead to widespread closure of small and medium sized businesses and constrain or impede the development of domestic industries. Despite having approved the merger the Court remained cognisant of the public interest concerns, stating that:

> [T]he introduction of the largest retailer in the world to the South African economy may pose significant challenges for the participation of South African producers in global value chains which, as the evidence indicates within the retailing sector, is dominated by Wal-Mart. Failure to engage meaningfully with the implications of this challenge posed by globalization can well have detrimental economic and social effects for the South African economy in general and small and medium sized business in particular.

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[252] *Minister of Economic Development and othersl and Wal-Mart Stores Inc. et al* case no 110/CAC/Jul11.
[253] Massmart is the second-largest distributor of consumer goods in Africa, the leading retailer of general merchandise, liquor and home improvement equipment and supplies, and the leading wholesaler of basic foods.
[254] Supra note 261 at 2.
[255] South African Commercial, Catering and Allied Workers Union (SACCAWU); National Union of Metal Workers of South Africa (NUMSA); Food and Allied Workers Union (FAWU)
[256] Supra note 261.
[257] Ibid.
[258] Ibid.

The Court emphasised that the South African Competition regime was concerned with economic or market power, its creation, extension, distribution and (ab)use, emphasising that section 12A made it clear that the analysis enjoined the Competition authority to apply these principles by undertaking an examination of factors beyond standard questions of a transaction's impact on price and output. However, in this case the Court believed that the application of the principles set out in the Act had not been applied effectively, holding that:

> Given Wal-Mart's size and expertise . . . the proposal for a condition which would seek to enhance the participation of South African small and medium size producers in particular, in global value chains which are dominated by Wal-Mart so as to prevent job losses, at the least, and, at best, to increase both employment and economic activity of these businesses protected under s 12A must form part of the considerations which this Court is required to be taken into account in considering a merger of this nature . . . .This flows from the model of Competition Law chosen by the legislature and in particular as set out in s 12A. It also forms part of the mandate given to the Tribunal and, on appeal, to this Court when faced with the inquiry as to whether a merger should be approved.[259]

The Court found that in order to ensure that local South African suppliers remained empowered to respond to the challenges posed by the merger and benefit thereby it was necessary that a study be conducted by experts nominated by government, the merging parties and the unions to determine the most appropriate means and the mechanisms.[260] The Court held that the condition put forward by the Tribunal, of establishing a procurement fund to assist local suppliers be properly interrogated.[261]

In relation to the concerns raised about employment, the Tribunal had ordered that in the event of positions becoming vacant, the merged entity was to give preference to the 503 employees who had suffered retrenchment in June 2010.[262] The Court, however, found the retrenchment of the workers was connected to the merger and for this reason found the response by the Tribunal to be entirely inadequate and ordered the reinstatement of these employees. In an effort to address the concerns effectively, the Court imposed further employment-specific conditions: a two-year period moratorium on retrenchment based on the merged entity's operational requirements; and that the merged entity honour the existing

[259] Ibid.
[260] Ibid para 109.
[261] Ibid.
[262] Supra note 261 at 6.

labour agreements as well as the existing bargaining practices with SACCAWU (the largest representative union). [263]

In the *Momentum/Metropolitan case,* the Competition Tribunal again elevated the importance of employment within the public interest considerations.[264] The Tribunal emphasised that a merger that increased Competition could still be prohibited if merging parties neglected to address the effect the transaction had on the employment sector.[265] In this case, the merging parties proposed to limit the number of merger related job losses to 1 000 in the first three years subsequent to the implementation of the merger.[266] The parties undertook to use their best endeavours to redeploy affected employees in the merged entity by providing core skills training to affected unskilled and semi-skilled employees, as well as outplacement support and counselling.[267] The National Education Health and Allied Workers Union (Nehawu) took an opposing view, arguing that the merging parties failed to satisfactorily substantiate how the job losses and retrenchment figure of 1 000 was deemed appropriate. Nehawu argued for prohibition of the merger, alternatively that it take place without prejudice to employees and no job losses.[268] In the result, the Tribunal approved the merger on condition that for two years after the transaction, with the exception of the senior managers, no retrenchments should occur.[269] The Tribunal also expressed its scepticism at the use 'soft' redundancy initiatives like reskilling and redeployment as being, from their experience, largely ineffective.[270]

The landmark characteristic of this case is the drawing of a rational connection between job losses (negative public impact) and the efficiency to be gained from the merger;[271] that the parties had to go further and demonstrate reasonable grounds that justified the significant employment losses.[272] Efficiencies on their own were insufficient to justify a prejudicial effect on employment.[273]

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[263] Ibid.
[264] *Metropolitan Holdings Ltd v Momentum Group Ltd* case no 41/LMJul10. [2010] ZACT 87 (9 December 2010)
[265]Ibid.
[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] Ibid.
[270] Ibid.
[271] Yongama Njisane The rise of Public Interest: Recent high-profile mergers' cited in Master's dissertation *Competition Law's inclusion of Public Interest Considerations in Mergers and Beyond: A Potential Paradox* by Nicholas Meyer 'The 'rise of Public Interest: Recent high-profile mergers' (2011)) 3.
[272] Ibid.
[273] Ibid at 6.

In the earlier decision of *Harmony Gold Mining Company Limited v Goldfields Limited*[274], such sentiments were echoed, providing a valuable summary of the role played by public interest considerations. It was held:

> The public interest inquiry may lead to a conclusion that is the opposite of the Competition one, but it is a conclusion that is justified not in and of itself, but with regard to the conclusion on the Competition section. It is not a blinkered approach, which makes the public interest inquiry separate and distinctive from the outcome of the prior inquiry. Yes, it is possible that a merger that will not be anti-competitive can be turned down on public interest grounds, but that does not mean that in coming to the conclusion on the latter, one will have no regard to the conclusion on the first. Hence section 12A makes use of the term "justified" in conjunction with the public interest inquiry. It is not used in the sense that the merger must be justified independently on public interest grounds. Rather it means that the public interest conclusion is justified in relation to prior Competition conclusions.[275]

The above decisions, the provisions of section 12A, the Competition Appeal Court and the Tribunal have given valuable guidance in certain areas of public interest considerations. From its experience in the evaluation of previous mergers, the Commission, in its public interest guidelines has noted that parties to a merger proceeding often provide insufficient information pertaining to public interest considerations, particularly the effect on employment.[276] These failures cause serious delays for the Commission in its evaluation of the merger as more information may have to be requested to enable the Commission to make an informed decision.[277]

Merger evaluation in South Africa has a threefold test. First-instance authorities have to establish whether a merger is likely to substantially prevent or lessen Competition (SLC test). Secondly, if the inquiry reveals a substantial lessening of Competition, then it must determine whether there are any 'technological, efficiency or other pro-competitive gains' that outweigh the anti-competitive effect of the merger and whether there are any public interest considerations that would outweigh the negative Competition effects. Notwithstanding the outcome of these enquiries an assessment is finally necessary into whether the merger would have a substantial positive or negative impact on any of the public

[274] *Harmony Gold Mining Company Limited v Goldfields Limited* CT case 93/LM/Nov 04 at para 76.
[275] Ibid.
[276] Supra note 266.
[277] Ibid.

interest grounds as set out in section 12A (3) of the Act.[278] Where a merger substantially lessens or prevents Competition, authorities must consider whether the merger transaction will result in any efficiency gains. The efficiency test may be used to justify the anti-competitive effects of the merger transaction. The balancing of the SLC test and the efficiency test is often problematic in that the authorities are faced with compromising Competition dangers with efficiency benefits. [279]

IV. MERGER ANALYSIS UNDER ARTICLE 9 OF ANGOLAN COMPETITION LAW:

South Africa's Competition policy was formulated in the historical context of a white-minority-controlled country and economy, creating a huge wealth gap between the white minority and the black majority, who had been denied access to the same standard of education as white people.[280] Consequently, the black majority were denied the opportunity to effectively participate economically with white-owned and controlled companies.[281] Whilst inequality in Angola is not necessarily race-oriented, Competition policy has been introduced in a time where a black minority control (soon becoming a thing of the past) the country and its economy, leaving the majority with meagre opportunities to participate actively in the economy. This has expanded even further the gap between the 'haves' and the 'have nots'. The problem is not white-versus-black but more about the haves and the have nots.

