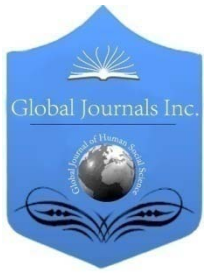
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Public Interest Considerations and their Impact on Merger Regulation in South Africa

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Introduction- The ultimate goal of any competition policy is to enhance consumer welfare, and it is not surprising that the South African competition policy is founded on the same principles. The South African Competition Act 89 of 1998 aims to promote the efficiency, adaptability and development of the economy, provide consumers with competitive prices and product choices, promote employment and advance the social and economic welfare of South Africans, expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic as well as ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy and to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons. It is believed that through achieving these aims, consumer welfare in South Africa will be increased.

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Public Interest Considerations and their Impact on Merger Regulation in South Africa

Simbarashe Tavuyanago

Chapter 1

I. Introduction

a) Introduction

The ultimate goal of any competition policy is to enhance consumer welfare, and it is not surprising that the South African competition policy is founded on the same principles. The South African Competition Act 89 of 1998[1] aims to promote the efficiency, adaptability and development of the economy, provide consumers with competitive prices and product choices, promote employment and advance the social and economic welfare of South Africans, expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic as well as ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy and to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.[2] It is believed that through achieving these aims, consumer welfare in South Africa will be increased.

The preamble of the Act[3] gives a broad overview of the motivation behind the enactment of the law. It makes mention amongst others, of the inequalities and injustices that emanated from Apartheid, resulting in excessive concentration of power, wealth and ownership and as a consequence the prevalence of anti-competitive policies and trade practices. It goes on to state that the law's aim must be to address these inequalities by opening up the economy to greater ownership by a greater number of South Africans.

The preamble makes it clear that in attaining this just and equitable state, an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development will benefit all South Africans and is therefore desirable. It is in this light that the law was enacted, to fulfil the aims outlined in the preamble.

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[1] Republic of South Africa Competition Act 89 of 1989 (as amended), hereinafter referred to as the Competition Act.
[2] Ibid S 2.
[3] Ibid PREAMBLE.

It is also evident from the wording of the preamble that public interest considerations, such as the welfare of workers, owners and consumers have to be considered in any policy or legislation. This has created difficulties in the past for competition authorities tasked with evaluating mergers, on how to strike a balance between competition concerns such as development of the economy and greater accessibility to global markets on the one hand and public interest concerns such as the welfare of workers and consumers on the other.

In view of the inclusion of public interest considerations in the South African Competition Act, it is evident that in carrying out an assessment of a proposed merger, there must be a two pronged test by the competition authorities. Firstly, to assess the competition concerns around such proposed merger and secondly, to assess the public interest factors.

b) Nature and scope of dissertation

The aim of this dissertation is to look at recent developments in South African Competition Law, paying particular attention to the role of public interest considerations as expressly provided for by the Competition Act in merger regulation. The dissertation will define what public interest entails, assess how it has been applied in high profile cases hitherto and determine what role it plays in merger regulation. It will look at what the role of public interest considerations are in relation to competition considerations as well. The application and attempted balancing of the competition considerations and the public interest considerations has raised the question whether or not the two facets can be reconciled or whether one outweighs the other. It is therefore the aim of this dissertation to unpack this issue and answer it.

The chronology of the dissertation will be to look at the definition of the South African competition policy first, putting it into the context of the South African competition law background. I will then investigate the inclusion of the public interest provision in the Act and its role in supporting or bringing to effect the desired outcome of competition policy. Further, an expose on the application of the public interest provision will follow, highlighting a couple of high profile cases that have been adjudicated with regards to public interest provisions.

I will look at and dichotomise a number of merger cases in an effort to determine how public

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interest considerations are applied, what their role is and how much impact they can have on a proposed merger.

A comparative analysis will be made to see how other jurisdictions deal with the balancing of competition considerations and public interest considerations if any. Lastly an attempt will be made to reconcile the two seemingly polar considerations and recommendations will be made.

Chapter 2

II. Merger Control in South Africa

a) *Current merger regime*

Modern antitrust law is concerned with market power, which is the power of a firm to control prices, exclude competition or behave to an appreciable extent, independently of consumers, competitors or suppliers.[4] While a firm may gain market power through its own independent endeavours, one of the easiest ways is to merge with or acquire another firm.[5] It is submitted that it is this possibility that gives rise to a great concern as to the potential for abuse of this facility, which in turn necessitates the monitoring and regulation of mergers. Checks and balances to ensure that anti-competitive practices do not become commonplace are therefore necessary.

According to the Competition Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.[6] Such a merger may be attained through the purchase or lease of the shares, an interest or assets of the other firm in question, or an amalgamation or other combination with the other firm.[7]The Act provides for the assessment of three different mergers, viz horizontal, vertical and conglomerate. While it is not the aim of this dissertation to go into the specifics of each of these types of mergers and the Act itself does not specifically distinguish conceptually between the three categories of mergers,[8] it is worthwhile to differentiate between the different mergers for academic reasons.

A horizontal merger is a merger between firms producing or selling identical or similar products in the same geographical area. This type of merger results in the elimination of direct competition since the firms are in a horizontal relationship with each other and compete for the same consumers in relation to the same goods. A vertical merger is one where there is a combining of firms that are in a vertical relationship such as a manufacturer and a distributor. These do not eliminate direct competition per se as the firms are not in a horizontal relationship. Conglomerate mergers generally cover all other mergers where the merging parties have no apparent economic relationship. The parties in this type of merger may not be producing the same goods, or be in the same geographical area but may for one reason or another, such as efficiencies, decide to merge.[9]

The bottom line, having looked at all the different mergers is that as a result of a merger a competitor is being removed from the market which leaves an altered market structure; and because of that, merger control is necessary to ensure that there is no abuse of the merger and acquisition process. Although horizontal mergers give rise to the most serious competition law concerns, this paper looks at mergers in the general sense and why merger assessment and regulation is important.

Some of the major concerns that give rise to and necessitate merger control are that mergers could result in the combined entity gaining market power, enabling it to increase prices and reduce output unilaterally.[10] This would definitely be to the detriment of consumers and will counter one of the aims of the Competition Act, which is to increase consumer welfare as consumers will be deprived of competitive prices and a wide range of product options as envisaged by the Act.[11] Due to increased market concentration there may be a tendency to collude, because the reduction of players in the industry is likely to facilitate the arms-length tacit co-ordination of behaviour.[12] Such a result would lead to adverse effects for consumers as firms can fix prices and enter into other anti-competitive practices while servicing their own interests and not those of the consumers.

b) *Responsible authorities for merger control*

i. *Introduction*

Chapter 3 of the Competition Act regulates mergers and is the backbone of the dissertation as it not only provides who should carry out the assessment but also outlines what should be considered and to what extent it should be considered. Section 12 sets out specifically who should carry out the assessment. "Whenever required to consider a merger, the Competition Commission or the Competition Tribunal…".[13] It is clear from the wording of the section that the responsible authorities in terms of merger regulation are the Competition Commission and the Competition Tribunal. These authorities and their duties

[4] M. Brassey, *Competition Law*, 2002, 1st Ed, p. 224.
[5] Ibid.
[6] S 12(1)(a).
[7] S 12(1)(b)(i-ii).
[8] M. Brassey, *Competition Law*, 2002, 1st Ed, p. 228.
[9] Ibid p. 229.
[10] Ibid p. 225.
[11] S 2(b).
[12] M. Brassey, *Competition Law*, 2002, 1st Ed, p. 225.
[13] S 12A(1).

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are set out in Chapter 4 of the Act, parts A and B respectively.

ii. *Competition Commission*

The Competition Commission has a number of duties, with its central functions being to investigate and evaluate alleged prohibited practices in terms of Chapter 2, to consider applications for exemptions from provisions of Chapter 2, to consider mergers of which it receives notice in terms of Chapter 3. Of particular importance to this dissertation is the third function where the Competition Commission is responsible to authorise with or without conditions, prohibit or refer mergers to which it receives notice in terms of chapter 3.[14]
In respect of merger control, the Commission must be notified of all mergers that fall into the definition of an intermediate or large merger.[15] Small mergers need not be notified unless specifically required by the Commission within six months of the implementation of the merger.[16]

a. Powers of the Commission

In the case of small and intermediate mergers notified to it, the Commission must either approve conditionally or unconditionally or prohibit implementation of a merger.[17] If the Commission issues out a certificate, be it conditional or unconditional approval or the prohibition of a merger, one of the parties, or a registered trade union or employees of one of the parties may appeal such decision to the Competition Tribunal.[18] The Commission with regards to notification of a large merger has no power to make a decision. The Commission must refer such notice to the Competition Tribunal, together with a recommendation as to whether the implementation of the merger should be approved or prohibited.[19] .

iii. *Competition Tribunal*

The main functions of the Competition Tribunal are to adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred and if so impose remedies provided for by the Act, to adjudicate any other matter that may in terms of the Act be considered by it and to make any order provided for by the Act, and to hear appeals from or review any decision of the Commission that may in terms of the Act be referred to it.[20]

With regards to merger proceedings, the Tribunal must consider large mergers referred to it by the Commission and either approve such mergers conditionally or unconditionally or prohibit them.[21] The Tribunal must also consider small and intermediate mergers referred to it by a party to a merger, registered trade union or employees of a party to a merger.[22] In these circumstances the Tribunal serves as an appeal forum and is supposed to review the decision of the Commission and either confirm or revoke that decision.[23]

iv. *Competition Appeal Court*

While the Competition Appeal Court has no direct input in terms of assessing, approving or prohibiting a small, intermediate or large merger, it still has a role to play in merger assessment. It is a court of appeal and therefore may review any decisions of the Tribunal and consider any appeal against any of the Tribunal's final decisions that may in terms of the Act be taken on appeal.[24]

The Competition Appeal Court may make any decision and give any judgement or make any order, including an order to confirm, amend or set aside a decision or order of the Tribunal or to remit the matter to the Tribunal for further hearing on terms it deems appropriate.[25] It is therefore important to appreciate the role of the Competition Appeal Court in terms of merger assessment as merger assessment does not always end with the Commission or Tribunal.

