

CML 6006W MASTERS IN COMMERCIAL LAW

DISSERTATION TITLE:

PUBLIC INTEREST AND MERGER CONTROLS IN SOUTH AFRICA
The role of public interest in merger evaluations and how efficiency-driven
principles are reconciled with public interest considerations

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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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TABLE OF CONTENTS

1. INTRODUCTION.....	3
2. WHAT IS COMPETITION POLICY.....	6
3. BACKGROUND AND HISTORY OF THE SOUTH AFRICAN COMPETITION ACT.....	10
4. MERGER CONTROL.....	15
4.1 DEFINITION OF A MERGER.....	16
4.2 WHAT CONSTITUTES CONTROL.....	16
5. EVALUATION OF A MERGER.....	20
6. DISCUSSION OF THE PUBLIC INTEREST CRITERIA IN MERGER EVALUATION.....	22
7. CASES INVOLVING PUBLIC INTEREST GROUNDS LISTED IN SECTION 12.....	28
7.1 The effect on a particular sector or region.....	28
7.2 The effect of the merger on employment.....	29
7.3 The effects of a merger on the ability of small business, or firms controlled or owned by historically disadvantaged persons to become competitive.....	34
7.4 The effect of the merger on the ability of national industries to compete in international markets.....	37
8. CRITICISM CONCERNING THE INCLUSION OF PUBLIC INTEREST ISSUES IN THE COMPETITION ACT.....	40
9. SUPPORT FOR THE INCLUSION OF PUBLIC INTEREST OBJECTIVES IN THE ACT.....	48
10. RECONCILING TRADITIONAL COMPETITION POLICY GOALS AND PUBLIC INTEREST CONSIDERATIONS IN MERGER EVALUATION.....	53
11. CONCLUSION.....	58
12. BIBLIOGRAPHY.....	61

1. INTRODUCTION

This paper looks at the development of South Africa's new Competition policy. Major focus falls on public interest objectives explicitly included in the Competition Act¹ (the Act) and decisions in merger review, where public interest issues have materially impacted decisions by competition authorities. The aim of the paper is to examine the role of public interest in merger evaluations and to note how traditional competition goals are reconciled with public interest considerations.

The ultimate goal of any competition policy is to enhance consumer welfare. Achieving this goal has been a major challenge for Competition authorities in South Africa and other developing countries. In South Africa, this may be attributed to the fact that the South African Competition Act's policy purpose begins with economic efficiency, but extends much further. The Acts' main purpose, 'to promote and maintain competition'², is supplemented by 6 (six) particular sets of goals. The first of these is the efficiency, adaptability and development of the economy.³ The second goal, competitive prices and choices for consumers⁴, recognizes the foundation of an economic-based policy in concerns about consumer welfare. The other four sets of policy goals in section 2⁵, represent other public interest issues: employment and social and economic welfare, opportunities to participate in world markets (and to recognize competition in South Africa), equitable opportunities for small and medium-sized enterprises to participate in the economy, and increase the ownership stakes of historically disadvantaged persons.

The public interest goals are restated in section 12 (3) as issues that have to be considered by the commissioner or tribunal when evaluating mergers.

¹ Republic of South Africa Competition Act 89 of 1998 (as amended)

² *ibid* s2

³ *ibid* s2(a)

⁴ *ibid* s2(b)

⁵ *ibid* s2(c-f)

Furthermore the law's preamble restates the law's political motivations. They include policies of equity and distribution as well as efficiency and they clearly incorporate goals and ideals for competition law. The preamble characterizes the problem that the law seeks to address; that past practices, including apartheid, led to excessive concentration of ownership and control, inadequate restraints on anti-competitive trade practices, and unjust restrictions on full and free participation in the economy. The preamble states that the economy must be open to greater ownership by a great number of South Africans. All these are the concerns about equity and justice. Consistently with the important focus on equity, the preamble describes restrictions on free competition as "unjust," rather than as "inefficient." The preamble does recognize the problem of inefficiency and waste but connects these two with equity, in noting not only that a credible competition law and institutions to administer it are necessary for an efficient economy, but also that as efficient, competitive economic environment, balancing the interest of workers, owners and consumers and focus on development, will benefit all South Africans.

The above structure has created difficulties for competition authorities. In most cases, they have to engage in a balancing act. They have to find a balance between public interest concerns and competition concerns as they evaluate transactions. Finding this kind of balance has led to the perception that competition concerns and public interest concerns carry equal weighting, as seen in the preamble of the Act and in some of the objectives stated in the Act.

Related to the perception is that in some of the cases public interest issues may take precedence and some of the cases perhaps competition concerns may actually take precedence. It is assumed that it is decided on a case-by-case basis.

In this paper I will therefore look at merger controls in South Africa and the effect public interest has had in practice concerning mergers. In looking at this effect, I will also try and dispel the perception that competition concerns and public interest concerns carry equal weighting. I will show that in most cases the Tribunal and the Competition Appeal Court (CAC) have developed a more coherent position for public interest in the context of the Act. The authorities have accepted that within the context of mergers, section 12A provides for a two-stage analysis. The first phase involves the

determination by the Tribunal whether the Merger is likely to substantially lessen or prevent competition, having regard to the evidence and arguments presented before it by the parties. The enquiry is concluded by assessing the factors set out in section 12A(2). The Tribunal can only move to the second stage that is looking at public interest grounds after it has made a competition finding. However, in some cases, the Tribunal has been inconsistent in applying this approach.⁶ They have been criticized for bringing public interest into the primary enquiry. Lack of consistency may therefore be a challenge for the Legislature to clarify the position for public interest in the context of the Act.

On a much broader note, I will look at the purpose of a competition policy and the perceived difficulties in reconciling a competition analysis with a public interest analysis. In order to illustrate this, the paper discusses the reasoning behind the incorporation of certain national and political objectives in South Africa's competition law by setting out the background and history, which preceded the current legislation. Thereafter, the purpose and objectives of competition laws in particular merger controls.

This is followed by the manner in which public interest provisions are applied in practice. A critical analysis of Section 12A is provided. Section 12A(1) does not make it clear that public interest must also be considered if a merger is found to substantially restrict competition but is justified on the basis that pro-competitive effects outweigh those negative effects in terms of section 12A(1)(a)(i).⁷ Section 12A(1)(b) commences with the words "otherwise". This creates the impression that it will come into play only if the merger does not substantially prevent competition.⁸ Public interest test, unlike the efficiency defence, possesses a "janusfaced" quality.⁹ It can save a merger that would have been rejected on pure competition criteria, but it may also lead to the rejection of a merger, which is not anti-competitive.¹⁰ The discussion thereafter, draws on the possibility of prohibiting a merger that is not anti-

⁶ *Medicross Healthcare Group (Pty) Ltd and Prime Cure Holdings (Pty) Ltd (11/LM/Mar05) [2005] ZACT 66*

⁷ Lawrence Reyburn: Philip Sutherland and Katherine Kemp, *Competition law of South Africa* Durban: Butterworths, 2006 at p10-92

⁸ *Ibid*

⁹ *Ibid*

¹⁰ *Ibid*

competitive, or approves a merger that is anti-competitive, on public interest grounds. Specific cases are cited as examples to illustrate the point. The paper concludes that despite the incorporation of non-competition factors in South Africa, there is a substantial degree of convergence with international anti-trust, that is, reconciliation is achievable.

2. What is competition policy?

Competition policy is a regulatory tool, which seeks to address market failures by maintaining or creating the foundations for effective functioning markets.¹¹ In essence, competition policy aims to emulate free market conditions by creating regulatory institutions and procedures or laws that will ensure equal opportunities for all business to stimulate economic efficiency and protect consumers.¹²

It is agreed that the principal purpose of competition law is to structure the market for goods and services by imposition of controls designed to promote competition within the market.¹³ Some people contend that this is and must be the sole object; others, say that this should be the only object of its value to be preserved, because the law becomes less effective when its true purpose is mixed up with other objectives.¹⁴ They argue that non-competition objectives should not fall within the ambit of competition policy. Objectives like promotion of employment are seen as matters for microeconomic, not competition policy.¹⁵ It is argued that employment promotion, could, if elevated sufficiently highly in a competition policy judicial decision result in reduced efficiency and prices and products which competitive markets might shun.¹⁶ Similarly, to adopt a policy to advance the (undefined) social welfare of South Africans might result in policies with outcomes contrary to those aimed under section 2 (a) and (b) of the Competition Act, 1998. All the goals provided for in section 2 (c) to (f) are also said not to be matters for competition policy and would have negative

¹¹ *Minette Neuhoff A Practical guide to South African Competition Policy and Law LexisNexis Butterworths Durban 2006 p11*

¹² *Ibid*

¹³ *Martin Brassey Competition law 1st ed 2002 Juta p1*

¹⁴ *ibid*

¹⁵ *Reekie Duncan W. The Competition Act, 1998: An Economic Perspective. The South African journal of Economics vol. 67:2 1999 p257*

¹⁶ *ibid*

results in trying to achieve the traditional competition goals.¹⁷ The competition policy is seen as an inappropriate forum to address these goals.

However, others criticize the above views as being altogether too simplistic. They argue that the imperatives of the market, important as they are, must nevertheless be placed in the balance with other social objectives in order to produce results that give proper effect to the complex matrix of needs, aspirations and ideals operating in society at the time.¹⁸ Given the South African history of racial discrimination it is therefore not surprising to find non-competition objectives incorporated in the Competition Act.

South Africa is an example of a developing country, which has specific public interest goals incorporated in its competition legislation. This model of competition policy envisages Competition Authorities engaging in the balancing of various interests, namely those of workers and consumers when adjudicating competition matters.

Here the regulation of competition is considered an instrument for economic development. However, the non-competition objectives are seen as secondary to the traditional objectives of competition law, that is, 'to promote the efficiency, adaptability and development of the economy' and 'to provide consumers with competitive prices'.¹⁹ These goals top the section and this emphasises their importance.

The principal goal of the Act is to promote consumer welfare and the resulting improvement in the welfare of society as a whole. This was also emphasised in *Natal Association of Pharmaceutical Wholesalers & Others v Glaxo Wellcome (Pty) Ltd & others*²⁰ where it was held that "the main purpose of the South African Competition Act is to promote and maintain competition". The competition authorities have so far treated the competition goals with great respect and we can confidently predict that they will continue to reign superior in future judgements and rulings.

¹⁷ *ibid*

¹⁸ Martin Brassey *Competition law* 1st ed 2002 Juta p1

¹⁹ Section 2 (a) and (b) Competition Act 89 of 1998

²⁰ CT68/IR/Jun00, 28.8.2000 at para 64

The political history as it is seen in most developing countries will always influence a competition policy. It is clear that economic theories cannot be the sole determinant of policies adopted in any given period. Nevertheless, economic theories will always be an important source of influence on the adjudication of competition laws.

Some developed countries do also realise that competition is not an end in itself. For example, section 1.1 of the Canadian Competition Act states:

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

The Act thus recognizes the encouragement of competition as a means of achieving more fundamental goals: efficiency, expansion of world markets, protection of the opportunity for small business to compete, and protection of competitive prices and product choices.²¹ It is said that in many cases, the fundamental goals described in section 1.1 of the Canadian Competition Act are not in conflict.²² Promoting competition by preventing the monopolization of markets through inefficient exclusionary practices, for example leads to both efficiency and competitive prices.²³ But potential conflicts among the goals can arise. One potential conflict arise where small businesses would be harmed if a dominant firm were allowed to engage in efficiency-enhancing practices that disadvantage small firms, or if two large in a market were allowed to engage in a cost saving merger that lowered prices, thus harming small firms competing in the same market.²⁴ Policy analysts rarely argue that the efficiency goal of competition policy should be compromised so that small firms can survive.²⁵

²¹ Michael Trebilcock, Ralph A Winter, Paul Collins and Edward M. Iacobucci “*The law of Economics in Canadian Competition Policy*” University of Toronto Press Incorporated 2002 at p39

²² *ibid*

²³ *ibid*

²⁴ *Ibid* p40

²⁵ Michael Trebilcock, Ralph A Winter, Paul Collins and Edward M. Iacobucci “*The law of Economics in Canadian Competition Policy*” University of Toronto Press Incorporated 2002 p40

When looking at the South African Competition Act, a more contentious conflict arises between the fundamental goals of maximizing efficiency and achieving the most competitive prices for consumers. This conflict is most apparent in merger cases, where an acquisition may involve both significant gains in efficiency in the form of cost savings and an increase in prices because of a lessening of competition.²⁶ In most cases the South African Competition Authorities resolved such potential conflict in favour of efficiency. However, this is a debate that is beyond the scope of this paper.

It is argued that the basis in economics for favouring efficiency is sound.²⁷ Competition policy is said to be appropriately viewed as an instrument to maximize efficiency or the 'total surplus' gained by market participants.²⁸ The use of competition policy to achieve not merely efficiency but an equitable distribution of wealth is therefore criticised. It is argued that it would result in an excessively complex and non-transparent set of legal rules that would be both uncertain and arbitrary – being determined by opinions or values of whoever was sitting on the tribunal in a particular case.²⁹ It is believed that government should look at other avenues which are much better suited for the goal of distributing income equitably.