The introduction of the Competition Act in Angola is intended to effectively address such socio-economic imbalance. As explained in chapter 2, the merger process in Angola had been a mere 'tick-box' approach. There was no body that effectively regulated and considered how the proposed merger would impact consumer welfare and Competition in the market. Furthermore, little or no consideration was given to the potential conflicting situations that could arise as a result of the merger and how to address these. This, raises the salient question whether Angola's merger regulation or evaluation process

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[278] Hartzenberg T, ' Competition Policy and Enterprise Development: The Role of Public Interest objectives in South Africa's Competition Policy', 15, available at *http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.201.1,* accessed on 17 December 2015.
[279] Ibid.
[280] Teague IG, 2009 *The role of public interest in Competition Law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the Competition Laws of South Africa and of developing nations*, LLM Dissertation, , University of Cape Town, 52.
[281] Ibid.

in terms of Competition legislation will be effective in furthering the Competition goal of maximising welfare and ensuring an inclusive economy. As at the time of writing, the Angolan Competition Act is relatively new and untested, with no precedent that allows evaluation. However, an examination of the provisions of the Angolan Act, when viewed in the context of South African Competition law, will contribute significantly in the formulation of an educated opinion and assessing the role of the Angolan Act in the regulation of mergers.

a. Merger Process in terms of the Competition Act

The fundamental principles enshrined in Angolan Constitution in Article 89 - Fundamental Principles - paragraph 1 - states the following:

> The organisation and regulation of economic activities shall be based on a general guarantee of overall economic rights and freedoms in general, and an appreciation of work, human dignity and social justice, in accordance with the following fundamental principles:
> c) A market economy based on the principles and values of healthy Competition, morality and ethics, as prescribed and ensured by law.

The Competition Act repeats the focus of the Angolan Constitution. In view of the stage of development of the Angolan economy, the Competition Act is envisaged to introduce in the Angolan jurisdiction a law that not only regulates and protects Competition, but that also reignites and promotes the spirit of Competition amongst various economic players. As touched on in chapter 2 of this paper, the Angolan Competition Act on its own does not provide a sufficiently comprehensive delineation of the rules and procedures to be followed in mergers. In response to the need for further expansion and elucidation on anti-competitive practices, a presidential decree was signed and released in October 2018, *Regulamento da Lei da Concorrência* (Competition Law regulation).[282]

The Regulation sets forth the complementing norms and procedures necessary for the execution of the Competition Law n 5/18.[283] Article 16 of the Regulation reveals that, similarly to South African Competition authorities, Angolan authorities are required to evaluate a proposed merger in relation to its effect on the competitiveness of the market as well as public interest grounds.[284] Before that, as in South Africa, Article 17 of the Angolan Competition law provided that only mergers that reached or were above the required market share, turnover or annual turnover would be subject to the evaluation

[282] Supra note 48 at Article 16.
[283] Supra note 28.
[284] Supra note 48 at Article 16.

process.[285] Contrary to South African regulation, where the threshold is determined by the Minister of Trade and Industry, in Angola the threshold is be determined by a normative Act set by the President.[286] Article 10 of the Regulation sets out three instances where mergers are expected to be notified:[287]

a) Where, as a result of the merger, the firm acquires or increases its share to a value that is greater than or equal to 50 per cent of the domestic market of a particular good or service.[288]
b) Where, as a result of the merger, a share is attained that is equal to or above 30 per cent but below 50 per cent of a substantial part of a particular good or service in the domestic market. Provided that in the last year, the individual turnover of both merging firms in Angola exceeds 450 000 000 (four hundred and fifty million kwanzas).[289]
c) The turnover of the merging firms, in the last year in Angola, should be above 3 500 000 000 (three billion, five hundred million kwanzas).[290]

This paper now considers the extent to which Angola's merger evaluation process differs from or is similar to the South African legislation. Article 16 under Chapter III, of the Angolan Regulation of the Competition Law dealing with Concentration Acts (mergers) asserts that the evaluation process of the proposed transaction or concentration act is envisioned to determine whether the proposed transaction is susceptible of creating or strengthening a dominant position in the relevant market so as to have a negative impact on effective Competition within the domestic market,[291] instructing further that the Competition authorities should determine the effects the proposed transaction would have on the structure of Competition, having in mind the need to preserve and develop or promote effective Competition in the domestic market.[292]

Similarly to section 12A (2) of the South African Competition Act, Article 16(3)(a)-(s) establishes an extensive list of factors authorities are required to consider when assessing the strength of the merger and the probability that the merging firms are acting anti-competitively. If it is determined

[285] Supra note 28 at Article 17(1).
[286] Ibid.
[287] Ibid at Article 10.
[288] Ibid.
[289] Ibid.
[290] Ibid.
[291] Ibid at Article 16
[292] Ibid.

that the concentration or merger is likely to prevent or decrease substantially the level of Competition, Competition authorities are directed to extend the analysis and determine:

a) Whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of Competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; [293]
b) Can the proposed transaction can be justified under public interest grounds?[294]

Thus, Angola's Competition legislation adopts the same test as South Africa for merger evaluation. Furthermore, the Act instructs Angolan Competition authorities to examine the effect a merger would have on public interest grounds, namely, a particular industrial sector or region, employment, the ability of small industries to gain access to or to be competitive in any market and the ability of national industries to compete in international markets.[295] Whilst the Angolan legislation adopts South Africa's public interest grounds, economic criteria remain important; the additional objectives are intended to help further the country's social objectives and correct the existing disparities in the market.[296]

It is argued that the specific needs of a developing country justify the use of Competition policy to attain macro-economic stability and growth.[297] Hantke-Domas identified the realisation of moral and political values as the essential function of public interest considerations,[298] thus applying the view held by David Lewis that in a developing country, where distributional and poverty problems predominate and where all social and economic policy, no less Competition policy, is expected to contribute to the alleviation of these first order problems, public policy considerations are inevitably essential.[299] Furthermore, he argues that a Competition Act that fails to acknowledge the extreme disparities or high inequality levels in the system would certainly reduce the significance of such a legislation.[300] It would serve no purpose by failing to address the main objective of Competition Law. Incorporating the public interest element to merger analysis will inform and assist Angolan Competition authorities in cases where public interest is in issue or in cases that could potentially have an impact on consumers.

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[293] Supra note 48 at Article 16(4).
[294] Ibid.
[295] Ibid.
[296] Ibid at Article 16(5)(a-d).
[297] Supra note 276 at 69.
[298] Michael Hantke-Domas (2003) 'The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?' 15(2) *European Journal of Law and Economics*.
[299] Supra note 264.
[300] Ibid.

The public interest part of the merger test holds a 'Janus-faced' quality, in that it can either save a merger that would have been rejected on pure Competition criteria or it may also lead to the rejection of a merger, which is not anti-competitive. As stated above, 'the Competition authorities are unlikely to prohibit a merger that is not anti-competitive, or approve a merger that is anti-competitive, purely on public interest grounds'.[301]

V. ALTERNATIVE (KENYA)

The consideration of merger evaluation or regulation would not be complete without examining whether other developing countries follow a similar approach to that of South Africa and Angola. As discussed above, public interest is likely play a more significant role in the Competition Laws of developing countries than in those of developed countries.[302] Comparing the role of public interest in South African Competition Law with that of another developing country such as Kenya (instead of with a developed country that does not face dire socio-economic problems such as unemployment) would contribute significantly to assessing its role generally.

a. An Introduction to Kenya

Akin to Angola and South Africa, Kenya is a country of great potential, but whose government faces a number of socio-economic challenges. Kenya is an East African economic leader with a pioneering financial services sector and a strategic transport and communications hub.[303] The country is on an upward trajectory to modernise its infrastructure, increase industrial activity and improve its socio-economic performance.[304]The economy continues to depend significantly on its agricultural, service and tourism sectors, which have contributed approximately 80 per cent of GDP over the last 15 years.[305] However, more recently the country has become increasingly optimistic regarding the prospects of its extractives industries. The successful development of these industries and adjacent clusters, namely

[301] Supra note 276.
[302] Ibid.
[303] COMESA, 'Member States, Republic of Kenya', available *at www.comesa.int/ ,* accessed on 1 January 2019.
[304] *Kenya Vision 2030 http://cemusstudent.se/wp-content/uploads/2013/01/Vision_2030_Minister_of_State_Planning_National_Development_and_Vision_2030.pdf* accessed on 1 January 2019.
[305] Ibid.

through the development of local content, will contribute to employment growth, increase the tax base, fiscal revenues and foreign exchange, consequently, promote economic diversification.[306]

In 2003, the Government of Kenya adopted the Economic Recovery Strategy for Wealth and Employment Creation, aimed at reform and strengthening economic growth.[307] The government implemented macro-economic policies to stimulate job creation, improve governance, increase efficiency in public service delivery and foster an attractive business environment for private sector incumbents.[308] More recently, the government launched Vision 2030 aimed at further developing Kenya primarily as a competitive industrial hub both regionally and internationally.[309] The government prioritised manufacturing as a key sector to achieving its economic development goals through job and wealth creation, and export growth.[310] To achieve the defined goals, the sector has seen a coherent and unified approach by national and institutional constituents including national industrial policies, Kenya Vision 2030, Kenya's Industrial Transformation Programme (KITP) and Kenya Investment Authority (KenInvest), and others.[311]

With the aim of transforming Kenya into an industrialised economy while improving the quality of life for all its citizens, Kenya Vision 2030 emphasises the development of the manufacturing sector under the economic pillar with two key objectives:

1. Increase employment and wealth creation by strengthening the capacity and local content of domestically manufactured goods and increase the generation and use of research and development results; and
2. Boost export growth by raising the share of products in the regional market from 7 per cent to 15 per cent and developing niche products for existing and new markets.