c) Test for assessment of a merger

i. *Introduction*

In terms of section 12A of the Competition Act, the Competition Commission or Competition Tribunal in evaluating a merger, has to carry out a two-pronged assessment. The Commission or Tribunal has to consider competition considerations on one hand, which are purely economic and public interest considerations on the other in order to make a decision whether to approve a merger conditionally or unconditionally or whether to prohibit a proposed merger.

ii. *Competition considerations*

In terms of section 12A of the Act, the Commission or Tribunal has to determine whether or not the merger is likely to substantially prevent or lessen competition by assessing the factors set out in subsection 2, namely:

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

[14] S 21(1)(e).
[15] S 13(1)(a).
[16] S 13(5)(b); S 14(1)(b).
[17] S 14(1)(b).
[18] S 16(1)(a-b) read with S 13A(2).
[19] S 14A(1).
[20] S 27(1).
[21] S 16(2).
[22] M. Brassey, *Competition Law*, 2002, 1st Ed, p. 289.
[23] S 16(1).
[24] S 37(1); S 61(1).
[25] S 37(2)

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- Whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail, and
- Whether the merger will result in the removal of an effective competitor

If the Commission or the Tribunal finds that the merger is most likely to have an anti-competitive effect, it may still justify the merger on the basis of technological, efficiency and pro-competitive (TEP) gains,[26] which may be greater than the negative impact of anti-competitive practice and may therefore offset the effects of the merger being anti-competitive. The Commission or Tribunal must also consider whether or not the merger can be justified on substantial public interest grounds by assessing the factors laid out in subsection 3.[27]

Even where a merger is not anti-competitive, the competition authorities still have to consider whether the merger can or cannot be justified on public interest grounds.[28] It appears from the wording of section 12A(a) and (b) that there are two distinct stages at which public interests is considered.

iii. *Public interest considerations*

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

- A particular industrial sector or region
- Employment
- The ability of small and black businesses to become competitive
- The ability of national industries to compete internationally

The public interest assessment takes place separately and independently.[29] The public interests that must be considered fall into a closed list as seen above. The Competition Act is very specific about which public interests must be considered, as section 12A(3) limits the public interest inquiry to the four factors specifically mentioned.

The wording of the section does not make it clear whether public interest considerations must be taken into account if a merger was to substantially restrict competition but is justified on the basis that pro-competitive effects that outweigh the anti-competitive ones.[30] However, the fact that the public interest test must be applied separately and independent of the outcomes of the competition test was confirmed in *Harmony Gold mining Co/ Gold Fields Ltd*[31] wherein the following was stated, "Mergers following either path are then subject to the public interest inquiry…"[32]. The quote confirms that no matter what the outcome of the competition test is, the public interest consideration must still be applied as the second prong in the process of merger assessment.

To briefly summarise the merger evaluation process: it requires the Commission or Tribunal to carry out a dual test, Firstly considering competition concerns and secondly considering public interest factors. Even though a merger may not have an adverse effect on competition, it still has to be reviewed on public interest grounds as it may be prohibited based on that assessment. Conversely, the public interest inquiry may also work to resuscitate a merger that is otherwise anti-competitive. This makes the test mandatory because of the dichotomy of possible outcomes. Ultimately, public interest considerations can lead to the approval or prohibition of a merger.

Chapter 3

III. Public Interest Considerations in Merger Evaluation

a) Introduction

The South African Competition Act provides for competition authorities when considering mergers, to consider whether the merger can or cannot be justified on substantial public interest grounds by assessing the public interest factors set out in sub section (3).[33]

It is imperative that as a starting point, the term 'public interest' be defined. The Department of Trade and Industry (DTI) provided an insight into the scope of what public interest entails;

> The public interest is far broader than the sectional interests of firms and their workers within a particular industry. It also stretches beyond the interests of consumers, of emerging black entrepreneurs or of labour and community constituencies – although each must be satisfied that the end result fairly addresses their concerns.[34]

The opinion of the DTI provides a broad and all-encompassing view of what public interest entails. However, this definition is too broad and for purposes of application of the Act the 'public interest' is narrowed down. Section 12A(3) builds the understanding of public interest further by outlining the factors that are considered as public interest grounds. These factors mirror those outlined in the purpose of the Act.[35]

[26] S 12A(1)(a)(i).
[27] S 12A(1)(a)(ii).
[28] S 12A(1)(b).
[29] M. Brassey, *Competition Law*, 2002, 1st Ed, p. 275.
[30] P. Sutherland and K. Kemp, *Competition Law of South Africa*,2013, binder issue 17, p. 10-93.
[31] 93/LM/Nov04.
[32] Ibid at para 44.
[33] S 12A(1)(a)(ii).
[34] Department of Trade and Industry, *Proposed guidelines for competition policy; A framework for competition and development*, 27 Nov 1997, par. 1.1.3.
[35] J. Hodge et al, 'Public interest provisions in the South African Competition Act – A critical review', Competition policy, Law and Economics Conference 2009 p. 6.

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For purposes of this dissertation and for the application of the Act, public interest will be limited to the specific grounds that are unambiguously provided for by the Act. The fact that the Act unequivocally provides a list of the public interest grounds is supported by David Lewis' assertions, "The uncertainty that public interest evaluation introduces is significantly ameliorated by the specific content that the Act gives to public interest. It is not as it often is an infinitely elastic concept but is specifically limited by the Act's definition."[36] The Competition Act provides that when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that 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
d) The ability of national industries to compete in international markets[37]

Two important points may be taken from the public interest provision in section 12A(3). Firstly, it is submitted that the use of the word 'must' by the legislature emphasises the fact that competition authorities do not have discretionary powers when it comes to applying the public interest test. It is compulsory that they consider the effect of such a proposed merger on public interest. Secondly, the public interest grounds constitute a closed group. The Act provides for only four specific grounds. Anything over and above what the Act provides for in section 12A(3) is beyond the scope of the Act and is therefore irrelevant for purposes of this dissertation.

b) Rationale for considering public interest

Section 12A(1)(a)(ii) of the Act provides that in assessing the impact of a transaction on public interest, it is also necessary to assess whether it can or cannot be justified on substantial public interest grounds, by assessing factors set out in sub section (3). The use of the alternatives 'can and cannot' has been interpreted by the Competition Tribunal to mean that public interest can work in two directions, either having positive or adverse effects.[38] The words can or cannot are then instructive. They tell us that public interest can have both adverse and benign effects.[39]

It is evident that the public interest test unlike the efficiency defence has a 'janus-faced' quality.[40] It can save a merger that would otherwise have been prohibited on pure competition grounds, but may also result in the prohibition of a merger which is not anti-competitive.[41] The same was re-iterated in *Harmony Gold mining Co/ Gold Fields Ltd* case, "A merger that has failed in the competition test can still be passed on the public interest test and hence be approved. Conversely, that a merger that has passed the competition test could still fail the public interest test and hence be prohibited."[42]

c) Public interest considerations to be substantial

The Act requires the public interest being considered to be substantial.[43] This requirement raises the question as to what a substantial ground entails. The Act does not give a defined outline on what substantial means as noted in the *Shell South Africa/ Tepco* case.[44] The Tribunal states, "Note that the Act does not otherwise guide us in balancing the competition and the public interest assessments except insofar as section 12A(1)(b) requires that the public interest grounds should be substantial."[45]

Some light into what substantiality entails was shed by the *Distillers Corporation* case.[46] The Tribunal in addressing the public interest of employment was tasked with determining when job losses would be substantial. "How many jobs must be lost before one has grounds for substantial public interest? The legislature wisely does not seek to answer that for us, nor can we assume that it should be a uniform figure for all mergers – it would depend on the context."[47] The abstinence from giving a definition of what substantiality would entail aids in the development of Law. It is submitted that each case is unique and therefore regards should be had to circumstances and context. The legislature's omission to provide a yardstick in this view may be seen as constructive in the sense that each case can be decided based on its merits and does not have to fit a pre-determined mould, which may not be suitable for the context.

Another pointer as to how substantiality may be determined would be to look at residual public interest. The Tribunal's approach is to focus on residual public

[36] D. Lewis, 'The role of public interest in merger evaluation', International Competition Network, Merger Working Group, Naples 28-29 Sept 2002 p. 3.

[37] S 12A(3)(a-d).

[38] Harmony Gold Mining/ Goldfields Limited 93/LM/Nov04 at para 54.

[39] Ibid

[40] P. Sutherland and K. Kemp, *Competition Law of South Africa*,2013, binder issue 17, p. 10-93.

[41] Ibid.

[42] Harmony Gold Mining Limited/ Goldfields Limited 93/LM/Nov04 at para 45.

[43] S 12A(1)(b).

[44] Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd 66/LM/Oct01.

[45] Ibid at para 38.

[46] Distillers Corporation (SA) Limited/ Stellenbosch Farmers Winery Group Ltd 08/LM/Feb02.

[47] Ibid at para 240.

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interest or that part that is not susceptible to or better able to be dealt with under another law.[48] The approach in *Distillers Corporation* is supported by the decision in *Shell South Africa/ Tepco*, where it was decided that 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[49] and the Skills Development Act[50].[51]

What the above suggests is that the public interest considerations provided for in section 12A(3) can only be considered to be substantial where there is no other law or regulatory instrument to safeguard them. There are different pieces of legislation whose specific purpose is to protect some of the public interests listed in the Act such as the Labour Relations Act[52], The Basic Conditions of Employment Act[53] and The Black Empowerment Act.[54] It is submitted that the competition authorities' purpose is not to usurp the duties of such legislation but rather to play a supplementary role.

d) Cases where Public Interest considerations have been applied

i. *Introduction*

There are a number of cases in which the public interest considerations listed in section 12A(3) have been applied. This section of the dissertation seeks to highlight the importance of those public interest considerations by showing the weight which they are afforded within merger considerations. In some instances the public interest provision is invoked to try and save an anti-competitive merger whereas in others it seeks to prohibit pro-competitive mergers.

ii. *Industrial Sector or Region*

The Competition Act provides that when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on a particular industrial sector or region.[55] The use of the word 'sector' instead of market allows for a wide range of issues to be considered. In *Anglo American/ Kumba Resources*[56] Anglo alleged that it would invest heavily in the target firm Kumba post merger.[57] The Tribunal did not determine under which public interest concern, but it must be likely that if falls under this rubric.[58] The case was important in illustrating how the competition authorities must approach each of the public interests even if not specifically mentioned.

a. National Pers Ltd/ Education Investment Corporation Ltd[59]

The case involved the merger of the education businesses of National Pers Limited and Education Investment Corporation into a new company. There were a number of factors to consider and be decided.

