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LAWM03 LLM - Coursework

**UNIVERSITY OF CAPE TOWN
FACULTY OF LAW**

**The Swiss and the South African Public Interest Tests
in Competition Law**

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Two Systems compared

February 2006

CML654S Competition Law

Dissertation submitted in partial fulfilment of the degree
Magister Legum

Supervisor:
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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Law degree in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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

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List of Abbreviations

AJP	Aktuelle Juristische Praxis (Swiss legal periodical)
ANC	African National Congress
aArt.	alter Artikel (previous numeration)
Abs.	Absatz (subsection)
Art.	Artikel (article)
BBBEE	Broad Based Black Economic Empowerment
BEE	Black Economic Empowerment
BGE	Bundesgerichtsentscheid (Federal Tribunal Decision)
bn	billion
CEO	Chief Executive Officer
DA	Democratic Alliance
DEM	Deutsche Mark (German Mark – currency)
DTI	Department of Trade and Industry
E.	Erwägung (consideration)
EC	European Community
ECHR	European Convention on Human Rights (Europäische Menschenrechtskonvention, EMRK)
EU	European Union
ff.	folgende Seiten (following pages)
GEAR	Growth Employment and Redistribution
GWB	Gesetz gegen Wettbewerbsbeschränkungen (Germany)
ICN	International Competition Network
IDASA	Institute for a Democratic Alternative for South Africa
IDC	Industrial Development Corporation
JSE	Johannesburg Securities Exchange
KG	Kartellgesetz, Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (Federal Law on Cartels and other Restraints of Competition)
m	million

NZZ	Neue Zürcher Zeitung (Swiss daily newspaper)
OECD	Organisation for Economic Cooperation and Development
para	paragraph
RDP	Reconstruction and Development Programme
RPW	Recht und Politik des Wettbewerbs (Law and Politics of Competition, official publishing periodical of the Swiss Competition Authorities)
Rz.	Randziffer (reference note)
S.	Seite (page)
s	section
SACP	South African Communist Party
SMME	Small Medium and Micro Enterprises
TRALAC	Trade Law Centre for Southern Africa
UK	United Kingdom
US	United States
U.S.C.	United States Code
USD	United States Dollar
VKK	Veröffentlichungen der Schweizerischen Kartellkommission (Publications of the Cartel Commission (previous) official publishing periodical of the Swiss Competition Authorities)
WEKO	Wettbewerbskommission (Swiss Competition Commission)
ZGB	Zivilgesetzbuch (Swiss Civil Code)
Ziff.	Ziffer (cipher/number)

1. Introduction

There is a pertinent question to be asked about the value of comparative law analyses: Of what value are they? If the only thing we learn from history is that we do not learn anything from history, then comparative studies that intend to identify differences and similarities in the hope of gaining some understanding of how our legal systems function and how they could be improved, are fruitless. I do not share this pessimistic view and believe that valuable lessons can be learnt from contrasting different systems, firstly by learning that certain methods can work under certain circumstances, and secondly, by showing that not every successful model can be transplanted. External inspiration can never be a substitute for own interpretation.

This paper will illustrate the South African and Swiss Competition Acts with a specific focus on the public interest consideration common to both. It will investigate if and how political considerations enter into the weighting of the abstract term of public interest and whether South Africa as the less developed country can learn anything from the Swiss system. In order to arrive at a better understanding of the two countries' systems, this paper will include a short introduction to the historical development of competition law in both countries as well as a description of their respective legislative backgrounds. I will then analyse the various decisions, which have been handed down by the competition authorities, specifically with regard to the public interest grounds inherent in both systems. The thesis will deal mainly with South African merger control cases, where the South African Competition Act expressly requires a balancing of public interest with commercial and competition interests. Unlike the situation in Switzerland, there is an abundance of case law on these issues in South Africa. I will attempt to distil the relevant discernable rules or consistent approaches in both countries' decisions.

South Africa and Switzerland are very different countries in many respects. Switzerland can look back on more than seven hundred years of

nationhood and democratic processes. It is in the top earnings bracket of the member countries of the Organisation for Economic Cooperation and Development (OECD), with an average annual per capita income of USD 33,800.00.¹ It is, however, a country with limited natural resources and thus very dependent on its services and manufacturing industry. Switzerland, geographically situated in the heart of Europe and well known for its neutrality policy during the past 150 years, has an economy with a high export orientation.² With a population of 7.4 million and a relatively low unemployment rate of 3.8 per cent,³ it contrasts strongly with South Africa. Switzerland has chosen a political path that is separate from the European Union, and it has used bilateral agreements to gain those advantages, which otherwise would have accrued under such inclusion.

South Africa, on the other hand, is a young democracy just coming out of a period of political exile. It is a country trying to reintegrate itself into the global political and economic society. With a population of 44 million⁴ and blessed with mineral resources, agricultural and manufacturing capabilities, it is the powerhouse of Africa.⁵ Nonetheless, despite these positive endowments, the country has battled to overcome the economic legacy of apartheid, which artificially skewed the economy in favour of a small white minority. Although the country has achieved good growth in the past eight quarters,⁶ these figures are largely domestically driven and have not yet made significant inroads into the unemployment figure, which stands at 26,4 per cent.⁷ The wealth gap in the country is still dramatic.⁸

¹ Figure for 2004, available under www.cia.gov/cia/publications/factbook/geos/sz.html.

² In 2004 Switzerland had a trade surplus of USD 10bn with exports to the value of USD130bn against imports to the value of USD120bn, www.cia.gov/cia/publications/factbook/geos/sz.html,

³ See figures of the Swiss Federal Department for Social Affairs under www.bfs.admin.ch/bfs/portal/de/index/themen/bevoelkerung/uebersicht/blank/wichtigste_kennzahlen.html and link of the Swiss Statistical Office to www.ams.jobarea.ch.

⁴ See Statistics South Africa, available under www.statssa.gov.za.

⁵ The country's GDP amounts to 25% of the total GDP of Africa; see South African portal under www.southafrica.info/doing_business/economy/econoverview.htm.

⁶ See tables of the DTI under www.thedti.gov.za/econdb/resbank/rb6006SK.html.

⁷ See South African Statistical Office under www.statssa.gov.za/publications/P0210/P0210September, March2000,2005.pdf.

⁸ The Ecumenical Foundation of Southern Africa reported in July 2004 that 40% of South Africans live below the poverty line; the country has a Gini coefficient (a measure of national income distribution) of 0,6, which is considered very high, see UN Office for the coordination of humanitarian affairs, www.irinnews.org/report.asp?ReportID=42356&SelectRegion=Southern_Africa&SelectCountry=SOUTH_AFRICA.

South Africa, which was effectively sidelined from participating in world markets during the apartheid era owing to international sanctions, focused primarily on strengthening its internal economy, which resulted in big conglomerates dominating the industries such as Rembrandt, Sanlam and others. With the advent of democracy in the mid 1990s, the new government identified competition law as an important tool for reorganising the economy, bringing the large black population back into the economic mainstream, strengthening small and medium sized enterprises, and improving the efficiency of the national economy, which had suffered dearly during the age of isolation.⁹

In 1992, the Swiss electorate decided not to join the European Economic Community and thus has also not participated in the ensuing political integration steps that have taken place in the European Community. While the Swiss government has put its membership aspirations on hold for the time being, competition law is seen as an instrument to keep the country's borders open in the absence of political integration, by keeping trade free of the artificial barriers that are often erected by cartels and market-sharing arrangements.

This paper aims to investigate whether these objectives of advancing competition together with the public interest as articulated in the various political documents, laws and debates, have been met, by examining the jurisprudence of the two countries' administrative and judicial competition bodies. In the case of Switzerland, this paper will evaluate how the public interest exceptions as provided by the Cartel Act had been implemented. In the South African section, this paper will contrast the legislative background and foregoing political debate with cases that have emanated from the competition authorities. The paper will thus investigate whether there is a discernable effort to promote public interests by means of merger control as originally voiced by the political parties such as the African National Congress.

⁹ Eleanor M Fox, *Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia*, Harvard International Law Journal, Vol. 41, Number 2, Spring 2000, 579, 580.

There was much excitement and anxiety before the passing of the relevant Competition Acts in these two countries because of their potentially far-reaching consequences. In Switzerland, a country accustomed to a cartelized economy, many economic players felt uneasy about the immanent changes. In South Africa, the change in political power seemed to signal a large scale shake-up of the economic order as well. This paper will examine whether these aspirations and fears have actually materialised. Have these policies been implemented or has it all been political talk and hot air?

2. Swiss Legislative Background

2.1. Competition Legislation in Switzerland

Four separate acts deal with competition aspects in Switzerland. This paper will focus on the actual anti-trust act, the so-called *Kartellgesetz (KG)* or Cartel Act. The other three acts are the Price Control Act (*Preisüberwachungsgesetz*), addressing the price of goods and services and administered sectors such as postal services and electricity, the Act against Unfair Competition (*Bundesgesetz gegen den unlauteren Wettbewerb*), which deals with the manner and quality of competition, and the Domestic Market Act (*Bundesgesetz über den Binnenmarkt*), which aims to dismantle the cantonal barriers that hinder the free flow of services and goods within the country. These three acts function complementarily¹⁰ to the Cartel Act. For the purposes of this paper and the analysis of the public interest debate, a discussion on the influence of the Cartel Act will suffice.

2.2. History of Competition Law

Although Switzerland enjoys a reputation of being a highly industrious and efficient nation, for most of the 20th century, the Swiss economy was characterised by a system of group arrangements within the various sectors of industry. The Swiss economy only recently moved towards a free market economy based on competition and away from a system of accepted cartelization and organized industry.¹¹ The first Cartel Act came into effect in 1962. It was influenced by the jurisprudence of the country's highest court, to which I will return later. For a better understanding of this evolution, I will first examine the constitutional background in which Swiss competition law finds itself.

¹⁰ See Art. 3 Abs. 3 KG, which provides for the primacy of competition investigations.

¹¹ Roger Zäch, *Schweizerisches Kartellrecht* (Stämpfli Verlag Bern, 2005), Rz. 131 – 138, 58.

2.3. The Constitutional Freedom of Trade and Commerce

The starting point for an appreciation of competition law in Switzerland is understanding the concept of the freedom of trade and commerce (*Handels- und Gewerbefreiheit*), now referred to as the commercial freedom (*Wirtschaftsfreiheit*), which was first introduced as an individual right of citizens in the Federal Constitution of 1874 as Art. 31. Since the revision of the Constitution in 1999, this right is now contained in Art. 27. Together with the freedom of contract, private autonomy and the proprietary guarantees of the Federal Constitution,¹² the commercial freedom forms the basis of commercial endeavours in Switzerland.¹³ On the international stage, the commercial freedom, as understood and embraced by Swiss courts and legislation, is unique. No other traditionally liberal constitution has granted its citizens a comparable, all-encompassing right.¹⁴ Interestingly, the new South African Constitution of 1996 grants its citizens a similar freedom in section 22.¹⁵

How the understanding of this economic freedom has changed in Switzerland during the past 130 years, is illustrative of how competition law has evolved. Originally, the freedom of trade and commerce was understood to be a mere defensive right of the individual against state intrusion. It thus encompassed the right of the individual to be free in choosing, accessing and executing a profession. It was understood as a right of economic self-determination.¹⁶ This also meant that the right did not have any horizontal effect between private individuals or *Drittwirkung*, as it is known in German legal systems.¹⁷ Interpreted as it was in the late 19th and early 20th century, this meant that private individuals were unaffected by other individuals' rights

¹² Art. 26 Federal Constitution.

¹³ Ulrich Häfelin und Walter Haller, *Schweizerisches Bundesstaatsrecht* (Stämpfli Verlag 2005), Rz. 630/1, 185.

¹⁴ Ibid, Rz 624, 183; Giovanni Biaggini in Daniel Thürer, Jean-Francois Aubert, Jörg Paul Müller, *Verfassungsrecht der Schweiz* (Schulthess Verlag 2001), Rz. 4, 780; Klaus A. Vallender, *Kommentar der Schweizerischen Bundesverfassung* (Stämpfli Verlag 2002), Rz. 7, 357.

¹⁵ Iain Currie and Johan De Waal, *The New Constitution and Administrative Law – Volume 1* (Juta Law, 2002), 381.

¹⁶ Art. 26 Abs. 2 Federal Constitution; see also Häfelin und Haller (note 13), Rz. 628, 185; Vallender (note 14), Rz. 1, 355.

¹⁷ Vallender (note 14), Rz. 6, 357.

and did not have to respect these rights, neither with regard to others nor themselves. It was held to mean that they were not only free to exercise their occupation but also at liberty to limit their own freedom voluntarily and to curtail the reach and intensity of their economic activity. The *Handels- und Gewerbefreiheit* did not limit the individual's contractual ability or private autonomy. Persons restraining trade were thus perfectly within the exercise of their constitutional rights and interference by the state would have been regarded as a violation of exactly that right.

In the mid 20th century, however, this view was challenged.¹⁸ A growing number of scholars supported the idea that the personal liberties granted by the Constitution were more than mere defensive rights. The state was not simply proscribed from interfering with private liberties. They took the view that, in order for individuals to be able to make use of these liberties, the state in fact had a responsibility to protect and promote their exercise by ensuring that the conditions in society and on the markets were conducive to their application.¹⁹ This meant that private autonomy could not be abused to undermine other persons' rights to exercise their commercial freedom. The new interpretation also meant that the *Handels- und Gewerbefreiheit* did not prohibit state intervention against private restrictions if its aim was to facilitate others' enjoyment of the commercial freedom.

Traditionally, the state was only permitted to interfere with the principle of commercial freedom, if it had an explicit basis in the Constitution.²⁰ This new interpretation led to the introduction of the cartel article into the Federal Constitution as Art. 31^{bis} (now Art. 96 Abs. 1) in 1947 and the later adoption of the price control article of 1982 (Art. 31^{septies}, now Art. 96 Abs. 2). These two provisions laid the foundation for the new reading of the constitutional legitimacy for state intervention in cases such as competition control.

¹⁸ Häfelin und Haller (note 13), Rz. 626, 184, with reference to Fritz Gygi who introduced the idea of competing interests in formulating economic policy such as export economy policy, agricultural policy, monetary policy among others; see also Biagini in Thürer, Aubert, Müller (note 14), Rz. 26, 790.

¹⁹ Vallender (note 14), Rz. 6, 357.

²⁰ Today this rule is found in Art. 94 Abs. 4 of the Federal Constitution.

2.4. Boycott Jurisprudence of the Federal Tribunal

Swiss anti-trust law has its origin in the boycott jurisprudence of the Swiss Federal Court, the constitutional court of the country, long before the passing of the first Cartel Act of 1962. That period (from the 19th century to the beginning of the 20th century) was characterised by sector arrangements and high degrees of solidarity within commercial sectors, and price cutting was regarded as a foul practice, which drew the wrath of the relevant professional organisations and colleagues. The two leading cases of the time illustrate this well.

In 1896, the Federal Court was called to adjudicate the first in a line of boycott cases.²¹ An entrepreneurial baker, *Mr Vögtlin*, who had quit his local professional association, which had enforced rigid price control among its members, started offering bread at lower prices. The association decided to discipline the rebel by using its market power, and ordered the various Swiss flour producers and millers to boycott the baker. It threatened to strike dissidents from their list of approved suppliers. *Vögtlin* managed to obtain flour from further afield. This flour, however, was of lower quality and more expensive, and led to his clients cancelling the few delivery contracts *Vögtlin* had earned. *Vögtlin* went to court, claimed compensation and eventually won. The Federal Court took into consideration the private autonomy of the association and its affiliates, but also accepted that individual entrepreneurs had a personal right to practise their profession and that a call to infringe on such a right, by means of a boycott, was illegal.²²

In 1960, the Federal Court had the opportunity to fine-tune its jurisprudence in the matter *Witwe Alfred Giesbrecht und Söhne*.²³ The case revolved around a major glass retailer, who also fitted glass. The co-operative that controlled the market for window glass in Switzerland declined

²¹ BGE 22, 175, decision of 30 March 1896.

²² BGE 22 I 185.

²³ BGE 86 II 374.

to grant the retailer *Giesbrecht* the volume rebates he would have been entitled to, because *Giesbrecht* also fitted glass. The fitting of glass by glass retailers was prohibited under the statutes of the co-operative in order to protect another sector, the carpenters, who traditionally fitted glass. The court held that the Swiss commercial system was premised on a free market system without state intervention. It held that the freedom of trade and commerce contained in the Constitution, which entitles every citizen to exercise his choice of work without state intrusion, also precluded private individuals from limiting this right. Each individual had to be accorded the right to organise his personal commercial endeavours as he pleased. Actions that undermined this right were thus not legal.²⁴ The court differentiated between the normal and legitimate right to refuse to deal with the specific individual and the concerted boycott effort of the cooperative, which sought to discipline the victim and to compel him to act in a certain way.

2.5. Cartel Act of 1962

The first Cartel Act of 1962 was still premised on the general understanding that cartels were not necessarily bad and that the sole duty of cartel legislation was to prevent and combat the most abusive extremes (so-called *Auswüchse*) of such behaviour. The text of the constitutional article giving the Swiss Federal State the power to legislate in this sector clearly stipulated an abuse-oriented approach (*Missbrauchsbekämpfung*).²⁵ The new Act set up a commission that was empowered to investigate complaints and which had to balance various interests with competitive influences. This approach of only fighting abusive agreements and behaviours, and not interfering in other types of restrictive contractual arrangements, has stayed with the Swiss system until today. As such, it contrasts with the systems prevalent in the EU, Germany and the US, where certain types of contracts are prohibited per se and then, by using a rule of reason method and

²⁴ Commercial freedom read together with the right of personality of the Swiss Civil Code (Art. 28), BGE 86 II 376/7 E. 4.