As indicated by the World Bank's Ease of Doing Business annual report, Kenya has maintained its strong business reform agenda, fulfilling five key reforms in the past years aimed at improving the business climate for small and medium-sized businesses.[312] The reforms have lifted Kenya to 61st place

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[306] Ibid.
[307] Ministry of Planning and National Development, Preamble of the Economic Recovery Strategy for Wealth and Employment Creation, Ministry of Planning and National Development, June 2003.
[308] Ibid.
[309] Supra note 346.
[310] Ibid.
[311] Ibid.
[312] World Bank Group Flagship Report 'Doing Business' 2019, Kenya available at *http://www.doingbusiness.org/content/dam/doingBusiness/country/k/kenya/KEN.pdf,* accessed on 27 December 2018.

among 190 economies in the Global Ease of Doing Business ranking.[313] This is a considerable improvement from 80th position in 2017, earning the country a spot among the global top improvers for the fourth time in the past 11 years.[314] The World Bank report stated that 'in recent years, Kenya has embraced a strong reform agenda aimed at boosting investment and creating jobs.[315] During this past year, Kenya has once again shown itself as one of the global leaders in adopting international best practices in business regulation'.[316] While acknowledging Kenya's accomplishment, Felipe Jaramillo, the World Bank Country Director encouraged the government of Kenya to persist in its efforts to address the remaining hurdles that affect the establishment and growth of SMEs, a segment that is critical to the creation of more jobs and opportunities for Kenyan youth.[317]

b. An Overview of The History of Competition Law in Kenya

Before implementing the Competition Act, the Restrictive Trade Practices, Monopolies and Price Control Act ("the RCT Act") regulated Competition in the Kenyan market.[318] The Act came into operation on 1 February 1989, when the economy of Kenya was experiencing a shift from a price control regime, with significant state intervention, to a market economy, with the accompanying realisation of the necessity for a law that would regulate Competition[319]. As stated in the preamble of the RCT:

> An Act of Parliament to encourage Competition in the economy by prohibiting restrictive trade practices, controlling monopolies, concentrations of economic power and process and for connected purposes.[320]

The now repealed Act covered three main areas: first, section 4 to section 21 of the Act addressed restrictive trade practices, namely associations, discrimination in supply, predatory trade practices, collusive tendering and collusive bidding at an auction. Secondly, sections 22 to 32 set rules that ensured and defined the control of monopolies, mergers and takeovers. The third area covered by the Act under sections 33 to 39, was control and display of prices, defining the provisions relating to price control. The

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[313] Ibid.
[314] Ibid.
[315] Ibid.
[316] World Bank Kenya Country Director Felipe Jaramillo.
[317] Ibid.
[318] The Restrictive Trade Practices, Monopolies and Price Control Act, 1989, Cap 504 of the Laws of Kenya.
[319] CUTS International, 2010 'Competition Law in Kenya – a snapshot', Briefing paper, Africa Resource Centre, Nairobi, , 1, *www.cuts-international.org/Nairob.*
[320] Supra note 345.

Act made provision for the control of restrictive trade practices, collusive tendering, monopolies and concentrations of economic power and the control of mergers and takeovers, including exemptions, which excluded regulated sectors of the economy from the scope of Competition Law. The RCT Act, however, failed to address abuse of dominance.

The RCT Act had a number of shortcomings. The transitional nature of the legislation rendered it ineffective regarding the initial objective to move the country from a price control regime to a market regime.[321] Further the Act preserved price control provisions which it should have been done away with; the enforcement procedures were unnecessarily complicated and the Commissioner's role was reduced to that of an adviser, making the remedial process ineffective.[322] However, in acknowledging the significance of effective Competition for economic development, the government introduced further legal reform by enacting the Competition Act, No. 12 of 2010[323] that came into effect on 1 August 2011,[324] repealing the RCT Act, Cap 504.[325] The following is contained in the preamble of the Act:

> [To] promote and safeguard Competition in the national economy; to protect consumers from unfair and misleading market conduct to provide for establishment, powers and functions of the Competition Authority and the Competition Tribunal, and for connected purposes.[326]

Its objectives were "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, in order to:[327]

a. increase efficiency in the production, distribution and supply of goods and services;
b. promote innovation;
c. maximize 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;

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[321] Ibid.
[322] Competition Authority of Kenya, "Competition Policy and Law", 3, available at *www.cak.go.ke/,* accessed on 29 December 2018.
[323] Ibid.
[324] Competition Act, No. 12 of 2010 (as amended), Cap 504 of the Laws of Kenya.
[325] Ibid.
[326] Preamble of the Competition Act, 2010 (as amended), Cap 504 of the Laws of Kenya.
[327] Section 3 of the Competition Act, 2010 (as amended), Cap 504 of the Laws of Kenya.

g. bring national Competition Law, policy and practice in line with best international practices; and
h. promote the competitiveness of national undertakings in world markets[328]

In the consideration or assessment of mergers, the Competition authority was obliged in terms of section 46(2)[329] take the following into account:

a. The extent to which the proposed merger would be likely to prevent or lessen Competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;
b. 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;
c. 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;
d. The extent to which the proposed merger would be likely to affect a particular industrial sector or region;
e. The extent to which the proposed merger would be likely to affect employment;
f. The extent to which the proposed merger would be likely to affect the ability of small undertakings to gain access to or to be competitive in any market;
g. The extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets; and
h. 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.

The government went a step further and developed guidelines to enhance transparency and predictability in the merger evaluation and enforcement process. The guidelines were developed to assist and provide

[328] Ibid.
[329] S 43(2) of the Competition Act, 2010 (as amended), Cap 504 of the Laws of Kenya.

clear criteria in relation to the Public Interest Test in merger evaluations.[330] Given the extensive nature of the Public Interest Test and the possibility of different interpretations or misrepresentations, the guidelines strengthen the accountability of the Competition Authority.[331] The guidelines emphasise the importance of promoting and sustaining employment by ensuring that no substantial job losses occur as a result of a merger, ensuring the salvaging of failing and dormant firms and to ensure the encouragement of mergers of media firms that would enhance production of local content and programmes and in consequence support youth employment.[332] Two further objectives of the guidelines are to: 'ensure the vulnerable members of the society are not affected as a result of mergers' and 'the guidelines are predicated upon the need for media plurality. This is aimed at ensuring that no media house should and will be allowed, through mergers, to control and manipulate the media output to the detriment of public interest'.[333]

Besides the Public Interest Test, the guidelines provide for a Substantial Lessening of Competition (SLC).[334] The SLC criteria are aimed at economic efficiency and addressing consumer benefit concerns, looking at the extent to which a merger is likely to prevent or lessen Competition or restrict output, lead to acquisition or strengthening of dominant positions in a market and lessen efficiency in production and distribution.[335] While the Public Interest Test, examines the extent to which a merger would affect employment; the SLC criteria touch on the ability of small and medium enterprises to access or to compete in any market; the ability of national industries to compete in international markets and a particular industrial sector; and the salvaging of dormant and failing firms.[336]

The guidelines indicate that in the evaluation of a proposed merger, the Competition authority must consider the efficiency argument against significant job losses and ask whether the efficiencies are reasonable in the light of the countervailing public interest to conserve jobs.[337] A party may satisfy the first leg of the merger enquiry by showing that the employment loss is connected to an efficiency claim;

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[330] Competition Authority of Kenya, 'Public interest test in merger determinations', par 1, p. 1, *www.cak.go.ke,* accessed on 30 December 2018.

[331] Ibid.
[332] Supra note 28 at 67.
[333] Supra note 354 at par 8, p.2.
[334] Ibid.
[335] Ibid.
[336] Ibid.
[337] Ibid at par 15, p. 3

however, this on its own is not enough as the efficiency gain is considered to be isolated from the stakeholders' interest.[338]

In addition, the guidelines specify that merger efficiencies will always be balanced against the impact of the job losses on public interest.[339] When evaluating the effect of a merger on an industrial sector, the focus of the Competition Authority will be to ensure stability and growth.[340] This means that, specifically where dominance is inevitable, when a firm acquires another firm and there is no other credible acquirer, the merger may be allowed on condition that the acquiring firm proceeds to manufacture the products of the firm acquired, for a specific period based on the viability of the merged firm's manufacturing ability.[341] The guidelines specifically provide that the Competition authority must always determine on a case-by-case basis the remedies in relation to public interest and thereafter, if necessary impose rational, proportionate and enforceable conditions.[342]

VI. CONTRASTING ANGOLA, KENYA AND THE SOUTH AFRICAN COMPETITION LAWS

In line with Angola and South Africa's Competition laws, Kenya's Competition Law not only protects and upholds the interests of consumers, but explicitly seeks to promote and safeguard the national economy from unfair and misleading market conduct. In this regard, Competition law scholar Professor Eleanor Fox argues that, 'until the disempowered fully participate in the economy, the efficiency potential of the nation is not likely to be realised'.[343] It follows that Competition laws should be personalised to fit particular environments, especially those of developing countries where part of the population is disempowered and denied access to the economy. In addition, her view the Competition laws of a country should be tailored according to its historical antecedents carries weight.[344] The Angolan and Kenyan Competition Acts have taken a similar approach to that of South Africa on

[338] Ibid, at 16, p.3
[339] Ibid.
[340] Ibid.
[341] Ibid at par 17, p.3.
[342] Ibid at par 24, p.3.
[343] Eleanor M. Fox and Michal S. Gal Drafting Competition Law for Developing Jurisdictions: Learning from Experience, (2014) Law & Economics Research Paper Series Working Paper NO. 14-11, *New York University School of Law*. Available at *http://ssm.com/abstract+2425329*
[344] Ibid.

mergers; whilst economic criteria are important, the focus is on including wider public interest objectives, modelled to include grounds based on unique historical backgrounds.