The definition of 'industrial sector' was the first port of call in the case. The term 'industrial sector' had to be interpreted widely to include any sector of economic activity.[60] The Tribunal had to decide whether the merger fell into the education 'sector'. It was noted that education is central to the South African economy and society, and that Apartheid has left a scar upon and massive challenges to this sector. Education is particularly important in addressing the legacy of Apartheid which left a large number of students unprepared for the world of work and so hampered the social and economic development of South Africa.[61]

The Tribunal accordingly paid full attention to the merger to protect the access of prospective students to education and thus giving effect to the purpose of section 12A(3)(a) of the Competition Act. The case illustrated how protection can be extended to a particular industry. The merger was approved with conditions, with the main condition being the divestiture of Success College.

b. Wal-Mart Stores Inc and Massmart Holdings Ltd[62]

With regards to the public interest of assessing a merger's impact on a particular industrial sector or region, the major concern with the Wal-Mart merger was the issue of procurement of products.

The Government and Southern African Clothing and Textile Union (SACTWU) were concerned that post merger, the merged entity would materially divert its procurement of products from local industries and markets to imports and that would have an impact on the products of domestic firms whose demand for their local products would dwindle and force them to close or downscale.[63] The theory of harm was based on the merged entity's increase in market share because of lower prices which it could offer because of its superior buying power in sourcing products overseas. The

[48] Ibid at para 237.
[49] Employment Equity Act 55 of 1998.
[50] Skills Development Act 97 of 1998.
[51] Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd 66/LM/Oct01 at para 58.
[52] Labour Relations Act 66 of 1995.
[53] Basic Conditions of Employment Act 75 of 1997.
[54] Broad Based Black Economic Empowerment Act 53 of 2003.
[55] S 12A(3)(a).
[56] Anglo American Holdings Ltd/ Kumba Resources Ltd with Industrial development Corporation intervening 46/LM/Jun02.
[57] Ibid at paras 141-144
[58] P. Sutherland and K. Kemp, *Competition Law of South Africa*,2013, binder issue 17, p. 10-95.
[59] 24/LM/May03.
[60] P. Sutherland and K. Kemp, *Competition Law of South Africa*,2013, binder issue 17, p. 10-95.
[61] Ibid.
[62] 73/LM/Nov10.
[63] Ibid at para 73.

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intervening parties came up with two proposals to alleviating the concern. Either the merger had to be prohibited, or there had to be an import quota imposed on the merged entity to limit the amount of imports versus local products.

The imposition of such a condition posed problems in itself. Firstly, the imposition of specific import quotas would contravene international trade law and conditions of the World Trade organisation. Secondly, the direction of the quota condition was not decided, SACTWU proposed 5 years while SMME's proposed 3 years.[64] To deal with the import quota problem, the merging parties proposed an investment remedy aimed at developing local suppliers in the amount of R100 million over a 3 year period.[65] The investment remedy was more attractive as the Tribunal felt it was more appropriate as it sought to make local industries more competitive.

The imposition of the investment remedy was a major development in merger law in South Africa. While this kind of remedy had been applied before in the *Pioneer* case[66] where a development fund remedy involving a cartel in the bread and milling industry was set aside for Agro-Processing competitiveness, this was the first time such remedy was being applied in merger law.

It is evident from the discussed cases that the industrial sector or region consideration plays an important role in the assessment of mergers. Not only is it a specifically provided public interest in terms of the Act but the public interest has practical implications as it is actually applied in case law.

iii. *Employment*

Of the various public interest grounds contained in the merger provisions, employment has thus far received a fair deal of consideration.[67] When evaluating the effect of a merger on employment, competition authorities will keep in mind that other regulatory regimes provide more direct protection for employees.[68] They will not be prepared to interfere with regards to wages, collective bargaining and working conditions.[69]

On the face of it, it is difficult to distinguish protection of employment levels from interference in other aspects of employment.[70] Yet it has been accepted that because of the powerful link between direct employment loss and a restructuring initiative such as a merger, it is undoubtedly in this area that the legislature intended a role for the competition authorities.[71] In evaluating the effect of a merger, the competition authorities will not merely play the numbers game.[72] They will not merely consider the number of jobs lost through a merger, they will rather look at the substantial effect which the merger has on employment.[73] In this regard, the questions whether retrenchment packages are sufficient enough and whether retrenchments are properly negotiated will be more important than the number of jobs lost.[74] Bearing this in mind, it is thus important for the employees and their views to be represented in matters that will directly affect them. The most important rights given to employees by the competition laws are procedural.[75] This allows employees to receive timeous information about mergers that often affect them deeply.[76]

To ensure that the effect of a merger on employment is properly analysed by the competition authorities, input from affected employee groups and trade unions is considered. The Act specifically requires that trade unions and /or employee representatives of affected employees be notified of any proposed mergers that are notifiable to the competition authorities.[77] In this regard, trade unions have played a very notable role in the public interest of employment, representing employees and ensuring that mergers do not have an uncompensated adverse effect on employment.

The competition authorities summarise the rights of employees accurately with regards to the effect a merger can have on employment,

> The prime concern of employees would obviously be the effect of a merger on employment. Keeping this information confidential deprives labour of not only the right to access to information that legislation clearly gives them, but also the right to make meaningful representation to the competition authorities on an issue that directly affects their interest.[78]

The importance of trade unions and employee representatives will be clearly articulated in some of the case law below.

[64] Ibid at para 108.
[65] Ibid at para 119.
[66] Competition Commission v Pioneer Foods (Pty) Ltd 15/CR/Feb07 and 50/CR/May08.
[67] V. Chetty, 'The place of Public Interest in South Africa's Competition Legislation', ABA section of Antitrust Law, 53rd Spring Meeting, Mar 30 – April 1 2005, p. 16.
[68] Distillers Corporation (SA) Limited/ Stellenbosch Farmers Winery Group Ltd 08/LM/Feb02 at para 232.
[69] Ibid at paras 233-238.
[70] P. Sutherland and K. Kemp, *Competition Law of South Africa*,2013, binder issue 17, p. 10-96.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid at paras 242-243.
[75] P. Sutherland and K. Kemp, *Competition Law of South Africa*,2013, binder issue 17, p. 10-96.
[76] Ibid.
[77] S 13A.
[78] Competition Commission of South Africa and Competition Tribunal of South Africa, *Unleashing Rivalry, Ten years of enforcement by the South African Competition Authorities [1999-2009]*, 2009 p. 31.

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a. Unilever PLC/ Competition Commission/ CEPPWAWU[79]

CEPPWAWU is a trade union that represented the interests of Chemical, Energy, Paper, Printing, Wood and Allied Workers. The public interest concern in this case was the number of potential job losses in South Africa (a country with and already high unemployment rate) resulting from the merger.[80]

The Tribunal imposed a condition of approval that merging parties had to consult the trade unions regarding job losses, as a pre condition of approving the merger.[81] It was argued that section 13A(2) of the Act provides that merging parties must serve a copy of the merger notice on the registered trade union, employee representatives or, failing any of them, the employees themselves.[82] The Tribunal further argued that the most significant right the Competition Act has extended to employees and unions is the right to timeous information with regards to the potential employment impact of a merger.[83]

However, having alluded to the protection that the Competition Act extends to employees in terms of mergers, the Tribunal felt that the most powerful and therefore appropriate channel for unions to address the employment related issues arising from the merger was labour specific legislation, in this case being the Labour Relations Act[84] in terms of collective bargaining agreements.[85]

b. Wal-Mart Stores Inc and Massmart Holdings Ltd[86]

The target firm in this merger was Massmart holdings, a local wholesaler and retailer of groceries, liquor and general merchandise. The acquiring firm was Wal-Mart, the largest retailer in the world.[87] The merger did not raise any competition issues as it did not threaten to substantially prevent or lessen competition. The major concerns were public interest grounds such as employment and industrial sector. The public interest concerns were of such a serious nature that they warranted an intervention by various third parties who all opposed the merger.[88]

The public interest consideration at play was the effect of the proposed merger on employment, in particular the potential number of job losses through retrenchments post merger. In assessing the impact on employment, the Tribunal noted that there was no evidence that retrenchments would result from the merger, if anything the merger was likely to create jobs.[89] However, in reaching its decision, the Tribunal was cautious of relying on documentary evidence filed by the merging parties that predicted job growth for two reasons;

a) There was no guarantee that there would be creation of jobs post merger as expansion of the merged entity could happen elsewhere outside of South Africa
b) The expansion of the merged entity could be divisional rather than uniform. Meaning that one division could do well while others struggled, resulting in job losses in departments struggling[90]

The problem with looking at possible expansion in the broad sense would have been that while the net effect is expansion of the firm, the expansion could be divisional. This means that some divisions would flourish while others would suffer. The danger then of accepting the documentary evidence was that there was no guarantee that the South African division(s) would do well and therefore escape the potential of job losses. To ensure the protection of employment the merging parties undertook that there would not be any retrenchments in South Africa resulting from the merger for a period of two years; a retrenchment moratorium similar in nature to that in the *Metropolitan* merger.[91]

To further the public interest of employment, the case not only dealt with the potential job losses during the merger, but also extended the protection to employees of the merged entity. The intervening third parties demanded that there be a condition that would regulate how the merged entity would deal with organised labour in the future. Given Wal-Mart's antipathy with organised labour, the unions wanted conditions that would introduce central bargaining. The Tribunal was satisfied with these arguments and imposed two conditions with regards to trade unions;

a) The merged entity to continue to honour existing labour agreements
b) The merged entity not to challenge SACCAWU as the largest representative union within the merger entity for an appropriate period determined by the Tribunal.[92]

[79] [2001-2002] CPLR 336 (CT).
[80] V. Chetty, 'The place of Public Interest in South Africa's Competition Legislation', ABA section of Antitrust Law, 53rd Spring Meeting, Mar 30 – April 1 2005, p. 8.
[81] Unilever PLC/ Competition Commission/ CEPPWAWU [2001-2002] CPLR 336 (CT) at para 1.
[82] Ibid at para 40.
[83] Ibid at para 43.
[84] 66 of 1995
[85] Ibid.
[86] 73/LM/Nov10.
[87] Ibid at para 2.
[88] The intervening parties were the South African Commercial Catering and Allied Workers Union(SACCAWU), Congress of South African Trade Unions(COSATU), Food and Allied Workers Union(FAWU), National Union of Metal Workers in South Africa(NUMSA), South African Small Medium and Micro Enterprises Forum(SMMEF), South African Clothing and Textile Workers Union(SACTWU), The Minister of Economic Development, The Minister of the Department of Trade and Industry(DTI) and The Minister of Department of Agriculture Forests and Fisheries(DAFF).
[89] 73/LM/Nov10 at para 39.
[90] Ibid at para 40.
[91] Ibid at para 42.
[92] Ibid at para 59.

