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Merger Control – A Public Affair?

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1. INTRODUCTION

Merger control, which forms part of competition law, is conducted by competition authorities to prevent the lessening of competition or an emergence of a dominant player in the relevant market. The analysis of mergers focuses on the effects of the consolidation of business and firms.¹ Unlike most of competition law, which becomes operative after an act prohibited by it is committed, merger control is preventative in nature as it seeks to prevent a structural restraint against competition prior to its occurrence and therefore requires an *ex ante* assessment of the possible effects of consolidation on the performance of markets and firms. During the review process, competition authorities consider a range of issues including some that form part of the country's industrial or social policy. Merger control laws give competition authorities the ability to assess and remedy the potential anti-competitive effects of a merger, thereby preserving competitive market structure and benefiting consumers.² Some of the issues taken into account include the lessening of competition in the market, the likely adverse effects on consumers as well as domestic firms, the employment consequences, the preservation of national champions and international competitiveness.³ While some of these issues are competition law considerations, others are non-competition factors and are considered to be public interest grounds. Such grounds are contentious.

'I've come to treat our task in dealing with public interest in much the same way that I treat my mad uncle, in much the same way that every family treats its mad uncle – with wary respect. We may try and ignore him; we may even deny his existence. But he somehow manages to turn up, invited or not, at every major family event. For the most part he turns out to be quite an amiable, agreeable old chap, but he does have the potential to behave in a very unpredictable manner, one that causes severe embarrassment to a smug, complacent family, often threatening to tear it apart and reduce its reputation and standing in the society at large. He is nevertheless often respected by the younger members of the family,

¹ Joseph Wilson *International Competition Law Series: Globalization and the Limits of National Merger Control Laws* Volume 10 (2003) 44.

² Joseph Wilson *International Competition Law Series: Globalization and the Limits of National Merger Control Laws* Volume 10 (2003) 46.

³ Joseph Wilson *International Competition Law Series: Globalization and the Limits of National Merger Control Laws* Volume 10 (2003) 44 – 45.

who feel that he has insights about the real world lacking in the more staid leaders of the family',⁴

David Lewis' treatment of public interest is echoed by the recent Wal-Mart/Massmart merger⁵ debate. Briefly stated, the merger of these two entities would undoubtedly promote consumer welfare through a lower price structure and, further, would not result in an increase of Massmart's share in the market, a traditional competition law ground for prohibition. Therefore, the question often posed is why, then, did public interest play such a leading role in this case? The debate sparked by this controversial case indicates the very many conflicting views on the application of public interest criteria to merger cases in South Africa, and globally. This paper will seek to examine the role of public interest in competition law by critically analyzing South African competition legislation, the most recent case law on the subject, with specific focus on the Wal-Mart/Massmart decision, and comparing the South African competition law's approach to public interest considerations with developed as well as developing countries and the potential effect such considerations might have on investment into South Africa. The paper seeks to argue the question of whether public interest objectives should have weight in merger control and, if so, how far can these considerations extend into realms beyond competition law?

2. **HISTORY OF PUBLIC INTEREST**

In South Africa's burgeoning democracy, and having regard to its particular history and contemporary economic circumstances, there was a particular need for new competition legislation. Given the character of South Africa's new political regime and the presence of labour in the process of formulating the new law, there was little prospect of excluding critical factors such as employment and the racially skewed ownership structures from the ambit of an important piece of legislation, being the Competition Act. As such, any disregard for major public-interest issues at that time would have led to a loss of credibility in the

⁴ Lewis, D. 2002. The Role of Public Interest in Merger Evaluation. Paper presented at the *Merger Working Group, International Competition Network*. 28 – 29 September 2002. Naples. 1 – 4. Available at <http://www.comptrib.co.za/assets/Uploads/Speeches/lewis5.pdf>, accessed on 12 September 2012.

⁵ 110/CAC/Jul11 and 111/CAC/Jun11.

eyes of the public. The South African government recognised that the competition policy it wished to develop also needed to align with broader government policies and objectives of redress and development. Therefore, if these factors could not fit neatly into an orthodox competition statute, then they would enter by way of the introduction of public interest criteria.⁶ In this way, the South African Competition Act differed from those in other jurisdictions by including public-interest objectives as part and parcel of the assessment of competition issues rather than keeping them as a separate consideration.

The introduction of the public interest criteria into South African merger review attracted a vast amount of attention and aroused controversy. While the government at the time was looking to create a comprehensive framework that would achieve a competitive and fast-growing economy⁷, many South African businesses appeared to experience difficulty in grasping the 'nettle of merger review in any shape or form'.⁸ It was viewed as an unwelcome political intervention in an important area of business decision-making. However, despite its controversial nature, it was recognised that no major piece of socio-economic legislation would have passed muster without incorporating job creation and Black Economic Empowerment (BEE) into the overall objectives of the policy and statute. However, it has been argued that this did not necessarily mean that these objectives had to be included in the criteria for evaluating mergers, but once the unions grasped the concept, there was, in the prevailing political and economic climate, no way that these objectives were going to be denied.⁹ Competition policy was thus seen as something that should be complementary to efforts to improve employment, support emerging entrepreneurs, particularly those from historically disadvantaged backgrounds, and enhance consumer transparency.¹⁰

⁶ D Lewis *Thieves at the Dinner Table* (2012) 41.

⁷ J. Hodge *et al* 'Public interest provisions in the South African Competition Act: A critical review' in *The Development of Competition Law & Economics in South Africa* (edited by K. Moodaliyar and S. Roberts) (2012) at page 3.

⁸ D Lewis *Thieves at the Dinner Table* (2012) 95.

⁹ D Lewis *Thieves at the Dinner Table* (2012) 118.

¹⁰ J. Hodge *et al* 'Public interest provisions in the South African Competition Act: A critical review' in *The Development of Competition Law & Economics in South Africa* (edited by K. Moodaliyar and S. Roberts) (2012) at page 4.

At the time of its introduction, it was at the international level that the inclusion of public interest factors into merger review generated the greatest controversy. However, currently, it appears that in mature competition jurisdictions, a public interest test is applied only in the case of cross-border acquisitions, being acquisitions of domestic firms by foreign-owned firms. The unusual element of South African competition law was not that public interest or non-competition issues played a part in deciding whether to approve a merger, but that the public interest criteria were incorporated into the South African Competition Act and that they applied to all mergers as distinct from only cross-border mergers. Another novel feature of the South African Competition Act is that it placed the responsibility for public interest decisions at the hands of independent competition authorities, rather than with government agencies, with the hope that this would limit the scope for political interference.¹¹

3. **LEGISLATION – section 12A of the Competition Act, 89 of 1998.**

The public interest provisions in South Africa's Competition Act, 89 of 1998, ("the Competition Act") are dealt with in section 12A. The relevant provisions are set out below:

12A. Consideration of mergers

- (1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and-
 - (a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine-
 - (i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

¹¹ J. Hodge *et al* 'Public interest provisions in the South African Competition Act: A critical review' in *The Development of Competition Law & Economics in South Africa* (edited by K. Moodaliyar and S. Roberts) (2012) at page 5.

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

Section 12A(2) provides that when determining whether or not a merger is likely to substantially prevent or lessen competition, the competition authorities must assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including the following –

- i) the actual and potential level of import competition in the market;
- ii) the ease of entry into the market, including tariff and regulatory barriers;
- iii) the level and trends of concentration, and history of collusion, in the market;
- iv) the degree of countervailing power in the market;
- v) the dynamic characteristics of the market, including growth, innovation, and product differentiation;
- vi) the nature and extent of vertical integration in the market;
- vii) 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
- viii) whether the merger will result in the removal of an effective competitor.

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

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

Therefore, as can be construed from the legislation, section 12A(3), read together with section 12A(1), provides that the initial consideration of the merger must consist of an examination of whether the merger is likely to substantially prevent or lessen competition by an examination of the factors set out in section 12A(2). Once that enquiry has been completed, and if it then appears that the merger is likely to substantially prevent or lessen competition, a determination must be made whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain, which will be greater than the losses, and thus offset the effects of the prevention or lessening of competition that has already been found to exist pursuant to the initial enquiry. Further, and irrespective of the findings in relation to these considerations, the competition authorities must consider whether the merger can or cannot be justified on substantial public interest grounds. As the legislation provides, the competition authorities first need to examine the effect of the merger transaction on competition itself and, thereafter, its effect on specified public interest factors. Section 12A(1)(b) expressly mandates the competition authorities to assess the effect of a merger on specified public interest grounds.

In practise, only two sets of public interest grounds have generally surfaced before the competition authorities when conducting merger control proceedings. These two grounds are the employment impact and the promotion of BEE. In regards to the employment impact, generally the argument would be a plea for turning down or imposing conditions on a merger which, while acceptable in competition grounds, is likely to lead to job losses. For the promotion of BEE, the argument would usually be for approving a merger that might not pass muster on competition grounds, but that nevertheless carries sufficient promise of black economic empowerment, thus justifying the merger.¹² In essence, the provisions of section 12A envisage three separate, but interrelated inquiries, namely:

- i) whether or not the merger is likely to substantially prevent or lessen competition;

¹² D Lewis *Thieves at the Dinner Table* (2012) 117.

- ii) if the result of this inquiry is in the affirmative, whether technological, efficiency or other pro-competitive gains will trump the initial conclusion so reached in stage one, together with the further consideration based on substantial public interest grounds which, in turn, could justify permitting or refusing the merger; and
- iii) notwithstanding the outcome of the above two enquiries, the determination of whether the merger can or cannot be justified on public interest grounds.¹³

Unlike the efficiency test, the public interest test is undertaken regardless of the finding of the merger's impact on competition. In essence, the process requires the competition authorities to weigh the effects that the merger will have on competition against its effects on the public interest factors specified in section 12A(3). However, the Competition Act is silent on how this balance should be attained.¹⁴ Many other African jurisdictions have given similar mandates to their competition authorities and the decision of the South African Competition Appeal Court in the Wal-Mart/Massmart decision has continent-wide relevance. The transaction required competition approval in six African countries and was approved without substantial conditions being imposed in four of the six countries. While there were some regulatory complications in Namibia, the most significant challenge was the South African competition legislation and the opposition by the government and the various trade unions.¹⁵ The case is outlined and discussed more fully below.

4. **WAL-MART / MASSMART: A CRITICAL ANALYSIS**

The primary acquiring firm Wal-Mart, being the largest retailer in the world, announced its intention to acquire a 51% shareholding in Massmart, a local wholesaler and retailer of grocery, liquor and general merchandise, on 27 September 2010. The acquisition was immediately seen as controversial and

¹³ 110/CAC/Jul11 and 111/CAC/Jun11 Judgment of 9 March 2012 at para [11] – [12].

¹⁴ Nkomo, M. & van Wyk, M. 2012. Public Interest Criteria in Mergers – Protectionist Measures? *Sixth Annual Competition Law, Economics and Policy Conference in South Africa*. 6 – 7 September 2012. 3.

