



Public interest considerations under the Competition Act No. 89 of 1998 and the effect on Foreign Direct Investments (FDIs) in South Africa

LLM Mini Dissertation

By

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**Submitted in partial fulfilment of the requirements of the degree
LLM (Mercantile Law)**

**Prepared under the supervision of
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At The

Faculty of Law, University of Pretoria, South Africa

30th October 2014



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DECLARATION

I, Ikho Tshweza, hereby declare that this mini-dissertation is original and has never been presented in the University of Pretoria or any other institution. I also declare that any secondary information used has been duly acknowledged in this mini-dissertation.

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ACKNOWLEDGEMENTS

When I decided to embark on this journey, I knew that it would not be easy but there was a light at the end on the tunnel. To reach any destination requires strength within the inner self and help and encouragement from others. I would like to express my sincere thanks and gratitude to the Department of Mercantile Law, Faculty of Law, at the University of Pretoria for granting me this opportunity.

My heartfelt gratitude goes to my supervisor Professor Corlia Van Heerden for her professional assistance in ensuring that this mini-dissertation reached a successful end and completion.

Also, I would like to thank the staff of OR Tambo Law library, University of Pretoria and the staff of Muckleneuk library, University of South Africa, for their constant assistance and encouragements.

Lastly, but not least, I would like to thank whole heartily the tremendous patient exhibited by my wife (Zikhona Tshweza) and her encouragements and willingness to support me throughout this journey and assisting with the editing of this mini-dissertation. My thanks also go to my mother and brother (Tembisa Tshweza and Akho Tshweza) as well as my children for supporting me through this journey and wishing me the successful completion of this mini-dissertation.



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1 CHAPTER 1

1.1 Introduction and background

South African competition policy and law recognise the importance of public interest considerations. According to Hantke-Domas, who is quoted by Boshoff, Dingley and Dingley, “public interest in the legal context has more to do with the realisation of political and moral values and it is this concept of public interest that informs the decision-makers on how to decide disputes where there is a conflict.”¹

These values are for example clearly defined in the merger review section of the Competition Act,² hereinafter referred to as the Act, and that the relevant competition authority must consider whether the proposed transaction can or cannot be justified on certain public interest grounds which include, employment, the competitiveness of small business and firms controlled or owned by previously disadvantaged persons, national industries competitiveness in international markets and the impact of a merger on a particular industrial sector or region. The Act differs from other legislation of other jurisdictions in that it provides an innovative inclusion of public interest objectives as part of the assessment of competition issues rather than as a separate assessment or decision. The Act is different in that it has provided mechanisms for resolving conflicts between policy and competition considerations by placing the determination of public interest considerations in the hands of the independent competition authorities.

According to David Lewis the former chairman of the Competition Tribunal, the inclusion of public interest grounds in merger review is one of the aspects of the Act that generated enormous controversy when the Act was promulgated.³ He indicates that the business community advocated for the omission of the public interest grounds in the legislation but everyone involved in the negotiating process recognised that no major socio-economic legislation would have passed muster without incorporating job creation and Black Economic Empowerment (BEE) into the overall

¹ Boshoff, Dingley and Dingley *The Economics of Public Interest Provisions in South African Competition Policy*: available at <http://www.compcom.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf> (accessed 25 October 2012).

² See chapter 3 of the Competition Act No. 89 of 1998.

³ Lewis *Enforcing Competition Rules in South Africa: Thieves at the Dinner Table* (2013) 109.



objectives of the policy and the legislation.⁴ This resulted in the Act being written in such a way that explicitly acknowledges the importance of public interest and thus provides a role for the consideration of factors that go beyond the boundaries of competition. These public interest considerations and objections are initially outlined in the preamble, the purpose of the Act and then stipulated as a consideration in the assessment of both of exemptions and mergers.⁵

In reviewing proposed mergers transactions, the Competition Commission or Tribunal must for example first consider the impact on competition.⁶ If there are adverse implications for competition, then it must determine whether there are offsetting gains and whether the merger can be justified on public interest grounds.⁷ As indicated above, this balancing act is done by assessing the transaction against a number of specified public interest factors, namely the impact on a region, on employment, on international competitiveness and on promoting the spread of BEE. This balancing act always raises the question of whether the public interest considerations that are being evaluated are informed by consumer welfare interests or whether the inquiry is based on advocating and upholding total welfare. According to David Lewis, the balancing act is a tricky exercise which should be the responsibility of competition authorities as envisaged in our Act.⁸ He believes that competition bodies have the requisite expertise in reconciling the public interest considerations with competition considerations as opposed to “Minister or other public official may be tempted, particular in a society with an underdeveloped competition culture, to give undue weight to the strength of the social forces supporting the public interest in question.”⁹

David Lewis’ reconciliatory approach to public interest is more progressive to the landmark case of *Shell/Tepco*¹⁰ where the Competition Tribunal indicated that the Competition Commission should not apply the public interest considerations such as BEE in an overzealous manner and that other

⁴ Lewis (2013) 110.

⁵ See Hodge, Goga and Moahloli *Public interest provisions in the South African Competition Act: A critical review* contained in Moodaliyar K and Roberts S *The Development of Competition Law and Economics in South Africa* (2012) 3.

⁶ Hodge, Goga and Moahloli (2012) 3.

⁷ Hodge, Goga and Moahloli (2012) 3.

⁸ Lewis D *Presentation on The Role of Public Interest in Merger evaluation* at International Competition Network: Merger Working Group, Naples (28-29 September 2002): available at <http://www.comtrib.co.za/assets/Uploads/Speeches/lewis5.pdf>.

⁹ Lewis (28-29 September 2002).

¹⁰ *Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd* Case No. 66/LM/Oct01 para 58.



legislative prescripts like the Employment Equity Act, the Skills Development Act and the Petroleum Charter were more appropriate legislative instruments.¹¹

1.2 Research problem

The public interest considerations are more defined and developed in the part of the Act that deals with mergers. Section 12 A outlines the factors that must be taken into account when evaluating a merger transaction and public interest grounds are clearly specified in section 12 A(3). However the problem that is encountered by competition authority during the merger evaluation is the balancing of public interest grounds against other pro-competitive grounds so that the outcome receives a weighting that is warranted.

The potential uncertainty that arises during the merger evaluations is as follows:

- a) Whether competition authorities are evaluating the public interest grounds through the prism of the competition evaluation or through a wide perspective that incorporates public good and welfare.¹²
- b) Whether the public interest provisions can amount to a potential abuse by the executive through using them as a lever to attaining ill-considered foreign investment and trade policy.¹³

These uncertainties then lead to the question of whether the interpretation by competition authorities, courts and South African government of the public interest test under the Act has had a negative effect or contributed to any decline in foreign direct investments into South Africa.

1.3 Research objectives and limitations of the study

This study follows a premise that South African competition law is still at a developmental point and needs to find its make-up like other emerging economies so that it gives clarity and certainty to foreign investors on how it evaluates public interest considerations in merger

¹¹ Lewis (28-29 September 2002).

¹² Lewis (2013) 112.

¹³ Lewis (2013) 128.



transactions. Such certainty should also spill over to policy formulation so that a South African policy on FDIs is developed. This study will therefore review whether the use of the public interest criterion has a negative or positive effect on FDI inflows into South Africa. The study then introduces a multidisciplinary approach in addressing this problem and will seek to evaluate the following:

- To look at key South African decisions by competition authorities and courts that adjudicated on public interest considerations in merger regulation under the Act and evaluate whether such decisions provide certainty on how South Africa deals with mergers with public interest concerns.
- To evaluate the South African government's foreign investment policy on cross border mergers and look at whether it has provided certainty on how South Africa deals with mergers that have public interest concerns.
- To comparatively look at competition policies and legislative frameworks of developed economies such as the European Union and investigate on how they regulate mergers with public interest concerns. Such analysis will assist at the end of the study in determining whether the South African regulation and adjudication of such mergers is aligned with international practices and trends.
- To advance a conclusion that indicates whether the interpretation by competition authorities, courts and South African government of the public interest test under the Act has had a negative effect or contributed to any decline to foreign direct investments into South Africa.

The study will be limited to a focus on the evaluation of public interest considerations in merger reviews and will not investigate other factors that inhibit FDIs inflows into a country such as taxation laws, foreign exchange regulation, easiness of setting up a business or foreign entry regulation, etc.

1.4 Research methodology

The research study will adopt a multidisciplinary perspective (with respect to competition law and law on foreign investments) in an attempt to provide clarity on whether the evaluation of public interest consideration under the Act has had an effect of FDIs in South Africa.



A qualitative approach, comprising of a literature overview on public interest considerations, as well as trade and investment law will be used to conduct the research.

Information will be gathered from various sources such as literature study of books, South African competition case law with special focus on public interest considerations in merger regulation, journal articles, electronic articles, policy documents and legislation in achieving the research objectives. Moreover the research will undertake a comparative study by reviewing literature, legislations and case law from developed and developing economies and look at the mechanisms and regulatory frameworks that have been put in place by these economies in reviewing mergers with public interest concerns.

1.5 Research benefits

The following parties will benefit from the study of public interest consideration and their effects on FDIs in South Africa:

1.5.1 The researcher

The researcher works for South African National Space Agency and this organ of state enters into various Public Private Partnerships (PPP) and Commercial Agreements with multinational corporations which have an interest in developing South Africa and other African countries in the area of Aerospace and Satellite Development. This study will broaden the knowledge base of the researcher and improve his ability to effectively advise the multinational corporations on South Africa's foreign direct investment policy and how public interest considerations are dealt with under the policy and by South African competition authorities.



1.5.2 University of Pretoria

The research product will form part of the University database for future reference and will be used by the Mercantile Law department and students doing research and courses related to the area of competition law.

1.5.3 Competition authorities and other organs of state

The research study and its findings can be used by the Competition Commission of South Africa when evaluating merger transactions.

Departments like the National Treasury (NT), Department of Trade and Industry (DTI) and Department of Economic Development (DED) can use the study in policy development which will assist with policy harmonisation and certainty.

1.5.4 Competition, trade and investment law practitioners

The findings of this study could assist competition, trade and investment law practitioners and hopefully clear some uncertainty about how public interest considerations should be evaluated in merger transactions. This could improve the quality of service these practitioners provide to their clients when advising them on the merger transaction as well as improve content of the competitiveness report when notifying the merger transaction.

1.6 Chapter Outline

Chapter 2: Public interest provisions in the Act and interpretation by South African landmark cases

The research study in chapter 2 will detail the different areas in the Act where the public interest provisions are outlined. The chapter will then focus on how our competition authorities and courts have evaluated the public interest criterion in merger reviews and a landmark case,



*Shell/Tepco*¹⁴ will be analysed. Recent merger cases like *Wal-Mart/Massmart*,¹⁵ *Metropolitan/Momentum*¹⁶ and other landmark cases dealing with public interest evaluation will also be critically analysed by the research study as they have brought a different dimension and innovative conditions being imposed on merging parties. The chapter will also evaluate the approach and nature of conditions that have been set by competition authorities in adjudicating mergers public interest considerations.