South African authorities have been cautious to approve or disapprove mergers on public interest grounds. Similarly, section 46(2) of the Kenyan Competition Act, and Article 16(4) of the Angolan Competition Act specifically require Competition authorities to consider the effect a merger would have on public interest grounds, namely with regard to a particular industrial sector or region, employment, the capacity of small industries to gain access to or to be competitive in any market and the ability of national industries to compete in international markets.[345]

As has been pointed out in this chapter, it is settled in South African case law that the Competition and public interest tests for the approval of a merger are equal in status. This confirms the intention of the legislature that a merger must be justified on both Competition and public interest grounds to be approved. In merger evaluations the pro-competitive gains are interlinked with non-competition objectives. Furthermore, healthy Competition will not be enhanced by disregarding the interest of the public. Competition law particularly in developing countries, where authorities still face the struggle of achieving credibility and legitimacy, has been used to target and promote certain public interest considerations, namely: employment and a greater spread of ownership ie ensuring an economy is all-inclusive. In the next chapter the deficiencies of mergers are examined, with consideration for different types of mergers and the potential problems they present, particularly in the Angolan economy. This chapter ends with the words of Lewis: 'Developing country agencies have a long way to go in achieving this credibility and it will not be achieved by standing aloof from those issues that most engage popular sentiment.'[346]

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[345] S 46(2)(k) of the Competition Act, 2010 (as amended), Cap 504 of the Laws of Kenya and art 16(5) of the Angolan Competition Law, regulation.

[346] Lewis D, International Competition Network, 'The role of public interest in merger evaluation', September 2002, Naples, 28-29, 2.

CHAPTER 4

POTENTIAL DEFICIENCIES OF MERGERS: HORIZONTAL & VERTICAL

I. INTRODUCTION

As discussed above, by introducing legislation aimed at regulating Competition, Angolan policymakers recognised both the need to implement the law and its capacity to benefit the Angolan market, particularly with the reallocation of capital and labour to the most efficient and high value producers.[347] Scholars assert that mergers and acquisitions bring down costs and expand output, thereby presenting benefits not only for the merging entities but also the broader society.[348] When balancing the traditional purpose of Competition Law − which is to promote and maintain Competition by regulating anti-competitive conduct of firms while ensuring consumer welfare is maintained − with the economic or commercial objective of firms, which is wealth maximisation, it should be noted that not all mergers provide consumers with the expected benefit of lower prices and greater output. Instead, some mergers have the underlying objective of constraining Competition by inflating prices and reducing output, presenting a threat to Competition and essentially reducing consumer welfare.

This chapter examines the possible challenges mergers present to a market, in particular the Angolan market, by drawing on the experience of South Africa as well as other jurisdictions. Horizontal, vertical or conglomerate mergers are first distinguished, and then the weaknesses of both horizontal and vertical mergers are examined and the concerns each type of merger raises are outlined, while presenting statistical methods to assist the process of merger evaluation. The chapter touches on various scholarly arguments and schools of thought to establish the type of merger that presents the greatest peril for an economy and ends by examining the key amendments proposed by the Competition Amendment Bill, specifically the provision for mergers.

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[347] Ohanian, L. 'Another Too Big to Fail Firm' (2018) *Forbes* available at *https://www.forbes.com/2010/05/11/airlines-merger-economy-opinions-contributors-lee-ohanian.html#6eebcb222f1f* Published on 11/05/2010, accessed on 13 October 2018.
[348] Ibid.

II. MERGER CONTROL

The second significant area of Competition regulation is merger control. A merger may raise Competition concerns given its ability to enable a merged entity to increase market share and consequently intensify market power which enhances a firm's ability to manipulate the price of an item by manipulating the level of supply, demand or both.[349] The amalgamation of two or more firms will more often than not result in a concentration.[350] However, dominance and concentration in itself is not anti-competitive; it is how the firms behave when they are dominant or in a concentrated market that raises concern. A concentrated market can often lead to cartel conduct. Despite some of the disadvantages of mergers, which will be discussed extensively below, a merger has the potential to maximise welfare by facilitating improved efficiency in the allocation of scarce resources.[351] However, this notion must be treated with caution. Both Angolan and the South African Competition regulation direct Competition authorities to consider whether the proposed merger has the potential to substantially prevent or lessen Competition.[352] The justification of 'technological, efficiency or pro-competitive gain' only becomes relevant if the proposed transaction would have a deleterious impact on Competition, in which case it would balance the harmful impact it has on Competition.[353]

Parties to a merger transaction are required to provide the Competition authorities with the rationale of the transaction, which often point to the commercial or economic benefits, namely it results in economies of scale, facilitating entry into global markets and it helps companies grow and expand their business activities, equipping them to face Competition at both national and international level with competitive prices. Mergers can also often be a pretext for firms struggling to survive, and lastly, aid in increasing the market share of merged entities. Notwithstanding these benefits, mergers also have the potential to limit Competition or form monopolies. Thus, the clear rationale for merger regulation is to determine whether a merger will have a detrimental impact on Competition, requiring authorities to trade off the possible benefits a merger could bring.[354]

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[349] Ibid.
[350] Ibid.
[351] Coppola, M 'Consideration of Public Interest Factors in Antitrust Merger Control' . (2016) CPI 24, available at *https://www.Competitionpolicyinternational.com/consideration-of-public-interest-factors-in- antitrust-merger-control/,* accessed on 13 March 2016.
[352] Supra note 24 s12A (1) and note 28.
[353] Supra note 48 at art 16.
[354] Meyer, N, *Competition Law's Inclusion of Public Interest Considerations in Mergers and Beyond: A Potential Paradox?* LLM Dissertation, University of Cape Town.
https://open.uct.ac.za/bitstream/handle/11427/25461/thesis_law_2017_meyer_nicholas.pdf?sequence=1, accessed on 10 October 2018.

Further, economic theory suggests that the existence of anti-competitive market conduct and poor economic performance is heightened in markets that exhibit certain structural characteristics, such as few participants, high entry barriers, customers with little bargaining power and lack of innovation.[355] Accordingly, by proactively regulating the structure of the economy and markets, merger regulation prevents the development of market structures that have the potential to enhance a firm's ability to abuse unilateral or cooperative market power at the expense of consumers.[356]

III. USING MERGERS TO ACHIEVE A STRATEGIC OBJECTIVE

A merger may be classified as horizontal, vertical or conglomerate. As detailed in the previous chapter, jurisdictions classify mergers in various ways; for example the South African Competition Act classifies mergers as small, intermediate and large, while the Angolan Competition law does not classify or 'label' the type of merger, but makes a distinction based on the market share a firm will acquire as a result of the merger.[357]

Generally, a firm obtains a stronger competitive advantage as a result of a merger.[358] Whether it is a vertical or horizontal, intermediate or large merger, firms often use it as a strategy to achieve specific strategic objectives that ultimately stimulate growth. However, this may have a detrimental effect on Competition. Consequently, the effect a merger (horizontal or vertical) has on Competition has been a topic of much debate and is a question many experts still grapple with. The question whether a vertical or horizontal merger presents a higher threat to Competition will differ according to each jurisdiction and economic theory This paper presents the argument that the expected horizontal merger wave in Angola will certainly demand a higher degree of attention by Competition authorities.

IV. HORIZONTAL MERGERS

A horizontal merger is defined as a merger between firms operating at the same level of the supply chain, selling substitutable products in the same geographic area.[359] In layperson's terms, it is a merger

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[355] Ibid.
[356] Ibid.
[357] Supra note 24.
[358] Ian Linton 'What is a Horizontal Merger and a Vertical Merger?' (2018) available at *https://smallbusiness.chron.com/horizontal-merger-vertical-merger-60981.html*, accessed on 29 September 2018.
[359] Supra note 6 at 177.

between direct competitors. The primary objective of a horizontal merger lies in the increase of revenue.[360] By offering existing customers an additional range of products, a company is able to eliminate the time and effort required to develop a new product choice.[361] In the event that one of the merging firms has distribution facilities or customers in areas not currently covered, a horizontal merger will enable the firm to diversify the geographical territories it commonly covers. Firms often prefer a horizontal merger as it eliminates or reduces the threat of Competition in the market. This in turn, gives the merged entity a competitive advantage of having greater resources and market share, allowing the firm to achieve economies of scale and become a price maker rather than a price taker.[362] Since, this enhances leverage for companies, with the removal or reduction of one competitor, market power of the merging firms is elevated (by some degree), which leads to market concentration which could potentially prejudice consumer welfare as a result of the control a firm will have over pricing.[363] In the European Union, this type of merger is considered the most hazardous for Competition.[364] Section 39 of the European Commission Merger Guidelines, sets out just how problematic horizontal mergers can be for Competition authorities.