¹⁵ D Rudman 'Wal-Mart's expansion into Africa focuses attention on public interest', 9 May 2012, available at <http://www.mondaq.com/x/176348/Antitrust+Competition/WalMarts+Expansion+Into+Africa+Focuses+Attention+On+Public+Interest>, accessed on 12 September 2012.

the debate has been characterised by criticism against Wal-Mart's reputation among labour unions, the involvement of government and over-reaching of public policy in competition matters. The Competition Commission initially recommended that the merger be approved unconditionally. This recommendation was challenged at the Competition Tribunal by various labour unions who opposed the merger on public interest grounds. These labour unions included the South African Commercial Catering and Allied Workers Union (SACCAWU), Congress of South African Trade Unions (COSATU), Food and Allied Workers Union (FAWU), National Union of Metal Workers in South Africa (NUMSA), the South African Clothing Textile Workers Union (SACTWU) and the South African Small Medium and Micro Enterprise Forum. The Tribunal granted a delay in the hearing process to allow more time for three government departments to make submissions. Although no competition concerns were identified in the transaction, public interest concerns were raised in terms of section 12A(3) by the various trade unions. The public interest concerns raised were the effects that the merger would have on employment, distribution and retail sectors, and the ability of small businesses or firms, controlled by historically disadvantaged persons, to become competitive.¹⁶ Interestingly, the Minister of Economic Development intervened in the matter and his stated concern was not merely with the direct consequences of the merger, but rather with the prospect that Wal-Mart would substitute imported goods for South African products in its newly acquired stores. Therefore the Minister advocated for a commitment from the merged entity that it would maintain local procurement at the same levels as Massmart, being the South African target entity. Effectively the Minister was demanding the imposition of a local procurement quota and Wal-Mart made it clear that it would not willingly submit to this condition if imposed.¹⁷ Another important element in the Minister's intervention is that he chose to enter into private negotiations with the merging firms, and not make submissions to the Commission's investigators. In so doing, he indirectly held out the promise that if the firms were to reach agreement with

¹⁶ Nkomo, M. & van Wyk, M. 2012. Public Interest Criteria in Mergers – Protectionist Measures? *Sixth Annual Competition Law, Economics and Policy Conference in South Africa*. 6 – 7 September 2012. 3.

¹⁷ D Lewis *Thieves at the Dinner Table* (2012) 133.

him, he would ensure that the agreement would be approved by the competition authorities.¹⁸

The Tribunal approved the merger in May 2011, after hearing evidence from both the merging parties and the opponents to such merger, and after finding that the transaction did not prevent or lessen competition in any of the markets in which Massmart operated. However, conditions, which were tendered voluntarily by the merging parties, were imposed together with the approval. The conditions addressed the public interest concerns raised by the government and the unions in opposing the merger and were primarily focused on the employment and procurement issues. The government and the unions challenged the Tribunal's approval before the Competition Appeal Court (CAC), but for different reasons.¹⁹ The most relevant for this paper was SACCAWU's appeal to the CAC based on the criticism of the normative approach adopted by the Tribunal to the application of the Competition Act. SACCAWU contended that the approach adopted by the Tribunal ignored the express language of the Competition Act and that the South African competition regime is concerned with 'economic or market power, its creation, extension, distribution and (ab)use, and that the entry of a firm with the scale of operations and consequent economic power of Wal-Mart into the South African economy will disrupt the competitive equilibrium and processes in the retail sector, as well as alter competition for suppliers in the retail supply chain'.²⁰ SACCAWU, therefore, contended that the merging parties' adoption of the perspective of the consumer welfare standard wholly ignores its explicit rejection by the Competition Act. SACCAWU recommended that section 12A directs the competition authorities to take account of factors which do not play a role in terms of the consumer welfare approach to competition policy and that section 12A makes it clear that the analysis, as required by the Competition Act, enjoins the competition

¹⁸ D Lewis *Thieves at the Dinner Table* (2012) 133 – 134.

¹⁹ D Rudman 'Wal-Mart's expansion into Africa focuses attention on public interest', 12 May 2012, available at <http://www.mondaq.com/x/176348/Antitrust+Competition/WalMarts+Expansion+Into+Africa+Focuses+Attention+On+Public+Interest>, accessed on 12 September 2012.

²⁰ 110/CAC/Jul11 and 111/CAC/Jun11 Judgment of 9 March 2012 at para [91].

authority to undertake an examination of factors beyond standard questions of a contemplated transaction's impact on price and output.²¹

In light of SACCAWU's contentions outlined above, the CAC raised the question as to what weight is to be given to the factors set out in section 12A(3) in order to determine whether these should trump a finding based on more traditional considerations of consumer welfare as provided for in section 12A(2).²² The CAC held that the Competition Act mandates the authorities to weigh up the competition effects of the merger against the public interest harm. The court found that a merger can be prohibited on public interest grounds only when the merger would lead to substantial public interest harm.²³ Where the public interest harm is not sufficient to justify prohibition of the merger, it will still need to be measured to determine whether or not conditions should be imposed on the merger approval, and if so, the extent of such conditions. Therefore, evidence of public interest harm is crucial in determining whether or not a merger should be set aside for the reason of substantial negative effects on public interest.

Although the CAC found that there was insufficient evidence to conclude that the merger's effect on Small, Medium and Micro Enterprises and employment was sufficient to prohibit such a merger, the CAC partly upheld the appeal as it found that there were legitimate concerns which justified the imposition of conditions. However, the CAC found that the existing conditions imposed by the Tribunal were insufficient and therefore made additions to them. In summary, the CAC agreed with the imposition of employment conditions and extended them by ordering a study to be conducted by three experts appointed by SACCAWU, the government and the merging parties to assist the CAC in framing a supplier-development condition. The CAC concluded that in dealing with a standard that seeks to weigh up the competition assessment against the public interest assessment, it is highly unlikely that the prohibition of the merger could be justified based on public interest grounds. However, the CAC acknowledged that in such circumstances, the public interest harm was not

²¹ 110/CAC/Jul11 and 111/CAC/Jun11 Judgment of 9 March 2012 at para [92] and [93].

²² 110/CAC/Jul11 and 111/CAC/Jun11 Judgment of 9 March 2012 at para [99].

²³ 110/CAC/Jul11 and 111/CAC/Jun11 Judgment of 9 March 2012 at para [114].

irrelevant by upholding the imposition of conditions on such merger.²⁴ The conditions imposed in terms of the order were the following:

- 1) the merged entity must ensure that there are no retrenchments, based on the merged entity's operational requirements resulting from the merger, for a period of two years from the effective date of the transaction;
- 2) the merged entity is required to reinstate the 503 employees who were retrenched in 2009 and June 2010 (such retrenchments were found to be related to the merger itself);
- 3) the merged entity must honour existing labour agreements and must not challenge SACCAWU's position to represent the bargaining units for at least three years from the effective date of the transaction; and
- 4) the merged entity must commission a study to determine the most appropriate means by which local South African suppliers may be empowered to respond to the challenges posed by the merger, and thus benefit from it.

In October 2012, the CAC released its final judgment based on its previous order that the merged entity must commission a study to determine the most appropriate means, together with a mechanism, by which local South African suppliers may be empowered to respond to the challenges posed by the merger and benefit from it. The CAC examined the reports compiled by the experts and ordered the merged entity to establish a fund within four months of the order. Such fund was ordered to comply with various requirements, and amongst others, one requirement is that Massmart must 'contribute a maximum amount of R200 million to the fund over the duration of the fund, which shall be for five years'.²⁵ Further, the CAC ruled that Massmart should design and propose projects to an advisory board for its advice and recommendation. The advisory board may then advise Massmart to consider particular projects for design and proposal to the board.

²⁴ D Rudman 'Wal-Mart's expansion into Africa focuses attention on public interest', 12 May 2012, available at <http://www.mondaq.com/x/176348/Antitrust+Competition/WalMarts+Expansion+Into+Africa+Focuses+Attention+On+Public+Interest>, accessed on 12 September 2012.

²⁵ 110/CAC/Jul11 and 111/CAC/Jun11 Judgment of 9 October 2012 at para [49].

5. A COMPARATIVE PERSPECTIVE

Turning the focus away from the Wal-Mart/Massmart case, to an examination of other recent cases containing public interest considerations, which have come before the Tribunal, reveals an interesting trend of the South African competition authorities. One such case is Metropolitan Holdings Limited and Momentum Group Limited²⁶, decided in 2010. The Tribunal conditionally approved the acquisition by Metropolitan of 100% of the ordinary issued share capital of Momentum. The Tribunal first assessed the competitive effects of the merger and concluded that it was unlikely to substantially prevent or lessen competition in any relevant market. However, the merger gave rise to a public interest consideration in the form of loss of employment. The merging parties submitted that the merger might lead up to approximately 1000 job losses as a result of redundancies and the need to improve efficiencies in the post-merger entity. The Tribunal approved the merger subject to a limited moratorium on retrenchments for two years with terms that clarified the conditions on the merged entity. It was the Tribunal's view that any negative impact on public interest factors cannot be arbitrarily arrived at without establishing a clear connection between the envisaged negative impact and the claimed efficiencies. Further, it was emphasised that even if a negative impact on employment can be connected to a particular claimed efficiency, this does not release the parties from their duty to show that the employment losses can be justified for a reason that is public in nature to offset the public interest in preserving jobs as a result of the merger.

The Kansai/Freeworld merger was another example of a merger in which the Competition Commission imposed significant conditions relating to public interest considerations. In Kansai Paint Co. Limited and Freeworld Coatings Limited²⁷, decided in 2011, the Commission approved the hostile takeover by Kansai, a coatings manufacturer, of Freeworld, a manufacturer and distributor of decorative and performance coatings, subject to a number of welfare and public interest conditions that included the condition of the prohibition of merger related

²⁶ 41/LM/Jul10.

²⁷ 53/AM/Jul11.

retrenchments for a period of three years as well as the requirement that Kansai implement a Black Economic Empowerment deal within two years of the approval of the merger.²⁸ Framed as forming part of the competition authorities' statutory mandate to consider public interest grounds in terms of section 12A(3) of the Competition Act, the latter condition raised many questions regarding the ambit of the public interest grounds that properly fall to be considered by the competition authorities.²⁹

As demonstrated by the case law above, a marked increase in public interest considerations has taken place in South Africa in recent years. In the first ten years of the Competition Act, public interest considerations have not been of a great concern in the vast majority of transactions and South Africa saw sustained economic growth during this time. It is only very recently, in a period of temporary recession and substantial job losses, that public interest issues are becoming more and more prevalent and the competition authorities interpretation thereof more contested.³⁰ What, then, is the approach of other jurisdictions? A brief study of public interest considerations in international merger control regimes demonstrates that a number of countries do give weight to public interest considerations, however, this is strictly limited to certain sectors and the general trend is to move away from placing considerable weight onto such issues and to rather focus on pure competition law objectives in merger control.

5.1 United States and Canada

It is submitted that in the first half of the 20th century, competition law in the United States was used to address an indefinite range of concerns, such as the level of employment, the redistribution of wealth and the spreading of business opportunities among a large number of firms.³¹ By the end of the 1970s, the

²⁸ Boshoff, W, Dingley D & Dingley, J. 2012. The Economics of Public Interest Provisions in South African Competition Policy. *Sixth Annual Competition Law, Economics and Policy Conference in South Africa*. 6 – 7 September 2012. 7.

²⁹ Avidon, C & Azzarito, C. 2012. 'Being pushed to promote government policies'. *Without Prejudice*. February 2012.

³⁰ J. Hodge *et al* 'Public interest provisions in the South African Competition Act: A critical review' in *The Development of Competition Law & Economics in South Africa* (edited by K. Moodaliyar and S. Roberts) (2012) at page 10.

³¹ Odudu, O. 2010. The Wider Concerns of Competition Law. *Oxford Journal of Legal Studies* (Vol. 30, No. 3). 599 – 613 at 599.