²⁵ Zäch (note 11), Rz. 132, 58.

systematic exemptions, agreements deemed beneficial on a balance of effects are declared legal (*Verbot mit Legalausnahmen*, prohibition with legally defined exceptions).²⁶ In effect, however, these two systems, due to their various exceptions and interpretations, are moving closer together.

2.6. Cartel Act of 1985

The Act of 1985 went on to introduce certain types of behaviour, which were seen to eliminate effective competition (*wirksamer Wettbewerb*). The Act was preceded by intense discussions about the constitutional legality of introducing a competition system, which would condemn such actions with only an efficiency defence as protection. In the end, the majority of parliamentarians were convinced that the constitutional understanding governing the Swiss economy was one that favoured a freely coordinated system of competition above one of group arrangements. The pro-competition surge, however, fell short of introducing merger control provisions into the Act. The feeling was that the constitutional mandate, which expressly required the state to fight the negative consequences of cartels, did not extend to mergers or provide for their prevention. It was held to be beyond the powers of the authorities to disallow a merger preemptively, as this would have been interference in the market structure and not concentrated on fighting market behaviour, which would have been deemed covered by the Constitution.²⁷

2.7. Cartel Act of 1995

Like the South African Competition Act and the present the Swiss Cartel Act of 1995 contains an explicit purpose clause. In contrast to the Competition Act, it does not purport to endorse any other purpose than competition itself.²⁸ It solely and explicitly aims to combat the harmful

²⁶ EU: EU Agreement article 81 subsection 1 and subsection 2 and article 82; US: Sherman Act of 1890, s 1 and s 2, Clayton Act of 1914, s 2, 3 and 7 and 7A; and Germany: § 1 GWB.

²⁷ Zäch (note 11), Rz. 134, 59.

²⁸ Art. 1 KG; the South African Competition Act also seeks to promote consumer welfare, employment and economic welfare, the country's competitiveness, SMEs as well as the economic reintegration of previously disadvantaged persons, s 2 Competition Act.

economic and social effects of cartels and other restraints of competition. There is no mention of consumer welfare, employment, environmental or social concerns. The new Act of 1995 departed from the traditional understanding of fighting the extremes of anti-competitive agreements with socially negative consequences and introduced provisions to the extent that certain behaviour and arrangements would be automatically deemed to be anti-competitive, thereby shifting the onus of proof for benevolence to the accused parties.²⁹

As in South African law, the Swiss Cartel Act is premised on two substantive pillars: Protecting competition against unlawful restraints of trade by some arrangement or by a dominant market player, and controlling mergers. The Act also includes the possibility of exemptions as does the South African Competition Act. The two systems are very similar. One major difference, however, is the treatment of public interest grounds, to which I shall return shortly. The Cartel Act has recently been amended once more. The main body of the Act has remained unchanged from the 1995 model. The added refinements are explained below.

2.8. Cartel Act of 2003

The Cartel Act was revised in 2003. Two important amendments have been introduced: Whistle-blowing and direct sanctions. These two sudden inclusions were prompted by events that made the news in many countries. On 17 April 2000, the Swiss Competition Commission released a press statement wherein it announced that it had completed its investigation into the suspected cartel of the companies *Hoffmann-La Roche*, *BASF* and *Rhône-Poulenc*. It had found that these companies had also operated their worldwide cartel in Switzerland for the past nine years.³⁰ While the EU and the US sanctioned the cartel members with hefty fines,³¹ the Swiss

²⁹ So-called hard-core cartels, Art. 5 Abs. 4 KG.

³⁰ See press release under www.weko.admin.ch/publikationen/pressemitteilungen/00139/190400-D_Vitaminkartell.pdf?lang=de.

³¹ The European Commission's fines totalled €855.22m, with the Swiss-based company *Hoffmann-LaRoche* having to pay €462m and *BASF AG* paying €296.16m, EC decision of 21 November 2001, Case COMP/E-1/37.512-Vitamins; in the US *Hoffmann-LaRoche* pleaded guilty to criminal anti-trust

authorities were only able to give a stern warning. The companies could only be penalised the next time they were caught. Under the previous provisions of the 1995 Cartel Act, a company could only be fined for a transgression after it had repeated an action that the Commission had previously found to be illegal.³² It is no wonder that critics of the Swiss system cynically remarked: *Der erste Mord ist gratis!* – The first murder is on the house!

The amended Cartel Act changed this. Now, ‘hard-core’ cartels (fixing of prices, output and markets) and certain vertical restraints are unlawful *per se* and punishable on detection.³³ Administrative penalties may be levied on 10 per cent of the threefold of the annual turnover of the participants and not only on a single annual turnover as in South Africa.³⁴ To bolster the provision and assist the work of the Commission, parliament also passed a new section, which ensures leniency towards whistleblowers.³⁵

With this step, Switzerland has effectively joined the rest of the developed world as far as competition legislation is concerned and expresses a clear commitment to a free market economy based on unimpeded competition.³⁶ The evolution has been completed. An issue that is still contentious, though, is the public interest exception. As in South Africa, it is a concept that, although most lawyers agree on its importance and inclusion in a competition system, many would disagree on its positioning and weighting. The following section will analyse how the public interest exception is dealt with in the Swiss system.

offences and paid a fine of USD500m, while *BASF AG* paid USD225m, Department of Justice decision of 20 May 1999, available under www.usdoj.gov/opa/pr/1999/May/196at.htm.

³² Art. 50 aKG.

³³ Art. 49a Abs. 1 KG.

³⁴ *Ibid.*, compared to s 59(2) of the South African Competition Act.

³⁵ Art. 49a Abs. 2 KG; to date there has been no reported case where the new provisions have been applied. This is most probably because there was an extensive window period after the new provisions came into effect on 1 April 2004 until 31 March 2005 during which time companies and individuals were able to notify their agreements and get the Commission’s opinion on their validity. Many such agreements have been evaluated and the parties have done much to comply with legislation. During the phasing-in period, the Commission dealt with more than 150 notifications and gave reasoned opinions in more than 50 other cases, Competition Commission Annual Report 2004, 2.

³⁶ Häfelin and Haller (note 13) Ziff. 621, 183.

3. Swiss Public Interest Test

3.1. Introduction

As discussed, the Swiss Cartel Act has developed towards greater compatibility with the law of its neighbouring states. But even with this harmonization, interesting differences remain between Swiss and European law in general³⁷ and, in particular in the area of competition law. Switzerland, as mentioned in the Introduction, occupies a unique situation in the heart of Europe without actually being part of it politically.³⁸ While the South African Competition Act, in following its EU and Canadian role models,³⁹ has incorporated efficiency defences and public interest reasons to counterbalance anticompetitive effects into its test, which looks at the effects of the agreement, behaviour or merger, the Swiss system has chosen a ‘two-step-two-body’ approach.

3.2. Role of the Swiss Competition Commission

Under the previous Cartel Act, the Swiss competition authorities were required to take into account all possible results of anticompetitive behaviour as well as any resulting positive effects in other spheres of society, including consequences in the public interest domain. This so-called *Saldomethode* or ‘net result method’ gave rise to many difficult situations that were nearly impossible to resolve.⁴⁰ It required competition authorities to be experts at determining what was good for competition, and to give an economic equivalent value to social and related issues, a task that was complex, subjective and often arbitrary. To avoid this bundling of issues, the legislature decided to split the duties under the Act of 1985.⁴¹ The

³⁷ Swiss law includes strong elements of direct democracy, such as obligatory referendums, rights to political initiatives, but also an unusual government of national unity and federation of strong cantons.

³⁸ Switzerland is not a member of the EU.

³⁹ Compare Canadian merger rules in the Canadian Competition Act, s 92 Part VIII – RS.1985 c C-34.

⁴⁰ The memorandum to the 1995 Act speaks of placing the competition authorities before ‘unsolvable problems’, 7; see also Zäch (note 11), Rz. 162, who mentions procedural delays and personal preferences of the Commission members as complicating issues.

⁴¹ Zäch (note 11), Rz. 521, 253; Isabelle Chabloz, *L’Autorisation exceptionnelle en droit de la Concurrence* (Stämpfli Verlag 2002), Rz. 1063, 301-302.

Commission was thus entrusted to adjudicate the competition merits of agreements and mergers, while the Federal Council was charged with considering public interest grounds. This freed the Commission from mixing too many considerations. The substance of the legislation has remained the same as under the old Act (Art. 29 aKG), but the structure and application of the law has been refined.⁴² The evaluation of economic and public interests is now performed by separate bodies in a sequential fashion.⁴³

The Federal Council, the executive branch of the state,⁴⁴ is thus called to determine whether agreements or mergers that are found to be unlawful by the Commission, may be exempted on compelling public interests grounds. The Cartel Act of 1995/2003 has thus far not rendered many decisions that can assist the legal fraternity in determining the extent and scope of the new 'public interest'. Moreover, the said Act does not, in contrast to the South African Act, define what constitutes a public interest. Consequently, the jurisprudence relating to the old Act, which demanded a holistic balancing of factors, can give some guidance on this question.⁴⁵ The memorandum of the 1995 Act named a few such political considerations, including public service delivery, industrial sector protection, regional diversity, the promotion of the ability of Swiss firms to compete overseas and employment.⁴⁶ Some of these interests are also contained in s 12A(3)(a-d) of the South African Competition Act. The Federal Council can also receive some guidance from the policy choices made by parliament in other economic laws, such as the Federal Agriculture Act (*Bundesgesetz über die Landwirtschaft*) or the Federal Film Act (*Bundesgesetz über die Filmproduktion und Filmkultur*).⁴⁷

⁴² Eric Homburger, Bruno Schmidhauser, Franz Hoffet, Patrik Ducrey, *Kommentar zum Schweizerischen Kartellgesetz* (Schulthess Verlag 1996/7 Zürich), Rz. 2.

⁴³ Zäch (note 11), Rz. 520, 252.

⁴⁴ The seven member Swiss executive is a type of government of national unity representing the seven largest parties, Art. 175 Federal Constitution.

⁴⁵ Interests such as environmental protection, service delivery stability, traffic safety, health protection, see Yvo Hangartner and Felix Prümmer, *Die ausnahmsweise Zulassung grundsätzlich unzulässiger Wettbewerbsbeschränkungen und Unternehmenszusammenschlüsse*, AJP 2004, 1097.

⁴⁶ Zäch (note 11), Rz. 520, 252; Hangartner and Prümmer (note 45), 1093.

⁴⁷ Examples quoted by Hangartner and Prümmer (note 45), 1108.

Similar considerations are apparent in the South African context, where policy decisions in other laws also influence the decisions of the Competition Tribunal. In the South African context, however, it seems that the policy decisions made in other legislation act more like hurdles in the Tribunal's public interest analysis than as a form of guidance and inspiration. As this paper will seek to illustrate, the mere fact that the South African parliament has drafted legislations in a certain domain means that South African competition authorities tend to defer to such legislation rather than drawing their own conclusions and making bold own decisions. These areas seem to be treated as 'no-go-zones'.

The Swiss competition system entrusts the highest branch of government with the delicate duty of evaluating public interests. From an economic point of view, legitimising the departure from blatantly sound competition findings in favour of public interests is risky and in essence the core of a political process. Responsibility therefore should fall squarely on the shoulders of those who are constitutionally mandated with carrying that risk and with protecting and promoting public interest in general. By placing responsibility for these choices at the door of the highest political office, the Swiss parliament has managed to give such decisions the maximum of democratic legitimacy. The members of the Federal Council are elected from the members of parliament in a manner that seeks to give the highest possible degree of equal representation of political, gender and cultural backgrounds.⁴⁸ This leads to government being perceived as a balanced and representative body rather than as the executive of a winning party. As I shall demonstrate later, it is this very question of legitimacy that frequently sits uneasily on the shoulders of the members of the South African Competition Commission and Tribunal. The Federal Council, with more than 150 years of experience, is not new to the duty of assuming certain adjudicative functions.⁴⁹ That is probably why most Swiss citizens do not feel

⁴⁸ See www.admin.ch/ch/e/bk/buku/buku.

⁴⁹ Ibid; the first Federal Council was elected in 1848; the Council has judicial functions as described in the Federal Law on Administrative Procedure (*Bundesgesetz über das Verwaltungsverfahren*), Art. 72; however, for renewed criticism, especially regarding the rule of law principle, Art. 5 Abs. 1 Constitution and ECHR requirements, Art. 6 (1), see Hangartner and Prümmer (note 45), 1100 and 1105.

threatened by tweaking the system of separation of powers in this manner. Experience thus far has been positive and the Federal Council takes its duty very seriously.

Nevertheless, the introduction of this special and separate test for public interests did cause some consternation in parliament before the Act was passed in 1995. It was considered a very 'dangerous article'.⁵⁰ The National Bank, in its submission to parliament, raised the pertinent question, why public interests needed to be guarded with the instrument of competition inefficiencies.⁵¹ It felt that if public interest did in deed need protection it was up to parliament to make special statutory provisions to this end. There was concern that powerful lobbies would influence the Federal Council in its decision-making to the detriment of competition.⁵² Other concerns ranged from formalistic worries about the fact that exemptions would in actual fact result in private individuals becoming lawmakers, as their rules for the markets were subsequently endorsed by government,⁵³ to concerns about the difficulty of reconciling the Federal Council's sweeping powers with the general constitutional requirement of the rule of law (*Legalitätsprinzip*), which demands that the law shall be the basis for any state action.⁵⁴ In the case of exemptions according to Art. 8 and Art. 11 KG, this basis is very widely described and open, which is potentially dangerous. *Prümmer* and *Hangartner* fear that such exemptions might facilitate anti-competitive influences by exemption applicants and uncontrollable government intervention, especially now that the pressures have increased on companies and individuals to comply with the new stricter Cartel Act provisions.⁵⁵ Until 2003, this had evidently not been the case. Experience will answer whether the tightening of the competition system will tempt more parties to follow the route of the Federal Council exemption instead of desisting from anti-competitive behaviour. A similar question could be posed

⁵⁰ Homburger et al (note 42), Rz. 8; renewed criticism in Hangartner and Prümmer (note 45), 1094.

⁵¹ Homburger et al (note 42), Rz. 8; Hangartner and Prümmer (note 45), 1099.

⁵² *Ibid*, Rz. 18; this is also a concern raised by David Lewis, *The Role of Public Interest in Merger Evaluation*, speech at the ICN Merger Working Group, 28 - 29 September 2002, 3 with regard to the South African context.

⁵³ Hangartner and Prümmer (note 45), 1099.

⁵⁴ Art. 5 Abs. 1 Federal Constitution.

⁵⁵ Hangartner and Prümmer (note 45), 1097.

in the South African context: Do merger parties willingly risk presenting an anti-competitive merger together with some public interest advantages in an anticipated gamble to have it looked on benignly by the Competition Tribunal?

3.3. Federal Council Exemption

The Cartel Act allows parties to apply for exemption under both the procedures against restrictive behaviour or agreements (Art. 8 KG), and under the merger control procedure (Art. 11 KG). One finds similar provisions in the South African Competition Act in s 10, which are discussed below in section 5.4. Parties may, after the Commission has found that their arrangement or merger is anticompetitive and not warranted because of pro-competitive gains (Art. 5 Abs. 2 KG),⁵⁶ apply to the Federal Department of Economic Affairs to have the arrangement, agreement or merger exempted by the Federal Council.⁵⁷ The application remains an exception, though, and behaviour that has been found to be unlawful under the Act will not merely be exempted because it is capable to realizing some public good. There needs to be a compelling necessity for the public interest to be realized in this fashion.⁵⁸ Furthermore, not just any public interest ground will suffice. Rather, the realisation of such an important interest must outweigh the considerable negative effects of the agreement or practice.⁵⁹ The memorandum to the 1995 Act introduced the example of the fixed book prices in Switzerland, to which I shall return later in this paper.⁶⁰

The decision by the Federal Council, moreover, is always limited in its duration and may be coupled with conditions.⁶¹ It is important to note that the Council is not a supplementary instance of appeal, but a wholly separate

⁵⁶ An exemption application may not be lodged before a negative finding by the competition authorities, Art. 31 Abs. 1 KG, but may be lodged before an appeal against the Commission's ruling.

⁵⁷ For a detailed account of the application procedure, see Hangartner and Prümmer (note 45), 1105.

⁵⁸ Homburger (note 42), Rz. 20; RPW 1998/3, Ziff. 5, 482.

⁵⁹ Ibid.

⁶⁰ This sector had been the object of the Cartel Commission (the present Commission's predecessor under the older Cartel Acts) and these arrangements were upheld, see VKK 3/1973, 187, VKK 2/3/1982, 117, as quoted in BGE 129 II 44, E. 10.1; see also below Chapter 4.