Chapter 3: South African government's policy on merger transactions

The research study in chapter 3 will investigate the South African government's position when intervening in merger transaction with public interest concerns. In recent high profile merger transactions such as that of *Wal-Mart/Massmart as well as the Kansai /Freeworld*,¹⁷ government's intervention has been viewed as using competition law as means of substitution for industrial or trade policy.¹⁸ The chapter will critically analyse the current government foreign investment policy and legislative proposals on cross border mergers and look at whether it has provided certainty on how South Africa deals with such mergers with public interest concerns.

Chapter 4: European Union position on the assessment of public interest considerations in merger review

According to Davis Lewis, "public interest considerations weigh more heavily in developing countries than they do in developed countries. 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 than in developed countries; secondly, developing country competition authorities are still engaged in a very basic struggle to achieve credibility and legitimacy in their countries."¹⁹ Chapter 4 of the research study will do a comparative analysis and look at policy and regulatory framework of the European Union (EU). The chapter will focus more at the EU level and will have limited observation on the policy and regulatory frameworks of member states.

¹⁴ *Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd* para 58.

¹⁵ See *The Minister of Economic Development and Others v The Competition Tribunal and Others* CAC Case no. 110/CAC/Jul11 and 111/CAC/Jun11.

¹⁶ *Metropolitan Holdings Limited / Momentum Group Limited* Case no. 41/LM/Jul10.

¹⁷ *Kansai Paint Co.Ltd / Freeworld Coatings Ltd* Case no. 53/AM/Jul11.

¹⁸ See Boshoff, Dingley and Dingley (accessed 25 October 2012).

¹⁹ Lewis (28-29 September 2002).



The first part of the chapter will outline the social and economic considerations that have informed the EU competition policy. The second part of the chapter will detail the application of EU merger control provisions and regulatory provisions in relation to public interest considerations. The EU comparative analysis is important for bench marking purposes and will provide some light on whether the South African public interest provisions are a norm in the global economics arena.

Chapter 5: Conclusion and recommendations

Lastly, chapter 5 of the research study will conclude by critically examining South Africa's performance and position as a friendly investment destination. This analysis will evaluate whether the interpretation by competition authorities, courts and South African government of the public interest provisions under the Act has provided investment certainty or whether negative effect of such interpretation has contributed to any decline to foreign direct investments into South Africa. According to the Global Competition Review, South African competition authorities have adopted an increasingly adversarial approach to mergers transitions, particularly ones involving foreign entities.²⁰ The report further stated that there is a marked increase in the use of remedies or conditions within merger evaluations.²¹

Clearly these sentiments and perceptions are not good in the long run and need to be managed well. Data from other institutions such as the United Nations Conference on Trade and Development (UNCTD) World Investment Report and FDI figures from other research institutions and organisations will be examined to determine the authenticity of these claims. In conclusion the chapter will establish whether there is clear evidence that links the conditions imposed in mergers with public interest considerations and decline of FDIs in South Africa.

²⁰ *Global Competition Review*, available at, <http://www.globalcompetitionreview.com/features/article/31877/south-africas-competition-commission>, accessed 29 May 2012.

²¹ *Global Competition Review* (accessed 29 May 2012).



2 CHAPTER 2

2.1 Public interest provisions in the Act and interpretation by South African landmark cases

2.1.1 General

The public interest grounds as indicated in chapter 1 are specifically outlined in the preamble, the purpose of the Act and then stipulated as a consideration in the assessment of both exemptions and mergers. The main objective of this chapter is to give full detail of these specified areas of the Act that outline the public interest provisions.

A brief background and context of each public interest provision will be outlined, however a more detailed account and focus of this dissertation will be expanded on the public interest provisions contained in merger review as they are more defined than any other provisions in the Act. This chapter will also critically analyse how the South African competition authorities and courts have interpreted public interest test in merger transactions. The analysis will be conducted through a focus on South African landmark cases by assessing the nature of the innovative conditions and remedies imposed by these rulings.

2.2 Public interest provisions in the Act

2.2.1 The Preamble

The preamble of the Act discusses the context and reasons for enacting the Act. The preamble reads as follows:

“The people of South Africa recognise:

- That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anticompetitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.
- That the economy must be open to greater ownership by a greater number of South Africans.
- That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.



- That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans.

In order to –

- provide all South Africans equal opportunity to participate fairly in the national economy;
- achieve a more effective and efficient economy in South Africa;
- provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;
- create greater capability and an environment for South Africans to compete effectively in international markets;
- restrain particular trade practices which undermine a competitive economy;
- regulate the transfer of economic ownership in keeping with the public interest;
- establish independent institutions to monitor economic competition; and
- give effect to the international law obligations of the Republic.”²²

This is the first place where public interest is referred to directly in the Act. In summary the preamble states that the Act is will benefit all South Africans and is necessary in order to regulate the transfer of economic ownership in keeping with public interest.²³

2.2.2 The purpose of the Act

The promulgation of the Act is an outcome of negotiations and consultations by government, labour and business community through a tri-partite forum. According to Ramburuth, the purpose of the South African competition law encompasses orthodox concerns related to efficiency, prices and choice.²⁴ Section 2 of the Act articulates the purpose of the Act as “promoting competition in order to realize goals related to employment and creation, equitable participation in the economy by small and medium-sized enterprises, a broader and more racially diverse spread of ownership and international competitiveness.”²⁵ The Act thus clearly defines and envisages a role for the

²² See Preamble, Competition Act No. 89 of 1998.

²³ See Hodge, Goga and Moahloli (2012) 5.

²⁴ Ramburuth *Recent Activities and Policy Priorities in South Africa* contained in Emch, Regazzini and Rudomino *Competition Law in the BRICS Countries* (2012) 214.

²⁵ Ramburuth (2012) 214.



competition process in rectifying the distortions and inequalities wrought on the economy and society by the apartheid regime.²⁶

According to Hodge, Goga and Moahloli, the articulated purpose of the Act can be seen as directly related not to competition principles, but rather to public interest.²⁷ These key themes of the purpose of the Act are also reiterated throughout the Act and developed further in the provisions detailing exemptions and mergers.²⁸

2.2.3 Public Interest considerations in exemption provisions

Public interest considerations are applicable in the assessment of whether or not an exemption can be granted to a practice or agreement that may be considered as a prohibited practice in terms of the Act.²⁹ The granting, refusing or revoking of an exemption is contained in Chapter 2, section 10 of the Act.³⁰ Section 10(3)(b) of the Act in particular outlines the four public interest considerations that are considered and are as follows:

- “(i) maintenance or promotion of exports;
- (ii) promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive;
- (iii) change in productive capacity necessary to stop decline in an industry; or
- (iv) the economic stability of any industry designated by the Minister, after consulting the Minister responsible for that industry.”³¹

2.2.4 Public Interest considerations in merger provisions

It was indicated in Chapter 1 that public interest considerations are more defined in part of the Act that deals with mergers and more fully developed in section 2A. Section 2A(1)(a)(ii) of the Act in particular states that in addition to competition and efficiency considerations, it is necessary to evaluate “whether a merger can or cannot be justified on substantial public interest grounds by

²⁶ Ramburuth (2012) 214.

²⁷ Hodge, Goga and Moahloli (2012) 5.

²⁸ Hodge, Goga and Moahloli (2012) 5.

²⁹ Hodge, Goga and Moahloli (2012) 6.

³⁰ Neuhoff, Govender, Versfeld and Dingley *A Practical Guide to the South African Competition Act* (2006)155.

³¹ Competition Act No. 89 of 1998.



assessing the factors set out in subsection (3).”³² Section 2A(1)(b) of the Act further states that the evaluation must “otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).”³³

Subsection 3 of the Act reads as follows: “When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –

- (a) A particular industrial sector or region;
- (b) Employment;
- (c) The ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
- (d) The ability of national industries to compete in international markets.”³⁴

The sections outlined above and part of the public interest component for mergers, will be examined in more detail in the next section by assessing how the competition authorities have interpreted these provisions.

2.3 Interpretation by competition authorities of public Interest considerations contained in merger provisions

A number of mergers with public interest considerations have been interpreted by the competition authorities since the advent of the Act. Section 2A (1)(a)(ii) of the Act, detailed in the previous section was interpreted by the Competition Tribunal in *Harmony Gold Mining/Goldfields*³⁵ to mean that public interest can work in two directions or can have both “adverse of benign effects.” According to Hodge, Goga and Moahloli, public interest can on one hand be used as a basis for approving an anticompetitive merger, and it can be used to prohibit a pro-competitive merger.³⁶ In *Harmony Gold Mining/Goldfields*,³⁷ the Tribunal further stated that a merger that has failed the competition test can still be passed on the public interest test and be approved. On the other hand a

³² Hodge, Goga and Moahloli (2012) 6; Competition Act No. 89 of 1998.

³³ Competition Act No. 89 of 1998.

³⁴ Competition Act No. 89 of 1998.

³⁵ See *Harmony Gold Mining Ltd / Goldfields Ltd* CT Case no. 93/LM/nov04 para 54.

³⁶ See Hodge, Goga and Moahloli (2012) 7.

³⁷ *Harmony Gold Mining Ltd / Goldfields Ltd* para 45.



merger that has passed the competition scrutiny in accordance with this section could still fail the public interest test and be prohibited.³⁸

According to Section 2A (1)(b) of the Act, authorities should further “otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).”³⁹ The use of the word ‘otherwise’ herein has been interpreted by the Tribunal to mean that an evaluation must be done, regardless of whether the competition analysis is positive or negative.⁴⁰

In *Anglo American /Kumba Resources*,⁴¹ the Tribunal interpreted the word ‘otherwise’ to mean that Public interest evaluation must still be undertaken by the Tribunal, regardless of the outcome of the section 12A (2) competition analysis. The tribunal further stated that “the public interest component can operate either to sanitise an anticompetitive merger or to impugn a merger found not to be anticompetitive.”⁴²

Section 2A (1)(b) of the Act, further requires that the public interest grounds should be ‘substantial’. Hodge, Goga and Moahloli, however assert that there is no guidance that is given in the Act in determining what constitutes ‘substantial’ public interest.⁴³ In the merger transaction between *Distillers/Stellenbosch Winery*,⁴⁴ the Tribunal indicated that the legislation ‘offers no criteria as a yardstick’. According to Hodge, Goga and Moahloli, the lack of guidance on how to interpret the ‘substantial’ public interest was also noted in the *Shell/Tepco*⁴⁵ merger, whereby the Tribunal indicated that the Act does not provide any guidance on how to balance the competition and public interest assessments.⁴⁶ The lack of guidance on this issue clearly is seen by Hodge, Goga and Moahloli as an indication that the legislature wisely does not seek to provide a formula on how to balance the competition and public interest assessments nor can it be assumed that a formula

³⁸ *Harmony Gold Mining Ltd / Goldfields Ltd* para 45; See also Hodge, Goga and Moahloli (2012) 7.