United States antitrust laws were, to many observers, too robust. US Competition law prohibited many 'normal' business transactions by over-expanding in favour of helping the underdog and dispersing power.³² Judge Frank Easterbrook articulated the result of such when he wrote, 'When everything is relevant, nothing is dispositive'.³³ The 1980s ushered in an era of conservatism, led by the Reagan administration, and this new administration set about to cut back the law that regulated business in the United States.³⁴ As a result of this, competition law in the United States changed and the focus shifted entirely to consumer welfare and legitimate efficiency.

'The victory of Chicago School was more a victory of economic libertarianism than a victory of consumers; 'consumer welfare' was merely the label given for the raison d'être of the new regime. Freedom of business was the victor; especially of the large firms that has been treated with suspicion. Aggregate consumer welfare was a limiting principle to protect the freedom of business while acknowledging the existence of the law... By the end of the twentieth century, there was a considerable range for manoeuvre in claiming that exclusionary conduct met the test of harming consumer welfare and therefore deserved to be called anti-competitive'.³⁵

In the United States and Canada, public interest in mergers has mainly focused on mergers in the media and banking sectors respectively. Competition authorities in both countries have no public interest encumbrance when assessing mergers with the exception of these two sectors.³⁶ In recent years, United States merger analysis has become increasingly well-grounded in economics and the focus has been directed solely on the protection of consumer welfare. The United States competition authorities focus on whether the merger is likely to create or enhance market power or facilitate its exercise.³⁷

³² Eleanor M. Fox 'What is harm to competition?' Antitrust, exclusionary practices, and the elusive notion of anticompetitive effect' (2001) LexisNexis, at 2.

³³ Easterbrook, F. 1984. The Limits of Antitrust. *Texas Law Review Journal* (Vol. 63, No.1).1 – 40. 12.

³⁴ Eleanor M. Fox 'What is harm to competition?' Antitrust, exclusionary practices, and the elusive notion of anticompetitive effect' (2001) LexisNexis, at 2.

³⁵ Eleanor M. Fox 'What is harm to competition?' Antitrust, exclusionary practices, and the elusive notion of anticompetitive effect' (2001) LexisNexis, at 2 – 3.

³⁶ Njisane, Y. 2011. The rise of Public Interest: Recent high profile mergers. *Public Interest Law Gathering*. 1 – 24. 17.

³⁷ International Competition Network: Mergers Working Group 'Description of Analytical Framework under United States Merger Law. 2002 Naples Conference. 21.

In Canada, non-competition issues, such as industrial policy or labour policy issues, are not taken into account by the Canadian Competition Bureau in its merger control review of merger transactions, unless such policies form a barrier to entry into the market. However, case precedent obliges the Competition Bureau to consider all of the purposes of the Canadian Competition Act when taking into account the extent of the anti-competitive effects and whether they may be offset and outweighed by merger-related efficiencies, and due regard has been taken to ensure that Small, Medium and Micro Enterprises ("SMMEs") have an equitable opportunity to participate in the Canadian economy.³⁸

5.2 European Union

There are two levels of merger control in Europe. The first is the European Union merger control for certain transactions with a 'community dimension', which fall within the jurisdiction of the European Commission under the EU Merger Regulation, Council Regulation No. 139/2004. The second is national merger control for those transactions which do not meet the European Union Merger Regulation criteria, but nevertheless qualify for investigation under the national laws of Member States. All European Union Member States have national merger control laws, with the exception of Luxembourg. Within the European Union of 27 Member States, the European Commission has exclusive jurisdiction over 'concentrations with a community dimension'. Generally, transactions which are subject to notification to, and clearance by, the European Commission under the European Union Merger Regulation are not subject to parallel merger inquiries under the national merger control provisions of the various Member States. However, there are provisions which allow for parallel inquiries in certain limited circumstances.³⁹

The European Commission, which is termed a super-national competition agency, has various Council Regulations, termed Merger Regulations. The Merger Regulations grant the European Commission the exclusive jurisdiction to

³⁸ The European Lawyer Reference (Van Bael & Bellis). 2011. *Merger Control*. London, United Kingdom. 122.

³⁹ Ashurst LLP Quickguides 'EU Merger Control', January 2012, available at www.ashurst.com/doc.aspx?id_Resource=4629, accessed on 9 June 2013.

decide on mergers, or ‘concentrations which have a community dimension’. The Commission appraises a concentration with a view to ascertaining whether it creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.⁴⁰ The Commission must take various factors into account: i) the need to preserve and develop effective competition within the common market; ii) actual or potential competition from the European community or from around the world; iii) market position of the undertakings and their economic and financial power; iv) access of suppliers and users to supplies and markets; v) legal or other barriers to entry; vi) supply and demand trends for the relevant goods; vii) the interests of the intermediate and ultimate consumers; and viii) the development of technical and economic progress, provided that it is to the consumers’ advantage and does not form an obstacle to competition.⁴¹

All the factors which the Commission is required to take into account in appraising a merger, save for one, are based purely on competition law. The consideration of the development of technical and economic progress is a non-competition law ground and is considered to be an industrial policy ground. Such examples are the prevention of a foreign company from acquiring a controlling interest in a key European community company, preventing a merger that would lead to considerable unemployment in the European community, or creating a European champion to revive a declining European community industry or to compete effectively with a foreign competitor.⁴² However, the GE/Honeywell merger case set out below has led to major criticism of the EU merger control regime.

5.3 GE/Honeywell merger discussion

General Electric was the world’s largest producer of large and small jet engines for commercial and military aircraft. Honeywell was a leading firm in the production of avionics, including navigation equipment, certain non-avionic

⁴⁰ Joseph Wilson *International Competition Law Series: Globalization and the Limits of National Merger Control Laws* Volume 10 (2003) 159 – 160.

⁴¹ Joseph Wilson *International Competition Law Series: Globalization and the Limits of National Merger Control Laws* Volume 10 (2003) 160.

⁴² Joseph Wilson *International Competition Law Series: Globalization and the Limits of National Merger Control Laws* Volume 10 (2003) 160.

products, engines for corporate jets and engine starters. General Electric and Honeywell agreed to merge in what would have been the largest industrial merger in history. The European Commission declared in July 2001 that the merger between General Electric and Honeywell was 'incompatible with the common market' according to the Merger Regulations. The decision was appealed by the merging parties to the Court of First Instance which, in December 2005, decided to uphold it. This thwarted merger stands out as the only merger between US companies to be derailed solely by the European competition authorities, while being cleared by the US Department of Justice and 11 other jurisdictions.

The European Commission declared:

'The combination of the two companies' activities would have resulted in the creation of dominant positions in the markets for the supply of avionics, non-avionics and corporate jet engines, as well as the strengthening of GE's existing dominant positions in jet engines for large commercial and large regional jets. The dominance would have been created or strengthened as a result of horizontal overlaps in some markets as well as through the extension of GE's financial power and vertical integration to Honeywell activities and of the combination of their respective complimentary products. Such integration would enable the merged entity to leverage the respective market power of the two companies into the products of one another. This would have the effect of foreclosing competitors, thereby eliminating competition in these markets, ultimately affecting adversely product quality, service and consumers' prices'.⁴³

The European Commission effectively concluded that a more diversified, and thus more competitive General Electric, would somehow disadvantage other market participants, specifically those in the European market. Therefore the question has been raised as to how to define 'the anticompetitive effect' of exclusionary practices? Does the concept of anti-competitiveness only include provable increases in market power that will lower output and raise prices for consumers? Or does it go further than this and include the exclusionary impact on competitors of dominant firm conduct, the impact on market actors of coercive uses of power to deprive them of what they need for their own efficient

⁴³ Eleanor M. Fox 'What is harm to competition?' Antitrust, exclusionary practices, and the elusive notion of anticompetitive effect' (2001) LexisNexis, at 10.

performance, and the impact on competitors of market structures that confer on a dominant firm either preferred access to an important input/facility or leveraging?⁴⁴ Could the concerns of reduced competition and higher prices for consumers resulting from the merger not have been eliminated by the imposition of certain conditions with the result that the merger could proceed? However, it seems that the merging parties could not come to a solution which met the European competition authorities' approval.

Although this case does not deal primarily with public interest issues, it has been widely held to be a clear example of the European competition authorities protecting the local market players and illustrates the anxiety caused in the consideration of a merger with the potential to swamp the relevant market and impede competition. Criticism of the decision has revealed opinion that the EU competition authorities are given enormous discretion and that under the current EU procedures and practices, merging firms and their legal counsel need to recognize the very substantial discretion enjoyed by the staff of the EU's Merger Task Force and plan their approach accordingly.⁴⁵ This could serve as a warning to the practice of competition law in South Africa and gives light to the potential problems that could arise if the competition authorities are given too much room to interpret legislation and use their own discretion in correcting the wrongs of South Africa's past inequality.

5.4 United Kingdom

A key feature of the merger provisions in the UK's Enterprise Act, 2002, is that the Secretary of State should not be involved in individual cases, and that decisions should be taken by the Office of Fair Trading and Competition Commission as the UK merger control regime follows the principle that competition analysis in normal merger cases should be carried out by specialist competition authorities. However, there may be situations in which the investigation of a merger may be justifiable on grounds of a wider public interest than its detrimental effect on competition.

⁴⁴ Eleanor M. Fox 'What is harm to competition?' Antitrust, exclusionary practices, and the elusive notion of anticompetitive effect' (2001) LexisNexis, at 10.

⁴⁵ D.E. Patterson & C. Shapiro, 'Transatlantic Divergence in GE/Honeywell: Causes and Lessons' (2001) available at <http://faculty.haas.berkeley.edu/shapiro/divergence.pdf>, accessed on 08 August 2013.

Section 58 of the Enterprise Act provides for specified public interest considerations in merger control:

- 1) national security;
- 2) considerations in respect of media, including plurality and free expression; and
- 3) the stability of the UK financial system.⁴⁶

However, the list may be added to in instances where the Secretary of State thinks a certain public interest ground ought to be specified. Section 58(3) provides that 'the Secretary of State may by order modify this section for the purpose of specifying in this section a new consideration or removing or amending any consideration which is, for the time being, specified in this section'. Further, section 42 of the Act provides for the intervention of the Secretary of State in certain public interest cases. These sections were demonstrated in the Lloyds/HBOS merger case discussed below.