It is common cause that under ideal conditions, competitive markets promote efficiency. This is seen as the most fundamental result of economics and the basis for competition policy.³⁰ Actual markets may depart from competitive or ideal conditions for many reasons. The market outcome can be distorted by various externalities. It is therefore argued that the task competition law sets itself is ambitious.³¹ Competition cannot effectively provide a system of recompense for externalities. Externalities are described as the costs saved or benefits achieved by exploiting the goods, services or opportunities that are, by necessity or tradition, common property.³² Discharging waste in a common river is an externality; taking the benefit of communal lighting

²⁶ *ibid*

²⁷ *ibid*

²⁸ *ibid*

²⁹ *ibid*

³⁰ *ibid*

³¹ Martin Brassey *Competition law* 1st ed 2002 Juta p 6

³² *ibid*

without paying for it is a positive externality.³³ Allocating these costs, which are in a sense beyond the market, is beyond the scope of a regulatory system devoted to the promotion of competition within the market.³⁴ It is therefore argued that such a system, moreover, can say nothing and do nothing about the social desirability of its outcomes: it cannot, for instance, interfere to prevent the rich from getting what the poor might better use.³⁵ Classic competition law does not take into account any of these shortcomings. It is therefore submitted that including social and political goals in the competition policy should not be viewed in the negative.

3. BACKGROUND AND HISTORY OF THE SOUTH AFRICAN COMPETITION ACT

Competition law in its modern form originated in North America.³⁶ By 1985, most industrialised Western countries had adopted rules or laws aimed at restricting potential harmful or so-called anti-competitive conduct similar to those of the United States of America.³⁷

In South Africa, competition was regulated since 1979 by the Maintenance and Promotion of Competition Act 96 of 1979. The 1979 Act allowed the adjudication of Competition matters by the then Competition Board, which was appointed by the Minister of Trade and Industry and which could investigate matters at its own initiative. The 1979 Act contained no explicit prohibitions, and while certain practices such as resale price maintenance, collusion on prices, trading terms and market division, as well as bid rigging, were subsequently declared outright illegal, there was no compulsory enforcement action or merger control.

The South African Competition policy was less developed because of South Africa's apartheid legacy, which led to its marginalisation from the global economy. In addition to the global marginalisation, domestic policy further compounded the competition challenges. High levels of concentration, both in ownership and control,

³³ *ibid*

³⁴ *ibid*

³⁵ *ibid*

³⁶ Minette Neuhoff *A Practical guide to South African Competition Policy and Law* LexisNexis Butterworths 2006 P12

³⁷ *ibid*

and conglomerate organisation structures coupled with strong vertical integration were typical of many industries and markets.³⁸ Many firms had diversified their activities, investing in a variety of unrelated economic activities, and focused, almost exclusively, on the domestic markets, as a result of economic sanctions.³⁹

The South African economy was characterised by a dual structure with a modern, almost-exclusively white formal economy, and a less-developed, almost exclusively black, predominantly informal economy.⁴⁰ This dichotomous economic structure, and the apartheid laws, which prevented black South Africans from participating in certain economic activities and geographic areas, meant that participation in the formal economy, and opportunities to develop formal and growing businesses, was limited for black South Africans.⁴¹ By contrast the formal economy developed markets and industries that became in many cases highly concentrated with effective economic barriers to entry, in addition to the racial regulatory barriers of the apartheid regime.⁴²

When the African national Congress (ANC) came into power in 1994, it recognised that these challenges would have to be addressed by a range of economic and social policies, and in addition to substantive focus on trade and industrial policies for transformation of the economy. The competition policy became the policy option for the regulation and development of enterprise to enhance economic opportunities and participation in the formal economy of black South Africans.⁴³

The ANC mapped out an extensive policy reform programme in the early 1990s, prior to the first democratic elections in 1994. The 1992 Policy Guidelines for a Democratic South Africa provided an overview of the policy revamp envisaged. As part of this process, an assessment of South Africa's competition challenges and the efficacy of the existing competition law, was undertaken. A complementary initiative

³⁸ Trudi Hartzenberg "Competition Policy and Enterprise Development: The Role of Public interest objectives in South Africa's Competition Policy" p6 www.competition-regulation.org.uk/conferences/southafrica04/index.shtml

³⁹ *ibid*

⁴⁰ *ibid*

⁴¹ *ibid*

⁴² *ibid*

⁴³ *Ibid* p7

was a review of South Africa's industrial strategy.⁴⁴ Key focus areas of the industrial strategy project were:

- Markets and ownership structures
- Small and medium enterprises, and the conglomerates
- Technological and institutional capacities
- Human resource development and workplace organisation

Although this investigation into the development of an industrial strategy for South Africa focused narrowly on the manufacturing sector, the issues identified were also relevant to agriculture, mining and the services sectors.⁴⁵ Many of the findings of this project related to competition issues, and in 1995, the new Department of Trade and Industry (DTI) started a three-year programme of consultation with competition experts and a broad range of stakeholders in South Africa to develop a new competition policy.⁴⁶ The product of this extensive exercise was put forward in 1997, as 'DTI's Guidelines for Competition Policy,' intended to stimulate discussion and debate on the role of competition policy in the restructuring of the economy.⁴⁷

Another complementary policy area that enjoyed much attention during the policy reform process was small business development. In 1993/4 an extensive empirical and theoretical study was conducted to identify key constraints to small business development in South Africa. A number of small business support initiatives were developed to actively promote small business development, with the expectation that small business would become an engine of growth and employment creation. These initiatives included financial schemes (loans or credit guarantees), skills support schemes and technology transfer schemes, among others.⁴⁸

The 1997 DTI Competition Guidelines considered the existing competition law of 1979, and found it wanting in a number of respects to address the challenges at hand. The 1979 Maintenance and Promotion of Competition Act did not contain any

⁴⁴ Trudi Hartzenberg "Competition Policy and Enterprise Development: The Role of Public interest objectives in South Africa's Competition Policy" p7 www.competition-regulation.org.uk/conferences/southafrica04/index.shtml

⁴⁵ *ibid*

⁴⁶ *ibid*

⁴⁷ *ibid*

⁴⁸ *ibid*

provisions related to vertical or conglomerate configurations or concentration of ownership. There were no pre-merger notification requirements. The 1979 Act contained no explicit prohibitions, and the final yardstick for decisions was the 'public interest', which was not defined in the Act. The *ad hoc* and inconsistent decisions of the Competition Board were thus not unexpected. The Competition Board was appointed by the Minister of Trade and Industry, and a special court was to hear appeals; but never actually did hear any. A regulation issued by the Minister of Trade and Industry in 1984 declared some practices *per se* unlawful. These included resale price maintenance, horizontal collusion on price, terms or market share and bid rigging. There were, however, no prosecutions despite this regulation.⁴⁹

Effective implementation of a strong competition policy was viewed as an important tool to regulate private enterprise, given that the ANC's policy of nationalisation, which had been espoused prior to its election, had been abandoned, when the new government came to power.⁵⁰

Specific goals of competition policy included the dilution of the high level of concentration of economic power, on the grounds that this was detrimental to balanced economic development. In particular, competition law was to reduce the domination of the economy by a white minority, and to promote greater efficiency of the private sector.⁵¹

After a comprehensive policy process, which included debates within the National Economic Development and Labour Council (NEDLAC), a new competition law, the Competition Act, no 89 of 1998 was promulgated and became effective in September 1999. The Act provides for the establishment of three specific institutions to implement the law; a Competition Commission, a Competition Tribunal and a Competition Appeal Court. The Competition Act incorporates features, which reflect the unique challenges facing South Africa's economic development. It permits and, in certain cases, requires consideration of equity issues such as empowerment,

⁴⁹ www.dti.gov.za

⁵⁰ Trudi Hartzenberg "Competition Policy and Enterprise Development: The Role of Public interest objectives in South Africa's Competition Policy" p8 www.competition-regulation.org.uk/conferences/southafrica04/index.shtml

⁵¹ *ibid*

employment and impact on small and medium enterprises. Enterprise development is thus an important focus for South Africa's new competition policy and law. Although equity considerations are explicitly incorporated into South Africa's competition law, political channels as a means of appealing these issues, are not permitted. There is also no ministerial power to override the decisions of the competition agencies, as there had been previously. The introduction of South Africa's new competition policy and law took place within the broader context of a new industrial policy, a liberalised trade policy and revamped labour legislation in the second half of the 1990s. This was a new era in policy making for economic transformation.

In the Explanatory Memorandum accompanying the Competition Act it is stated that the overriding objective of competition policy is the promotion of competition in order to advance economic efficiency, international competitiveness and adaptability as well as the market access of small, medium and micro-enterprises ("SMMEs"), creation of new employment opportunities and the diversification of ownership in favour of historically disadvantaged South Africans. The equity or non-competition considerations recognise that South Africa's discriminatory past resulted in a skewed distribution of ownership and control, inadequate restraint on anti-competitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans.⁵²

The South African Competition Act draws heavily from developed countries' experience and practices in the area. As a consequence, precedent in jurisdictions such as Canada, Australia and Europe have influenced its content, application and interpretation.⁵³

⁵² Vani Chetty "The Place of Public Interest in South Africa's Competition Legislation: Some implications for international antitrust convergence. www.abanet.org/antitrust/at-committees/at-ic/pdf/spring/05/aba-paper_p5

⁵³ Minette Neuhoff *A Practical guide to South African Competition Policy and Law* LexisNexis Butterworths 2006 P12

4. Merger Control

Merger law differs from other areas of competition policy in that ‘it is prophylactic in nature: rather than attempting to control the exercise or abuse of market power, it seeks to prevent its creation in the first place.’⁵⁴ Under competition law, specific practices are prohibited in advance.⁵⁵ In the case of mergers, *ex-ante* control takes place. In this case enterprises party to a proposed merger or acquisition above a certain threshold are required to give prior notification, upon which competition authorities assess the potential impact of the reduction of competition due to the proposed merger or acquisition.⁵⁶

Competition policy on horizontal mergers is based on the proposition that an increase in concentration in a market can lead to an increase in market power. The consequences of increased market power are higher prices, resulting in inefficiently low market output levels as well as wealth transfers from buyers to sellers.⁵⁷

The link between increased market concentration and greater market power is obvious in the extreme case of a merger of two firms to monopoly in a market with strong barriers to entry.⁵⁸ Monopoly prices exceed duopoly prices. The impact of mergers in more moderately concentrated markets with low barriers to entry is more difficult to assess, and depends upon market conditions.⁵⁹ In a merger case, economic theory provides a framework for bringing evidence to bear on market conditions that affect the impact of the merger.⁶⁰ The competition authorities adopt a framework for investigating mergers. However, as recognized in guidelines, the facts arising in each merger are different and must be assessed on their own merits.

⁵⁴ Michael Trebilcock, Ralph A Winter, Paul Collins and Edward M. Iacobucci “The law of Economics in Canadian Competition Policy” University of Toronto Press Incorporated 2002 at p131

⁵⁵ Maher M. Dabbah *EC and UK Competition Law* Commentrary, Cases and materials. Cambridge University Press 1st ed 2004

⁵⁶ *ibid*

⁵⁷ *ibid*

⁵⁸ *Ibid* 132

⁵⁹ *Ibid* 132

⁶⁰ *ibid*

4.1 Definition of a merger

A merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the other business of another firm.⁶¹ The definition applies to any direct or indirect acquisition of control over a business. It does not require that the business being acquired should belong to a competitor, supplier or customer or other person.⁶² Nor does it stipulate that the acquisition must be of a 'substantial interest' a requirement that had been incorporated from the Canadian Legislation, where it serves the function of the catch-all section now to be found in s 12 (2) (g) of the Act.

The definition covers horizontal, vertical and conglomerate mergers. It also requires there to be a 'business' involved, although that term is not defined in the Act.⁶³ Section 12 (1) (b) states that a merger may be achieved through the purchase or lease of the shares, an interest or the assets of the target firm or by an amalgamation or combination with it. The scope is broad but is necessary to prevent evasion.⁶⁴ It is the acquisition of control that is decisive and s 12 (2) sets out at length, different categories of control. Paragraphs (a) to (f) clearly stipulate conventional forms of control over firms.

4.2 What constitutes control?

What constitutes 'control' was analyzed at length by the Competition Tribunal in the case of *Bulmer SA (Pty) Ltd & Seagram Africa (Pty) Ltd / Distillers Corporation (SA) Lts, Stellenbosch Farmers Winery Group (Pty) Ltd & The Competition Commission*.⁶⁵ The decision was upheld by the Competition Appeal Court.⁶⁶ This transaction involved the acquisition by Distillers of the business of SFW, both of whom had common shareholding 90% of their share capital, namely Rembrandt, KWV and SAB with 30% each. The remaining 10% was held by the public, but not necessary the

⁶¹ Republic of South Africa Competition Act 89 of 1998 (as amended) s12

⁶² Section 12 (1) of the Act, prior to its amendment by the Competition Second Act 39 of 2000, referred to the business of 'a competitor, supplier, customer or other person' which, provided a limited scope of the section.