⁶¹ Art. 31. Abs. 3 KG.

body invoked for an entirely different reason, namely the exemption of unlawful agreements and mergers on non-competition grounds.⁶² The procedure looks similar to the application for exemption under s 10 of the South African Competition Act. But contrary to the situation in South Africa, in Switzerland it is, however, only possible to exempt an arrangement or merger, which has been found to be anti-competitive. The reverse is not possible.⁶³ Political institutions cannot be called in to thwart a competitive arrangement because of fears regarding the public interest, which would be possible in South Africa under s 12A(3) of the relevant Act.⁶⁴

The fact that the decision by the Federal Council is not subject to any court review or appeal is further evidence of its political and not primarily legal function. Some scholars have questioned whether this is consistent with Switzerland's obligations under the European Convention on Human Rights (ECHR). The ECHR requires that civil decisions be subject to at least one instance of review with full factual and legal competence.⁶⁵ In the case of exemptions under Art. 8 and Art. 11 KG, these decisions are significantly different to the more common civil suites. These differences warrant their exclusion from the procedural guarantees of the ECHR. Among these differences are the standing of the parties that claim public and not private interests, and the fact that they can only demand correct application of the law, as the ECHR does not give a means to review the mere adequacy (*Zweckmässigkeit*) of the administrative decisions with civil consequences.⁶⁶ As these are exceptions to the rule and thus a form of 'equity', the individuals do not have a personal right, which they could enforce before the Federal Council. The opinion in Swiss legal circles and the present interpretation of section 6 (1) ECHR by the Federal Tribunal, is that it is premised on the so-called 'protective norm theory' (*Schutznormtheorie*). This is understood to give a plaintiff a cause of action only in such cases where the law invoked in protection of the suite is specifically designed to protect

⁶² Hangartner and Prümmer (note 45), 1107.

⁶³ Zäch (note 11), Rz. 524, 254.

⁶⁴ Zäch (note 11), Rz. 336, 162.

⁶⁵ S 6 (1) ECHR; full text available under <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

⁶⁶ Hangartner and Prümmer (note 45), 1105 - 1106.

the plaintiff or, in cases where the plaintiff is plainly affected more than other persons in a similar position.⁶⁷ This is manifestly not the case in the Federal Council's exemption procedures. To date, this question has not yet been tested in Switzerland or before the Convention's courts in Strasbourg. Evidently, no party would claim that the section that permits certain illegal arrangements to be exempted under special circumstances at the discretion of the government, gives them a personal and enforceable right to this treatment.

3.4. Conclusion

From the above, it is obvious that the Swiss system goes to great lengths in order to accommodate public interest concerns in its competition system, and that it has found a unique and appropriate solution for this country. By streamlining the competition evaluation before the Commission and carving out public interest questions, the analysis has become simpler and clearer.⁶⁸ Transferring jurisdiction on public interest concerns onto the Federal Council does not only fit neatly into the Swiss administrative system, but it also gives adequate weight to such an approach, while restraining parties from attempting to obtain clearance for overtly anti-competitive applications. The following section will examine the decisions on record, which deal with the public interest issue. Has the system fostered a climate, which nurtures the public interest at the expense of competition, or have these rules made the public interest intangible and hard to promote?

⁶⁷ See leading case BGE 104 Ib 245, 249.

⁶⁸ Zäch (note 11), Rz. 6, 2.

4. Swiss Cases

4.1. Introduction

In this section of the paper, I will analyse the actual cases on record concerning the public interest defence in competition law. Even before dealing with the substance of the cases, it is possible to ascertain that the provision has to date played a small role in the authorities' jurisprudence. The public interest defence of the Cartel Act has not lived up to its envisaged grandeur. No party has yet resorted to applying for exemption under Art. 11 KG in a merger control case.⁶⁹ To date only a single case, to which I shall turn in the next section, has been brought before the Federal Council with an Art. 8 KG application for exemption.⁷⁰ Certain events of the more recent past might bring a new bearing on this situation, however, which is a question this paper will briefly outline later.

4.2. Music Notes Case

In the ten years since the provision has been in place, this case has to date been the sole instance where an application has been made to the Federal Council for the exemption of an anti-competitive agreement. The case concerned a restrictive vertical agreement, with horizontal effect, by the distributors of music notes, who had agreed to fix the price of their musical scores in 1996.⁷¹ The agreement was proposed by the largest of the industry's associations, which represented 45 music publishing houses and over 160 music outlets. Their joint transactions constituted about 90 per cent of all the music note purchases in Switzerland.⁷² The agreement obliged retailers to maintain the prescribed prices, prohibited discounts to customers and rebates stemming from parallel imports from across the border and

⁶⁹ The Swiss Competition Commission has, according to its annual reports, approved, without conditions, 164 of the notified 182 mergers between 2000 and 2004, which is over 90 per cent, see Commission's Annual Reports 2000 – 2004.

⁷⁰ Price Binding of Music Notes, Federal Council decision, RPW 1998/3, 478 – 483, available under www.weko.admin.ch/publikationen/00188/index.html?lang=de

⁷¹ Not all retailers supported the system; especially retailers near Swiss borders, who experienced competition from foreign retailers, were against it, see RPW 1997/3, 337, Ziff. 23.

⁷² *Ibid.*, 334, Ziff. 3.

resale, set binding conversion rates for music note imports and imposed fines for transgressions. Members not committing to the pricing regime were threatened with supply boycotts.⁷³

The Commission found that the agreement effectively eliminated any price competition in this sector, as it stripped retailers of any means to compete on price. It thus denied them any bargaining ability with regard to pricing, discounts and the like.⁷⁴ The Commission found that this constituted a prohibited practice according to Art. 4 Abs. 1 KG read in conjunction with Art. 5 Abs. 3 KG.⁷⁵ The agreement was declared illegal in September 1997.⁷⁶ The Commission demonstrated that, although the agreement was constructed as a vertical agreement between producers and retailers, its effect was one of aligning all retailers with each other horizontally by demanding the maintenance of the same price across the board.⁷⁷

The producers tried to present a case for the agreement by arguing that the system enhanced the musical and cultural diversity in the country. The Commission refused to consider this argument. It correctly noted that it was not competent to entertain public interest considerations, as only the Federal Council had jurisdiction to adjudge these according to Art. 8 KG.⁷⁸

The producers consequently applied to the Federal Council for an exemption under Art. 8 KG on 20 October 1997. They based their case on the public interest ground of cultural diversity. They argued that the price fixing made it possible for sellers of notes to subsidise scores that were less sought after with the higher returns of more popular music, and that this enabled the stores to keep a representative selection of notes for sale in stock. This was necessary in order to foster a broad and vibrant musical appreciation and culture. According to the Association, this would otherwise

⁷³ Ibid, 335/6, Ziff. 9 – 18, 341, Ziff. 43.

⁷⁴ Ibid, 336, Ziff. 19.

⁷⁵ Art. 4 Abs. 1 KG defines the concept of an agreement and Art. 5 Abs. 3 KG is the deeming provision, which concludes that horizontal agreements on price (among other parameters) are considered to eliminate effective competition.

⁷⁶ RPW 1997/3, 343, Ziff. 56.

⁷⁷ Ibid, 341, Ziff. 45.

⁷⁸ Ibid, 343, Ziff. 51.

not be possible, as in most cases, the disparity between the actual cost of procuring the scores, especially from abroad, and their actual return would be too great. An accessible and wide selection was, they thus asserted, vital for the nurturing of the musical culture in all categories of music, and in fact constituted a cultural duty they had taken upon themselves to fulfil.⁷⁹ The Association thus maintained that free pricing would inevitably lead to producers limiting their wares to the scores most in demand.⁸⁰ The arrangement thus contributed to the spread of music and access to notes in the whole country.

As mentioned previously, an agreement advanced in favour of the public interest must not only be conducive to promoting the public interest, but it must be necessary and the public interest must be compelling (*überwiegende öffentliche Interessen*).⁸¹ The Federal Council accepted that the public interest of cultural diversity and musical variety could indeed qualify as a legitimate public interest, which might warrant exemption.⁸² Despite this, the Federal Council still denied the Association's application,⁸³ mainly because the producers failed to prove that the cross-subsidisation did actually lead to lower prices for other works and also because, in its view, the producers had not sufficiently set out the necessity nor the adequacy of the system to achieve the goal of musical diversity.⁸⁴ The Federal Council felt that it would suffice for all scores to be available on the market. It was not necessary for every set of notes to be obtainable in a single shop.⁸⁵ It believed that music note purchases are rarely, if ever, unplanned, as they are usually made by someone receiving a musical education, attending a course or participating in special productions, and not as impromptu buys.⁸⁶ The factor of pre point-of-sale assistance was not as decisive as in the book market where the situation of a potential buyer wandering into a shop

⁷⁹ RPW 1998/3, 480, Ziff. 4.

⁸⁰ Ibid.

⁸¹ See Art. 8 and 11 KG, *ibid*, 482, Ziff. 5.

⁸² Ibid, 482/3, Ziff. 7.

⁸³ Ibid, 485, Ziff. 12.

⁸⁴ Ibid, 483, Ziff. 8.

⁸⁵ Ibid, 485, Ziff. 12.

⁸⁶ Ibid, 484, Ziff. 9.

without a concrete idea as to what he or she would want to buy, might arise more frequently.

Various other factors also made the sale of musical material different to transactions in other retail sectors. The Council pointed out that music notes were non-perishable and easy to store and handle, and that customers could competently be advised telephonically. These characteristics made them perfect for mailing and distribution by courier services. The above were thus regarded as further arguments against the need for them to be available at a single venue.⁸⁷

The Council also questioned the ostensible beneficial effect of the agreement. It concluded that consumers were likely to make their purchases from large retailers, hoping that they would have the sought score in stock, effectively putting smaller stores at a disadvantage.⁸⁸ It also felt that the existence of the cartel would increasingly prompt consumers to make their purchases abroad because other countries offered more competitive prices.⁸⁹ Further, it held that, although it agreed with the value of musical diversity and cultural endorsement and the financial viability of burdening purchasers of music notes with costs for other scores, which they did not necessarily want to buy, it was primarily the duty of music schools, clubs and choirs, rather than businesses, to further these causes. The promotion of cultural policy was, after all, not the core business of publishers or retailers. The institutions charged with these duties were not dependent on all stores being able to provide the whole range of music scores.⁹⁰

The Council summed up its finding by stressing that the valid public interest of cultural diversity, which was ensured through a wide selection and availability of music notes, was not synonymous with an area-wide sales network with retailers stocking all possible notes.⁹¹ An extensive network of

⁸⁷ Ibid, 485, Ziff. 10.

⁸⁸ Ibid, 485, Ziff. 10; the Council reinterpreted the arguments of the Association to the contrary.

⁸⁹ Ibid; with Switzerland being a small landlocked country surrounded by five other European countries, with many major cities on or near borders, this is easier than in South Africa.

⁹⁰ Ibid, 484, Ziff. 10.

⁹¹ Ibid, 485, Ziff. 11.

music note sellers was thus not required to advance the public interest, and thus the conditions for an exemption were not met.⁹²

4.3. Fixed Book Price Case

The precedent set by the music notes case might soon be challenged. The so-called 'fixed book price case' has recently stirred competition circles. The Swiss Association of Book Dealers and Publishers (*Swissbooks*) had issued a press statement in March 2005 that it intended to appeal against a ruling by the Competition Commission, which had ruled against its system of book price fixing.⁹³ The Commission had found that the applied system eliminated price competition amongst the retailers. By prohibiting the system, it hoped that the industry would be forced to specialise its distribution channels and to develop upmarket traditional bookshops as well as low-end discount-type book outlets. The chairman of the Commission felt that the incumbent system was antiquated and in dire need of an overhaul.⁹⁴ There was widespread negative reaction by members of the Association to the Commission's decision. Interestingly, in addition to the loss of cultural heritage argument, the media labour union *Comedia* also feared the loss of 600 to 1000 jobs – an issue that, for some unknown reason, was not raised again in the decision.⁹⁵

Although the Competition Appeal Body (*Rekurskommission für Wettbewerbsfragen*) had previously already dismissed the Association's appeal in May 2001 the Association had taken the matter to the Federal Tribunal, which had partially found in their favour and ordered the Commission to re-evaluate the pro-competitive arguments brought forward by the organisation.⁹⁶ The Commission announced on 21 May 2005 that, after re-evaluation, it still found the agreement to be anti-competitive for the reasons discussed below.

⁹² Ibid, 485, Ziff. 11 and 12.

⁹³ Commission decision, RPW 1999/3, 461; statement of 30 March 2005, see www.swissbooks.ch/cms2/cms.cgi?cfg=2&list=id&prm=62&sort=a&tmpl=jarchiv_detail.

⁹⁴ See commentary in NZZ of 8 September 1999, 19.

⁹⁵ Ibid.

⁹⁶ BGE 129 II 18, E. 10.4 and E. 11.1.

In the German-speaking parts of Europe (Germany, Austria and Switzerland), publishers had introduced a system of book price fixing in 1993, which required its participating booksellers to keep to agreed selling prices (the so-called *Sammelrevers*). The bookshops thus consented to sell the publishers' wares at the predetermined prices, indirectly keeping their prices in line with their competitors. The agreement extended to the maintenance of duties for re-imports into Switzerland, and dealt with permitted rebates and special sales. The agreement also provided for arbitration, special audits and financial penalties, which were due to *Swissbooks*, in the case of transgressions. Although the Association had no powers to force sellers to join the agreement, a high percentage of the German books sold in Switzerland were subject to the agreement.⁹⁷ The agreement thus had international ramifications. Switzerland imports 80 per cent of its German books from Germany. The figures involved in these transactions are significant. The *Börsenverein des Deutschen Buchhandels*, the German counterpart of *Swissbooks*, which is also a party to the agreement, represents an industry, which annually exported books to the value of DEM 350bn to Switzerland.⁹⁸

The Commission found that the agreement was a vertical agreement according to Art. 4 Abs. 1 KG, which aimed to restrain the freedom of price and thus influenced competition negatively. The Federal Tribunal concurred with the Commission and stated that price is in most cases the primary determining condition in the competition amongst goods and that, in the present case, where approximately nine tenths of the selection of books were carved out of this competitive process, this was to be considered as a substantial influence on competition.

Similar to the situation in the Music Notes case, *Swissbooks* had claimed that the fixed prices permitted sellers to provide to the consumer a broader palate of choice in literary works, as it assisted in keeping down

⁹⁷ More than 90 per cent of German text book prices are fixed this way, see BGE 119 II 18.

⁹⁸ In €-terms this is approximately €170bn; see also commentary in NZZ of 8 September 1999, 19.

costs of publications that were less sought after. It also ensured a denser distribution network, as the higher prices permitted smaller bookshops in less centralised areas, such as smaller towns and villages, to survive without having to battle against the major book retailers, which would otherwise have pressed for substantial rebates from the publishers and offered cheaper prices. Giving up the system of fixed prices would have drastically reduced the chances of selling specialised titles, new books or works of smaller volumes. The Association also claimed that abandoning the system would inevitably lead to a dangerous concentration process in the publishing sector, which in turn would mean that only the big publishing houses that specialise in bestsellers and other high grossing mainstream publications would survive. The casualties would be the smaller publishers who, according to them, were very often pioneers in the field by discovering and promoting new authors and who were thus driving innovation in the industry. The literary avant-garde would so ultimately succumb to financial pressures. The system also ensured that decisions to translate certain works into less commonly spoken languages were viable, and thereby assisted the Swiss government's policy of promoting and protecting the four national languages.⁹⁹ Without this guaranteed income, publishers would soon be knocking at the door of government to obtain subsidies before printing books in less commonly spoken languages. By fixing the books' prices, the Association believed that it was contributing to minimising the state's intervention.

In effect, the Association was trying to convince the Commission of the value of a cross-subsidisation scheme for the book publishing sector. The crux of the matter was, however, that the parties did not suggest that the pricing system actually led to a general lowering of prices. Their argument centred on the issue of being able to provide cheaper 'fringe books' by means of the system, an argument that was deemed insufficient as a pro-competitive defence as permitted under the Swiss anti-trust system (Art. 5

⁹⁹ See s 70 of the Federal Constitution, which ensures the right of citizens to converse in 'their national language' in administrative procedures and requires the state to develop and promote the cohesion among language groups and to safeguard the status of the lesser spoken languages (besides German and French) of Italian and Rhätoromanisch in the regions.

Abs. 2 KG). Moreover, in the proceedings before the Commission in 1999, it had dismissed this line of argument, as it felt that it did not belong under the heading of an efficiency defence but rather under the public interest defence, a question, which it was not competent to adjudge.¹⁰⁰ The Federal Tribunal suggested in its appeal decision that the counter arguments by the Association could not be discharged that easily, but that they required closer inspection. The court felt that the arguments put forward by *Swissbooks* (lowered production costs, improvement of the products, dissemination of technical and professional expertise, rational use of resources)¹⁰¹ needed closer examination, as they all could warrant protection from competitive prosecution.¹⁰²

The Commission again considered these arguments in its 2005 proceedings but came to the same conclusion as in their first hearing in 1999. The benefits advanced in favour of the price fixing system could not be proven.¹⁰³

The Association had suggested that the price fixing system allowed for a better use of limited resources, categorising the literary works of authors as such limited resources. In the view of the Association, the system facilitated the dissemination of knowledge through books and helped to unearth and distribute the otherwise hidden wisdom of society.¹⁰⁴ The Commission did not accept this argument. Firstly, it stated that such an attempt to disguise efficiency arguments as public interest grounds would not be accepted, as the Cartel Act clearly separated the two interests. Secondly, it dealt the defence a harsh blow when it likened it to the arguments put forward in favour of pro-efficiency considerations, which the Commission had already discounted.¹⁰⁵

¹⁰⁰ See RPW 1999/3, Ziff. 94, 461.

¹⁰¹ Art. 5 Abs. 2 lit. a KG.

¹⁰² See BGE 129 II 45, E. 10.2., E. 10.3.1, E.10.3.2 and E. 10.4.