The UK merger control regime in recent years has been an example of an enduring economics-based system of merger regulation. In September 2008, Lloyds TSB and Halifax Bank of Scotland (HBOS) were allowed to merge into the Lloyds Banking Group, in a deal brokered by the UK government. For the first time since the Enterprise Act came into force in 2002, the UK government used its public interest powers to allow a merger which was opposed by the Office of Fair Trading on competition grounds (based on substantial lessening of competition in relation to personal current accounts, banking services for SMMEs and mortgages). In order for the merger to be allowed, the Secretary of State had to create a new public interest ground with the consent of Parliament. The Secretary of State used his power under section 42 of the Enterprise Act to create a new public interest ground, being 'maintaining the stability of the UK financial system' and forced the merger through on the new public interest ground without the Competition Commission having a chance to consider its implications for competition. This was done on the basis of section 45 of the Act, finding that the benefits of the merger for the stability of the UK financial system

⁴⁶ The European Lawyer Reference (Van Bael & Bellis). 2011. *Merger Control*. London, United Kingdom. 778.

outweighed the likely anti-competitive outcomes.⁴⁷ It can be argued that the decision was misguided as it did not deal with the systematic problems that had become apparent at the time and created some competition problems. Due to the fact that the merged entity had to be bailed out by the government following the merger, gives reason to believe that Lloyds/HBOS failed to achieve the stated public interest in any event. This has led to a powerful bank with significantly reduced competition. The conclusion may be drawn that the decision to allow the Lloyds/HBOS merger prioritised short-term concerns and financial stability. The criticism of the case involves the point that bringing public interest considerations into play widens the issues of debate and will inevitably encourage lobbying by those who want to support their particular interests. Some commentators have suggested that the UK may have gone too far in creating an 'unduly purist economic enforcement regime' and the time may now have come to consider whether it would be beneficial to allow broader political interventions in merger control on non-competition grounds. Such interventions would also allow the government to block foreign acquisitions of British firms.⁴⁸ Merger control on purely competition grounds encourages innovation and efficiency, resulting in new products and lower prices while preventing the exercise of excessive market power. There is a growing consensus that the Lloyds/HBOS merger should have been blocked purely on competition grounds and that HBOS should have been nationalised instead.⁴⁹ It has been argued that economics-based merger control is transparent and preferable to general public interest assessments, which are unpredictable and open to abuse.⁵⁰

Therefore, a return to broader political interventions on public interest grounds, as demonstrated in the Lloyds/HBOS case, would risk creating inconsistency in merger regulation and uncertainty for firms. While it might prevent some

⁴⁷ Andreas Stephan, 'Did Lloyds / HBOS Mark the Failure of an Enduring Economics Based System of Merger Regulation?', July 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1931007, accessed on 8 June 2013.

⁴⁸ Andreas Stephan, 'Did Lloyds / HBOS Mark the Failure of an Enduring Economics Based System of Merger Regulation?', July 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1931007, accessed on 8 June 2013, page 2.

⁴⁹ Andreas Stephan, 'Did Lloyds / HBOS Mark the Failure of an Enduring Economics Based System of Merger Regulation?', July 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1931007, accessed on 8 June 2013, page 14.

⁵⁰ Andreas Stephan, 'Did Lloyds / HBOS Mark the Failure of an Enduring Economics Based System of Merger Regulation?', July 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1931007, accessed on 8 June 2013, page 1.

'damaging' mergers, it would also discourage mergers which benefit the economy and make it less likely that foreign firms will invest in the UK. 'The unpredictable circumstances in which a public interest intervention might be perceived as being necessary makes it impossible to provide a satisfactory definition of public interest'.⁵¹ The current system in the UK, which focuses on competition issues only, has worked well in the past and has provided businesses with transparency and predictability. Public interest factors should remain restricted to a small number of identified industries where there is good reason to consider non-competition law factors.

5.5 Australia and New Zealand

The substantive merger control test in Australia is whether the acquisition will have the effect or likely effect of substantially lessening competition in any market in Australia. Section 50(3) of the Competition and Consumer Act, 2010, provides that the Australian Competition and Consumer Commission must consider the following factors: actual and potential level of import competition; barriers to entry; market concentration; countervailing power; acquirer's ability to significantly and sustainably increase prices or profit margins post-merger; availability of substitutes; dynamic characteristics of the market including growth, innovation and product differentiation; removal of any vigorous and effective 'maverick' competitor; and the degree of vertical integration.⁵² The Australian Competition and Consumer Commission generally only considers merger-related efficiencies if they affect the competitiveness of a market. Non-competition issues are not taken into account by the Australian Competition and Consumer Commission when deciding whether or not to grant clearance of a merger. The majority of the issues taken into account in merger decisions are competition issues including merger efficiencies and the impact of regulation.⁵³

Non-competition issues rarely factor into New Zealand's Commerce

⁵¹ Andreas Stephan, 'Did Lloyds / HBOS Mark the Failure of an Enduring Economics Based System of Merger Regulation?', July 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1931007, accessed on 8 June 2013, page 15.

⁵² S Henrick and W Leach 'International Comparative Legal Guides: Australia Chapter – Merger Control 2013', available at <http://www.iclg.co.uk/practice-areas/merger-control/merger-control-2013/australia>, accessed on 10 June 2013.

⁵³ The European Lawyer Reference (Van Bael & Bellis). 2011. *Merger Control*. London, United Kingdom. 30.

Commission's merger control analysis. 'Australia and New Zealand adopt a more or less similar approach to public interest during merger review. They have a process of merger authorisation which enables firms to apply to the Australian Competition Tribunal and the Commerce Commission respectively for an approval of mergers that are deemed anti-competitive if the public benefit outweighs these'.⁵⁴ However, New Zealand's Commerce Act (1986) specifically provides that in the exercise of its powers, the Commerce Commission 'shall have regard to the economic policies of the Government as transmitted in writing from time to time to the Commission by the relevant Minister'.⁵⁵

5.6 China

China has incorporated specific provisions for public interest in their merger control regulations, but the main focus of these is whether, as a result of the merger, the concentration has an impact on national security.⁵⁶ On the 30th of August 2007, China adopted its first anti-monopoly law in an effort to continue the modernization of its economy through fostering competition and increasing efficiency. The law is intended to protect free competition and consumer rights, as well as allow the healthy development of China's socialist market economy.⁵⁷ Chapter I sets out the overarching principles and purposes of the law, as well as the basic structure and functions of enforcement authorities. Chapter II prohibits monopoly agreements, including prohibited conduct, price fixing and collusion to depress product output. Chapter III prohibits the abuse of a dominant market position, notably including prohibitions on selling products at 'unfair' prices. Chapter IV of the Anti-Monopoly Law governs merger control and includes the factors which need to be examined when determining whether or not to approve mergers. However it leaves the thresholds for notification to be defined by the

⁵⁴ Njisane, Y. 2011. The rise of Public Interest: Recent high profile mergers. *Public Interest Law Gathering*, 1 – 24. 16.

⁵⁵ The European Lawyer Reference (Van Bael & Bellis). 2011. *Merger Control*. London, United Kingdom. 500.

⁵⁶ The European Lawyer Reference (Van Bael & Bellis). 2011. *Merger Control*. London, United Kingdom. 133.

⁵⁷ Alston & Bird LLP Antitrust Advisory 'China Adopts Landmark Anti-Monopoly Law', 9 October 2007, available at <http://www.alston.com/Files/Publication/cacb493e-7743-4783-8720-e9cd375d15f6/Presentation/PublicationAttachment/c300dc85-5a3c-4efd-997b-01737100445c/Chinese%20AML%20Advisory.pdf> accessed on 9 June 2013.

State Council. Chapter V limits the ability of Chinese administrative agencies to hinder competition.⁵⁸

The merger review provisions set out in Article 27 are in many ways consistent with approaches of other jurisdictions, including consideration of the concentration of the market, and the market share and power of the parties to the transaction. However, other factors are deviations from the major jurisdictions.⁵⁹ Article 27 provides that the Ministry of Commerce, China's executive agency for competition must consider a proposed merger's effect 'on the development of the national economy'. This essentially enjoins the Ministry of Commerce to consider industrial policy factors during merger review.⁶⁰ Article 28 obligates the relevant authority to prohibit concentrations that 'will or may eliminate or restrict market competition'. Quite notably, this factor does not include a requirement that such a restriction be 'substantial', unlike the EU requirement of 'substantial lessening of competition' in order to justify prohibition. Where Article 28 seems to provide a savings clause from harsh and literal applications, it does still add a great deal of discretion and unpredictability by empowering the authority to permit a transaction where its advantages outweigh its disadvantages, or where the concentration is 'in harmony with the public interest'.⁶¹

There has been much debate around the viability and success of the Anti-Monopoly Law. Some commentators are of the view that the law is a major step in establishing a system of commercial law consistent with international norms, while others believe that the interpretation and application of the law may raise serious concerns about whether the law will, in practice, be used primarily to protect competition and consumer welfare in China, or whether it will be used as a protectionist device to favour State Owned Enterprises and privatised

⁵⁸ Alston & Bird LLP Antitrust Advisory 'China Adopts Landmark Anti-Monopoly Law', 9 October 2007, available at <http://www.alston.com/Files/Publication/cacb493e-7743-4783-8720-e9cd375d15f6/Presentation/PublicationAttachment/c300dc85-5a3c-4efd-997b-01737100445c/Chinese%20AML%20Advisory.pdf> accessed on 9 June 2013.

⁵⁹ H. Stephen Harris 'The New China Anti-Monopoly Law', 16 August 2007, available at <http://www.chinacenter.net/the-new-china-anti-monopoly-law/>, accessed on 9 June 2013.

⁶⁰ Njisane, Y. 2011. The rise of Public Interest: Recent high profile mergers. *Public Interest Law Gathering*. 1 – 24. 16.

⁶¹ H. Stephen Harris 'The New China Anti-Monopoly Law', 16 August 2007, available at <http://www.chinacenter.net/the-new-china-anti-monopoly-law/>, accessed on 9 June 2013.

indigenous companies in Chinese markets.⁶² For example, the broad language in Chapter I raises questions about whether the specific provisions might be interpreted in a non-normative manner. Article 1 of Chapter I provides that the law is enacted for the purpose of protecting ‘the public interest’ and to promote ‘the healthy development of the socialist market economy’. It has been suggested that such language could be used to support policies inconsistent with an interpretation that would protect open competition based on free market principles.⁶³

5.7 India

Indian Competition Law has largely followed that of the European Union, and United Kingdom specifically, and will prohibit any merger which is likely to cause an appreciable adverse effect on competition. The courts in India generally approve a merger unless it is contrary to public interest or is patently unfair to any group of shareholders. The courts do not ordinarily interfere in the collective wisdom of the shareholders and/or creditors in approving a scheme, even in cases where two or more large companies have merged and issues relating to the formation of a monopoly have been raised.

The Indian Competition Act does not permit a combination that causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India. For this purpose, various factors specified in Section 20(4) of the Act would be considered by the Competition Commission of India. Such factors include: actual and potential level of competition through imports in the market; extent of barriers to entry; level of combination in the market; degree of countervailing power in the market; likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins; extent of effective competition likely to sustain in a market; extent to which substitutes are available or are likely to be available in the market; market share, in the relevant market, of the persons or enterprise in combination, individually and as a combination; likelihood that the

⁶² H. Stephen Harris ‘The New China Anti-Monopoly Law’, 16 August 2007, available at <http://www.chinacenter.net/the-new-china-anti-monopoly-law/>, accessed on 9 June 2013.

⁶³ H. Stephen Harris ‘The New China Anti-Monopoly Law’, 16 August 2007, available at <http://www.chinacenter.net/the-new-china-anti-monopoly-law/>, accessed on 9 June 2013.

combination would result in the removal of a vigorous and effective competitor or competitors in the market; nature and extent of vertical integration in the market; possibility of a failing business; nature and extent of innovation; relative advantage, by way of contribution to the economic development, by any combination having or likely to have an appreciable adverse effect on competition; and whether the benefits of the combination outweigh an adverse impact of the combination, if any.⁶⁴

In terms of whether non-competition law factors are considered in such an analysis, there is some reference to factors such as (i) nature and extent of innovation, and (ii) relative advantage by way of contribution to the economic development, which can be said to be non-competition issues. However, no direct reference is found to other non-competition issues such as policies of the government in assessing the merger.⁶⁵

5.8 Brazil

The main provisions relating to merger control in Brazil are contained in Law No. 8884 of June 1994 and in a number of Resolutions issued by the Administrative Council for Economic Defence (“CADE”), the Secretariat for Economic Monitoring (“SEAE”) and Secretariat for Economic Law (“SDE”). All three agencies have a role to play in the merger control process in Brazil, although only CADE has the authority to make final decisions on such matters.⁶⁶ Brazilian competition law provides that ‘any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services shall be submitted to CADE for review’.⁶⁷ In Brazil, a merger will normally be cleared if it is not considered to create or strengthen a dominant position and no further analysis on the ‘lessening of competition’ will generally be conducted. Much like South Africa, an economic efficiency defence is

⁶⁴ P Rai and P Srinipasan ‘International Comparative Legal Guides: India Chapter – Merger Control 2013, available at <http://www.iclg.co.uk/practice-areas/merger-control/merger-control-2013/india>, accessed on 10 June 2013.