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The import of this case is two-fold. It illustrates the importance of taking into consideration the public interest ground of employment when assessing a merger. It also highlights the value of trade unions as employee representatives, making sure that the views of employees are adequately heard and addressed.

c. Metropolitan Holdings Limited and Momentum Group Limited[93]

This case brings to the fore the interaction between public interest (employment in this case) and commercial efficiencies. The case included the acquisition of 100% of the issued share capital of Momentum by Metropolitan Holdings. In considering the merger, the Tribunal first carried out a competition test and decided that the merger did not pose any threat to competition. The question then shifted to whether the merger had any detrimental effects on public interest grounds.

The merger gave rise to one public interest concern, being the loss of jobs resulting from the merger. The merging parties submitted that the merger would result in an approximate 1000 job losses as a result of duplication of roles and the need to improve efficiencies in the merged entity.[94] In passing its judgement and seeking to protect the rights of employees, the Tribunal issued a moratorium on retrenchments for a period of two years with the following terms;

a) The merged entity was to ensure that there were no retrenchments in South Africa resulting from the merger for a period of 2 years from the effective date of the proposed transaction
b) The condition in (a) would apply to the 204 senior management positions set out in the table provided in the record
c) Metropolitan and Momentum were to circulate conditions (a) and (b) to all their employees within 7 days of the date of the order[95]

The parties sought to downplay the job losses by claiming that they had a plan to redeploy, retrain and offer early retirement packages to some of the employees, bringing down the number of those affected by the merger from the initial 1500 to 1000 employees.[96] The Tribunal revealed the importance of clearly articulating the connection between job losses and efficiencies. There had to be a clear picture of how the job losses were determined and whether they could be justified based on the public efficiencies of the merged entity. The Tribunal found that the parties had failed to show a rational connection between the efficiencies sought from the merger and the job losses claimed to have been necessary.[97]

The Tribunal emphasised that while a negative impact on employment may clearly be connected to a particular claimed efficiency, that does not discharge the parties of their duty to show that the losses could be justified for a reason that is public in nature. The parties in this case had failed to discharge that onus and as a result the merger was approved subject to the above conditions.

d. Daun et Cie AG/ Kolosus Holdings Ltd[98]

The public interest of employment and how the competition authorities go about protecting this interest was central in this case. The case went far to reiterate the pivotal role that trade unions and employees representatives play in matters that directly affect employees and employee rights. The merging parties in the case had estimated that in the worst case scenario, the merger would give rise to about 150 retrenchments. However, the parties acknowledged during the hearing that the ultimate number of job losses could potentially exceed that number.[99]

The trade unions SACTWU and SAFATU expressed concerns with regards to the job losses and sought assurance that the job losses resulting from the merger would be limited. The Tribunal in its decision imposed a condition that the parties had to limit the number of job losses to 150 for a year post merger, and emphasised the need for true and accurate disclosure of facts when notifying a merger,

> It must be emphasised that the notification requirements exist precisely to ensure transparent disclosure of all material aspects of the transaction at an early stage. This is needed to allow the competition authorities and with regards to labour issues, the trade unions to react accordingly. It is improper for the notification to be sugar-coated merely to ensure a favourable reaction, while later in the process less favourable facts are disclosed, particularly when the number of retrenchments is as significant as in this case.[100]

The Tribunal further stipulated that it also took into cognisance the fact that it was easy for companies to disguise merger related retrenchments so that it would appear that they would still occur absent the merger. It went on to chastise the practice, remarking, "These practices are strongly discouraged and the importance of transparent bona fide disclosure is once again emphasised. It is those concerns that motivated the imposition of the condition in the merger."[101]

[93] 41/LM/Jul10.
[94] Ibid at para 61.
[95] Ibid at para 64.
[96] Ibid at para 79.
[97] Ibid at para 70.
[98] 10/LM/Mar03.
[99] Ibid at para 121.
[100] Ibid at para 136.
[101] Ibid at para 138.

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It is evident from the treatment of the need for disclosure of possible job losses and the involvement of the trade unions in discussions that employment is a key public interest ground when considering the effect of a merger on public interest. The importance of employment cannot be ignored or downplayed.

e. Tiger Brands Ltd and Ashton Canning Company Ltd and Others[102]

The case was based on the public interest ground of employment as well, in particular the potential number of job losses that would be a direct result of the merger. It was estimated that there would be a loss of 45 permanent jobs and 1000 seasonal jobs due to the merger.

The Commission sought to protect the interests of employees and in so doing imposed a condition that provided for the creation of a training fund to the tune of R2 million to benefit retrenched employees, seasonal farmers and members of the Ashton community.[103] In as much as the condition would not minimise job losses, it would go far in developing the skills of retrenched employees and seasonal farmers, better equipping them for any other prospective employment. It is submitted that the imposition of the condition also worked to signal to all employees the substance of employment as a ground that had to be considered in merger evaluations. It reiterated the fact that the competition authorities do not just play the numbers game in considering employment as the number of job losses is not always commensurate to the protection afforded employees. In *Metropolitan Holdings Limited and Momentum Group Limited*[104] the potential permanent job losses were in the 1000s, whereas in this case only 45 permanent jobs were anticipated, however both cases were given due consideration with regards to protection of employment.

What can be taken deduced from the discussed case law is that the public interest ground of employment is central in the assessment of what effect a merger will have on public interest as a whole. It empowers the competition authorities to extend protection of employment and employee rights through the imposition of conditions. Often the levels of employment cannot be maintained at pre merger levels if efficient gains are to be realised.[105] The imposition of conditions can thus only go so far. Sometimes the conditions are only for a short specified period, as noted in *DB Investments vs De Beers;*[106] it could not be expected of an employer to provide a perpetual undertaking to ensure that all the conditions were adhered to.[107]

In arguing for the protection of employment it will not be sufficient to show that job losses will occur after the merger. It is necessary to prove that the job losses will be a consequence of the merger.[108] Only then may competition authorities deem it fit to intervene and issue conditions where possible.

Over and above the protection that employees get from legislation and statutory instruments specifically enacted and tasked with protecting them, the competition authorities still have a duty to extend that protection. Many of the job losses can be addressed by the imposition of conditions as seen in some of the cases above. The fact that the competition authorities, over and above the specific labour legislation assume jurisdiction and seek to extend protection of employment, goes on to demonstrate the significance of the public interest ground of employment.

iv. *The ability of smallbusinesses, or firmscontrolled or owned by historically disadvantaged persons, to become competitive*

In terms of section 12A(3)(c) of the Competition Act, the effects of a merger on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons to become competitive must be evaluated as part of the public interest test. This falls in line with one of the definite aims of the Act as provided for in the preamble, to spread greater ownership by a greater number of South Africans.

a. Anglo American Holdings Ltd and Kumba Resources Ltd, Industrial Development Corporation Intervening[109]

The facts of the matter were that Anglo attempted to purchase Kumba, a black economic empowered company. The Industrial Development Corporation(IDC), a statutory body whose primary function is to foster economic development pertaining to black owned businesses, intervened on the public interest ground provided in section 12A(3)(c) of the Act. The IDC argued that the merger would create a barrier to entry for potential black firms and therefore impede empowerment in the industry.[110] It therefore proposed that Kumba remain an independent black owned company.

In its submissions, the IDC stated that the Tribunal was to respect the object of promoting a greater spread of ownership by historically

[102] 46/LM/May05.
[103] Ibid at para 132.
[104] 41/LM/Jul10.
[105] P. Sutherland and K. Kemp, *Competition Law of South Africa*,2013, binder issue 17, p. 10-97.
[106] DB Investments south Africa v De Beers Consolidated Mines Ltd [2001-2002] CPLR 172 (CT).
[107] Ibid at paras 172-173.
[108] P. Sutherland and K. Kemp, *Competition Law of South Africa*,2013, binder issue 17, p. 10-97.
[109] 45/LM/Jun02 and 46/LM/Jun02
[110] Ibid at paras 148-152.

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disadvantaged persons.[111] The provision was to be interpreted widely so as to encompass the purpose of the preamble of the Act.[112] It had to be borne in mind that the Apartheid economic system had led to excessive concentration in the economy and it was a major goal of the Act to promote wider spread of ownership.[113]

Anglo on the other hand argued that the Tribunal should not accept the broad interpretation of the 'spread of ownership' provision.[114] In its submissions for the merger, Anglo argued that such a wide interpretation of the provision would result in the transformation of the Competition Act from an antitrust statute albeit with a public interest aspect into an unchecked vehicle for redistribution.[115]

The Tribunal stated that if the IDC's approach were to be adopted there was no evidence to suggest that the merger would frustrate the purpose of the Competition Act by closing the door on further entry by black owned firms. It was also not sufficiently proven that the interests of the black owners of Kumba would not be increased despite the merger since Anglo had given notice of an undertaking to comply with all the regulations that required empowerment transactions to take place.[116] It also had completed a memorandum of understanding with the Government in which it agreed to promote the interests of previously disadvantaged persons. The merger was therefore approved with the aforementioned conditions.

It is submitted that in as much as the IDC did not get a favourable judgement, the Tribunal had benefited from the intervention of the IDC given the economic and social significance of the transaction. The intervention had created a platform where the unpacking and discussion of what public interest grounds to consider and their application could be addressed. Overrally this was beneficial to the development of competition law as it provided precedence on how to apply the public interest consideration of black empowerment.

b. Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd[117]

In this matter, Thebe, a black economic empowerment company attempted to sell off its subsidiary Tepco to Shell South Africa citing financial problems. Tepco was suffering net losses due to the mature nature of the oil industry and high structural barriers to entry.[118]

Having determined that the merger did not pose any threat to competition, the Tribunal shifted its focus to the public interest test. Bearing in mind that Tepco was a company owned by black persons, the question whether the merger would have an effect on the ability of small or black controlled or owned firms to become competitive had to be addressed.