¹⁰³ Commission's order of 21 May 2005, Ziff. 167, 65, available under.

www.weko.admin.ch/publikationen/pressemitteilungen/00225/300305-PC-Buch-D.pdf?lang=de

¹⁰⁴ Ibid, Ziff. 191, 73.

¹⁰⁵ Ibid, Rz. 188, 72.

Nonetheless, despite these setbacks, *Swissbooks* seems adamant to fight all the way. The Commission is expecting them to apply for an exemption eventually.¹⁰⁶ In its order, the Commission expressly reiterated that its decision was a purely competitive analysis and that it did not include cultural or educational deliberations.¹⁰⁷ These were reserved for the adjudication by the Federal Council. It is interesting to note that *Swissbooks'* chances of succeeding before the Council might be better than those of their music colleagues in the case discussed previously. In the judgement of the Council against the music publishers, the Council noted that the reasons advanced for the pricing regime of the notes compared unfavourably with the similar system used by the book publishers, as in the latter case the need for closer client-to-seller contact and thus a greater selection of goods could be established.¹⁰⁸ In the opinion of the Council, music notes are hardly ever required at short notice or by an inexperienced buyer. Books, however, could fall in this category. The same had not been convincingly argued for the music notes case.

4.4. Conclusion

Looking at these decisions and considering the fact that the Swiss law has given rise to so few cases under the public interest exemption provisions, it would seem that these sections of the Swiss law are not of any real practical importance. The Federal Council exemption solutions are not something that entities would primarily aspire to, as they are limited in application and duration, in addition to the fact that they involve a further administrative procedure with further delays and uncertainties, which are major negative factors in commercial transactions. The Swiss system has created a delicate and well-balanced system to deal with the complex questions of evaluating such conflicting objectives, such as competitive markets and public interests, and has entrusted the highest political authority to adjudge the most important of these questions. Despite this, the practical

¹⁰⁶ Annual Report of the Competition Commission 1999, 9.

¹⁰⁷ As in the line of media merger cases, where the arguments of newspaper diversity were also not heard due to their public interest content, RPW 1997/1, 179 and RPW 1998/140.

¹⁰⁸ RPW 1998/3, Ziff. 10, 485.

results seem to indicate that companies and merger participants either distrust the public interest exemption as a means of keeping anti-competitive practices and mergers, or that they are content to arrange their transactions in a pro-competitive manner.

This would indicate that, even for economies that have a history of concentration there might be a natural inclination to change for 'the better' under the sustained pressure of competition law. It would seem that, by making the public interest exemption elusive, competition could be promoted. This finding puts the expectations for the South African economy in a new light. It would seem to support the growing recognition of the role that competition law is starting to play in the world's economic systems, and a mounting awareness of the need for economic players to comply with these rules. The following chapter will analyse this question and aims to answer whether competition legislation in South Africa has delivered on its promises to rectify the one-sided economic situation in that country.

5. South African Legislative Background

5.1. Competition Legislation in South Africa

South African courts have also found themselves resolving disputes turning on the issues of contractual loyalty and restraints of trade, similar to the situation faced by the courts in Switzerland. Before the *Competition Act of 1979* came into effect, South African jurisprudence was influenced by these two opposing principles. The distinction was drawn between, on the one hand, restrictions on the freedom to trade, which were considered legal,¹⁰⁹ as they functioned as ancillary restraints, and on the other hand, the illegal restraints of trade.¹¹⁰ To understand the evolution that South African anti-trust law has undergone, it is necessary to highlight some of the more decisive events in the country's political and economic development.¹¹¹

5.2. South African Act of 1955

The *Regulation of Monopolistic Conditions Act No 24 of 1955* was the first attempt of the legislature to deal with the issues of competition. The Act established the Board of Trade and Industry, which investigated monopolistic market situations and evaluated them with regard to the effect on the public interest and recommended remedies to the minister,¹¹² who could order arrangements to be changed at his discretion. Like the earlier Swiss Acts, the South African Act also only dealt with 'monopolistic conditions' and did not apply to mergers. As the Act only put in place the institutions dealing with monopolies and contained no *per se* prohibitions, it also had no direct impact on the behaviour of economic players, which is another similarity with earlier Swiss rules. In reality, the effects of the Act

¹⁰⁹ Martin Brassey, John Campbell, Robert Legh, Charles Simkins, David Unterhalter, Jerome Wilson, *Competition Law* (Juta Law 2000), 60.

¹¹⁰ *Ibid*, 61.

¹¹¹ For a more comprehensive summary, see DTI, *The Evolution of Policy in South Africa – Proposed Guidelines for Competition Policy*, 27 November 1997, chapter 3, hereinafter 'the DTI Guidelines'.

¹¹² *Ibid*, 64.

were minimal. A mere six of the eighteen investigations ordered actually ended with arrangements between the minister and the parties.¹¹³

5.3. The South African Act of 1979

The *Maintenance and Promotion of Competition Act 96 of 1979* aimed to deal with the shortcomings of the previous act and was the main competition instrument until the present Act of 1998. The 1979 Act established a new body charged with investigating competition concerns called the Competition Board. The public interest test under that Act was similar to the considerations we find today under the 1998 Act.

Similar to the Act of 1955, the new Act of 1979 again limited the Board to an investigative role and empowered only the minister to order changes.¹¹⁴ Restrictive arrangements were deemed to be in the public interest and the Competition Board had to prove that the opposite was in fact true, while in the case of monopolistic markets the burden of proof was on the parties. They had to justify why monopolies were in the public interest.¹¹⁵ Even though the new Act advanced competition jurisprudence in South Africa, there was still scope for improvement and more active intervention.¹¹⁶

5.4. Background to the new Competition Act of 1998

The economic situation of South Africa in the late 1980s and early 1990s was characterised by high concentration through a few big conglomerate corporations.¹¹⁷ Existing legislation effectively excluded the majority of the population from participating in politics and the economy, and marginalised small businesses. International sentiment towards the apartheid government had furthermore led to disinvestment in the country,

¹¹³ Ibid, 66.

¹¹⁴ Brassey et al (note 109), 71 and 72.

¹¹⁵ Ibid, 77.

¹¹⁶ Ibid, 12 and 13; Competition Tribunal, *Challenges/Obstacles faced by Competition Authorities in achieving greater economic Development through the Promotion of Competition*, Background note for the OECD Global Forum on Competition, February 2004, 1, hereinafter 'OECD report'.

¹¹⁷ Trudi Hartzenberg, *Competition Policy and Enterprise Development: The Role of Public Interest Objectives in South Africa's Competition Policy*, TRALAC, August 2004, 6.

civil and industrial unrest and macroeconomic instability. The new ANC-led government was looking to change this.¹¹⁸

The 1955 Freedom Charter already expressly demanded that ‘the national wealth of our country, the heritage of South Africans, shall be restored to the people’.¹¹⁹ In May 1992, the ANC drafted its *Policy Guidelines for a Democratic South Africa*. With regard to the envisaged competition policy, the text stated:

‘the concentration of economic power in the hands of a few conglomerates has been detrimental to balanced economic development in South Africa. The ANC is not opposed to large firms as such. However, the ANC will introduce anti-monopoly, anti-trust and mergers policies in accordance with international norms and practices, to curb monopolies, continued domination of the economy by a minority within the white minority and promote greater efficiency in the private sector.’¹²⁰

It seemed clear from such statements that the new competition instruments were designed to break the economic stranglehold of the old guard and to launch the slow moving economic behemoth towards the 21st century.

The Reconstruction and Development Program of the new government recalled the need for comprehensive reconstruction of the South African economy.¹²¹ It stated the need to introduce stringent anti-trust rules to increase competitiveness¹²² and to prevent market domination and abuse, as well as to promote consumer protection and discourage the existing pyramid structures, which had dominated the South African economy.¹²³ The

¹¹⁸ See RDP, para 4.1.5 and 4.1.6; Hartzenberg (note 117), 1 and 3; Brassey et al (note 109), 88.

¹¹⁹ Text of the Freedom Charter available under www.anc.org.za/ancdocs/history/charter.html.

¹²⁰ See *Ready to Govern – ANC Policy Guidelines for a democratic South Africa*, 28 – 31 May 1992, section D.2, document available under www.anc.org.za/ancdocs/history/readyto.html.

¹²¹ See section 4.1.1 of the RDP, available under www.polity.org.za/html/govdocs/rdp/rdp4.html#4.1.

¹²² Section 4.4.2.2 RDP.

¹²³ Section 4.4.6.2 RDP.

document envisaged the setting up of a commission, which would ‘review the structure of control’ of the domestic economy in order to spread control more widely.¹²⁴ At the onset, there was no doubt considerable political momentum to make use of competition law, together with other policy instruments, to further the public interests listed in the RDP. The section on competition policy was adopted by government and parliament in the White Paper on Reconstruction and Development in 1994,¹²⁵ and formed the basis of the Growth Employment and Redistribution macroeconomic policy of government in 1996, thereby effectively ending any radically socialist ideas of the ANC.¹²⁶

5.5. Precursors to the new Competition Act

In 1997, the Department of Trade and Industry published its *Proposed Guidelines for Competition Policy*,¹²⁷ which were incorporated into the 1998 Competition Bill by government. These *Guidelines* already embraced a more traditional competition orientation, and stated that the ‘overriding goal is to achieve a more effective economy in South Africa’.¹²⁸ They echoed the sentiment of a report commissioned by the DTI two years earlier:

‘one should guard against attempting to use competition policy to attain social, redistributive or development objectives that are not directly linked to the state of competition and may better be served by other types of policies.’¹²⁹

From this short statement, it becomes apparent that the political energy of the policy papers had not survived unscathed. This is a stance the Tribunal was to embrace frequently in its later jurisprudence. The Tribunal is in good company though. *Furse* shares this view:

¹²⁴ *Ibid.*

¹²⁵ Text available under www.polity.org.za/html/govdocs/white_papers/rdpwhite.html?rebookmark=1.

¹²⁶ Hartzenberg (note 117), 2, 8 and 9.

¹²⁷ DTI Guidelines (note 111).

¹²⁸ *Ibid.*, para 1.1.3; see also Fox (note 9), on the standard content of the new act, 585.

¹²⁹ Unpublished report by C V N Fourie, D Lewis and W J Pretorius, *Towards Competition Policy Reform in South Africa*, as quoted in Brassey et al (note 109), 83 – 84.

‘There is no reason why tools of competition law cannot be used in support of wider social objectives, such as income redistribution, but the efficiency of any such move must be doubted. It is unlikely that the application of a sophisticated, and therefore costly, competition law can be more effective in this area than the imposition of, say, a windfall tax on monopoly profits.’¹³⁰

The *Guidelines* did, nevertheless, contain some strong language and advocated that ‘competition policy can assist the objectives of empowerment policy. Excessive concentrations of power can be broken up and in the process empowerment can be strengthened.’¹³¹ The *Guidelines* also contested that the legacy of apartheid could ‘gradually be rectified in part through competition policy’ and ‘[i]t is therefore crucial that all government policies – including competition policy – are aligned so as to reduce the uneven development, inequality and absolute poverty, which are so prevalent in South Africa.’¹³² The *Guidelines* even spoke about involuntary divestiture,¹³³ something big business in South Africa was understandably worried about.¹³⁴ Chapter 4.3 of the *Guidelines* expressed the government’s dedication

‘to actively strive for a “level playing field” but [it] will recognise that, in order to overcome distortions generated by past policy interventions, it will be obliged to support sectors and clusters effectively discriminated against by past policies.’

On the other hand, the document made it very clear that, in the view of the DTI, there was no room for a revolution. In the section dealing with the definition of the public interest, it stated unequivocally that

¹³⁰ Mark Furse, *Competition Law of the EC and UK* (Oxford University Press 2004), 229.

¹³¹ DTI Guidelines (note 111), para 7.1.2; Hartzenberg (note 117), 9.

¹³² DTI Guidelines (note 111), para 10.1.3.

¹³³ *Ibid*, para 2.4.9.

¹³⁴ OECD report (note 116), 2; the Tribunal qualified these hopes by adding that it aimed at ‘injecting a measure of realism into the expectations of the public’, 2.

'we have to address some misconceptions about public interest that may have already arisen. The Guidelines are not aimed at the direct or blanket control of the absolute size of enterprises, the prohibition of mergers and acquisitions in concentrated industries, the enforced unbundling or divestiture of vertically-integrated corporate ownership or the existence per se of monopolies, oligopolies and cartels, even though all these aspects are highly relevant for competition policy.'¹³⁵

The *Guidelines* stressed the importance of striking the correct balance between competitiveness and development. This included promoting such interests as macroeconomic harmonisation, empowerment, employment and consumer welfare in complementarity to competitiveness.¹³⁶ All this deliberation and background information eventually culminated in the passing of the Competition Act No 89 of 1998, in effect since the beginning of September 1999 and which has been amended on three further occasions since then.

5.6. Competition Act of 1998

The present Act is founded on the traditional pillars of competition law: addressing restrictive practices, the abuse of dominance and merger control.¹³⁷ The Commission must be notified of mergers, if the turnover of the parties exceeds certain thresholds. Large mergers are then referred to the Tribunal with a recommendation by the Commission.¹³⁸ Mergers that have been found to be either competitive or anti-competitive still have to pass the public interest hurdle of s 12A(3). *Hartzenberg* describes the uniqueness of the Act as the unusual mix of 'equity and justice balanced with traditional economic efficiency concerns.'¹³⁹

¹³⁵ DTI Guidelines (note 111), para 1.3.1.

¹³⁶ *Ibid*, para 1.3.3; see also Fox (note 9), 585.

¹³⁷ Fox (note 9), 584; the South African Act is hereinafter referred to as 'the Competition Act'.

¹³⁸ See s 11 and s 14A.

¹³⁹ *Hartzenberg* (note 117), 3.

For restrictive practices the Act has a special exemption section, which frees certain agreements from the prohibitions of chapter 2, if they are required to meet one of the objectives of s 10(3)(b) of the Act. These objectives include the promotion and maintenance of exports, the support of small and medium sized enterprises and businesses operated by previously disadvantaged persons, or industrial sector protection.¹⁴⁰ The Commission has granted this exemption on two published occasions.¹⁴¹ In both cases, the exemptions concerned state-owned enterprises. In the one, the national airline *South African Airways* and the Australian airline *Qantas* had applied for exemption for their code-sharing agreement.¹⁴² The other exemption concerned *SASOL*, the state-owned liquid fuel company.¹⁴³ The underlying reason for these exemptions is similar to the grounds advanced in this regard in Switzerland. The policy goal of efficient competition is not a singular objective, but it may be trumped by other 'higher priorities'.¹⁴⁴

As the evidence suggests, it would seem that this section of the Act has to date played only a limited role. The rest of this paper will therefore focus on the public interest debate and the decisions, which have accompanied the merger control cases before the Competition Tribunal in South Africa.

¹⁴⁰ S 10(1); the section also contains the possibility to apply for exemption relating to the use of intellectual property rights.

¹⁴¹ See www.compcom.co.za/procedures/procedures_exemp_intro.asp?level=3&child=1

¹⁴² See www.compcom.co.za/procedures/SAA&QantasCorrect.asp.

¹⁴³ See www.compcom.co.za/resources/media2002.asp?level=1&child=5, 15 August 2002.

¹⁴⁴ Brassey et al (note 109), 314; see also Hartzenberg (note 117), 14; Fox (note 9) refers to these provisions as 'bold' and 'uncharted territory', 586 and 587.

6. South African Public Interest Test

6.1. Introduction

The focus of the work of the South African Competition Commission has been the implementation of the merger rules of chapter 3 of the Competition Act. The Commission submits large mergers to the Competition Tribunal for approval.¹⁴⁵ According to the Tribunal's annual reports, it has to date evaluated 213 large mergers, 189 of which have been approved unconditionally, 20 of which have been approved with conditions, and only four of which have been disallowed.¹⁴⁶ In other words, the overwhelming majority of submitted mergers have passed the Tribunal's evaluation without great difficulty.

The Tribunal evaluates the pro- and anti-competitive effects of the proposed mergers. The Commission and Tribunal become active if the merger is 'likely to substantially prevent or lessen competition', s 12A(1).¹⁴⁷ Thereafter, the Tribunal moves to the second part of the analysis and concerns itself with the effect of the merger on the public interests, as defined in s 12A(3)(a-d) of the Act. This public interest test is thus conducted through the 'filter of a completed competition finding', as explained by the Tribunal's chairperson.¹⁴⁸ Interestingly, the public interest evaluation must be undertaken by the Tribunal regardless of the outcome of the competition analysis.¹⁴⁹ This means that both competitive as well as anti-competitive mergers face the final hurdle of public interest scrutiny. 'The public interest can operate either to sanitise an anticompetitive merger or to impugn a

¹⁴⁵ S 14A(1).

¹⁴⁶ Annual Report of the Competition Commission 2003/4, 15.

¹⁴⁷ The Swiss Commission only gets involved if it believes the merger 'creates or strengthens a dominant position as a result of which effective competition can be eliminated', Art. 10 Abs. 2 KG, ie their intervention starts at a later, more concentrated stage.

¹⁴⁸ Lewis (note 52), 3; Kenneth Creamer described this approach as promoting the weighing up of 'static competition objectives against the more dynamic objectives of industrial and development policy', *Challenges of the New Competition Law*, in South African Mercantile Law Journal (1999), 342, at 352; see also Hartzenberg (note 117), 13.