⁶⁵ P Rai and P Srinipasan ‘International Comparative Legal Guides: India Chapter – Merger Control 2013, available at <http://www.iclg.co.uk/practice-areas/merger-control/merger-control-2013/india>, accessed on 10 June 2013.

⁶⁶ Regazzini, J.A.C. 2005. Merger Control in Brazil. *Competition Law International*. 22 – 25. 22.

⁶⁷ Article 54 of Law No. 8884 of 11 June 1994, Brazil.

expressly taken into account in Brazilian competition law, which allows for a merger to be approved⁶⁸ when:

- 1) the transaction will result in an increase in productivity or improvement in quality, and increased efficiency, or foster technological or economic progress;
- 2) these benefits are proportionately passed on to consumers;
- 3) the transaction does not eliminate a substantial portion of the relevant market;
- 4) the transaction is limited to acts necessary to obtain the beneficial effects.

Further, Brazilian competition law permits mergers to be approved where only three of these requirements are satisfied where they are in the public interest or otherwise to the benefit of the Brazilian economy, but generally, CADE does not take into account non-competition issues for the approval of a merger.^{69 70} An interesting point to note is that CADE has reviewed a steadily increasing number of merger applications. It has imposed conditions or otherwise intervened in less than five percent of all cases.⁷¹ In the recent Performance Commitment Agreement negotiated by CADE in the *Sadia and Perigão* merger case⁷², it was established that one of the conditions for the approval of the transaction was that the companies were forbidden to fire employees until the implementation of the committed divestitures.⁷³ Despite this case, the imposition of conditions on merger approvals by CADE is extremely low considering Brazil is a developing country.

5.9 Comparison to South Africa

The above analysis of various other jurisdictions and their approach to the application of public interest considerations demonstrates that, while South Africa may be consistently considering public interest factors, many jurisdictions

⁶⁸ Article 54, Paragraph 1 of Law No. 8884 of 11 June 1994, Brazil.

⁶⁹ Regazzini, J.A.C. 2005. Merger Control in Brazil. *Competition Law International*. 22 – 25. 24.

⁷⁰ The European Lawyer Reference (Van Bael & Bellis). 2011. *Merger Control*. London, United Kingdom. 84.

⁷¹ Regazzini, J.A.C. 2005. Merger Control in Brazil. *Competition Law International*. 22 – 25. 25.

⁷² No. 08012.004423/2009-18.

⁷³ The European Lawyer Reference (Van Bael & Bellis). 2011. *Merger Control*. London, United Kingdom. 84.

are no longer considering public interest as part of their competition legislation, save for mergers in specified sectors. The Global Competition Review of the South African Competition Commission noted that there was a marked increase in the use of remedies with 28 mergers being cleared with conditions in 2011 compared to only 11 in 2010.⁷⁴ If anything, the above reveals that South Africa places a heavy and perhaps burdensome importance on public interest in merger control and this only seems to be becoming more and more prevalent as shown in the increase in its emphasis in South Africa's case law. Although it can be argued that the competition authorities have made efforts to provide workable remedies through the imposition of conditions, and perhaps this should be seen as a positive development, it compounds the question of how far can the competition authorities reach before they go too far.

What can be seen from the above analysis of the various jurisdictions, as well as the Momentum/Metropolitan, Kansai/Freeworld and Wal-Mart/Massmart cases, is that globally, the consideration of public interest issues in merger control is either being abandoned altogether or being reduced to a fraction of the overall factors affecting competition authorities' decisions on merger transactions around the world. In most of the jurisdictions that are strong reference points for South Africa's competition law, there is either no public interest component or the public interest decision lies outside of the competition authorities. As South Africa's Competition Act requires the deliberate balancing of competition law and public interest, there is very little assistance from other jurisdictions on how this balancing act should be achieved.⁷⁵ However, despite the global positions, South Africa only seems to be increasing the role that public interest issues have to play in merger control. Despite South Africa's significantly different background, should we not be moving in the same direction as the rest of the world? However, an argument to this question could be that law-making should come from within and not from external sources, because legislation should respond to contextual problems within the country

⁷⁴ Kariga, R, Ngobeni, J & Ngobese, M. 2012. Is South Africa a Good Investment Destination? A Relook at Conditions in Merger Cases. *Sixth Annual Competition Law, Economics and Policy Conference in South Africa*. 6 – 7 September 2012. 8.

⁷⁵ J. Hodge *et al* 'Public interest provisions in the South African Competition Act: A critical review' in *The Development of Competition Law & Economics in South Africa* (edited by K. Moodaliyar and S. Roberts) (2012) at page 12.

concerned that need to be solved. Law is not ideally generated by outsiders who suggest that, because they have a certain law, you should too. Therefore it is important to understand and to assess who within a developing country like South Africa would be harmed by what practices, how these harms can be prevented and at what cost?⁷⁶ A very difficult balance needs to be struck and it is easier said than done.

6. **THE EXTENSION OF PUBLIC INTEREST: THE ARGUMENTS**

Public interest issues, raised in merger control mechanisms throughout the world, usually revolve around or are related to certain key areas. Some commentators argue that mergers have a disruptive effect on the management of one or both of the merged firms and this may be detrimental to their long-term prospects and the public interest. Mergers may also be objected to on the ground that they lead to firms of such size and power as to be in opposition to a balanced distribution of wealth. Another objection is that mergers may lead to the closure of factories and result in unemployment. Further, mergers may result in the control of indigenous firms being passed to foreign companies, in which case any economic advantages of the merger may be thought to be outweighed by the desirability of maintaining the decision-making process and profits locally.⁷⁷

6.1 *The Positive and Negative Effects of Globalisation*

'Manifestly, competition law cannot be a substitute for industrial or trade policy, hence this court cannot construct a holistic policy to address the challenges which are posed by globalization. But the public interest concerns set out in section 12A demands that this court gives tangible effect to the legislative ambition'.⁷⁸

Globalisation requires firms and businesses to be competitive on a global scale, with expansion beyond national boundaries an imperative. Globalisation itself is not a new concept, the process of international economic integration has been underway for decades, but the pace and scale of today's globalisation is

⁷⁶ Fox, E.M. 2007. Economic Development, Poverty and Antitrust: The Other Path. *Southwestern Journal of Law and Trade in the Americas*. 101 – 125. 114.

⁷⁷ R Whish and D Bailey *Competition Law* 7th edition (2012) 825.

⁷⁸ 110/CAC/Jul11 and 111/CAC/Jun11 Judgment of 9 March 2012 at para [154].

unprecedented. The intensification of globalisation around the world has had various impacts on different countries, some negative and some positive. The negative aspects to globalisation, specifically in relation to the employment sector, relate to domestic producers being unable to compete with foreign imports and thus experiencing a loss of demand and markets and are therefore being forced to reduce wages or cut jobs altogether. However, the possible positive impacts result in rapid growth, in both output and employment. These positive results are due to suppliers who are able to transform their operations to take advantage of the larger global markets exposed to them. Thus globalisation signifies both a potential threat and potential opportunity to a developing country like South Africa.

Thus, why did the CAC have a knee-jerk reaction on the assumption that globalisation would definitely threaten South Africa's economy? Surely, at this stage, we cannot answer the question as to whether Wal-Mart's merger with Massmart will result in substantial employment losses and / or the weakening of its domestic supply chains? It is very difficult to foresee exactly what the outcome of a merger as large as the Wal-Mart one would be. What if Wal-Mart's entry into the market results in enhanced growth, lower prices and better quality of goods for consumers and, as a result, increased wages for employees, an expansion in employment and the strengthening of opportunities for SMMEs?⁷⁹ In light of this, it seems apparent that the CAC viewed it as desirable to have a degree of protection from the threat of globalisation, hence the imposition of the conditions. However, could the conditions imposed on the Wal-Mart/Massmart merger be said to reduce the chances of the positive impacts of globalisation taking place? It is proposed that most, if not all, the conditions imposed on the merger will result in increased costs to the merged entity, specifically the R200 million fund, and these costs will need to be recouped somewhere. This undoubtedly creates a stifling effect and how are we to know the consequences of such and, especially, the effect of such costs on the end result – most likely being the consumers? In an era of globalisation, where interactions of the economies is ever increasing, it has been suggested that a minimum of

⁷⁹ Morris, M. 2012. Wal-Mart/Massmart Study for the Competition Appeal Court. 9 June 2012. 7 – 8.

convergence around certain principles is necessary, especially in regard to merger procedure. Therefore, should South Africa not be following in the footsteps of a country like Brazil?

6.2 Global Value Chains

The above arguments can be illustrated further by the effect of global value chains – the reason for the increased pace of globalisation. Businesses around the world are being forced to adapt to the ever increasing pace, scale, and complexity of globalisation. Reductions in communication and transportation costs as well as the emergence of new technologies have enabled firms of all sizes to market their products and services to the international market. This has resulted in an increase in both the scope and scale of competition. In order to adjust to this international marketplace, businesses need to change the way they operate and function. The adoption of the global value chain business model opens up numerous new options for firms on the path to greater success, including small and medium enterprises provided they are willing to adapt accordingly. It is fair to say that most developing countries wish to become part of the increasingly integrated world economy with the hope of increasing their economic opportunities, generating higher rates of profit and growth, and inducing a higher rate of investment in their countries.⁸⁰

'The global economy is increasingly structured around global value chains that account for a rising share of international trade, global GDP and employment. The evolution of global value chains in sectors as diverse as commodities, apparel, electronics, tourism and business service outsourcing has significant implications in terms of global trade, production and employment and how developing country firms, producers and workers are integrated in the global economy. Global value chains link firms, workers and consumers around the world and often provides a stepping stone for firms and workers in developing countries to integrate the global economy. For many countries, especially low-income countries, the ability to effectively insert themselves into global value chains is a vital condition to their development. This supposes ability to access global value chains, to compete successfully and to 'capture the gains' in terms of national economic development, capability building and generating more and better jobs to reduce

⁸⁰ Fox, E.M. 2007. Economic Development, Poverty and Antitrust: The Other Path. *Southwestern Journal of Law and Trade in the Americas*. 101 – 125. 111.

unemployment and poverty. Thus, it is not only a matter of whether to participate in the global economy, but how to do so gainfully.⁸¹

The value chain describes the full range of activities and processes that firms and labourers perform to bring a product from its conception to its end use. This includes activities such as design, production, marketing, distribution and support to the final consumer. The activities that comprise a value chain can be contained within a single firm or divided among different firms.⁸² The whole process of producing goods, from raw materials to finished product, has increasingly been dissected and each process can now be carried out wherever the necessary skills and materials are available at competitive cost.⁸³ 'The globalisation of value chains is driven by companies' desire to increase efficiency, as growing competition in domestic and international markets forces firms to become more efficient and lower costs, as well as the desire to enter new emerging markets and gain access to strategic assets that can help tap into foreign knowledge'.⁸⁴ Increasingly countries begin to specialise in tasks rather than just products.