⁶³ Martin Brassey *Competition law* 1st ed 2002 Juta p 236

⁶⁴ *ibid*

⁶⁵ CT 94 / FN / Nov 00 and 101 / FN / Dec00

⁶⁶ CAC 08 / CAC / May 01, 27.11.2001

same persons. Rembrandt and KWV had combined their holdings through a single company, Rembrandt-KWV Investments, which thus held 60% of the shares in each company. The purchase consideration was payable in new Distillers shares which were to be distributed to the SFW shareholders by a dividend in *spicie*. The end result was one larger single entity the shares of which were held as to 90% by the same persons who held shares in SFW.

The merging parties argued before the commission that the merger was not a 'merger' for the purposes of the Act as there was no change in ultimate control. The Commission agreed and the merger was implemented without notification based on this analysis. Bulmer and Seagrams, two competitors, challenged this result. They contended that the two respondent companies had always been separate and distinct juristic and business competitors and as a consequence, their merger would significantly affect and hamper competition in the liquor industry.

At the Tribunal the question was whether there was an acquisition of control. The Tribunal held that s12 does not purport to define control, but merely circumstances in which a person controls a firm. It does not purport to create an exhaustive list of the circumstances where control exists. This evidenced by the fact that s12(2) does not provide for the simplest of merger transactions contemplated by s12(1)(a), ie the purchase of assets. The Tribunal then stated that s12(2) listed cases of indirect control being covered by s12(1).

The applicants argued that all the elements of s12(1) were satisfied in that Distillers, a person acquired direct control over the business of SFW by way of an asset purchase. Thus there was a merger, which had to be notified. This involved a literal interpretation of the statute, and the respondents argued against such an approach on the basis that it cannot have been the legislature's intention to extend the burden of notifications beyond the mischief for which it was intended to deal. They argued that what the legislature required to be notified were only changes to 'ultimate' control and 'effective control'.

The respondents argued that one must distinguish between the form and substance of control. As a matter of form Distillers assumed control over SWF's business, but

given that they were both controlled by the same shareholders prior to the transaction, and the combined entity will remain so controlled post-transaction, no change in effective control had taken place and therefore there was no merger. They argued that s12(2) listed different instances of ultimate or effective control. Where firms are located in the same economic family a rearrangement between a purchaser and seller within the family does not lead to change of effective control and thus falls outside of s12. Reference was made to cases in the European Union and United States where the single economic entity doctrine was accepted.⁶⁷

However, the single economic entity doctrine is relied on principally in those jurisdictions in assessing restrictive practices, an area of substantive law. The Tribunal was of the view that it had to apply caution in determining whether the doctrine applied to the merger notification, an area of procedural law. The Tribunal stated:

'...A change in direct control presumptively triggers the obligation to notify. However, we recognize that a limited class of transaction exists where the obligation may be negated if there is irrefutable evidence that indirect control remains unaffected. This is a case of firms who form part of a single economic unity, because the change in the direct form of control is illusory and has not altered the substance of control that both antedated and postdates the transaction... The less something looks like a wholly owned parent subsidiary relationship the more cautious we need to be. To put it in another way, the more ambiguous the case for a single economic entity the less scope there is for rebutting the inference that a direct acquisition has led to a change of control.'

The Tribunal concluded that in relation to s12(1):

- the scope to accept argument about a single economic entity as a jurisdictional prerequisite must at this stage of enquiry be limited to the jurisdictional prerequisite must at this stage of enquiry be limited to the clear-cut cases suggested by s 4(5), dealing with restrictive practices within the same economic entity:

⁶⁷ *Vibro Europe BV v Commission of the European Communities* 1996 ECR I 5457 and *Copperweld Corp v Independent Tube Corp* 467 US 757 (1984).

- s12 read as a whole conceives of control as an event-based concept which means that control can be acquired by one person by virtue of one provision of s12(2) while it still resided in another person by virtue of another provision of the section. This does not lead to absurdity, as control is a notion determined both *de jure* and *de facto* and is not always rigidly reposed in one person at any given moment.

The Tribunal then applied this logic to the facts of the case. What appears to have been fatal in this case to the argument of the respondent was that although between them, KWV, Rembrandt and SAB had 90% of the shares, pre- and post-merger, the respondents could not satisfy the Tribunal that there was concerted action between them to indicate that they formed a single controlling mind. They held 30% each. At best for them, the Tribunal held, was that when the three shareholders concurred, they could prevail. *'What they have not demonstrated is some factual or legal framework to indicate that the shareholders act in concert on a regular basis to control the alleged group leading to the conclusion that collectively they constitute a single controlling consciousness.'*

The applicants alleged that the respondents were in fact competitors. They were separate legal entities, controlled by separate boards of directors, had operated separately under separate JSE Listings and had publicly held themselves out to shareholders as being in competitive relationship to the benefit of shareholders.

On the facts the Tribunal concluded that the respondents had not established that a single controller prior to the transaction controlled the two firms. Neither they nor the three common shareholders constituted a single economic entity. Distillers, a person, acquired direct control over the business of another person. Hence a merger had taken place, which the parties were ordered to notify.

The Competition Appeal Court upheld the decision of the Tribunal. The Appeal Court did not decide the issue on whether or not there was change in ultimate control. It analyzed the provisions of chapter 3 of the Act and what they sought to achieve read together with the purposes of the Act. The Court stated:

'The applicable sections of the Act thus provide a clear indication of the purpose of Chapter 3, namely that the transaction which are likely to substantially lessen

*competition should be carefully examined by the competition authorities. This interpretation is supported by the preamble to the Act... Section 2 provides that the purpose of the Act is to promote competition in the Republic. It follows that the Act was designed to ensure that the competition authorities examine the widest possible range of merger transactions to examine whether competition was impaired and this purpose provides a strong pro-pointer in favour of a broad interpretation of the Act.*⁶⁸

The Court did not accept the argument that if there was no change in ultimate control, there was no notifiable merger. This was not mandated by the express wording of s12(1) which made no express provision for the exclusion of transactions between a company and its wholly owned subsidiary from the definition of merger.

'For this reason the purpose of merger control envisages a wide definition of control, so as to allow the relevant competition authorities to examine a wide range of transactions which could result in an alteration of market structure and in particular reduces the level of competition in the relevant market.'

The Appeal Court therefore did not decide the issue on whether or not there was a change in ultimate control. It took a slightly broader approach than the Tribunal. To reach its conclusion, it analysed the provision of Chapter 3 of the Act and what they sought to achieve read together with the purpose of the Act.

5. Evaluation of a merger

Section 12A of the Act⁶⁹ states that, in evaluating a merger, the commissioner has to first consider whether the merger is likely to substantially prevent or lessen competition. Factors considered by the commission are stated in subsection (2), they include;

- the actual and potential level of import in the market;
- the ease of entry into the market, including tariff and regulatory barriers
- the level and trend of concentration, and history of collusion, in the market
- the degree of countervailing power in the market

⁶⁸ Ibid paras 23-24

⁶⁹ Republic of South Africa Competition Act 89 of 1998 (as amended)

- the nature and extent of vertical integration in the market
- whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail, and
- whether the merger will result to the removal of an effective competitor.

If the commission finds that the merger is likely to have an anti-competitive effect, it may still find the merger to be justifiable on the basis (i) of efficiency, or (ii) on the basis of public interest considerations.⁷⁰

Furthermore, s12A(3) provides that when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or Tribunal must consider the effect that the merger will have on-

- (a) a particular industrial sector or region;
- (b) employment
- (c) the ability of small and black business to become competitive, and
- (d) the ability of national industries to compete internationally.

To summarize the section, the merger evaluation process therefore entails the commission or Tribunal to first establish whether the merger is likely to substantially prevent or lessen competition. Second, If decided that merger will lessen competition, then it must be established whether the merger will result in ‘technological, efficiency or other pro-competitive gains’ that will outweigh the anti-competitive effects of the merger. The efficiency test is therefore included as a defence for an anti-competitive merger transaction. Third, irrespective of the outcome of the evaluation of the competition impact of the merger, a public interest test has to be conducted. Even though a merger may not have an adverse effect on competition, it still has to be reviewed on public interest grounds. The public interest test can also work to resurrect a merger that is otherwise found anti-competitive. This test is therefore mandatory in all merger assessments.

⁷⁰ *ibid* S12A(a)

It is this reason that the principle of having explicit public interest goals brings fears that efficiency will be overlooked in favour of equity. However in practice such fears have no basis as authorities take a cautious approach to public interest pleas.

6. Discussion of the Public Interest Criteria in merger evaluation

As seen above, the **public interest** considerations are specifically stated in the Act. If the merger is found to restrict or prevent competition substantially, section 12A(1)(a)(ii) provides that it must be determined whether “the merger can or cannot be justified on substantial **public interest** grounds” listed in the Act. Section 12A(1)(b) also states that competition authorities evaluating the merger must “otherwise determine whether the merger can or cannot be justified on substantial public interest grounds”.

It has been argued that section 12A (1) is not well formulated. Section 12A (1)(a)(ii) and in section 12A(1)(b) both use of the phrase "can or cannot be justified". It was argued that this may create the impression that the merger may be condemned only if it would also be against public interest and that it cannot be approved unless it can be positively justified on public interest grounds, irrespective on whether the merger is pro-competitive or anti-competitive.⁷¹ However, the tribunal in the *Gold Fields*⁷² case rejected this interpretation. It has proposed that the words “can or cannot” were included to indicate that public interest criteria do not always point in the same direction, but that they will have to be weighed up against each other and that a net public interest effect of a merger must be determined.⁷³ Moreover, it has been suggested that the phrase was also included to allow competition authorities to confirm conclusions reached on competition grounds, on the basis of public interest.⁷⁴ Sometimes, competition and net public interest will point in the same direction and, in such cases, competition authorities can utilize public interest to bolster their decisions on competition issues.⁷⁵

⁷¹ Ibid

⁷² *Harmony Gold Mining Co / Gold Fields Ltd* 93 / LM / Nov04 par 31ff

⁷³ Ibid

⁷⁴ Lawrence Reyburn: Philip Sutherland and Katherine Kemp, *Competition law of South Africa* LexisNexus Butterworths, Durban 2006 at p10-93

⁷⁵ Ibid

Section 12A(1) does not make it clear that public interest must also be considered if a merger is found to substantially restrict competition but is justified on the basis that pro-competitive effects outweigh those negative effects in terms of section 12A(1)(a)(i).⁷⁶ Section 12A(1)(b) commences with “otherwise”. This creates the impression that it will come into play only if the merger does not substantially prevent competition.⁷⁷ However, the Tribunal has made it quite clear that public interest issues should also be considered in these situations.

In matter of *Anglo American Holdings Limited /Kumba Resources Limited (Industrial Development Corporation Intervening)*,⁷⁸ the Tribunal held that the use of the word “otherwise” in the Act means that the **public interest** evaluation must be undertaken regardless of the outcome of the overall “**competition**” analysis. In other words, even if the Tribunal found that the merger would not lead to a substantial prevention or lessening of **competition**, this did not mean that the merger should necessarily be approved. It was held that even if the merger would not adversely affect **competition**, such merger could only be approved if the Tribunal was satisfied that in addition to having no anti-competitive effect, no **public interest** grounds exist on which the merger should be prohibited.

So Public interest test, unlike the efficiency defence, possesses a "janusfaced" quality.⁷⁹ It can save a merger that would have been rejected on pure competition criteria, but it may also lead to the rejection of a merger, which is not anti-competitive.⁸⁰ However, competition authorities are unlikely to prohibit a merger that is not anti-competitive, or approve a merger that is anti-competitive, on public interest grounds.⁸¹ Competition law is not directly aimed at protecting any of these interests.⁸² In various cases the Tribunal has decided that:

⁷⁶ *ibid*

⁷⁷ *Ibid*

⁷⁸ 45/LM/Jun02

⁷⁹ Lawrence Reyburn: Philip Sutherland and Katherine Kemp, *Competition law of South Africa* Durban: LexisNexis Butterworths, 2006 at p10-93

⁸⁰ *Ibid*

⁸¹ Lawrence Reyburn: Philip Sutherland and Katherine Kemp, *Competition law of South Africa* Durban: Butterworths, 2006 at p10-93

⁸² *ibid*

*“in many respects our jurisdiction in these areas is secondary, as these other statutes and the institutions that they create, are better placed and resourced to deal directly and effectively with these issues than are we, given that our discretion is described in section 12A(3) at a high level of abstraction and generality”.*⁸³

The Tribunal has however not been consistent in applying the above approach. In *Medicross Healthcare Group (Pty) Ltd and Prime Cure Holdings (Pty) Ltd*⁸⁴ The Tribunal commenced its determination of whether the merger was likely to substantially prevent or lessen competition (s 12A (2)(e) of the Act) with an analysis of the “general state of healthcare provisioning in South Africa the policy objectives of the South African government in the realm of healthcare provision, the mechanisms whereby government intends achieving those objectives and the place and role of the private sector...”⁸⁵

The Tribunal brought the public interest when looking at whether the merger is likely to substantially prevent or lessen competition. Things like mechanisms by which Government intends to achieve its policy objectives and the place and role of the private sector in these objectives are issues, which fall within the purview of Parliament and the Executive; they are not issues that fall within the remit of the competition authorities.