¹⁴⁹ The public interest is not defined in the Competition Act, and neither do the DTI Guidelines (note 111) give any weighting; see also OECD Global Forum on Competition, *Competition Law and Policy in South Africa*, 11 February 2003, 8, hereinafter 'OECD Commentary'.

merger found not to be anticompetitive'.¹⁵⁰ This contrasts strongly with the approach in Switzerland. Under Swiss merger law, once a merger has been found to be harmless from a competition point of view, the investigation ends. There is no basis for parties or other complainants or indeed government to enter into the fray and to demand a public interest inquest and find the transaction wanting in that regard.

In contrast to other countries, in South Africa, then, the public interest test is not read into the evaluation of the mergers. Neither is it suppressed or separated from the procedure.¹⁵¹ It is expressly mentioned in the Act.

The Tribunal can look back on nearly six years of experience in this field. Even after this time its chairperson explained that the Tribunal had not developed anything near a magical formula for finding 'the elusive balance between public interest and competition', but rather that it had found some 'rules of thumb' to guide their way. They had grown to treating the public interest test with 'wary respect'.¹⁵² It had, according to him, the reverence of younger generations, but also the potential to rip apart old structures, which had grown rigid and blind. The chairperson readily conceded that it would remain impossible to 'ever eliminate an element of pure judgement that inevitably constitutes part of all public interest assessments'.¹⁵³ The well-known paradox that markets need to be regulated for them to be free,¹⁵⁴ requires carefully judged balancing of differing issues. This is complicated by the fact that the people in charge 'must employ norms and standards that are value-laden and frequently incommensurable'.¹⁵⁵

¹⁵⁰ *Anglo American Holdings Ltd – Kumba Resources Ltd* merger, 46/LM/Jan02, para 137; Hartzberg (note 117), 15 and 16; see also detailed explanation in the *Shell –Tepco* merger 66/LM/Oct01, para 37 – 38.

¹⁵¹ Lewis (note 52)1; Lewis mentions systems where regulatory bodies usurp jurisdiction in merger cases with public interest aspects such as banking (as in South Africa), Lewis (note 52), 3; see also in Switzerland, Art. 10 Abs. 3 KG for banking mergers, where the Competition Commission is replaced by the Banking Commission and the Competition Commission's role is reduced to an advisory one.

¹⁵² Lewis (note 52), 1.

¹⁵³ *Ibid.*, 1.

¹⁵⁴ Brassey et al (note 109), 56.

¹⁵⁵ *Ibid.*

6.2. Composition of the Authorities and the Transformation of the Judiciary

The way in which the South African Competition Act is structured and envisioned to function, leads to the outcome that, in evenly matched situations, when a merger is deemed to be neither obviously anticompetitive nor overtly pro-competitive, it is the subjective, 'value-laden' opinion of those persons sitting on the decision-making bench who will ultimately determine the outcome most compatible with their own conviction. Sympathy for the cause will eventually sway the pendulum either towards a more extensive interpretation of the public interest or toward a more traditional limited approach. This point, however, opens a different and equally contentious question in the South African context: The composition of the judicial branch. A detailed analysis of this issue is beyond the scope of this paper. It is, however, undeniable that, at least when viewed from the outside, this question could have an influence on the reading of public interest questions and the extent to which the competition authorities are willing to use the instrument of the Competition Act to transform the country's 'economic' society. A few brief observations are warranted.

In the United States, the electorate has grown accustomed to the influence and consequences of the presidential power to appoint, among others, the Supreme Court judges and thereby sway the either republican or democratic leaning of the bench.¹⁵⁶ In South Africa, in contrast, the debate on 'transformation in the judiciary', old judges and racism on the bench, is still very recent, delicate and controversial with the potential for far-reaching and disruptive consequences.

The ANC had already proposed what it envisioned as the way to correct the legal system of South Africa in its 1991 *Constitutional Principles for a Democratic South Africa*. Here it stated under the heading of

¹⁵⁶ Art. II, s 2 (2) US Constitution; see Lawrence H Tribe, *God save this honourable court: how the choice of Supreme Court Justices shapes our history* (New York, Random House 1985); the Swiss authorities have seemingly conceded that politics and law are intrinsically linked as their publishing periodical is called *Recht und Politik des Wettbewerbs* – Law and Politics of Competition.

‘Administration of Justice’ that ‘[w]ithout interfering with its independence [...] the judiciary shall be transformed in such a way as to consist of men and women drawn from all sectors of South African society.’¹⁵⁷ In January 2005, the ANC defended its stance on the need for the South African judiciary to transform. Referring both to the above *Policy Guidelines* and the *Constitutional Principles*, as well as its resolution at the party’s 2002 Stellenbosch conference, where it promised ‘to expedite the transformation of the judiciary, to create a more representative, competent, sensitive, humane and responsive judiciary’, it vowed to rise to the

‘important challenge to transform the collective mindset of the judiciary to bring it into consonance with the vision and aspirations of the millions who engaged in struggle to liberate our country from white minority domination. The reality can no longer be avoided that many within our judiciary do not see themselves as being part of these masses, accountable to them, and inspired by their hopes, dreams and value systems. If this persists for too long, it will inevitably result in popular antagonism towards the judiciary and our courts, with serious and negative consequences for our democratic system as a whole.’¹⁵⁸

This is strong language, which strikes fear into the hearts of those who hold the separation of powers holy, and questions the sanctity of judicial independence. The opposition party has strongly condemned the route suggested by the ANC despite agreeing, in principle, with the objective of making the judiciary more inclusive.¹⁵⁹

¹⁵⁷ *Constitutional Principles for a Democratic South Africa*, April 1991, available under www.anc.org.za/ancdocs/policy/constprn.htm;

for a more current and approving opinion see the SACP’s position of 11 January 2005, available under www.sacp.org.za/index.php?option=com_content&task=view&id=120&Itemid=104.

¹⁵⁸ Press statement available under www.anc.org.za/ancdocs/pr/2005/pr0110.html.

¹⁵⁹ See the DA’s reply, *The DA’s judicial review: Threats to Judicial Independence in South Africa*, (undated), available under www.da.org.za/da/Site/Eng/campaigns/DOCS/Judiciary_DA.doc; for a less politically slanted opinion see IDASA’s comments of 27 February 2005, available under www.idasa.org.za/index.asp?page=output_details.asp%3FRID%3D698%26TID%3D12%26OTID%3D26.

Whether the accusations of racism and judicial resistance are of merit is not directly relevant for the purposes of this examination. What one can conclude, however superficial the finding might be, is that the bodies charged with implementing public interests in competition authorities are reasonably well diversified from an equity¹⁶⁰ point of view. While 50 per cent of the Tribunal's members consist of persons from previously disadvantaged groups,¹⁶¹ the Commission is made up of 70 per cent of previously disadvantaged persons and has a gender split of 54 per cent female to 46 per cent male employees.¹⁶² The Competition Appeals Court is made up of seven members, of which four are from previously disadvantaged backgrounds.¹⁶³ The argument that public interests are not promoted with enough vigour, a tentative conclusion this paper debates, because of the composition of the implementing bodies is, at least at first glance, unwarranted. If we can thus conclude that the race mix at the Commission and the Tribunal does not have a direct bearing on the development of the public interest, there must be different reasons for the conservative judgements of the body.

6.3. Competition and Equity – a Challenging Balancing Act

The South African authorities are well aware of the sheer impossible task of correctly balancing the two opposing interests of competition and policy concerns. The consensus is that public interest grounds complicate an otherwise pure competition analysis.¹⁶⁴ The Tribunal, however, admits that 'in the real world [...] we have little choice but to grapple with public interest

¹⁶⁰ Meaning race and gender.

¹⁶¹ See Competition Tribunal Annual Report 2003/4, 7 - 8.

¹⁶² See Competition Commission Annual Report 2003/2003, 41.

¹⁶³ See Competition Tribunal Annual Report 2003/4, 36; these figures compare positively with the overall statistics for the racial spread in the South African judiciary where black judges still only account for 34 per cent and women only make up 11 per cent; figures from M T K Moerane SC, *The Meaning of Transformation of the Judiciary in the New South African Context*, presentation at the National Judges' Symposium, 16 July 2003, in South African Law Journal, Volume 120 (Part 4) 2003, 708, at 713; according to Sibusiso Ndebele, a member of the ANC National Executive Committee, 99 of the 197 High Court Judges in South Africa are still white males, see article in the ANC's journal *Umrabulo*, *The Transformation of the Judiciary*, June 2005, available under www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo23/building.html.

¹⁶⁴ Lewis (note 52), 1; see also Fox (note 9), 591; in Brassey et al (note 109) Legh feels 'the mingling of these concepts will impose significant obligations on the competition authorities', 88.

considerations.¹⁶⁵ Fox sums it up neatly by saying that the structure and exceptions of the Act ‘imply that South Africans are sometimes willing to pay a supra-competitive cartel price for goods and services as a cost of advancing the critical effort to bring more of the historically excluded population into the economic mainstream.’¹⁶⁶ Given the historical, political and economic background of South Africa, the Tribunal notes that it would render itself and the other competition authorities useless and deluded, if they would not take into consideration the effects of their decision-making on, for instance, employment in a country suffering from crippling joblessness or to ignore the results of merger cases on the participation of historically disadvantaged persons in the economy.¹⁶⁷ They would soon find themselves discredited and disregarded, something that all parties concerned are intent on avoiding.

There seems to be a strong commitment in the Tribunal to express the public interest in its jurisprudence. ‘No public agency that relies on public support can escape the influence of a strongly held public interest’ is how the Tribunal puts it.¹⁶⁸ Worded in this fashion, it sounds nearly like a resignation to the overwhelming weight of the public interest. It would seem as if there is a compelling force, which presses for the advancement of the public interest. The facts, as we shall see later, however, belie this statement. The apparent fissure forced into the solid and economically sound bastion of competition analysis is very much contained in South Africa. Firstly, as the Tribunal explains itself, the public interest grounds are not ‘infinitely elastic’ but must fit into the definitions of the Act.¹⁶⁹ Secondly, the ‘primacy of the competition evaluation’ is underlined through the mere structure of the Act, seen that it precedes any public interest evaluation.¹⁷⁰

¹⁶⁵ Lewis (note 52), 2.

¹⁶⁶ Fox (note 9), 587.

¹⁶⁷ Hartzenberg (note 117), 19 - 20.

¹⁶⁸ Lewis (note 52), 2.

¹⁶⁹ Despite this position, the Tribunal did recently consider, under the heading of public interest, a submission by the Freedom of Expression Institute, which had lamented the diminishing number of independent voices in the print media, *Johannic Publishing Ltd – New Africa Publications Ltd*, 36/LM/Apr04; the public interest might not be ‘infinitely elastic’ but might just prove to be sufficiently flexible to accommodate new concerns (ie cultural diversity, in a country with 11 national languages, s 6 (1) of the Constitution), when they come the Commission’s way.

¹⁷⁰ Lewis (note 52), 3.

6.4. Role of the Commission

In contrast to the Swiss system, in South Africa it is the same authority, which performs the competitive and public interest test. This can be either advantageous or difficult, depending on the developmental status of the country concerned. The Competition Tribunal favours a unified body approach for a country such as South Africa.¹⁷¹ One of the arguments advanced is the need for the executive to define and implement industrial policy during the early stages of a country's development in order to strengthen selected sectors or interest groups.¹⁷²

By not splitting the decision-maker into separate bodies, one dealing with competition questions and another dealing with public interest issues as in Switzerland and not permitting a ministerial override as before,¹⁷³ the South African system has three perceived advantages: Firstly, the decision-making body is always in touch with the competition implications of its decisions. Public officials might be tempted to give too much weight to social interests, especially in a country with a young competition system where an understanding and appreciation of the careful balance between competition and policy might not yet have permeated all spheres of government. Secondly, the Competition Tribunal holds its sessions in public and thus avoids the danger of lobbying behind the scenes. Decisions are published and thus develop competition jurisprudence, while at the same time educating legal practitioners in this still young and evolving field of law, which is particularly relevant in a developing country such as South Africa. Finally, the unified body approach enhances the standing of the Tribunal and its independence if its decision cannot be overthrown at a political whim for reasons of political expediency.¹⁷⁴

¹⁷¹ Lewis (note 52), 2; see also Fox (note 9), 591.

¹⁷² Lewis (note 52), 2.

¹⁷³ Ibid, 9 and 15.

¹⁷⁴ Lewis (note 52), 3; Hartzenberg (note 117), 9 and 16.

6.5. Conclusion

Considering that all four of the public interests enumerated in the Competition Act require political attention, it makes sense to strengthen the body charged with their promotion. The important question is, whether these aims have actually been achieved. Bearing in mind the diversity of the four interests, there would be wide scope for jurisprudential evolvement. Not only the listed interests in s 12A(3), but also the Preamble and the Purpose Clause of Act allow for further interpretation. The DTI was already well aware of these challenges. Recognising that the 'key to understanding of public interests in economic policy is the combination of competitiveness and development', it also realised that being able to sufficiently serve both objectives would prove to be a 'momentous challenge'.¹⁷⁵ Nevertheless, the *Guidelines* clearly stated government's commitment to addressing both key issues in a commensurate manner. South African competition policy is unique in its blend of aspects and rests on several policy pillars.¹⁷⁶ The public interest is clearly defined with reference to both competitiveness and development. The former requires sound competition analysis and strict application of generally accepted antitrust standards. The latter requires combating the past inequalities in social and economic participation and control.¹⁷⁷ Combining the two and claiming to be doing justice to both will no doubt be difficult.

In the following chapter, I will investigate whether the policy decisions outlined above, which gave rise to the Competition Act, have influenced and shaped the decisions of the Competition Tribunal in merger cases. Have the competition authorities seized the opportunity to advance the public interest cause through its decision making power? It might be illustrative to bear in mind that parliament amended the Preamble of the Act in 2000, which deals with opening the economy to 'greater ownership by a greater number of

¹⁷⁵ DTI Guidelines (note 111), 5.

¹⁷⁶ Ibid, para 2.4.

¹⁷⁷ Ibid, para 2.4.3.

South Africans.’¹⁷⁸ Has the Tribunal been bold or has it come to pass, as Fox predicted in her article in 2000,

‘[i]f expectations are high that the new competition law will visibly change the terms of economic participation of the historically repressed black majority in South Africa, they are likely to be unfulfilled; the stated purpose of the competition law could give false hope?’¹⁷⁹

¹⁷⁸ The writers of the OECD report concede that, although the policy declarations are not decisive on their own, they should not be treated as non-scripta, especially since parliament felt it necessary to underline and clear up this point by adding the section to the Preamble in 2000, OECD Report *Competition Law and Policy in South Africa*, February 2003, 8.

¹⁷⁹ Fox (note 9), 588.

7. South African Cases

7.1. Introduction

As the figures impressively demonstrate,¹⁸⁰ the South African Competition Tribunal has approved the overwhelming majority of merger cases, which have come before it, most of them without conditions.

The Competition Act lists the considerations that may be discussed under the public interest heading in merger control cases. According to s 12A(3), these are the effects 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. The Tribunal has dealt with all four of these public interests, albeit to varying degrees of regularity and intensity. Probably the most important and most called upon category has been employment.¹⁸¹ Other aspects, such as empowerment and sector/industry promotion or international competitiveness, have played lesser roles. The Tribunal is also still fighting to establish a clear understanding of the functioning of the interrelationship between the competitive analysis and the role of public interest grounds,¹⁸² a problem the Swiss authorities have not experienced since the separation of the two issues, as we have seen previously. This process of establishment and definition is ongoing, and the stance of the Tribunal will continue to be challenged. The following sections will analyse the cases in which the public interest test has been applied by examining whether the test plays a meaningful role in promoting the much intoned public interest and whether there is a discernable rule of the Tribunal.

¹⁸⁰ Over 98 per cent, *Annual Report of the Competition Tribunal 2003-2004*, 15.

¹⁸¹ Brasseley et al (note 109), 275.

¹⁸² For a detailed overview see *Harmony Gold Mining Co Ltd – Gold Fields Ltd merger*, 93/LM/Nov04.

7.2. Substantiality and Merger Specificity

The Competition Act of South Africa, just like its Swiss counterpart, requires the public interest grounds advanced to be ‘substantial’.¹⁸³ In addition, the Tribunal has developed a strict rule pertaining to the ‘merger specificity’ of the claimed public interests. Although merger specificity is not mentioned in the Act itself, from a procedural point of view it is important to demonstrate at the outset that the mere fact that the merging parties or participants bring into play one of the four listed public interests, this does not suffice to engage the Tribunal in a discussion on the actual merits. A number of cases have failed to be considered under public interest grounds because the assertions of the parties were either not substantial enough or not conditional to the transaction under review.¹⁸⁴

In the *Tongaat - Hulett Group - Transvaal Suiker Bpk* merger,¹⁸⁵ a transaction that the Tribunal eventually prohibited,¹⁸⁶ the parties entered the whole foursome of public interest defences for their transaction. The Tribunal had found that it would be likely that the merger would substantially lessen or prevent competition, and that this could not be offset by the claimed pro-competitive gains.¹⁸⁷ The Tribunal furthermore felt that none of the claimed gains were in fact benefits, which were ‘sufficiently substantial’ or merger-specific to countervail the negative effects of the merger. It could not be said that they could not possibly take place in the absence of the merger.¹⁸⁸ The parties advanced economies of scale arguments, claiming that these would lead to lowering of production costs in order to support their merger under the head of promoting international competitiveness. Not only was this an uncharacteristic use of the public interest ground, moreover, it was not supported by the evidence at hand. The Tribunal pointed out that the notion that the South African sugar millers were small was not true in the

¹⁸³ S 12A(2)(b); see also *JD Group Limited – Ellerine Holdings Limited* merger, 78/LM/Jul00.