The Commission in its assessment of the merger has imposed a condition that Tepco continue to exist as an independent firm jointly controlled by Thebe and Shell South Africa.[119] The Tribunal was however sceptical of this condition as it resulted in the restructuring of the original deal into one that neither of the merging parties wanted.[120] The Tribunal argued that the Commission's role was to promote and protect competition and a specified public interest. It was not to second guess the commercial decisions of precisely that element of public interest it is enjoined to defend.[121] It went on to point out that the competition authorities however well intentioned, were well advised not to pursue their public interest mandate in an over-zealous manner, lest they damage precisely those interests that they ostensibly sought to protect.[122]

The merger was considered to be commercially sound and not to pose any threat to public interest. It was therefore approved without any conditions.

v. *Ability of national industries to compete in international markets*

As provided for by section 12A(3)(d) of the Competition Act, when applying the public interest test and assessing the impact of a merger on the public interest, regard must be had to the effect that a merger will have on the ability of national industries to be competitive on international markets.

a. Nampak Ltd/ Malbak Ltd[123]

The parties to the merger were firms involved in the packaging industry with overlapping activities in folding cartons and flexible plastic packaging.[124] The rationale for the merger was that the merged entity would be able to compete more effectively for the business of multinational customers, also increasing a deeper penetration of export markets.[125]

In their submissions, the parties produced evidence relating to the scale of operation required to compete for the business of multinational consumers. They argued that a would-be supplier would not be able to compete without the scale and concomitant technology to match the output of the world scale.[126]

[111] Ibid at paras 147-150.
[112] Ibid at para 148.
[113] Ibid.
[114] Ibid at para 156.
[115] Ibid.
[116] Ibid at para 168.
[117] 66/LM/Oct01.
[118] Ibid at para 11.
[119] Ibid at para 2.
[120] Ibid at para 42.
[121] Ibid at para 51.
[122] Ibid at para 58.
[123] [2004] 2 CPLR 337 (CT).
[124] Ibid at paras 5-6.
[125] Ibid at para 9.
[126] Ibid at para 50.

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They argued that the merger would provide them with such capacity.[127] The Tribunal acknowledged the importance of multinational customers to the parties' business, noting that its decision was rooted in evidence that strongly indicated significant developments in the manner in which multinational corporations organised their global production.[128]

The Tribunal concluded that the pro-competitive arguments raised by the merging parties justified the merger on the public interest of promoting international competitiveness as envisaged by section 12A(3)(d).[129] The merger was therefore approved.

b. Tongaat-Hullet Group Ltd/ Transvaal Suiker[130]

This merger had been found by the Competition Commission to be anti-competitive as it would have substantially prevented or lessened competition. The parties to the proposed merger argued the public interest ground of national industries becoming competitive on the international markets in a bid to save the anti-competitive merger.[131]

The parties when arguing for the merger had alleged that the merged entity would have a greater ability to compete on international markets because of the larger scale of the entity.[132] However, the Tribunal warned that it would be reluctant to consider an argument that domination of a local market by a merged firm was necessary for international success.[133]

The Tribunal further argued that in selected instances, scales of economies and rationalisation of production units may support the argument.[134] However, the size of the firm in itself would not be conclusive.[135] Where the merger did not increase the size of productive units, or allow them to operate more effectively, the Tribunal would not allow an anti-competitive merger on that basis.[136] The merger was therefore prohibited.

The major import of this case was to illustrate the dual application of the public interest test. On the one hand the test may be used to challenge a merger that is pro-competitive and does not pose any threat to competition based on the negative impact such merger would have on any of the listed public interest grounds. On the other hand, the test may be used to attempt to approve a merger that is anti-competitive, on the basis that the benefit to public interest would offset the anti-competitiveness effects of it.

e) Summary

It is evident from the cases discussed above that public interest considerations have to be taken into account in merger evaluation as they are mandated by legislation. The Competition Act unequivocally provides for public interest to be considered in every proposed merger. It is compulsory to apply the public interest test regardless of the outcome of the competition test. However, in as much as the public interest is provided for and protected by the act, the competition authorities have been cautious in the consideration and application of the test. There is an unlikely possibility of approving an anti-competitive merger based on public interest grounds.

Basing on the above discussed case law, it can be deduced that having considered the competition test and having applied the public interest test, the competition authorities may make any of the following decisions with regards to mergers;

- Unconditional approval, such as in *Shell South Africa/Tepco* merger;
- Conditional approval, such as in *Tiger Brands/Ashton* merger;
- Prohibition, such as in *Tongaat-Hullet/ Transvaal Suiker* merger.

In evaluating the public interest provision, the competition authorities take cognisance of the fact that competition law is not directly aimed at protecting any of the specific public interest grounds. Rather, the jurisdiction of the authorities with regards to the public interest is secondary, owing to the fact that there are specific mechanisms to protect public interest.

There are statutes enacted to specifically deal with the public interest grounds listed in section 12A(3). Some of the legislation includes the Labour Relations Act[137], the Basic Conditions of Employment Act[138], the Skills Development Act[139] and the Broad Based Black economic Empowerment Act[140] to name a few. The Competition Act's provisions that extend the protection of public interest play a secondary role to the specific legislation. It is submitted that it is because of this secondary role that the competition authorities follow a cautious approach, as they do not intend on commandeering the duties and responsibilities of other instruments.

[127] Ibid.
[128] Ibid at para 63.
[129] Ibid at para 65.
[130] 83/LM/Jul00.
[131] Ibid at para 114.
[132] Ibid.
[133] Ibid at para 115.
[134] Ibid.
[135] Ibid.
[136] P. Sutherland and K. Kemp, *Competition Law of South Africa*, 2013, binder issue 17, p. 10-99.

[137] 66 of 1995.
[138] 75 of 1997.
[139] 97 of 1998.
[140] 53 of 2003.

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Chapter 4

IV. Comparative Analysis

a) Introduction

A brief overview of public interest considerations in merger regimes internationally shows that a number of jurisdictions give credence to public interest considerations.[141] However, the consideration is strictly limited to certain sectors and different bodies assessing the public interest and the competition aspects. I will briefly look at the regime in the United Kingdom and compare it with the South African one.

The UK has been specifically been picked for a two reasons. Firstly, English law to this day forms part of the sources for South African Common Law. South African Common Law has these main strands: Roman Dutch Law, English Law and South African precedent.[142] Considering that many of the English doctrines have remained as part of the South African Law[143], it is reasonable that a comparative analysis be made with a system of law that is familiar. Secondly, it is submitted that both competition regimes are fairly new, with the South African Competition Act[144] coming into effect in 1999 and the UK Enterprise Act[145] coming into effect in 2003. It is submitted that a comparison between the two is most ideal as they were promulgated around the same period of time and therefore would have had some similar influences.

I will look at the similarities in the systems and the differences as well, and try and conclude whether the systems are just procedurally of fundamentally different.

b) United Kingdom Merger Control

The United Kingdom, like South Africa, has a fairly new competition regime, which was ushered in with the introduction of the Enterprise Act 2002.[146] The legislation involved a major overhaul of the domestic system of merger control.[147] It fundamentally changed both substantive and the institutional architecture of the domestic law of the UK.[148] Under the old regime, which operated under the auspices of the Fair Trading Act,[149] there was a broad public interest test to be applied in assessing mergers. However, the Labour Government argued that the public interest test was too vague and should be replaced.[150]

Pursuant to the Labour Government's push, reform to the UK competition regime came in the form of the Enterprise Act 2002. One of the primary objectives of the reforms to UK merger control introduced by the Enterprise Act 2002 was the de-politicisation of the system.[151] Under the old regime, the Secretary of State for Business, Enterprise and Regulatory Reform[152] was the ultimate decision maker with regards to mergers.[153] For example, where the Competition Commission had concluded that a merger would likely harm public interest, it fell to the Secretary of State to decide what action to take.[154]

However, with the advent of the Enterprise Act 2002, powers to make decisions were conferred on the Competition Commission in relation to mergers and market investigations.[155] The Act diminished substantially the powers of the Secretary of State to make decisions in competition law cases, particularly relating to mergers.[156] The Secretary of State now has limited powers with regards to merger control but still retains powers of intervention in relation to certain mergers.[157] The Secretary of State may intervene in public interest cases as provided for by the Act.[158]

The Enterprise Act 2002 also removed decision making powers of the Ministers with relation to mergers, passing the responsibilities to the competition authorities which were at the time, the Office of Fair Trading[159] and the Competition Commission.[160] The primary responsibility of the regulation of mergers and takeovers now lies with the Competition and Markets Authority (CMA).[161] The CMA has to investigate and assess whether a merger should be prohibited on the basis of whether the merger can be expected to lead to

[141] In Canada for example, public interest in merger assessment is focussed on mergers in the banking sector and is subject to approval by the Minister of Finance. The Canadian Competition Act provides for the assessment of proposed bank mergers to be subjected to a public interest assessment because of the potential effects on retail and by extension impact on consumers.

[142] F. du Bois (ed.), *Wille's Principles of South African Law,* 2007, 9th Ed, p. 65.

[143] Ibid p. 66.

[144] Competition Act 89 of 1998.

[145] UK Enterprise Act 2002 Chapter 40 (hereinafter referred to as the Enterprise Act 2002).

[146] UK Enterprise Act 2002 Chapter 40.

[147] R. Whish, *Competition Law*, 2008, 6th Ed, p. 887.

[148] Ibid p. 59.

[149] UK Fair Trading Act 1973 Chapter 41.

[150] A. Seely, 'Takeovers, The public interest test', standard note SN5374, September 2014, p. 1.

[151] Slaughter and May, 'UK Merger Control Under the Enterprise Act 2002', 2009, p. 34. www.slaughterandmay.com (accessed 2014-10-28).

[152] Hereinafter referred to as Secretary of State.

[153] Slaughter and May, 'UK Merger Control Under the Enterprise Act 2002', 2009, p. 34. www.slaughterandmay.com (accessed 2014-10-28).

[154] Ibid.

[155] R. Whish, *Competition Law*, 2008, 6th Ed, p. 61.

[156] Ibid p. 60.

[157] Slaughter and May, 'UK Merger Control Under the Enterprise Act 2002', 2009, p. 34. www.slaughterandmay.com (accessed 2014-10-28).