The Tribunal concluded its analysis by stating that:

“ It is our view then, that in this extremely fluid context, the absence of an established and stable regulatory framework for this embryonic market as well as for some related and long-standing markets (for example, pharmaceuticals) demands that we adopt a particularly cautious and circumspect approach to private interventions, such as this merger, that will inevitably impact on the development of the market under consideration. Public interest considerations impinging on the outcome of

⁸³ *Distillers Corporation (SA) Lts, v Stellenbosch Farmers Winery Group (Pty) Ltd* 08/LM/Nov04 par 214; *Industrial Development Corporation of South Africa Ltd v Anglo-American Holdings* 45 / LM / Jun 02 and 46 / LM / June02 of 23/10/2002 par 22; *Anglo American Holdings Ltd / Tepco Petroleum (Pty) Ltd* 66/LM/Jun02 pars 137 – 139; *Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd* 66/LM/Oct01 pars 37-38

⁸⁴ 11/LM/Mar05 [2005] ZACT 66

⁸⁵ *ibid* para 51

interventions in this area- be they interventions by the State, by regulators or by private market participants- are, for unimpeachably good reason unusually intense and this also predisposes us to particular circumspection.”

The Tribunal clearly went against the more established approach. The more coherent position for public interest in the context of mergers is that section 12A provides for a two-stage analysis. The first phase involves the determination by the Tribunal whether the Merger is likely to substantially lessen or prevent competition, having regard to the evidence and arguments presented before it by the parties. The enquiry is concluded by assessing the factors set out in section 12A(2). The Tribunal can only move to the second stage that is looking at public interest grounds after it has made a competition finding.

There is no textual support in the Act for bringing public interest into the primary enquiry. The need to consider public interest grounds compromises a separate and subsequent enquiry to the primary determination, which involves a competition analysis.

The finding of the Tribunal is therefore surprising as stated above that in earlier cases, the Tribunal had held that Competition law is not directly aimed at protecting any other interests. This means that a competition analysis should not be mixed with public interest considerations. Jurisdiction in public interest areas is secondary, as there are other statutes and the institutions that are created, that are better placed and resourced to deal directly and effectively with these issues than they are, given that their discretion is described in section 12A(3) at a high level of abstraction and generality.

On appeal, the CAC⁸⁶ reiterated the approach adopted in previous cases. It held that within the context of mergers, section 12A provides for a two-stage analysis.⁸⁷ The first phase involves the determination by the Tribunal whether the merger is likely to substantially lessen or prevent competition, having regard to the evidence and

⁸⁶ *Medicross Healthcare Group (Pty) Ltd v Prime Cure Holdings (Pty) Ltd (55/CAC/Sep05) [2006] ZACAC 3*

⁸⁷ *ibid* para 19

argument presented before it by the respondent and the parties.⁸⁸ The inquiry is conducted by assessing the factors set out in section 12A(2). The word likely has its prime meaning of “probability” whilst the word “substantially” means materially or considerably in amount or duration.⁸⁹

The court further held that the manner in which the Tribunal justifies its finding on the evidence before it is of critical importance. The court referred to the case of *Mondi Ltd and Kohler Cores and Tubes v Competition*,⁹⁰ it said:

*“ The decision required by section 12A(1) must be made on evidence which is available to the Tribunal. In other words the Tribunal cannot base its decision upon speculation of a kind, which cannot be attributed to any evidential foundation placed before the Tribunal. But the prohibition against unjustified speculation should not be confused with the need for a predictive judgment. The section enjoins the Tribunal to forecast a likely possibility, that is, it makes a predictive judgment, based on evidence which has been placed before it.”*⁹¹

It follows therefore that if the Tribunal finds on the evidence available that the merger is capable of having the anti-competitive effect contemplated, the test would have been satisfied.⁹² However, the Tribunal can only move to the second stage after it has made this finding. In the present case, the Tribunal adopted a “cautious and circumspect” approach based, to a considerable extent, on public interest considerations.⁹³

The court found it extremely difficult to determine the weight, which the Tribunal gave to these public interest grounds in its probabilistic enquiry. The public interest issues should have been of no relevance to the first stage of its enquiry, which needed to examine the evidence relating to the proposed merger’s impact upon competition.⁹⁴ Public interest considerations would have been more appropriately considered during

⁸⁸ *ibid*

⁸⁹ *ibid*

⁹⁰ *Mondi Ltd and Kohler Cores and Tubes v Competition Tribunal [2003] 1 CPLR 25 (CAC) 33*

⁹¹ *Medicross Healthcare Group (Pty) Ltd v Prime Cure Holdings (Pty) Ltd (55/CAC/Sep05) [2006]*

ZACAC 3 par 20

⁹² *ibid* par 21

⁹³ *ibid* par 22

⁹⁴ *ibid* par 23

the second phase in terms of section 12A(3), as the need to consider public interest grounds is a separate and subsequent enquiry to that of the primary determination.⁹⁵

The court then held that in the result, the Tribunal misdirected itself by adopting an incorrect test when assessing the evidence. It failed to engage fully with the probabilistic enquiry of the evidence presented before it. It failed to apply the test set out in section 12A(1) and (2) before considering the public interest grounds.⁹⁶

The *Medicross* case highlights one of the few inconsistencies by the Tribunal in dealing with section 12A. These inconsistencies create the perception that competition considerations and public interest considerations are in equal weighting. That in some cases public interest issues may take precedence and some of the cases perhaps competition concerns may actually take precedence because it is decided on a case-by-case basis

It is submitted that the two-stage inquiry is the right approach, given that public interest is described in section 12A(3) at a high level of abstraction and generality. The two-stage approach therefore creates a more coherent position for public interest in the context of the Act. It is further submitted that to avoid future inconsistencies and perceptions, there is a challenge to the Legislature to clarify the position for public interest in the context of the Act.

However in most cases as we will see in the discussion below, what seems to be the most important effect of the public interest criteria has been that the authorities frequently approve mergers subject to conditions that protect the public interest.⁹⁷ The Tribunal has used the two-stage approach with the primary inquiry being a competition analysis.

⁹⁵ *ibid*

⁹⁶ *ibid*

⁹⁷ *Distillers Corporation (SA) Lts, v Stellenbosch Farmers Winery Group (Pty) Ltd* 08/LM/Feb02 19/03/2003 par 232-238; *Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd* 66/LM/Oct01 pars 58; *Anglo-American Holdings / Kumba Resources Ltd* 46/LM/Jun02 pars 167, 170

7. Cases involving Public interest grounds listed in the Act

7.1 The effect on a particular industrial sector or region

The effect on a particular industrial sector or region must be considered. The use of the word "sector" instead of "market" allows for a wide range of issues to be considered. In *Anglo American Holdings Ltd / Kumba Resources Ltd*,⁹⁸ Anglo alleged that it would invest heavily on the target company, Kumba, after the merger. The Tribunal did not determine under which public interest concern, listed in section 12A(3), this issue had to be considered, but it must be likely that it falls under this rubric.⁹⁹ However it was decided that Anglo did not show that it was either obliged to make the proposed investments or that it was likely to do so.¹⁰⁰ Public interest gains from the merger were not certain enough to warrant consideration absent the imposition of a condition to oblige them to make the investment.¹⁰¹

The term 'industrial sector' should be interpreted widely to include any sector of economic activity¹⁰². In *Nasionale Pers Ltd / Education Investment Corporation Ltd*,¹⁰³ the Tribunal had to evaluate a merger in the education sector. It was noted that education is central to the South African economy and society, and that apartheid has left a scar upon, and massive challenges to, this sector. Education is particular important in addressing the legacy of apartheid, which left a large number of students unprepared for the world of work and so hampered the social and economic development of South Africa. The Tribunal accordingly paid careful attention to the merger to protect the access of prospective students to education. This was clearly regarded as significant in terms of section 12A(3)(a), but it was apparently also considered as part of the analysis in terms of section 12A(1).¹⁰⁴

⁹⁸ 46/LM/Jun02 pars 141-144

⁹⁹ Lawrence Reyburn: Philip Sutherland and Katherine Kemp, *Competition law of South Africa* Durban: Butterworths, 2006 at p10-95

¹⁰⁰ *ibid*

¹⁰¹ *ibid*

¹⁰² *ibid*

¹⁰³ 24/LM/May03 par 23

¹⁰⁴ Lawrence Reyburn: Philip Sutherland and Katherine Kemp, *Competition law of South Africa* Durban: Butterworths, 2006 at p10-96

In *PSG Investment Bank Holdings Ltd / Real Africa Durolink Holdings Ltd*,¹⁰⁵ the Tribunal considered the systematic harm caused by the exit of a bank from the market. Again it was not stated what public interest aspect was relevant here, but it was suggested that it concerned the effect, which the merger would have on a particular "industrial sector".¹⁰⁶ However, a competition authority should be conservative in addressing this aspect as a public interest issue.¹⁰⁷ It is preferable for this types of problems to be regulated by other authorities.¹⁰⁸

7.2 The effect of the merger on Employment

Of the various **public interest** grounds contained in the merger provisions, employment has thus far received a fair deal of consideration. When evaluating the effect of the merger on employment Competition authorities will keep in mind that other regulatory regimes provide more direct protection for employees. They will not be prepared to interfere with regard to wages, collective bargaining and working conditions.¹⁰⁹ The most important rights given to employees by competition laws are procedural. It allows employees to receive timeous information about mergers that often affect them deeply.

To ensure that the effect of a merger on employment is properly analysed by the **Competition** Authorities before approving such merger, input from affected employee groups and trade unions are considered. The Act specifically requires that trade unions and/or employee representatives of affected employees be notified of any proposed mergers that are notifiable to the **Competition** Authorities.¹¹⁰ This is achieved by the requirement that parties to a merger serve a copy of the merger notification made to the **Competition** Authorities on such trade unions or employee representatives, prior to the submission thereof to the **Competition** Authorities. Of importance is the practical reality that a merger cannot be registered with the

¹⁰⁵ 31/LM/May01

¹⁰⁶ Lawrence Reyburn: Philip Sutherland and Katherine Kemp, *Competition law of South Africa* Durban: Butterworths, 2006 at p10-96

¹⁰⁷ *ibid*

¹⁰⁸ *ibid*

¹⁰⁹ *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08?LM/Feb02 19/03/2003 pars 232-238

¹¹⁰ Section 13A of the Competition Act, 1998

Commission until proof is provided to the Commission that service has been affected on trade unions or employees, where applicable.

The involvement of employee organisations may materially affect the implementation of a proposed merger. An illustration is the case of *Unilever PLC /Competition Commission/ CEPPWAWU*.¹¹¹ CEPPWAWU was a trade union representing the interests of chemical, energy, paper, printing, wood and allied workers. In this case the **public interest** concern was the number of potential job losses in **South** Africa, which already has a high unemployment rate.

The Tribunal held that a valid assessment of the effect of the merger on employment could not be conducted on the information made available by the parties. Hence, the Tribunal imposed as a condition for the approval of the merger an obligation on the merging parties to consult the trade unions regarding job losses, as a pre-condition to approving the merger. The Tribunal maintained that the most significant right that the **Competition** Act extended to employees and the unions was the right to timely information with respect to the potential employment impact of a merger. However despite the above, the Tribunal felt that the most powerful channel for unions to address employment related issues arising from a merger was labour specific **legislation**, being the Labour Relations Act, 1995, or private collective bargaining agreements. The Tribunal therefore approved the merger subject to conditions.

What is important to note is that this public interest concern also empowers competition authorities to protect levels of employment through conditions. What is also interesting in this case is that the trade unions also made submissions to the Tribunal regarding **competition** issues. They maintained that the merger should be prohibited entirely because of the high levels of concentration in the market and the dominance of the merging parties. They also argued that the relationship between the major retailers and manufacturers, including the merging parties, was not based on countervailing power in the market, but rather on profitable mutual dependence. Here the trade unions were allowed not only to provide submissions on employment issues, but also on **competition** issues. It was found by the Tribunal ultimately that the

¹¹¹ [2001-2002] CPLR 336 (CT)

implementation of the merger, subject to conditions, was not likely to substantially lessen or prevent **competition**.