> A merger in a concentrated market may significantly impede effective Competition, through the creation or the strengthening of a collective dominant position because it increases the likelihood that firms are able to coordinate their behavior in this way and raise prices even without entering into an agreement . . . within the meaning of Art. 81.[365]

The increase in prices and the decline in service levels raises serious Competition concerns as a result of the 'unilateral effects'[366] – where the factors that limit a firm's ability to abuse market power are absent, which has the effect of intensifying unilateral market power.[367] Various scholars have analysed the pattern of mergers and find that mergers induce some structural changes in the market by reducing the level of participants, making firms more symmetric.[368] These changes have an impact on the 'collusive equilibria', enabling collusion among firms by making collusion easier, more stable and effective.[369]

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[360] Ibid.
[361] Ibid.
[362] Ibid.
[363] Supra note 57.
[364] Miguel de la Mano, 'Coordinated Effects Section 22 of the EU Competition Policy', available at *http://ec.europa.eu/dgs/Competition/economist/delamano2.pdf,* accessed on the 28 September 2018.
[365] Ibid.
[366] Ibid.
[367] Ibid.
[368] Ibid.
[369] Business Source Premier *'*Merger Control: Why is Competition Law relevant to M&A?*',* (2018) *International Financial Law Review*. Accessed on 5 May 2018.

This is commonly referred to as the 'coordinated' effects of a merger.[370] The United States understands the coordinated effect of mergers as being 'composed of actions by a group of firms that is profitable for each of them only as a result of the accommodating reactions of the others. This behavior includes tacit or express collusion . . .'[371]

a. 'Too Big To Fail' or 'Too Small To Succeed'

With the above in mind, the announcement by the Angolan National Bank of the increase in the minimum share capital has spurred much speculation about the possibility of a wave of mergers in Angola in the near future, particularly within the banking sector.[372] However, little has been said of the risks that such horizontal mergers and acquisitions may represent to the Angolan market.[373] Jose de Lima Massano, Governor of the Angolan National Bank, recently told the Financial Times newspaper when asked about the minimum share capital notice (02/2018), that he was sceptical about the ability of the existing 30 odd banks, to adjust to meet the minimum requisite share capital without merging with other stronger financial institutions.[374] In the result, financial institutions in Angola currently face the dilemma of remaining 'too small to succeed' or paradoxically 'too big to fail'.

Mergers, ultimately resulting in the concentration of firms trying to meet the financial target of the Angolan government, which is to achieve a financial system that is robust and secure, can present problems.[375] The notion of a firm becoming 'too big to fail' occurs where an entity is so vital to the country's economy that, it simply cannot be allowed to fail.[376] The potential failure thereof, would lead the country into a crisis, requiring an urgent intervention by the state to bail out the firm, while safeguarding the interests of various parties.[377] When an entity becomes 'too big' not just in dimension but also in the influence it holds on a country's economy, the possibility of failure or collapse of such a firm becomes unthinkable, given the devastating effect its collapse would have.

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[370] Ibid.
[371] Ibid.
[372] Supra note 148.
[373] Rosemary Peavler,'What are Horizontal and Vertical mergers?', (updated 2018) *the balance small business*, available at *https://www.thebalancesmb.com/horizontal-and-vertical-mergers-explained-392846,* accessed on the 22 October 2018.
[374] Speaking to the British newspaper *Financial Times*, as part of participation in the FT Africa Summit, recently held in London under the theme "Africa means business" *https://www.manifexto.com/beta/leitor/343335#.W82I6kdS3M8,* accessed on 22 October 2018.
[375] Ibid.
[376] Andrew Ross Sorkin, *Too Big to Fail: The inside Story of How Wall Street and Washington fought to save the Financial system−and Themselves* (2010) Viking.
[377] Ibid.

Such discussion demands mention of the historic collapse of Lehman Brothers in 2008.[378] It serves as a prototype of how weak supervision can lead to firms (in particular banks) taking undue risks. In the Lehman Brothers case, the U.S government, Treasury, regulatory and supervisory bodies were faced with having to provide a large cash infusion for the failing firm.[379] The cash infusion (bailout) failed to materialise and the banking giant collapsed with catastrophic global consequences.[380] The case raises public policy issues and demonstrates the urgent need for effective and efficient supervisory oversight and strengthened coordination in ensuring the long-term success of a firm.[381] It is often overlooked that the case serves as a reminder of the potential risks of sector concentration. It was not merely an accounting scandal.

The collapse of the Lehman Brothers is attributed to various toxic factors and it would be wrong to pinpoint concentration or mergers. However, recent market trends demonstrate that once a business starts to acquire or increase its market share by way of mergers and acquisitions, it becomes hard to change course.[382] If Angolan banks are not effectively regulated and supervised, horizontal mergers will lead to the absorption of smaller banks, resulting in the creation of new financial conglomerates[383] A huge new bank could join the platoon of 'too big to fail' institutions.[384] When firms are too big to fail they are more inclined to take undue risks on the assumption that they will be rescued – too important to the financial system to disappear. While this might mean that the broader economy ekes some benefits from mergers, it may well be bad news for consumers.[385]

A study conducted by Deloitte Angola on the Governance of Angolan Banking highlighted the challenges as well as the opportunities in the banking sector.[386] According to the analysis, Angola has

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[378] Ryback William, 'Lehman Brothers: Too Big to Fail?' *Toronto Leadership Centre*, available at *http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/J3-LehmanBrothersCaseStudy.pdf* accessed on the 10 October 2018.
[379] Neil Mohindra, 'The failure of "too big to fail"', (2017) *The Financial Post,* available at *https://business.financialpost.com/opinion/the-failure-of-too-big-to-fail* accessed on 22 October 2018.
[380] Ibid.
[381] Ibid.
[382] Ibid.
[383] Ibid.
[384] Ronald Orol 'For Banks, Era of 'Too Big to Fail' is also Era of 'Too Small to Succeed' (2016) *The Street*, available at *https://www.thestreet.com/story/13538771/1/for-banks-era-of-too-big-to-fail-is-also-era-of-too-small-to-succeed.html* accessed on 15/10/2018.
[385] Ibid.
[386] Deloitte Angola, 'Banca em Análise 2018, Governance da Banca Angolana Desafios e Oportunidades' available at https://www2.deloitte.com/content/dam/Deloitte/ao/Documents/financial services/Bancaemanalise/Deloitte_BA2018_Completo-Digital-v09.pdf, accessed on 15 October 2018.

28 licensed and active commercial banks.[387] This figure is alarming, in light of Angola's relatively small population of 28 million. With only 9 million open active bank accounts, the fact that Angolans commonly have more than one bank account admits the assumption that there are only 4.5 million people actively engaged in the banking sector.[388] The market is currently dominated by the five largest banks (by asset size) commanding 67 per cent of the market share.[389] With the minimum capital notice by the Central Bank one can safely speculate that more mergers (horizontal) will be undertaken by investment and commercial banks. Mergers will certainly be the best alternative to allow financial institutions to stay afloat and meet the share capital requirement. Small cap banks will look to merge with or be acquired by large cap banks, consequently heightening further the market power held by the top five banks.[390] The expected mergers will require effective oversight by the Competition authority to ensure that the combined banks do not become 'too big to fail',[391] or alternatively the consolidation does not result in loss of Competition, or ultimately hold the country's economy hostage.

In addition to the above, horizontal mergers have the potential to cause significant impediments to effective Competition. Concentration results in the acquisition of a competitor in the same line of business, thereby attaining market power which may result in the merged entity eliminating a potential market entrant.[392] To counter this, Competition authorities would have to consider various analytical steps like assessing the market shares held against the level of concentration, as well as the competitive importance of the two entities.[393] As has been pointed out in chapter 2, market share does not equate to market power. They are separate concepts, the examination whereof will provide useful information on the impediments that could arise as a result of concentration, and will also provide insight into the potencies of companies and possible changes that are likely to occur.[394] To demonstrate the above, consultants Simon Pilsbury and Andrew Meaney, in a discussion paper for the OECD, focused on the

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[387] Ibid.
[388] The World Bank Data, ' Commercial bank branches per (100,000 adults)' available at https://data.worldbank.org/indicator/FB.CBK.BRCH.P5?end=2016&locations=AO&start=2004&view=chart accessed on 15 October 2018.
[389] Supra note 421.
[390] Supra note 148.
[391] Maria Fabiana Penas and Haluk Inal, 'Too Big to Fail Gains in Bank Mergers' (2001) *University of Maryland* Available at *https://pdfs.semanticscholar.org/41c3/0fbffd86ba128f4478b10bb593462f88e271.pdf,* accessed on 15 October 2018.
[392]Pilsbury, S. and A. Meaney 'Are Horizontal Mergers and Vertical Integration a Problem?' , (2009) OECD/ITF Joint Transport Research Centre Discussion Papers, No. 2009/04, OECD Publishing, Paris, available at *https://doi.org/10.1787/226635086758,* accessed 12 October 2018.
[393] Ibid.
[394] Ibid.