[158] S 42(2) Enterprise Act 2002 Chapter 40.

[159] Office of Fair Trading Closed on 01/04/2014, (www.gov.uk/government/organisations/office-of-fair-trading)

[160] A. Seely, 'Takeovers, The public interest test', standard note SN5374, September 2014, p. 1.

[161] Ibid p. 2.

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a substantial lessening of competition.[162] This is purely a competition test, which is the only test the CMA is mandated to apply when assessing mergers. While the establishment of the CMA was a major reform in the competition regime, it should be underlined that this did not see any changes either to Ministers' powers to intervene, or to the substantial lessening of competition test which the CMA applies in assessing mergers.[163] It would therefore appear as if the competition authorities in the UK have no power to assess any public interest concern that the merger may have an impact on as these powers rest with the Secretary of State.[164]

With the introduction of the Enterprise Act, the new test for merger assessment became more focussed on competition;

> Although in recent years it has been rare for merger cases to be decided on anything other than competition grounds, such a change may help to reduce strategic uncertainty in that companies should have a clearer idea as to the issues that will be taken into account in an investigation… A merger control regime that is more focused on competition will benefit consumers by promoting the maintenance of open competitive markets.[165]

In as much as the test for merger assessment is based on the competition test, it must be borne in mind that the Act still allows the Secretary of State to intervene in special case mergers where they give rise to certain specified public interest concerns.[166] There are three types of possible public interest cases, namely:

- Public Interest
- Special Public Interest
- In respect of mergers with a community dimension, cases raising legitimate interests[167]

It is within any of these three categories that the specified public interest may fall. The specified public interest considerations that the Secretary of State may consider in terms of section 58 of the Act are:

- National Security, which includes public security
- The interest of maintaining stability of the UK financial system
- Plurality of media, including accurate presentation of news in newspapers, free expression of vies in newspapers and a plurality of views in newspapers[168]

In the specifically mentioned public interest cases, the Secretary of State may make an assessment of a merger purely on the grounds that it runs counter to the public interest, without deferring to the substantial lessening of competition test.[169] He may also give regards to both tests in coming to his decision.[170]

One important feature of the new regime is the independence from Government interference in general insofar as the competition authorities are dealing with a purely competition based test. The Secretary of State does not have any powers to make a decision or interfere in the decision making of a merger assessment that is purely based on the substantial lessening of competition.[171] Looking at the nature of the merger assessment regime in UK, being purely competition based and barring any interference from Government, it can be deduced that the specified grounds on which the Secretary of State may intervene create the exception rather than the norm.[172]

Another important feature is that the Act allows Government, through the Secretary of State to amend the public interest provision. The Secretary of State may add or remove any specified public interest ground, which has been done once. In October 2008 the then Labour Government presented secondary legislation to add the public interest, "The interest of maintaining stability of the UK financial system" in response to the global financial crisis and having regards to the importance of the financial services sector.

c) UK system v South African system

It is imperative to carry out a close analysis and comparison of both the systems of merger assessment in the UK and South Africa by juxtaposing them. While both systems have a number of similarities, they also differ fundamentally in the approaches in which they carry out their merger assessments with regards to public interest considerations. As a general point of departure it is of the essence to note that both jurisdictions recognise public interest as factor that may be considered in certain merger assessments. However, that is as far as it goes in terms of similarities as the countries differ in terms of where public interest has to be considered, by whom it has to be considered and how it has to be considered.

i. *Recognition of public interest*

Both countries recognise specific public interest grounds which may be considered in assessing a merger. South African competition law recognises public interest through the Competition Act[173] while United Kingdom recognises specific public interest grounds

[162] Ibid.
[163] Ibid.
[164] Ibid p. 4.
[165] Department of Trade and Industry, 'The enterprise Act, Competition Reform', Regulatory impact assessment, 2002, p. 10.
[166] S 58 Enterprise Act 2002 Chapter 40.
[167] S 6.1 Merger Assessment Guidelines, Competition Commission and Office of Fair Trading, 2010.
[168] Ibid S 6.1.4.
[169] A. Seely, 'Takeovers, The public interest test', standard note SN5374, September 2014, p. 1.
[170] Ibid.
[171] Ibid p. 4.
[172] S 6.2 Merger Assessment Guidelines, Competition Commission and Office of Fair Trading, 2010.
[173] S 12A(3) Competition Act 89 of 1998.

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through the Enterprise Act.[174] Both Acts recognise a closed group of public interest grounds as they are specific.[175]

The difference in the systems is that in South Africa, public interest forms part of the merger assessment process as the second part of a two-pronged process. When assessing a merger the competition authorities have to carry out a competition test first and then carry out a public interest test.[176] However in the UK public interest does not form part of the merger assessment, there is only one test to be applied, which is the competition test. Public interest is rather an exception to the norm; the Secretary of State may intervene in a merger where it may have an effect on specified public interests. So while both countries recognise public interest, in South Africa it forms part of the merger assessment process whereas in the UK it is raised as an exception.

ii. *Enforcement Authorities*

In South Africa, the duty to carry out merger assessment lies with the competition authorities, being the Competition Commission and the Competition Tribunal.[177] Whereas in the UK, the duty lies with the CMA, which formerly lay with the Office of Fair Trading and the Competition Commission.[178] In South Africa, the same authorities are responsible for carrying out both the competition and the public interest tests. They first have to assess whether a merger is likely to substantially prevent or lessen competition and regardless of the outcome must still carry out the second test, determining whether there are any public interest ground that may be used to justify the approval or prohibition of the merger. The advantage of having the same authority carry out both tests is that in striking a balance between both tests, the authority will put everything in context as they are not removed from either of the tests.

In the United Kingdom, there is a separation of the authorities that are in charge of carrying out the competition test and raising the public interest considerations. The competition authorities are tasked with carrying out the only test recognised in merger assessment which is the competition test. The Secretary of State under special circumstances may however raise specified public interest concerns and assess the merger either solely based on those public interest grounds or having regards to the competition test. The separation of regulatory power in the UK helps in that mergers are decided on purely competition grounds without interference from Government. However, the separation may also be detrimental in that it does not always put into context the reason behind a decision by the competition authorities when the Secretary of State intervenes. The fact that the Secretary of State may decide on a merger solely on public interest grounds where he intervenes is also counter-productive as the decision of the competition authorities should always be taken into account.

iii. *Effect of public interest test*

In South Africa, public interest consideration in a merger assessment may have one of two outcomes. It can work to either prohibit a merger that is not anti-competitive having considered the adverse effect that the merger may have on public interest. It may also work to approve a merger that is anti-competitive where the benefits to the public interest are benign and off-set the negative effect of the competition test.

In the UK on the other hand, it appears that public interest will only be used to prohibit a merger based on one of the specified public interest grounds. The Enterprise Act provides for intervention of a merger assessment by the Secretary of State and enables him to prohibit a merger that runs contrary to any of the specified public interests. There is no mention of the fact that the Secretary of State has power to approve an anti-competitive merger based on public interest considerations.

iv. *Ability to adapt the law*

Both jurisdictions have a closed list of public interest consideration that may be taken onto account when assessing mergers.[179] As these are explicitly set out in legislation, the competition authorities cannot remove or add any other grounds or act outside these precepts.

In the UK, the public interest grounds that the Secretary of State can invoke when considering the impact of a merger on public interest are also a closed list. However, UK legislation gives the Government power to change these grounds, "The Secretary of State may by order modify this section for the purpose of specifying in this section a new consideration or removing or amending any consideration which is for the time being specified in this section."[180] An advantage of this proviso is that it allows for adaptability to developments in law and other factors that may be necessary to take into consideration when assessing mergers. This was evidenced by adapting the law with regards to the 2008 global financial meltdown which prompted an addition to the public interest ground (The

[174] S 58 Enterprise Act 2002 Chapter 40.

[175] S 12A(3) Competition Act and S 58 Enterprise Act.

[176] The South African Competition authorities have to consider a competition analysis first in terms of S 12A(1) and S12A(2) and then consider public interest considerations set out in S 12A(3). In the UK, the CMA carries out a competition test and the Secretary of State may intervene and consider public interest cases.

[177] S 12A Competition Act 89 of 1998.

[178] S 22(1) Enterprise Act 2002 Chapter 40.

[179] S 12A(3) of the Competition Act recognises four public interest considerations while S 58 of the Enterprise Act recognises three specific public interest considerations.

[180] S 58(3) Enterprise Act 2002 Chapter 40.

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interest of maintaining stability of the UK financial system) provided for by the Act.[181]

d) Summary

While there are a number of similarities in the UK and South African systems of merger assessment, there are also a number of marked differences. There are differences with regards to responsible authorities for carrying out different aspects of merger assessment, differences in the procedure of carrying out the merger assessment and differences in the powers that different authorities have. The natural inclination where there are differences between two or more systems is to attempt to find the most effective and better system. This is not the case in this situation. The differences in the substance and approaches of the two systems have to be considered in the context of the history of competition law in each country and the histories of the countries as a whole.

The UK does not give any consideration to public interest in assessing mergers because even in the old regime, the public interest had almost become abrogated by disuse, "Although in recent years it has been rare for merger cases to be decided on anything other than competition grounds…"[182] There was no need for the public interest test, which was also considered to be vague.

The South African situation on the other hand is very different. Bearing in mind not only the history of competition but the country as a whole and the past injustices of the Apartheid regime, most legislation enacted seeks to correct the wrongs of that era and the Competition Act is no exception. The competition policies of the Apartheid regime led to a lot of concentration of the economy, it was therefore imperative to include and embed public interest grounds such as employment and black economic empowerment into the Act so as to specifically protect and advance those interests.

It is reasonable to conclude that while both systems have their differences, the common denominator is that they both recognise and protect public interest, albeit on different levels and affording them different weight in the merger assessment process. The different systems both work well in their respective jurisdictions, because of the context in which they are applied. It is therefore unnecessary to want to change or adapt the South African system to any other system because of its unique history.

[181] A. Seely, 'Takeovers, The public interest test', standard note SN5374, September 2014, p. 4.

[182] Department of Trade and Industry, 'The enterprise Act, Competition Reform', Regulatory impact assessment, 2002, p. 10.