An example of the above is the apparel industry (blue jeans) in Mexico, where Mexico initially entered the industry in the assembly stage of the value chain. However, they quickly developed expertise in providing trim and labels, and distinct washes and finishes. By 2000, operations had also developed expertise in distribution by shipping their products directly to the point of sale. The figure below illustrates the country's upgrading into new higher value segments of the apparel value chain from 1993 until 2000.

⁸¹ G Gereffi and K Fernandez-Stark 'Global Value Chain Analysis: A Primer', 31 May 2011, available at www.cggc.duke.edu/pdfs/2011-05-31_GVC_analysis_a_primer.pdf, accessed on 10 June 2013 at 2.

⁸² G Gereffi and K Fernandez-Stark 'Global Value Chain Analysis: A Primer', 31 May 2011, available at www.cggc.duke.edu/pdfs/2011-05-31_GVC_analysis_a_primer.pdf, accessed on 10 June 2013 at 4.

⁸³ OECD Policy Brief 'Moving up the (Global) Value Chain', July 2007, available at <http://www.oecd.org/sti/ind/38979795.pdf>, accessed on 8 June 2013.

⁸⁴ OECD Policy Brief 'Moving up the (Global) Value Chain', July 2007, available at <http://www.oecd.org/sti/ind/38979795.pdf>, accessed on 8 June 2013.

Fig 1. USA : MEXICO Apparel Value Chain – Activities and Location⁸⁵

	Textiles	Trims & Labels	Cutting	Assembly	Laundry & Finishing	Distribution	Marketing	Retail
1993								
USA	√	√	√	√	√	√	√	√
Mexico				√				
1996								
USA	√	√	√	√	√	√	√	√
Mexico	√	√		√	√			
2000								
USA	√	√	√	√	√	√	√	√
Mexico	√	√	√	√	√	√		

In 1993, only four U.S. manufacturers of blue jeans had a significant presence in Mexico. By 2000, the number of export customers grew to more than two dozen. Brand marketers and retailers engaged Mexican firms to increase their production volumes and the range of activities performed.⁸⁶

Global value chains have to be taken into account by any country seeking to develop exports and grow its economy. Ignoring their importance will doom African countries to failed strategies.⁸⁷ Sub-Saharan Africa, including South Africa, has not participated extensively in global value chains. Instead the region has specialised in exporting commodities to world markets. Globalisation has a variety of effects, both positive and negative, but the visible, short-term costs, such as job losses in the more developed countries, often gain the most attention. The long-term benefits, such as overall increased productivity in a more competitive, skilled economy, with higher salaries are harder to calculate and visualise.

⁸⁵ G Gereffi and K Fernandez-Stark 'Global Value Chain Analysis: A Primer', 31 May 2011, available at www.cggc.duke.edu/pdfs/2011-05-31_GVC_analysis_a_primer.pdf, accessed on 10 June 2013 at 14.

⁸⁶ G Gereffi and K Fernandez-Stark 'Global Value Chain Analysis: A Primer', 31 May 2011, available at www.cggc.duke.edu/pdfs/2011-05-31_GVC_analysis_a_primer.pdf, accessed on 10 June 2013 at 14 – 15.

⁸⁷ P Draper and R Lawrence 'How should Sub-Saharan African countries think about global value chains?', 19 March 2013, available at <http://gegafrica.org/blogs/2012-09-06-18-37-12/item/221-how-should-sub-saharan-african-countries-think-about-global-value-chains>, accessed on 8 June 2013.

The prospective development advantages of global value chains represent a potential change for economic growth, with significant implications for employment, innovation and the strategy of governments and firms in developing countries. The benefits of globalisation will continue to be unevenly distributed, with gains going to those with more education, skills, wealth and power. However, the inclusion of large emerging economies like China, India, Brazil and Mexico is a qualitative shift in the process. However, it does not necessarily improve the chances for smaller countries in the global economy unless they devise policies to enhance their own capabilities to foster development.⁸⁸ Further, one needs to make a distinction between the benefits to the company entering the host country and the host country itself.

The entry of a global player like Wal-Mart into a developing country may very well lead to increased job creation and skills development for the labour force of that country. However, it is not as simple in application in a country like South Africa where our labour is considered to be expensive and difficult to navigate. It is conceded that Wal-Mart's access to global value chains would enable it to outsource cheaper labour, from countries like India and China, and thus bypass more expensive South African labour. Undoubtedly this is not an ideal result, but seems unavoidable in the light of South Africa's need to attract Foreign Direct Investment (dealt with more fully below). On the other hand, the entry of multinational firms may generate additional positive effects on host countries' economies because of their typically superior performance as highlighted above. Their use of more advanced production methods, their network of international suppliers, customers and contracting firms and their intangible assets are sources of value creation. Productivity in host countries is therefore positively influenced overall by the presence of multinational corporations since they are more successful than domestic firms in increasing their level of productivity. The presence of multinational firms also affects the productivity of host countries in indirect ways, such as increased competition resulting in higher productivity, lower prices, a more efficient resource allocation, technology

⁸⁸ G Gereffi and K Fernandez-Stark 'Global Value Chain Analysis: A Primer', 31 May 2011, available at www.cggc.duke.edu/pdfs/2011-05-31_GVC_analysis_a_primer.pdf, accessed on 10 June 2013 at 36.

transfers and spillover and South Africa needs to tap into this.⁸⁹ However, in order to enhance these benefits, South Africa should ensure that policies are developed and adopted in order to enhance our own capabilities and foster maximum development from access to global value chains.

Therefore, while understanding the need to protect the South African labour force, allowing a global player like Wal-Mart entry into the South African market would not only benefit our country in numerous ways, but would also encourage the entry of other global companies into the South African marketplace. If the entry of these players poses no legitimate competition concerns, and no substantial public interest threat, then we should be welcoming their arrival and all the advantages and benefits that their presence may bring to the table instead of making them jump through hoops by imposing restrictive conditions which have not technically been mandated by the Competition legislation. As a developing country, South Africa needs to focus on the potential benefits and advantages that the entry of a global player will bring to the economy and not immediately look to make investment into South Africa a difficult and uncertain exercise, especially given the current economic climate and perception of foreign investors. We need to encourage investment and growth by reassuring those willing to invest in our country through foreign direct investment, which is dealt with more fully below.

6.3 Foreign Direct Investment

The generous interpretation that has been given to the public interest factors and their relationship to the competition considerations in the Wal-Mart/Massmart case indicates that a far wider range of public interest issues will have to be considered by merging parties and their competition lawyers, as well as the competition authorities, in the future. This will impact heavily on the investigation and clearance of a broad range of merger transactions in South Africa, including the high profile mergers, which involve foreign giants.⁹⁰

⁸⁹ OECD Policy Brief 'Moving up the (Global) Value Chain', July 2007, available at <http://www.oecd.org/sti/ind/38979795.pdf>, accessed on 8 June 2013.

⁹⁰ Irvine, H. 2012. 'The world after Wal-Mart – Will South African mergers ever be the same again?' *Without Prejudice*. June 2012.

In a developing country like South Africa, Foreign Direct Investment (FDI) brings many benefits, some of which have a positive impact on employment, such as the establishment of a new production capacity, skills transfer and improvement in the production processes which increases competitiveness and demand for local products. The South African government seems to view foreign direct investment with great suspicion, particularly the policy-makers in the Department of Trade and Industry and the Economic Development Department. These departments seem to want the competition authorities to make their decisions for them as well as trying to influence the competition and public interest outcomes, that are the statutory responsibility of the competition authorities, by conducting parallel and often conflicting negotiations with the merging firms before going to the competition authorities, “thus returning us to the pre-1999 era of the smoke-filled room”.⁹¹ This is exemplified by the Wal-Mart and Kansai cases.

*‘In short, we have policy-makers who appear to want to regulate key markets, but who are unwilling to assume responsibility for taking that step. And so the state looks to the competition authorities to impose the outcomes it desires. Time and again all that it established is that the competition authorities are not sectoral regulators. All that is achieved by attempting to use the competition authorities for this purpose is to undermine their independence, a key element in the respect that they have earned’.*⁹²

It must be remembered that a large proportion of FDI comes in the form of mergers and acquisitions. There are various methods of attracting FDI, however, interference in the commercial decisions of companies is not one of them.⁹³ Any foreign investor seeks a level of certainty in the policies of the country he is investing in. South African competition authorities in recent years have not made investors any more comfortable with their latest merger decisions. Competition authorities should be creating certainty in the extent of the application of public interest considerations in merger cases, as it is not clear where the boundaries are to be drawn in practice. Confusion has been

⁹¹ D Lewis *Thieves at the Dinner Table* (2012) 289.

⁹² D Lewis *Thieves at the Dinner Table* (2012) 289 – 290.

⁹³ Kariga, R, Ngobeni, J & Ngobese, M. 2012. Is South Africa a Good Investment Destination? A Relook at Conditions in Merger Cases. *Sixth Annual Competition Law, Economics and Policy Conference in South Africa*. 6 – 7 September 2012. 3 – 4.

caused by the inconsistent application and implementation of public interest issues by the competition authorities in recent years and this criticism is similar to that of the GE/Honeywell merger decision alluded to earlier in this paper. It has been suggested that the Commission should engage more with the merging parties and other stakeholders in order to find solutions⁹⁴, which will address public interest concerns raised from the outset. This should go some way to allaying foreign investor concerns.

7. **THE EXTENSION OF PUBLIC INTEREST – HOW FAR CAN IT GO?**

Many questions are raised by the above analysis. Should there not be a common assessment framework for non-competition public interest issues? Further, if these issues are taken into account, how should the analysis of such issues relate to the analysis of the competition issues and, more importantly, who should assess any non-competition public interest issues? While it is perfectly common practice for mergers to be subject to multiple criteria and decision-makers, the South African oddity lies in having a single decision-maker, being the competition authority, responsible for deciding a merger on two, potentially conflicting, sets of criteria.⁹⁵ Can it really be said that competition authorities are better placed to judge public interest issues, rather than strictly competition issues which is where their expertise and accountability lie. While the law places the public interest enquiry on the same plane as the competition and efficiency assessments, the fact is that the sequencing of the decision is such that the competition and, if necessary, efficiency investigations are concluded before the public interest considerations are evaluated and balanced against the competition and efficiency conclusions. Any authority which has been principally and specifically charged with promoting and defending competition objectives would be hard pressed to prohibit or approve a merger on grounds other than the impact on competition.⁹⁶ Most importantly, which non-competition public interest issues are of most importance and which should not

⁹⁴ Kariga, R, Ngobeni, J & Ngobese, M. 2012. Is South Africa a Good Investment Destination? A Relook at Conditions in Merger Cases. *Sixth Annual Competition Law, Economics and Policy Conference in South Africa*. 6 – 7 September 2012. 20.

⁹⁵ D Lewis *Thieves at the Dinner Table* (2012) 120.

⁹⁶ D Lewis *Thieves at the Dinner Table* (2012) 120.

be considered? As a result of the uncertainty raised by cases like Wal-Mart, firms do not necessarily know which goals their merger may jeopardise. This can lead to unpredictable results and have an adverse effect on economic efficiency. The assessment of public interest should be transparent and predictable.