³⁹ Competition Act No. 89 of 1998.

⁴⁰ Hodge, Goga and Moahloli (2012) 7.

⁴¹ *Anglo American Holdings / Kumba Resources Ltd*, with Industrial Development Corporation intervening CT Case no. 46/LM/jun02.

⁴² *Anglo American Holdings / Kumba Resources Ltd*; See also Hodge, Goga and Moahloli (2012) 7.

⁴³ Hodge, Goga and Moahloli (2012) 8.

⁴⁴ *Distillers Corporation (SA) Ltd / Stellenbosch Farmers Winery Group* CT Case no. 08/LM/Feb02.

⁴⁵ *Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd* para 38; See also Hodge, Goga and Moahloli (2012) 8.

⁴⁶ See also Hodge, Goga and Moahloli (2012) 8.



should mean a uniform figure for all mergers as each assessment should depend on the particular context and situation.⁴⁷

2.4 Interpretation of the public interest considerations under subsection 12A (3)

According to David Lewis, the impact of a merger transaction on BEE and employment are two sets of public interest grounds that are mostly argued in practice.⁴⁸ He further states that the international competitiveness ground is mostly subsumed into the efficiency arguments for a transaction that lacks efficiencies and those that might be prohibited or conditions imposed.⁴⁹ The next part of this Chapter will assess the test and yardstick applied by competition authorities and courts when evaluating the two sets of public interest grounds.

2.4.1 Black economic empowerment grounds

According to Lewis, the BEE merger transactions have over the years been generally structured in a manner that involves an acquiring company finding a black partner, who in most cases were politically connected and presented during hearings held by competition authorities as the 'beneficiary of the transaction and representative of a class.'⁵⁰

The *Shell/Tepco* merger transaction is one of South Africa's classical cases which paved the way in outlining the approach that needs to be followed by competition authorities in evaluating BEE transactions. The proposed transaction involved a black owned company named Thebe Investment Corporation (Pty)Ltd (Thebe) which proposed to sell its subsidiary, Tepco Petroleum (Pty)Ltd (Tepco) to Shell South Africa (Pty)Ltd (SSA).⁵¹ Thebe was in return positioned to acquire a 25% stake in Shell South Africa Marketing (Pty) Ltd (Shell SA Marketing), a subsidiary of SSA, responsible for retail marketing, the marketing distribution network, commercial fuels, liquefied petroleum gas, aviation, marine, lubricants and bitumen.⁵²

⁴⁷ Hodge, Goga and Moahloli (2012) 8.

⁴⁸ Lewis (2013) 109.

⁴⁹ Lewis (2013) 109.

⁵⁰ Lewis (2013) 112.

⁵¹ *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* para 3.

⁵² *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* para 5.



As a result of the proposed transaction, Tepco was geared in a foreseeable future to remain a separate brand, distinct from Shell, and still be managed by the current management which was predominantly black.⁵³ Furthermore the transaction included an undertaking by Shell SA Marketing to retain the Tepco brand and develop it in the market for as long as it remains viable and profitable.⁵⁴ On face value the deal seemed plausible, however the Commission had public interest concerns regarding the disappearance of a black-owned petrol brand. This resulted in the Commission in recommending to the Tribunal to impose conditions in approving the transaction. When the matter came before the Tribunal, the Tribunal noted that its role is secondary in matters where there is already applicable legislation.⁵⁵ The Tribunal indicated that the 'role played by competition authorities in defending even those aspects of the public interest listed in the Act is, at most secondary to the other statutory and regulatory instruments, in this case the Employment Equity Act, the Skills Development Act.'⁵⁶

Another merger transaction that has cast a bad light on BEE was the attempt by a BEE consortium, Bidco to acquire one of three South Africa's large private hospital groups, Afrox Healthcare.⁵⁷ The transaction arose when African Oxygen, a subsidiary of British Oxygen, wanted to sell Afrox Healthcare ('Ahealth').⁵⁸ The other two large private hospital groups, Mediclinic and Netcare also wanted to acquire Ahealth.⁵⁹ Netcare decided not to proceed with the acquisition after they were advised that the transaction would not pass competition muster.⁶⁰ This left Mediclinic in the picture and they devised a strategy to acquire Ahealth by targeting a BEE partner to counter any competition concerns that may arise during the evaluation stage.⁶¹

Bidco was 75% owned by two BEE companies, Brimstone and Mvelaphanda and 25% of the company was owned by Mediclinic.⁶² Mediclinic was able to secure the funding for the transaction and in addition the deal was structured in a manner that Mediclinic would acquire from Bidco, 2500 beds,

⁵³ *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* para 6.

⁵⁴ *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* para 6.

⁵⁵ *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd*, para 40.

⁵⁶ *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd*, para 58; See also Hodge, Goga and Moahloli (2012) 8.

⁵⁷ Lewis (2013) 113.

⁵⁸ *Business Ventures 790 (Pty) Ltd / Afrox Healthcare Limited* Case no. 105/LM/Dec04, para 19.

⁵⁹ *Business Ventures 790 (Pty) Ltd / Afrox Healthcare Limited* para 26.

⁶⁰ *Business Ventures 790 (Pty) Ltd / Afrox Healthcare Limited* para 26.

⁶¹ Lewis (2013) 113.

⁶² *Business Ventures 790 (Pty) Ltd / Afrox Healthcare Limited* para 27.



approximately 33% of Ahealth capacity.⁶³ According to Lewis, this meant that Bidco was being used as a front to enable Mediclinic to acquire a large interest in a large competitor and with Bidco being weakened with the subsequent transfer of its key assets to Mediclinic.⁶⁴ Without properly scrutinising the transaction, the Commission approved the transaction as it viewed it as an opportunity by a BEE partner being a major player in the private hospital industry. Lewis affirms that the Commission was naive in its evaluation of the bid as it believed that Bidco was the controlling shareholder with Mediclinic playing a minority role.⁶⁵ This was dismissed by the Tribunal and the transaction was dubbed as ‘fronting on a grand scale.’⁶⁶

Lewis avers that the Ahealth transaction tainted BEE transactions as they were being used by established companies to thwart competition, but believes that this does not necessarily undermine the importance of BEE, but does question the wisdom of balancing the two interests of expanding BEE and promoting competition at the same time.⁶⁷

2.4.2 Public interest considerations: employment

According to Hodge, Goga and Moahloli, public interest considerations have not loomed large during the first 10 years of the implementation of the Act as at that time there was sustained economic stability and certainty.⁶⁸ It is only recent years, when the global economy was affected by the temporary recession and sustained job losses, that public interest issues have become more prevalent and asserted in merger evaluations.⁶⁹ The two important cases that have demonstrated the serious contestation and assertion on this point have been the *Wal-Mart/Massmart* merger transaction as well as the *Metropolitan/Momentum* transaction. The next part of the chapter will evaluate the application of the public interest test by the competition authorities in these two cases as well as analyse, innovative remedies and condition imposed.

⁶³ *Business Ventures 790 (Pty) Ltd / Afrox Healthcare Limited* para 27.

⁶⁴ Lewis D (2013) 114.

⁶⁵ Lewis D (2013) 114.

⁶⁶ Lewis D (2013) 114.

⁶⁷ Lewis (2013) 114.

⁶⁸ Hodge, Goga and Moahloli (2012) 10.

⁶⁹ Hodge, Goga and Moahloli (2012) 10.



In *Wal-Mart/Massmart*,⁷⁰ the Competition Appeal Court (CAC) approved the merger between Massmart Holdings Limited and Wal-Mart Stores Inc. This approval was given notwithstanding attempts by various interveners, including various unions under the umbrella of the Congress of South African Trade Unions (COSATU), three ministers, namely the Minister of Trade and Industry, the Minister of Agriculture Forestry and Fisheries and the Minister of Economic Development (the "Ministers") and the South African Small Medium and Micro Enterprises Forum to have the merger prohibited.⁷¹

The Ministers' intervention arose from a concern regarding Wal-Mart's global procurement network and the extent to which its logistical capabilities might have affected imports into South Africa.⁷² The interveners submitted that the merger would result in a move of procurement away from local producers towards foreign low cost producers situated in Asia.⁷³ It was rationalised that such a move would in turn result in employment losses, closure of Small to Medium Micro Enterprises (SMME's) and stifle the growth of the local industries.⁷⁴

Although the CAC approved the merger, it held that significant public interest concerns arose from the merger. The CAC in particular indicated that an introduction of a retail giant like Wal-Mart into the local economy needed to be carefully scrutinised as "failure to engage meaningfully with the implications of this challenge posed by globalisation can well have detrimental economic and social effects for the South African economy in general" and to SMME's in particular.⁷⁵ The CAC further found that the Competition Act contains a clear and distinct public interest consideration, which must be applied by the competition authorities, and the application of this principle had not been properly applied by the Competition Tribunal.⁷⁶ In this regard, the CAC stated that –

"the proposal for a condition which would seek to enhance the participation of South African small and medium size producers in particular, in global value chains which are dominated by Wal-Mart so as to prevent job losses, at the least, and, at best, to increase both employment and economic activity of these businesses protected under s 12 A must form part of the considerations which this

⁷⁰ *The Minister of Economic Development and Others v The Competition Tribunal and Other* para 108.

⁷¹ See Boshoff, Dingley and Dingley (accessed 25 October 2012).

⁷² *The Minister of Economic Development and Others v The Competition Tribunal and Other* para 47.

⁷³ *The Minister of Economic Development and Others v The Competition Tribunal and Other* para 48.

⁷⁴ See Boshoff, Dingley and Dingley (accessed 25 October 2012).

⁷⁵ See Boshoff, Dingley and Dingley (accessed 25 October 2012).

⁷⁶ *The Minister of Economic Development and Others v The Competition Tribunal and Other* para 164.