Chapter 5

V. Conclusion

a) Justification of the inclusion of public interest considerations in the Act

The rules of the market game that include competition rules can enhance market outcomes by promoting not only the achievement of efficiencies but also greater equity. To this extent, South Africa's competition law is progressive in its explicit incorporation of public interest considerations; whereas even mature jurisdictions shy away from such potentially contentious territory.[183]

Considering the history of South Africa, the nature of the economy and the unequal distribution of wealth and resources that resulted from unfair and unjust apartheid economic policies, the inclusion of public interest considerations in the Competition Act is justified. Putting everything into a historical context, there needed to be an impermeable policy that would seek to address such inequalities in the field of competition law. Employment creation and black economic empowerment are major challenges to sustainable development in South Africa and explicit reference to these factors is thus to be expected in a significant area of policy and law such as the Competition Act. In some sense this provides a balance of considerations in the challenge to develop a set of complementary policies and laws to facilitate enterprise development and the achievement of broader socio-economic objectives.[184]

David Lewis argues that public interest considerations weigh more heavily in developing countries than they do in developed countries.[185] The reasons for this are instructive; first, it is widely accepted that there is a greater role for industrial policy, for targeting support at strategically selected sectors or interest groups, in developing rather than in developed countries.[186] Secondly, developing country competition authorities are still engaged in a very basic struggle to achieve credibility and legitimacy in their countries, thus:

[183] T. Hartzenberg, 'Competition Policy and Enterprise Development', The role of public interest objectives in South Africa: Competition Policy, pp. 19-20 in W. Myeni, Public Interest and merger controls in South Africa, The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations, LLM Dissertation, University of Cape Town, 2008, p. 48.

[184] W. Myeni, Public Interest and merger controls in South Africa, The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations, LLM Dissertation, University of Cape Town, 2008, p. 49. www.uctscholar.uct.ac.za (accessed 2014-10-28).

[185] D. Lewis, 'The role of public interest in merger evaluation', International Competition Network, Merger Working Group, Naples 28-29 Sept 2002, p. 2.

[186] Ibid.

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> In a country like South Africa, while we in the competition authorities may understand the pitfalls in balancing competition and public interest, we equally recognise that a competition statute that simply ignored the impact of its decisions on employment or securing a greater spread of black ownership would consign the Act and the authorities to the scrap heap.[187]

It is therefore evident that in a developing country such as South Africa, while economic growth and development is paramount, there are broader social factors that should be considered in attempting to further that economic growth.

The institutional framework of competition law prior to 1994 lay with the Competition Board as mandated by the Competition Act of 1979, which had powers to start an investigation into merger activity of its own volition.[188] However, the competition law was fully integrated into the structure of Governmentand had no political independence, the implications being that it was used by the ruling party as a tool to protect their economic interests even though they were in the minority.[189] It thus became necessary to change the whole of competition policy so as to extend protection to the majority of South Africans. The new policy had to go above and beyond the scope of just economic competition policy; it had to contribute to changing the ownership structure of the economy so as to allow redistribution of wealth.[190] This saw the introduction of the new Competition Act and with it provision for the consideration of public interest in merger regulation.

The cases discussed above are testament to the fact that competition law is one of the instruments used to promote South Africa's non-competition objectives. The incorporation of public interest in the Act does not override the underlying competition policy objectives. It is submitted that if anything, the public interest provision plays an ancillary role in furthering the objectives of competition policy.

The inclusion of non-competition objectives in the Act is an example of how the principles of international antitrust law may be achieved even though non-competition factors are incorporated into legislation. Such incorporation sets the South African system apart from others, customising antitrust law to suit its history and context. Such inclusion can be justified by noting that their purpose is not to circumvent the objectives of competition policy but rather to further them. Evidence to this is that to date, no merger has been barred because of the inclusion and consideration of public interest considerations. This is because the South African competition authorities will always view public interest as being secondary to competition objectives. It will always be assessed second, after a merger has either been approved or prohibited based on purely competition grounds.

It must be borne in mind that South Africa is an independent country, with a unique history and therefore unique needs. In any jurisdiction around the world, policies are made in response to the conditions prevalent in that jurisdiction, to solve problems pervasive in that society and to further its development. Likewise, the South African competition policy was formulated as a direct response to the serious need to further the socio-economic rights of the majority of South Africans, hence the inclusion of non-competition objectives in the Act. The inclusion of public interest objectives in the Act was a way to address the inequalities that were brought about by the Apartheid policies. Black economic empowerment and employment are major societal concerns which also form part of the national policy objectives. It is unthinkable that reference to these key concerns would have been omitted from a piece of socio-economic legislation as significant as the Competition Act.[191]

The Act seeks to spread ownership to previously disadvantaged individuals and protect the interests of such individuals. The need to promote black ownership and create jobs for those disadvantaged by the Apartheid regime's policies is a story unique to South Africa. It is plausible to reason that under such circumstances, the policies of Government and other instruments that seek to promote Governmental objectives should also be unique.

b) Criticism of the inclusion of public interest considerations in the Act

There have been a number of criticisms levelled against the inclusion of public interest in the Competition Act. The major argument being that competition legislation should seek to further the objectives of competition policy and not include any political, non-competition objectives.[192] Competition policy should purely be based on competition issues and the object of implementing controls to promote competition within a market. Non-competitive objectives such as promotion of employment that falls outside the scope of the

[187] Ibid

[188] W. Myeni, Public Interest and merger controls in South Africa, The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations, LLM Dissertation, University of Cape Town, 2008, p. 50. www.uctscholar.uct.ac.za (accessed 2014-10-28).

[189] Ibid p. 51.

[190] Ibid p. 52.

[191] W. Myeni, Public Interest and merger controls in South Africa, The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations, LLM Dissertation, University of Cape Town, 2008, p. 54. www.uctscholar.uct.ac.za (accessed 2014-10-28).

[192] R.W. Duncan, 'The Competition Act, 1998: An Economic Perspective',*The South African journal of Economics*, vol. 67, 2, 1999, p. 257.

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Competition Act should not be included in competition policy.[193]

One of the criticisms levelled against the inclusion of public interest is the definition and scope of what 'public interest' entails, with it being open to many different interpretations.[194] While the Act provides a closed list of public interest grounds that should be considered in proposed merger evaluations, there is an opinion that there is no predefined public interest; therefore any regulation based on pursuing the objective is necessarily open to individual interests.[195] The scope for error, flexible interpretation and subjectivity of judgement seems great. Prospective local and foreign investors could then be well deterred from takeover activity if there are to be unknown and unpredictable reactions by the authorities.[196] A reduction in such activities could adversely affect exports, corporate tax revenue and hamper possible spinoff demand for products of small and medium enterprises.[197] What the uncertainty created by the inclusion of non-competition issues does is that it threatens the very competition policy principles the Act is founded on through the scaring off of potential investors.

Another criticism of the inclusion of public interest considerations is that they have no place in competition law as they are political and not competition objectives.[198] The defined public interest grounds include socio-economic objectives that also form part of the national development objectives. It is argued that in relying on competition policy to achieve such national goals is inappropriate.[199] There are more specific and directed pieces of legislation to protect these socio-economic rights of consumers.[200] Major concerns such as employment and advancement of black economic empowerment are specifically provided for by legislation such as the Labour Relations Act[201] and Broad Based Black Economic Empowerment Act[202] respectively.

Duncan argues that the aim of competition policy is not to become a redistribution tool.[203] The overall welfare is seen as greatest when the resources of a society are allocated in the economy so that consumers are able to satisfy their wants as far as technological and physical constraints permit.[204] In this way, the wealth of the nation is maximised. The aim of competition policy should be to help bring about this result.[205] Where Government wishes to include other (political) objectives into application of competition policy then it poses a large challenge to the credibility and duty of competition policy.[206] Antitrust authorities may note such goals but they are the responsibility of other agencies.[207]

The inclusion of the public interest element in merger evaluation has also been criticised for creating a lot of unnecessary litigation, resulting in unnecessary delays in merger decisions. This has had a negative impact on the competition authorities as the workload of the Tribunal and the Commission has overwhelmingly been concentrated on merger control.[208] In most hostile takeovers[209], the target firm will rely on public interest grounds as a last ditch attempt to prevent such transaction.[210]

Where pure competition issues fail, the public interest is invoked with enthusiasm. Firms that are not known for their love of labour or employment become overnight the standard bearers of social equity.[211] This has been the case dating back to the failed Nedbank bid for Standard bank through to *Harmony/ Goldfields* saga and to the bid of the HCI for Johnnic.[212]

In *Harmony Gold Mining Company Limited/ Gold Fields Limited*[213] Gold Fields asked the Competition Tribunal to block a merger between the two firms on public interest grounds alone, where the merger did not substantially prevent or lessen competition.

[193] Ibid.

[194] W. Myeni, Public Interest and merger controls in South Africa, The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations, LLM Dissertation, University of Cape Town, 2008, p. 40. www.uctscholar.uct.ac.za (accessed 2014-10-28).

[195] T. Hartzenberg, 'Competition Policy and Enterprise Development', The role of public interest objectives in South Africa: Competition Policy, p. 19.

[196] R.W. Duncan, 'The Competition Act, 1998: An Economic Perspective',*The South African journal of Economics*, vol. 67, 2, 1999, p. 283.

[197] Ibid.

[198] Ibid.

[199] Ibid.

[200] Ibid.

[201] 66 of 1995.

[202] 53 of 2003.

[203] R.W. Duncan, 'The Competition Act, 1998: An Economic Perspective',*The South African journal of Economics*, vol. 67, 2, 1999, p. 283.

[204] Ibid.

[205] Ibid p284.

[206] Ibid.

[207] Ibid.

[208] W. Myeni, Public Interest and merger controls in South Africa, The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations, LLM Dissertation, University of Cape Town, 2008, p. 43. www.uctscholar.uct.ac.za (accessed 2014-10-28).

[209] A hostile takeover occurs where a target firm is acquired by another firm (acquiring firm) by going straight to the target firm's shareholders and not through a negotiated agreement with management.

[210] N.Manoim,'The role of Competition authorities in hostile takeovers and its inter-relationship with the Securities Regulation Panel',Speech delivered at the Annual Gala event of the Competition Law Committee, 15 November 2005.

[211] Ibid.

[212] Ibid.

[213] 93/LM/Nov04.