¹⁸⁴ More recently *Inzuzo Furniture Manufacturers (Pty) Ltd – PG Bisons Holdings (Pty) Ltd*, 12/LM/Feb04, 12.

¹⁸⁵ 83/LM/Jul00, para 114.

¹⁸⁶ *Ibid*, para 1 and 117.

¹⁸⁷ *Ibid*, para 96, 111 and 112.

¹⁸⁸ *Ibid*, para 114.

international comparison. It also noted that the smallest of the merging parties was actually producing at the lowest cost and that no productive efficiencies were to be expected, as there was no plan to consolidate the production capacities.¹⁸⁹ 'Broad generalisations' on these muted advantages would not be accepted by the Tribunal.¹⁹⁰

In the *JD Group Ltd - Ellerine Holdings Ltd* merger,¹⁹¹ the Tribunal discredited the parties' averments that the merger would benefit the 'unbanked' (meaning the persons without bank accounts) because of the financial services branch of the furniture stores. Despite the fact that it was not clear under which one of the public interest grounds this concern could fall, the Tribunal nevertheless investigated the claim. It came to the resounding conclusion that, contrary to the parties' claims, the merger would in fact lessen competition for credit facilities if the two companies were allowed to merge. Furthermore, the Tribunal found that the credit facility existed before the merger possibility and that it was not contingent on it. The argument that franchising some of the stores, which would 'be beneficial to small businesses and create employment opportunities' was also rejected. The Tribunal correctly found that franchising is a means to diversify risk and a business strategy not intrinsically linked to mergers.¹⁹²

In the *Schuhman Sasol (South Africa) Ltd - Price's Daelite (Pty) Ltd* merger, the Tribunal found that the transaction would lead to a lessening of competition, and efficiency gains advanced by the applicants were rejected. The Tribunal then brushed aside averments by the parties that the merger would improve their ability to penetrate the international markets in the absence of any evidence.¹⁹³ The Tribunal said:

¹⁸⁹ Ibid, para 115.

¹⁹⁰ Ibid, para 116.

¹⁹¹ 78/LM/Jul00, 31.

¹⁹² Ibid, 30.

¹⁹³ 23/LM/May01, para 74; international competitiveness was also not a sufficient argument according to the Competition Commission's *Report to the South African Reserve Bank* regarding the proposed *Nedcor – Stanbic* merger, 14 April 2000, 60.

‘However, we have not been told how this will be achieved and no further weight is given to this bland assertion. It is certainly not clear that a successful export strategy requires the merging of SCHS [*Schuhman Sasol*] and PD [*Price’s Daelite*].’¹⁹⁴

Instead, the Tribunal found that the prohibition of the merger would actually assist small and medium sized enterprises to enter and expand in the market.¹⁹⁵ The transaction was thus prohibited. The Tribunal was following a strict line in evaluating the public interest grounds advanced by the various parties. Evidently, the public interest grounds claimed in favour of a merger need to be significant and pointedly dependant on the transaction. This strict approach has given the Tribunal much room to manoeuvre and thus avoid discussing public interest grounds.

7.3. Employment

The major category of public interest considerations is employment and the consequences of mergers on the work force. To enhance the role that employees and their representative organisations can play, the Competition Act provides for the active involvement of trade unions during the merger procedure.¹⁹⁶ The Act requires the merging parties to inform the registered trade unions of the effects of the merger, and gives them procedural participation rights in the dealings before the competition authorities.

The Tribunal has adopted a flexible approach with regard to the weight afforded to job protection in merger cases. It is understood that, in a country with an official unemployment rate of 26.5 per cent,¹⁹⁷ the preservation and creation of jobs is a major concern. The South African economy has undergone dramatic restructuring during the past decade. Since coming out of economic isolation, the national industry has steadily increased efficiency

¹⁹⁴ 23/LM/May01, para 74.

¹⁹⁵ Ibid, para 75.

¹⁹⁶ S 13A(2); for a detailed overview see

www.compcom.co.za/procedures/procedures_mergaquis_particip.asp?level=1&child=3;

Hartzenberg (note 117), 17.

¹⁹⁷ See Statistics South Africa, www.statssa.gov.za, figures March 2005.

but at the same time not generated new jobs.¹⁹⁸ Job creation and job retention in the face of all this industrial turmoil is thus vitally important.

The Tribunal is aware, however, that it cannot merely look at the prospect of losing jobs because of a merger. More importantly, it must consider the prospect of greater job losses if it does not approve a merger. 'We are mindful then that to prohibit the merger on employment grounds may have the unintended consequence of exacerbating the employment loss'.¹⁹⁹ These considerations have surfaced in several of its decisions.²⁰⁰ Nonetheless, this stance has not clouded the Tribunal's discernment. There have been cases, where the 'merge to save jobs' argument has failed.²⁰¹ Despite the pressures of employment interests, the Tribunal has not been bullied into submission by trade unions with unsubstantiated demands.

In the *Bid Industrial Holdings – G Fox & Co (Pty) Ltd* merger, the Tribunal clearly stated that it would not accept all and any union demands above the *bona fide* undertakings of merging parties to limit job losses occasioned because of a merger.²⁰² The Tribunal has also shown reluctance to overrule the agreement achieved by the merging parties and unions.²⁰³ In the *Citibank NA South African Branch – Mercantile Bank Limited* merger, for example, the Tribunal conceded that it did not have an adequate remedy for job losses in one of the merging parties, as these had taken place before the case came before the Tribunal.²⁰⁴ Despite all these decisions, it remains clear that negative employment consequences are regularly at the forefront

¹⁹⁸ In fact, South Africa in 1995 generated a GDP of R440bn with a labour force of 13,6m people, while in 2004, GDP was R1387bn with a smaller labour force of 11,9m, data from the Statistics South Africa and a report by Geeta Kingdon and John Knight, *Unemployment in South Africa, 1995 - 2003: causes, problems and policies* (Global Poverty Research Group), January 2005, 3.

¹⁹⁹ *Boart Longyear – Huddy (Pty) Ltd and Huddy Rock Tool (Pty) Ltd* merger, 41/LM/Aug03, 12.

²⁰⁰ *Randfontein Estates Ltd – AngloGold Ltd*, 03/LM/Jan01, *Unilever Plc and others – Robertson Food Pty*, 55/LM/Sep013; *Clidet No 383 (Pty) Ltd – The Free State Operations of AngloGold Ltd*, 05/LM/Jan02, 4; *JD Group Ltd – Profurn Ltd*, 60/LM/Aug02; *Schuhmann Sasol (South Africa) (Pty) Ltd – Price's Daelite (Pty) Ltd*, 23/LM/May01; with regard to missed job opportunities in case of prohibition, para 76, an argument eventually disregarded; *Lonmin Plc – Southern Platinum Corporation*, 41/LM/May05, para 13, discussed below.

²⁰¹ *Schuhmann Sasol (South Africa) Ltd – Price's Daelite (Pty) Ltd* merger, 23/LM/May01, para 76.

²⁰² 58/LM/Aug04, para 20.

²⁰³ *Cherry Creek Trading (14) Pty – Northwest Star (Pty) Ltd* merger, 52/LM/Jul04, para 22.

²⁰⁴ 91/LM/Nov04, para 21.

of the list of public interest grounds reviewed and frequently the only serious concern.

In the *Distillers Corporation (SA) Limited – Stellenbosch Farmers Winery Group* merger, a consolidation in the wine and spirits sector, the Tribunal's decision eventually hinged on an interpretive issue. The merger was contested on several fronts and concerned a field of the South African industry that had been characterised by high state intervention and market sharing.²⁰⁵ The merging parties submitted that the transaction would enable the new entity to benefit from economies of scale and enhance the company's international competitiveness.²⁰⁶ The former was a classical 'efficiency defence', while the latter was one of the less frequently advanced public interest grounds listed in the Act.²⁰⁷

The labour unions had claimed that the job losses occasioned by the merger amounted to 1182 out of a total of 5828 posts, a percentage of 20, that this figure warranted to be considered substantial according to the law, and that it should therefore prevent the approval of the merger. The merging parties, however, presented the job losses differently and were able to lead evidence to the result that out of the 1182 job losses, only a fraction of the workforce, namely 164, or 8 per cent, had actually been retrenched.²⁰⁸ In the Tribunal's view, this figure fell well short of what it deemed to constitute a 'substantial public interest', because the employees who had taken voluntary retirements and severance packages could not be regarded as 'adversely affected'. The Tribunal thus did not prohibit the merger. In the end, it was the lower number of effective dismissals, which gave the merging parties the edge.

In the *Lonmin Plc – Southern Platinum Corp* merger,²⁰⁹ the parties again focused their public interest defence on the mitigating effects of the

²⁰⁵ 08/LM/Feb02, para 25 - 28.

²⁰⁶ Ibid, para 19.

²⁰⁷ See s 12A(3)(d).

²⁰⁸ Other posts had either been phased out or employees had accepted voluntary packages, see 08/LM/Feb02 para 227 - 228.

²⁰⁹ 41/LM/May05.

merger on the employment situation. According to the parties, the merger could save 1132 of a total of 1532 jobs.²¹⁰ Despite this fact, the Commission still felt that the 400 envisioned losses constituted a substantial public interest. The effects of the merger and the consequent job losses would have to be ameliorated by the following: The retrenchments would have to be limited to a maximum of 400 persons, which was the worst case scenario of the parties; retrenched employees would have to be short-listed for posts in *Lonmin Plc* and a skills training program would have to be introduced for the jobless workers. This was also a condition implemented in the next case under consideration below.²¹¹ In the *Lonmin Plc* case the negative impact of a prohibition and the claimed salvaging effect on jobs in case of approval (73 per cent job saved) left the Tribunal little room to manoeuvre. At the same time, it would seem that the 25 per cent retrenched was already substantial enough to warrant intervention.

In one of its most recent cases, the Tribunal has again been put to the test as to when it feels compelled to intervene when mergers lead to retrenchments. In the *Tiger Brands Ltd – Ashton Canning Co (Pty) – Newco – Langeberg Food International* merger,²¹² the Tribunal had to consider a merger in the canned fruit and fruit puree industry. This was a case where the Tribunal found that the merger would undoubtedly lead to a substantial lessening or prevention of competition on the local South African market.²¹³ The merging parties failed to convince the Tribunal that the relevant market for their industry was to be considered international. They did manage, however, to advance some valid efficiency defences, which had a positive impact on the merger and were substantial enough to cancel out the negative effects of the limited competition, even though the parties did not show that cost reductions would filter through to consumers: ‘The bulk of the anti-competitive effect in this merger will be felt in export markets.’²¹⁴

²¹⁰ Ibid, para 13, this would have been a saving of 73 per cent of the labour force.

²¹¹ These were the conditions the Tribunal imposed on the merger, *ibid*, para 15.

²¹² 46/LM/May05.

²¹³ Ibid, para 109.

²¹⁴ Ibid, para 126, this did not concern the Tribunal because, as the ‘effects doctrine’ of s 3(1) of the Competition Act limited its jurisdiction to activities having an effect within the Republic of South Africa.

Although the parties referred to the ‘failing-company’ defence, this was never raised separately.²¹⁵ Nonetheless, because the parties presented evidence that pointed in this direction, the Tribunal did investigate whether this argument stood up to scrutiny. The Tribunal concluded that, despite party statements to the opposite, closure of the participating companies was not a believable scenario.²¹⁶ Although it was a competition consideration, the striking of this argument had consequences for the public interest arguments raised in favour of the merger by the parties.

The parties advanced three out of four possible public interest defences to ensure safe passage for their venture through the perilous competition evaluation. The argument of improving the company’s international competitiveness, to which I shall return later, was not specifically raised under the heading of public interest although this was the primary reason advanced in favour of the transaction.²¹⁷ The parties claimed that the merger was beneficial for the region of Ashton and for the SMMEs of the surrounding area and above all that it was necessary to save jobs in both of the merging entities. Disapproval of the transaction would have led to an estimated 273 permanent jobs and 4000 seasonal jobs being lost while, according to the parties, approval of the merger would only lead to the loss of 45 permanent jobs and 1000 seasonal posts.²¹⁸

Despite the proposition of three separate public interest reasons in favour of the transaction, in reality, because of their linkage, the real question turned on the substantiality of the ‘jobs lost – jobs saved’ argument. The Tribunal then also did not deal with each of the public interests separately but focussed on the employment issue. It was clear that any retrenchments in the village of Ashton would inevitably lead to greater impoverishment of the region as a whole, with negative knock-on effects for the small supporting industries of the town and area. In addition, the Tribunal

²¹⁵ Ibid, para 71.

²¹⁶ Ibid, para 75 and 79.

²¹⁷ This aspect is dealt with below in section 7.5.

²¹⁸ 46/LM/May05, para 133.

argued that the region-SSME defence was derived from the failing firm defence, which it had dismissed earlier.

The Tribunal returned to the naked figures of retrenchments, which were disputed neither by the parties nor by the Commission.²¹⁹ It came to the unqualified conclusion that the 'merger will have a substantially negative effect on employment and hence the public interest.'²²⁰ It would not be possible to approve of the merger unconditionally.

The Commission had taken up the parties' suggestion to approve the merger under the condition that a fund be set up to assist the released workers in retraining.²²¹ The parties had envisaged to inject the fund with R250.000.00. The Commission favoured a significantly higher amount of R2m, and also wanted the money to benefit the unemployed persons of the Ashton region in general. The Tribunal considered both suggestions and concluded that both the amount and the modalities of the suggestion were deficient. A fund as contemplated by the Commission would have turned the firm 'into an enlarged welfare agency', and would have caused conflict among the various groupings of unemployed of Ashton, some of which would feel unfairly dealt with in having to share the fund's spoils with 'ordinary' unemployed persons who had not worked for the cannery.²²²

The Tribunal then turned to the suggested amount of R250.000.00 and heavily criticised the attempts of the parties to remedy the negative employment effects with such a paltry amount. With one thousand retrenchments, this would have resulted in R250.00 being invested per person in the retraining of the previous employees. The Tribunal spoke plainly of what it held of the proposal: 'As a contribution to their retraining it is

²¹⁹ Note that in this case again the figures suggested by the relevant labour union and the numbers advanced by the parties differed considerably, with the former claiming that 10 – 15 per cent of permanent posts would be lost, while the parties put this figure at less than 10 per cent, for seasonal workers the union claimed a loss of approximately 15 – 20 per cent, while the parties had this figure at a much lower 7 per cent, see 46/LM/May05 para 138 and 140.

²²⁰ Ibid, para 143.

²²¹ Ibid, para 144.

²²² Ibid, para 146.

as wanting in utility as it is in its generosity.²²³ The parties claimed being stretched to the limit financially with the first offer. This smacked of deceitfulness. *Tiger Brands*, the majority shareholder of the special purpose vehicle set up to hold the merging companies, had reported increased revenues of R15.3bn for the past financial year and a jump of 45 per cent in net profits to R1.56bn.²²⁴ The Tribunal consequently dismissed this argument without further contemplation, and agreed with the Commission that a R2m fund should be established, noting cynically that the poverty argument 'ill befits a firm that has, post merger, pretensions to be a national champion, let alone a firm that boasts one of the country's major conglomerates as its two thirds shareholder.'²²⁵ The Tribunal made the merger conditional on the R2m fund and noted that this was to be considered to be on the low end of the acceptable spectrum if anything.²²⁶ The parties agreed. The above shows that, in the proceedings before the Tribunal, there is clearly an inherent element of gamble and risk. The Tribunal called the bluff of the parties with regard to their limited financial means – and suddenly the resources for the retraining fund could be increased by a factor of eight.

The above case does make it clear that addressing the public interest of employment properly and adequately in a transaction is vital before a merger will be approved. It also shows that, despite substantial negative employment effects, parties are able to influence and ameliorate the situation with adequate and constructive ancillary concessions. The decision also shows that these concessions need to be of equivalent substance and not betray the seriousness of the harsh realities for the workforce that is without work and income in a country stunted by this problem.²²⁷ Nonetheless, the Tribunal evidently does not want to stand in the way of mergers unnecessarily, and in cases where the numbers are in a grey area

²²³ Ibid, para 148.

²²⁴ See Annual Report 2005 of Tiger Brands Ltd, which also shows an increase in dividends of 35 per cent, available under www.tigerbrands.com; see Cape Times Business Report, 25 November 2005, 1.

²²⁵ 46/LM/May05, para 149.

²²⁶ Ibid, para 150.

²²⁷ Amidst the criticism of the value of the fund, Tiger Brands has announced a staff empowerment transaction to the value of R723,6m, see www.tigerbrands.com.

as here, a solid and generous offer might well tilt the scales towards approval.

In the latest published case of the Tribunal, *Business Investment Ventures No 976 (Pty) Limited – Sage Group (Pty) Limited*,²²⁸ the authority passed a merger despite substantial negative effects on employment. As in the previously discussed cases, the parties claimed that, in the absence of the merger, the job losses would be more severe than under the merger. In addition, the parties offered a 'retrenchment plan', which included the redeployment of retrenched workers in the merged group of companies, voluntary retrenchment and retraining programs. This convinced the Tribunal to approve of the transaction conditional on the implementation of the plan.²²⁹

7.4. Empowerment

Empowerment is an ongoing concern in all spheres of South African society and also one that has preoccupied the Tribunal, albeit to a lesser degree than one might have expected.²³⁰ The fact that black economic empowerment (BEE) is being promoted in many sectors of the South African industry, either by the industry itself or under the guidance of the relevant ministries,²³¹ has taken some of the pressure off the competition authorities to force this issue. The question is, however, whether the Tribunal is using the existence of this initiative as a convenient reason for not interfering.