Court is required to be taken into account in considering a merger of this nature. This flows from the model of competition law chosen by the legislature and in particular as set out in s 12 A. It also forms part of the mandate given to the Tribunal and, on appeal, to this Court when faced with the inquiry as to whether a merger should be approved”.⁷⁷

The CAC also ruled that the conditions imposed by the Competition Tribunal in relation to the establishment of a procurement fund to assist local suppliers, was not sufficiently interrogated and considered.⁷⁸ The CAC instead proposed that a study be conducted by experts nominated by government, the merging parties and the unions to advise the CAC on how to develop “an investment remedy which is both rational, justifiable in terms of the evidence provided, as well as in terms of the challenges with which the South African economy is confronted as a result of this merger and the legitimate concerns which follow from the provisions of s 12 A (1) read with (3), in particular the future of small and medium sized producers.”⁷⁹

With respect to the maintenance of employment, the CAC disagreed with the order granted by the Tribunal which had provided that the merged entity must when employment opportunities become available, give preference to the 503 employees retrenched at Game Store, Nelspruit in June 2010.⁸⁰ In contrast the CAC ordered that these employees must be reinstated as it found that the retrenchment of these workers was sufficiently related to the merger.⁸¹ Other employment related conditions imposed by the CAC included a moratorium on retrenchments based on the merged entity's operational requirements for a period of two years as well as imposing that the merged entity must honour existing labour agreements and current practice of bargaining with SACCAWU (the largest representative union).⁸²

⁷⁷ See *The Minister of Economic Development and Others v The Competition Tribunal and Other* para 162 and 163.

⁷⁸ *The Minister of Economic Development and Others v The Competition Tribunal and Other* para 165.

⁷⁹ See *The Minister of Economic Development and Others v The Competition Tribunal and Other* para 167; See also Boshoff, Dingley and Dingley (accessed 25 October 2012).

⁸⁰ *The Minister of Economic Development and Others v The Competition Tribunal and Other* para 146.

⁸¹ See *The Minister of Economic Development and Others v The Competition Tribunal and Other* para 146; See also Boshoff, Dingley and Dingley (accessed 25 October 2012).

⁸² *The Minister of Economic Development and Others v The Competition Tribunal and Other* para 108; See also Boshoff, Dingley and Dingley (accessed 25 October 2012).



According to Ramburuth, the CAC decision in *Wal-Mart/Massmart*, affirmed the approach taken by competition authorities towards public interest matters.⁸³ He avows that the CAC in *Wal-Mart/Massmart* demands that competition authorities should balance the competition and public interest issues raised in a transaction through a test of proportionality.⁸⁴ This means the public interest enquiry should not be sub-ordinate to the competition enquiry as its relative status is determined by the facts of a case.

In the *Metropolitan/Momentum* merger transaction, the test for the treatment of employment loss was comprehensively outlined by the Tribunal. In this case the merging parties initially estimated that the merger would result in the loss of approximately 1500 jobs.⁸⁵ The job loss numbers were disputed by the union representing the majority of the employees to be retrenched and they argued that the merger should be prohibited on the grounds that the merging parties failed to justify the job losses.⁸⁶ The Tribunal in its evaluation of the merger found that the 1500 number paraded by the merging parties for job losses could not be rationally explained as there was not proper retrenchment analysis or study conducted to arrive at the numbers provided.⁸⁷ The Tribunal found that the merger could not be justified on public interest grounds but however approved the merger on competition grounds subject to a 2 years moratorium on any merger related retrenchments.⁸⁸ The condition however did not apply to senior management.

According to Lewis, the principle laid down in *Metropolitan/Momentum* merger transaction is that “once it has been established that there will be substantial job loss arising from the merger – and this was not seriously in contention – then, in order to have the merger approved unconditionally, the evidentiary burden imposed on the parties requires that they prove that (1) a rational process has been followed to arrive at the determination of the numbers of jobs to be lost, that is, that the reason for the job reduction and the number of jobs proposed to be shed are rationally connected; and (2) the public interest in preventing employment loss is balanced by an equally weighty but countervailing public interest, which justifies the job loss and which is cognisable to the Act.”⁸⁹

⁸³ Ramburuth (2012) 215.

⁸⁴ Ramburuth (2012) 215.

⁸⁵ *Metropolitan Holdings Limited and Momentum Group Limited* para 79.

⁸⁶ Lewis (2013) 120.

⁸⁷ *Metropolitan Holdings Limited and Momentum Group Limited* para 100.

⁸⁸ Lewis (2013) 120.

⁸⁹ Lewis (2013) 121.



Lewis further opines that the principle laid down above will not be satisfied with the demonstration of substantial efficiency gains resulting from the merger.⁹⁰ The substantial efficiency gains will especially not be sufficient if they are of a private nature and competing in particular against a public loss arising from the transaction.⁹¹

2.5 Conclusion

In conclusion it is clear from the above mentioned cases that our authorities and courts are developing our competition jurisprudence. The innovative conditions and remedies imposed are indicative of such development. In concurring with Lewis, it is evident that the approach of taking out the subjective element when applying the public interest test will go a long way in developing our competition law jurisprudence and providing a degree of certainty in the application of the public interest test.⁹² In further agreement with Lewis, it should be noted and commended that our competition authorities have 'resisted using their employment of the public interest mandate as an instrument for industrial policy' in particular in situations whereby the executive has intervened in some of the high profile merger transactions due to pressures such as intended job losses and the effects of a particular merger on the local economy and SMME's at large.⁹³

⁹⁰ Lewis (2013) 121.

⁹¹ Lewis (2013) 121.

⁹² Lewis (2013) 122.

⁹³ Lewis (2013) 122.



3 CHAPTER 3

3.1 South African government policy on merger transactions

3.1.1 General

This chapter will investigate South African government's position when intervening in merger transactions with public interest concerns. In recent high profile merger transactions such as that of *Wal-Mart/Massmart as well as Kansai /Freeworld*,⁹⁴ government's intervention has been viewed as using competition law as a means of substitution for trade and investment policy. The chapter will critically analyse the current government investment policy and proposed investment legislation and look at whether it has provided certainty on how South Africa regulates mergers with public interest concerns. The Chapter will first examine the understanding of FDIs and the role such investments play in creation of economic growth and development in developing countries such as South Africa. The second part of the Chapter will look at the policy frameworks that have been developed by the South African government in order to provide guidance and policy certainty on the countries' entry requirements and treatment of mergers with public interest considerations. Lastly the Chapter will evaluate the proposed Promotion and Protection of Investment Bill and investigate whether it provides the necessary clarity and certainty to foreign investors on our countries' entry requirements and treatment of mergers with public interest considerations.

3.2 The concept of FDI and its role in developing the South African economy

3.2.1 The definition of foreign investment

According to Sornarajah, foreign investment involves the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the full control of the owners of the assets.⁹⁵ He further asserts that there is no doubt that the transfers of physical property such as equipment or the physical property that is brought or

⁹⁴ See *The Minister of Economic Development and Others v The Competition Tribunal and Others; Kansai Paint Co.Ltd / Freeworld Coatings Ltd.*

⁹⁵ Sornarajah *The International Law on Foreign Investment* 2nd ed (2007) 7.



constructed such as plantations or manufactured goods constitute FDIs.⁹⁶ He contends that such investment is different from portfolio investments also known as foreign indirect investments as such investments normally involves the movement of money for the purchase of shares in companies formed or functioning in another country.⁹⁷ Portfolio investments are further distinct in that there is a divorce between management and control of the company and the share of ownership in it.⁹⁸ According to Booysen the distinction seems artificial.⁹⁹ He avers that a foreigner, who takes up 30% shareholding in a newly created company, makes a direct investment in that company, and the country in which it is incorporated and therefore the protection such person enjoys should not be different irrespective of the percentage he holds in the issued share capital of the company.¹⁰⁰ Sornarajah argues that there is continuing uncertainty on whether portfolio investments are protected in the same manner as FDIs.¹⁰¹ He however holds the position that a better view is that portfolio investments are not protected unless specifically included in the definition of FDIs.¹⁰²

3.2.2 Forms of FDIs

It is acceptable in international trade and investment law that there are two forms of FDIs, namely mergers and greenfield investments. These are the two forms of FDI inflows that we also experience within the South African economy. Mergers are defined for example in the section 12(1)(a) of the Act as occurring “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*.”¹⁰³ Section 12(1)(b) of the Act go further and state that a merger may be “achieved in any manner, including through, purchase or lease of the shares, an interest or assets of the other *firm* in question; or through amalgamation or other combination with the other *firm* in question.”¹⁰⁴

⁹⁶ See Sornarajah (2007) 7.

⁹⁷ Sornarajah (2007) 7.

⁹⁸ Sornarajah (2007) 7.

⁹⁹ Booysen *Principles of International Trade Law* (2003) 531.

¹⁰⁰ Booysen (2003) 531.

¹⁰¹ Sornarajah (2007) 9.

¹⁰² Sornarajah (2007) 9.

¹⁰³ Competition Act No. 89 of 1998.

¹⁰⁴ See Competition Act No. 89 of 1998.



According to Neuhoff, Govender, Versfeld and Dingley, in layman's terms, a merger occurs when two independent companies combine their businesses.¹⁰⁵ They further elaborate that a process by which a merger takes place can be either by mutual consent or through a hostile takeover.¹⁰⁶ The Act regulates three kinds of mergers, namely horizontal, vertical and conglomerate mergers. A horizontal merger is defined by Neuhoff, Govender, Versfeld and Dingley as a merger between firms operating at the same level of the of the supply chain selling "substitutable products in the same geographical area."¹⁰⁷ A vertical merger is described as entailing the integration of parties in a vertical relationship, such as a manufacturer and its distributor.¹⁰⁸ Lastly a conglomerate merger is described as covering all other forms of mergers that are neither horizontal nor vertical in nature.¹⁰⁹ These transactions for example take place between parties that have no defined or apparent relationship.¹¹⁰ Advantages of mergers are identified as follows:

- Mergers are regarded as easier to carry out than starting investment processes from the beginning and thus for example a process of building a new production facility takes longer than sealing a takeover deal.¹¹¹
- Another advantage with a merger is that it is easier to merge or acquire a foreign enterprise in order to take advantage of both the tangible and intangible assets of the acquired firm.¹¹²
- A merger with a foreign firm also makes it easier to benefit from synergy of operations between two firms.
- Mergers are also advantageous in that they lower the cost of doing business abroad such as the incidence of bribes, policy barriers and other impediment to entry.¹¹³

Greenfield investments on the other hand occur when a firm establishes a wholly owned production facility in a foreign location from scratch.¹¹⁴ This kind of FDI could be seen as a strategy or a meaningful way of integrating a business into the foreign community and a way of winning the

¹⁰⁵ Neuhoff, Govender, Versfeld and Dingley (2006) 177.

¹⁰⁶ Neuhoff, Govender, Versfeld and Dingley (2006) 177.

¹⁰⁷ Neuhoff, Govender, Versfeld and Dingley (2006) 177.

¹⁰⁸ Neuhoff, Govender, Versfeld and Dingley (2006) 178.