A further case involving employment issues was the matter of *DB Investments SA v De Beers Consolidated Mines Limited*.¹¹² Here trade unions representing employees affected by the merger raised concerns in respect of an adverse impact on employment as a result of the merger. This resulted in the merging parties offering an undertaking to the employees that their conditions of employment would not change following the merger. This undertaking was however not made in perpetuity. The Tribunal held that it could not be expected of an employer to provide a perpetual undertaking and accordingly approved the merger.

It is interesting to note how the explicit consideration of **public interest** grounds has influenced the thinking of the **Competition** Authorities on other occasions. The *Nedcor/Stanbic*¹¹³ case, a hostile merger between two banks where Nedcor Limited sought to acquire more than 49% of the shares in Standard Bank Investment Corporation Limited, is an example of the weight given to **public interest** concerns in **South** Africa. The merger between the banks fell to be determined in terms of the Banks Act (since the merger was subject to authorisation by **public** regulation which provision has now been changed). The Minister of Finance was to act after consultation with the **Competition** Authorities. The Minister, in declining approval of the merger in terms of the Banks Act, quoted the **Competition** Commission's recommendations, which he relied on in making his decision as follows:

*“In conclusion, therefore, the Commission is of the view that the proposed transaction should be prohibited on the grounds that it will have significant social costs (primarily) potential abuse of market power in the retail banking market and potential job losses), which represents a net loss to society, which cannot be offset by any potential efficiency gains or **public interest** considerations.”*

¹¹² *DB Investments SA v De Beers Consolidated Mines Limited* [2001-2002] CPLR 172 (CT)

¹¹³ *Standard Bank Investment Corp Ltd & Others v The **Competition** Commission & Others* 2000 (2) SA 797 (SCA)

In the case of *Daun et Cie AG / Kolosus Holdings Ltd*¹¹⁴ trade unions expressed concerns and sought assurances that job losses as a consequence of the merger would be limited. Despite indicating in their initial submission that the worst-case scenario with regard to job losses would be 150, the merging parties acknowledged during the hearing that the ultimate number of job losses could potentially exceed this number. The competition Tribunal imposed a condition, which required the parties to limit the number of job losses to 150 for a year post-merger.

In its decision, the Competition Tribunal emphasised that:

*'...the notification requirements exist precisely to ensure transparent disclosure of all material aspects of the transaction at any early stage. This is intended to allow the competition authorities and, with regard to labour issues, the trade unions to react accordingly. It is improper for the notification forms to be "sugar coated" merely to ensure a favourable reaction, while later in the process, less favourable facts are disclosed, particularly when the number of retrenchments is as significant as in this case.'*¹¹⁵

The Tribunal further stated that they also take cognisance that it is rather easy for companies to disguise merger related retrenchments so that it appears that this will occur absent the merger. They were of the opinion that this practice is strongly discouraged and the importance of transparent and *bona fide* disclosure was once again emphasised.

In the case of *Tiger Brands Ltd / Ashton Canning Company (Pty) Ltd and Others*¹¹⁶ the consequence of the merger was the loss of 45 permanent jobs and 1000 seasonal jobs. For this reason, the Competition Commission sought to impose a condition that, amongst others, provided for the creation of a training fund to the value of R2 million to the benefit of retrenchment workers and other members of the Ashton community. The merging parties considered the amount of R2 million as excessive and instead offered an amount of R250 000 for retraining.

¹¹⁴ *Daun et Cie AG / Kolosus Holdings Ltd* 10/LM/Mar03

¹¹⁵ *ibid*

¹¹⁶ *Tiger Brands Ltd / Ashton Canning Company (Pty) Ltd and Others* 46/LM/May05

The Competition Tribunal approved the merger subject to conditions which included:

- That the merging parties would not retrench more than 45 employees from the aggregate number of employees employed by both firms immediately prior to the order; and
- That the merging parties make available an amount of R2 million for the purpose of training all effected persons.¹¹⁷

The above cases have demonstrated that this public interest concern also empowers competition authorities to protect levels of employment through conditions. On the face of it, it is difficult to distinguish protection of employment levels from interference in other aspects of employment.¹¹⁸ Yet it has been accepted that, “because of the powerful link between direct employment loss and a restructuring initiative like a merger, it is undoubtedly in this area that the legislature intended a role for the competition authorities.¹¹⁹ However, interference by competition authorities, even on this level, is said to create difficulties.¹²⁰ Competition authorities will not merely consider the number of jobs lost through the merger, but they will rather look at the substantial effect, which the merger has on employment.¹²¹ In this regard, the question whether retrenchment packages are sufficient, and whether retrenchments are properly negotiated, will be more important than the number of jobs lost.¹²² Often levels of employment cannot be maintained at pre-merger levels in efficient gains are to be realised.¹²³ Loss of managerial positions is not considered to be as serious as losses of unskilled jobs.¹²⁴ The skills of managerial staff are regarded as more marketable.¹²⁵ It will not be sufficient to show that job losses will occur after the merger. It is necessary to prove that the job losses will be a consequence of the merger.¹²⁶ Competition authorities will be loath to strike down mergers on the basis

¹¹⁷ *ibid*

¹¹⁸ Lawrence Rebyburn: Philip Sutherland and Katherine Kemp, *Competition law of South Africa* Durban: Butterworths, 2006 at p10-96

¹¹⁹ *ibid*

¹²⁰ *ibid*

¹²¹ *ibid*

¹²² *ibid*

¹²³ *ibid*

¹²⁴ *Harmony Gold Mining Co / Gold Fields Ltd 93 / LM/May05* pars 81

¹²⁵ *ibid* par 91

¹²⁶ Lawrence Rebyburn: Philip Sutherland and Katherine Kemp, *Competition law of South Africa* Durban: Butterworths, 2006 at p10-97

that jobs will be lost.¹²⁷ In many case the problem of job losses can be addressed by imposing conditions.

7.3 The effects of a merger on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons to become competitive.

The effects of a merger on the ability of small businesses, firms controlled or owned by historically disadvantaged persons to become competitive must be evaluated. In case of *Anglo American Holdings Ltd and Kumba Resources Ltd*,¹²⁸ the Competition Tribunal approved the merger between Anglo American Plc and Kumba Resources. Anglo (a firm traditionally having a significant standing in the **South African** mining industry) attempted to purchase Kumba, a black economic empowerment company. In this case the Industrial Development Corporation ("IDC"), a statutory body whose primary function is to foster economic development pertaining to black owned businesses, intervened on **public interest** grounds. The IDC argued that the merger would pose a barrier to entry for potential black firms, and therefore impede empowerment in the industry. The IDC recommended that Kumba needed to remain a black economic empowerment controlled firm.

The IDC maintained that in interpreting the provisions in the **Competition** Act pertaining to black economic empowerment, the Tribunal ought to adopt a purposive interpretation and not confine itself to the literal wording of the **Competition** Act. Hence, the IDC argued, that when interpreting the **Competition** Act the Tribunal must respect the objects of promoting a greater spirit of ownership and increasing stakes of historically disadvantaged persons in **South** Africa. They wanted the provision to be interpreted widely in the light of the preamble and section 2. That the apartheid economic system led to excessive concentration in the economy and it was one of the goals of the Act to promote a wider spread of ownership of economic assets by a greater number of South Africans. It was accordingly argued that a merger between Anglo and Kumba, should be prohibited or allowed only subject to

¹²⁷ *ibid*

¹²⁸ Industrial Development Corporation of South Africa Ltd and Anglo American Holdings Ltd Case No.:45/LM/Jun02 and 46/LM/Jun02

conditions to allow for these assets to come into the hands of previously disadvantaged persons.

Anglo, on the other hand, argued that the Tribunal ought not to use a broad interpretation of these provisions. In its argument Anglo submitted that such an interpretation would have dangerous policy consequences, because it would transform the **Competition** Act from an antitrust statute into an unchecked vehicle for redistribution. Anglo argued further that the legislature had not intended to invest such an ambitious power in an un-elected body without clear language in the provisions.

In its finding the Tribunal did not pronounce on which interpretation was the correct one. However, it did say that if the IDC's approach were to be applied, there was no evidence to suggest that the merger would frustrate the **Competition** Act's purpose. The Tribunal found no evidence to suggest that the merger would close the door on an increase of historically disadvantaged persons' ownership in the industry. The Tribunal therefore approved the merger. Furthermore, it was not sufficiently shown that the interests of previously disadvantaged persons in Kumba would not be increased despite the Anglo take-over. Anglo had given notice of its intention to comply with other rules that required empowerment transactions to be concluded, and it had concluded a memorandum of understanding with government according to which it also agreed to promote the interests of previously disadvantaged persons. The Tribunal stated that although it had not found for the IDC in this decision, it benefited from its participation as an intervener, given the economic and social significance of this transaction.

In the case of the large merger between Shell *South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd*,¹²⁹ Thebe, a black economic empowerment company attempted to sell off its subsidiary Tepco, to Shell **South** Africa. The reason for the sale was that Tepco found itself in financial problems, suffering net losses due to the mature nature of the industry as well as high structural barriers to entry. In accordance with the

¹²⁹ *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (Case No: 66/LM/Oct01) <http://www.comptrib.co.za/decidedcases/html>.

Competition Act, the first question the Tribunal asked was whether the merger was likely to prevent or lessen **competition**. In this regard it found that the merger was not likely to prevent or lessen **competition**.

The second question that the Tribunal asked was whether there were any **public interest** grounds for not approving the merger. The Tribunal considered the effect that the merger would have on the ability of small, black owned/controlled firms to become competitive. The Tribunal noted that the Commission had approved the merger subject to a number of conditions. One of the conditions imposed by the Commission was that Tepco had to continue to exist in the market jointly controlled/owned by Thebe and Shell **South** Africa. However, the Tribunal was critical of this condition because it amounted to the parties restructuring the deal in a form that neither of the parties wanted. The Tribunal stated:

“Empowerment is not furthered by obliging firms controlled by historically disadvantaged persons to continue to exist on a life support machine.”

The Tribunal was also critical of a number of other conditions imposed by the Commission on the proposed merger. In fact, the Tribunal approved the merger without any conditions. The Tribunal found that the Commission had adopted a paternalistic approach. No doubt, the Tribunal’s reasoning and decision is far more tempered and accepts an evaluation based on sound economic analysis as follows:

*“The Commission’s role is to promote and protect **competition** and a specified **public interest**. It is not to second – guess the commercial decisions of precisely that element of the **public** that it is enjoined to defend, particularly where no threat to **competition** is entailed The **Competition** authorities, however well intentioned, are well advised not to pursue their **public interest** mandate in an over-zealous manner, lest they damage precisely those interests that they ostensibly seek to protect.”*

A further case in which a **public interest** issue arose indirectly was that of *Wesbank, a division of FirstRand Bank Ltd / Industrial Machinery Finance Book*¹³⁰, owned by

¹³⁰ www.comptrib.co.za

*Barloworld Equipment Finance, a division of Barloworld Capital (Pty) Ltd.*¹³¹The merger involved the acquisition by Wesbank of Barloworld Equipment Finance's industrial machinery book. This merger was not one with any anti-competitive effects, however, the Commission recommended that a condition be imposed on the proposed merger. The condition was that if customers were unable to secure finance from financial institutions, Barloworld Capital (the target firm) would retain the right to facilitate the financing. The rationale for the condition was that many of Barloworld Capital's customers were small to medium sized businesses and businesses controlled by previously disadvantaged persons. The Commission argued that these customers' interests and concerns needed to be protected and therefore suggested that the above condition be imposed.

The Tribunal rejected the Commission's condition and approved the merger without any conditions. The Tribunal listed a number of commercial factors, present in the financing industry, which, in their opinion protected the concerns and interests of small to medium sized black economic empowerment companies. It is evident from this case that the Tribunal rejected the Commission's attempt to introduce black economic empowerment or promotion of small businesses as a justification for imposing a condition on a merger, where this was clearly unnecessary.

Some of the above cases show that the commission has sometimes been blinded by empowerment aspects of merger transactions. In some other high profile cases, the Commission has recommended conditional approval where prohibition was clearly suggested from a pure competition perspective.

7.4 The effect of a merger on the ability of national industries to compete on international markets

The effect of a merger on the ability of national industries to compete on international markets must be considered. In the case of *Nampak Ltd / Malbak Ltd*¹³² the looked at this public interest grounds as provided for in section 12A(3)(d) of the Act. The parties are firms involved in the packaging sector with overlapping activities in folding cartons and flexible plastic packaging.

¹³¹ [2004] 2 CPLR 337 (CT)

¹³² Case 29/LM/May02

As part of their rationale for the transaction, the merged entity contended that it would be to compete more effectively for the business of multinational customers. The parties also contended that the merger would allow for deeper penetration of export markets. The Competition Tribunal noted that the pro-competitive arguments raised justified a merger on public interest grounds as provided for in section 12A(3)(d) of the Act.

In their submission, the parties presented evidence relating to the scale of operations required to compete for the business of multinational customers and noted that:

...a would-be supplier would not be able to compete for the business of this corporation without the scale and concomitant technology to match the output of this world scale plant – there is, in this production model, simply no room for the packaging producer geared to produce for the domestic market in which it is located plus a fractional export component.