challenges of horizontal and vertical mergers.[395] They found that determining the market share entities would hold upon a merger must be based on the assumption that the shares were equivalent to the sum of their pre-merger market shares.[396] As per the Regulation of the Angolan Competition Law, a firm is presumed dominant where its market share equals or exceeds 50 per cent.[397] By that measure, the provisions of Article 6 serve as a guideline to determine whether a financial institution, after the horizontal merger, holds a market share equivalent to or exceeds 50 per cent, which would therefore mean that the entity occupies a dominant market position.[398] Horizontal mergers that lead to market share below 25 per cent are assumed not to present significant impediments to Competition, and are not subject to approval.[399]

b. The Herfindahl Hirschmann Index

A commonly employed method of analysing concentration as a result of horizontal mergers is the Herfindahl Hirschmann Index (HHI).[400] This statistical measure assists in determining and attempting to understand the level of Competition between firms that operate in the same product or geographic markets, and how the distribution of market share occurs across firms.[401] Calculating the square of each market share value of all firms in a particular market provides a clear and precise insight into whether the market is competitive, or highly concentrated.[402] This enables the process of evaluating potential merger issues and whether or not to approve the merger to take place. The HHI was

[395] Ibid.
[396] Ibid.
[397] Supra note 48.
[398] Ibid.
[399] Ibid.
[400] HHI was developed independently by the economists A.O. Hirschman (in 1945) and O.C. Herfindahl (in 1950). Hirschman presented the index in his book, *National Power and the Structure of Foreign Trade* (Berkeley: University of California Press, 1945). Herfindahl's index was presented in his unpublished doctoral dissertation (1950), 'Concentration in the U.S. Steel Industry' *Columbia University*.
[401] Stephen A. Rhoades, *The Herfindahl-Hirschman Index,* (1993)The Board's Division of Research and Statistics, March 1993, page 188, available at *https://fraser.stlouisfed.org/files/docs/publications/FRB/pages/1990-1994/33101_1990-1994.pdf* accessed on 25 October 2018.
[402] Ibid.

used by the U.S. Federal Reserve as the primary step when analysing how bank mergers affect Competition and whether it was likely that post-merger market structures could surpass concentration levels.[403] The HHI is an expedient tool which Competition regulators (particularly in Angola) could use during the expected merger wave. However, it unlocks only one element in the intricate process of analysing the competitive effects of horizontal mergers. Other factors such as the public interest test provide a more comprehensive analysis, as discussed in chapter 3.

V. NON-HORIZONTAL MERGERS (VERTICAL MERGERS)

A vertical (or non-horizontal merger as referred to in certain jurisdictions) entails the integration of manufacturers and distributors who do not operate in the same market, also known as parties in a vertical relationship.[404] Non-horizontal mergers raise concerns different to horizontal mergers. Vertical mergers may allow a company to upstage its competitors by constraining their access to important supplies.[405] This may weaken competitors and raise the barrier to entry.[406] Furthermore, it has the effect of improving efficiency along the supply chain, allowing firms to coordinate on the optimal outcome or to 'internalize' the externality that they impose on each other, thus increasing profits for the acquiring firm. It is argued that consumers also stand to benefit from vertical mergers.[407]

While horizontal mergers might require attention, vertical mergers have been a pervasive concern for economists and Competition Law experts. In certain circumstances non-horizontal mergers may be a significant impediment to effective Competition.[408] Some economists assert that vertical mergers never give rise to Competition concerns, as the efficiencies gained from vertical integration far outweigh any potential anti-competitive effects, whilst others believe that vertical mergers present a higher risk to Competition.[409] As will be critically discussed below, more recent South African merger cases seem to support the latter view as most of the mergers that have been prohibited have been vertical.[410]

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[403] Ibid.
[404] Yongmin Chen On Vertical Mergers and their Competitive Effects'(2001) 32(4) *Rand Journal of Economics*.
[405] Supra note 6.
[406] Ian Linton, What is a Horizontal Merger and a Vertical Merger?' (revised 2018)' available at *https://smallbusiness.chron.com/horizontal-merger-vertical-merger-60981.html,* accessed on 29 September 2018.
[407] Ibid.
[408] Ibid.
[409] Supra note 6.
[410] Ibid at 177.

In the early 1950s through to the 1970s, the Traditional Market-Foreclosure Theory suggested that vertical mergers sabotage Competition by denying competitors access to suppliers or buyers.[411] The *loci classici* for this view can be found in two fundamental US Competition Law cases, the *Brown Shoe Co.* case and the *Ford Motor co*. case.[412] Foreclosure theory asserts that non-horizontal mergers can diminish Competition and welfare where merging parties are able to foreclose access to inputs or customers from their actual or potential rivals.[413] This has the effect of weakening the rival's revenues or incentive to compete. In addition, the potential for collusion is another reason for ongoing concern about non-horizontal mergers.[414]

Grant Saggers explains that generally, after a non-horizontal merger and if a firm gains an appreciable level of market power, there is a tendency for the upstream division of the merged firm to 'self-deal' ie limit sales by electing to trade solely with its own downstream division, also known as 'input foreclosure'.[415] Downstream rivals enjoy a competitive disadvantage, with a stagnant market share, depreciation of market power and low margin on sales.[416] The presence of a strong force of buyers or the possibility of foreclosed firms obtaining alternative inputs reduces the power of the merged entity to raise the costs of downstream rivals.[417] Whatever the case, Competition regulators should be concerned when the foreclosed product is a critical component for the downstream market.[418]

The effects of a non-horizontal mergers may also extend to removing an important customer from its upstream rival's customer base.[419] This is referred to as 'customer foreclosure'.[420] Customer foreclosure is attained when, as a result of a vertical merger, the number of downstream firms is reduced, limiting the number of downstream firms upstream rivals usually supply to.[421] This may have the effect of weakening Competition; however, a strong customer base impedes the occurrence of

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411 Yongmin Chen 'On vertical mergers and their competitive effects' (2001) 32: 4, *RAND Journal of Economics* Winter 667-685.
412 *Brown Shoe Co. v. United States,* 370 US 294 (1962), and *Ford Motor Co. v. United States*, 286 F. Supp. 407 (E.D. Mich. 1968).
413 Saggers G. 'Vertical Mergers − The European Guidelines on Non-Horizontal Mergers and Their Relevance for South Africa' (2008) 11(3) *South African Journal of Economic and Management Sciences* *http://www.scielo.org.za/pdf/sajems/v11n3/02.pdf,* accessed on 26 October 2018.
414 Ibid.
415 Ibid.
416 Roirdan and Salop 'Evaluating Vertical Mergers: a Post Chicago Approach' (1995) *Anti-Trust Law Journal* 513.
417 Supra note 452.
418 Ibid.
419 Ibid.
420 Ibid.
421 Ibid.

customer foreclosure if suppliers are able to operate at efficient levels and expand to alternative markets in which to sell their products while incurring the lowest costs.[422]

As mentioned above, non-horizontal mergers facilitate the prospects for collusion. Foreclosure permits participants to remove other participants in the market by augmenting barriers.[423] This improves the symmetry between players, who are able to exchange sensitive yet 'unique' information between the upstream or downstream conspirator. This occurs if the vertically merged firm's division in the downstream market is used as a channel whereby sensitive information may be exchanged or to actively monitor the behaviour of the other conspirators.[424] To determine the likelihood of collusion and whether the integration raises Competition concern, Riordan and Salop suggest the 'but for test', asking whether, but for the merger the 'unique' information could not have been obtained in the absence of the merger.[425] Ascertaining that competitors are coordinating the prices or information obtained by the vertically integrated firm's downstream division must be projectable to the prices offered to other downstream firms.[426] Riordan and Salop explain further that if the products sold by the upstream firms are targeted specifically to the buyer's specifications, then the prices offered to the downstream division by other suppliers cannot be compared when monitoring adherence.[427] In essence, as the products offered by upstream firms become more homogeneous, the projectability of information is heightened.[428] 'Coordination by competitors to restrict output and raise prices is the very antithesis of Competition' (Verouden).[429]

As a disclaimer, the EU non-horizontal merger guidelines start of by emphasising that 'non-horizontal mergers pose no threat to effective Competition unless the merged entity has a significant degree of market power (which does not necessarily amount to dominance)'.[430] This establishes that although the degree of market power held by a firm is important, it is not decisive, and one should not conclude that vertical mergers impede effective Competition solely based on the degree of market power

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[422] Ibid.
[423] Ibid at 254.
[424] Ibid.
[425] Supra note 455.
[426] Ibid.
[427] Ibid.
[428] Ibid.
[429] Ibid.
[430] Dr. Verouden V. 'Control of Non-horizontal Merger in the EU' (2007) OECD RCC Merger Workshop available at *http://ec.europa.eu/dgs/Competition/economist/verouden_budapest_2008_en.pdf,* accessed on 26 October 2018.

a firm holds. The guidelines raise three salient questions that should be asked when determining the anti-competitiveness of vertical mergers namely:[431]

1. Does the merged entity have the ability to foreclose?
2. Does the merged entity have the incentive to foreclose?
3. Would foreclosure have a significant detrimental effect on Competition?