¹⁰⁹ Neuhoff, Govender, Versfeld and Dingley (2006) 178.

¹¹⁰ Neuhoff, Govender, Versfeld and Dingley (2006) 178.

¹¹¹ Aregbeshola *Policy Determinants for FDIs in South Africa*, published MComm Thesis in Business Management, University of South Africa (2008) 52.

¹¹² Aregbeshola (2008) 53.

¹¹³ Aregbeshola (2008) 53.

¹¹⁴ Aregbeshola (2008) 53.



loyalty and trust of the people.¹¹⁵ This form of FDI is a good catalyst for economic development and job creation in foreign economies. Although greenfield FDI could be more expensive and challenging in the beginning, the long term effect and benefits for such investments could in most cases far offset the associated shortcomings.¹¹⁶

Although FDIs can have positive spin-offs for economies of developing nations, the inflow of FDI can have “unintended side-effects” on an economy.¹¹⁷ These side effects may include:

- “conflicts between the host country and that of the investor;
- creation of a hostile business environment;
- de-capitalisation as foreign owners transfer earnings abroad;
- market inefficiencies and misallocation of resources; and
- creation of competition damaging to local firms, including market dominance and abuse of dominant positions.”¹¹⁸

According to Hartzenberg, many of these adverse consequences can be mitigated by policy measures.¹¹⁹ Hartzenberg believes that Investment policy and competition policy play a complementing role in promoting efficiency, consumer welfare, economic growth, and development.¹²⁰ The impact and effect of “FDI on a host economy depends on several factors. They include:

- mode of entry (for example mergers or greenfield investment);
- the type of activity engaged in by the investment enterprise, and whether or not it is already undertaken in the host country;
- sources of finance for FDI (e.g. reinvested earnings, intra-company loans, or equity capital from parent companies); and
- the effect on domestic companies.”¹²¹

¹¹⁵ Aregbeshola (2008) 53.

¹¹⁶ Aregbeshola (2008) 53.

¹¹⁷ Aregbeshola (2008) 53.

¹¹⁸ Hartzenberg *South African institute of international Affairs: Perspective on Trade, Investment and Competition Policy in South Africa*: available at http://www.saiia.org.za/doc_download/36-perspectives-on-trade-investment-and-competition-policy-in-south-africa (accessed on 09 March 2012).

¹¹⁹ Hartzenberg (accessed on 09 March 2012).

¹²⁰ Hartzenberg (accessed on 09 March 2012).

¹²¹ Hartzenberg (accessed on 09 March 2012).



The next part of this Chapter will focus on the South African policy in dealing with this interplay between investment policy and competition policy. Attention will focus on the policy frameworks that have been developed by the South African government in order to provide guidance and policy certainty on the countries' entry requirements and treatment of mergers with public interest considerations.

3.3 South African investment and competition policy on merger transactions

The South African government has, in recent years, embarked on a process of developing key investment law policy frameworks that are geared at modernising and providing certainty to foreign investors on our legal and regulatory requirements for investing into the South African economy. FDIs are recognised in chapter 3 of the National Development Plan (NDP) in playing a significant role in view of the context of curbed savings and FDIs are seen as drivers in creating rising outputs, incomes and employment growth.¹²² The NDP further recognises the importance of developing policy and regulatory frameworks that provide greater certainty to investors that want to contribute to the development and growth of the South African economy.¹²³

It is in view of these identified weaknesses in trade, investment and competition law policies, the South African government has in recent years embarked on a process of reviewing our policies in this regard to provide greater certainty to foreign investors on our legal and regulatory requirements for investing in the South African economy. The World Trade Organisation avers that the institutional framework governing investment in South Africa has remained broadly unchanged since 2003.¹²⁴ According to Hartzenberg the country has made significant progress in liberalising exchange controls since 1994 and foreign and domestic investors are subject to the same laws and regulations, through the application of the 'national treatment' principle.¹²⁵ Investments are therefore controlled in the local context through sector-specific legislation.¹²⁶ This includes "competition regulation (primarily related to mergers under the Competition Act) and sectorial regulations

¹²² Republic of South Africa, National Planning Commission, *National Development Plan: Vision for 2030*, Pretoria: Government Printer, 2011.

¹²³ Republic of South Africa, National Planning Commission.

¹²⁴ World Trade Organisation *Trade Policy Review: SACU, Annex 4, South Africa* WT/TPR/S/222/ZAF Geneva: WTO (2009).

¹²⁵ Hartzenberg (accessed on 09 March 2012).

¹²⁶ Hartzenberg (accessed on 09 March 2012).



affecting foreign entry and ownership in strategic sectors (e.g. the financial sector – banking and insurance – mining, telecommunications and broadcasting, and transport).¹²⁷

There is recognition that there are gaps in the current South African policy environment and they relate to uncertainty on the South African position with regards to protection of investments made by foreigners in our economy and the process of expropriating and compensating for such investments.¹²⁸ Moreover there has also been uncertainty around the role played by the executive in intervening in merger transactions that have public interest concerns and this introspective was informed by the highly publicised *Wal-Mart/Massmart* merger transaction as unpacked in the previous chapter.¹²⁹

It is against this backdrop that the South African government embarked on a process of reviewing its foreign investment policy and regulatory framework. The process commenced in 2009, with the DTI developing a policy framework review on bilateral investment treaties.¹³⁰ This process was followed up in 2011 by another process lead by the NT whereby they proposed a review framework for cross-border direct investment into South Africa.¹³¹ With regards to the first process, the DTI established a Task Team mandated to review Bilateral Investment Treaties (BITs) entered into by the Republic of South Africa (RSA). The review was informed by the backdrop that the “South African government had entered into agreements that were heavily stacked in favour of investors without the necessary safeguards to preserve flexibility in a number of critical policy areas.”¹³² To a large extent, the aim of the review was also to correct this misalignment and to place before government the “true facts inherent to commitments undertaken by the RSA under BITs whilst at the same time updating the RSA’s BIT regime as is being contemplated by many developed as well as developing countries whose history and experience of BITs is similar to that of the RSA.”¹³³

¹²⁷ Hartzenberg (accessed on 09 March 2012).

¹²⁸ Republic of South Africa, National Treasury discussion document, *A Review Framework for Cross-Border Direct Investment in South Africa*. Pretoria: Government Printer, February 2011.

¹²⁹ Republic of South Africa, National Treasury discussion document.

¹³⁰ Republic of South Africa, Department of Trade and Industry government position paper, *Bilateral Investment Treaty Policy Framework Review*. Pretoria: Government Printer, June 2009.

¹³¹ Republic of South Africa, National Treasury discussion document.

¹³² Republic of South Africa, Department of Trade and Industry government position paper.

¹³³ Republic of South Africa, Department of Trade and Industry government position paper.



The findings flowing from the review process of BIT's identified a major problem associated with BITs in that they are inflexible tools that allow foreign investors to sue for lost profits, including anticipated future profits, if governments change regulations, even when such reforms are in the public interest.¹³⁴ The review process recommended for the South African government to review its stance on BITs, so as to ensure that they are in harmony with the country's broader social and economic priorities.¹³⁵ One of the key recommendations flowing from the review process of BIT's has been the recognised need of developing a well-coordinated strategic investment document which will ensure that the role and responsibilities of individual stakeholders is coordinated in such a way that will give direction to current trade and investment policy and the alignment with competition policy.¹³⁶

The second process lead by the NT in reviewing the policy framework on cross-border direct investments (FDIs) in RSA recognises the role played by trade and investment policy frameworks in maintaining "an open environment for inward FDI, thereby encouraging new inflows of foreign capital with expected benefits for employment, productivity, growth and competition and at the same time safeguarding public interest."¹³⁷ The NT discussion document further recognises the importance of the South African government in developing a more coherent, harmonised and transparent framework to cover all foreign direct investment into South Africa.¹³⁸ The benefits of such improvements are acknowledged as catalysts in assisting and fostering the aim to "improve predictability for foreign investors and domestic companies through transparency in decision-making; support consistency in inward FDI policy across government departments; and support the policy framework for managing the macroeconomic benefits and risks of cross-border capital flows."¹³⁹ It is clear from the NT discussion document and review process that the South African government is recognising the important role of harmonising the relationship between investment policy with other economic and trade policies so that such investment policy can coexist with other regulations and policies that address existing, specific objectives.

¹³⁴ Republic of South Africa, Department of Trade and Industry government position paper

¹³⁵ Republic of South Africa, Department of Trade and Industry government position paper.

¹³⁶ Republic of South Africa, Department of Trade and Industry government position paper.

¹³⁷ Hartzenberg (accessed on 09 March 2012); Also see Republic of South Africa, National Treasury discussion document.

¹³⁸ Republic of South Africa, National Treasury discussion document.

¹³⁹ Hartzenberg (accessed on 09 March 2012); Also see Republic of South Africa, National Treasury discussion document.



The competition policy under the Competition Act is therefore identified as a prime example of this approach. The public interest considerations under the Act play an important role during the merger assessment and review process. It is acknowledged in the NT discussion document that any investment policy framework that is developed for South Africa needs to be transparent and would need to set out the basis for approval or rejection of entry into the country.¹⁴⁰ It is further accepted that the range of public interest issues arising from specific transactions cannot be “perfectly foreseen, and therefore it is nevertheless appropriate to outline the principles of public interest that would be examined in order to enhance the transparency of the process and to limit the extent of discretion.”¹⁴¹ Thus the investment policy framework as envisaged by the review process is one that gives clear direction on the types of conditions that may apply to cross-border acquisitions. Further it must contribute to greater certainty for foreign firms to limiting scope for arbitrary decisions.¹⁴²

3.4 Promotion and Protection of Investment Bill

The two review processes on the South African investment law architecture and policy, being the policy framework review on bilateral investment treaties as well as the review framework for cross-border direct investment into South Africa have both culminated and incorporated to the drafting process that have informed the new proposed Promotion and Protection of Investment Bill¹⁴³ hereinafter referred to as the Investment Bill. The Investment Bill was published by The DTI for public comment on the 1st November 2013. Lang expresses the view that on the face of it, the Bill includes the usual features of BITs whilst introducing measures which address the concerns identified in the DTI’s review, thereby attempting to redress the balance between the needs of foreign investors and the government’s right to implement transformative policy.¹⁴⁴ This part of this chapter will not review all the provisions of the Investment Bill, but will focus on those pertinent

¹⁴⁰ See Republic of South Africa, National Treasury discussion document.

¹⁴¹ See Republic of South Africa, National Treasury discussion document.

¹⁴² See Republic of South Africa, National Treasury discussion document.

¹⁴³ Promotion and Protection of Investment Bill, GG vol 581: No.36995, 1 November 2013.