The Tribunal acknowledged the importance of multi-national customers to the parties' business:

Our decision is rooted in evidence, which strongly indicates significant developments in the manner in which multinational corporations organize their global production. These are manifest in an increasing centralization at selected locations of production units capable of serving a regional, continental or, even, global customer base. In a parallel development, multinational companies producing consumer non-durables, even those multinationals unable to centralize their production, are moving rapidly toward single-source purchasing of major inputs, including packaging.

However, the Tribunal, in *Tongaat-Hullet Group Ltd / Transvaal Suiker*¹³³ warned that it will be reluctant to consider an argument that domination of a local market by a merged firm is necessary for international success. Economics of scale and rationalisation may be important here. However, the size of a firm in itself will not be conclusive. Where the merger does not increase the size of productive units, or allow them to operate more effectively, the Tribunal will not allow an anti-competitive

¹³³ 83/LM/Jul00 pars 115 - 116

merger on this basis. Often, robust local competition will prepare firms for robust international competition. The arguments of the Tribunal show that there will be a close link between this public interest argument and the justification of a merger on the basis of efficiency.¹³⁴

The Tribunal, in *Iscor Ltd / Saldanha Steel (Pty) Ltd*¹³⁵, decided that possible failure of a firm to the merger may also be relevant in determining whether the merger is in the public interest.¹³⁶ In *Tiger Brands Ltd / Langeberg Food International Ashton Canning Co (Pty) Ltd*,¹³⁷ an attempt to rely on the failing firm doctrine in terms of section 12A(2)(a)(i) was dismissed primarily because it was found that the merging firms were not really failing and it was not shown that there was no alternative suitor for any of them.¹³⁸ The Tribunal was highly critical of an argument put forward by the parties to the effect that the merger could be approved on public interests grounds on the basis that failure of target firms will have a negative impact on the industrial region in which it operated, would lead to Major job losses, and would harm small business that would lose a major customer in the area. It called this argument an attempt to sustain a failed-firm argument through the back door that was unsustainable through the front door.¹³⁹

The above cases illustrate the manner in **public interest** provisions in **South Africa** are interpreted by the **Competition** Authorities in their evaluation of mergers. Although the public interest test in merger review is clearly specified, the Competition Tribunal has been cautious in its consideration of this test. They are unlikely to prohibit a merger that is not anti-competitive, or approve a merger that is anti-competitive, on public interest grounds. The authorities appreciate the fact that Competition law is not directly aimed at protecting any of the public interests objectives. The Tribunal has decided that in many respects their jurisdiction in these

¹³⁴ Lawrence Reyburn: Philip Sutherland and Katherine Kemp, *Competition law of South Africa* Durban: Butterworths, 2006 at p10-99

¹³⁵ *Iscor Ltd / Saldanha Steel (Pty) Ltd* 67/LM/Dec01

¹³⁶ *Ibid* pars 97-98

¹³⁷ *Tiger Brands Ltd / Langeberg Food International Ashton Canning Co (Pty) Ltd* 46/LM/May05 pars 135-137

¹³⁸ *ibid*

¹³⁹ Lawrence Reyburn: Philip Sutherland and Katherine Kemp, *Competition law of South Africa* Durban: Butterworths, 2006 at p10-99

areas is secondary, as there are other statutes and institutions that are better placed and resourced to deal directly and effectively with these issues than they are.

8. Criticism concerning the inclusion of public interest issues in the Competition Act

One of its weakest points of the ‘public interest’ is that is open to many possible interpretations. The Act provides a list of substantial public interest grounds but there is a widespread opinion in institutional economics that there is no predefined public interest, therefore any regulation based on pursuing this objective is necessarily open to individual interests.¹⁴⁰ The scope for error, flexible interpretation, subjectivity of judgement seems great.¹⁴¹ Prospective local or foreign investors could then well be deterred from takeover activity if there are to be unknown and unpredictable reactions by the authorities.¹⁴² A reduction in such activities could adversely affect exports, corporate tax revenue, and hamper possible spin-off demand for products of small and medium scale enterprises.¹⁴³

The benchmark of ‘public interest’ is seen as far less adequate for assessing damage caused by anti-competitive types of behaviour than ‘consumer welfare’ as stipulated in the Sherman Act or ‘social welfare’ (or ‘social optimum’) sometimes used in EU competition policy.¹⁴⁴ The problem with ‘public interest’ is that it has a substantial but non-measurable political component. Microeconomic or Industrial Organisation theory do not provide analytical tools for measuring it while ‘consumer welfare’ (or, to a lesser extent, also ‘social welfare’) are such economic terms for which the size of change can be adequately assessed.

¹⁴⁰ Trudi Hartzenberg “Competition Policy and Enterprise Development: The Role of Public interest objectives in South Africa’s Competition Policy” www.competition-regulation.org.uk/conferences/southafrica04/index.shtml

¹⁴¹ Reekie Duncan W. The Competition Act, 1998: An Economic Perspective. The South African journal of Economics vol. 67:2 1999 p283

¹⁴² *ibid*

¹⁴³ *ibid*

¹⁴⁴ Trudi Hartzenberg “Competition Policy and Enterprise Development: The Role of Public interest objectives in South Africa’s Competition Policy” www.competition-regulation.org.uk/conferences/southafrica04/index.shtml

The problem of ‘public interest’ has been raised in a very sensitive social and economic context in South African competition policy. In *Glaxo Wellcome plc / Smithkline plc*,¹⁴⁵ the Treatment Action Campaign (“TAC”), a voluntary organisation that campaigned for affordable HIV/AIDS drugs, asked the Tribunal to approve a merger between multi-national pharmaceutical firms subject to a condition that the merged firm allow competition by producers of generic drugs, which could be used to treat opportunistic infections in HIV/AIDS cases and anti-retrovirals for HIV. The Tribunal stated that it was sympathetic to the cause of the TAC, but there was no product overlap between the merging firms, which allowed for the imposition of such a condition in a competition case. It apparently thought that none of the public interest grounds listed in the Act justified such intervention.¹⁴⁶

Even though the South African economy is very seriously suffering from the consequences of AIDS and the National labour supply is largely hit by AIDS, the Tribunal realised that no competition policy tool was to be effectively used in this matter of really great ‘public interest’. Such a decision can come in defence of ‘Public interest’ that public interest as such is not a basis of decision making under the Competition Act.

Another criticism of public interest has been what the definition includes. The socio-economic objectives incorporate redistribution, labour interests and black economic empowerment.¹⁴⁷ It is argued that relying on competition policy to achieve these objectives is inappropriate.¹⁴⁸ There are more specific (and hence more effective) policies that can be used.¹⁴⁹ The overall welfare is seen as greatest when the resources of society are allocated in the economy so that consumers are able to satisfy their wants as far as technological and physical constraints permit.¹⁵⁰ In this way the wealth of the nation is maximised. The aim of competition policy should be to help bring about this result.¹⁵¹ When government wishes to achieve other objectives (e.g to

¹⁴⁵ 58/AM/May01 par 20

¹⁴⁶ Lawrence Reyburn: Philip Sutherland and Katherine Kemp, *Competition law of South Africa* Durban: Butterworths, 2006 at p10-94

¹⁴⁷ Reekie Duncan W. The Competition Act, 1998: An Economic Perspective. The South African journal of Economics vol. 67:2 1999 p283

¹⁴⁸ *ibid*

¹⁴⁹ *ibid*

¹⁵⁰ *ibid*

¹⁵¹ *ibid*

redistribute income or wealth, to promote the interests of historically disadvantaged groups or to encouraged structural, regional or national organisational changes other policies should be applied.¹⁵² Anti-trust authorities may note such goals, but they are a responsibility of other agencies.¹⁵³

It has also been stated that it will be difficult to determine the public interest and that it may be a “policy at war with itself”.¹⁵⁴ The asserted public interest can pull competition authorities in opposite directions.¹⁵⁵ As seen in the in the matter between *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd*,¹⁵⁶ the different public interest criteria themselves do not always point in the same direction. A procedure for dealing with such situations has been developed.¹⁵⁷

- Every public interest ground asserted must be viewed in isolation to determine whether it is substantial.¹⁵⁸
- If more than one contradictory public interest factor is found to be substantial, then the competition authority must attempt to reconcile them.
- If no reconciliation is possible, then the conflicting aspects must be balanced and a net conclusion must be reached. However in the *Distillers*¹⁵⁹ matter the Tribunal observed that a balancing seldom will be necessary. It stated that

*“this is because a contradiction can be of two types. One when the opposite interests collide head on, like two medieval knights in jousting contest where only one can emerge as victor and continue his course. This is where we are faced with a stark choice of whether to prohibit or to approve. The other situation is where the opposite interests avoid one another like vehicles bypassing each other in opposite directions on a dual lane road. They pass one another without affecting their respective courses”.*¹⁶⁰

¹⁵² *ibid*

¹⁵³ *ibid*

¹⁵⁴ Lawrence Reyburn: Philip Sutherland and Katherine Kemp, *Competition law of South Africa* Durban: Butterworths, 2006 at p10-94

¹⁵⁵ *ibid*

¹⁵⁶ 08/LM/Feb02 19/03/2003 para 215

¹⁵⁷ *Ibid* para 217

¹⁵⁸ *Ibid* par 236

¹⁵⁹ *ibid*

¹⁶⁰ *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08?LM/Feb02 19/03/2003

In this case the merger could be approved on pure competition grounds. Accordingly, it was not necessary to weigh public interest factors unless it could be shown that a public interest factor, when viewed in isolation, would justify prohibition of a merger.

The incorporation of public interest grounds in the Act may also be criticised for creating unnecessary litigation or causing unnecessary delays in mergers. Substantively, the workloads of the Competition Commission and the Tribunal have overwhelmingly been concentrated on merger control.

It is argued that in most hostile take-overs, the target firm will rely on public interest grounds as a last bid to prevent the take over. Where pure competition issues fail, the public interest is invoked with enthusiasm. Firms that are not known for their love of labour or empowerment become overnight the standard bearers of social equity.¹⁶¹ This has been the case dating back to the failed *Nedbank* bid for *Standard Bank* through to the *Harmony / Goldfields* saga, and to the bid by *HCI* for *Johnnic*.¹⁶²

In the matter between *Gold Fields limited and Harmony Gold Mining Company Limited*,¹⁶³ Gold Fields, asked the Competition Tribunal to block the merger on public interest grounds alone, even if the merger would not prevent or lessen competition. Harmony countered that though it must take public interest into account, the tribunal's core mandate is competition.

In giving its reasons for approving the hostile take-over by Harmony Gold Mining Company Limited of Gold Fields Limited, the Tribunal carefully considered the argument and evidence regarding the impact of the transaction on public interest. The tribunal first looked at the legal position as set out in Section 12A of the Competition Act. Gold fields argued that if a merger raised no competition problems and no negative public interest issues, it must still be prohibited if there is no evidence that it can be justified on public interest grounds.¹⁶⁴ Thus when making a public interest enquiry, the tribunal has to first ask if the merger cannot be justified on public interest

¹⁶¹ <http://www.comptrib.co.za/Publications/Speeches/manoim.pdf> Speech by Norman Manoim, Annual Gala event of the Competition Law Committee, 15 November 2005

¹⁶² *ibid*

¹⁶³ Case no: 93/LM/NOV04

¹⁶⁴ *ibid* Para33

grounds. If they come to the conclusion that there is no basis for concluding that there is not, the Tribunal cannot close the book and walk away.¹⁶⁵ The Act requires them to consider if the merger can be justified on public interest grounds. If there is no evidence that the merger can be justified on public interest grounds it must be prohibited.¹⁶⁶ In other words, unless there is a positive public interest gain from a merger, it must be prohibited. The Tribunal found this conclusion to be far-reaching, as it would render a lot of mergers, which come before the Tribunal, susceptible to prohibition.¹⁶⁷

As observed by the Tribunal, Gold Fields conclusion may be attributed to the fact that the Act requires the tribunal to have regard to public interest criteria even if no competition issue is implicated. This is because of the wording of s12A (b), which makes the public interest test mandatory in all merger assessments. Gold fields noted that because of the word ‘otherwise’ found in section 12A(b), the Act requires the Tribunal to have regard to Public interest criteria.¹⁶⁸ Public interest can operate either to resurrect a merger that is anti-competitive or condemn a merger that has survived the competitive assessment. Gold Fields also went on to note that in the purpose section of the Act, section 2, public interest criteria are reflected in some sections such as (c), (e) and (f) which they argued, that they are not intuitively competition concerns.¹⁶⁹

Through this, Gold fields then argued that section 12A is a reading of the Act that requires divorcing the Public interest from any relationship to competition.¹⁷⁰

The argument was stomped on pretty smartly by the tribunal, who first looked at the fact that the South African Competition Act is structured in a way that ensures that when public interest considerations are factored into a merger evaluation, this is always done through the filter of the competition analysis. The mere sequencing of the evaluation, with the authority required to make a finding first on competition

¹⁶⁵ *ibid* para 34

¹⁶⁶ *ibid* par34

¹⁶⁷ *ibid* para 35

¹⁶⁸ *ibid* para37

¹⁶⁹ *ibid* para38

¹⁷⁰ *ibid* para 39

grounds, then follows Public interest test means that Public interest cannot be divorced from any relationship from competition.