An early attempt by the Commission to advance the cause of black economic empowerment was evident in the conditions it had proposed for the merger between *JD Group Limited* and *Ellerine Holdings Limited*.²³² The Commission had suggested that the proposed divestiture of 150 stores should be preferably offered to a BEE Group. The Tribunal was unconvinced

²²⁸ 54/LM/Jun05.

²²⁹ *Ibid*, para 15.

²³⁰ Hartzenberg (note 117), 24, who describes economic empowerment as a 'key policy objective'.

²³¹ Industry charters available at the Black Management Forum, under www.bmfonline.co.za.

²³² 78/LM/Jul00, para 4.8.

that this measure could have offset the detriment to competition; it also criticised the lack of details as to how such divestment would occur and eventually prohibited the transaction.

In the *Clidet 323 (Pty) Ltd – MCG Industries (Pty) Ltd* merger,²³³ the Tribunal found that the empowerment opportunities opened by the merger were an additional reason to approve it, over and above the fact that the merger was deemed to be beyond suspicion from a competition point of view. One must bear in mind that this consideration is not superfluous, as it might be considered under Swiss law, as in South Africa, as discussed previously, a merger cleared under competitive considerations is not home free. Public interest concerns can still catch up with a case and lead to its downfall. The finding in the *Clidet 323 (Pty) Ltd* case shows that the Tribunal is careful not to let this aspect slip out of the focus of the parties and the authorities merely because a merger might seem uncontentious at first glance because of its neutral effect on competition.

In a similar case, the Tribunal quelled any rising competition fears with the positive prospects that the merger would have on ‘boosting black economic empowerment’.²³⁴ In the *Shell South Africa (Pty) Ltd – Tepco Petroleum (Pty) Ltd* merger case,²³⁵ the Commission was concerned about the effects of the exit of the selling entity *Thebe*, a company controlled by historically disadvantaged persons, which would result from the sale of its interest in *Tepco*.

The Commission, while in favour of the transaction as a whole, was worried about the message sent out if the merger was approved without some conditions to safeguard the stake of historically disadvantaged persons. This was a case where a pro-competitive merger was under threat from negative public interest fears. On the other hand, the Commission realised that suggesting the prohibition of the merger would have defeated

²³³ 59/LM/Oct01, para 12.

²³⁴ *Business Venture Investments 790 (Pty) Ltd – Afrox Healthcare Ltd*, 105/LM/Dec04, para 84.

²³⁵ 66/LM/Oct01.

both the commercial aspirations of the *Thebe* shareholders and the goal of *Shell* to take positive steps towards empowerment as demanded by the industry charter.²³⁶

The structures and conditions suggested by the Commission would have seriously altered the underlying rationale of the transaction. The Tribunal thus did not sanction the conditions of the Commission and approved of the transaction unconditionally. It held that empowerment would not be assisted by forcing empowerment companies to hold onto investments, against their better commercial judgment.²³⁷ This would lead to those persons originally targeted for advancement paying the price of policy meddling.²³⁸

‘The Commission’s role, after all, is to promote and protect competition and a specified public interest. It is not to second-guess the commercial decisions of precisely that element of the public that it is enjoined to defend.’

This was especially pertinent as in the present case there was no threat to competition.²³⁹ In the above case, then, the Tribunal again used the opportunity to limit itself and the perception of competition law as an instrument to advance effective empowerment. The Commission had attempted to make the merger conditional on some binding commitment of the entities to promote entrance of non-whites into management. The Tribunal confronted these demands with the accustomed hesitancy. It referred to the presented programs for capacity building and skills development of historically disadvantaged persons, as well as the proposed transition committee within the company. It maintained that

²³⁶ The transaction would have led to *Thebe*’s shares in *Tepco* being sold to *Shell Marketing SA* in exchange for a 17 per cent stake in the acquiring firm, setting *Shell South Africa* firmly on course of the goal of a 25 per cent participation by formally disadvantaged shareholders as set out in the Petroleum Industry Charter, available under www.sapia.org/za/pubs/charter.htm; the transaction also provided for the *Thebe* shareholders to appoint a director to the board of *Shell South Africa*, *Ibid*, para 6; for a detailed account of the transaction see 66/LM/Oct01, para 3 – 6.

²³⁷ *Ibid*, para 42; see also OECD Commentary (note 149), 18.

²³⁸ *Ibid*, para 49; Hartzenberg (note 117), 27.

²³⁹ *Ibid*, para 51.

'we are however sceptical of the ability of the Competition authorities to play a meaningful role in securing these laudable objectives and we are extremely concerned at the prospect of generating, in the process, a range of wholly unintended consequences.'²⁴⁰

This fear has permeated many of the Tribunals decisions. I do not doubt that the Tribunal could play a very meaningful role in promoting the public interest if it wanted to. In the *Tepco* merger, the Tribunal was eventually vindicated by the parties, especially *Thebe*, which wholly supported the transaction and pleaded strongly for not losing sight of the fact that what was good for *Tepco*'s shareholders in *Thebe* in particular, was eventually good for historically disadvantaged persons and for empowerment in general. *Thebe*'s CEO put it concisely when he stated:

'the question is, is it *Tepco* that must be made more competitive or it is *Thebe* that must be made more competitive? If *Thebe* can compromise certain things about *Tepco* in order to gain an added economic advantage for *Thebe*, which is a historically disadvantaged company acting on sectors broader than just the petroleum sector, yes. *Thebe* becomes more competitive as a black owned company. I don't have problems in making that decision because I know that we will be empowered and I can actually demonstrate through our BEE approach that we are a much more vibrant BEE company after the transaction, than before the transaction, at a *Thebe* level.'²⁴¹

This pragmatism is a recurring feature of the jurisprudence of the Tribunal to date. In one of the harder fought merger battles between the merger parties and the *Industrial Development Corporation*,²⁴² the Tribunal

²⁴⁰ *Ibid*, para 54.

²⁴¹ *Ibid*, para 56.

²⁴² *Anglo American Holdings Ltd – Kumba Resources Ltd* merger, 46/LM/Jan02, para 145, the IDC entered the case as an intervening party.

had to decide whether it permitted a merger between *Anglo American Holdings Ltd* and *Kumba Resources Ltd* in the light of empowerment averments.

The Tribunal concluded that, as a starting point, there were no reasons to prevent the merger, as it did not raise any anti-competitive issues and as no lessening or prevention of competition was to be expected from the merger. As both *Anglo American* and the *IDC* invoked public interest grounds for their sides of the story, the Tribunal reiterated its method of evaluating cases with diametrically opposed public interest arguments.²⁴³ The Tribunal would review the substantiality of each of the claimed public interests separately to see whether these were indeed compelling. Then it would assess whether, given their importance, they were mutually exclusive and contradictory without a chance of reconciliation. Lastly, it would balance the two or more established public interests to come to 'a net conclusion'.

Anglo American, having won the 'competition round', advanced several reasons over and above the pro-competitive reasons listed at the outset of its submission to the Tribunal in an attempt to outweigh any negative public interest concerns put forward by the *IDC*. *Anglo American* proposed sector benefit arguments, which will be examined later under the section 7.6 on *Sector and Region Protection*.

The *IDC* wanted the merger to be prohibited because, in its view, it ran contrary to the objectives of the Act, particularly the ability of historically disadvantaged persons to become competitive according to s 12A(3)(c). The *IDC* advanced a purposive interpretation of the section, in keeping with the spirit of the whole Act and the Preamble. It demanded that s 12A(3)(c) be read together with s 2(f) of the Act, which expressly claims that one of the purposes of the Act was 'to promote a greater spread of ownership in particular to increase the ownership stakes of historically disadvantaged

²⁴³ Ibid, para 140, with reference to the *Distillers Corp – Stellenbosch Farmers Winery Group* case, 08/LM/Feb02, para 217.

persons'.²⁴⁴ The *IDC* argued for the prohibition of the merger because unopposed it would lead to the further strengthening the economic grip of a company that was already one of the most powerful in the country.²⁴⁵ The *IDC* strongly advocated that the Tribunal should seize the opportunity offered to it by the reorganisation of *Iscor* to 'further the goal of empowerment'.²⁴⁶ It alleged that this restructuring was a pivotal moment in the country's economic development, and held that it was an opportunity for historically disadvantaged persons to 'get their hands on such a strategic asset'.²⁴⁷

To its detriment, the *IDC* could not convince the Tribunal that it had a viably financed offer by an empowerment consortium in the wings to snap up the target firm in preference to *Anglo American*.²⁴⁸ The Tribunal, although sympathetic to the fears raised by the *IDC*, stated that in the absence of a realistic alternative bid for the share in *Kumba*, it had no option but to let the merger pass. The Tribunal even went so far as to adopt the reasoning of the *IDC* but then put the finger on the weakness of the corporation's argument. Even if it could rally enough support for a bid, there would be no guarantee that the shareholders would be willing to sell. The Tribunal called the *IDC*'s scheme 'wholly speculative'.²⁴⁹ It also stated that prohibiting the merger would not advance the cause of previously disenfranchised citizens, as then the *status quo*, which was no more favourable, would remain. The third option suggested by the *IDC*, which included a whole list of conditions for the merger approval, was not considered by the Tribunal, for procedural and substantive reasons.²⁵⁰

²⁴⁴ 46/LM/Jan02, para 147 and 150, interestingly the *IDC* did not invoke s 9 (2) of the Constitution, which permits measures being taken to 'advance persons [...] disadvantaged by unfair discrimination', neither did it refer to the aim of the act stated in third part of the Preamble, of regulating 'the transfer of economic ownership in keeping with the public interest', nor did it engage any arguments in favour of a horizontal reading of the section, according to s 8 (2) of the Constitution ('direct horizontal application'), an ongoing debate in South Africa, see *Khumalo and Others v Holomisa*, 2002 (5) SA 401 at 419; see also Dennis Davis in the foreword to Brassey et al (note 109), where he contends that the content of the Competition Act will have to reflect 'the particular demands of this country', v.

²⁴⁵ *Ibid*, para 153; Anglo American Plc has stakes in gold, diamond and platinum, other metals, paper; with operations in 22 countries, the group had reported record headline earnings for 2004 (USD2,689m), see www.angloamerican.co.uk.

²⁴⁶ *Ibid*, para 152; *Iscor* was being restructured into *Kumba Resources* and *Mittal Steel*.

²⁴⁷ *Ibid*.

²⁴⁸ *Ibid*, para 162.

²⁴⁹ *Ibid*, para 161.

²⁵⁰ *Ibid*, para 163.

The Tribunal then considered the value of the averment by the *IDC* that, by permitting the merger, ‘it would close the door on increasing the ownership of historically disadvantaged persons in *Kumba*’.²⁵¹ The Tribunal disagreed with the *IDC* and clearly stated that the undertakings of *Anglo American* did not support the notion of the corporation that the merger would have ‘an irreversible impact on the ability of historically disadvantaged persons to acquire a meaningful stake in *Kumba*’. It based this opinion on two facts: Firstly, it held that the Mining Charter, to which *Anglo American* was a signatory party, required it to pursue an empowerment strategy for previously disadvantaged persons.²⁵² Secondly, it cited the Memorandum of Understanding between *Anglo American* and the government, in which both expressed their commitment to expand iron ore mining in the Northern Cape region, while including an empowerment facet.²⁵³ The Tribunal noted that, although this was not the empowerment path envisaged by the *IDC*, it was in no way inferior.²⁵⁴ Obviously, there is no magic formula to promote empowerment.

In effect, the Tribunal refuted the substantiality of the *IDC*’s claim and thus was able to abandon the notorious and complex balancing procedure. After their victory, the merging parties did not rest on their laurels. Two years after the Tribunal decision, *Kumba Resources* has transformed its shareholding and set up a BEE holding company, which owns the majority in a special purpose vehicle, which holds three quarters of the shares of *Kumba Iron Ore Company*.²⁵⁵ This case, to which I shall return later in section 7.7 under *Policy Reluctance and Deference*, might have had a different result and forged new ground for the public interest causes, if the *IDC* had been better prepared and if it had concerned a less ‘formidable’

²⁵¹ *Ibid*, para 167.

²⁵² See scorecard for mining, available under www.dme.gov.za/minerals/pdf/scorecard.pdf.

²⁵³ See speech of CEO Tony Trahar at the Anglo America Plc Annual 2003 General Meeting, available under www.angloamerican.co.uk/shareholderservices/agm/agm2003/2003tonyspeech/; see also the press release of the DTI of 17 December 2002 in which the trade minister outlined the government’s commitment to uphold the standards of the *Broad Based Socio Economic Empowerment Charter* in the proposed public private partnership development, see www.dti.gov.za/article/articleview.asp?current=0&arttypeid=1&artid=64.

²⁵⁴ *Anglo American Holdings Ltd – Kumba Resources Ltd*, 46/LM/Jan02, para 168.

²⁵⁵ For an overview of the structure see www.kumbabee.com/the_deal/transaction_summary.html.

adversary, who was on the better side of the arguments because of its commendable social responsibility²⁵⁶ and progressive approach to black economic empowerment.²⁵⁷ Maybe it would have been more difficult for the Tribunal to dismiss the *IDC's* suggestions, which it found 'sympathetic' by its own accounts, if the *IDC's* corporate bankers had sat ready with a cheque with enough of a premium to entice the *Anglo American* shareholders to enter into the sale.

7.5. International Competitiveness

This public interest ground is infrequently invoked. In the previously mentioned case *Distillers Corporation (SA) Limited – Stellenbosch Farmers Winery Group Ltd*,²⁵⁸ the merging parties suggested that the merger would assist the new company to penetrate international markets. The Commission followed the parties on this argument in its submission to the Tribunal and believed that any possible anti-competitive effects of the merger could be vindicated by the anticipated amplification of the new company's competitiveness. The Tribunal was not convinced by these averments, and put to the parties that the claimed better marketing ability for South African wine and spirits internationally did not depend on the two companies actually merging, but that it could also be achieved without being an economic unit.²⁵⁹

In the previously discussed *Tiger Brands Ltd – Ashton Canning Co (Pty) – Newco – Langeberg Food International* merger,²⁶⁰ the Tribunal had to consider a merger in the canned fruit and fruit puree industry. The parties had asserted that the merger was necessary for their companies to remain competitive internationally, as the South African fruit canning industry had been under increased and continuing pressure to compete in the world due

²⁵⁶ *Anglo American* was at pains to point out that it was partnering in the Mining Charter and that it had already sold certain of its operations to historically disadvantaged persons, 46/LM/Jan02, para 157.

²⁵⁷ Interestingly, this case, despite its high profile, does not figure as one of the highlighted cases of the year in the Tribunal's Annual Report for the years 2003/4.

²⁵⁸ 08/LM/Feb02, para 171.

²⁵⁹ 08/LM/Feb02; this reasoning also applies to the point raised earlier under 'merger-specificity' and just goes to show that the claim of international competitiveness is not a magic pass in merger cases.

²⁶⁰ 46/LM/May05.

to the strengthening of the local currency, which had made South African produce more expensive for foreign importers, and the existence of steep import barriers in the northern industrialised nations in the forms of import duties. The Tribunal did not accept this as sufficient reason to counterbalance the negative effects of the merger.

This argument has not been advanced since and it would seem that despite the strength of the South African currency since 2004, merger parties have not resorted to pinning their hopes on convincing the Tribunal that anti-competitive effects would be warranted because of improved international market access.

7.6. Sector and Region Protection

In the *Naspers Limited – Educational Investment Corporation Limited* merger,²⁶¹ the Tribunal found that the transaction would substantially reduce competition in the educational medium sector, a part of industry that, the Tribunal agreed, was of paramount importance for society.²⁶² In addition, the efficiency gains claimed were not specific to the merger.²⁶³ Despite these problems, the merger was cleared under the condition that the merged entity was to 'identify and participate in joint programs with the Department of Education aimed at building capacity in public education'. In retrospect, this was an obligation that seems rather vague and hard to enforce in the face of the dangerous potential consequences but it sufficed to clear the transaction.

In the *Tongaat-Hulett Group Ltd – Transvaal Suiker Bpk* case,²⁶⁴ which the Tribunal eventually prohibited, the parties tried to sway the authorities by suggesting that the merger would benefit the Mpumalanga region and advance empowerment by selling crop land to small scale farmers from

²⁶¹ 45/LM/Apr00.

²⁶² Ibid, para 47, note that the public interest invoked was not the status of education in general, but merely the status of publishing houses and related companies operating in the education sector.

²⁶³ Ibid, para 45.

²⁶⁴ 83/LM/Jul00.

historically disadvantaged backgrounds. The Tribunal held that these assurances were not substantial enough to outweigh the negative impacts of the merger,²⁶⁵ nor did the Tribunal accept that these assurances were merger specific.

In the *Anglo American – Kumba* case mentioned before, *Anglo American* listed the proposed investments of the company in the Northern Cape region and the knock-on effects on the local economy as regional public interest grounds in favour of the merger.²⁶⁶ In the view of the Tribunal, the lack of certainty and the non-binding nature of the promises made by *Anglo American*, these arguments were not valid. In the case at hand, however, it ultimately did not matter, as the public interests did not countervail the positive effects of the merger.