¹⁴⁴ Lang *Bilateral Investment Treaties: A shield or a Sword* Bowman Gilfillan Newsflash: available at <http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-Bilateral-Investment-Treaties.pdf>.



provisions that will have a direct impact on competition law and some provision of the Competition Act as well as the impact of the Investment Bill on assessment of merger transactions.

When the Investment Bill was published, the Minister of DTI, Rob Davies, indicated that the aim of the Investment Bill is to update and modernise South Africa's legal framework for foreign investment and that BITs will be phased out.¹⁴⁵ As already outlined in the previous section the rationale for replacing BITs with the investment Bill was informed by the reasoning of saying that the BITs in question afford foreign investors more rights in the South African market than domestic investors, since the latter do not have recourse to international arbitration panels when they feel their rights have been transgressed. The second argument is that BITs are problematic in that they tend to rule in favour of corporate interests at the expense of host nation policy space.

In reviewing the Investment Bill, it is clear from the onset that the "general texture of the Investment Bill reflects a government that is in need of expansive regulatory space for its transformation agenda, industrial policy and the progressive realisation of socio-economic rights."¹⁴⁶ One notable feature of the preamble is its assertion of the principle of 'public interest.' Public interest considerations are a key determining factor or consideration during a merger assessment as already outlined in the previous Chapter. According to Makokera, this principle has generally been widely interpreted and there is substantial disagreement within the legal community in South Africa on what constitutes 'public interest.'¹⁴⁷ Makokera further expresses that this principle features centrally in the Bill and that as the South African Institute of International Affairs (SAIIA) they are recommending that the DTI should offer a statutory definition in the final legislation.¹⁴⁸ Makokera believes that such definition will give foreign investors a sense of certainty and transparency, as opposed to the current framing which could lend itself to arbitrary actions.¹⁴⁹

¹⁴⁵ Steyn *The new Promotion and Protection of Investment Bill: an assessment of its implications for local and foreign investors in South Africa* Legal Brief: available at <http://www.werksmans.com/legal-briefs-view/new-promotion-protection-investment-bill-assessment-implications-local-foreign-investors-south-africa> (accessed December 2013).

¹⁴⁶ Makokera *South Africa's Draft Promotion and protection of Investment Bill: A Submission by the South African institute of international Affairs*: available at <http://www.thetradebeat.com/book/saiia-submission-on-south-africa-s-draft-promotion-and-protection-of-investment-bill>.

¹⁴⁷ See Makokera.

¹⁴⁸ Makokera.

¹⁴⁹ Makokera.



Another pertinent area that is closely linked with merger review provision of the Competition Act is the right of every country by virtue of the principle of sovereignty in accepting or denying foreign investors or aliens' entry into its territory. Section 5(2) of the Investment Bill codifies this principle by denying the right of establishment.¹⁵⁰ Section 5(3) further states that foreign investment is subject to compliance with applicable domestic laws and international agreements.¹⁵¹ With regards to these provisions, the screening process, the procedural dimensions of the examination are not explained in the Bill.¹⁵² Makokera avers that it is not clear who would conduct the examination, particularly which state institution(s) and nor is it clear which investments would be screened.¹⁵³ Steyn on the other hand has a different interpretation of these provisions and he believes that they do not amount to blanket requirements of vetting investments into RSA and thus sees this as a positive aspect of the Investment Bill as such vetting requirements are stringently followed in countries such as Australia and Canada.¹⁵⁴ Clearly these above mentioned sections of the Investment Bill are recognising the role to be played by various legislative frameworks that regulate the entry of foreign investors into the country and the merger review provisions of the Competition Act come into the fore in this regard.

Lastly another important provision in the Investment Bill is section 10.¹⁵⁵ The provision captures and affirms the right of the South African government to regulate in the public interest. As already alluded above, the definition of public interest is not outlined. However the provision provides a list of considerations that can be taken into account by government in this regard and they include inter alia to redress "historical, social and economic inequalities" to "promote and preserve cultural heritage and practices and indigenous knowledge" to "foster" beneficiation, to "achieve the progressive realisation of socioeconomic rights" and to protect "essential security interests."¹⁵⁶ Makokera sees these considerations as an "exposition of aspects of South Africa's industrial and economic policy within which it aspires to harness FDI for sustainable development."¹⁵⁷

¹⁵⁰ See Promotion and Protection of Investment Bill.

¹⁵¹ Promotion and Protection of Investment Bill.

¹⁵² See Makokera.

¹⁵³ See Makokera.

¹⁵⁴ See Steyn (accessed December 2013).

¹⁵⁵ Promotion and Protection of Investment Bill.

¹⁵⁶ See Steyn (accessed December 2013).

¹⁵⁷ See Makokera.



3.5 Conclusion

We can see from this Chapter that the South African government approach to FDIs is galvanised around the spirit of the NDP and is serious in attracting more FDIs into our economy. This can only be done through the modernisation of our investment policy and the development of a legislative framework that seeks to promote such ideals and plans. The harmonisation and alignment of the trade, investment and competition policy is a key driver in the attainment of an economic policy that is geared at promoting growth in the growth domestic product (GDP), creation of employment and bridging the inequality gap in the country. The Promotion and Protection of Investment Bill might still be at its infancy and not perfect yet. Nonetheless it is a vehicle that is earmarked with a task of sparking such alignment and harmonisation with a view of providing greater policy and regulatory certainty and clarity to local or foreign investors on what to expect when investing into the South African economy.



4 CHAPTER 4

4.1 EU position on the assessment of public interest considerations in merger review

4.1.1 General

Merger control law and regulation is an integral part of most competition jurisdictions. The European Union (EU) is no exception and mergers (also referred to as concentrations in the EU) encompass issues such jurisdictional questions, procedure, substance and policy, at both member states level and EU level.¹⁵⁸

This chapter will conduct a comparative analysis and look at policy and regulatory framework of the EU. The chapter will focus on the EU level and will have limited observation on the policy and regulatory frameworks of member states. The first part of the chapter will outline the social and economic considerations that have informed the EU competition policy. Lastly the second part of the chapter will detail the application of EU merger control and regulatory provisions in relation to public interest considerations.

4.2 Social and economic considerations underlying the EU competition policy

4.2.1 Market Integration as the paramount goal

As the preamble and Articles 2 and 3(1)(g) of the EC Treaty illustrates,¹⁵⁹ the rationale of the European Community (EC) competition law is very much linked to the single market goal that permeates the interest of the Community and not the direct interests of populist movements that are against concentration and market power, even though it was designed with the intention to curb such practices.¹⁶⁰ Buttigieg contends that in the years predating 1993, the primary goal of EU competition law was market integration, but that does not mean that the EU competition policy does not consider other goals.¹⁶¹ In this regard he quotes the then EC Competition Commissioner,

¹⁵⁸ Fountoukakos and Herron *Mergers and joint ventures: an overview of EU and national case law* National Competition Law Bulletin: available at <http://www.concurrences.com/e-Competitions/N40270>.

¹⁵⁹ Consolidated Version of Treaty Establishing the European Community, Official Journal of the European Communities, C 325/33, 24.12.2002.

¹⁶⁰ Buttigieg *Competition Law: Safeguarding the Consumer Interest: A comparative Analysis of US antitrust Law and EC Competition Law* (2009) 47.

¹⁶¹ See Buttigieg (2009) 48.



Van Miert, who stated that “ the aims of EC competition policy are economic and social. The policy is concerned not only with promoting of efficient production but also achieving the aims of the European treaties: establishing a common market, approximating economic policies, promoting harmonious growth, raising living standards, bringing Member States close together, etc. To this must be added the need to safeguard a pluralistic democracy which could not survive a strong concentration of economic power.”¹⁶² In looking closer, it can be said that the EC competition policy goals are multiple. According to Wilks and McGowan, the aforesaid multiple goals as outlined by Van Miert, are not given priority and the primary goals still remains market integration.¹⁶³ Further they also contend that the design and enforcement of EC competition policy is imbued with the goal of integration rather than efficiency.¹⁶⁴ Neven, however, believes that the EC market integration goal is often in conflict with the economic efficiency goal and does not amount to economic benefits in that efficiency is compromised on the altar of market integration to the detriment of consumers.¹⁶⁵

4.2.2 Other public interest considerations influencing EU competition policy

According to Rusu, the public interest goal or the welfare of the European Community as a whole match what one may name the Europe-tailored concept of societal welfare and as such has influenced the enactment of the EU merger control policy.¹⁶⁶ This has resulted, as opined by Bouterse, to goals and objectives of the Community that primary revolve around the notion of political, economic, market and policy integration.¹⁶⁷ This means that the EU competition policy is not designed to solely achieve the competition goal of consumer well-being but it has a multifarious mission that includes a focus what Bouterse terms ‘extra-competition policies’ which includes goals such as development of alternative energy sources, transport policy, industrial policy, environmental policy and even cultural policy.¹⁶⁸ This part of the chapter will look at the aforesaid public interest considerations or ‘extra-competition policies’ and see how the integration of these considerations into the application of the competition policy is achieved in the EU.

¹⁶² See Buttigieg (2009) 48.

¹⁶³ Wilks and McGowan *Competition Policy in the European Union: Creating a Federal Agency?* contained in Doern and Wilks *Comparative Competition Policy* (1996) 238.

¹⁶⁴ Wilks and McGowan (1996) 238.

¹⁶⁵ Neven *Competition Policy Objectives* contained in Ehlermann and Laudati *European Competition Law Annual 1997: Objectives of Competition Policy* (1998) 111.

¹⁶⁶ Rusu *European Merger Control: The Challenges Raised by Twenty Years of Enforcement Experience* (2010) 104.

¹⁶⁷ Bouterse *Competition and Integration: What Goals Count?* (1994) 120.

¹⁶⁸ Bouterse (1994) 120.



According to Buttigieg, opinions of EU member states seem to be divergent on the issue of integrating competition policy within the broader economic policy of the EU.¹⁶⁹ Some member states are in favour of the integration with others concerned about the result of such integration.¹⁷⁰ Bouterse who is in favour of the integration is of the view that the public interest considerations or non-competition objectives are contained in the preamble to the EC Treaty and its Articles 2 and 3 in conjunction with Article 81(3).¹⁷¹ The objectives of the preamble to the EC Treaty and those of its Articles 2 and 3 have already been expanded on above. In respect of Article 81(3), it should be noted that this is one of the key provisions in the European merger control system that is used to monitor the levels of concentration in the market.¹⁷² This Article outlines the competition and non-competition factors to be taken into account in approving or refusing a merger transaction or any form of concentration or agreement within a particular market. Bouterse further contends that in light of these Articles, the EC Treaty empowers the European Competition Commission, herein after referred to as the Commission with the right to take into account also considerations relating to general economic policy as opposed to purely competition related considerations.¹⁷³ Bouterse concludes that for example Article 81(3) incorporates a German type rule of reason that requires the Commission to take into account also non-competition goals and policies.¹⁷⁴

She further opines that there is one goal that has been given precedence over competition and consumer interests.¹⁷⁵ This goal is the enhancement of European competitiveness and industrial policy objectives in general.¹⁷⁶ Article 157(1) of the EC Treaty which promotes European competitiveness will in most cases be used to guard against negative factors that curb industrial and economic growth in the Community and thus trump competition considerations.¹⁷⁷ The goal of enhancing European competitiveness and industrial policy will now be discussed in more detail.