A tangible concern exists if the aforementioned questions are answered in the affirmative; such a deleterious impact on Competition would result in foreclosure. The US guidelines on non-horizontal mergers attempted to provide some direction to the theories and framework analysis on non-horizontal mergers. The guidelines published in 1984 are outdated and deceptively modest.[432] The more recent publication of guidelines by the European Union, although they also have shortfalls, have become an essential reference for practitioners in both developing and developed jurisdictions. Likewise, they will certainly offer Angolan Competition authorities better benchmark advice than the American predecessor.[433]

VI. SOUTH AFRICA'S EXPERIENCE WITH VERTICAL MERGERS

Although some economists advocate that vertical mergers never raise Competition issues and that the efficiencies resulting from vertical mergers far outweigh the anticompetitive effects, mergers of this nature do however, have the potential to diminish Competition.[434] The Post-Chicago School of Thought, holds the view that although vertical mergers present fewer threats to Competition and generate larger pro-competitive gains, authorities should still approach mergers of this nature with great caution as the potential for anti-competitive effects remain.[435] In support of this view, Advocate Unterhalter in the Case of *Mondi Limited v Kohler Cores and Tube*s, submitted that,

> Anti-trust law in general adopts the approach that cooperation among firms in a vertical relationship holds the potential for greater efficiency than does cooperation among

[431] Supra note 455.
[432] The United States Department of Justice 'Non-horizontal Merger Guidelines' (1984) available at *https://www.justice.gov/atr/non-horizontal-merger-guidelines,* accessed on 27 October 2018.
[433] Ibid.
[434] Collen Evans Kgapane *A Comparison of Merger Regulation in South Africa and Comesa* (2015) LLM thesis, University of Pretoria, 16.
[435] Supra note 452.

> horizontal competitors. As vertical mergers often do not raise a significant likelihood of consumer harm, it is unnecessary in most cases to assess the efficiency benefits of a specific proposed merger to evaluate the net competitive impact thereof.[436]

Given the potential vertical mergers have to diminish the essential purpose of the South African Competition Act, which is the promotion and enhancement of market entry of smaller businesses and in particular of previously disadvantaged people, the South African Competition authorities have been very critical or suspicious of non-horizontal mergers.[437] Consequently, of the few mergers that have been prohibited in South Africa, most have been of a vertical nature.[438] The case of *Mondi Limited v Kohler Cores and Tubes* is particularly noteworthy; although it is but one of the many non-horizontal merger decisions made by the South African Competition Tribunal, the case is important as it highlights the complexities surrounding non-horizontal mergers. The idiosyncrasy of the case provided South African authorities with the opportunity to set a precedent for the evaluation of vertical mergers and the potential for anti-competitiveness.[439]

An attempt by an international supplier of paper, Mondi Limited, (Mondi) to merge with its downstream customer Kohler Cores and Tubes ("KC&T) was prohibited by the Tribunal in May 2002.[440] Relying on the HHI method as well as the structural features of the market, the Tribunal noted that only Mondi and Kohler possessed a significant amount of market power, and as a result the merger of both these entities would aid collusion and cement harm to Competition.[441] The proposed merger would facilitate the flow of 'unique' price information between upstream suppliers, removing the only maverick buyer capable of impeding upstream collusion. By adopting the market foreclosure perspective, the Tribunal found that the proposed merger strengthened the potential for the merging entity to 'self-deal', which would place non-integrated downstream firms in a position of dependence.[442] In addition the Tribunal found that Sappi (a domestic paper supplier with significant number of markets) would be able to adopt the traits of a monopolist and dictate prices.[443] Furthermore, the Tribunal assessed the potential for customer foreclosure and found that the acquisition of KC&T would remove

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[436] Ibid at paragraph 39.
[437] Supra note 24.
[438] Supra note 483.
[439] Ibid.
[440] Supra note 256.
[441] Ibid at paragraph 86.
[442] Supra 452.
[443] Supra note 490.

potential entrants to the upstream market,[444] especially as KC&T was the only firm capable of attracting internationally supplied core-board.

The failure by the merging party to present satisfactory evidence of sufficient pro-competitive efficiency gains as well as the factors stated above led the Tribunal to conclude that the anti-competitive effects of the proposed merger exceeded any pro-competitive gains.[445] The Tribunal concluded that the non-horizontal merger would 'substantially prevent or lessen Competition in both the upstream and downstream markets through exclusionary foreclosure and through facilitating collusion'. An appeal to the Competition Appeal Court failed[446]

VII. CONGLOMERATES

By contrast, a 'conglomerate', covers all other types of mergers that are neither horizontal nor vertical in nature. It may be identified as transactions between parties that have no apparent economic relationship.[447] This is beyond the scope of the research therefore will not be addressed in much detail.

VIII. EFFICIENCY AS A RATIONALE FOR MERGERS

The phrase 'unless the firm concerned can show technological, efficiency or other pro-competitive gains' recurs in the Competition Law of both Angola and South Africa, demonstrating the intention of the legislators to lay down that the only way to counteract the negative effects of anti-competitive conduct is through efficiency.[448] Neuhoff et al suggest that the evaluation of a merger becomes ambiguous if a merger has the effect of increasing or improving efficiency of the merging firms; efficiency gains in the form of a price decrease will outweigh the effect of the rise in market power.[449] Considering that mergers increase market power, 'mergers which do not entail efficiency gains hurt consumers and society at large'.[450]

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[444] Ibid.
[445] Ibid.
[446] Supra note 450 at paragraph 100.
[447] Supra note 6.
[448] Supra note 24 and note 28.
[449] Ibid.
[450] Ibid.

The inquiry into the anti-competitiveness of a merger does not end when the Competition authorities conclude that the proposed transaction is likely to substantially prevent or lessen Competition in the market.[451] The final step is to consider whether there is an efficiency defence that stems from the (horizontal or non-horizontal) merger which potentially outweighs the negative impact the transaction has on Competition.[452] The onus rests on the merging firms to provide detailed and quantifiable information on the existence and adequacy of any claimed efficiencies.[453] The decision in the case of *Tongaat-Hulett Group* provides an example of what constitutes efficiency gains as contemplated in the Competition Act.[454] The Tribunal asset forth factors which provide useful insight into the issue of efficiency gains, holding:

> An efficiency gain is one that evidences some new products or processes that will flow from the merger of the two companies, or that intensifies new markets that will be penetrated in consequence of the merger, markets that neither firm on their own would be have been capable of entering, or that significantly enhances the intensity with which productive capacity is utilized.

IX. THE SOUTH AFRICAN COMPETITION AMENDMENT BILL

The South African economy, is characterised by unusually high levels of concentration, in part due to strategic barriers to entry created by incumbents as well as low rates of business formation and as a result of mergers and acquisitions.[455] In response to this, the proposed amendments contained in the Competition Amendment Bill are intended to address the structural challenges in the South African economy, particularly concentration and the racially-skewed ownership of firms.[456] The amendment is necessary as the existing Act does not enable the Competition Commission or the Tribunal to address concentration, but only collusion and market abuse. The Amendment Bill is envisioned to ensure evidence-based inquiry into and explicit scrutiny of concentration when mergers are considered; prosecution of abuses of dominance, and market inquiries to be undertaken by the Competition

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[451] Supra note 42.
[452] Ibid.
[453] Ibid at 194.
[454] *Tongaat-Hulett Group Limited and Transvaal Suiker Beperk Middenen Ontwikkeling (Pty) Ltd / Senteeko (Edms) Bpk / New Komati Sugar Miller's Partnership TSB Bestuursdienste* (83/LM/Jul00) [2000] ZACT 47 (27 November 2000).
[455] Ministry of Economic Development Republic of South Africa, (2017). 'Background Note on Competition Amendment Bill'
[456] Ibid.

authorities.[457] The amendments would permit the Competition authorities to undertake far-reaching and targeted interventions to address concentration and scrutinise the racially-skewed spread of ownership of the South African economy. They are aimed at creating more opportunities so as to advance the transformation of ownership in the economy and improve policy coherence and promote institutional and procedural efficiency.[458] In order to give effect to the above, the following changes to the Act were identified, namely:

i) The provisions of the Act that prohibit collusion, abuse of dominance and price discrimination should be strengthened.
ii) A more intensive consideration of these features in merger proceedings is required. This includes addressing the phenomenon of creeping concentration and preventing coordination among horizontal competitors through a common shareholder.
iii) Special attention must be given to the impact of anti-competitive conduct on small businesses and on firms owned or controlled by historically disadvantaged persons.
iv) The Commission must be empowered to investigate and analyse the impact of decisions made by it, the Tribunal and the CAC in mergers, enforcement proceedings and market inquiries.
v) The market inquiry process must be boosted to provide for outcomes that can address structural features in the light of evidence-based analysis.