The Tribunal emphasised that the section says that a competition evaluation must be done first. If the merger passes the competition evaluation it then follows the Public interest test as provided in section 12A (1) (b). If the merger is found to be anti-competitive then the next stages provided in sub-section (a) follow.¹⁷¹ First one performs the efficiency trade-off required by (a) (i) the efficiency trade-off can be greater than and offset the anti-competitive effects in which case the merger can again be considered to have passed the competition inquiry and be like the merger that followed the path of subsection (b).¹⁷² If the efficiency trade-off does not redeem the merger then the merger emerges from the competition enquiry as having a net harm to competition.¹⁷³

What is evident then is that under path (b) a merger emerges always having passed the competition enquiry, but a merger under path (a) may, depending on the verdict of efficiency trade off, pass or fail the competition test.¹⁷⁴

The Tribunal therefore found that mergers following either path are then subject to the public interest inquiry. The (a) merger does so in terms of (a)(ii) and the (b) in terms of that sub-paragraph.¹⁷⁵ The language of the public interest is therefore identical for both namely, whether the merger “*can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).*”¹⁷⁶

The Tribunal found that under path (a), the words *can* or *cannot* indicate that a merger that has failed the competition test can still be passed on public interest test and hence be approved. Also, that a merger that has passed the competition test could still fail the public interest test and hence be prohibited.¹⁷⁷ But this interpretation does not explain why under path (b) where only have passed mergers the legislature still

¹⁷¹ *ibid* para 42

¹⁷² *ibid*

¹⁷³ *ibid*

¹⁷⁴ *ibid* para 43

¹⁷⁵ *ibid* para 44

¹⁷⁶ *ibid*

¹⁷⁷ *ibid* 45

provides for a “*can*”, because there is no need of transforming a merger as only passed mergers go there.¹⁷⁸

Gold Fields therefore argue that the word “*can*” is otherwise superfluous in paragraph (b) unless it can be given the interpretation for which they contend.¹⁷⁹ They argue that one not only has to determine whether the merger “*cannot*” be justified on public interest grounds, but also assuming the rationale for “*cannot*”, still prove that it *can*, that is, the existence of a positive impact on public interest.¹⁸⁰ It then follows that the only way you can account for the *can and cannot* as alternative in the same phrase is to adopt this approach.

But, as the Tribunal rightfully points out, neither logic nor the manner in which section 12A is construed or sensible public policy, support this interpretation. Gold Fields argument does not make sense because means that a firm has to justify a merger solely on Public interest grounds, not on competition grounds whereas this is a statute concerned primarily on competition.

The Tribunal also pointed out that the use of the words *can or cannot* by the legislature may be because public interest grounds once evaluated, do not always point to the same net conclusion.¹⁸¹ In certain cases, they may lead to opposing conclusions, which require internal weighing up to lead to some net conclusion on public interest.¹⁸² It also found that Gold fields argument that section 2 supports the interpretation of section 12A of the autonomy of the Public interest concerns in the Act not to be correct. Although some sub-paragraphs of section 2 refer to purely public interest concerns they do so in competition context.¹⁸³ Section 2 commences with the injunction that “*the purpose of this Act is to promote and maintain competition in the Republic in order...*” The Public interest in the purpose section is seen clearly as dependent not independent of competition.¹⁸⁴

¹⁷⁸ *ibid* 46

¹⁷⁹ *ibid* 47

¹⁸⁰ *ibid* 47

¹⁸¹ *ibid* 54

¹⁸² *ibid*

¹⁸³ *ibid* 57

¹⁸⁴ *ibid* 58

Gold Fields approach was seen not to be consistent with the policy of the Act. The Tribunal acknowledges that while our public interest requirements are an anathema to merger control policy, few would argue for a position that mergers are so inherently harmful, that absent a positive contribution to public interest, a merger that raises not competition concerns must be stopped. On the other hand the contrary position is compelling. That is, a merger that raises no competition concerns and no negative public interest concerns should be permitted.¹⁸⁵ The Tribunal therefore found that as a matter of law, it was not necessary for Harmony to show that the merger can be justified on public interest grounds. All that they had to establish, having found that the merger will not have a likely anti-competitive effect, is that the merger will not have a substantial negative effect on public interest.¹⁸⁶

This is a case that has proved interesting, precisely because it has, arguably, little or nothing to do with competition issues. No gold producer, however large, can influence the gold price. A merged Harmony-Gold Fields might be bad for competition upstream, in supplier industries, and some of the evidence and argument at the tribunal was around that. The case shows that the incorporation of public interest grounds in the Act may create unnecessary litigation and cause unnecessary delays in hostile take-overs. Gold Fields merely invoking public interest as a way of preventing the take over.

When the competition issues failed the core of Gold Fields' case was that a merger would drive up unemployment and poverty in an industry that had already lost hundreds of thousands of jobs.

One question raised at the hearings was what, if anything, the competition authorities should do about it and whether their role extended beyond their core mandate so that they could, or should, make decisions based on public interest alone. Another question was whether this merger would make things better or worse. Gold Fields argued it would significantly worsen joblessness; Harmony that it could ultimately make it better by making mining more efficient.

¹⁸⁵ *ibid* 60

¹⁸⁶ *ibid*

It is therefore submitted that the delays caused by conducting a public interest analysis reflects negatively to South Africa's reputation in International Anti-trust. Conducting a proper assessment of competition factors whilst simultaneously conducting a public interest enquiry and analysis, makes it difficult to achieve consistency on timing due to the lengthened review periods required for public interest analysis. This can be problematic for parties hoping to finalise a global deal as soon as possible. It would appear that achieving consistency on substantive outcomes may be more important. Longer review period may be required in appropriate circumstances than in a jurisdiction where only a competition evaluation is required.

Accordingly, conducting both a competition analysis and a public interest analysis may be difficult to converge to an agreed standard on timing if more time may be required to conduct a proper review of the matter. An element of uncertainty is also introduced owing to potential interveners who may seek to protect certain adversely affected interests. This was evident in the *Anglo America / Kumba (IDC intervening)* case.

The tribunal has set public interest conditions for merger approvals. But it is unlikely that it will ever block a merger on public interest grounds alone. If it did, it would be intervening in broader public policy areas, opening itself to challenges from all sides. It would also, in effect, be trying to second-guess the market — and who's to know that investors aren't as well, or better, placed to judge, which is the better management team? The specific mention in the merger evaluation is therefore unnecessary because the approval of a merger is ultimately based on a sound economic analysis. In other words the incorporation of public interest goals creates unnecessary and unwelcome delays.

9. Support for the inclusion of Public Interest objectives in the Act

Although there has been criticism concerning the inclusion of public interest issues in the Competition Act, their inclusion has to be read in context. Competition law forms an important part of effective market governance.¹⁸⁷ The rules of the market game,

¹⁸⁷ Trudi Hartzenberg "Competition Policy and Enterprise Development: The Role of Public interest objectives in South Africa's Competition Policy" p19-20 www.competition-regulation.org.uk/conferences/southafrica04/index.shtml

that include competition rules, can enhance market outcomes by promoting not only the achievement of efficiencies, but also greater equity.¹⁸⁸ To this extent South Africa's competition law is progressive in its explicit incorporation of public interest considerations; whereas even mature jurisdictions shy away from such potentially contentious territory.¹⁸⁹ With South Africa's history, the inclusion of public interest concerns makes good policy sense. The nature of the South African economy, its grossly unequal distribution of income and wealth, and hence too its inequality of economic opportunity have to be addressed by a coherent set of policy initiatives. Thus employment creation, black economic empowerment and small and medium-sized enterprise development are familiar objectives across a range of economic policies.¹⁹⁰

As sated above, employment creation and black economic empowerment are major challenges to sustainable development in South Africa. Explicit reference to these factors is thus to be expected in a significant area of policy and law such as the competition Act. In some sense this provides a balance of considerations in the challenge to develop a set of complementary policies and laws to facilitate enterprise development and the achievement of broader socio-economic objectives.

South Africa just like many other developing countries is faced with the challenge of the spread of AIDS, underdevelopment, unemployment and poverty. The AIDS epidemic on its own has resulted in the growth of orphaned children and shortage of skilled labour. With such problems, including none-competition grounds in the South African competition policy can be understood as another way to address social problems and inequalities.

David Lewis (Chairperson of the Tribunal) has readily conceded that public interest considerations weigh more heavily in developing countries than they do in developed countries.¹⁹¹ He argues that the reasons for this are instructive: first, it is widely accepted that there is a greater role for industrial policy, for targeting support at

¹⁸⁸ *ibid*

¹⁸⁹ *ibid*

¹⁹⁰ *ibid*

¹⁹¹ www.comptrib.co.za/Publications/Speeches/lewis5.pdf David Lewis Chairperson Competition Tribunal *The Role of Public Interest in Merger Evaluation 28-29 September 2002*

strategically selected sectors or interest groups, in developing than in developed countries; secondly, developing country competition authorities are still engaged in a very basic struggle to achieve credibility and legitimacy in their countries.¹⁹² He also acknowledges that:

*"...Credibility will certainly not be achieved by bending to the whim of every interest group, nor will it be secured by a competition authority that refuses to take direct account of major national economic problems and aspirations. Hence, in a country like South Africa while we in the competition authorities may well understand the pitfalls in balancing competition and public interest, we equally recognise that a competition statute that simply ignored the impact of its decisions on employment or on securing a greater spread of black ownership, would consign the act and the authorities to the scrap heap."*¹⁹³

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. In addition many regimes, especially developing country regimes, impose a public interest test on those merger decisions that fall squarely within the jurisdiction of the competition authorities. Hence employees threatened by a merger are well advised to show that they have sought the protection of the Labour Relations Act before invoking the Competition Act in their defense. By the same token employers who have ignored these obligations are likely to be reminded of them when appearing before the Competition Tribunal.¹⁹⁴

The incorporation of public interest objectives in the Competition Act can also be traced back to the history of the South African Competition policy. The institutional framework of South African competition policy seemed to be reformed in 1979 with the creation of a Competition Board. The members of this Board had to be appointed by the Minister of Trade and Industry or other members of the government. At least in principle, the Board had the powers to start investigations on its own. This was, however, only one new element of the 'tripartite system' suggested by the inquiry, and the decision-making arm of it was not created. The executive powers in

¹⁹² *ibid*

¹⁹³ *ibid*

¹⁹⁴ *ibid*

competition policy remained with the Minister, and the reports actually produced by the Board were mostly used as reading material by government officials but had no real implications on patterns of structure or behaviour in competition.

This institutional problem underlined another very important weakness of the 1979 competition law. Namely, that it did not make a distinction between antitrust and the control of anti-competitive actions by the government. This distinction is important in a competition policy. It has been frequent in developing countries that competition policy had to fight government-made obstacles to competition or that only a strong-willed competition authority could be successful when confronting governments indifferent to competition issues. The Board very rarely investigated anti-competitive behaviour by government bodies or state-owned firms, and such investigations were not followed by disciplinary action. This is easy to understand since the Board was politically and administratively subordinated to the government, and its members were not at all independent from the state. Some of the most important shortcomings of the law were corrected in 1984 as a result of an initiative taken by the Competition Board. Some kinds of conduct were declared *per se* against the law. These practices included RPM (resale price maintenance), horizontal collusion (on prices, sales terms or market shares), and bid rigging. In a very classical style (reminiscent of early American activism), the violations of such prohibitions were supposed to be pursued as criminal acts, but no such punitive action was taken by the government between 1984 and 1994.

The inefficiency of pre-1994 South African competition policy was the result of three major shortcomings of the 1979 competition law. First, it did not create an adequate benchmark for establishing the anti-competitive character of any kind of structure or conduct observed on the market. Along with this, the almost complete lack of *per se* prohibitions made it extremely difficult to proceed against violations of the law. Second, competition policy was fully integrated in the structure of government and it did not enjoy any degree of political independence. Therefore it could be used rather *by* than *against* the government. It could be used as a tool for protecting the economic interests of the ruling political elite supported only by a minority of the population.

Its overhaul became thus a political necessity after the change of political regime. **For these political reasons, the reform of South African competition policy had to go far beyond the scope of competition policy, as it is usually understood by literature.** Among other things, it had to contribute to changing the ownership structure of the economy in favour of the ethnical groups (mainly Blacks) who had been basically excluded from the ownership of entrepreneurial assets of some importance for the national economy. In fact, the playing field tilted in favour of certain groups of Whites had to be levelled in order to create markets with more or less equal chances for entrepreneurs belonging to different ethnic groups.