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The claim from Gold Fields was that if a merger raised no competition problems and no negative public interest issues, it must still be prohibited if there is no evidence that it can be justified on public interest grounds.[214] This argument was based on section 12A(3) of the Act, which makes it mandatory for there to be a public interest test in every merger evaluation regardless of the outcome of the competition test. Gold Fields argued that firstly the competition authorities must consider whether the merger cannot be justified on public interest and secondly to consider whether a merger can be justified on public interest.[215] They continued to argue that where there is no evidence that the merger can be justified on public interest grounds, it must be prohibited.[216] What Gold Fields sought to claim was that unless a merger had a positive public interest gain, it was not supposed to be approved. The Tribunal found that the conclusion had far reaching implications as it would render a lot of mergers that came before the Tribunal susceptible to prohibition.[217]

The litigation resulted in a delay of the merger. It is submitted that such delays caused by conducting lengthy and unnecessary public interest analysis may be bad publicity for South Africa's reputation in the international antitrust law arena. Such delays may be problematic for parties hoping to close an international deal as soon as possible, which might in turn shut out investors.

c) Conclusion and Recommendations

It can be argued that many regimes claim to uphold a 'pure' competition analysis whilst responding to overwhelming public interest by tailoring competition analysis to support a decision that has been actually made on public interest grounds. In the case of South Africa, there is no necessity to engage in such obfuscation, as the competition authorities are explicitly required to consider public interest.[218]

The Act, having recognised public interest considerations, provides for the balancing of the public interest grounds with competition factors as well. The Act specifically sets out the sequence to be followed in the merger evaluation process, with competition considerations being assessed first and the public interest factors being assessed second. The provision for a balance presupposes the existence of at least two aspects that have to be assessed together. In the case of merger evaluation those two aspects are competition concerns and public interest considerations. There cannot be one test without the other, which explains why to date, no decision has been made by the competition authorities based on public interest considerations alone.

The need for a balancing between competition and public interest considerations shows that public interest is not more important than the competition analysis. The responsibility that is also placed on the competition authorities to carry out this balancing of factors points to the fact that while public interest is considered, competition concerns remain the focal point as competition authorities are tasked with carrying out the analysis. It is submitted that the two pronged test is the correct one, with competition analysis taking precedence. The two pronged approach is effective in creating a coherent position for public interest considerations in merger control.

The primacy of competition considerations is reiterated through the fact that it is the initial test to be carried out in the evaluation of a proposed merger. The public interest test is conducted based on the outcome of a completed competition analysis. The precedence of the competition analysis coupled with the competition authorities carrying out the analysis reaffirms the primacy of competition and the subordinate nature of the public interest considerations.

The structure of the Act with regards to the two pronged approach is cardinal in underpinning a developing system of law that has the principal decision being made based on competition grounds with public interest considerations seeking to ameliorate the negative impact of the merger through imposition of conditions where applicable. The structure therefore creates a check for the competition considerations, through assessing their impact on the public and striking a compromise that is beneficial to both competition policy and public interest.

With regards to the difference with other jurisdictions in expressly providing for public interest considerations it has to be borne in mind that every jurisdiction is unique and its policies will be tailored to match the demand in society. Lewis remarks that:

> No public agency that relies on public support can escape the influence of a strongly held public interest. It is inevitable that in a developing country such as South Africa, where distributional poverty problems are at the forefront, all social and economic policies are expected to contribute to the alleviation of these problems.[219]

The inclusion of public interest considerations in the Competition Act is in direct response to the socio-

[214] Ibid at para 33.
[215] Ibid at para 34.
[216] Ibid.
[217] Ibid at para 35.
[218] W. Myeni, Public Interest and merger controls in South Africa, The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations, LLM Dissertation, University of Cape Town, 2008, p. 56. www.uctscholar.uct.ac.za (accessed 2014-10-28).
[219] D. Lewis, 'The role of public interest in merger evaluation', International Competition Network, Merger Working Group, Naples 28-29 Sept 2002, p. 3.

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economic needs of South Africans. There is need to advance employment, black economic empowerment and the thriving from small businesses so as to set off the effects of the Apartheid competition regime that concentrated power and ownership in the hands of a few.

The inclusion of public interest in merger evaluation is not evidence of a fatally compromised competition regime. In one way or another, it is a feature of most regimes and in those regimes where it is a particularly strong feature, serious consideration of the public interest by competition authorities is likely to underpin the credibility of fledgling authorities.[220]

Taking into consideration the above discussion on different histories of different jurisdictions influencing policy, I strongly recommend that public interest remain a part of the Competition Act as it plays a fundamental role as one of the instruments used to redress past inequalities. The recognition of public interests does not circumvent the purpose of the Act, if anything it helps to advance objects such as employment creation and protection and the spread of ownership to more South Africans.

There may be need for the Legislature to reconsider some of the aspects with regards to public interest in merger evaluation. For example, rather that analysing public interest grounds as the second part of the merger evaluation process public interest should be invoked as defence to a merger that has been found to be anti-competitive. The 'janus-faced' system should rather adopt an approach akin to that of the United Kingdom where public interest only has one role to play, which is to prohibit a merger where the specified grounds have been considered and it is found to be against public interest.

In the same light, the public interest considerations in South Africa must only be invoked as a defence that attempts to save an anti-competitive merger by offsetting the anti-competitive effect with the positive effect the merger will have on public interest. Such an approach will in turn reduce the number of vexatious litigations as some cases brought to the authorities on public interest grounds are a last ditch attempt to invoke frivolous claims based on public interest.

The approach will also lessen the work load of the competition authorities, or at least lessen the number of merger cases that they have to adjudicate so that they can focus on other aspects of competition law. Lastly the change in approaches will also bring about a level of legal certainty as to whether or not a merger can be prohibited based on public interest considerations, as it will clearly define what can and cannot be done by invoking public interest.

[220] Ibid p. 4.

It is evident from the above discussion and from the analysis of above cases that the South African competition authorities have not been arbitrary in the application of the public interest provision. There has been a very careful approach to the balancing of public interest concerns and competition issues in the evaluation of mergers since the inception of the Competition Act 89 of 1998.

Bibliography

Acts

1. Basic Conditions of Employment Act 75 of 1997.
2. Broad Based Black Economic Empowerment Act 53 of 2003.
3. Canadian Competition Act R.S.C., 1985, c. C-34.
4. Employment Equity Act 55 of 1998.
5. Enterprise Act 2002 Chapter 40.
6. Fair Trading Act 1973 Chapter 41.
7. Labour Relations Act 66 of 1996.
8. Republic of South Africa Competition Act 89 of 1998.
9. Skills Development Act 97 of 1998.
10. United Kingdom Competition Act 1998 c. 4.1

Articles and Conference Papers

11. Antony Seely, Takeovers, The public interest test, standard note SN5374, September 2014.
12. David Lewis, The role of public interest in merger evaluation, International Competition Network, Merger Working Group, Naples, 28-29 September 2002.
13. Department of Trade and Industry (South Africa), Proposed guidelines for competition policy, A framework for competition and development, 27 November 1997.
14. Department of Trade and Industry (UK), The Enterprise Act, Competition Reform – Regulatory impact assessment, 2002.
15. James Hodge, Sha'ista Goga and Tshepiso Moahloli, Public interest provisions in the South African Competition Act – A critical review, Competition Policy, Law and Economics Conference, 2009.
16. Norman Manoim, The role of competition authorities in hostile takeovers and its inter – relationship with the Securities Regulation Board, 15 November 2005.
17. Reekie Duncan W, The Competition Act 1998: An economic perspective. The South African Journal of Economics 67(2) 1999.
18. Slaughter and May, UK Merger Control Under the Enterprise Act 2002, 2009.
19. Trudi Hartzenberg, Competition Policy and Enterprise Development, The role of public interest objectives in South Africa's Competition Policy, August 2004.

© 2015 Global Journals Inc. (US)

20. Vani Chetty, The place of public interest in South Africa's competition legislation, ABA section of antitrust law, 53rd Spring Meeting, March 30 – April 1 2005.

Books

21. Competition Commission and Competition Tribunal. Unleashing Rivalry, Ten years of enforcement by the competition authorities [1999 - 2009] Pretoria 2009.
22. Francois du Bois, Wille's Principles of South African Law, 9th Ed, Juta, Cape Town, 2007.
23. MartinBrassey, Competition Law, 1st Ed, Juta, 2002.
24. Minette Neuhoff, A Practical Guide to South African Competition Policy and Law, LexisNexis, Durban, 2006.
25. Phillip Sutherland and Katherine Kemp, Competition Law of South Africa, binder issue 17, LexisNexis, Durban, 2013.
26. Richard Whish, Competition Law, 6th Ed, Oxford University Press, UK, 2008.

Case Law

27. Anglo American Holdings Ltd/ Kumba Resources Ltd with Industrial Development Corporation intervening 45/LM/Jun02 and 46/LM/Jun02.
28. Competition Commission v Pioneer Foods (Pty) Ltd 15/CR/Feb07 and 50/CR/May08.
29. Daun et Cie AG/ Kolosus Holdings Ltd 10/LM/Mar03.
30. Distillers Corporation (SA) Limited/ Stellenbosch Farmers Winery Group Ltd 08/LM/Feb02.
31. Harmony Gold Mining Co/ Gold Fields Ltd 93/LM/Nov04
32. Medicross Healthcare Group (Pty) and Prime Care Holdings (Ltd) [11/LM/Mar05] ZACT 66.
33. Metropolitan Holdings Limited and Momentum Group Limited 41/LM/Jul10.
34. Nampak Ltd/ Malbak Ltd [2004] 2 CPLR 337 (CT).
35. National Pers Ltd/ Education Investment Corporation Ltd 24/LM/May03.
36. Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd 66/LM/Oct01
37. Tiger Brands Ltd and Ashton Canning Company and Others 46/LM/May05.
38. Tongaat-Hullet Group Ltd/ Transvaal Suiker 83/LM/Jul00.
39. Unilever PLC/ Competition Commission/ CEPPWAWU [201-2002] CPLR 336 (CT).
40. Wal-Mart Stores Inc and Massmart Holdings Ltd 73/LM/Nov10.

Dissertation

Wenzile Myeni, Public interest and merger controls in South Africa. The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations. University of Cape Town, 2008.

Websites

www.compcom.co.za
www.comptrib.co.za
www.dti.gov.za
www.gov.uk
www.slaughterandmay.com
www.uctscholar.uct.co.za

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