¹⁶⁹ Buttigieg (1994) 48.

¹⁷⁰ Buttigieg (1994) 48.

¹⁷¹ See Bouterse (1994) 121; Consolidated Version of Treaty Establishing the European Community.

¹⁷² Consolidated Version of Treaty Establishing the European Community; See also Rusu (2010) 113.

¹⁷³ See Bouterse (1994) 121.

¹⁷⁴ See Bouterse (1994) 121.

¹⁷⁵ See Bouterse (1994) 121.

¹⁷⁶ See Bouterse (1994) 121.

¹⁷⁷ Consolidated Version of Treaty Establishing the European Community; Also see Buttigieg, 58.



4.2.2.1 Competitiveness and industrial policy

Buttigieg is of the view that within the European context, industrial policy makers have over time regarded competition policy a positive impediment in the creation of competitiveness for European companies and industries on the world stage.¹⁷⁸ He believes that the challenge facing European competition policy is the striking of a right balance between the demands of competition, the requirements of competitiveness and the alignment of the said demands to industrial policy.¹⁷⁹ Wilks and McGowan avers that the European Commissions' Directorate General responsible for Competition Policy (DG Competition) have in recent years softened its interventionist approach in judging merger transactions from a clear industrial protectionist prism and is now adopting a more economic based approach in the interpretation and application of Article 81.¹⁸⁰ Wilks and McGowan however argue that the Commission has in certain cases failed to strike the balance in this regards and has allowed industrial considerations to trump competition and consumer well-being objectives.¹⁸¹ As an example in this regards, Neven, Nuttall and Seabright argues that the Commission is at times influenced indirectly by national or industrial lobbyists and thus not openly considering industrial policy factors in a transparent manner when assessing individual merger transaction.¹⁸² Neven, Nuttall and Seabright see a danger in this approach in that this may lead to "excessive tolerance of market power" especially in merger transactions.¹⁸³

Another example cited by Buttigieg, whereby industrial competitiveness weighed more than competition considerations was the cooperation agreement within the British petroleum industry.¹⁸⁴ This was a cooperation agreement between *BP Chemicals Limited/ Imperial Chemicals Industries Plc.*¹⁸⁵ According to Buttigieg, the Commission was more concerned with the interest of the British petroleum industry than with the interest of consumers, thereby "stressing the elements of industrial policy and reasoning that the consumers are better served in the long term by a stronger

¹⁷⁸ Buttigieg (2009) 54.

¹⁷⁹ Buttigieg (2009) 54.

¹⁸⁰ Wilks and McGowan (2006) 239.

¹⁸¹ Wilks and McGowan (2006) 239.

¹⁸² Neven Nuttall and Seabright *Mergers in Daylight* (1993) 224.

¹⁸³ See Neven, Nuttall and Seabright (1993) 224.

¹⁸⁴ See Buttigieg (2009) 58.

¹⁸⁵ *BP Chemicals Limited/ Imperial Chemicals Industries Plc* BPCL/ICI (1984) OJ L212/1; See also Buttigieg 58.



industry able to both run at efficiency capacity loadings and to earn sufficient profits to finance future investments and research and development.”¹⁸⁶

Bouterse affirms that when the Commission is taking into account industrial policy when assessing a merger or any concentration or in applying Article 81(3), it is applying the concept of workable competition as outlined in the *Metro (No. 1)*¹⁸⁷ case. The concept of workable competition was regarded by the Commission in its pure economic sense to mean that “competition should not be pursued as an end in itself.”¹⁸⁸ In interpreting the concept of workable competition in relation Article 81(3) and Article 3(1)(g), the Commission declared that the concept means “the powers conferred upon the Commission under Article 81(3) show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of *objectives of a different nature* and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the Common Market.”¹⁸⁹ According to Buttigieg, and in view of the aforesaid interpretation of workable competition, it is clear that the Commission cannot give importance to goals such as reduction of overcapacity, industrial and international competitiveness at the total expense of competition to an extent that competition goals are completely eliminated on the relevant product or service market.¹⁹⁰ He further stresses that it is indispensable that a sufficient degree of competition remains and is taken into account in the application of Article 81(3).¹⁹¹

4.2.2.2 Employment policy considerations

Employment has also at times been considered as a relevant factor to be taken into account by the Commission in the interpretation of Article 81(3).¹⁹² The principle in this regard was laid out in the *Metro (No 1)* case where it was decided that the opposed concentration transaction was a “stabilising factor with regards to provision of employment which, since it improves the general

¹⁸⁶ See Buttigieg (2009) 58.

¹⁸⁷ *Metro SB-Großmärkte GmbH & Co KG v Commission (No 1)* Case no. 26/76 (1977) ECR 1875; See also Bouterse 124.

¹⁸⁸ See *Metro SB-Großmärkte GmbH & Co KG v Commission (No 1)* 1905; See also Bouterse 124.

¹⁸⁹ See *Metro SB-Großmärkte GmbH & Co KG v Commission (No 1)* 1905; See also Buttigieg 60.

¹⁹⁰ Buttigieg (2009) 60.

¹⁹¹ Buttigieg (2009) 60.

¹⁹² Buttigieg (2009) 61.



conditions of production, especially when the market conditions are unfavourable” and such objectives are within the scope of Article 81(3).¹⁹³

In the *Ford/Volkswagen*¹⁹⁴ joint venture transaction the Commission claimed that it was possible to take into account factors other those mentioned specifically in Article 81(3), including the maintenance of employment.

4.3 EU merger control and regulatory provisions

EU merger control and regulation is governed by the EU Merger Regulation 139/2004, hereinafter referred to as EUMR.¹⁹⁵ The EUMR is then complemented by the Implementing Regulation 804/2004¹⁹⁶ setting out procedural rules pertaining to time limits, and the conduct of hearings etc. This regulatory regime is meant to give life to the provisions of Article 83 of the EC Treaty, whereby regulations and directives are referred to a preferred method of ensuring compliance and implementation of Articles 81 and 82 of the EC Treaty.¹⁹⁷ The focus of this last portion of this chapter will review the application of the aforesaid provisions on merger transactions with public interest considerations. As already outline above in this chapter the concept of concentration in the EU is broader concept. EUMR applies to all concentrations with a union dimension, such as transactions that fulfil the requirements as laid down in Articles 1 and 3 of the EUMR.¹⁹⁸ The notion of “concentration” is defined in more detail in Article 3 and Article 3(1) and distinguishes two general categories of concentrations, namely mergers and acquisitions of control.¹⁹⁹ According to Lorenz, the distinction does not influence the substantial assessment of the proposed transaction in any way, but is meant to assist in determining the obligation of a party in notifying a transaction to the Commission pursuant to Articles 4(2) of the EUMR.

¹⁹³ See *Metro SB-Großmärkte GmbH & Co KG v Commission (No 1)* para 43; Also see Buttigieg 61.

¹⁹⁴ *Ford/Volkswagen* (1994) OJ L20/14.

¹⁹⁵ Lorenz *An Introduction to EU Competition Law* (2013) 243; Also see Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations between undertakings, OJ No L, 24 of 29 January 2004.

¹⁹⁶ Commission Regulation (EC) No. 804/2004 implementing Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations between undertakings, OJ No. L 133 of 30 April 2004, 1 as amended by the Commission Regulation (EC) No. 1033/2008 of 20 October 2008, OJ No. L 279 of 22 October 2008, 3.

¹⁹⁷ See Preamble to Council Regulation (EC) No. 139/2004 of 20 January 2004.

¹⁹⁸ Lorenz (2013) 244.

¹⁹⁹ Council Regulation (EC) No. 139/2004 of 20 January 2004.



4.3.1 Public interest provisions in the EUMR

The approach in assessing public interest considerations in merger review is first outlined in the EUMR in Article 2(1)(b).²⁰⁰ Article 2(1)(b) of the EUMR was designed to prevent that previous challenges associated with the direct interpretation of Article 81 of the EC Treaty whereby the Commission adopted a tendency to use competition policy as a means to protect SMME's and competitors in general, instead of the competitive process itself.²⁰¹ Article 2(1)(b) allows for efficiencies to be taken into account in the assessment of a merger review and that such efficiencies should be in the interest of consumers and should not impede on effective competition.²⁰² According to Buttigieg, the efficiency goal in Article 2(1)(b), is merely an 'intermediate goal' to attain the 'ultimate goal' of enhancing consumer interest.²⁰³ Therefore he further asserts that the aforesaid regulation is a first step in a right direction as "competition policy should not seek to attain other goals or if it does seek other goals, these should be subordinate to consumer well-being, so that at no stage should practices or conduct inimical to consumer interests can be condoned for the sake of other objective."²⁰⁴

4.3.2 Legitimate interests in the EUMR

The other important provision in the EUMR whereby public interest considerations are outlined is in Article 21(4).²⁰⁵ Member states are in principle not entitled to apply national competition legislation rules on concentrations having a union dimension which are covered by the EUMR.²⁰⁶ According to Article 21(4) of the EUMR, member states may in exceptional circumstances apply their national laws in order to protect certain public interests or legitimate interests as long as those interests are compatible with the general principles and other provisions of EU law.²⁰⁷ In other words, member states can prohibit certain concentrations that would otherwise be approved by the Commission in

²⁰⁰ Council Regulation (EC) No. 139/2004 of 20 January 2004.

²⁰¹ Buttigieg (2009) 258.

²⁰² Council Regulation (EC) No. 139/2004 of 20 January 2004.

²⁰³ Buttigieg (2009) 383.

²⁰⁴ Buttigieg (2009) 383.

²⁰⁵ Council Regulation (EC) No. 139/2004 of 20 January 2004.

²⁰⁶ Lorenz (2013) 260.