With regards to the Wal-Mart/Massmart case, it cannot be denied that this merger has resulted in much debate in regard to the role that non-competition policy factors play in decisions made by competition authorities. How far can competition authorities go in the extension of their jurisdiction and do they have the requisite knowledge, expertise and insight into the many non-competition issues that such merger decisions ultimately raise? A positive outcome on the public interest assessment could lead to a merger being approved notwithstanding its potential anti-competitive effects, while a pro-competitive merger could be prohibited or subject to stringent conditions as a result of a negative effect on the listed public interest grounds.⁹⁷

Until *Kansai* and *Wal-Mart*, no public interest considerations resulted in the imposition of conditions which so clearly exceeded the public interest grounds listed in the Competition Act. It is common cause in the *Wal-Mart* case that there were no competition issues at stake in the merger. *Wal-Mart* was a new entrant into the market and it is submitted that the South African grocery and general retail market is, for the most part, intensely competitive. However, that is not to say that *Wal-Mart* does not carry with it certain undesirable baggage, being a notorious reputation for generally poor employment practices and a particularly aggressive anti-union stance.⁹⁸ The South African unions attempted to argue that *Wal-Mart's* entry into the market would result in job losses in *Massmart*, a public interest criterion that the competition authorities were obliged to consider. However, the merging parties effectively dispelled this concern. If anything, the evidence suggests that the direct employment consequences of the merger are likely to be positive. The unions also argued that *Wal-Mart* would engage in practices contrary to South African labour relations legislation. This

⁹⁷ *Anglo American Holdings Ltd v Kumba Resources Ltd (Industrial Development Corporation intervening)* [2003] 2 CPLR 288 (CT), at para [138].

⁹⁸ D Lewis *Thieves at the Dinner Table* (2012) 133.

consideration is not part of the mandated public interest criteria but, given Wal-Mart's reputation, was bound to be raised.⁹⁹

'In Wal-Mart, the Department of Trade and Industry argued for a broader interpretation of the public interest grounds so as to include, among other things, local procurement. Though government's procurement objectives did not find a home in the conditions imposed, the various departments and trade unions that made submissions were successful in ensuring that training and development programmes that will assist SMMEs and previously disadvantaged persons in trading with Wal-Mart, will be established. Such a condition, while framed as falling within the ambit of 'harm to the public interest in employment, industry sectors, BEE business and small business', is a far stretch from the listed public interest grounds'.¹⁰⁰

Further, the imposition of such conditions could surely be said to be a hugely intrusive intervention into the day-to-day business of a firm whose merger did not actually present any competition concerns in the first place and whose management's discretion would be circumscribed by the conditions. It could be argued that imposing conditions on a merged firm, whose market power did not increase with such merger, is potentially over-regulation. It is submitted that the imposition of the level of conditions by the CAC in the Wal-Mart/Massmart merger is unprecedented and could even have a highly anti-competitive impact in not allowing the merged entity to determine certain key operational variables on its own accord. In line with this, the conditions prohibiting retrenchments by Massmart has unseen potential implications for efficiency and consumer welfare. By not allowing the merging parties to allocate their labour in the most efficient manner raises costs for the firms, and increases the cost of productions without any gains or output, even if for a short term. 'This is a waste of resources and decreases the productive efficiency of the firm. If these costs are passed on to consumers, this raises prices, which reduces the allocative efficiency and consumer surplus benefits of the merger'.¹⁰¹ In particular, with reference to the R200 million fund which Massmart is required to establish, the

⁹⁹ D Lewis *Thieves at the Dinner Table* (2012) 133.

¹⁰⁰ Avidon, C & Azzarito, C. 2012. 'Being pushed to promote government policies'. *Without Prejudice*. February 2012.

¹⁰¹ Boshoff, W, Dingley D & Dingley, J. 2012. The Economics of Public Interest Provisions in South African Competition Policy. *Sixth Annual Competition Law, Economics and Policy Conference in South Africa*. 6 – 7 September 2012.18.

imposition of such a financial requirement on an entity, as well as the involvement of an external advisory board, is surely worrying in view of corporate governance policies as it is restricting the powers of the board of directors to act independently and in the best interests of the company. This results in severe limitations on the fiduciary duties of the board and is a clear infringement of concrete principles of company law. Such a fund could also indirectly influence the shareholder value of the merged entity by imposing additional costs, thereby possibly decreasing the entity's share price.

Further, the scope of employment-related issues, as shown in the Wal-Mart/Massmart merger, and which now have to be considered, have been considerably widened by the CAC. The CAC's contention that it was required to take into account a condition to prevent job losses at the very least, and at best, increase and promote employment and economic activity in the consideration of a merger of that nature,¹⁰² could be said to be going too far. The reasoning behind such a statement could lie in one question which does need to be addressed and that is the meaning of the word 'substantial' in the context of the Competition Act. Section 12A(1)(b) of the Act requires that the public-interest grounds should be 'substantial'. However, it has been argued that the Act does not provide further guidance in determining what constitutes 'substantial' public interest.¹⁰³ This leaves a considerable opportunity for interpretation by the competition authorities in what they deem is 'substantial' public interest. For example, what would the competition authorities deem as a substantial loss of jobs or substantial creation of jobs in the context of considering a merger? Does it all depend on the context of the case and perhaps the prevailing economic climate? Surely, the promotion and increase of employment is not something the competition authorities should be actively trying to achieve? Should they not only be concerned with anti-competitive issues and, at the very most, perhaps try to prevent 'substantial' job losses if possible and only if it does not infringe too much on the company's governance of itself? Trade unions can now raise concerns about possible changes to the benefits enjoyed by workers and the

¹⁰² 110/CAC/Jul11 and 111/CAC/Jun11 Judgment of 9 March 2012 at para [162].

¹⁰³ J. Hodge *et al* 'Public interest provisions in the South African Competition Act: A critical review' in *The Development of Competition Law & Economics in South Africa* (edited by K. Moodaliyar and S. Roberts) (2012) at page 8.

conditions of employment of workers as a result of any merger, as well as seek conditions from the merging parties, which address these. 'There is already considerable forum shopping by trade unions that frequently rely on the competition process to extract concessions from merging parties they could not hope to win in the CCMA or the labour courts. This is likely to become a more common feature'.¹⁰⁴

Many commentators on competition law have suggested that public interest considerations are best left to other agencies better equipped to deal with those issues, specifically when they relate to employment and especially given that the focus on the impact of employment is unique to South Africa. Perhaps the effects that mergers have on employment should be investigated by other agencies and through other avenues of legislation. David Lewis supposed the following in this regard:

*'... most regimes appear to prefer a separation between the identity of the competition decision-maker and the public interest decision-maker... In our regime, the decision is unified with the competition authority taking both the competition decision and the public interest decision and then balancing them and taking the final decision over which there is no ministerial override. There are advantages. Firstly, it means that the decision-making body is acutely sensitive to the competition implications of the transaction whereas a Minister or other public official may be tempted, particularly in a society with an underdeveloped competition culture, to give undue weight to the strength of the social forces supporting the public interest in question. Secondly, argument before the Competition Tribunal is held in open session and accessible to the public and its decisions have to be reasoned and public, thus significantly reducing the likelihood of lobbying that will inevitably accompany a regime of political decision-making ... For most developing countries, I would opt for placing the decision in the hands of the competition authorities. This at least ensures that competition criteria will be treated seriously and it ensures that the competition authorities are not treated as mere advisory bodies capable of being ignored whenever politically inconvenient.'*¹⁰⁵

While David Lewis' approach to this issue has valid points and is persuasive, one cannot ignore that there can still be a separation of competition and public

¹⁰⁴ Irvine, H. 2012. 'The world after Wal-Mart – Will South African mergers ever be the same again?' *Without Prejudice*. June 2012.

¹⁰⁵ Lewis, D. 2002. The Role of Public Interest in Merger Evaluation. Paper presented at the *Merger Working Group, International Competition Network*. 28 – 29 September 2002. Naples. 1 – 4, available at <http://www.comptrib.co.za/assets/Uploads/Speeches/lewis5.pdf>, accessed on 12 September 2012.

interest issues where the competition authority maintains the overall decision on the approval of a merger. Lewis appears to combine the two as one and the same considerations and this does not always have to be the case. The competition decision does not have to be completely in the hands of a ministerial body if all that body is required to consider are public interest concerns. Given the lack of guidance on what constitutes 'substantial' public interest grounds, many judgements of the competition authorities focus on the 'residual public interest, or that part that is not susceptible to or better able to be dealt with under another law, is substantial'.¹⁰⁶ In the *Distillers / Stellenbosch Winery merger*¹⁰⁷, the competition authorities argued that Parliament had enacted legislation that dealt quite specifically with the issues referred to in section 12A(3). Further, the competition tribunal argued that other legislation and institutions created by Parliament are better placed and resourced to deal directly and effectively with issues and that they (the Tribunal) would only intervene in cases where merger-specific losses were so adverse that no other law or regulator could remedy them.¹⁰⁸ This line of thinking should be applied more readily in future merger decisions and the definition of 'substantial' should be given a more narrow and restrictive meaning.

'Public interest grounds are "protected and promoted by legislation and institutions specifically designed for that purpose", rendering it unnecessary to broaden their ambit in the context of competition enforcement where more appropriate forums to further government policies exist. This is especially so in light of the fact that the competition authorities "have to balance impacts on competition with employment impacts whereas the concerns of the Labour Relations Act and other collective bargaining arrangements have no such balancing requirement"'.^{109 110}

Having a system of merger control that allows intervention for non-competition reasons can hardly be called 'competition' law. Prohibiting mergers on social

¹⁰⁶ *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* CT Case no. 08/LM/February 2002, 19 April 2001.

¹⁰⁷ *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* CT Case no. 08/LM/February 2002, 19 April 2001.

¹⁰⁸ J. Hodge *et al* 'Public interest provisions in the South African Competition Act: A critical review' in *The Development of Competition Law & Economics in South Africa* (edited by K. Moodaliyar and S. Roberts) (2012) at page 8.

¹⁰⁹ Avidon, C & Azzarito, C. 2012. 'Being pushed to promote government policies'. *Without Prejudice*. February 2012.

¹¹⁰ *Daun et Cie AG v Kolosus Holdings Ltd* [2003] 2 CPLR 329 (CT), at para [124] and *Unilever plc / Competition Commission / CEPPWAWU* [2001 – 2002] CPLR 336 (CT), at para [43].

grounds or for reasons of industrial policy may be directly antagonistic to the process of competition.¹¹¹ Further to this, the competition authorities are not elected officials with a mandate from the electorate to decide on public interest issues. Allowing competition authorities to make public interest decisions that might result in social, political or cultural consequences may damage democratic values and, therefore, government should ultimately determine public interest issues.¹¹² Amongst the countries that promote public interest objectives, it seems that developed countries are inclined to confine the consideration of such objectives to a minister or other political decision-making body, whereas developing countries tend to do the opposite and utilise the competition authorities to consider public interest objectives in making their decisions.¹¹³ It is important to note that several 'transitioning' countries include among their objectives of competition law, the goal of ensuring that government actions are consistent with the promotion of competition law. Some jurisdictions, such as Germany and Switzerland, have found that the competition law and policy objectives are best preserved by combining investigative and adjudicative functions into a single quasi-judicial agency, while still reserving the consideration of public interest objectives to a ministerial decision-maker.¹¹⁴ Perhaps it is time for South Africa to join the ranks of these transitional countries?