In relation to mergers, the Bill proposes the following key amendments:

1) Even when the Commission and Competition Tribunal conclude that a merger does not or will not substantially prevent or lessen Competition, they must still consider the public interest issues relating to the merger.
2) The Bill introduces additional factors for the Competition authorities to consider when assessing a merger such as:
    - the extent of shareholding in another firm in related markets;
    - the extent to which a party is related to another firm in related markets (i.e. through common members or directors); and
    - any mergers engaged in by a party for such period as may be stipulated by the Commission.

[457] Ibid.
[458] Ibid.

(These provisions are aimed at addressing the concerns around creeping concentration, and the erection and maintenance of strategic barriers to entry. The idea of this amendment is to see whether mergers are in fact exacerbating concentration.)

3) The Bill introduces additional public interest considerations such as:
    - the ability of small businesses to effectively enter into, participate in and expand within the market; and
    - the promotion of a greater spread of ownership.
4) The Amendment Bill empowers the Commission or Tribunal to make any appropriate decision regarding any condition relating to a merger.
5) The Bill now introduces a provision that empowers the President to constitute a Committee comprised of Ministers and officials, to intervene in respect of a merger where the acquiring firm is foreign, and the merger has the potential to adversely affect the country's national security interests.

Although this provision has raised concern, it is common in a number of other countries.

X. CONCLUSION

A number of theoretical frameworks, guidelines, the Competition Act and some of the decisions taken by the Tribunal have been considered in this chapter. It is evident that whether a merger is horizontal or vertical, a merger may present a problem, particularly in developing jurisdictions. Long-existing anti-competitive dynamics and complex economic environment of a market will only intensify the anti-competitive effects of mergers. As suggested by Saggers, a way to overcome this problem is for Competition authorities to conduct highly exhaustive investigations into the dynamics of the market, which will ensure adequately comprehensive decisions.[459] This would require Competition authorities to invest greater time and resources in evaluating vertical mergers. However, the established methods and guidelines will provide useful reference with which to inform and formalise future investigations and analyses of mergers in Angola. The following chapter will conclude the dissertation by considering in detail the South African Competition Amendment Bill, evaluating specifically the proposed changes to

[459] Supra note 49

the merger provisions, while at the same time providing the Angolan Competition authorities with possible recommendations.

CHAPTER 5

I. CONLUSION & RECOMMEDATIONS

The South African Competition regime is a valuable point of reference for the Angolan Competition regime, imposing innovative conditions that give effect to the twin needs of enabling Competition and promoting the explicit public interest goals set out in the Competition Act. The South African Competition authorities have been successful in tackling Competition issues; both the Competition Commission and the Competition Tribunal have investigated many mergers, and exposed and terminated several South African cartels and other harmful anti-competitive practices.[460] The experience of the South African Competition regime clearly shows that achieving the objectives set out in the preamble of both the Angolan as well as South African Competition laws cannot be achieved through the law alone. Legislation is one of many complementary policy instruments necessary in achieving these objectives. Competition policy should be broadly framed, embracing both traditional Competition issues, as well transformative public interest goals.[461] Examples include a number of prominent cases such as the Walmart acquisition of Massmart: where the Competition Appeal Court ordered:

i. A local supplier development fund to be set up, capitalised with R200 million by the merging parties, to promote smaller businesses to become part of its supply chain; and

ii. Reinstatement of workers retrenched in anticipation of likely retrenchments; and

iii. Protection of the collective bargaining arrangements that had been in place prior to the merger.

Another merger was the AB InBev's acquisition of SAB Miller, in which the Court approved the merger subject to extensive public interest conditions, including:

i. A commitment not to retrench any employee involuntarily as a result of the merger;

ii. The retention of aggregate employment levels at the same level for five years as pertained at the date of the merger;

[460] Supra note 516.
[461] Ibid.

iii. Support for small businesses and emerging farmers through a R1 billion supplier development fund;

iv. Support for the local procurement of inputs, including an active programme to support domestic farmers (with a target of 2 600 new employees and 800 new farmers) that would help to turn South Africa from a net importer of beer inputs to a net exporter of value-added beer inputs; and

v. A requirement to divest of certain operations owned by the target firm in South Africa.

Lastly, the merger of three bottling plants of Coca-Cola and the subsequent change in ownership of the controlling share in the company was accompanied by binding commitments to open up company-sponsored display unit space to competitors, as well as extensive employment and small business development conditions, including the attainment of a 30% black-economic empowerment ownership target in the SA operations within a defined period.

In an article written by an Executive Director of BODIVA − Angola's securities exchange − Akiules Neto emphasises his conviction that true economic activity occurs when the market and economic platform are inviting and sufficiently competitive.[462] In simple terms, this means that the market is able to offer return (of profit) to entrepreneurs. However, for this to materialise, it is vital that countries focus on improving the 12 pillars identified in the Global Competitiveness Index.[463] In achieving this, a combined effort by the state, the business community, and the civil society is crucial, with no overlap, and with each entity assuming its designated role and focusing its resources and efforts on promoting and improving competitiveness factors.

Further, viable, inclusive economic growth requires innovation which is inevitably stultified by markets that are highly concentrated,[464] impacting negatively on a viable competitive process and impeding the enhancement of welfare.[465] With the changes, by way of amendment to the Competition Act, to the South African Competition regime, it is clear that regimes should follow the lead by

[462]Ibid.
[463] Ibid.
[464] Ministry of Economic Development Republic of South Africa, 'Background Note on Competition Amendment Bill' (2017).
[465] Ibid.

recognising the need to enhance scrutiny of the causes of concentration as well as the need to develop measures to lessen concentration in markets.[466]

As envisaged in the South African Competition Amendment Bill, it is recommended that merger evaluation, should be conducted on both Competition and public interest grounds. Articles 16(3)(a-s) of the Angolan Regulations of Competition Law lists the factors Competition authorities must consider when evaluating a merger; however the factors listed fail to take into account the possibility of collusion between competitors through common shareholding and overlapping ownership structures. Thus it would be vital for the Competition regime to closely scrutinise ownership structures and make the disclosure of the relationship of parties in a merger proceeding mandatory. This would ensure that the market is protected from creeping concentration and the erection and maintenance of strategic barriers to entry.

In addition, it is recommended that Angola consider installing an alternative body or authority besides the Competition Regulator, responsible for the application of the Competition Law. Such a Competition Commission or Regulator would have investigative and prosecutorial authority, and be responsible for investigating complaints regarding anti-competitive conduct. In this respect, the lack of a Competition Tribunal will certainly provide challenges for the Competition Authority, particularly when adjudicating cases or enforcing its decisions as well as for parties who would wish to appeal against a decision of the Commission.

These measures are essential to realising the transformative vision of economic empowerment for all, in particular those individuals who have been excluded or previously disadvantaged. Although the South African and Angolan jurisdictions have distinct historical backgrounds, people of both countries were subjected to discriminatory practices which resulted in excessive concentrations of ownership and control in the national economy. Inadequate restraints or control against anti-competitive practices has limited the full and free participation of all Angolans in the economy. Thus, it is crucial that the Angolan Competition regime address this state of affairs. As stated in the South African Constitution:

> Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination, may be taken.

[466] Ibid.

Given the high unemployment rate and the state of the Angolan economy in general, public interest issues should take prominence. Particularly in developing countries, public interest consideration should not be ignored; their inclusion will improve the business environment in Angola and allow the country to attain the objectives set in the preamble (*supra*). The aims should be to achieve an efficient, competitive economic environment, balance the interests of workers, owners and consumers and to focus on development which benefits all Angolans.

As has been emphasised throughout this paper, merger regulation attempts to proactively regulate the structure of the economy and markets in order to ensure that markets function optimally. For this reason, it is important that merger evaluation process in Angola be effective and efficient in order to ensure that the Angolan economy functions free from anti-competitive conduct. As expressed by Akiules Neto, Competition is the base factor of efficiency and competitiveness of the economy. Thus the effective enforcement of the Angolan Competition law will be crucial to ensure the positive impact of privatisation on Competition in the economy. Recent experience, both at national and international level, demonstrates that a private monopoly has a more pernicious effect than a public monopoly.

The Angolan legislature has adopted a dynamic approach in the regulation of Competition, adapting the law to the reality of the local jurisdiction and avoiding a mere 'import-export' of international best practices and material on Competition. This approach and drive for actual and meaningful change lays the groundwork for Competition Law to thrive, promoting the traditional Competition goals set forth in the Act. The delay in introducing a Competition regime has afforded the Angolan legislature the opportunity to examine the precedents of other regimes in developing and developed jurisdictions.

While Angola is currently in the process of setting up a Competition Commission, and although Angolan law relies heavily on the decisions or precedents of its former colonial leader, Portugal, there is value to be had in the study of experience within Africa as a point of reference, particularly when neighbouring African countries are leading the way in the that field of law. Lastly, the proposed amendments to the South African Competition Act show that there is always room for improvement. The suggestions or recommendations made throughout this dissertation with reference to South Africa are by no means an indication that Angola should simply adopt the South African approach. Angolan authorities may rely on the experience of the South African Competition regime as a point of reference, and then tailor the application of Competition Law to the intrinsic reality of the Angolan jurisdiction.

To use the words of the Tribunal in the Walmart case: ‘You don’t have to make the world a better place you just don’t have to make it worse’.

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