It is therefore submitted that a balance between traditional competition policy objectives and public interest considerations is achievable. The cases on the consideration of mergers in South Africa as reviewed above indicate that competition law is an instrument used to promote South Africa's specific industrial policies. However, as shown in the cases, the Competition Authorities in South Africa have not been arbitrary in the application of the provisions on public interest. The balancing of public interest considerations with a competition evaluation has been very carefully considered as is illustrated in the cases discussed.

It is further submitted that the incorporation of public interest objectives in competition legislation in South Africa does not mean that the overriding objectives of competition policy will not be achieved. In fact, South Africa's competition legislation is an example of a jurisdiction where a substantial degree of convergence with international anti-trust may be achieved despite the incorporation of non-competition factors in the legislation and potential or perceived difficulties in reconciling competition evaluation with a public interest analysis.

The commitment of authorities to achieve the level of convergence is evident by the fact that the incorporation of provisions in the merger regulation promoting employment and black economic empowerment, have to date not been a bar to obtaining merger approval since the decisions are ultimately based on sound economic analysis.

It may therefore be deduced that a degree of convergence can nevertheless be achieved since the South African Competition Authorities in their application of the law view public interest as secondary concept to the economic analysis. Public interest seems to be limited by definition in the legislation. In other words, the competition evaluation on whether for example, a merger will prevent or lessen competition still occupies a primary position, thereafter the public interest test is treated as a filter and is given secondary consideration.

The ability to achieve a certain level of convergence may also be attributed to the fact that the provisions on competition aspects are similar to the provisions in laws of mature jurisdictions like Canada. Certain public interest provisions as found in South Africa also feature in industrialized countries, namely promotion of small businesses and promotion of the ability of national firms to compete in international markets. The Canadian Competition Act has specifically incorporated such objective and it may be a consideration in certain mergers.

Furthermore, the South African legislation stipulates that in applying the Act, appropriate foreign and international law may be considered. The Competition Authorities are mindful also of the risk of deterring foreign direct investment if it had to impose burdensome requirements and processes on parties. In the *Tepco/Shell* the Tribunal warned the Commission against being overzealous in applying public interest. This demonstrates commitment in sustaining a certain level of convergence.

10. Reconciling traditional competition policy objectives and public interest considerations in merger control evaluation.

Section 2 of the Competition Act¹⁹⁵ begins by stating that the purpose of the Act is to promote and maintain competition in the Republic. The section sets down a number of goals, which the Act aims to achieve including goals, which are viewed, as independent of competition concerns. Section 12A also begins by stating that whenever required to consider a merger, competition authorities must first determine whether or not the merger is likely to substantially prevent or lessen competition, by

¹⁹⁵ No,89 of 1998

assessing factors which it sets out in subsection 2. The section also provides that a merger should be assessed on public interest grounds.

The South African legislation on public interest is therefore unusual in certain key respects:

- First, the inclusion of a public interest test is unusually explicit and, simultaneously, confined by Section 12A(3) to a set of specific criteria. This may then give the competition authorities the power to prohibit or impose conditions upon a merger that passes the evaluation on competition grounds.
- Second, it is the competition authorities – rather than a Minister or some other representative of the public – that is required to make the public interest judgment. The Act does however require that the Minister of Trade and Industry (or, in particular cases, other directly affected Ministers) be served with a copy of the merger notification in order to enable them to plead their case before the competition authorities.

The competition authorities are then put in this difficult position of trying to reconcile competition objectives and public interest goals in merger controls. As illustrated by the cases, the authorities have tended to take a cautious approach to public interest pleas. The view of the Tribunal – articulated in some cases on mergers, is that each public interest afforded protection in the Competition Act is more comprehensively protected through other statutory and regulatory instruments. Accordingly, in enforcing the public interest factors stipulated in the act, the competition authorities should seek to complement the range of other interventions principally tasked with underpinning a given public interest.

The Act's public interest defences have been subject to predictable criticism by anti-trust practitioners. However, their inclusion has to be seen in the specific context of the society out of which this act emerges. Employment and Black economic empowerment represent major societal concerns and national policy objectives. It is unthinkable that reference to these key concerns would have been omitted from a piece of socio-economic legislation as significant as the Competition Act. Their inclusion and the willingness of the competition authorities to grapple with the difficult balance between public interest and competition has added considerable

credibility to the act and the institutions that it has created. That the competition authorities are seen as institutions intent upon promoting participation in the economic life of the nation is strengthened by the explicit inclusion of these public interest considerations.

The way the South African Competition Act is structured enables the competition authorities to balance public interest and competition in merger evaluation, through the filter of the competition analysis. As stated in the *Gold fields and Harmony* matter, the mere sequencing of the evaluation, with the authority required to make a finding first on competition grounds, promotes this. This therefore explains why, to date, public interest factors have not, on their own, determined the outcome of a merger evaluation. The overall outcome has, without exception, been determined by the competition analysis (or, in the one case, by efficiency considerations) with public interest considerations occasionally informing conditions attached to an approval.

The fact that a single agency – the competition agency – is responsible for balancing the competition and public interest factors also underpins the centrality accorded competition factors in the authorities' decisions. During the drafting of the Act there was active public debate regarding the locus of decision making with respect to public interest. It was resolved to locate all decision making in the competition authority. At the same time the Act provides that the Minister of Trade and Industry and the representative trades union in the affected workplaces are provided with notice of any proposed transaction specifically to enhance their ability to present public interest arguments to the competition authorities.

Other interested parties are entitled to apply to 'intervene' in merger proceedings before the Tribunal. In the case of large mergers – or appeals from decisions of intermediate mergers – the arguments are ventilated at public hearings and the decisions, with full reasons, are published. This ensures that the competition authorities actually confront the public interest factors – while competition may well be the primary filter in any decision, the process ensures that the competition authorities do not remove the public interest considerations from the frame.

Some people may argue that the South African competition regime is well served by the explicit introduction of public interest factors and by its limited definition. This

ensures that while there is no room to hide from the difficult task of investigating and adjudicating public interest claims, there is equally no incentive to clothe a public interest decision in the garb of competition analysis. In developing countries it is difficult to negate public interest concerns.

David Lewis, the Chairperson of the Competition Tribunal has consistently defended those sections of the competition legislation that cater for concessions based on public interest concerns. In his view, public interest is ‘the mad, old uncle that comes knocking on the door when we have nowhere to hide.’¹⁹⁶ The only solution is to find some way of living with him. In short, no public agency that relies on public support can escape the influence of a strongly held public interest. Furthermore, Lewis counters that it is inevitable that in a developing country such as South Africa, where distributional and poverty problems are at the forefront, all social and economic policies are expected to contribute to the alleviation of these problems.¹⁹⁷ Competition policy is not exempt from this expectation and under these circumstances it is better to be seen to be grappling with such issues transparently and effectively rather than occupying a purist view of what competition policy should consist of.¹⁹⁸

It can also be argued that many regimes claim to uphold a ‘pure’ competition analysis whilst responding to overwhelming public interest by tailoring a competition analysis to support a decision that has actually been made on public interest grounds. In the case of South Africa, there is no necessity to engage in this kind of obfuscation, as the competition authorities are explicitly required to consider public interest.

At the same time, the drafters elected to limit the range of factors that may be claimed under public interest. The South African legislation’s scope is limited to four clearly stated grounds. Accordingly, in South Africa an interest group that wishes to invoke public interest must demonstrate that the merger compromises the four stated criteria contained in the Act, which authorities do not have to assess a new ground each time.

Competition law and jurisprudence is, for the most part, a product of the most advanced industrialised economies and is increasingly formulated in response to

¹⁹⁶ D. Lewis ‘The Role of public interest in merger evaluation.’ Paper presented to ICN, Naples, 28-29 September 2002

¹⁹⁷ *ibid*

¹⁹⁸ *ibid*

sophisticated advances in economic theory as well as detailed and complex empirical analysis. Whilst globalization advances in economic theory, it presents challenges to developing countries. In giving a lecture on globalization, at Santa Clara University, Amantra Sen,¹⁹⁹ stated that the central economic issue related to globalization is that of inequality.²⁰⁰

He said that two important recognitions are central our understanding the relation between markets and inequality.²⁰¹ First, the market economy can generate very different results, depending on how physical resources are distributed, how human resources are developed, what rules of the game prevail, and so on.²⁰² Second, he believes that the market on its own is not the only institution in which decisions are taken, social and political institutions have a positive role to play in promoting equity and in enhancing what the markets can achieve, within each country and more broadly, in the world.²⁰³

Sen believes that there are various factors that prevent Globalization from producing results.²⁰⁴ First, there has to be global commitment to democracy. He sees no conflict between promoting economic growth and supporting democracies and social rights. In fact, he believes that democratic freedoms and social opportunities can contribute substantially to economic development. Second, he believes that even though private foreign investment can, in many situations, help a poor country get richer, there are safeguards that are needed to avoid being overly influenced by the power of large multinational companies. Third, he also believes that the distribution of benefits of international interactions depends on a variety of global institutional arrangements, including trade agreements, medical initiatives, educational exchanges, facilities for technological dimension, ecological and environmental restraints, and fair treatment for accumulated debts. Forth, patents, inequalities and inefficiencies. He feels that the intellectual property rights and patent laws often have a profound negative effect on the lives and freedoms of many people in the world. He gives an example that these laws tend to inhibit the use of life-saving medicine vital for diseases like AIDS-by

¹⁹⁹ A Sen “Globalization and Poverty” Transcript of Lecture given at Santa Clara University, 10/29/02

²⁰⁰ *ibid* p5

²⁰¹ *ibid* p6

²⁰² *ibid*

²⁰³ *ibid*

²⁰⁴ *ibid*

making inexpensively produced drugs remarkably expensive through high royalties.²⁰⁵

He therefore believes that in as much as globalization deserves strong defence, it also demands many far-reaching reforms. He feels that when we welcome, rightly, the great efficiency of market transactions, we also have to find ways and means of strengthening the non-market institutions that can complement and countervail the enormous power of the global market economy.²⁰⁶ There is a compelling need in the contemporary world to ask questions not only about the economics of globalization, but also to place these questions in an appropriately historical and political perspective and to relate them to the demands of contemporary global ethics.²⁰⁷

The argument by Sen justifies why public interest has been explicitly included in South Africa's competition policy. As stated before, the inclusion has to be seen in the context of the society out of which this Act emerges. Employment and Black economic empowerment represent a major societal concerns and national policy objectives. It therefore makes sense to refer to these key concerns in the Competition Act.

11. Conclusion

This discussion has made it clear that having public interest objectives explicitly included in the Act is important. Prior 1994, the distortions by government regulation, high levels of concentration in ownership and control, and vertically integrated conglomerate organisations were not conditions supportive of a strong competition culture and robust competition processes. This meant that the usual objective of competition policy to promote competition and economic efficiency was important, but at the same time, broader public interest objectives were also important. Public interest objectives mattered in the context of competition policy even though they were also to be pursued through other policy channels

This discussion has also made it clear that having public interest objectives explicitly included in the Act with regard to merger reviews has not and is unlikely to materially

²⁰⁵ *ibid* p7

²⁰⁶ *ibid* p9

²⁰⁷ *ibid*

impact on decisions by competition authorities. Authorities have on the other hand been able to strike a balance between public interest and competition objectives.

The discussion has also shown that it is important to develop a more coherent position for public interest in the context of the Act. Such an approach has to be applied in a consistent manner to avoid perceptions that competition considerations and public interest considerations are in equal weighting. That in some cases public interest issues may take precedence and some of the cases perhaps competition concerns may actually take precedence because it is decided on a case-by-case basis.

The two-stage inquiry is the right approach, given that public interest is described in section 12A(3) at a high level of abstraction and generality. The two-stage approach therefore creates a more coherent position for public interest in the context of the Act. The task in balancing public interest and competition considerations is eased by having public interest evaluated separately from the competition analysis. The primacy of the competition evaluation is secured by the structure of the Act which provides that the competition evaluation is completed as the prior step in the decision making process and, hence, that the public interest test is conducted through the filter of a completed competition finding.

This structure accordingly underpins a developing jurisprudence that tends to have the principal decision – to prohibit or allow a merger – taken on competition grounds with the public interest considerations possible accounting for the imposition of conditions carefully crafted to ameliorate the negative public interest impact. Also the Competition Tribunal has held quite explicitly that the protection that the Competition Act gives to the specified categories of public interest is ancillary to the protection offered by other legislation specifically directed at protecting those elements of public interest.

The Act has the effect of making the trade-offs clearer and prevents any temptation to camouflage public interest decisions by presenting them in the light of competition analysis. To avoid unnecessary lengthy litigation, the legislature should, in time, reconsider some general aspects of the place of public interest in the merger evaluation. One possibility is that public interest criteria only be considered as a defence to mergers found to be anti-competitive, and not as a possible bar to a merger

that passes the competition evaluation. This will greatly assist competition authorities when trying to balance competition goals and public interest. It will also do away with speculations on whether a merger found to be competitive can be barred on public interest grounds only.

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