To date there has been only one case in which a negative public interest finding has managed to prohibit a proposed merger. In the *Iscor Ltd – Saldanha Steel (Pty) Ltd* merger,²⁶⁷ the Tribunal found conclusively that the merger would have anti-competitive effects. However, the Tribunal believed that disallowing the merger was not an option under the circumstances, because of regional public interest grounds at stake. *Saldanha Steel* had been a good corporate citizen in the region and was a vital part of Saldanha's economic life. 'The failure of the transaction would in all probability lead to a closure temporarily or permanent of the firm, and with that a devastating impact on the region.'²⁶⁸

Obviously, it takes quite a bit to tilt the scale away from a competitive merger, just as it takes the life of a whole region to 'impugn a merger found not to be anti-competitive.'

²⁶⁵ Ibid, para 114.

²⁶⁶ 46/LM/Jul02, para 141.

²⁶⁷ 67/LM/Dec01.

²⁶⁸ Ibid, para 156.

7.7. Policy Reluctance and Deference

Despite the political run-up to the Act and the hopes of many politicians that the competition authorities would be able to change the economic landscape by means of their rulings, there has been great reluctance on behalf of the Commission and Tribunal to force through such efforts. This is in itself not surprising if one recalls that the DTI explained as far back as 1997 that ‘the public interest in competition law is defined through its relationship to Government’s broader economic policy’, and that it can never be distilled independently.²⁶⁹ The reluctance by the Tribunal to interfere with public interest concerns that are also dealt with by legislation has been formative in its jurisprudence and seems to be restraining any pro-active approach to forcing the advancement of these interests.

In the *Tepco – Shell* case mentioned above, the Tribunal concluded its analysis with these enlightening words:

‘The role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory and regulatory instruments – in this case the Employment Equity Act, the Skills Development Act and the Charter itself immediately spring to mind. The competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an over-zealous manner lest they damage precisely those interests that they ostensibly seek to protect.’²⁷⁰

In the *Distillers Corporation Ltd – Stellenbosch Farmers Winery Group* merger, the Tribunal positioned itself by explaining that ‘competition

²⁶⁹ DTI Guidelines (note 111), para 1.2.1. and 1.2.3; other acts to be considered are the Preferential Procurement Act No 5 of 2000, which sets out rules for Government tenders; the Employment Equity Act No 55 of 1998, which aims to alleviate the disparities of the labour market left behind by the apartheid system by means of affirmative action; and the Skills Development Act No 97 of 1998, which aims to address employment disadvantages, promote skills development and learnership at the workplace, and assist with the re-entry of workers into the labour market after retrenchment.

²⁷⁰ 66/LM/Oct01, para 58.

authorities do not exercise [...] public interest determinations in a void'.²⁷¹ It was referring to the fact that in many instances Parliament has legislated concerns dealt with in the Competition Act. It explicated that, in these situations, its jurisdiction was 'secondary' and any remaining public interest concerns had to be substantial to warrant interference.²⁷²

'Thus in this case where the public interest asserted is employment, if it could be demonstrated that the merger specific employment effects are so adverse that no other law or regulator can remedy them, then we would be obliged to intervene to either prohibit or set conditions on the approval.'²⁷³

Contrary to the Tribunal's opinion, I believe it is hardly imaginable that a situation could arise, which could not be remedied with an appropriate and drastic new law. This would in effect mean that the competition authorities would never be obliged to intervene. This approach greatly limits the reach of competition authorities to define policy, or rather; it gives them the freedom to study in a case-by-case fashion the facts of each merger before them and to consider any legislative attempts to redress public interest inequities.

The Tribunal followed up this decision with an even more overt statement regarding its secondary role. In the merger case *Daun Cie AG and Kolosus Holdings Ltd*,²⁷⁴ the Tribunal went on to say that 'it is incumbent on an unelected, administrative tribunal, principally charged with defending and promoting competition, to approach its public interest mandate with great circumspection.'²⁷⁵ The Tribunal conceded that it did have to consider public interest grounds and that it was not about to 'shy away from tough decisions'. At the same time, it also suggested that the Tribunal's role was

²⁷¹ Ibid, para 232.

²⁷² Ibid, para 237.

²⁷³ Ibid, para, 238.

²⁷⁴ See 10/LM/Mar03.

²⁷⁵ Ibid, para 124.

‘at most [...] ancillary to these other statutes and institutions; it is supportive of their general thrust and should, by and large, not be employed as a substitute for, and in order to second guess, these other interventions.’²⁷⁶

The Tribunal went to great lengths to explain the democratic merits of the legislative process and unequivocally stated,

‘it cannot be that the legislature, having painstakingly constructed a comprehensive statutory framework for industrial relations, intended that an administrative tribunal, with no expertise or standing, should impose its own framework and substantive provisions on a firm that came before it in order to have a merger adjudicated.’²⁷⁷

The Tribunal stressed that, if it were to meddle too intensely in ‘the realm of industrial relations’, it would ‘significantly extend the public interest mandate and would, moreover, court conflict in a sensitive area for which we have only a limited responsibility or technical competence.’²⁷⁸ What a change from the original revolutionary promises six years earlier. The Tribunal has voluntarily reduced itself to a secondary body with ‘no expertise or standing’. In its *Distillers Corporation* decision, the Tribunal reaffirmed this stance, when it stated that, ‘Parliament has in many instances enacted legislation that deals quite specifically with the issues referred to in s 12(A)(3) and employment is no exception’. It further said that, ‘other statutes and institutions that they create, are better placed and resourced to deal directly and effectively with these issues than are we, given that our discretion is described in s 12A(3) at a high level of abstraction and generality.’²⁷⁹

²⁷⁶ Ibid.

²⁷⁷ Ibid, para 125.

²⁷⁸ Ibid.

²⁷⁹ 08/LM/Feb02, para 232.

As the labour authorities had already cleared the appeals against the dismissals occasioned by the merger and found in the favour of the merging parties, the Tribunal said that it was not its role to act as a supplementary regulator.²⁸⁰ All of a sudden the Tribunal is no longer a specialised agency of government with skill and expertise but a secondary body with limits to its capabilities. It has come to see itself more as an ancillary afterthought to competition values than the guardian of the public interest on an equal footing. This begs the question whether the competition authorities are mere competition implementers and not policy makers? Why does the Act then contain a section on 'public interest'? The OECD report is quite blunt about this:

'General concerns about the structure of the political economy have not been elements of merger control, despite the prominence of these issues in the debate about the law in the 1990s. The Commission and the Tribunal take a standard competition-policy approach to merger analysis and actions. Concerns about aggregate concentration and pyramid-like investment structures, although still of some interest, have not been issues in deciding particular cases.'²⁸¹

In the *Anglo American – Kumba* merger mentioned above, *Anglo American* for obvious reasons implored the Tribunal to stay true to its limited mandate. It warned that 'to follow the approach of the *IDC* would be to interpret the Act not only in a manner contrary to its ordinary language, but also in a manner with dangerous policy consequences. Such an interpretation would transform the Competition Act from an anti-trust statute, albeit with a public interest aspect,²⁸² into an unchecked vehicle for redistribution',²⁸³ something that parliament could never have wanted to do. It paraphrased the Tribunal's stance in previous cases, when it advanced the

²⁸⁰ Ibid, para 234.

²⁸¹ OECD Report (note 116), 19.

²⁸² Note that in the pleadings by *Anglo American* the public interest grounds are demoted to public interest 'aspects', 46/LM/Jan02, para 156.

²⁸³ Ibid; see also approving Hartzenberg (note 117), 28 and 32.

‘primacy argument’, and stated that the government’s policy decisions, in this case restructuring the nation’s ownership structure in the extractive industries through the Mining Charter, should not be pre-empted by decisions of the Tribunal. It repeated that the Tribunal’s authority could be secondary at most.²⁸⁴ It would seem that businesses are willing to deal with policy evolution in parliament – a forum where industry can lobby policy makers and influence decisions. Fighting an activist Tribunal might prove more difficult.

In this case, big business eventually won the day, mainly due to the lack of proper evidence presented by the *IDC* to bolster its case and owing to the fact that *Anglo American* had been exemplary in its empowerment endeavours and that it was in compliance with the government initiated Mining Charter.²⁸⁵ The Tribunal did not accept the *IDC*’s fear that, by permitting the merger, historically disadvantaged persons would suffer irreversibly in their ability to get a foot in the economic door. The Tribunal did not, however, exclude the possibility of ever changing its approach, merely stating that in the present case, mainly due to the evidentiary deficiencies, it would not deviate from its previous jurisprudence.²⁸⁶

In one of its most recent rulings, the Tribunal has reverted to its more conservative earlier stance. In the *Edgars Consolidated Stores (Pty) Ltd – Rapid Dawn 123 (Pty) Ltd* merger,²⁸⁷ it dismissed applications by the relevant sector trade union to impose on the merged entity a limit with regard to the amounts of textiles and clothing it was permitted to import from overseas. The trade union feared that *Edgars Consolidated*, with its increased market share, would source more of its supplies from abroad.²⁸⁸ The Tribunal announced that it would approach such a demand with the

²⁸⁴ *Ibid*, para 157; interestingly, a mere three years prior to the *Anglo* case in the *Telkom SA Ltd – TPI Investments – Praysa Trade 1062 (Pty) Ltd* merger, the Tribunal still held that when taking into account the effect of the merger on employment ‘this obligation must also be read in the context of s 2(b) of the Act, which states that amongst the purposes of the Act is to “promote and maintain competition in order to promote employment”’, 81/LM/Aug00, para 39.

²⁸⁵ *Ibid*, para, 157 and 158.

²⁸⁶ *Ibid*, para 170.

²⁸⁷ 21/LM/Mar05.

²⁸⁸ *Ibid*, para 25; the union chose a bad example, as *Edcon* used more local materials than the target firm, para 27 and 29.

usual ‘considerable circumspection’.²⁸⁹ Imposing limitations on commercial considerations would inevitably hurt consumer welfare²⁹⁰ and would promote the interests of *Edgars’* competitors at the expense of the company. Such limitations belong into the realm of trade negotiations and market access barriers and are not merger specific.²⁹¹

7.8. Conclusion

As indicated, the Tribunal is very strict on separating politics from competition, even though the dividing line is unclear. As previously mentioned I do not believe it is at all possible to divide the two concerns, especially in a country such as South Africa where every law is made by politicians with vastly differing backgrounds and every policy discussion is based on laws that have, for the better or the worse, shaped the country. After all, law is just politics laid down in rules. *Hartzenberg* seems to disagree,

‘There may be occasions where the promotion of public interest objectives will be better served by other policy interventions than competition policy, and the competition authorities should be bold enough to hold back on such decisions.’²⁹²

Is the Tribunal bold by its reluctance? History will tell whether this was the right approach. I fear it will prove to have been the wrong option. *Harzenberg* feels that such a cautious approach will enhance the standing and credibility of the Tribunal.²⁹³ No doubt, the South African competition authorities are at the start of a long and testing path to their acceptance and stature in the country. I doubt, however, that the tentative role the Tribunal has played in promoting the public interest, in the few cases where it has been raised, will truly enhance its renown.

²⁸⁹ Ibid, para 29.

²⁹⁰ Ibid, para, 30.

²⁹¹ Ibid, para 32.

²⁹² Harzzenberg (note 117), 31.

²⁹³ Ibid, 32.

8. Conclusion

This paper has shown that the Swiss and South African systems, although they come from different legislative backgrounds, have similar aims and are tackling similar problems. Both have been themed to be instruments for promoting the public interest. Both are viewed as measures to promote growth and integration into the global economy, and both are fighting archaic structures grown from isolation.

The Swiss have put in place a well-balanced and finely tuned system to deal with the delicate and contentious issue of public interests. In practise, however, it seems that despite the division of duties among the competition authorities, the real battle is winning the efficiency arguments beforehand. The fact that there has been only one application to the Federal Council under the 1995 Act seems to be an indication that the exemptions available under the Act are either underutilised or unnecessary.²⁹⁴ In addition to that, the fact that the decided case and the one that might still be decided, have both raised 'cultural diversity' concerns, illustrates the contrasts between the two systems. Although Swiss law does not mention any public interest in the Act, when one contrasts the cases against the public interest the Competition Tribunal has to wrestle with, the difference becomes quite glaring. On the one hand stands the valid cause of cultural diversity, and on the other, there is employment, equity, sector and regional survival and international competitiveness. It is no wonder that the Federal Tribunal has not found it necessary to give its stamp of approval to a system, which overprices music notes or books. As long as they remain reasonably accessible, the Council will not override the competition finding, a decision which I find sound.

In the South African context, there is much more at stake than cultural diversity. The public interests here go much deeper and seek to heal much more severe wounds. In view of this, it is surprising and to a degree even

²⁹⁴ Detailed analysis in Hangartner and Prümmer (note 45), 1093 - 1110.

worrying that the South African authorities are still finding it necessary to hide behind formalistic arguments, political deference and self-imposed limits, and that they have not been bold enough to test the limits of their policy making, or at least policy influencing, powers in order to advance that society.

In the South African context, the fact that only one merger has been prohibited thus far because of public interest grounds would indicate that the competition authorities are still very hesitant to wield their 'policy power' and that they are deferent to the wisdom of commerce and politics. 'The development dimension does appear in some of the Competition Act's goals and criteria [...], but these issues have been second-order matters in practice', according to the OECD.²⁹⁵ As the DTI opined in its *Guidelines* in 1997, 'some competition policy features may displease some more than others'.²⁹⁶ It seems that to date big business and the large conglomerates of the 'old days' have fared rather well under the new Act. The fear that the competition authorities would champion public interest grounds with excessive fervour in an attempt to set right the skewed South African economic landscape has not happened. In its *Distillers Corporation (SA) Limited – Stellenbosch Farmers Winery Group Ltd* decision, the Tribunal resigned itself to fighting present and future battles: '[...] we cannot use the provisions of the Competition Act to turn the clock back to redeem, *ex post facto*, the sins of the past [...]'.²⁹⁷

Why does this matter? Why is the advancement of the economic stature of historically disadvantaged persons imperative, and why is combating chronic and depressing unemployment so central for the stability and future harmony of all stakeholders in this new nation? Why is promoting sectors and regions in South Africa vital, and why is the international standing of the country important? Why are these public interests more crucial, more decisive than cultural diversity in Switzerland? Why is it

²⁹⁵ OECD Report (note 116), 37.

²⁹⁶ DTI Guidelines (note 111), 3.

²⁹⁷ 08/LM/Feb02, para 36.

acceptable for the Swiss Federal Tribunal to set the standard for the public interest exceedingly high and why is it worrying if the competition authorities of South Africa do the same?

The public interest advancement in South Africa, I am arguing, is particularly important because a decade after the democratic miracle in South Africa the optimism of the world and the citizens of South Africa needs to be backed up by positive evidence. After twelve years of reconciliation, the enthusiasm needs to be supplemented by progress before it ebbs away. The millions of poor unemployed South Africans, who have been promised that their joint future with all of their fellow citizens will be better under a new dispensation, have waited patiently – a patience, which is remarkable under the circumstances, a patience, which is fed by goodwill and forgiveness. It is a patience, which could prove perilous to put on hold indefinitely.

Not taking away anything from the successes of government and the achievements of private business in their joint attempts to alleviate poverty, advance the common good and build a nation, my fear is that it might be too little progress for such a long period. Government is frequently hampered in its service delivery and transformation efforts due to personnel and capacity constraints. With their competition authorities, who have been put into place to care for the public good, not on a secondary level, but on an equal par with competition concerns, government has a competent and able body that could and should make progress in small parts of our economy with strong signalling effect. To date, the competition authorities have not made use of this opportunity. Granted, one does not want an activist, pro-public interest panel, which has no regard for the real competition questions. South Africa can ill-afford to lose its positive recognition in a world of fickle and mobile international investors. To date, the decisions by the Commission and the Tribunal have been very sound and well-received internationally from a competition point of view.²⁹⁸ At the same time, I believe, South Africa needs

²⁹⁸ See OECD Peer Review Report 2003, which found the South African authorities to be 'impressive and sophisticated', Competition Commission media release available under www.compcom.co.za/resources/Media%20Releases/MediaReleases%202003/March/Med%20Rel%2005%2001%20Mar5%202003.asp.

authorities, who are more willing to make use of their mandate in a positive manner for the greater good. I believe that a little more public interest promotion would be a good investment for South Africa in the end to overcome the adverse and challenging inequalities that still abound.

After a decade of democracy in South Africa, the figures on black economic empowerment are still discouraging.²⁹⁹ After more than ten years of appealing to the goodwill and understanding of corporate South Africa, the government is adopting a stricter tone. Maybe this new tide will also see some more policy decisions by the competition authorities. The Tribunal will be all too aware of the fact that this tide may be difficult to stem once the proverbial floodgates have been opened. As it has itself warned on previous occasions: 'We are extremely concerned at the prospect of generating, in the process, a range of wholly unintended consequences.'³⁰⁰ Although it is true that fear is a weak basis for laying down important judgments and formulating policy for a transforming country, it is just as vital for this process to have authorities with enough foresight to look beyond the immediate consequences of their judgments and into the future. Else I fear that the words of the Freedom Charter will remain elusive and

'our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities.'³⁰¹

²⁹⁹ Black ownership is at 9.4 per cent in public companies according to the Government's 10 Year Review Paper, and a mere 3 per cent of the JSE's capitalisation is held by black investors, see www.southafrica.info/doing_business/trends/empowerment.

³⁰⁰ 66/LM/Oct01, para 54.

³⁰¹ Introduction of the Freedom Charter, 26 June 1955, subsection 3.

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(Please note: All internet sites referred to in this paper were last accessed and running at time of going to print on 10 February 2006)