²⁰⁷ Council Regulation (EC) No. 139/2004 of 20 January 2004. Also see Lorenz M, 260.



specific cases.²⁰⁸ The three types of legitimate interests that can be used block certain concentrations are as follows:

- **Public security and defence:** member states are allowed to take into account the protection of their public security interests and concerns. According to Lorenz, this encompasses the supply of services and goods that are essential for public health.²⁰⁹
- **Plurality of the media:** this exception has been introduced to protect the member states' legitimate interest in protecting plurality of information and preserving certain sources of information.²¹⁰
- **Prudential rules:** more relevant to the financial sector and geared at entitling member states the right to block concentrations that could put the risk of the financial system or part of it, or threaten the interests of consumers.²¹¹

Member states may also invoke other public interest considerations than those explicitly listed in Article 21(4).²¹² In such cases, the public interest considerations that could serve as the basis for application of national competition rules must be communicated to the Commission.²¹³ After the assessment of the compatibility of the demonstrated public interest with the general principles and other provisions of EU law, the Commission must inform the member state about its approval of the referral within 25 working days.²¹⁴ In the event that the member state fails to comply with the material provisions of Article 21(4) of the EUMR, the Commission is entitled to instigate the infringement procedure in accordance with provisions of Article 258 of the Treaty on Functioning of the European Union (TFEU).²¹⁵

4.4 Conclusion

In summary, this chapter has demonstrated the important role played by EU competition policy in furthering consumer interest and well-being. We can see from the chapter that the EU competition policy has multiple goals that revolve around the notion of political, economic, market and policy

²⁰⁸ Lorenz (2013) 260.

²⁰⁹ Council Regulation (EC) No. 139/2004 of 20 January 2004. Also see Lorenz M, 260.

²¹⁰ See Rusu (2010) 262.

²¹¹ See Rusu (2010) 262. Also see Lorenz, M, 260.

²¹² See Rusu (2010) 262. Council Regulation (EC) No. 139/2004 of 20 January 2004.

²¹³ See Rusu (2010) 262. Council Regulation (EC) No. 139/2004 of 20 January 2004.

²¹⁴ Lorenz (2013) 261.

²¹⁵ Lorenz (2013) 261.



integration. We have seen in the chapter that consumer interest is not the ultimate goal of the EU competition policy, as in most cases this goal is easily trumped by industrial and European competitiveness policy objectives. This shows that public interest considerations are an integral factor that is considered in the EU merger review. However as Buttigieg point out, these public interest considerations should not prevent the Commission from moving towards a position whereby in the near future, EU competition policy is driven by a goal of safeguarding consumer interests and well-being.²¹⁶

As we have also seen in this chapter, the objectives of the EC Treaty as well as the EUMR have already embedded in the EU competition rules, the importance of safeguarding the interests of the consumer. Therefore in conclusion, the position advanced by Buttigieg is supported, and thus the EU competition policy and rules in merger review should be consistent in adhering to the aforesaid objectives and should continue in promoting market integration and observing other multiple goals, but such integration should not be allowed to trump the paramount goal of consumer well-being.²¹⁷ The EU endeavour to consistently promote consumer well-being as an ultimate goal in applying its competition policy is an important endeavour that the South African authorities and courts should strive to achieve in the quest to realise the alignment and harmonisation of the competition policy and regulation with other competing public interests such as industrial policy and other socio-economic interests and goals.

²¹⁶ Buttigieg (2009) 384.

²¹⁷ See Buttigieg (2009) 384.



5 CHAPTER 5

5.1 Conclusion and recommendations

5.1.1 General

This chapter will be the concluding chapter for the research study that has been undertaken. In concluding, the chapter will be critically examining South Africa's performance and position as a friendly investment destination. This analysis will be done by evaluating whether the research study has achieved the set objectives of addressing the research problem or question. The research problem or question seeks to establish whether the interpretation by competition authorities, courts and South African government of the public interest provisions under the Act has provided investment certainty in this regard or whether the negative effect of such interpretation has contributed to any decline to FDIs into South Africa. In further answering this research problem or question herein, further data from institutions such as United Nations Conference on Trade and Development (UNCTD) World Investment Report, and FDI figures from other research institutions will be examined.

5.2 Summary of the research study objectives

The approach adopted in this research study in responding to the research problem or question at hand has been meticulous in nature with each chapter contributing to address the research problem or question through supported arguments and authority. A comprehensive decoding of the concept of public interest as outlined under the Act was undertaken in chapter two. A number of important cases that have provided clarity on the interpretation and application of public interest consideration in merger transactions were reviewed as well as the conditions imposed by the competition authorities in assessing the said transactions. It is clear from the reviewed cases that our competition authorities and courts are developing our competition jurisprudence and the innovative conditions and remedies imposed are indicative of such development. It was suggested in chapter two by Lewis that it is important going forward for our competition authorities and courts to mature and to resist any application of the subjective element when applying the public interest



test.²¹⁸ As already elaborated in chapter two, it was proposed that such an approach will go a long way in developing our competition law jurisprudence and providing a degree of certainty in the application of the public interest test and will limit the scope to be played by the executive in influencing the application of the public interest test in high profile merger transactions.

In chapter three, the research study further addressed the research problem or question through an enlightening and comprehensive review of the policy and legislative framework that is adopted by the South African government in providing policy and regulatory certainty on how public interest considerations should be applied in merger transactions. It has been demonstrated in chapter three that by adopting the NDP as a blueprint for economic development, the South African government is serious in attracting more FDIs into our economy.²¹⁹ The harmonisation and alignment of the trade, investment and competition policy has been shown as a key driver in the attainment on an economic policy that is geared at promoting growth in the growth domestic product (GDP), creation of employment and bridging the inequality gap in the country.²²⁰ The Promotion and Protection of Investment Bill was also reviewed and revered as an important framework that will be geared at sparking such alignment and harmonisation with a view of providing greater policy and regulatory certainty and clarity to local or foreign investors on what to expect when investing into the South African economy.²²¹

In the furtherance of the goal to address the research problem or question, a comparative analysis was embarked on in chapter four. The rationale for the comparative analysis was to benchmark the practices adopted in the South African context in relation to the interpretation and application of public interest considerations in merger transaction to see if such application is in accordance with accepted international practices. The EU merger control policy and regulatory framework was reviewed in this regard.²²² It was demonstrated that the EU competition policy has multiple goals that revolve around the notion of political, economic, market and policy integration.²²³ Similar to the South African context, this reflected that public interest considerations are an integral factor that is considered in the EU merger review. The objectives of the EC Treaty as well as the EUMR were

²¹⁸ Refer to (fn 89) above.

²¹⁹ Refer to (fn 119) above.

²²⁰ Refer to (fn 135 and 136) above.

²²¹ Refer to heading 3.5 – conclusion on chapter 3 above.

²²² Refer to heading 4.2 on chapter 4 above.

²²³ Refer to (fn 164) above.



shown to have been embedded in the EU competition rules, the importance in safeguarding the interests of the consumer as a paramount goal that should co-exist with other multiple goals.

5.3 The effect of public interest considerations on FDIs to South Africa

According to Kariga, Ngobeni and Ngobese, it is very difficult to do a quantitative analysis of how merger conditions have had an impact on FDIs as they form a small subset of factors that affect FDIs.²²⁴ They advise that for such an exercise one would need to take a lot of factors into consideration and then weigh the true impact of merger conditions.²²⁵ According to the Grant Thornton, International Business Report for 2012, inflows of FDI into the South African economy have been “volatile over the past decade, reaching US\$7bn in 2005 but then turning negative in 2006 and peaking at US\$9bn in 2008 before the financial crisis truck and recovering to US\$6bn in 2011.”²²⁶ According to the report, inflows over the first half of 2012 were down 44% compared with the same period in 2011.²²⁷ In the assessment of the FDI trends and inflows into the South African economy and with specific focus from years 2009 to 2012. Kariga, Ngobeni and Ngobese opine that this was the time that the Tribunal began placing more emphasis on public interest grounds and in particularly employment in 2010.²²⁸ According to them, the data assessed is not conclusive, it does not seem like the increase in conditions imposed by competition authorities and courts has resulted in a corresponding decrease FDIs.²²⁹

In assessing the FDI inflows into South Africa for the year 2013. According to the UNCTD, World Investment Report for 2014,²³⁰ the FDI inflows to Southern Africa almost doubled in 2013, jumping to \$13.2 billion from \$6.7 billion in 2012, mainly owing to record-high flows to South Africa and

²²⁴ Kariga, Ngobeni and Ngobese *Is South Africa a Good Investment Destination? A Relook on Conditions in Merger Cases*: available at <http://www.compcom.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/Is-South-Africa-a-good-investment-destination-22.08.2012-F.PDF> (accessed on 22 August 2012).

²²⁵ See Kariga, Ngobeni and Ngobese (accessed on 22 August 2012).

²²⁶ Grant Thornton *International Business Report 2012: Emerging Markets Opportunity Index: high growth economies*: available at http://www.gti.org/files/ibr2012_em_report_2012_final.pdf.

²²⁷ Grant Thornton *International Business Report 2012*.

²²⁸ See Kariga, Ngobeni and Ngobese (accessed on 22 August 2012).

²²⁹ See Kariga, Ngobeni and Ngobese (accessed on 22 August 2012).

²³⁰ United Nations Conference on Trade and Development (UNCTD) *World Investment Report 2014: Investing in SDGs: An Action Plan*: available at <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=937>.



Mozambique.²³¹ In both countries, infrastructure was the main attraction.²³² The positive sentiments espoused by World Investment Report for 2014 in respect of the investment confidence shown to the region, elucidates that South Africa is on the right track in attracting FDIs and such confidence has had a positive effect on the whole region and the African continent benefits as a result. The report also shows that South African outward FDI almost doubled, to \$5.6 billion, powered by investments in telecommunications, mining and retail, mainly into the African continent.²³³ In assessing the data from the World Investment Report for 2014 and other data referred above, there is no empirical evidence that shows any link between the public interest conditions imposed by our competition authorities and courts to any decrease in FDI inflows to the country. The data reviewed clear illustrates that the South African economy in on a positive trajectory and is an investment friendly destination that is consistently attracting FDIs.

In conclusion, the objectives of the research study have been accomplished and fulfilled and the research problem and question has been answered. The research study has unequivocally demonstrated that the public interest conditions imposed by our competition authorities and courts have not contributed to a decrease in FDI inflows to the country. The research has also emphasised the importance of policy and regulatory certainty in achieving greater economic stability and growth in South Africa. It has been shown in the EU context that the policy and regulatory framework in respect of the merger control regime needs to be applied consistently in accordance with the primary objectives of the Community in achieving and promoting consumer interest and well-being. The South African competition policy and regulatory framework is also focusing on this alignment and harmonisation. With the advent of the Promotion and Protection of Investment Bill, the South African government is trying to strike a balance in achieving the goal of consumer interest and well-being within the mist of other competing public interests such as industrial policy and other socio-economic interests and goals.

²³¹ See UNCTD *World Investment Report 2014*.

²³² See UNCTD *World Investment Report 2014*.

²³³ See UNCTD *World Investment Report 2014*.



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