However, despite the various arguments above, it would be difficult to exclude the consideration of public interest factors from a merger decision altogether as it is required in terms of the competition legislation and, save for any amendments to such, the issue will continue to rear its head in merger cases. In the past year, the competition authorities have intensified their approach in addressing public interest concerns. Trade unions and government departments are vigorously exercising their rights to participate in such proceedings by

¹¹¹ R Whish and D Bailey *Competition Law* 7th edition (2012) page 824 – 825.

¹¹² Boshoff, W, Dingley D & Dingley, J. 2012. The Economics of Public Interest Provisions in South African Competition Policy. *Sixth Annual Competition Law, Economics and Policy Conference in South Africa*. 6 – 7 September 2012. 3.

¹¹³ Secretariat for the Organisation for Economic Co-operation and Development. 2003. The Objectives of Competition Law and Policy submitted under Session 1 of the Global Forum on Competition held on 10 – 11 February 2003. 6.

¹¹⁴ Secretariat for the Organisation for Economic Co-operation and Development. 2003. The Objectives of Competition Law and Policy submitted under Session 1 of the Global Forum on Competition held on 10 – 11 February 2003. 8.

raising public interest grounds and seeking conditions from the merging parties to address their concerns. President Jacob Zuma has very recently advised the South African National Assembly that government is 'looking at competition policy to improve job creation' and further, 'while inviting foreign direct investments we will also do all we can to protect local jobs and industries'. These comments raise the concern that merger control might be used to require merging parties to take positive steps to benefit public interest rather than merely show that the merger is not harmful to the public interest¹¹⁵ or, in the least, not anti-competitive. Therefore, despite arguments against David Lewis' position, it seems that government bodies are still very able to invade the competition authorities' jurisdiction in such instances where public interest issues are raised by a merger. Even though our legislation maintains that the competition authorities are solely responsible for these considerations, the interference by government and trade unions is likely to keep the competition authorities very much in check – but how much interference should really be permitted? Further, would the introduction of one single ministerial body, tasked solely with the consideration of public interest issues, not be better than allowing a stampede of intervening government entities from throwing their political agendas into the fray? Although one always needs to play devil's advocate and ask the question of how independent would the single ministerial body really be?

What is lacking is guidance on how these issues are to be measured and competition authorities have to consider and determine each on a case-by-case basis. While this system may have worked in the past, the cases discussed in this paper illustrate that there are different interpretations of the limits to which public interest can be applied, specifically in regard to the Wal-Mart/Massmart merger.¹¹⁶ Therefore, if the legislation is unlikely to be amended any time soon, it is submitted that the only guidance the competition authorities really have in dealing with public interest issues is case law precedent. It has been suggested, that in order to speed up reviews, the Competition Commission should issue

¹¹⁵ Mohamed, Z. 2012. 'Public Interest perspectives'. *Without Prejudice*. October 2012.

¹¹⁶ Njisane, Y. 2011. The rise of Public Interest: Recent high profile mergers. *Public Interest Law Gathering*. 1 – 24. 19.

guidelines on the information which merging parties are required to provide in their merger filings. 'Until then, merging parties who need swift clearances should anticipate these issues well in advance of lodging their filings and deal with them appropriately. This could include offering appropriate conditions as an early stage of the investigation'.¹¹⁷ However, it could be argued that this will not alleviate any delays as external parties could still intervene in proceedings in any event. Since the establishment of our current competition legislation in 1998, government and other entities have not, until very recently, actively used competition law as a tool to intervene and enforce its policy objectives. Thus, seeing the recent resurgence of government intervention, it is unlikely that delays will not be a prevalent issue in merger decisions going forward, unless something is done to close the floodgates.

The consideration of public interest issues should have, as an underlying principle, the concept of merger-specificity in any merger control regime. In the pursuit of protecting competition and not competitors, competition authorities are directed to consider and deal with that which has a recognisable link to the merger under investigation. Public interest considerations cannot be divorced from competition analysis entirely, but authorities cannot overreach in their application of such public interest considerations, lest this results in unintended consequences and the imposition of over-restrictive conditions.¹¹⁸ Further, the public interest conditions imposed in the cases outlined above seem to extend beyond a narrow application of the public interest objectives contained in the Competition Act and are increasingly reflective of the interests of third party interveners. This undoubtedly raises questions as to whether the competition authorities are finding the right balance between competition and public interest considerations as envisaged by the Competition Act. It has been argued that the Competition Act has clearly defined the range of public interest considerations to be taken into account in merger decisions. However, even if the Act is specific about the specific type of ground which should be considered, it is still unclear as to how much of that public interest ground should be taken into

¹¹⁷ Irvine, H. 2012. 'The world after Wal-Mart – Will South African mergers ever be the same again?' *Without Prejudice*. June 2012.

¹¹⁸ Njisane, Y. 2011. The rise of Public Interest: Recent high profile mergers. *Public Interest Law Gathering*. 1 – 24. 20.

account in merger decisions. The Wal-Mart merger saw the competition authorities broaden the interpretation of the employment aspect of public interest to employment in supplier industries and employment conditions rather than pure employment numbers. Further, for efficiency and growth, developing countries need always to adjust to the changing dynamics of markets and competition. All principles and rules should be consistent with the imperative of flexibility and adjustment.¹¹⁹ Considering this principle, and if the Act were to be amended, perhaps the key is the insertion of a level of guidance to the competition authorities as to what ‘substantial’ public interest grounds encompass, in order to avoid the competition authorities over-reaching in their attempt to right all and every socio-economic ill of South Africa, instead of focusing their attention on pure competition law issues. As a developing country, we cannot be rigid and stiff to change and it would be prudent to be aware of the impacts on society, but it is important that we do not try to leave too much responsibility in the hands of the competition authorities to address the wrongs of the past.

8. **CONCLUSION**

*‘Developing country antitrust should not be used to protect inefficient Davids against Goliath, but it may and should be used to empower Davids against Goliath by keeping open paths of mobility and access’.*¹²⁰

In line with Fox’s principle, there is a general consensus amongst various interest groups in South Africa that there is a need for public interest consideration in merger control. It is important to note that the South African competition legislation was drafted by the democratically elected government as part of a collection of policy instruments aimed at the achievement of economic development imperatives and addressing the socio-economic ills left over from previous regimes and, as such, there is a very pressing need for competition policy that is responsive to the broader socio-economic needs of society. ‘Public

¹¹⁹ Fox, E.M. 2007. Economic Development, Poverty and Antitrust: The Other Path. *Southwestern Journal of Law and Trade in the Americas*. 101 – 125. 121.

¹²⁰ Fox, E.M. 2007. Economic Development, Poverty and Antitrust: The Other Path. *Southwestern Journal of Law and Trade in the Americas*. 101 – 125. 101.

interest objectives continue to be embraced on a fairly widespread basis by developing and transitioning countries, particularly in the area of merger control'. Developing countries deserve competition law that fits the facts of their markets and responds to their conditions and needs. The law should be so designed and characterised that the people embrace it as sympathetic and legitimate rather than reject it as foreign.¹²¹ South Africa is no exception and it is conceded that some public interest objectives should be promoted given the stage of economic development of our country. Completing deleting any reference to public interest objectives from the Competition Act is not the answer.

'...it is possible to incorporate public interest issues credibly into core competition evaluations, without doing violence to the principal mandate of any agency charged with defending and promoting competition'.¹²²

The above can be achieved through a combination of factors. Firstly, the public interest criteria are clearly defined in the Act and, generally, competition authorities have managed to resist extravagant expansions of their ambit. In applying the public interest variables, a competition authority has to bear in mind that in representing consumers it is not only representing a public interest, but arguably the only interest shared by all of the public. Secondly, incorporation of public interest criteria into the Competition Act, as well as the decision that the competition authorities be given the responsibility for the balance between the competition and the public interest criteria instead of the possibility that the balance being struck behind closed doors by a minister and a powerful political lobby.¹²³

However, despite this, one needs to question the level at which public interest should be considered in merger control proceedings. The Wal-Mart debacle has been a wake-up call as it bears out the caution advocated by those who warned of the potential abuse of the public interest provisions when employed by an executive power that has little respect for regulatory independence or competition, and that is determined to use the public interest test as leverage to attain ill-considered industrial policy objectives, even when the attainment of

¹²¹ Fox, E.M. 2007. Economic Development, Poverty and Antitrust: The Other Path. *Southwestern Journal of Law and Trade in the Americas*. 101 – 125. 125.

¹²² D Lewis *Thieves at the Dinner Table* (2012) 137.

¹²³ D Lewis *Thieves at the Dinner Table* (2012) 138.

those objectives is directly in conflict with consumer interests.¹²⁴ We cannot blindly place our faith in competition authorities to address the developmental needs and socio-economic ills of our country. Competition law and its enforcement should not be viewed as a possible way to further government policies that may have other, more appropriate forums or legislative frameworks. The greatest concern for analysts and commentators is that policy will eventually trump the law and we will find ourselves in a position where competition law becomes so conflated with industrial and governmental policy that it will be difficult to distinguish between them. The tension between competition analysis and public interest increases uncertainty in the business community as to how future transactions will be dealt with by the competition authorities. The Wal-Mart case clearly demonstrates that government departments are willing to stretch the interpretation of the public interest criteria to their breaking point. Therefore, it is submitted that the public interest grounds listed in the Competition Act should be interpreted narrowly and considered only to the extent that they relate generally to competition law, and if there is no other appropriate mechanism for pursuing such policy objectives.¹²⁵ In addition, providing legislative guidance to the definition of 'substantial' may go some way in assisting competition authorities in assessing whether a public interest ground is important enough to warrant the imposition of conditions, an act which has not been expressly legislated in the Competition Act. Further, if conditions are imposed, competition authorities need to ensure that these conditions do not go beyond the scope of competition law. Conditions such as the requirement that Massmart honour existing labour agreements and not challenge SACCAWU's position as the largest representative union within the merged entity, is a clear example of public interest issues being taken beyond competition law as it is not a listed ground in terms of the Competition Act. The R200 million fund condition could also be seen to be anti-competitive in its own right as it could raise prices for consumers and indirectly negatively influence the share price of the merged entity.

¹²⁴ D Lewis *Thieves at the Dinner Table* (2012) 138.

¹²⁵ Avidon, C & Azzarito, C. 2012. 'Being pushed to promote government policies'. *Without Prejudice*. February 2012.

Parliament's economic development committee, as a response to the Wal-Mart/Massmart merger case, proposed that a statutory body charged with evaluating foreign direct investment, in order to ensure that it is in the public interest, be established.¹²⁶ The establishment of such a body would not only provide certainty on the regulatory environment for foreign investors, but would also assist in so far as it can deal with all public interest matters that are deemed not merger specific or competition issues. This proposal is a positive step in the right direction.

As the situation currently stands, it seems that the South African legislature is unlikely to amend the position in the Competition Act and therefore, judging from precedent, public interest considerations under the South African Competition Act will become increasingly important in the context of merger control. Therefore, the competition authorities should act within their scope of powers and should not be coerced into pursuing government objectives that fall outside the public interest grounds listed in the Competition Act. If the competition authorities fail in this regard, it would undermine the appropriate role of competition law and completely overlook non-competition law legislation and other entities created to facilitate the achievement of public interest objectives, as well as indirectly undermine sound company law principles of corporate governance.

¹²⁶ L Ensor 'Body needed to 'evaluate foreign investment' 23 November 2011, available from Business Day at <http://www.businessday.co.za/Articles/Content.aspx?id=159362>, accessed on 11 June 2013.

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